OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20046104
G. PEREIRA[1]	)
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	)

OPINION

Representing the Parties:

For Appellant: G. Pereira

For Respondent: Joel M. Smith, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, G. Pereira (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of $9,661.00, a late-filing penalty of $2,415.25, and applicable interest, for the 2016 taxable year.

Appellant waived the right to an oral hearing; therefore, we decide the matter based on the written record.

ISSUES

1. Has appellant established error in FTB's proposed assessment issued to appellant and his spouse for 2016?
2. Has appellant established reasonable cause to abate the late-filing penalty?

FACTUAL FINDINGS

1. Appellant and his spouse, C. Pereira, (the couple) did not file California individual tax returns in 2016. FTB received information from the IRS indicating that the couple had filed their federal taxes using the married filing joint filing status and using an address in

[1] Appellant filed a joint federal tax return with his spouse C. Pereira, and FTB's Notice of Action was issued to both appellant and C. Pereira; however, C. Pereira did not join this appeal, and we refer only to G. Pereira as appellant.

Woodland Hills (California address). FTB sent the couple a Request for Tax Return (addressed to the California address), requiring that they either file their 2016 return, provide a copy of a filed return, or explain why they did not have a California filing requirement. The couple did not respond, and FTB issued a Notice of Proposed Assessment (NPA), estimating the couple's income based on the information reported on their federal tax return, and proposing net tax of $9,661.00 (after withholding credits), a late-filing penalty of $2,415.25, and interest.

2. Appellant protested the NPA claiming that he had no California filing requirement because he had not been a resident of California in 2016. The couple did not respond to FTB's request for additional information, and thereafter, FTB issued a Notice of Action at the California address affirming its NPA.

3. Appellant was advised by the couple's Florida tax advisor that he was not a resident of California in 2016. The tax advisor has worked for a CPA firm for 23 years.[2] The CPA firm reviewed FTB-issued instructions regarding what constitutes residency for California tax purposes. The tax advisor is experienced in preparing federal and state tax returns and has prepared tax returns for the couple both before and after 2016. Appellant provided information relevant to determining his 2016 residency to the tax advisor, including his Mexican temporary residency card, his work and living arrangements in Mexico, and his days visiting family in California in 2016.

4. This timely appeal was filed on April 14, 2020, using the California address as appellant's address of record. All correspondence regarding the appeal has been addressed to the California address.

5. The couple's IRS Tax Return Transcript for 2016 reflects the California address, and federal adjusted gross income that matches the estimated income used in FTB's NPA. The couple's IRS Wage and Income Transcript shows various Forms 1099 (reporting income from broker and barter exchange transactions, and interest income), each of which reflects the California address.[3]

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[2] The tax advisor's years of experience is undisputed.

[3] The couple's IRS Wage and Income Tax Return Transcript for 2016 reports self-employment income, and the associated Schedule C reports that the income was from Star Strategic Partners, which was located at a Calabasas, California address, but was dissolved in 2012. Plaintiff describes this as a "mistake," and continues to assert his income in 2016 was from employment by Q Pagos.

6. Appellant was the founder of two companies (Q Pagos and Redpag) that did business in Mexico beginning in 2013. Appellant thereafter obtained a Mexico temporary residency card in January 2014, which he renewed in December 2015.
7. In 2015, the two companies[4] were sold, and appellant signed a three-year employment agreement with Q Pagos on May 1, 2015. The employment agreement states that appellant's principal place of business is in Mexico. The agreement also provided appellant a housing allowance "for the purpose of assisting Executive in paying the costs associated with housing or living quarters in Mexico City."
8. On February 26, 2018, appellant obtained a Mexico permanent residency card.
9. Beginning March 1, 2015, appellant rented an apartment in Mexico City.
10. Prior to appellant living in Mexico, the couple resided at the California address.
11. In 2016, Appellant paid rent in Mexico, obtained dental services in Mexico, and used a credit card to make purchases in Mexico City.
12. During 2016, appellant traveled to the United States (to California, Florida, and New York), after which he returned to Mexico. His trips to California terminated at Los Angeles International Airport (LAX) which is near the couple's California residence. Also during 2016, appellant's spouse travelled to Mexico City, Florida, and New York, on dates coinciding with appellant's trips. Appellant's spouse's infrequent travel to Mexico departed from LAX located near the California address.[5] Appellant's adult sons both traveled from LAX to Mexico City on one occasion in 2016. The billing address on one travel document was at the California address.
13. Appellant provided credit card statements for all of 2016, which regularly reflect charges made both in Mexico City and in and around Woodland Hills, CA. The California address is on the credit card statements.
14. The couple maintained a rental home at the California address during 2016 and received mail there. The couple signed an addendum to a rental agreement extending the

[4] Appellant states that Redpag is a subsidiary of Q Pagos.

[5] C. Pereira also left from LAX when she traveled to New York and returned to LAX. The records do not indicate from where C. Pereira traveled on her trips to Florida.

June 4, 2012 lease at the California address to July 15, 2015.[6] Neither party disputes that the couple resided in California prior to 2014.

15. The couple used the California address as their mailing address in 2016. Appellant's sons listed the California address for university and credit card purposes in 2016.

16. Appellant continued to maintain an apartment in Mexico until August 1, 2019, when he rented a hotel room in Florida after entering into an employment agreement with a Florida company. Appellant executed a one-year lease for a Florida apartment beginning May 22, 2020.

17. Appellant obtained a small business (sole proprietorship) loan on June 18, 2020, which listed the California address.

18. The couple's 2017 and 2018 IRS Tax Return Transcripts both reflect that the California address was used for filing joint federal returns.

19. The couple received an NPA for the 2017 taxable year, sent December 29, 2020, to the California address, and appellant responded thereto on February 25, 2021, using the California address.

20. For appeals purposes, appellant has continued to use the California address as his address for contacts from the Office of Tax Appeals.

DISCUSSION

Issue 1: Has appellant established error in FTB's proposed assessment issued to appellant and his spouse for 2016?

FTB's Estimation of Appellant's Income

Every individual subject to the California Personal Income Tax Law must file with FTB a return specifically stating the items of gross income from all sources and the deductions and credits allowable. (R&TC, § 18501(a).) If a taxpayer fails to file a return, FTB "may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due." (R&TC, § 19087(a).)

If FTB proposes a tax assessment based on an estimate of income, its initial burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d

[6] Additional lease extensions are not in our record, but we assume it was extended beyond 2015 because appellant is still using that address on correspondence.

509, 514; *Appeal of Bindley*, 2019-OTA-179P.) The taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) When a taxpayer fails to file a valid return, FTB's use of income information from various sources is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313.) Once FTB has met its initial burden, its determination is presumed correct, and the taxpayer has the burden of proving it is wrong. (*Appeal of Bindley, supra*.)

Here FTB received information from the IRS indicating that the couple reported a California address and various items of income. Based on this information, FTB determined that the couple was required to file a California return for the 2016 taxable year and estimated their income based on the IRS information, which we find to be reasonable and rational. Therefore, the proposed assessment is presumed correct, and appellant has the burden of proving it wrong.

Residency[7]

While California residents are taxed upon their entire taxable income (regardless of source), nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b), & (i), 17951.) California defines a "resident" as including: (1) every individual who is in California for other than a temporary or transitory purpose; or (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. (R&TC, § 17014(a)(1)-(2); see also Cal. Code Regs., tit. 18, § 17014.) An individual may have several residences simultaneously, but an individual can only have one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c); *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 284.) A "nonresident" is defined as "every individual other than a resident." (R&TC, § 17015.) In determining residency for an individual not domiciled in California, the inquiry is whether he or she was in California for other than a temporary or transitory purpose.[8] (R&TC, § 17014(a)(1).) But for an individual domiciled in California, the inquiry is whether the individual "is outside [of California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2).) "The key question

[7] Neither party has alleged any other basis to establish appellant's California tax return filing requirement.

[8] Although there is a rebuttable presumption that an individual who spends nine months or more in California is a resident for that taxable year (R&TC, § 17016), "[i]t does not follow, however, that a person is not a resident simply because he [or she] does not spend nine months of a particular taxable year in [California]. On the contrary, a person may be a resident even though not in [California] during any portion of the year." (Cal. Code Regs., tit. 18, § 17016; see also *Appeal of Mazer*, 2020-OTA-263P.)

under either [test] is whether the taxpayer's purpose in entering or leaving California was temporary or transitory in character." (*Appeal of Mazer*, 2020-OTA-263P.) FTB's determinations of residency are presumptively correct, and the taxpayer bears the burden of showing error in those determinations. (*Appeal of Mazer*, *supra*; *Appeal of Bragg* (2003-SBE-*02)* 2003 WL 21403264.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Appeal of Mazer*, *supra.)*

Appellant claims he was a resident of Mexico beginning in 2014 and that he intended to permanently leave California.[9] Appellant alleges he only maintained his California residence for mail purposes. He further alleges that "[i]t was our understanding that we never intended to reestablish our permanent home in California. In fact, during 2020 we moved away from Mexico and established our permanent residence in Florida, not California."

To determine appellant's residency during the 2016 tax year, we must first determine whether appellant was domiciled in California in 2016, and if so, whether appellant's absence from California was for other than a temporary or transitory purpose. As mentioned above, an individual can have only one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c).) Domicile is defined as the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when absent.[10] (*Appeal of Mazer*, *supra*; *Appeal of Bragg*, *supra*; Cal. Code Regs., tit. 18, §17014(c).) An individual who is domiciled in California and leaves the state retains his or her California domicile if there is a definite intention of returning to California, regardless of the length of time or the reasons for the absence. (Cal. Code Regs., tit. 18, § 17014(c).) To change domicile, a taxpayer must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Appeal of Mazer*, *supra*; see also *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 568 [these two elements are indispensable to accomplishing a change of domicile].) Intent is

[9] FTB's NPA assumes that both appellant and C. Pereira were California residents in which case they would need to file a joint California resident return (Form 540) because the couple's filed a joint federal income tax return for 2016. (See R&TC, § 18521(a)(1).) However, if appellant had been a nonresident with no income from a California source, C. Pereira would have had the option to file a separate California tax return. (R&TC, § 18521(c)(2).)

[10] Defined another way, domicile refers to the place where individuals have their "true, fixed, permanent home and principal establishment, and to which place [they have], whenever [they are] absent, the intention of returning." (Cal. Code Regs., tit. 18, § 17014(c).) Domicile "is the place in which [individuals have] voluntarily fixed the habitation of [themselves and their] family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce [individuals] to adopt some other permanent home." (*Ibid*.)

determined after taking into consideration, the individual's acts and declarations. (*Appeal of Mazer*, *supra*.) A domicile, once acquired, is presumed to continue until it is shown to have been changed. (*Ibid*.) If there is doubt on the question of domicile after presentation of the facts and circumstances, then domicile must be found to have not changed. (*Ibid*.)

It is undisputed that appellant was domiciled in California prior to 2014.[11] Thus, the presumption that appellant continued to retain a domicile in California arises, and appellant must present sufficient evidence to overcome the presumption and show that he not only moved to a new residence outside of California, but that he intended to remain there permanently or indefinitely. (*Appeal of Bragg*, *supra*.) We, therefore, must consider appellant's acts to determine whether they show that he intended to abandon his California domicile and establish a new one in Mexico. (See *Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.)

Clearly, appellant lived and worked in Mexico during 2016. Appellant obtained temporary resident status and eventually permanent resident status in Mexico. Appellant leased living space in Mexico City, where his employment contract required him to be. Appellant took regular trips from Mexico City to California, Florida, and New York and returned to Mexico City at the conclusion of each of those trips. Appellant's spouse traveled from California to Mexico approximately once every other month. Appellant established relationships with healthcare professionals in Mexico, and his credit card statements show regular purchases in Mexico throughout the year.

On the other hand, appellant's other actions do not indicate an intent to abandon appellant's California domicile and establish a new one. Appellant's spouse remained in California at their marital abode that was maintained in appellant's absence. This marital adobe was listed as their address on their 2016 federal tax return. The maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeals of Bailey*, *supra*, citing *Aldabe v. Aldabe* (1962) 209 Cal.App.2d 453.) Moreover, appellant's adult children continued to use the California address as their mailing address. Appellant and his spouse extended their lease at the California address to at least July 15, 2015, which was well after appellant alleges that he moved out of California. Both appellant, his spouse, and his adult children used the

[11] Appellant asserts that "[w]ith my spouse [C. Pereira], we built new social, business and medical practitioners relationships, we travelled throughout the country, [and] attended and participated in trade events." Neither party provided evidence or argument, other than appellant's assertion with respect to the residence of C. Pereira.

California address as their mailing address, and appellant has continued to use the California address throughout the pendency of this appeal. Appellant has consistently stated that his family remained in California during 2016, and that the purpose of his visits to California was to be with his family.

Appellant stated that he and C. Pereira each have separate American Express cards with both the couple's charges shown on the same joint account statements. The statements for 2016 show regular, monthly charges both in Mexico (presumably appellant's charges) and near the California address (presumably appellant's spouse's charges). Similarly, the Discover card in appellant's name, which was also used by C. Pereira, lists the California address, and the charges on that card were primarily made near the California address and in Florida.[12] Thus, appellant maintained significant contacts in California, and the evidence does not indicate an intent to remain in Mexico permanently nor to abandon his permanent domicile in California. Accordingly, we find that appellant was domiciled in California in 2016. As a result, appellant is considered a resident of California under R&TC section 17014(a)(2).

Temporary or Transitory Purpose

If a taxpayer is domiciled in California, the facts must be examined to determine whether the taxpayer was outside of the state for a temporary or transitory purpose, such that the taxpayer will continue to be treated as a California resident for tax purposes. (Cal. Code Regs., tit. 18, § 17014.) Whether an individual is outside California for a temporary or transitory purpose is a question of fact to be determined by examining all the circumstances of each case. (Cal. Code Regs., tit. 18, § 17014(b); see *Appeal of Bragg*, *supra*.) The determination cannot be based solely on the individual's subjective intent but instead must be based on objective facts. (*Appeal of Berner*, *supra*.) An absence for employment or business purposes which would require a long or indefinite period to complete is not temporary or transitory. (*Appeal of Crozier* (92-SBE-005) 1992 WL 92339.) An "indefinite period," however, is not one of weeks or months but one of "substantial duration" involving a period of years. (*Ibid*.) A safe harbor provision under R&TC section 17014(d) provides that a California domiciliary absent from this state for an "uninterrupted period" of at least 546 consecutive days (i.e., 18 months) under an employment-related contract shall be considered outside the state for other than a temporary or transitory

[12] Appellant stated that Mexico does not accept Discover cards, which is why there are no charges in Mexico.

purpose and thus a nonresident of California. A taxpayer's return to California for up to 45 days during the tax year will be disregarded in determining the 546 consecutive days. (R&TC, § 17014(d).) Appellant does not qualify for protection under the safe harbor provision because he admittedly traveled to California at least 49 days in 2016.[13] (R&TC, § 17014(d)(1).)

When a California domiciliary leaves the state for employment purposes, it is particularly relevant to determine whether, upon departure, the taxpayer substantially severed his or her California connections and then took steps to establish significant connections with his or her new place of abode, or whether the California connections were maintained in readiness for his or her return. (*Appeal of Harrison* (85-SBE-059) 1985 WL 15838.) *Appeal of Bragg*, *supra*, provides a list of nonexclusive objective factors (*Bragg* factors) to assist in determining with which state an individual had the closest connection during the period in question. However, these factors serve merely as a guide, and the weight given to any particular factor depends upon the totality of the circumstances. (*Appeal of Bragg*, *supra*.) The *Bragg* factors can be organized into three categories, as provided below. (*Appeal of Mazer*, *supra*.)

1. Registrations and filings with a state or other location, including: homeowner's property tax exemption; automobile registration; driver's license; voter registration/participation history; and the address and state of residence claimed on federal/state tax returns.

2. Personal and professional associations, including the state of the taxpayer's: employment; children's school; bank and savings accounts; memberships in social, religious, and professional organizations; use of professional services, such as doctors, dentists, accountants, and attorneys; maintenance/ownership of business interests; professional license(s); ownership of investment real property; and presence/connections/residency as indicated by third-party affidavits/declarations.

3. Physical presence and property, including: location and approximate sizes and values of residential real property; where the taxpayer's spouse and children reside; taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls); origination point of the taxpayer's checking account/credit card transactions; and the number/general purpose (vacation, business, etc.) of days the taxpayer spends in California versus other states.

For the first category of the *Bragg* factors, we note that appellant's employment contract was initially for three years ending in May 2018. During the term of the contract, including

[13] Appellant initially alleged that he spent 72 days in California in 2016; however, he revised that to 49 days in a supplemental brief. Both numbers exceed the threshold for qualifying for the safe harbor.

2016, appellant maintained leased housing in both California and Mexico. We do not have evidence that appellant registered any vehicle in Mexico, and the evidence suggests otherwise (several Uber charges in Mexico City). We also do not have in our record any evidence of where appellant maintained licenses, other than the residency cards appellant obtained and renewed. On federal tax returns, appellant filed jointly using the California address. These factors in the category relating to registrations and filings weighs in favor of a finding that appellant intended to return to California upon the completion of his employment contract.[14]

There is little evidence in the record with respect to the factors in the second category (personal and professional associations). As discussed, *ante*, appellant had at least a three-year contract for employment in Mexico, and he did obtain healthcare in Mexico. On the other hand, appellant's adult children who were in college in 2016 maintained the California address as their permanent residence. Based on evidence in our record, we believe this category weighs slightly in favor of finding that appellant had more than a temporary or transitory connection with Mexico.

For the third category of *Bragg* factors, we analyze appellant's personal and physical connections with each location. We know that appellant maintained residential real property leases in both California and in Mexico; the one in California and the one in Mexico where appellant lived in housing paid for by his employer. Appellant's family continued to use the California address and traveled to and from LAX, which is near the California address. Appellant's credit card statements from two merchants used the California address. Lastly, appellant indicated that his travel to California was for personal visits with his family on at least ten occasions in 2016. We find these factors weigh in favor of a finding that appellant was in Mexico for a temporary or transitory purpose.

Appellant has not established that he substantially severed his California connections. Appellant's spouse has remained at the family home at the California address before, during, and after the time during which appellant was in Mexico. The California address was used for all correspondence, statements, filing of tax returns, and in this appeal. Accordingly, we find that appellant was in Mexico for a temporary or transitory purpose. Therefore, we find that appellant was a resident of California in 2016 and is subject to tax on his entire taxable income, including

[14] Although appellant alleges, that he moved to Florida in 2019 after obtaining a new employment contract, we only look to what the objective intent was for taxable year 2016. Furthermore, the California address has been consistently used by appellant *after* his alleged move to Florida.

his income earned in Mexico. As a result, appellant has not established error in FTB's proposed assessment based on the information the couple reported on their federal return for 2016, and therefore, the couple is required to file a 2016 California tax return.

Issue 2: Has appellant established reasonable cause to abate the late-filing penalty?

California imposes a penalty for failing to file a valid return on or before the due date, unless the taxpayers show that the failure is due to reasonable cause and not due to willful neglect.[15] (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that it has been correctly imposed, and the burden of proof shifts to the taxpayer to establish reasonable cause to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) To establish reasonable cause, a taxpayer must show that the failure to time file returns occurred despite the exercise of ordinary business care and prudence. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) Whether the elements that constitute "reasonable cause" are present in a given situation is a question of fact. (*U.S. v. Boyle*, (1985) 469 U.S. 241, 249 (*Boyle*).)

Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Taxpayers who fail to acquaint themselves with the requirements of California tax law have not exercised ordinary business care and prudence. (*Appeal of Summit Hosting, LLC*, 2021-OTA-216P (*Summit Hosting*).) Each taxpayer has a non-delegable obligation to file a tax return by the due date. (*Ibid*; *Boyle*, *supra*, at p. 249.) The United States Supreme Court held that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing…." (*Boyle*, *supra*, at p. 252.) The Court, however, did observe that reasonable cause may exist if a taxpayer reasonably relies on the advice of an accountant or attorney with respect to substantive matters of tax law or

[15] Willful neglect, which is defined as a "conscious, intentional failure or reckless indifference," is not alleged here, and we see no evidence of such. (See *Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P; *U.S. v. Boyle* (1985) 469 U.S. 241.)

whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Id*. at pp. 250-251.)

While good faith reliance on professional advice may provide a basis for a reasonable cause defense, it is not absolute. (*Repetto v. Commissioner*, T.C. Memo. 2012-168.) To establish that reasonable cause exists under *Boyle*, a taxpayer must show that it reasonably relied on a tax professional for substantive tax advice as to whether a tax liability exists and that the following conditions are met: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law; and (2) the tax professional's advice is based on the taxpayer's full disclosure of relevant facts and documents. (*Boyle*, *supra*; *Appeal of Summit Hosting*, *supra*.) By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle*, *supra*, at p. 251.)

Appellant argues that he has reasonable cause for the failure to file a timely 2016 California tax return because he relied on the advice of his Florida tax preparer, who works for a CPA firm, that he was not a resident of California because he lived in leased premises in Mexico in 2016. Appellant states that his tax advisor has 23 years of experience with that CPA firm, preparing federal and state tax returns.[16] Appellant submitted a letter from the tax advisor stating the grounds on which he relied in advising appellant that he was a nonresident of California during 2016: (1) the amount of time appellant spent in California during the 2016 taxable year was 49 days while spending 316 days without California; (2) appellant moved his principal residence to Mexico City as evidenced by a three-year rental agreement with a renewal date in the year 2020; (3) appellant's principal place of business was located in Mexico from where appellant provided services as evidenced by an employment agreement with Q Pagos; (4) appellant obtained the required temporary residency approval in Mexico and then applied for permanent residency when allowed to do so; (5) appellant maintained a second home in California to use for vacation purposes and as a mailing address because he "felt the US Postal Service was more reliable"; (6) appellant expressed that he never intended to reestablish a permanent home in California and in fact moved from Mexico to Florida in 2020. Appellant's tax advisor has also prepared the couple's tax returns for the taxable year at issue and other

[16] FTB points out that appellant's expert is not a CPA. However, the Supreme Court, in *Boyle*, did not use the term CPA, but rather used the words "accountant" and "attorney" when referring to experts giving substantive tax advice. (*Boyle*, *supra*, at p. 251.) While all CPAs are accountants, not all accountants are certified to be CPAs.

taxable years and was aware of C. Pereira's income (none indicated for 2016) and that appellant visited his family in California during 2016.

FTB does not dispute that appellant's tax advisor has 23 years of tax experience. Rather, FTB questions whether the tax advisor had all the relevant facts and specific competence in California tax law. FTB states that appellant could only show reasonable cause if he relied on an expert with competence in California tax law, who made a diligent effort to obtain relevant information.

Recently, in *Summit Hosting*, *supra*, we held that it was not reasonable to rely on an expert without evidence of the tax professional's knowledge of, and experience in, California tax law. This appeal can be distinguished from *Summit Hosting* because in that case the appellant provided no information regarding what the expert's advice was, if any, no evidence of what steps the expert took to determine appellant's California tax liability, nor any evidence of what facts the expert was given with which to make the determination regarding appellant's California tax liability. However, different facts in these reliance-on-advice cases certainly can lead to different results. (*Whitehouse Hotel Ltd. Partnership v. Commissioner* (2014) 755 F.3d 236, 249.) We determine whether a taxpayer acted with reasonable cause on a case-by-case basis, evaluating the totality of the facts and circumstances. (*Ibid*.) In this case, appellant has submitted a letter indicating that the couple's tax advisor relied on FTB's published guidance with respect to appellant's residency and was given a comprehensive set of facts on which to base his advice to appellant. Additionally, unlike the taxpayer in *Summit Hosting*, appellant's tax advisor detailed the relevant facts upon which he based his advice and what steps he took to determine the relevant California tax law.

The couple's tax advisor has long-term experience working at a CPA firm on both federal and state tax returns, including the couple's returns. The tax advisor describes in a letter that he advised appellant that appellant's closest connections were with Mexico and that he was not a resident of California.[17] The letter indicates that the tax advisor was aware of various facts about appellant's connections to California and to Mexico, so the tax advisor was provided with facts relevant to the analysis of residency. Furthermore, appellant states that he also informed the tax advisor that he traveled to California from time to time to visit "his family." In this case, the tax

[17] Neither appellant nor FTB raised the issue of whether C. Pereira was a resident of California or Mexico during 2016, nor whether she had community property.

advisor had sufficient credentials to justify a taxpayer's reliance on the advice. (See, e.g., *Grecian Magnesite Mining, Industrial & Shipping Co., SA v. Commissioner* (2017) 149 T.C. 63 [the expert did not claim to be an international tax law expert; however, he had substantial tax preparation experience and had accurately prepared past year's returns, which was sufficient to justify taxpayer's reasonable reliance on the erroneous advice with regard to the federal failure to file penalty].)[18] The foregoing evidence indicates that the tax advisor reviewed California tax law and applied the relevant residency analysis to the relevant facts as the basis for the advice given to appellant that he had no filing requirement in California for 2016.[19]

Appellant, who is not a tax expert and was unfamiliar with California's residency laws supplied his tax advisor with all relevant facts, including that he was traveling to California to visit with family. Appellant, having provided all pertinent information to his tax advisor and received advice that he was not a California resident based on the tax advisor's interpretation of FTB's requirements, was not required to seek a second opinion. Moreover, determination of residency is based on a weighing of the *Bragg* factors under all the facts and circumstances. It is understandable that reasonably prudent people could weigh the facts and circumstances of this case and believe appellant is a nonresident because, for example, he worked and had connections in Mexico and was only in California for 49 days (a four-day difference from that allowed per year under the safe harbor. While our residency analysis concludes that appellant was a California resident in 2016, we find that appellant has shown reasonable cause due to his reasonable reliance on his tax advisor's advice and because appellant acted as reasonably prudent person in taking steps to determine whether he had a filing requirement.[20]

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[18] Considering all the facts and circumstances, including that the tax preparer had experience working on state returns, that community property and residency are complex, but common tax issues, and based on the competent analysis of California tax law provided by the tax preparer, plus the factors described above, we find the element of competency has been met.

[19] While there is no direct evidence in the record that appellant was advised that he did not have a California filing requirement, that the advisor did so may be inferred from the facts that the advisor prepared appellant's tax returns and research California tax law related to residency.

[20] In cases similar to *Summit Hosting*, it has been held to be unreasonable to rely on an out-of-state expert. (See *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860; see also *Appeal of Estate of Marilyn Monroe, Dec'd* (75-SBE-032), 1975 WL 3516 (*Monroe*.) Both of those appeals can be distinguished from the facts here. In *Appeal of Berolzheimer*, *supra*, the State Board of Equalization held that because there was no dispute regarding the underlying facts, just a mathematical error made by the expert, which does not require expertise, that it was unreasonable to rely on that expert. Here, appellant reasonably relied on an expert's analysis of all the facts and circumstances relating to his residency, not just an incorrect mathematical calculation. As noted above, appellant may reasonably rely on the advice of an accountant or attorney with respect to substantive matters of tax law or

HOLDINGS

1. Appellant has not established error in FTB's proposed assessment issued to appellant and his spouse for 2016.
2. Appellant has established reasonable cause to abate the late-filing penalty.

DISPOSITION

FTB's action in proposing additional tax on appellant's 2016 income is sustained. The late-filing penalty is abated.

DocuSigned by:
Teresa A. Stanley
0CC6C6ACCC6A44D...
Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:
Huy "Mike" Le
A11783AD0494428...
Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
Josh Lambert
GB1F7DA37631416...
Josh Lambert
Administrative Law Judge

Date Issued: 10/5/2021

whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Boyle*, *supra*, at pp. 250-251.) In *Monroe*, unlike here, there was no evidence that the advisor even investigated whether decedent's estate had a California tax liability.