OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S. BENJAMIN**	) OTA Case No. 20076396)

OPINION

Representing the Parties:

For Appellant: S. Benjamin

For Respondent: Gi Jung Nam, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Benjamin (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing an assessment of additional tax of $4,127, plus applicable interest, for the 2015 tax year.[1]

Appellant has waived his right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established that he was a nonresident of California during 2015.
2. Whether appellant has shown error in FTB's disallowance of the claimed charitable contribution carryover deduction.
3. Whether appellant has shown error in FTB's disallowance of the claimed theft loss deduction.
4. Whether appellant has shown error in FTB's disallowance of the claimed energy equipment exclusion.

[1] Appellant's wife did not sign the appeal letter and, therefore, she is not a party to this appeal.

5. Whether appellant has shown error in FTB's disallowance of California adjustments of $28,000.
6. Whether appellant has shown that he is entitled to claim an additional dependent exemption.

FACTUAL FINDINGS

1. Appellant and his wife (the couple) timely filed a joint California Resident Income Tax Return (Form 540) for the 2015 tax year, listing a California address. They reported three dependent exemptions credits.
2. The couple attached a 2015 Form W-2 issued to appellant by an employer in Texas. The Form W-2 listed an address in California for appellant.
3. On Schedule CA, California Adjustments – Residents, the couple reported California adjustments to reduce their income by $28,000.[2] The couple also reported additional California itemized deductions of $40,802 beyond their reported federal itemized deductions.[3]
4. FTB issued a Notice of Proposed Assessment (NPA), which disallowed the Schedule CA, California subtraction of $28,000, a casualty loss of $15,785,[4] a charitable contribution carryover deduction of $7,885, and an energy equipment deduction of $7,000. The NPA proposed an assessment of additional tax of $4,127, plus interest.

[2] The $28,000 of California adjustments consisted of a water-energy rebate of $6,000, turf removal incentive of $7,000, seismic improvement incentive of $5,000, cost sharing payments of $5,000, and low-income grants of $5,000. On the revised return, the $28,000 was removed from California adjustments. Appellant asserts that the amount was removed because it is not applicable to the California adjustments section. However, appellant increased itemized deductions on the revised return by $20,739.

[3] The $40,800 of additional itemized deductions consisted of a $15,785 casualty loss, a $7,700 energy equipment deduction, a $7,885 charitable contribution carryover deduction, a $6,155 medical expense deduction, and a $3,977 depreciation adjustment.

[4] On their federal return, the couple claimed that property was lost or damaged from casualty or theft, stating their car was broken into and that electronic and medical equipment was stolen. The casualty loss was disallowed because it did not exceed the required threshold of 10 percent of the couple's reported adjusted gross income. On appeal, appellant argues that the amount of the theft loss is $55,785, which exceeds the threshold.

5. In response to the NPA, the couple sent a revised California return that, along with other changes, claimed a fourth dependent.[5] FTB did not accept the amended return but treated it as a protest of the NPA.
6. The couple also filed a 2015 federal amended return with the IRS which made various adjustments, including adding a fourth dependent, and claimed a refund. The IRS disallowed the claim for refund.
7. On July 21, 2020, FTB issued a Notice of Action, affirming its NPA.
8. Appellant timely filed this appeal.
9. On appeal, appellant asserts that he was a nonresident of California during 2015.

DISCUSSION

Issue 1: Whether appellant has established that he was a nonresident of California during 2015.

FTB's determination of residency is presumptively correct, and the taxpayer bears the burden of showing error in this determination. (*Appeal of Bracamonte*, 2021-OTA-156P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) FTB's determination cannot be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in dispute. (*Ibid*.)

California residents are taxed upon their entire taxable income (regardless of source), while 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 places of residence 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.)

[5] Appellant claimed further deductions, including a medical and dental expense deduction, a state and local tax deduction, an interest deduction, and job expenses and certain miscellaneous deductions. These additional claimed amounts are not discussed in this Opinion as appellant provides no evidence or argument in support of these deductions.

Here, appellant contends he was a nonresident of California during 2015 and lived and worked in Texas. In order to determine which residency test to apply, we must determine first whether appellant was a California domiciliary during 2015.

Domicile Determination

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. (*Appeal of Mazer*, 2020-OTA-263P; Cal. Code Regs., tit. 18, § 17014(c).) An individual who is domiciled in California and leaves the state retains his or her California domicile as long as 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).) In order 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*.) Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Ibid*.) A domicile once acquired is presumed to continue until it is shown to have been changed. (*Ibid*.)

Appellant asserts that he has been living and working in Texas since 2012. Appellant provides a copy of a lease agreement for an apartment in Texas dated November 3, 2014. Appellant's Form W-2 shows a Texas address for his employer. While appellant spent substantial time living and working in Texas, his actions do not indicate he intended to abandon his old domicile and establish a new one. Appellant's wife and appellant's dependent children remained in California at the marital abode, which they maintained in appellant's absence. The California address for this home was listed on appellant's 2015 Form W-2 and the original and amended California returns.[6] The maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeal of Mazer*, *supra*.)

In addition, we note that for the 2012, 2013, and 2014 tax years, appellant and his wife appealed the IRS's disallowance of moving expenses and travel and living expenses, among other items. The federal appeal was heard by the United States Tax Court. (*Benjamin v. Commissioner*, T.C. Memo. 2018-70.) For the period 2012 through 2014, the tax court found that appellant "maintained a residence in California where his family lived," which was "far

[6] They also claimed home mortgage interest of $9,986 on both their 2015 original and amended federal returns. Because appellant's residence in Texas was a rental, we conclude that the mortgage interest is related to appellant's residence in California.

from the location of his employment." The tax court found that appellant "continued to maintain his principal residence in California during the times that he traveled to perform work for clients." The tax court findings show that, while appellant worked outside of California during 2012 through 2014, he retained his principal residence in California, where his wife and children resided. While the tax court case involved years prior to the one at issue, its holding is consistent with our finding that, while appellant worked in Texas, his settled and permanent connections remained in California. Based on the foregoing, we find that appellant has not shown that his domicile changed in 2015. Thus, appellant remained a California domiciliary in 2015.

Residency Determination

If a taxpayer is domiciled in California, we must 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. (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 particular case. (Cal. Code Regs., tit. 18, § 17014(b); *Appeal of Mazer, supra.*) The determination cannot be based solely on the individual's subjective intent but instead must be based on objective facts. (*Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.)

In *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264, a list of nonexclusive objective factors was provided to assist in determining which state an individual had the closest connection during the period in question. (See also *Appeal of Mazer*, *supra*.) 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 and may be evidenced by various records: (1) registrations and filings records (such as a driver's license, an address on tax returns, or voter registration address); (2) personal and professional associations records (such as where the taxpayer maintains business interests, where the taxpayer's children attend school, or where the taxpayer maintains memberships in social, religious, and professional organizations); and (3) physical presence and property (such as the location of real property owned or rented by taxpayer, taxpayer's telephone records, or origination of checking account and credit card transactions.) (*Ibid*.)

Appellant worked for a company in Texas and rented a house in Texas from November 2014, through November 2015. However, 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.)

Other than the evidence to show he worked and rented a house in Texas, appellant does not provide evidence to show further connections with Texas, such as a driver's license, vehicle registration, personal and professional associations, voter registration, bank account transactions, or other records. In addition, appellant has not provided any documentation or evidence to show that he substantially severed his California connections. While appellant developed some connections with Texas through his work and rental property in Texas, his family and permanent home remained in California. We find that ownership of their home in California to be a more significant connection than the rental in Texas that was leased for the purposes of employment in that state. In addition, on their federal Form 2441, *Child and Dependent Care Expenses* attached to their 2015 original federal return, appellant and his wife listed California addresses for their childcare providers. Therefore, the evidence indicates that appellant continued to maintain significant connections to California in 2015. This is consistent with the holding of the tax court in finding that appellant "continued to maintain his principal residence in California during the times that he traveled to perform work for clients." As a result, we find that appellant was a resident of California during 2015.

Issue 2: Whether appellant has shown error in FTB's disallowance of the claimed charitable contribution carryover deduction.

R&TC section 17201(a) incorporates by reference Internal Revenue Code (IRC) section 170, except as otherwise provided. IRC section 170(a)(1) allows a deduction for any charitable contribution that is made during the tax year. Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to that deduction. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) To sustain their burden of proof, a taxpayer must be able to point to an applicable deduction statute and show that he or she comes within its terms. (*Appeal of Jindal*, 2019-OTA-372P.)

Appellant has provided a variety of documents to support charitable contributions made during 2012, 2013, and 2014. In the federal appeal heard by the tax court, the tax court noted that the IRS conceded on appeal that appellant and his wife were entitled to charitable deductions claimed in 2012, 2013, and 2014, though it does not provide any detail as to the amount of those deductions.[7] (*Benjamin v. Commissioner*, *supra*, at p. *3, fn. 1.) However, we are unable to determine whether appellant has already been allowed charitable contribution deductions in the prior year when these contributions were made, which would determine the amount of their accumulated carryovers potentially available for deduction in 2015. Appellant has not provided a statement or documentation to match the claimed charitable contribution carryovers to specific amounts that exceeded the couple's contribution base in prior tax years. (Treas. Reg. § 1.170A-10(e).) Appellant has not provided copies of the couple's 2012, 2013, and 2014 federal and California income tax returns, or copies of the federal Forms 8283, Noncash Charitable Contributions, filed during these years. In addition, appellant has not provided a statement showing the excess charitable contributions made to 50 percent or 30 percent limited organizations in any taxable year. (See IRC, § 170(b)(1)(B); Treas. Reg. § 1.170A-10(e).)

Appellant does not provide any evidence that allows us to distinguish between charitable contributions allowed in prior tax years and any remaining carryover contributions potentially available for deduction in the 2015 tax year. Therefore, appellant has not shown error in FTB's disallowance of the claimed charitable contribution carryover deductions.

Issue 3: Whether appellant has shown error in FTB's disallowance of the claimed theft loss deduction.

R&TC section 17201(a) incorporates by reference IRC section 165, except as otherwise provided. IRC section 165(a) provides generally that there shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

In the case of any casualty loss whether or not incurred in a trade or business or in any transaction entered into for profit, the amount of loss to be taken into account shall be the lesser of either: (1) the amount which is equal to the fair market value (FMV) of the property immediately before the casualty reduced by the FMV of the property immediately after the

[7] With respect to carryover deductions reported for 2012, 2013, and 2014, the tax court found that appellant and his wife "did not provide any evidence to substantiate contributions that were disallowed for the years in issue or not deducted for previous tax years." (*Benjamin v. Commissioner*, *supra*, at p. *9.)

casualty; or (2) the amount of the adjusted basis prescribed in Treasury Regulation section 1.1011-1 for determining the loss from the sale or other disposition of the property involved. (Treas. Reg. §§ 1.165-7(b)(1).) Taxpayers have the burden of proving that they sustained a loss which arose from theft. (*Brechtel v. Commissioner,* T.C. Memo. 1985-495.)

Appellant has not provided evidence, such as a copy of a police report or any other documentation proving that a theft occurred. Appellant has also not provided evidence to show the FMV or basis of the items at the time of the theft. Appellant also asserts there was damage to his vehicle. Appellant has not provided any evidence of the vehicle's FMV or basis when the damage was incurred or following the damage. Appellant also states that his claimed theft loss of $55,785 includes insurance premiums, which are not deductible expenses. (IRC, § 165(a).) In addition, appellant has not shown that his claimed theft loss exceeds 10 percent of the couple's federal adjusted gross income, in order to satisfy the requirements of IRC section 165(h)(2)(A). Therefore, we find that appellant has not shown error in FTB's disallowance of the claimed theft loss deduction.

Issue 4: Whether appellant has shown error in FTB's disallowance of the claimed energy equipment exclusion.

Gross income does not include any amount received as a rebate, voucher, or other financial incentive issued by the California Energy Commission, the Public Utility Commission, or a local publicly owned electric utility for any expenses paid or incurred by a taxpayer for the purchase or installation of: (1) a thermal system as defined in Public Resources Code section 25600; (2) a solar system as defined in Public Resources Code section 25600; (c) a wind energy system device that produces electricity; and (d) a fuel cell generating system, as described in the California Energy Commission's Emerging Renewable Resources Account Guidebook, that produces electricity. (R&TC, § 17138.1.)

Former R&TC section 17138.2, which was in effect for tax years from January 1, 2014, through December 31, 2018, provided that gross income does not include any amount received as a rebate, voucher, or other financial incentive issued by a local water agency or supplier for participation in a turf removal water conservation program. In addition, any amount received as a rebate or voucher from a local water or energy agency or supplier for any expenses the taxpayer paid or incurred for the purchase or installation of any of the following devices shall be treated as a refund or price adjustment of amounts payable to that water or energy agency or

supplier: (1) a water conservation water closet that meets specified requirements; (2) a water and energy efficient clothes washer that meets specified requirements; and (3) a plumbing device necessary to serve recycling water uses as described in Water Code sections 13553 and 13554. (R&TC, § 17138.)

Appellant provides 2014 credit card statements for purchases at Home Depot with handwritten notes stating that the purchases were for an Energy Star air conditioner unit, an Energy Star machine, an Energy Star fridge, LED lights, and power tools. However, the statements only indicate the total amount paid to Home Depot. They do not indicate what was purchased, and no invoices or receipts were provided. Therefore, there is no basis for us to determine whether the items qualify for exclusion from appellant's income. In addition, appellant purchased the items in 2014, and has not provided any invoices, receipts, or other evidence showing that he purchased and installed qualifying equipment in 2015. Furthermore, appellant has not shown that he received a qualifying rebate, voucher, other incentive for the purchase and/or installation of qualifying equipment under R&TC sections 17138, 17138.1, or 17138.2, or that such rebate, voucher, or other incentive was improperly included in (rather than excluded from) the couple's California taxable income for the 2015 tax year. Therefore, appellant has not shown error in FTB's disallowance of the claimed energy equipment exclusion.

Issue 5: Whether appellant has shown error in FTB's disallowance of California adjustments of $28,000.

On Schedule CA, California Adjustments – Residents, the couple reported California adjustments to reduce their income by $28,000. The $28,000 of California adjustments consisted of a water-energy rebate of $6,000, turf removal incentive of $7,000, seismic improvement incentive of $5,000, cost sharing payments of $5,000, and low-income grants of $5,000. Appellant has not provided any evidence or argument showing that this reduction to his California gross income is warranted. Appellant has not pointed to any particular deduction or exclusion statute and shown that he comes within that statute's terms. (See *Appeal of Jindal*, *supra*.) Appellant has not shown that these items were included in the couple's federal gross income and needed to be removed and excluded from the couple's California gross income

through a California subtraction.[8] Therefore, appellant has not shown error in FTB's disallowance of California adjustments of $28,000.

Issue 6: Whether appellant has shown that he is entitled to claim an additional dependent exemption.

California law allows a taxpayer to claim an exemption credit for each dependent of the taxpayer for the taxable year, as defined in IRC section 152. (R&TC, §§ 17054(d)(1), 17056; IRC, § 151(c).) R&TC section 17056 incorporates IRC section 152, which provides that a dependent means a qualifying child or a qualifying relative. (IRC, § 152(a).) A qualifying relative is an individual: (1) who bears a relationship to the taxpayer, such as the taxpayer's parent, brother, or sister;[9] (2) whose gross income for the tax year at issue is less than the IRC section 151(d) exemption amount; (3) who received more than one-half of his or her support during the tax year at issue from the taxpayer; and (4) who is not a qualifying child of the taxpayer or any other taxpayer for the tax year at issue. (IRC, § 152(d)(1)(A)-(D).)

Appellant claimed a fourth dependent exemption credit for his brother. Appellant's brother filed a 2015 tax return with a spouse using the filing status of married filing jointly. However, an individual shall not be treated as a dependent of a taxpayer if such individual has made a joint return with the individual's spouse under IRC section 6013 for the same tax year. (IRC, § 152(b)(2).) In addition, appellant's brother reported a California adjusted gross income of $19,931. However, the exemption amount allowed under IRC section 151(d) during 2015 was $4,000. (See IRC, §§ 152(d)(1)(B), 151(d); Rev. Proc. 2014-61, 2014-47 I.R.B. 860.) Therefore, because appellant's brother filed a joint return and reported gross income exceeding the allowable amount, appellant may not claim his brother as a dependent.[10]

[8] California residents are taxed on all of their income regardless of source. (R&TC, § 17041(a).)

[9] IRC section 152(d)(2) provides a list of persons defined as qualifying relatives, which includes a brother.

[10] We note that the IRS also did not allow a refund for an additional dependent exemption credit claimed on appellant's amended federal return.

HOLDINGS

1. Appellant has not established that he was a nonresident of California during 2015.
2. Appellant has not shown error in FTB's disallowance of the claimed charitable contribution carryover deduction.
3. Appellant has not shown error in FTB's disallowance of the claimed theft loss deduction.
4. Appellant has not shown error in FTB's disallowance of the claimed energy equipment exclusion.
5. Appellant has not shown error in FTB's disallowance of California adjustments of $28,000.
6. Appellant has not shown that he may claim an additional dependent exemption credit.

DISPOSITION

FTB's actions are sustained.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Cheryl Akin
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Cheryl L. Akin
Administrative Law Judge

DocuSigned by:
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Administrative Law Judge

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