**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 20127088 |
| **K. PANDA AND** | ) |
| **M. PANDA** | ) |
| | ) |
| | ) |

**OPINION**

Representing the Parties:

For Appellants: K. Panda

For Respondent: Phillip C. Kleam, Tax Counsel III

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, K. Panda and M. Panda (appellants) appeal an action by the Franchise Tax Board (respondent) proposing additional tax of $4,478, a late filing penalty of $509.50, and applicable interest, for the 2015 tax year.[1]

Office of Tax Appeals Administrative Law Judges Elliott Scott Ewing, Natasha Ralston, and Tommy Leung held an oral hearing for this matter via video conference on August 17, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

## ISSUE

Whether appellant-wife's community property share of appellant-husband's income earned during the 2015 tax year is California taxable income.

## FACTUAL FINDINGS

1. Appellants filed a joint California Nonresident or Part-Year Resident Income Tax Return for the 2015 tax year. The return was filed late.

[1] Appellants concede the late filing penalty in their briefing, and the parties agreed at the prehearing conference in this matter that the issue stated herein is the sole issue in this appeal. Therefore, we do not further address the late filing penalty.

2. Respondent audited appellants' return and issued appellants a Notice of Proposed Assessment (NPA). The NPA increased appellants' California taxable income by $59,574. As relevant to this appeal, this increase included $41,150 for appellant-wife's 50 percent share of appellant husband's income earned in Nevada.
3. The NPA proposed to assess additional tax of $4,478, a late filing penalty of $509.50, and applicable interest.
4. The adjustments reflected in the NPA primarily resulted from respondent finding that appellant-wife's taxable income included her fifty percent community property share of appellant-husband's income earned in Nevada for the 2015 tax year. Respondent concluded that appellant-husband was domiciled in and a resident of Nevada, while appellant-wife was considered domiciled in and a resident of California for the 2015 tax year.
5. Appellants timely filed a protest of the NPA. At protest, appellant and respondent exchanged correspondence and, at the conclusion of the protest, respondent affirmed the NPA in its entirety.
6. This timely appeal followed.
7. During the 2015 tax year, appellant-husband was domiciled in Nevada.[2]
8. During the 2015 tax year, appellant-wife rented an apartment in California, held a California driver's license, maintained a vehicle that was registered using a California address and was employed full-time by a company based in California.

## DISCUSSION

The issue in this case first turns to the question of whether appellant-wife was a resident of California. If so, the inquiry then turns to whether, as a California resident, appellant-wife must include in her California taxable income one-half of appellant-husband's income earned while he was a resident of and domiciled in Nevada. These questions necessarily take us to approaching the case in several analytical steps.

[2] On Part I of the Schedule CA (540NR) for the 2015 tax year, appellants reported that appellant-husband was domiciled in Nevada.

Taxation of Residents

California residents are taxed on their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b) & (i), 17951; *Appeal of Mazer*, 2020-OTA-263P.) 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.) (Emphasis added.) Respondent's determinations of residency are presumptively correct, and the taxpayer bears the burden of showing error in those determinations. (*Appeal of Mazer, supra*.) This presumption is a rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary. (*Appeal of Bracamonte,* 2021-OTA-156P; *Appeals of Seltzer*, *et al.* (80-SBE-154) 1980 WL 5068.) Respondent's determinations cannot, however, be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Domicile

To determine appellant-wife's residency, the first question we turn to is whether appellant-wife was domiciled in California. (*Appeal of Bracamonte, supra*.) There is no dispute that appellant-wife was domiciled in California for the 2014 tax year (the year prior to the year in issue in this appeal). Respondent contends that appellant-wife remained domiciled in California for the 2015 tax year. However, appellants assert that appellant-wife had changed her domicile from California to Nevada, so that appellant-wife is properly treated as domiciled outside of California for the 2015 tax year. Thus, we must determine whether appellant-wife changed her domicile or whether she remained domiciled in California. If appellant-wife did not change her domicile, we then must determine whether she was "outside [California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2); *Appeal of Mazer, supra*.)

An individual can have only one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c); *Appeal of Mazer, supra*.) 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 Bragg*, (2003-SBE-002) 2003 WL 21403264.)*;* 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 Bragg, supra*; see also *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 568 [noting these two elements as indispensable to accomplishing a change of domicile].) Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Appeal of Bragg*, *supra*; *Noble v. Franchise Tax Bd.*, *supra*, 118 Cal.App.4th at pp.567-568)

A domicile once acquired is presumed to continue until it is shown to have been changed. (*Appeal of Mazer, supra*.) The burden of proof as to a change of domicile is on the party asserting such change. (*Appeal of Bracamonte, supra*.) 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*.) To successfully relinquish her California domicile, appellant-wife must have changed her "true, fixed, permanent home and principal establishment, and to which place [she has], whenever [she is] absent, the intention of returning." (Cal. Code Regs., tit. 18, § 17014(c).)

In this case, it is undisputed that appellant-wife's domicile prior to the 2015 tax year was California. Accordingly, her place of domicile for 2015 will be presumed to be California unless she can show that it has changed. (*Appeal of Bracamonte*, *supra*.) Appellants contend that appellant-wife abandoned her California domicile and intended to make Nevada her permanent home. We must therefore examine whether she intended to remain in Nevada permanently or indefinitely. (See *Appeal of Bragg*, *supra*.) Thus, we will examine appellant-wife's actions to determine whether they show that she intended to abandon her old California domicile and establish a new one in Nevada. (See *Appeal of Mazer, supra*.)

It is undisputed that following appellant-husband's move to Nevada in 2014, appellant-wife continued to work for her California employer, maintained an apartment in California, had access to a motor vehicle that was registered in California, and held a California driver's license, all during the 2015 tax year. Based on the record before us, it is not entirely clear how many days appellant-wife was physically present in California, as the parties have only provided estimates; however, based on respondent's and appellants' assertions in their briefs, as well as testimony from Mr. Panda at the oral hearing in this matter, appellant-wife was physically in

California, at a minimum, approximately 242 days during the 2015 tax year.[3] Thus, appellant-wife spent a great majority of her time in California.

Furthermore, it is undisputed that one of appellants' minor children lived in and attended school in California for a significant portion of the tax year at issue. In addition, during the 2015 tax year, appellant-wife remained employed by a California employer and continued to work in California for the majority of the year.[4] In sum, appellants have failed to rebut the presumption that appellant-wife's domicile remained in California during the 2015 tax year. (See *Appeal of Addington*, (82-SBE-001) 1982 WL 11679); Cal. Code Regs., tit. 18, § 17014(c).) While appellant-wife may have ultimately changed her domicile at some point in the future, we find that appellants have not met their burden of proof to show that appellant-wife did so during the 2015 tax year. Accordingly, we find that California continued to be appellant-wife's place of domicile for the 2015 tax year.

Residency

As we have determined that appellant-wife was domiciled in California, we must next determine whether appellant-wife should be considered a resident of California for the 2015 tax year. (See *Appeal of Mazer, supra.*) As previously mentioned, 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.) (Emphasis added.) A "nonresident" is defined as "every individual other than a resident." (R&TC, § 17015.)

For an individual domiciled in California, the inquiry is whether the individual "is outside [California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2); *Appeal of Mazer, supra*.) "The key question . . . is whether the taxpayer's purpose in entering or leaving California was temporary or transitory in character." (*Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.) 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.

[3] Appellant-husband's testimony at the oral hearing supports this. However, respondent asserts that appellant-wife spent "well over 270 days in California."

[4] Appellant-husband testified at the oral hearing that appellant-wife physically worked in California through November 2015.

(Cal. Code Regs., tit. 18, § 17014(b); see *Appeal of Addington*, *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*.)

The underlying theory of R&TC sections 17014 to 17016 is that the state with which a person has the closest connection during the taxable year is the state of his or her residency. (Cal. Code Regs., tit. 18, § 17014(b).) Therefore, in determining a taxpayer's residency, the contacts or connections a taxpayer maintains in California and other states are important factors to take into consideration. (*Appeal of Mazer, supra.*) For one thing, such contacts constitute an important measure of the benefits and protections the taxpayer has received from the laws and government of California. (*Ibid*.) Further, such contacts provide objective indicia of whether the taxpayer entered or left this state for temporary or transitory purposes. (*Ibid*.) "In situations where the taxpayers have significant contacts with more than one state, as appellants do here, the state with the closest connections during the taxable year is the state of residence." (*Appeal of Bracamonte, supra*.)

An absence for a specified duration of two years or less, and not indefinitely, has been held to be only temporary and transitory. (*Appeal of Crozier* (92-SBE-005) 1992 WL 92339.) However, a stay of less than two years will not automatically indicate a temporary or transitory purpose if the reason for the shortened stay is not inconsistent with an intent that the stay be long, permanent, or indefinite. (*Ibid*.) An absence for employment or business purposes which would require a long or indefinite period to complete is not temporary or transitory. (*Ibid*.) An "indefinite period," however, is not one of weeks or months but one of "substantial duration" involving a period of years. (*Ibid*.)

Here, the evidence shows that appellant-wife's time spent outside California during the 2015 tax year was for temporary or transitory purposes. For example, appellant-wife maintained an apartment in California, showing that she intended to return to California for work after any time spent in Nevada. Further, while the evidence shows that appellant-wife was seeking employment outside of California, there is no evidence that appellant-wife actually secured new employment outside of the state during the tax year at issue. The evidence does show that appellant-wife remained employed by her California employer at the close of the 2015 taxable year. Moreover, appellant-wife lived with a minor child who was enrolled in school in California, retained her California driver's license, and kept a car registered in California. All of these facts demonstrate an intent to return to California.

Thus, we conclude that appellant-wife was outside California for temporary or transitory purposes and that her "strongest connections were with California." (*Appeal of Bracamonte, supra*). Because we find that appellant-wife was domiciled in California and was outside of California only for temporary or transitory purposes, we therefore find that appellant-wife was a resident of California for the 2015 tax year. (See *Appeal of Mazer*, *supra*.)

Two-Step Analysis

In situations such as this, where one spouse is a resident of California and the other spouse is a nonresident of California, the determination of whether an item of income is taxable in California to the nonearning spouse can be broken down into a two-step analysis. (*Appeals of Cremel and Koeppel,* 2021-OTA-222P.) The first step requires a determination of the nonearning spouse's marital property interest in the earning spouse's income. (*Ibid.)* If the nonearning spouse has a marital property interest in the earning spouse's income, the second step requires a determination of whether the nonearning spouse's interest in such income is taxable in California. (*Ibid*.) The nonearning spouse's marital property interest in the income is taxable in California if the earning spouse is domiciled in a community property state and the nonearning spouse is a resident of California who is taxed on all income regardless of source. (R&TC, § 17041(a); *Appeals of Cremel and Koeppel, supra;* see also, *Appeal of Li,* 2020-OTA-095P.)

Step 1: Determination of Appellant-wife's Marital Property Interest in Appellant-husband's Income.

An individual's marital property interest in personal property is determined by the laws of the earning or acquiring spouse's domicile. (*Appeal of Li, supra*, citing *Schecter v. Superior Court* (1957) 49 Cal.2d 3, 10 and *Rozan v. Rozan* (1957) 49 Cal.2d 322, 326.) Here, the earning or acquiring spouse of the income in question is appellant-husband. In this case, it is undisputed that appellant-husband was domiciled in Nevada.[5] Nevada Revised Statutes section 123.220 provides that all property acquired after marriage by either spouse or both spouses, is community property. Because appellant-husband was domiciled in Nevada when the income was earned,

[5] As provided by respondent on appeal, Part I of the Schedule CA (540NR) for the 2015 tax year, as filed by appellants, indicates that appellant-husband was domiciled in Nevada. At protest, appellants also assert that pursuant to FTB Publication 1031, Section L, Meaning of Domicile, appellant-husband was domiciled in Nevada. Further, respondent affirms this, saying that it "agrees that Mr. Panda was a resident of Nevada in 2015 and that his wages of $82,900.00 subtracted on Schedule CA was earned in Nevada."

and because Nevada is a community property state, we conclude that the income in question is community property. (See *Appeal of Li, supra*.)

Where the income in question is community property, one-half of the income is attributable to each spouse and each spouse must report and pay tax on his or her respective one-half community property interest in the income. (See *Appeals of Cremel and Koeppel, supra*.) Thus, one-half of the community income is attributable to appellant-wife for tax reporting purposes. We next turn to the question of whether that income is taxable in California.

Step 2: Determination of Whether Appellant-wife's Community Property Interest in Appellant-husband's Income is California Taxable Income.

We have established that appellant-wife was a resident of California, and that fifty percent of appellant-husband's income is attributable to appellant-wife. We next turn to the question of whether California can tax the income. California residents are taxed on their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b) & (i), 17951.) Because appellant-wife was a California resident for the 2015 tax year, appellant-wife is taxed on all of her income, regardless of the source of that income. (See *Appeals of Cremel and Koeppel*, *supra*.) Thus, appellants' California taxable income includes appellant-wife's fifty percent community property interest in appellant-husband's Nevada income for the 2015 tax year.

## HOLDING

Appellant-wife's community property share of appellant-husband's income earned during the 2015 tax year is California taxable income.

## DISPOSITION

Respondent's action is sustained.

DocuSigned by:
E.S.Ewing
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Elliott Scott Ewing
Administrative Law Judge

We concur:

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

Date Issued: 11/23/2021