

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
M. MORGAN

) OTA Case No. 20086456
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OPINION

Representing the Parties:

For Appellant: M. Morgan

For Respondent: Desiree Macedo, Tax Counsel
Ron Hofsdal, Tax Counsel IV

For Office of Tax Appeals: Michelle Huh, Tax Counsel

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Morgan (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$12,033, and applicable interest, for the 2014 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, John O. Johnson, and Eddy Y.H. Lam held an electronic oral hearing for this matter on July 27, 2022. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUE

Whether appellant was a domiciliary and resident of California during the 2014 tax year.¹

FACTUAL FINDINGS

1. Appellant was a civilian employee for the United States Army.²

¹ An alternative argument—whether one-half of appellant’s income is subject to community property laws—was raised on appeal; however, based on the below discussion, this Opinion need not address that alternative argument.

² Appellant testified that he had dual status as a uniformed personnel and a civilian. Appellant’s grade with the United States Army was GS13, which is a civilian pay scale.

2. On or about March 2011, appellant received orders to transfer to Fort Lewis, Washington, from Elk Grove, California.
3. Appellant's spouse³ continued to live in California and received wages from California employers from at least 2010 to 2018.
4. On July 7, 2013, appellant received orders to deploy to Afghanistan as a civilian employee for about 320 days. Appellant testified that he returned from Afghanistan to Fort Lewis, Washington, in July 2014.
5. Appellant and his spouse filed a joint 2013 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR), indicating that appellant and his spouse were domiciled in California for the entire 2013 tax year.
6. Appellant returned to California in 2014 to assist his spouse in purchasing a home in Manteca, California. On October 1, 2014, appellant and spouse were in contract to purchase the home in Manteca, California. On October 15, 2014, their deed to the Manteca, California home was recorded and title was held by way of husband and wife, as community property. Appellant moved to the Manteca, California home in 2014 and stayed there until December 31, 2014.
7. Subsequently, appellant and his spouse filed joint California Resident Personal Income Tax Returns (Form 540s) from 2014 through 2017, indicating that they are California residents and that Manteca, California is their primary address.
8. On the joint 2014 Form 540, appellant claimed a California subtraction on Schedule CA equal to his wages earned outside of California. The wage and tax statements (Form W-2s) for both appellant and his spouse showed an address in Elk Grove, California.
9. Subsequently, FTB examined appellant's and his spouse's 2014 Form 540 and determined that they incorrectly subtracted appellant's "Wages, salaries, tips, etc." on their Schedule CA. On August 1, 2018, FTB issued a Notice of Proposed Assessment (NPA), increasing their taxable income and proposing additional tax of \$12,033, plus applicable interest.
10. Appellant protested the NPA. On March 26, 2020, FTB affirmed the NPA.
11. Appellant timely filed this appeal.

³ Appellant and his spouse filed joint California resident personal income tax returns for the 2014, 2015, 2016, and 2017 tax years. At oral hearing, appellant stated that he filed for divorce from his spouse during the 2018 tax year.

DISCUSSION

Burden of Proof

FTB's determination of residency is presumptively correct, and the taxpayer bears the burden of showing error in FTB's determination. (*Appeal of Bracamonte*, 2021-OTA-156P; *Appeal of Mazer*, 2020-OTA-263P.) This presumption is a rebuttable one, but FTB's determination cannot be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issue in dispute. (*Appeal of Bracamonte, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Taxation of Residents

California imposes a tax for each taxable year on the entire taxable income of every resident in the state who is not a part-year resident.⁴ (R&TC, § 17041(a)(1).) A "resident" includes: (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 the state for a temporary or transitory purpose. (R&TC, § 17014(a).) A California resident "continues to be a resident [of the state] even though temporarily absent from the state." (R&TC, § 17014(c).) An individual may have several residences simultaneously, unlike one's domicile. (*Appeal of Mazer, supra*; Cal. Code Regs., tit. 18, § 17014(c).)

The statutory definition of "resident" contains two alternative tests in determining residency: (1) an individual not domiciled in California is a California resident if the individual is in California "for other than a temporary or transitory purpose"; or (2) an individual domiciled in California is a California resident if the individual is outside of California only "for a temporary or transitory purpose." (*Appeal of Mazer, supra*; R&TC, § 17014(a)(1)-(2).) The satisfaction of either test leads to a conclusion that the individual is a resident of California. (*Appeal of Mazer, supra.*) "The key question under either [test] is whether the taxpayer's purpose in entering or leaving California was temporary or transitory in character." (*Ibid.*; *Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.)

⁴ A nonresident is an individual other than a resident. (R&TC, § 17015.) In contrast, a part-year resident is a taxpayer who is a resident of California during a portion of the taxable year and is a nonresident during the other portion of the taxable year. (R&TC, § 17015.5.) The taxable income of a nonresident or part-year resident includes: (1) "all items of gross income and all deductions, regardless of source" for any part of the taxable year in which the taxpayer was a California resident; and (2) "gross income and deductions derived from sources within [California]" for any part of the taxable year in which the taxpayer was not a California resident. (R&TC, § 17041(i)(1)(A)-(B).)

Here, appellant asserts that he intended to permanently move to his home in La Pine, Oregon, after he completed his assignment in Afghanistan and Fort Lewis, Washington, during the 2014 tax year. He further asserts that he came to California for a transitory purpose of helping his estranged spouse in purchasing a community property home in Manteca, California, before returning to Oregon, where he remained a permanent resident.

Domicile Determination

An individual can have only one domicile at a time, and he or she maintains that domicile until he or she acquires another one elsewhere. (*Appeal of Mazar, supra*; Cal. Code Regs., tit. 18, § 17014(c).) Domicile is defined as the place where an individual has his or her “true, fixed, permanent home and principal establishment, and to which place he [or she] has, whenever he [or she] is absent, the intention of returning,” regardless of the length of time or reasons why he or she is absent from the state. (*Ibid.*) It is the place where an individual has fixed his or her habitation and has a permanent residence without any present intention of permanently moving from that location. (*Ibid.*) The maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeal of Mazer, supra.*)

A domicile, once acquired, is presumed to continue until it is shown to have been changed. (*Appeal of Bracamonte, supra.*) In order to change domicile, an individual must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Ibid.*) An expectation of returning to one’s former place of abode defeats the acquisition of a new domicile. (*Appeal of Mazer, supra.*) “Intent is not determined merely from unsubstantiated statements; the individual’s acts and declarations will also be considered.” (*Ibid.*) The burden of proof as to the change of domicile is on the party asserting the change. (*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.*)

Prior to appellant leaving California in 2011, it appears that appellant and his spouse lived in Elk Grove, California. In March 2011, appellant moved from Elk Grove, California, to Fort Lewis, Washington, because of his work assignment for the United States Army. Thereafter, in July 2013, appellant was reassigned from Fort Lewis, Washington, to Afghanistan as a civilian employee for the United States Army for about 320 days. On appellant’s 2013 Form 540NR, he indicated that California was his domicile. On appellant’s 2014 Form W-2s, he continued to use his Elk Grove, California address and withheld California state income taxes.

In 2014, appellant returned to California to help purchase a home in Manteca, California, with his spouse, holding title by way of husband and wife, as community property. After the purchase of the home, appellant stayed with his spouse at the Manteca, California home until the end of December 31, 2014. On appeal, appellant did not file any personal income tax returns in Oregon for the 2014 tax year or provide any other filed tax returns for other years in Oregon. For the 2014 tax year, appellant filed Form 540, a California Resident Income Tax Return, and updated the address from Elk Grove, California to Manteca, California. For the 2015, 2016, and 2017 tax years, appellant continued to use the Manteca, California address on Form 540s and Form W-2s; his employer withheld California state taxes on Form W-2s; and appellant filed joint Form 540s with his spouse. It was only during the 2018 tax year that appellant finally listed an Oregon address on his Form W-2 and Form 540NR, when he and his spouse filed their tax returns separately. Appellant's employer also started reporting Oregon state income tax withholdings on his Form W-2 for the 2018 tax year.

There is ample evidence of appellant's intent to maintain California as his fixed domicile, after leaving California due to his work assignment with the United States Army. There is a lack of evidence showing that appellant abandoned his domicile since he not only consistently declared a California address as the primary address in his tax records, but his tax records were deliberately updated to reflect that he moved from Elk Grove, California, to Manteca, California, but not Oregon, for the 2014 tax year at issue. OTA also finds that appellant's action in returning to California in 2014, purchasing of the community property home in Manteca, California with his spouse in 2014, and moving into the new marital abode in Manteca, California, further shows that he never severed his California domiciliary status during the tax year at issue. It was only during the 2018 tax year that appellant filed for divorce and listed an Oregon address on his Form W-2 and Form 540NR. Appellant's employer also started reporting Oregon state income tax withholdings on his Form W-2 for the 2018 tax year. These facts do not indicate that appellant intended to abandon his domicile in California and establish a new one during the 2014 tax year.

Appellant asserts that he intended to permanently move to his home in La Pine, Oregon, after he completed his assignment in Afghanistan and Fort Lewis, Washington, in 2014.⁵

⁵ Appellant does not assert that he was a resident of Washington from 2011 to 2013, but states that he moved to Washington because he was stationed in Fort Lewis.

Appellant contends that he had no intent to stay in California because his relationship with his spouse, who was domiciled and a resident of California, was estranged; his Oregon driver's license was issued on March 27, 2011; he never had a California driver's license after getting his Oregon license in 2011; prior to 2014, his personal belongings were in Oregon; and prior to 2014, his purchase of a 2006 Ford F250 was reregistered from California to Oregon in 2011, and a 2012 Volkswagen Passat was registered in Oregon.⁶

However, the evidence does not support appellant's assertions that he intended to remain permanently or indefinitely outside of California during the 2014 tax year. First, while appellant argues that he was estranged from his spouse in 2014, evidence in the record indicates that appellant's relationship with his spouse was not completely estranged. In fact, appellant contends that he returned to California to help his spouse to complete the purchase of the community property home in Manteca, California, and remained in the Manteca, California home with his spouse until December 31, 2014. Additionally, appellant's spouse was listed on the homeowner's insurance for the La Pine, Oregon property and on an Oregon electric utility statement for the 2014 tax year, which is not an indication of an estranged relationship. Second, contrary to appellant's assertion, there are records from the Department of Motor Vehicles that a California driver's license was indeed issued to appellant in 2005, but was only surrendered on June 20, 2019. Lastly, the evidence supports a finding that appellant's personal belongings in Oregon and his vehicles, bought prior to 2014, that were registered in Oregon were a result of his job assignment in Fort Lewis, Washington, and not indicative of a permanent move outside of California.⁷

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. (*Appeal of Mazer, supra.*) Accordingly, appellant did not satisfy his burden of showing a change of domicile from

⁶ OTA notes that appellant testified that during the 2014 tax year, his oldest daughter was a resident in California, his other daughter was attending the University of Oregon, his oldest son was stationed in North Carolina, and his youngest son was stationed in Fort Lewis, Washington and spent half his time in Afghanistan. OTA also notes that appellant testified that he had a 2016 Ford Shelby registered in Oregon, which was purchased after the tax year at issue.

⁷ During the hearing, appellant testified that he moved some furniture, clothes, and personal items to Oregon either prior to or during 2014, but also indicated that he kept clothing and furniture in California as well, including chairs and mirrors from his grandmother. As noted in *Appeal of Bracamonte, supra*, where a taxpayer keeps their "precious mementos and other valuable items" can be indicative of which location they consider to be their "permanent home" for purposes of domicile determinations.

California to Oregon for the 2014 tax year, and California continued to be appellant's place of domicile for the 2014 tax year.

Residency Determination

As previously mentioned, because OTA finds that appellant was domiciled in California, appellant will be considered a resident of California under R&TC section 17014(a)(2) if OTA determines that appellant's absence from California was for a temporary or transitory purpose.

If a taxpayer is domiciled in California, the facts must be examined to determine whether the taxpayer was outside of California 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).) The determination cannot be based solely on the individual's subjective intent but instead must be based on objective facts. (*Appeal of Mazer, supra.*)

The underlying theory of R&TC sections 17014 to 17016 is that the state with which an individual has the closest connection during the taxable year is the state of his or her residency. (Cal. Code Regs., tit. 18, § 17014(b).) The contacts that a taxpayer maintains in California and other states are important objective indications of whether his or her presence in, or absence from, California was for a temporary or transitory purpose. (*Appeal of Bracamonte, supra.*) Where 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 Mazer, supra; Appeal of Zupanovich* (76-SBE-002) 1976 WL 4018.)

To evaluate a taxpayer's contacts with a state, *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264, provides a list of nonexclusive factors that are helpful in determining which state an individual had the closest connection to the period in question. These factors can be separated into three categories: (1) registrations and filings with a state or other agency; (2) personal and professional associations; and (3) physical presence and property. (*Appeal of Bracamonte, supra.*) However, these factors are not exclusive, and serve merely as a guide. (*Ibid.*) The weight given to any particular factor depends upon the totality of the circumstances. (*Ibid.*)

Here, appellant asserts that he was inside of California for a temporary and transitory period during the 2014 tax year. However, the residency test provided for an individual domiciled in California focuses on whether he or she is *outside* of California for a temporary or transitory purpose, not on whether he or she is *inside* of California for a temporary and transitory purpose. (Cal. Code Regs., tit. 18, § 17014(b); see *Appeal of Addington* (82-SBE-001) 1982 WL 11679.) In this appeal, although appellant's absence from California turned out to be rather lengthy, his absences appear to be dictated by his employment as a civilian employee for the United States Army where he was stationed at Fort Lewis, Washington, and Afghanistan during the 2014 tax year. Absences for reason of employment have usually not been regarded as a person being outside of California for other than a temporary or transitory purpose, especially when connections with California are not severed or significant new bonds are not established elsewhere. (See *Appeal of Addington, supra*; *Appeal of Gabrik* (86-SBE-014) 1986 WL 22686.)

Based on the objective facts from the record, appellant did not sever his ties to California or establish significant new bonds outside of California. In fact, the record indicates that appellant retained ties to California. To reiterate, appellant maintained his California addresses on his joint Form 540 and Form W-2s for the 2014 tax year, which infers that California is the permanent address of which he receives mail or communication while he was away due to his work assignment. His employer also reported California state income tax withholdings on his 2014 Form W-2s, which was not done for Oregon purposes. If appellant did permanently move to Oregon, as he asserts on appeal, it appears that appellant should have requested Oregon state income tax withholdings on his 2014 Form W-2s from his employer. Instead, for the 2014 tax year, appellant filed Form 540, which is a California resident tax return, and did not file any Oregon income tax return (resident or nonresident) for the 2014 tax year. Therefore, this is evidence that he did not sever his ties to California or establish new bonds in Oregon for the 2014 tax year.

Additionally, appellant purchased a home in Manteca, California, and recorded the deed on October 15, 2014, holding title as husband and wife, as community property in readiness for appellant's return. Appellant also stayed with his spouse in California after the purchase of the Manteca, California home throughout December 31, 2014, including the holiday season.⁸ Lastly,

⁸ Appellant and his spouse maintained the Elk Grove, California property until its sale in 2016, and the Manteca, California property until its sale in 2018.

appellant continued to retain a California accountant to handle his taxes for the 2014 tax year in question. These facts show that appellant maintained close connections in California during the tax year at issue.

Appellant indicates on appeal that his intent was to ultimately relocate to Oregon and that he had no reason to return to California. However, most of appellant's time spent outside of California during the 2014 tax year was not in Oregon, but in Afghanistan and Fort Lewis, Washington, as dictated by his employment. It is well established that one may intend to move from California at some time in the future, but it is "not the determinative factor as to whether a taxpayer has changed his or her residence ... for tax purposes." (See *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 567.) Instead, "intention is to be gathered from one's acts" and that "[p]hysical presence in [a] state has been 'a factor of greater significance than the mental intent or outward formalities of ties to another state.'" (*Ibid.*) Furthermore, a change in residence requires a "union of act and intent." (*Ibid.*) Insofar as can be discerned from the record, appellant undeniably returned physically to California and stayed until year end during 2014. Therefore, OTA finds that appellant's intent to move to Oregon during the 2014 tax year is unsupported by his physical acts and does not show that he was outside of California for other than a temporary or transitory purpose. (*Ibid.*)

Therefore, OTA finds that appellant's closest connections were with California and appellant failed to prove that he severed his substantial connections with California during the 2014 tax year or that he established significant new bonds elsewhere. (*Appeal of Addington, supra.*)

California Safe Harbor on Residency Determination

California provides a safe harbor provision that allows an individual who is domiciled in California but "is absent from the state for an uninterrupted period of at least 546 consecutive days (i.e., 18 months) under an employment-related contract" to be considered outside of the state for other than a temporary or transitory purpose. (R&TC, § 17014(d).) A taxpayer's return to California for up to 45 days during the tax year will be disregarded in determining the 546 consecutive days. (*Ibid.*)

Appellant has not met his burden to demonstrate that he qualifies for the safe harbor provision as prescribed in R&TC section 17014(d)(1) because it remains unclear whether appellant returned to California for only up to 45 days during the 2014 tax year. Appellant

consistently states that he returned to California to assist his spouse in purchasing the Manteca, California home because his spouse “was not allowed to purchase a home on her own” due to her poor credit. In appellant’s appeal letter, he stated that he was in California from October 2014 to December 2014. Later, appellant provided a timeline in response to FTB’s reply brief, which shows that he was in California only from December 15, 2014, to December 31, 2014. During the oral hearing, appellant testified that he returned to California during the middle or end of November 2014 and stayed in California until December 31, 2014. No additional evidence was submitted in support of his presence on these dates. However, there is evidence that the deed and mortgage instrument to the Manteca, California property were recorded on October 15, 2014, and the contract date for the purchase of the Manteca, California property was dated on October 1, 2014, meaning the home was not purchased in November 2014. Thus, without additional evidentiary support, OTA finds that appellant has not met his burden of proof to demonstrate that he only returned to California for up to 45 days.⁹ Accordingly, OTA finds that appellant does not qualify for the safe harbor provision as prescribed in R&TC section 17014(d). Therefore, appellant is a resident of California for 2014 tax year and is subject to tax on his entire taxable income, including his income earned outside of California.

⁹ Additionally, appellant testified that while on leave in 2014, he made transitory visits to see his daughters in Sacramento, California. No dates or length of visits was provided.

HOLDING

Appellant was a domiciliary and resident of California during the 2014 tax year.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:

Eddy Y.H. Lam

Eddy Y.H. Lam

Administrative Law Judge

We concur:

DocuSigned by:

Josh Lambert

Josh Lambert

Administrative Law Judge

DocuSigned by:

John O Johnson

John O. Johnson

Administrative Law Judge

Date Issued: 10/26/2022