OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. KUAN AND** **S. KUAN**	OTA Case No. 19095215

OPINION

Representing the Parties:

For Appellants: C. Kuan

For Respondent: Phillip C. Kleam, Tax Counsel III

For Office of Tax Appeals: Neha Garner, Tax Counsel III

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, C. Kuan and S. Kuan (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of $1,017,[1] plus applicable interest, for the 2014 tax year.

Appellants waived their right to an oral hearing; therefore, this matter is being decided based on the written record.

ISSUE

Whether appellants have established error in FTB's revised computation of their 2014 California taxable income or the resulting California tax using the "California Method" prescribed by R&TC section 17041(b).

[1] FTB's Notice of Action reduced the proposed additional tax assessment to $1,017. However, on appeal, FTB has agreed to further reduce the proposed additional tax assessment to $737, plus applicable interest.

FACTUAL FINDINGS

1. During the 2014 tax year, S. Kuan was a resident and domiciliary of California. During the 2014 tax year, C. Kuan was a resident of Nevada and was domiciled in a community property state.[2]
2. Appellants filed a joint 2014 California Resident Income Tax Return (Form 540) reporting federal adjusted gross income (AGI) of $128,786 consisting of: wages of $69,681, interest income of $101, social security benefits of $5,356, and gambling winnings of $53,648.[3] On Schedule CA, California Adjustments - Residents, appellants subtracted the social security benefits of $5,356 and C. Kuan's Nevada wages of $51,811 in computing their California AGI.
3. FTB examined appellants' 2014 Form 540 and Schedule CA and determined that they incorrectly subtracted C. Kuan's Nevada wages.[4] Based on this determination, FTB issued a Notice of Proposed Assessment (NPA). Because appellants filed a resident return (i.e., Form 540), the NPA continued to treat appellants as California residents, disallowed the Schedule CA wage deduction, and proposed additional tax of $1,286, plus applicable interest.
4. Appellants protested, contending that C. Kuan was a nonresident of California and that his earnings from Nevada should not be taxed in California.
5. At protest, FTB accepted appellants' argument that C. Kuan was a Nevada resident and determined appellants should have filed a California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) instead of their originally filed Form 540.[5] FTB also sent appellants FTB Publication 1031, which explains residency and community property

[2] Appellants contend that C. Kuan was domiciled in Nevada during the 2014 tax year while FTB contends that C. Kuan remained a California domiciliary during the 2014 tax year. As both California and Nevada are community property states, we need not determine which of these two states (California or Nevada) C. Kuan was domiciled in during the 2014 tax year.

[3] Of the total wages of $69,681 reported by appellants, $17,870 was earned by S. Kuan in California and $51,811 was earned by C. Kuan in Nevada. The gambling winnings of $53,648 was earned by C. Kuan in Nevada.

[4] The social security benefits of $5,356 were properly subtracted from appellants' California taxable income because social security benefits are not taxable for California tax purposes. (See R&TC, § 17087(a).)

[5] R&TC section 18521(a)(3) requires a joint nonresident return where one spouse is a nonresident and the couple files a joint federal income tax return.

guidelines, and a proforma Form 540NR and Schedule CA that showed how appellants should have filed their return.

6. FTB issued a Notice of Action (NOA) revising appellants' California AGI to $97,524[6] and reducing the proposed additional tax shown in the NPA from $1,286 to $1,017, plus applicable interest.
7. Appellants timely appealed the NOA.
8. In its reply brief, FTB further reduced appellants' proposed additional tax assessment to $737. FTB provides a "corrected" Form 540NR computing appellants' revised California tax liability using the "California Method" of taxing nonresidents. FTB's revised computation in the "corrected" Form 540NR reflects appellants' federal AGI of $128,786 and a California subtraction of $5,356 (related to the social security benefits which are not taxable in California), resulting in AGI from all sources of $123,430. FTB recomputed appellants' California AGI to be $70,650, which is $25,905 of C. Kuan's Nevada wages,[7] $17,870 of S. Kuan's California wages, $51 of interest income, and $26,824 of C. Kuan's Nevada gambling winnings.

DISCUSSION

California Taxation of Residents and Nonresidents

R&TC section 17041(a)(1) provides, in pertinent part, that a tax shall be imposed for each taxable year upon the entire taxable income of every resident of California who is not a part-year resident. Nonresidents, on the other hand, are only subject to tax on income derived from California sources. (R&TC, § 17041(b) & (i).) Because S. Kuan was a resident of California during the 2014 tax year, she will be taxed on all of her income, regardless of the source of that income. Because C. Kuan was a nonresident of California during the 2014 tax year, he will only be taxed on his California source income earned during the 2014 tax year.

---

[6] This amount included 50 percent of the wages earned by C. Kuan in Nevada ($25,905), 100 percent of the wages earned by S. Kuan in California ($17,870), and 100 percent of both the interest income ($101) and the gambling winnings ($53,648) appellants reported on their originally filed Form 540.

[7] FTB's reply brief states that it is including "50% of [C. Kuan's] Nevada wages attributable to [S. Kuan] of $29,906. . . ." However, this amount ($29,906) appears to be a typographical error, as 50 percent of C. Kuan's Nevada wages of $51,811 is $25,905 (rounding down), not $29,906, and FTB correctly uses $25,905 in its computation of appellants' revised California taxable income and revied California tax liability of $737 per the "corrected" Form 540NR provided with its reply brief.

Required 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 either because the nonearning spouse is a resident of California who is taxed on all income regardless of source, or because the nonearning spouse is a nonresident, but the income is California source income. (*Ibid*.)

Step One: Each Spouse's Marital Property Interest in the Items of Income

An individual's marital property interest in personal property is determined by the laws of the earning or acquiring spouse's domicile. (*Appeals of Cremel and Koeppel*, *supra*; *Appeal of Li*, 2020-OTA-095P.) Here, S. Kuan was domiciled in California during the 2014 tax year and C. Kuan was domiciled in either California or Nevada during the 2014 tax year. Both California and Nevada are community property states. (Fam. Code, § 760; N.R.S., § 123.220.) Because both spouses are domiciled in community property states, all four items of income (i.e., C. Kuan's wages and gambling winnings earned in Nevada, S. Kuan's wages earned in California, and appellants' interest income) are community property and one half of each of these items of income is attributable to each spouse for income tax reporting purposes. (*Appeals of Cremel and Koeppel*, *supra*.)

Appellants contend that community property laws are not applicable to them because they "are happily married." However, both California and Nevada law generally provide that property acquired by a married person during the marriage is community property. (Fam. Code, § 760 and N.R.S., § 123.220). Thus, the income earned by appellants during 2014 is community property. While exceptions may apply where, for example, the spouses have agreed that a spouse's earnings during the marriage will remain the earning spouse's separate property, appellants indicated that they "have no antenuptial or postnuptial agreements." (See, e.g., Fam. Code, § 850(a); N.R.S., §123.220(a).)

We agree with the dissent that FTB's initial briefing on the community property issue could have been clearer. In its opening brief, FTB correctly identifies the standard for when community property law applies when it cites to FTB Publication 1031 and states that "community property is all the property that is not separate property acquired by the husband or spouse, or both, while domiciled in a community property state, U.S. territory or country." Similarly in its reply brief, FTB is generally correct when it states that "[i]t is well settled that marital property interests in personal property are determined under the laws of the acquiring spouse's domicile," and "[w]hen one spouse is a resident of California and the other spouse is domiciled in another community property [state], the California spouse is liable for California income tax on his or her one-half community property interest in the other spouse's earnings." However, FTB's analysis of the facts following these statements did not focus on C. Kuan's state of domicile.[8] Even so, it does not follow that FTB's proposed assessment was not reasonable and rational (as suggested by the dissent) merely because FTB's analysis in its initial briefing might include a mistake or be unclear as to this issue.

The determination of whether FTB's proposed assessment is reasonable and rational should be based on an objective and independent application of the correct legal standard to the evidence in the record. It is not controlled by the parties' arguments in their initial briefs. As noted above, an individual's marital property interest in personal property is determined by the laws of the earning spouse's (here, C. Kuan's) domicile. Even before requesting additional briefing, based on the evidence in the record, it was reasonable and rational to conclude that C. Kuan's was domiciled in a community property state.[9] As such, it follows that FTB's conclusion that C. Kuan's wages were community property, when matched against this evidence,

---

[8] For example, FTB's opening brief states, "FTB explained that since [S. Kuan] was a *resident* of California and [C. Kuan] was a *resident* of Nevada, community property laws applied since both California and Nevada are community property states." (Italics added.) FTB's opening brief later states, "Therefore, as a California resident and domiciliary, the income attributable to [S. Kuan] is subject to California income tax." (Italics added.)

[9] The parties agreed that C. Kuan was a resident of Nevada and that S. Kuan was a resident and domiciliary of California. There was no evidence or argument in the record to suggest that C. Kuan's domicile was other than one of these two community property states. While the dissent is correct that "being a 'resident' of a state is not synonymous with being a 'domiciliary' of a state," we note that without other evidence, it was reasonable and rational to conclude that C. Kuan's domicile was the same as his residence. (See, e.g., *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 284 [noting that " 'domicile' and 'residence' are usually the same physical location" and that " 'residence' is frequently construed to mean domicile and the terms are often used synonymously" citing to Gov. Code, §§ 243, 244; Prob. Code, §301; Code Civ. Proc., §§ 395, 417].)

was reasonable and rational.[10] Because the record and initial briefing were lacking in specifics as to C. Kuan's domicile during the 2014 tax year, additional briefing was requested of both parties in order to give the parties the opportunity to clarify the asserted facts and their respective positions. While it was reasonable and rational to conclude that C. Kuan was domiciled in a community property state prior to the additional briefing request, the additional briefing by the parties removed any uncertainty and clearly established that C. Kuan was domiciled in a community property state.[11] Thus, FTB's determination that C. Kuan's wages were community property was not only reasonable and rational, it was factually and legally correct.

Step Two: California Taxability of Income Attributed to the Non-Earning Spouse

Because all four items of income are community property, we must move to the second step in the analysis. As noted above, under step two, a nonearning spouse's marital property interest in a particular item of income may be taxable in California either because the nonearning spouse is a resident of California who is taxed on all income regardless of source, or because the nonearning spouse is a nonresident, but the income is California source income. (*Appeals of Cremel and Koeppel*, *supra*.) As such, we will first address the taxability of the income items attributed to the California resident spouse, S. Kuan. Next, we will address the taxability of the income items attributed to the California nonresident spouse, C. Kuan.

---

[10] We disagree with the dissent's assertion that the burden of proof had shifted from appellants' to FTB as a result of FTB's revisions to its proposed assessment at protest. On appeal, it was appellants' burden to show error in FTB's determination that S. Kuan's community property share of C. Kuan's income was subject to California taxation. This required appellants to show that it was more likely than not that C. Kuan was domiciled in a non-community property state. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Rougeau*, 2021-OTA-335P, citing *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

[11] In both their additional brief and reply to FTB's additional brief, appellants clearly and unambiguously argue that C. Kuan was domiciled in Nevada during the 2014 tax year. Appellants' statement regarding Hong Kong was made in response FTB's contention that C. Kuan remained domiciled in California during the 2014 tax year. Appellants argue that under FTB's reasoning, C. Kuan could just as well be domiciled in Hong Kong. However, both before and after this statement regarding Hong Kong in their reply to FTB's additional brief, appellants continue to maintain that C. Kuan had changed his domicile from California to Nevada when he moved to Las Vegas in September 2002, and that he remained a Nevada domiciliary in 2014. Accordingly, we do not find that appellants at any time asserted that C. Kuan's domicile was Hong Kong, and instead maintained a continued assertion that his domicile was Nevada.

Taxability of Items of Income Attributed to S. Kuan

Because S. Kuan is a resident of California, and California residents are taxed on all of their income (regardless of source), appellants must include S. Kuan's 50 percent community property share of each of the four items of income in their California taxable income. This consists of 50 percent (or $25,905) of the $51,811 in wages that C. Kuan earned in Nevada, 50 percent (or $8,935) of the $17,870 in wages that S. Kuan earned in California, 50 percent (or $51) of the $101 in interest income, and 50 percent (or $26,824) of the $53,648 in gambling winnings that C. Kuan earned in Nevada. S. Kuan's 50 percent community property interest in the wages and gambling winnings earned by C. Kuan in Nevada are taxable in California even though they are not California source income because S. Kuan is a resident of California who is taxed on all of her income regardless of the source of that income.

Taxability of Items of Income Attributed to C. Kuan

Because C. Kuan is a nonresident of California, and nonresidents of California are only taxed on their income from California sources, appellants will only be required to include C. Kuan's 50 percent community property share of the four items of income in their California taxable income if those four items of income are from California sources. Here, the only item of income attributable to C. Kuan, which FTB included in its revised computation of appellants' taxable income, is C. Kuan's 50 percent interest (i.e., $8,935) in the $17,870 wages earned by S. Kuan in California.

The source of income in the hands of a nonearning, nonresident spouse is determined by applying California's nonresident sourcing rules to the facts surrounding how the income was generated as if the nonearning, nonresident spouse had derived the income directly from the source from which the earning spouse derived it. (*Appeals of Cremel and Koeppel*, *supra*.) Under California's nonresident sourcing rules, income from sources within this state includes compensation for personal services performed within this state. (Cal. Code Regs., tit. 18, § 17951-5.) It is undisputed that S. Kuan's wages were paid as compensation for services S. Kuan performed in California. Accordingly, these wages are California source income in the hands of S. Kuan and are also California source income in the hands of C. Kuan, the nonearning, nonresident spouse. Thus, C. Kuan's 50 percent community property share of S. Kuan's California wages (i.e., $8,935) is properly included in appellants' California taxable income.

As such, we find that FTB's revised computation, provided at appeal, properly computed appellants' California AGI to be $70,650, which consists of: 50 percent of C. Kuan's Nevada wages attributable to S. Kuan ($25,905), 50 percent of S. Kuan's California wages attributable to herself ($8,935) and the other 50 percent attributable to C. Kuan ($8,935) as California source income, 50 percent of appellants' interest income attributable to S. Kuan ($51), and 50 percent of C. Kuan's Nevada gambling income attributable to S. Kuan ($26,824).

Appellants' Contentions Regarding the Computation of Their California AGI

Appellants allege numerous errors in FTB's original and revised computations of their California AGI and resulting California tax liability. One of appellants' primary contentions on appeal is that because community property law applies, it "mandates that everything a married couple owns together is subject to a 50/50 split . . . ." Thus, appellant assert that FTB should have computed their California AGI by dividing their various items of income (totaling $123,430) by two and only including 50 percent of this amount (i.e., $61,716) in their California AGI, which is less than the $70,650, discussed above. Appellants further contend that "[s]ince the [California] AGI is incorrect, then all the subsequent amount of tax is incorrect."

However, the approach sought by appellants here fails to properly apply the required two-step analysis detailed above. In particular, appellants' approach appears to ignore the second step as it assumes that C. Kuan's 50 percent community property share of the income is not taxable in California simply because C. Kuan is a nonresident of California. In other words, a simple, equal division of appellants' entire taxable income does not comply with the two-step process. Under step-two of the required analysis, a nonearning spouse's marital property interest in a particular item of income may be taxable in California either because the nonearning spouse is a resident of California who is taxed on all income regardless of source, or because the nonearning spouse is a nonresident, but the income is California source income. (*Appeals of Cremel and Koeppel*, *supra*.) As noted above, all of S. Kuan's wages of $17,870, instead of just 50 percent as argued by appellants, are taxable in California. In other words, S. Kuan is taxable in full in California on her 50 percent share since she is a California resident, and C. Kuan, as a California nonresident, is also taxed in full on the remaining 50 percent share attributable to him under California's community property laws because S. Kuan's wages were paid as compensation for her personal services performed in California and is thus California source income in the hands of C. Kuan.

The California Method of Taxing Nonresidents

The calculation of the tax rate on a nonresident, which is statutorily required by R&TC section 17041(b), is part of a multistep process known as the "California Method." Under the California Method, the rate of tax that is applied to the income of a nonresident that is subject to California taxation is determined by taking into account the taxpayer's worldwide income for the entire tax year. (*Appeal of Million* (87-SBE-036) 1987 WL 59534.) This method does not tax out-of-state income received while a taxpayer is a nonresident of California (here, C. Kuan's 50 percent community property share of his Nevada wages and gambling income and 50 percent of appellants' interest income), but merely takes into account a taxpayer's "entire taxable income" for the year, including income from non-California sources, in determining the applicable tax rate. (R&TC, § 17041(b)(2).) The tax rate so determined is then applied only to the taxpayers' California taxable income. The purpose of the California Method is to apply the graduated tax rates to all individuals, not just those who reside in California.

For the 2014 tax year, California law requires the calculation of three ratios to be applied in determining: (1) the taxpayers' prorated deductions; (2) the tax rate applicable to the taxpayers' California taxable income; and (3) allowable credits, as follows:

1. Prorated Deductions. To calculate the percentage of itemized deductions or the prorated standard deduction allowable, taxpayers must divide California AGI by total AGI from all sources. The resulting ratio is then applied to the itemized deductions or standard deduction to find the prorated allowable amount. (R&TC, § 17304.)

2. Tax Rate. To calculate the tax rate for California, taxpayers must divide the tax on the total taxable income (calculated as if the taxpayers were California residents for the entire year) by the taxpayers' total taxable income. The resulting rate is then applied to the taxpayers' California taxable income to determine the California tax. (R&TC, § 17041(b)(2).)

3. Prorated Credits. To calculate the percentage of credits allowed on the taxpayers' California return, the California taxable income is divided by the total taxable income. The resulting ratio is then applied to the total exemption amount to find the prorated credits. (R&TC, § 17055.)

After reviewing FTB's reply brief and the calculations provided in the "corrected" Form 540NR attached to that brief, we find that the mechanics used to compute the revised tax of $737 are consistent with the law described above. The "corrected" Form 540NR shows appellants' AGI from all sources as $123,430 (which consists of C. Kuan's Nevada wages of $51,811, S. Kuan's California wages of $17,870, taxable interest of $101, and C. Kuan's Nevada gambling income of $53,648). The computation then subtracts appellants' total reported itemized deductions of $62,400, resulting in total taxable income of $61,030, and tax on total taxable income of $1,610. The "corrected" Form 540NR correctly reflects California AGI of $70,650, as discussed above. Appellants' California taxable income is $34,932,[12] and appellants' California tax rate is 0.0264. This rate is calculated by dividing the tax on total taxable income of $1,610 by the total taxable income of $61,030. Thus, appellants' total taxable income was used *only* as the denominator to determine the graduated tax rate to be applied to appellants' California taxable income of $34,932. The tax of $922 (i.e., $34,932 x 0.0264) less the $185 prorated exemption credits (i.e., $324 x 0.5724)[13] arrives at a corrected California tax of $737.

While appellants argue that FTB made several errors[14] in computing their taxes, FTB's revised computation correctly applies the California Method to appellants' California AGI of $70,650. Furthermore, California has a progressive tax system. Therefore, it is permissible for California to employ appellants' non-California income in the revised computation of their 2014 California tax rate to compute their total tax liability.[15] Thus, contrary to appellants' argument, FTB is not taxing their non-California source income but is instead using their total income from all sources to determine the correct rate of tax and the applicable ratio (percentage) to determine the correct California tax.

---

[12] This amount was calculated by taking appellants' California AGI of $70,650 and subtracting prorated itemized deductions of $35,718 (i.e., $62,400 x 0.5724). The percentage of deductions allowed was calculated by dividing appellants' California AGI of $70,650 by their AGI from all sources of $123,430.

[13] The percentage of credits allowed was calculated by dividing appellants' California taxable income of $34,932 by their total taxable income of $61,030.

[14] To the extent appellants raise arguments that we have not addressed, we have considered and found them to be without merit.

[15] The fundamental fairness and the constitutionality of using out-of-state income to calculate the rate of tax has been upheld by New York's highest court, and the United States Supreme Court refused to hear an appeal from the New York decision. (See *Brady v. New York* (1992) 80 N.Y.2d 596, cert. den. (1993) 509 U.S. 905.) The *Brady* court reasoned that similarly-situated taxpayers were those with the same total income. For example, a nonresident earning $20,000 in New York, but with $100,000 of reported total income, should be taxed on the $20,000 of New York-source income at the same rate as a New York resident with $100,000 of total income (and not at the same rate as a New York resident with $20,000 of total income).

HOLDING

Appellants have not established error in FTB's revised computation of their California taxable income or the resulting California tax using the California Method prescribed by R&TC section 17041(b).

DISPOSITION

Consistent with its concession on appeal, FTB's action is modified to reduce the proposed additional tax assessment to $737, plus applicable interest. Otherwise, FTB's action is sustained.

DocuSigned by:
Cheryl L. Akin
1A8C8E38740B4D5...

Cheryl L. Akin
Administrative Law Judge

I concur:

DocuSigned by:
Josh Aldrich
48745BB806914B4...

Josh Aldrich
Administrative Law Judge

T. LEUNG, Administrative Law Judge, Dissenting:

After examining appellants' 2014 Form 540, respondent FTB issued a Notice of Proposed Assessment (NPA) disallowing the subtraction of C. Kuan's Nevada wages from California adjusted gross income (AGI). Appellants protested, and after apparently being convinced that C. Kuan was a Nevada resident, FTB changed its theory for making its adjustments, modifying its NPA to include only 50 percent of C. Kuan's Nevada wages in California AGI as part of S. Kuan's community property interest. However, until the majority requested additional briefing (AB) regarding C. Kuan's state of domicile, FTB did not make any determination regarding his domicile.

As the majority correctly points out, in order to include C. Kuan's Nevada income in the computation of appellants' California AGI, C. Kuan must be domiciled in a community property state. (See *Schecter v. Superior Court* (1957) 49 Cal.2d 3, 10; *Rozan v. Rozan* (1957) 49 Cal.2d 322, 326; *Appeals of Cremel and Koeppel*, 2021-OTA-222P.) FTB's opening brief states: "Therefore, as a California resident and domiciliary, the income attributable to [S. Kuan] is subject to California income tax * * * FTB agrees that your client [C. Kuan] was a resident of Nevada in 2014 . . . ." In a letter to appellants dated February 7, 2019, FTB states: "[S]ince [S. Kuan] was a California resident and [C. Kuan] was a resident of Nevada, the community property laws come into play since both California and Nevada are community property states."

The record reveals no finding, not even an allegation, by FTB that C. Kuan was domiciled in a community property state prior to the majority's AB request. In short, FTB determined that S. Kuan was both a resident and domiciliary of California, while it determined that C. Kuan was only a resident, not a domiciliary, of Nevada. Being a "resident" of a state is not synonymous with being a "domiciliary" of a state. (Cf. R&TC, § 17014(a) and Cal. Code Regs., tit. 18, § 17014(c); see *Appeal of Mazer*, 2020-OTA-263P.)

Once appellants successfully rebutted FTB's initial adjustments in its NPA, FTB again had the burden of showing that its new adjustments, based on community property attribution, was reasonable and rational; in other words, the presumption of correctness attendant to FTB's determinations is not unconditional. (See *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) However, on its face, FTB did not present a reasonable and rational case for attributing half of C. Kuan's Nevada wages to his wife; in fact, FTB never mentioned C. Kuan's domicile until this panel requested additional briefing on the matter. In its AB, FTB states: "Up until now, FTB did not have an opinion as to whether Appellant-husband was or was not domiciled in California because Appellants conceded that he was domiciled in a community property state (Nevada) . . . ." But, C. Kuan's "concession" was made as a result of the AB request, and FTB points to nothing else in the record prior to the AB where C. Kuan's domicile is discussed. Without even alleging that C. Kuan was domiciled in a community property state until the majority issued its AB request, FTB's proposed assessment, on its face and as modified, is neither reasonable nor rational, and no presumption of correctness can attend to its action. Therefore, the burden of proof did not shift to appellants. (See *Todd v. McColgan*, *supra*., and *Appeal of Mazer*, *supra*.) Moreover, it is clear that FTB used the wrong legal standard to attribute C. Kuan's Nevada income to California – i.e., FTB used a residency standard instead of a domiciliary standard.

Under these circumstances, appellants should not have the burden of proving C. Kuan's state of domicile, as the burden never shifted from FTB to appellants. (See Evid. Code, §§ 500, 550(b).) Nevertheless, appellants, who were no longer represented and are not tax professionals, were asked to make this pivotal legal conclusion, a question that should have been decided by this panel based on the record before it. Indeed, appellants, in their reply AB, indicated that C. Kuan could just have well have been a domiciliary of Hong Kong, where he had lived for a long time, where he returned to get married, and where he returns to visit family while on vacation. I would therefore vote to reverse FTB's action.

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge

Date Issued: 4/15/2022