OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. DOGGETT**	OTA Case No. 20106816

OPINION

Representing the Parties:

For Appellant: Sharon Lynora Decker, CPA

For Respondent: Alisa L. Pinarbasi, Tax Counsel

For Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Doggett (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of $71,220,[1] plus applicable interest, for the 2015 tax year.

Appellant waived the right to an oral hearing; therefore, Office of Tax Appeals (OTA) decides this matter based on the written record.

ISSUE

Whether appellant has shown error in FTB's proposed assessment of tax on income received from a 2012 Long-Term Incentive Program (2012 LTIP).

[1] During the pendency of this appeal, appellant conceded that he owes tax to California on income of $39,686 received from his employer during 2015, in addition to owing tax on state wages, tips, etc. of $40,000 shown on his 2015 California income tax return. A document entitled "Summary of Wage Income" provided by appellant to FTB shows that appellant received 2015 wages of $79,686 (rounded), which, when reduced by previously reported wages of $40,000, results in $39,686. Appellant asserts that this amount of $79,686 represents payments for "Personal Time" that appellant received from Kaiser Foundation for Public Health (KFPH) from January 1, 2015, through February 28, 2015. Therefore, the amount claimed by appellant as not being subject to California tax either as a California resident or as California source income has been reduced from $614,939 to $575,253. Based on this concession, FTB indicates that the remaining proposed tax deficiency amount at issue in this appeal is $66,624.

FACTUAL FINDINGS

1. In 2011, appellant resided in New York, New York, and Jupiter, Florida. At this time, appellant was employed by JP Morgan Chase, where he worked in security and risk management.

2. In a letter to appellant dated December 14, 2011, the Executive Vice President and Chief Information Officer of the Kaiser Foundation for Public Health (KFPH), offered appellant the position of Senior Vice President, Chief IT Risk Officer in Oakland, California, subject to the terms of the letter (Employment Agreement). The Employment Agreement stated that appellant would start work at KFPH on March 5, 2012, and that he would receive a base salary of $400,000. In addition, KFPH awarded appellant a one-time "Special Payment" of $165,000 "[t]o offset a change in your cash compensation by accepting this employment with KFPH . . . ." The Special Payment was to be paid in a first installment of $55,000 within 30 days of appellant's start date, a second installment of $55,000 12 months after his start date, and a final installment of $55,000 24 months after his start date.

3. The Employment Agreement provided that appellant was also eligible to receive additional compensation through a 2012 Annual Incentive Plan (AIP), a 2011 LTIP and a 2012 LTIP, along with participation in a variety of retirement plans, other employee benefits, and relocation payments. The Employment Agreement provided the following language with regard to the 2012 LTIP:

> You will be eligible to participate in the Long-Term Incentive Plan that begins in 2012 and ends on December 31, 2014. While I intend that your grant would have a target value of $275,000, it is contingent on approval by the Compensation Committee of the Board of Directors of KFPH at its next meeting. *The final value of your award will be based on overall KFPH results against the stated goals for the three-year performance period.* The final payout will be made in a lump sum in 2015, and you would need to be employed by KFPH through the end of the performance period to be eligible. *Long-Term Incentive Plan grants are awarded selectively based on each executive's role and individual performance.* This offer does not imply a guarantee of future grants or continued participation in the Plan. (Emphasis added.)

4. The Employment Agreement further provided that appellant would be entitled to take "Personal Time" subject to certain conditions:

> "We encourage all employees to take time off for their general well-being. *Your manager will approve how much time is appropriate to take away from work considering both business and your personal needs*. As business and personal needs will vary from year to year, the amount of Personal Time that will be approved each year may vary. *There is no stated amount of Personal Time and no amount is promised or accrued. Your compensation is not reduced when you use Personal Time.* You do not earn or accrue paid leave to compensate for lost pay. As your compensation is not reduced for Personal Time and paid leave is not earned based on time worked, there is no payment for earned paid leave upon termination or transfer. Please refer to the Personal Time Policy for more details." (Emphasis added.)

5. On December 19, 2011, appellant indicated his acceptance of the KFPH offer by signing and returning the signed Employment Agreement to KFPH.
6. On or about March 5, 2012, appellant began working for KFPH in Oakland.
7. In late October or early November 2014, appellant gave notice to KFPH that he intended to leave his position at KFPH and move to Texas.
8. On March 1, 2015, appellant began work with American International Group, Inc. (AIG) in Texas.
9. On March 20, 2015, while appellant was a resident of Texas, KFPH paid him $575,253, which represented appellant's payout from the 2012 LTIP and is the amount at issue in this appeal.
10. A Form W-2 issued by KFPH shows that appellant had 2015 wages, tips, and other compensation of $654,939, including state wages, tips, etc. of $40,000, and no California income tax withheld.
11. On October 11, 2016, appellant filed a California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) for the 2015 tax year.
12. In a letter to appellant dated February 7, 2018, FTB stated that it was examining appellant's 2015 California return and had preliminarily determined that in addition to

reported wages of $40,000, appellant had failed to include additional income of $614,939 in California adjusted gross income. FTB asked appellant to provide a statement explaining why the additional income was not taxable by California, as well as to submit supporting documentation.

13. In a letter to FTB dated February 27, 2018, appellant stated that he disagreed with FTB's preliminary determination that he had additional California source income of $614,939, because the amount at issue stemmed from "a pre-determined, long-term incentive payment under an agreement entered in 2012 while the taxpayer was a resident of New York and was paid in 2015 when the taxpayer was a resident of Texas." Appellant asserted that KFPH had not withheld any California tax during 2014, which indicated the KFPH did not regard the 2012 LTIP as salary or wages. Appellant attached copies of the following documents: (1) a 2013 Form W-2 issued by KFPH to appellant, which showed California withholdings of $86,166.42; (2) a 2014 Form W-2 issued by KFPH to appellant, which showed California withholdings of $90,641.40; and (3) a 2015 Form W-2 issued by KFPH to appellant, which showed no withholding of state income tax for 2015, the tax year at issue.

14. In a letter to appellant dated June 5, 2019, FTB stated that it had determined that both the salary of $79,686 and the LTIP payment of $575,253 represented payments for services that appellant had performed in California. Therefore, FTB stated that it sourced appellant's remaining 2015 KFPH compensation of $614,939 to California.

15. On January 6, 2020, FTB issued a Notice of Proposed Assessment (NPA), which increased appellant's California taxable income, resulting in additional tax of $71,220, plus applicable interest.

16. In a letter to FTB dated February 26, 2020, appellant protested the NPA on the grounds that the 2012 LTIP payment was actually a signing bonus that should not be sourced to California. Appellant attached the following documents to his protest letter: (1) a KFPH paystub issued to appellant for December 2014 showing that KFPH did not withhold any California income tax; (2) a flight itinerary showing that appellant was scheduled to fly on a United Airlines flight from Newark International Airport in Newark, New Jersey, to San Francisco International Airport on December 2, 2014; (3) a disclaimer page issued by Hogg Robinson Group; (4) a travel itinerary showing that appellant was scheduled to fly

on a United Airlines flight from San Francisco International Airport to John F. Kennedy International Airport in New York, New York, on December 1, 2014, and that he was scheduled to stay at a hotel in New York on the night of December 1, 2014; (4) an email dated November 21, 2014, from AIG to appellant asking him to approve the time of his scheduled flight to New York; (5) an email from Hotels.com to appellant showing a reservation at the Hilton Garden Inn Houston/The Woodlands for the period December 21, 2014, through December 26, 2014; (6) a forwarded email from the Executive Vice President and Chief Information Officer of AIG announcing a new structure for AIG's technology organization, including a search for a new commercial business information officer; (7) emails exchanged between appellant and several AIG employees dated January 20-22, 2015, regarding the arrival of appellant's flight in New York and arranging transportation to AIG's offices at 175 Water Street; (8) a limousine service voucher dated January 26, 2015, showing that appellant was picked up in Flushing, New York, and taken to 175 Water Street, New York.

17. In a letter to appellant dated July 30, 2020, FTB stated that it would affirm its NPA. FTB asserted that because appellant was employed by KFPH, he performed services for KFPH, and that compensation for such services, no matter how they are labeled, constituted wages under California law.

18. On September 23, 2020, FTB issued a Notice of Action (NOA) affirming its NPA.

19. Appellant then filed this timely appeal.

20. On appeal, appellant provided a table entitled Summary of Wage Income, which showed that KFPH paid appellant $654,939.00 during 2015. According to the Summary of Wage Income, appellant's 2015 KFPH income was comprised of $79,686.00 in salary, and $575,253.00 of LTIP payment. Appellant also attached copies of the following additional documents: (1) a series of emails between the Executive Recruiting Director at AIG and appellant dated December 4, 2014, through January 6, 2015, relating to appellant's job candidacy at AIG; (2) a flight itinerary showing that appellant traveled on U.S. Airways from Greensboro, North Carolina, to New York on January 25, 2015; (3) a 2011 Form W-2 showing that KFPH withheld California income tax of $15,223.13 from appellant's 2011 compensation; (4) banking statements from an account in appellant's name at Wells Fargo Bank, N.A. for the periods January 1, 2015, through

January 31, 2015; February 1, 2015, through February 28, 2015; and March 1, 2015, through March 30, 2015, with various travel-related expenses circled in pen, as well as a deposit of $405,395.24 dated March 20, 2015, labelled Kaiser Foundation Payroll with a handwritten note stating "net LTIP"; (5) two documents containing wire transfer instructions signed by appellant on February 28, 2015; and (6) a document entitled Relocation Reimbursement Agreement for the AIG "Executive" Relocation Policy signed by appellant on February 28, 2015.

DISCUSSION

FTB's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of Stabile*, 2020-OTA-198P.) To overcome the presumed correctness of FTB's finding as to issues of fact, taxpayers must introduce credible evidence to support their assertions, and if they do not support their assertions with such evidence, FTB's determinations must be upheld. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

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.) Part-year residents are taxed on all their income earned while residents of this state (regardless of source), as well as all income derived from California sources while nonresidents. (R&TC, § 17041(b) & (i).) For nonresidents, income from sources within California includes compensation for personal services performed within California. (Cal. Code Regs., tit. 18, §§ 17951-2, 17951-5.) Nonresidents are therefore required to include in gross income when calculating their taxable income only that portion of their gross income that is derived from sources within California. (R&TC, § 17951(a); Cal. Code Regs. tit. 18, § 17951-1(a).)

Because appellant was a part-year resident during the 2015 tax year, he is subject to California tax on all income (regardless of source) earned while a California resident from January 1, 2015, through February 28, 2015, and on all income derived from California sources while a California nonresident from March 1, 2015, through December 31, 2015.

Treatment of 2012 LTIP Payment as a Signing Bonus

Since the 2012 LTIP payment was earned while appellant was a nonresident, OTA must determine whether it was California-sourced. OTA must then determine if the 2012 LTIP is compensation for performance of services or whether it is intangible property. The income of

nonresidents from stocks, bonds, notes, or other intangible personal property is not California source income unless the property has acquired a business situs in this state. (R&TC, § 17952.) With a few exceptions that are not relevant to this appeal, the income of nonresidents from intangible personal property such as shares of stock in corporations, bonds, notes, bank deposits and other indebtedness is taxable as income from sources within California only if the property has a situs for taxation in this state. (Cal. Code Regs., tit. 18, § 17952(b).) Intangible property has its situs in the state or country where the owner resides unless it has acquired a business situs elsewhere. (*Miller v. McColgan* (1941) 17 Cal.2d 432, 439.) "Intangible personal property has a business situs in this State if it is employed as capital in this State or the possession and control of the property has been localized in connection with a business, trade or profession in this State so that its substantial use and value attach to and become an asset of the business, trade or profession in this State." (Cal. Code Regs., tit. 18, § 17952(c).)

A fee for early termination of a contract received by a professional hockey player was not taxable in California, because the hockey player lived in Canada and the intangible contract right had not acquired a California business situs. (*Appeal of McAneeley* (80-SBE-131) 1980 WL 5045.) A contract clause that required two professional football players to repay a proportionate share of their bonuses for any period of time in which they failed or refused to practice or play with the professional football team demonstrated that the payments actually represented compensation for services, rather than mere consideration for signing contracts. (*Appeals of Hearst and Langham* (2002-SBE-159) 2002 WL 31771057; but see Rev. Rul. 2004-109 [amounts an employer pays as bonuses for signing a contract or ratifying a collective bargaining agreement in connection with the establishment of the employer-employee relationship are wages for purposes of federal income tax withholding].)

Here, there is no dispute that KFPH paid appellant $575,253 on March 20, 2015, while appellant was a resident of Texas and that this entire payment represents appellant's income from the 2012 LTIP. Therefore, the parties agree that appellant is only taxable on the 2012 LTIP payment to the extent that it represents California source income. (R&TC, §§ 17041(a), (b), & (i), 17951.) Appellant asserts that because he was a Texas resident on March 20, 2015, when he received the 2012 LTIP payment, this income should be treated as income from intangible property that is properly sourced to Texas, appellant's state of residence, and not to California because the property did not acquire a business situs in this state. Appellant provides a copy of

the Employment Agreement but has offered no other documents that purport to amend or otherwise modify its language, despite having been given the opportunity to do so at protest and on appeal.

Appellant asserts that he and KFPH intended that he should receive the entire 2012 LTIP payment as a signing bonus. Appellant asserts that while the Employment Agreement required him to be employed by KFPH through December 31, 2014, he was not required to perform any services for KFPH in order to receive the 2012 LTIP payment. Instead, appellant asserts that the Employment Agreement provides that the 2012 LTIP payment is one of several payments meant to compensate him for bonuses and stock options worth approximately $800,000, which he forfeited as a result of leaving JP Morgan Chase in 2012. Appellant claims that both he and KFPH behaved during the course of the Employment Agreement in such a way as to show that the 2012 LTIP payment was a true signing bonus unconnected with the performance of any services. To support his interpretation of the Employment Agreement, appellant has submitted Forms W-2 issued by KFPH to appellant and a December 2014 paystub. Appellant's Forms W-2 show that KFPH withheld California income tax of $15,223.13 for 2011, $86,166.42 for 2013, and $90,641.40 for 2014, but that KFPH did not withhold any state income tax for 2015, the tax year at issue. Likewise, appellant's December 2014 paystub shows that KFPH did not withhold any California income tax during that period.

KFPH's failure to withhold California income tax from appellant's compensation during December 2014 or 2015 does not prove that the 2012 LTIP was a true signing bonus. As appellant himself has conceded, he informed KFPH in October or November 2014 that he intended to leave his position at KFPH and to move to Texas. Therefore, the most likely explanation for the lack of withholding is that KFPH was aware appellant intended to move to Texas, which does not have a state income tax. By contrast, appellant's argument is undercut by the fact that KFPH not only failed to withhold any California tax on the 2012 LTIP payment of $575,253 but also on the remaining payments totaling $79,685.57, which appellant concedes to be California source income. If KFPH had refrained from withholding California tax from the 2012 LTIP payment because of its classification as a signing bonus, it follows that KFPH would still have withheld tax on appellant's remaining California source income. In addition, the only language in the Employment Agreement that concerns withholding relates to tax assistance offered for relocation allowances received by appellant to ease his move from New York and

Florida to California in 2012, which is not at issue in this appeal. The Forms W-2 and the December 2014 paystub are only relevant to the extent that they elucidate specific terms in the Employment Agreement.

Appellant also asserts that his negotiations with AIG and arrangements to move to Texas in late 2014 and early 2015 show that he was not required to perform any services for KFPH prior to receiving the 2012 LTIP payment. Appellant provides numerous documents from the period November 2014 through March 2015, including emails between himself and AIG employees, flight itineraries, hotel reservation confirmations, wire transfer documents and bank statements in order to show that he was actively interviewing and preparing to go to work for AIG. Appellant asserts that these documents show both that he was not performing any services for KFPH after October 2014, and that he was also satisfying the terms of the Employment Agreement such that KFPH awarded him his 2012 LTIP payment in March 2015. However, there is nothing about interviewing and preparing for a new position that is inherently incompatible with performing services for KFPH. The fact that appellant took several short trips to New York on December 1-2, 2014, or January 25-26, 2015, or that he stayed at a hotel in The Woodlands, Texas, for the period December 21, 2014, through December 26, 2014,[2] during the Christmas holiday season hardly proves that appellant had ceased performing services for KFPH. By themselves, the AIG documents do nothing to elucidate the intent of appellant and KFPH during December 2011, when the parties negotiated the Employment Agreement.[3] As OTA discusses in detail below, appellant has provided no information about the individual who managed him at KFPH during late 2014 and early 2015; therefore, OTA is unable to trace the nature of KFPH's performance under the Employment Agreement.

Appellant alleges that he was paid only for Personal Time after October 2014, which shows that he did not need to perform any services for KFPH in order to receive the 2012 LTIP payment. First, there is no evidence that appellant's remaining compensation of $79,685.57 was comprised solely of Personal Time. Appellant's Wells Fargo statements show that the deposit of

[2] Appellant has conceded that he moved to Texas "partially due to family matters."

[3] Indeed, there is additional ambiguity about using appellant's and KFPH's performance under the contract during late 2014 and early 2015 to interpret the Employment Agreement, since appellant's own documentation points to the fact that he was being recruited to AIG by the Executive Vice President and Chief Information Officer of KFPH, the same individual who recruited him to KFPH and signed the Employment Agreement on behalf of KFPH.

$10,584.55 received on January 23, 2015, the deposit of $10,584.56 received on February 20, 2015, and the deposit of $10,584.55 received on March 6, 2015, are all labeled simply as "Kaiser Foundation Payroll." Likewise, appellant's December 2014 paystub does not explicitly label any of his income as Personal Time.

Moreover, even if appellant was able to use substantial Personal Time between late October 2014 and February 28, 2015, that does not mean that he performed no services for KFPH. As appellant states, the Employment Agreement offered him broad discretion to use substantial Personal Time without endangering his 2012 LTIP payment. However, appellant may not unilaterally take Personal Time without the approval of his manager. Appellant's manager has discretion to determine "how much time is appropriate to take away from work considering both business and your personal needs." Significantly, appellant has provided no evidence indicating how much Personal Time his manager approved and how his personal requirements were weighed against KFPH's business needs. Therefore, even if appellant did use substantial Personal Time from October 2014, through February 28, 2015, and it is unproven that this was actually the case, there is no evidence that this was inconsistent with performing services for KFPH, since appellant was entitled to substantial personal time subject to the approval of his manager. Appellant has offered no other evidence. Therefore, OTA finds that appellant's interpretation of the Employment Agreement is not supported by the evidence. (See *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33 at pp. 37–39.)

The language of the Employment Agreement provides that appellant is eligible to participate in the LTIP that begins in 2012 and ends on December 31, 2014. There is one precondition for appellant to receive a payout under the 2012 LTIP: he must be employed by KFPH through the end of the performance period to be eligible. If that precondition is satisfied, then there are two additional conditions that determine the amount of LTIP income he receives: While the 2012 LTIP has a target value of $275,000, "[t]he final value of your award will be based on overall KFPH results against the stated goals for the three-year performance period." The Employment Agreement also provides the following language with regard to appellant's own performance: "Long-Term Incentive Plan grants are awarded selectively based on each executive's role and individual performance." Therefore, the plain language of the Employment Agreement provides that grants are related both to KFPH's overall results *and* to appellant's specific corporate performance. The Employment Agreement clearly states that the amount of

2012 LTIP income that appellant receives is subject to certain future conditions, which means that it cannot be a signing bonus. (*Appeal of Foster* (84-SBE-159) 1984 WL 16239; *Appeals of Hearst and Langham*, *supra*.)

By contrast, there is no explicit language in the Employment Agreement referring to the 2012 LTIP as a signing bonus or as a way to compensate appellant for leaving his prior position at JP Morgan Chase. However, when OTA looks at the Employment Contract as a whole, there is one form of compensation that *may* qualify as a true signing bonus. This is a "Special Payment" of $165,000 that is intended "[t]o offset a change in your cash compensation by accepting this offer of employment with KFPH . . . ." This payment, which is to be paid out in three installments of $55,000 (provided appellant remains a KFPH employee at the time of each payment), is not at issue in the present appeal.[4] By contrast, such explicit language showing the purpose of compensating appellant for something aside from the performance of services is absent from the language of the 2012 LTIP, as well as appellant's base salary, the AIP and the 2011 LTIP. Thus, when OTA looks at the Employment Agreement as a whole, it is clear that the 2012 LTIP was awarded solely with the expectation of appellant performing services for KFPH rather than as a true signing bonus. (R&TC, § 17952; Cal. Code Regs., tit. 18, § 17952(b); *Appeal of Foster*, *supra.*)

Appellant asserts that the 2012 LTIP was intended as part of a true signing bonus to reimburse him for over $800,000 of JPMorgan income he would otherwise forgo in exchange for leaving his position, joining KFPH, and remaining with KFPH until after December 31, 2014. Appellant asserts that the first installment of the signing bonus was the Special Payment, the second installment was the 2011 LTIP, and the final installment was the 2012 LTIP. With the possible exception of the Special Payment of $165,000, OTA has already concluded that all of these forms of compensation were conditioned on the basis of future performance. Appellant argues that the Employment Agreement plainly shows that he was eligible to receive the 2012 LTIP payment without performing any services for KFPH. Because the 2012 LTIP payment is specifically conditioned on the performance of future services, OTA has already rejected this interpretation. Appellant asserts that he has signed similar agreements in the past that contained

[4] OTA notes that even the terms of the Special Payment are ambiguous as to whether it is a signing bonus because the Employment Agreement requires appellant to be employed by KFPH at the time of each installment payment.

signing bonuses and non-compete clauses. However, appellant has provided no evidence to support this claim.

Appellant also argues that the Employment Agreement excluded him from participating in Kaiser's general LTIP based on the inclusion of the phrase, "This offer does not imply a guarantee of future grants or continued participation in the Plan." This sentence provides that appellant is not guaranteed to receive the target value of $275,000 as a payout and also limits appellant's right to participate in any LTIPs beyond 2012. This clause, once again, is evidence that appellant received the 2012 LTIP as compensation for services. Appellant also asserts that the term "performance period" in the 2012 LTIP language refers to KFPH's performance and budgeting, while appellant's performance is excluded from KFPH results against stated goals. This interpretation is facially contradicted by the explicit reference to "each executive's role and individual performance" in the 2012 LTIP clauses of the Employment Agreement. Appellant argues that as the Chief IT Risk Officer, he had no control over KFPH's results as against KFPH's stated goals for the period. However, appellant has provided no evidence concerning his role at KFPH, and, in any case, such evidence would not be probative when there is clear language in the Employment Agreement showing that the 2012 LTIP amount was measured in part by appellant's performance.

Appellant asserts that the 2012 LTIP language in the Employment Agreement is "general" and does not apply specifically to him. However, in signing the Employment Agreement on December 19, 2011, appellant adopted this general language as applying to himself. Appellant has not pointed to any language in the Employment Agreement or any subsequent amendment that modifies the individual performance language. Appellant asserts that he and KFPH agreed to remove language from the Employment Agreement stating that the 2012 LTIP was "based on a combination of organization an[d] individual performance." Appellant's assertion is unsupported by any evidence, as noted above. Moreover, the alleged language is superfluous, because the Employment Agreement already explicitly compensated appellant based on the performance of future services.

Appellant asserts that the 2012 LTIP and other portions of the Employment Agreement were non-compete clauses that are treated similarly to signing bonuses. Business and Professions Code section 16600 provides that a contract clause qualifies as a covenant not to compete when an individual "is restrained from engaging in a lawful profession, trade, or

business of any kind."[5] (Bus. & Prof. Code, § 16600; see also *Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal.App.4th 1068, 1072 [non-solicitation covenants here are subject to section 16600 because they restrict appellants' ability to compete].) OTA does not find any language in the Employment Agreement restricting appellant's ability to work for other companies prior to December 31, 2014. Rather, the 2012 LTIP provides a financial incentive for appellant to remain employed with KFPH. Therefore, OTA declines to construe the 2012 LTIP as a covenant not to compete.

Appellant also cites a number of regulations and State Board of Equalization (BOE) opinions concerning signing bonuses, such as *Appeal of Foster*, *supra*. Because OTA finds that the Employment Agreement clearly establishes that the 2012 LTIP payment was compensation for services rather than a signing bonus, *Appeal of Foster*, *supra*, does not support appellant's argument. Appellant also cites to another BOE decision that was not adopted as a BOE formal opinion. Therefore, OTA does not regard it as precedential authority. (Cal Code of Reg., tit. 18, § 30504.) Appellant also relies on California Code of Regulations, title 18, section 18662-6(f)(2), which provides that signing bonuses are determined on a case-by-case basis. Because this provision does not explicitly apply to employees but only to "nonresident independent contractors or to non-California business entities" who are generally employed in the entertainment business, OTA declines to apply this provision to the present appeal. (Cal. Code Regs., tit. 18, § 18662-6(a)(1).)

Therefore, OTA finds that the clear language of the Employment Agreement provides that the 2012 LTIP payment is compensation for appellant's performance of services, and not a true signing bonus.

California Source Income

If nonresident employees, including officers of corporations (but excluding nonresident traveling salesmen, agents or other employees for services performed or sales made whose compensation depends directly on the volume of business transacted), are employed continuously in this state for a definite portion of any taxable year, the gross income of the employees from sources within this State includes the total compensation for the period

[5] Similarly, California Code of Regulations section 17951-6(4) states that a covenant not to compete includes any arrangement to refrain from engaging in an activity, directly or indirectly, similar to the business activity carried on by the business which was sold.

employed in this state. (Cal. Code Regs., tit. 18, § 17951-5(a)(4).) "The critical factor which determines the source of income from personal services is not the residence of the taxpayer, or the place where the contract for services is entered into, or the place of payment. It is the place where the services are actually performed." (*Appeal of Stabile*, *supra*; *Appeals of Cremel and Koeppel*, 2021-OTA-222P.) Benefits, such as sick leave and vacation pay, which are a direct result of California employment, are includible as California income. (*Appeal of Stevens* (86-SBE-100) 1986 WL 22770.) "When assets are transferred by an employer to an employee to secure better services, they are plainly compensation. It makes no difference that the compensation is paid in stock rather than in money." (*Commissioner. v. LoBue* (1956) 351 U.S. 243, 247.) What constitutes a reasonable allocation method so as to properly limit a taxpayer's gross income to that income earned from California sources must be based upon the facts and circumstances of each case. (*Appeal of Stabile*, *supra*.)

Having found that, based on the language of the Employment Agreement, KFPH awarded appellant the 2012 LTIP payment of $575,253 as compensation, OTA must now establish whether the LTIP payment constitutes California source income. Appellant has not met his burden of proof to show that he was living and working in another state during 2014. Appellant's KFPH paystub was issued to appellant's California address on December 26, 2014, showing he was still an employee living and working in California through the end of 2014. Furthermore, the fact that appellant was in Texas or New York for brief stints is not sufficient to show that the services are deemed performed outside of California through the end of 2014. Appellant has not provided sufficient evidence showing that he performed some or all of his services for KFPH outside of California. OTA finds that appellant performed all services for KFPH during the performance period of the 2012 LTIP payment from 2012, through December 31, 2014, in California. As a result, 100 percent of appellant's 2012 LTIP income is taxable by California as California source income. (Cal. Code Regs., tit. 18, § 17951-5(a)(4).)

HOLDING

Appellant has failed to show error in FTB's proposed assessment of tax on income received from the 2012 LTIP.

DISPOSITION

FTB's action is sustained.

DocuSigned by:
Sara A Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

DocuSigned by:
Kenneth Gast
3AF5C32BB93B456...
Kenneth Gast
Administrative Law Judge

DocuSigned by:
John O Johnson
873D9797B9E84E1...
John O. Johnson
Administrative Law Judge

Date Issued: 11/29/2022