

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**G. DAVIS**

) OTA Case No. 19125576  
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**OPINION**

Representing the Parties:

For Appellant:

G. Davis

For Respondent:

Desiree Macedo, Tax Counsel

For Office of Tax Appeals:

Oliver Pfof, Tax Counsel

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, G. Davis (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$34,353 and \$164,765 for the 2011 and 2012 tax years, respectively.

Appellant waived the right to an oral hearing; thus, we decide the matter based on the written record.

**ISSUES**

1. Whether the Office of Tax Appeals (OTA) has jurisdiction to hear and decide an appeal of the invalid notice of action issued by respondent denying a claim for refund for the 2012 tax year.
2. Whether appellant was a domiciliary and resident of California during 2011.

**FACTUAL FINDINGS**

1. A California-based company employed appellant from January 2009 to June 2012.
2. Appellant was domiciled in California prior to 2011.

3. Property records show:
  - Appellant purchased a single-family residence in California in January 2010.
  - Appellant purchased a condominium in California in January 2010. Appellant sold this condominium in April 2017.
  - Appellant purchased a condominium in Florida in April 2010.
4. Appellant registered an automobile with the California Department of Motor Vehicles in July 2012.
5. Appellant renewed his California driver's license in April 2009 and surrendered it to Florida in May 2014.
6. Appellant registered to vote in Florida in April 2014.
7. Appellant maintained a valid license with The State Bar of California and can practice law in California.
8. Appellant timely filed 2011 and 2012 California resident income tax returns.
9. Respondent received information that the IRS adjusted appellant's 2011 and 2012 federal income tax returns. Based on the information received from the IRS, respondent issued in May 2015 a Notice of Proposed Assessment (NPA) for the 2011 tax year proposing additional tax of \$1,133, plus interest, and in May 2016 an NPA for the 2012 tax year proposing additional tax of \$14,788, plus interest. Appellant did not timely protest the NPAs and the proposed deficiencies for the 2011 and 2012 tax years became final.<sup>1</sup>
10. Respondent received a letter from appellant in December 2015 seeking to "withdraw" his 2011 and 2012 California resident income tax returns. A year later, in December 2016, respondent received from appellant amended 2011 and 2012 California individual income tax returns. The amended 2011 return reported a refund due of \$34,353, and the amended 2012 return reported a refund due of \$164,765. In the explanation of changes portion of the amended returns appellant stated all the income previously reported as California income was earned in Florida, where he permanently resided in 2011 and 2012.

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<sup>1</sup> If no protest is filed within the applicable statute of limitations, the amount of the proposed deficiency assessment becomes final, i.e., due and payable. (R&TC, §§ 19041, 19042.)

11. Respondent's records show that in April 2017 appellant made a payment that discharged the entire balance due on his 2011 tax account and made a payment of \$8,135.33 that partially reduced his 2012 tax account.<sup>2</sup>
12. Respondent treated appellant's amended 2011 and 2012 California individual income tax returns as claims for refund and denied them in their entirety in a Notice of Action – Claim for Refund Denial (NOA) dated September 4, 2019. Respondent stated it denied the claims for refund due to the lack of substantiation of appellant's "Florida workdays."
13. Respondent's records show appellant had a balance due on his 2012 tax account on September 4, 2019, which is the date respondent issued the NOA denying the claim for refund for the 2012 tax year, and on December 10, 2019, which is the date appellant timely filed this appeal.

### DISCUSSION

#### Issue 1: Whether OTA has jurisdiction to hear and decide an appeal of the invalid notice of action issued by respondent denying a claim for refund for the 2012 tax year.

OTA has jurisdiction to hear and decide an appeal that has been timely submitted to OTA pursuant to OTA's Rules for Tax Appeals if respondent mails a notice of action on cancellation, credit or refund, or any other notice which denies any portion of a "perfected" claim for a refund of tax, penalties, fees, or interest. (Cal. Code Regs., tit. 18, § 30103(a)(3).)

A perfected claim for refund must be in writing, signed by the taxpayer or the taxpayer's representative, and state the specific grounds upon which the claim is based. (R&TC, § 19322.) Also, to perfect a claim for refund, a claimant must make full payment of tax. (R&TC, § 19322.1 [for purposes of an appeal to OTA under R&TC sections 19324 and 19331,<sup>3</sup> a claim for refund that is made before full payment shall not be deemed filed until full payment is made];

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<sup>2</sup> Appellant's 2012 California resident income tax return reports \$126,404.00 of income tax withheld and tax due of \$38,361.00. According to the evidence in the record, respondent received a check from appellant, of which \$8,135.33 was credited to appellant's 2012 tax account. There is no evidence that any other payment was credited to the 2012 tax year aside from \$126,404.00 of income tax withheld.

<sup>3</sup> R&TC sections 19324 and 19331 refers to the State Board of Equalization; however, the Taxpayer Transparency and Fairness Act of 2017, Assembly Bill 102 (Stats. 2017, Ch. 16), as amended by Assembly Bill 131 (Stats. 2017, Ch. 252), created and established OTA in state government and transferred to OTA the duty to conduct appeals hearings for the various taxes and fees formerly administered by the Board, including the administrative appeals of California personal income taxes.

FTB Notice 2003-5 [an “informal” claim for refund will be “perfected” and deemed filed on the date that full payment of tax is made].)

For the 2012 tax year, appellant reported tax due of \$38,361.00 and respondent later issued an NPA proposing additional tax of \$16,234.68, plus interest, which went final. When respondent received appellant’s amended return in December 2016, respondent treated this as a perfected claim for refund, even though appellant had paid neither the \$38,361.00 reported tax due nor the \$16,234.68 in additional tax due.<sup>4</sup> Appellant’s sole payment was an \$8,135.33 partial payment in April 2017. Thus, appellant has not made full payment of tax to perfect his refund claim. Accordingly, without a perfected claim for refund, OTA does not have jurisdiction to hear and decide appellant’s appeal of respondent’s denial of the claim for refund for the 2012 tax year.

Issue 2: Whether appellant was a domiciliary and resident of California during 2011.

Burden of Proof

A determination by respondent that an individual is a California resident is rebuttably presumed correct. (*Appeal of Mazer*, 2020-OTA-263P.) To successfully rebut this presumption appellant must provide credible, competent, and relevant evidence sufficient to prove, by a preponderance of the evidence, respondent’s determination is erroneous. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Mazer*, *supra*.) Here, respondent determined that appellant was a California resident in 2011; thus, we must presume respondent’s determination is correct. The burden of proof is on appellant to prove otherwise.

Taxation of Residents

California residents are taxed on their entire taxable income, regardless of source, while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b), & (i), 17951.) Based on the individual’s domicile, the residency analysis is determined through one of two inquiries. To determine the residency of an individual not domiciled in California, the

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<sup>4</sup> Respondent therefore erred in issuing the September 2019 NOA because it should not have acted administratively by denying the claim for refund for lack of substantiation until appellant had made full payment of the amount of tax he claimed to be due to him as a refund for the 2012 tax year. Although respondent made the mistake of acting administratively on the claim for refund for the 2012 tax year before full payment was made, we are aware of no legal authority (and the parties have pointed to none) which permits us, or respondent for that matter, to treat respondent’s error as a waiver of the full payment requirement.

inquiry is whether the individual is in California for other than a temporary or transitory purpose. (*Appeal of Mazer, supra*; R&TC, § 17014(a); see also Cal. Code Regs., tit. 18, § 17014.) For an individual domiciled in California, the inquiry is whether the individual is outside California only for a temporary or transitory purpose. (*Appeal of Mazer, supra*.) We turn first to the determination of appellant's domicile in 2011.

#### Domicile Determination

A domicile is the one location where an individual has the most settled and permanent connection, the place where he or she intends to remain, and the place where he or she intends to return to when absent. (Cal. Code Regs., tit. 18, § 17014(c); *Appeal of Mazer, supra*.)

To change domicile, an individual must: (1) take up actual, physical residence in a particular place; and (2) intend to remain there permanently or indefinitely. (*Appeal of Mazer, supra*.) Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Appeal of Mazer, supra*.) An individual's acts must give clear proof of a current intention to abandon the old domicile and establish a new one. (*Chapman v. Superior Court* (1958) 162 Cal.App.2d 421, 426-427; *Appeal of Dobbs* (87-SBE-044) 1987 WL 50167.)

Once acquired, a domicile is presumed to continue until it is shown to have changed. (*Appeal of Mazer, supra*.) The burden of proof to establish a change of domicile has occurred is on the party asserting such change. (*Ibid.*) If there is doubt on the question of domicile after the presentation of the facts and circumstances, then domicile must be found to have not changed. (*Ibid.*)

Appellant's primary argument is that he overpaid tax to California in the 2011 tax year because he made the mistake of reporting to be a California resident on his original California tax return when he was in fact a resident of Florida in 2011. Appellant contends he became a permanent resident of Florida in April 2010 when he purchased a home there. Appellant contends his employer expected him to spend a "bulk" of his time working in Florida. Appellant states that one of his duties was to host an annual reception for other employees, representatives, and clients. Appellant also contends he earned all of his 2011 income in Florida. Appellant contends he had significant connections to Florida, including owning real property, paying property taxes, registering to vote, having a Florida driver's license, and having a Florida dog

license. For these reasons, appellant argues he is due a refund of \$34,353, as reported on his amended 2011 California income tax return.

However, appellant's contentions are unsupported because he has submitted no evidence.<sup>5</sup> In addition, the record shows that appellant was domiciled in California as of the beginning of 2010, and the evidence shows appellant did not abandon his domicile in California and did not establish a new domicile in Florida.

In 2011, appellant owned two residences in California and one residence in Florida. Appellant sold one of the California residences in April 2017. The purchase of the Florida residence in April 2010 is not sufficient evidence that appellant had changed his domicile to Florida in or by 2011, particularly given the fact that appellant retained ownership of two residences in California at the time. Appellant has not provided evidence showing he started actual, physical residence at the Florida residence in or by 2011. Moreover, appellant registered an automobile in California in January 2012, reinforcing a significant connection with California after the alleged permanent move to Florida. Appellant also remained licensed by the California State Bar to practice law, another significant connection to California in 2011. In addition, the evidence shows appellant's connections to Florida were not significant until 2014 when he registered to vote in Florida, was issued a Florida driver's license, and was allegedly issued a Florida dog license. Of significance, also, is appellant's statement to respondent that "there was no 'move' from California except for a number of boxes of personal items I personally shipped [to Florida] during the decorating process in 2010." For these reasons, appellant has not shown that he changed his domicile from California to Florida prior to or during the 2011 tax year, and therefore appellant was a California domiciliary for 2011.

#### Residency Determination

For an individual domiciled in California to be a nonresident of California, the individual must show that he is outside California for other than a temporary or transitory purpose. (*Appeal of Mazer, supra.*) If so, the California domiciliary is not a California resident. (*Ibid.*) However,

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<sup>5</sup> Although appellant argues that respondent has determined that he was a residence in Florida for the 2014 tax year, appellant has not submitted any documentation to support this argument. Regardless, based on the record, the facts from the 2014 tax year differ from the 2011 tax year.

if the California domiciliary is outside of California for only temporary or transitory purposes, then he is a California resident. (*Ibid.*)

The contacts or connections an individual maintains in California and other states are important factors to consider when determining whether an individual entered or left this state for temporary or transitory purposes. (*Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264; *Appeal of Mazer, supra.*) The *Bragg* decision provides a list of 19 nonexclusive objective factors to assist in determining if an individual is outside California for other than a temporary or transitory purpose. (*Appeal of Bragg, supra; Appeal of Mazer, supra.*) These factors, however, are only a guide, and the weight given to any particular factor depends upon the totality of the circumstances. (*Appeal of Bragg, supra; Appeal of Mazer, supra.*)

The *Bragg* factors can be organized into three categories: (1) registrations and filings (such as automobile registration and voting registration/participation history); (2) personal and professional associations (such as employment and professional licenses); and (3) physical presence and property (such as ownership of residential real property and number/general purpose of days the taxpayer spends in California versus other states). (*Appeal of Mazer, supra.*)

Here, appellant has not provided evidence showing how many days he spent in California or Florida in 2011. Although appellant contends his purpose for being in Florida was at the behest of his employer, there is also no evidence supporting this contention. As previously discussed, appellant held a license with the State Bar of California in 2011, registered an automobile in California in 2012 (one year after allegedly changing his domicile to Florida), and did not surrender his license or register to vote in Florida until 2014. Also, as previously discussed, appellant owned two residences in California in 2011.

Accordingly, the available evidence shows appellant maintained important connections to California in 2011, which greatly outweighed any connections established in Florida through the end of 2011. For these reasons, we find appellant was not in Florida in 2011 for other than a temporary or transitory purpose. Therefore, we find appellant was a resident of California in 2011.

HOLDINGS

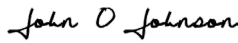
1. OTA does not have jurisdiction to hear and decide an appeal of the invalid NOA issued by respondent for the 2012 tax year.
2. Appellant was a domiciliary and resident of California in 2011.


DISPOSITION

We dismiss the portion of the appeal concerning the 2012 tax year for lack of jurisdiction. We otherwise sustain respondent’s action.

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 Huy “Mike” Le  
 Administrative Law Judge

We concur:

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 John O. Johnson  
 Administrative Law Judge

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 Michael F. Geary  
 Administrative Law Judge

Date Issued: 7/14/2022