

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 22029613
U. MALHOTRA AND)
A. MALHOTRA)
_____)

OPINION

Representing the Parties:

For Appellants: U. Malhotra

For Respondent: Brian Werking, Attorney

For Office of Tax Appeals: Michelle Huh, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, U. Malhotra and A. Malhotra (respectively, appellant-husband and appellant-wife; collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$6,740 and applicable interest for the 2015 tax year.

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

ISSUE

Whether appellants have met their burden of proving that appellant-wife was a nonresident of California during the 2015 tax year.

FACTUAL FINDINGS

1. Appellants timely filed a joint California Resident Income Tax Return (Return) for the 2015 tax year, listing two dependents and a California address. On their Schedule CA form, appellants reported California adjustments (subtractions) from their federal adjusted gross income (AGI) of \$72,472.
2. FTB audited appellants’ 2015 Return and determined that appellants improperly subtracted wages of \$72,472 that appellant-wife earned outside of California on their

Schedule CA form. FTB issued appellants a Notice of Proposed Assessment (NPA) for the 2015 tax year, which increased appellants' California taxable income by \$72,472. The NPA proposed additional tax of \$6,740 and applicable interest.

3. At the same time, appellants' 2014 tax year, which is not at issue in this appeal, was under audit for the same issue. When FTB issued a Notice of Action (NOA) for the 2014 tax year, appellants provided a letter dated June 3, 2019 (2014 Response),¹ stating:
- Appellant-wife left California on September 1, 2014, because she lost her job in Los Angeles and obtained a new job in Washington;
 - Appellant-wife returned to California on October 31, 2015;
 - Appellant-wife and appellant-husband each had a separate home during this time;
 - Appellants maintained a bank account in California;
 - Appellant-wife gave up her California driver's license for a Washington driver's license;
 - Appellant-wife registered a vehicle in Washington; and
 - Appellant-wife intended to return to California on March 31, 2016.

Appellants signed the response under penalty of perjury, stating that their information is true, correct, and complete. To support their statements, appellants attached copies of appellant-wife's lease for a rental property in Washington, for a 12-month period, starting on September 3, 2014, which was signed only by appellant-wife; appellant-wife's Washington driver's license; and Washington license plate.

4. Appellants subsequently protested the NPA for the 2015 tax year.
5. In a letter dated November 1, 2021 (2015 Response), appellants restated the information provided in their 2014 Response, but this time stated that appellant-wife did not intend to return to California. This response was also signed by appellants under penalty of perjury.
6. FTB requested that appellants provide evidence that appellant-wife was a nonresident of California during 2015, but appellants did not respond to FTB's request. FTB issued an NOA, affirming the NPA.

¹ The letter was provided by FTB for this appeal as protest correspondence for tax year 2015, and the letter states it is applicable to tax years 2014 and 2015.

7. This timely appeal followed.

DISCUSSION

Burden of Proof

FTB’s determination of residency is presumptively correct, and the taxpayers bear the burden of showing error in FTB’s determination. (*Appeal of Bracamonte*, 2021-OTA-156P.) This presumption is a rebuttable one, but FTB’s determination cannot be successfully rebutted when the taxpayers fail to present credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*) Unsupported assertions are insufficient to satisfy the taxpayers’ burden of proof. (*Ibid.*)

Appellants’ 2015 Return subtracted appellant-wife’s wages from her employment in Washington on their Schedule CA form. The Return listed a California home address. FTB determined that appellants improperly subtracted the wages because appellant-wife was a California resident during 2015. Appellants have the burden of showing error in FTB’s determination.

Taxation of Residents

California imposes a tax for each tax year on the entire taxable income of every resident in the state who is not a part-year resident.² (R&TC, § 17041(a)(1).) The statutory definition of “resident” contains two alternative tests for determining residency: (1) for an individual not domiciled in California, the inquiry is whether the individual is in California “for other than a temporary or transitory purpose”; or (2) for an individual domiciled in California, the inquiry is whether the individual “is outside [California] for a temporary or transitory purpose.” (R&TC section 17014(a); *Appeal of Mazer*, 2020-OTA-263P.) 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.*) An individual who spends in the aggregate more than nine months in California during the tax year is presumed to be a California resident,

² A part-year resident is a taxpayer who is a resident of California during a portion of the tax year and is a nonresident during the other portion of the tax year. (R&TC, § 17015.5.) The taxable income of a part-year California resident includes “all items of gross income and all deductions, regardless of source” for any part of the tax year in which the taxpayer was a California resident. (R&TC, § 17041(i)(1)(A).) Meanwhile, a nonresident is an individual other than a resident. (R&TC, § 17015.) The taxable income of a nonresident includes “gross income and deductions derived from sources within [California].” (R&TC, § 17041(i)(1)(B).)

unless that presumption is rebutted by satisfactory evidence that shows that the individual is in California for a temporary or transitory purpose. (R&TC, § 17016.) A California resident “continues to be a resident even though temporarily absent from the state.” (R&TC, § 17014(c).)

On appeal, appellants assert that appellant-wife was a nonresident of California during 2015 because she moved out of California and she accepted a job in Washington. Appellants assert that appellant-husband was not able to find work in his field in Washington, but that if appellant-husband had found employment in Washington, the family would have moved permanently to Washington. Appellants assert that in 2015, appellant-wife moved back to California because she was offered a job in California. As support for their contention that appellant-wife’s Washington wages are not taxable by California, appellants provide documentation showing that appellant-wife obtained a Washington driver’s license, registered a vehicle in Washington, and rented an apartment in Seattle before moving back to California.

Domicile

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. (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.*)

To change domicile, an individual must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Appeal of Mazer, supra.*) An expectation of returning to one’s former place of abode defeats the acquisition of a new domicile. (*Ibid.*) “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.*)

It is undisputed that appellant-wife was a domiciliary of California prior to leaving in September 2014. Accordingly, her place of domicile for 2015 will be presumed to be California unless appellants prove that appellant-wife's place of domicile changed. Appellants contend that appellant-wife intended to make Washington her permanent home because of her employment in Washington. Although appellant-wife was physically present in Washington, appellants must show that appellant-wife intended to remain in Washington permanently or indefinitely.

While appellant-wife lived and worked in Washington, her actions do not indicate that she intended to abandon her domicile in California and establish a Washington domicile. Appellant-husband and appellants' children remained in California at appellants' marital abode, which appellants listed on their 2015 Return as their home address. Appellants assert that appellant-husband and their children would have moved to Washington permanently if appellant-husband found employment in Washington, but appellant-husband did not, in fact, find such employment and no steps were taken to move appellant-husband and appellants' children to Washington.

Further, appellants state on their 2014 Response to FTB that appellant-wife intended to return to California on March 31, 2016. Although appellants' 2014 Response conflicts with their 2015 Response about appellant-wife's intent to return to California, appellants concede in both responses that appellant-wife physically returned to California in October 2015. Once appellant-wife moved back to California in October 2015, she returned to the marital abode. An expectation of returning to one's former place of abode defeats the acquisition of a new domicile. (*Appeal of Mazer, supra.*) These facts indicate that appellant-wife's domicile did not change from California to Washington. Accordingly, appellants have not shown that appellant-wife's domicile changed, and therefore, California continued to be appellant-wife's place of domicile during 2015. As a result, because appellant-wife was domiciled in California, she will be considered a resident of California under R&TC section 17014(a)(2) if she was outside the state for a temporary or transitory purpose.

Residency

California defines a "resident" as including: (1) every individual who is in California for other than a temporary or transitory purpose; or (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. (R&TC, § 17014(a)(1)-(2); Cal. Code Regs., tit. 18, § 17014.) If an individual acquires the status of resident by being physically

present in California for other than a temporary or transitory purpose, he or she remains a resident even though temporarily absent from the state. (Cal. Code Regs., tit. 18, § 17014(a).) If the individual leaves California for other than temporary or transitory purposes, he or she no longer is a resident of the state. (*Ibid.*) If the individual is domiciled in California, he or she remains a resident unless he or she is outside of the state for other than a temporary or transitory purpose. (*Ibid.*) The facts and circumstances of each case determine whether the purpose for which the individual is in California is considered temporary or transitory in character. (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.*)

Generally, an individual is considered to be in California for temporary or transitory purposes and not a resident of California if he or she is simply passing through California, “or is [in California] for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement,” in which he or she is in California for a short period of time. (Cal. Code Regs., tit. 18, § 17014(b).) Conversely, an absence from California for a specified duration of two years or less, and not indefinitely, has been held to be only temporary or transitory. (*Appeal of Mazer, supra.*) However, a stay of less than two years will not automatically indicate a temporary or transitory purpose if the reason for the shortened stay is consistent with an intent that the stay be long, permanent, or indefinite. (*Ibid.*) An absence for employment or business purposes that would require a long or indefinite period to complete is not temporary or transitory. (*Ibid.*) An “indefinite period,” however, is not one of weeks or months but one of “substantial duration” involving a period of years. (*Ibid.*)

The underlying theory of R&TC sections 17014 to 17016 is that the state with which an individual has the closest connection during the tax year is the state of his or her residency. (Cal. Code Regs., tit. 18, § 17014(b).) Therefore, in determining a taxpayer’s residency, the contacts or connections a taxpayer maintains in California and other states are important factors to take into consideration. (*Appeal of Mazer, supra.*) 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.*) Such contacts are a measure of the benefits and protection that the taxpayer has received from the laws and government of California and as objective indicia of whether the taxpayer entered or left the state for temporary or transitory purposes. (*Ibid.*)

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. (*Appeal of Mazer, supra.*) These factors can be separated into three categories: (1) registrations and filings with a state or other agency³; (2) personal and professional associations⁴; and (3) physical presence and property.⁵ (*Ibid.*) 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, appellants assert that appellant-wife left California in September 2014 for employment purposes and returned to California in October 2015. While appellant-wife lived and worked in Washington during a part of 2014 and a part of 2015, she obtained a Washington driver's license, registered her vehicle in Washington, and leased a rental property in Washington. Appellants do not contend, and the evidence does not show, that appellant-wife made any other connections in Washington or attempted to sever her connections in California. Appellants did not provide evidence establishing that they planned to separate or move the entire family to Washington. Appellant-husband maintained the marital abode in California where appellants' children also resided. Appellant-wife was the only individual who signed the lease for the rental property in Washington, while appellant-husband and their children continued to reside in the California residence, as indicated on their 2015 Return. In October 2015, appellant-wife returned to the marital abode in California to reside with appellant-husband and their children once she found employment in California. Appellants did not show that they intended to register their children in schools in Washington, join any personal or professional associations in Washington, use any professional services in Washington, or open new financial

³ Registrations and filings with a state or other agency can include homeowner's property tax exemption, automobile registration, driver's license, voter registration and voting participation history, and address used and state of residence claimed on federal/state tax returns. (*Appeal of Mazer, supra.*)

⁴ Personal and professional associations can include employment, children's school, bank and savings accounts, memberships in social, religious, and professional organizations, use of professional services, maintenance or ownership of business interests, professional license, ownership of investment real property, and presence, connections, or residency as indicated by third party affidavits or declarations. (*Appeal of Mazer, supra.*)

⁵ Physical presence and property can include location and approximate sizes and values of residential real property, where the taxpayer's spouse and children reside, taxpayer's telephone records, origination point of taxpayer's checking account or credit card transactions, and number of days or general purpose the taxpayer spends in California versus other states. (*Appeal of Mazer, supra.*)

accounts in Washington. Appellant-wife continued to use her bank account in California and deposit funds into the account for the family's benefit in California.

Appellants did not provide any evidence that appellant-wife's employment in Washington was for an indefinite period of substantial duration. In their 2014 Response, appellants indicated that appellant-wife was expected to return to California on March 31, 2016. Although appellants state in their 2015 Response that appellant-wife did not intend to return to California, the fact that appellant-wife found employment in California and moved back to California during 2015 supports the conclusion that appellant-wife intended to return to California. Because appellant-wife's connections to Washington were for employment purposes for a short period and appellant-wife did not attempt to sever her substantial connections in California, her presence in Washington was for a temporary or transitory purpose. Thus, appellants have not met their burden of proving that appellant-wife was a nonresident of California during the 2015 tax year.⁶

⁶ Because appellants have not met their burden of proving that appellant-wife was a nonresident of California during the 2015 tax year and not subject to California personal income tax, a discussion regarding appellant-wife's taxable community property interest is not required.

HOLDING

Appellants have not met their burden of proving that appellant-wife was a nonresident of California during the 2015 tax year.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:
Veronica I. Long
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Veronica I. Long
Administrative Law Judge

We concur:

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Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Date Issued: 9/27/2023