

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 220410138
J. GILLETTE AND)
S. GILLETTE)
_____)

OPINION

Representing the Parties:

For Appellants: J. Gillette and S. Gillette

For Respondent: Christopher M. Cook, Attorney

For Office of Tax Appeals: Steven Kim, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. and S. Gillette (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,887 and applicable interest for the 2017 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 established that they were not California residents during the 2017 tax year.

FACTUAL FINDINGS

1. Appellants filed a California Resident Income Tax Return (Form 540) for the 2017 tax year, reporting federal adjusted gross income of \$80,000 and California subtractions of \$80,000, resulting in taxable income of \$0.¹ The source of the \$80,000 was an early distribution from S. Gillette’s individual retirement account (IRA). Appellants reported

¹ Appellants filed a Form 540 for the 2003 through 2014, 2016, 2017, 2020, and 2021 tax years. Appellants filed California Nonresident or Part-Year Resident Income Tax Returns (Form 540NR) for the 2015, 2018, and 2019 tax years.

- California withholdings of \$4,000, “other taxes and credit recapture” of \$2,000, and an overpayment of \$2,000.
2. FTB reviewed appellants’ 2017 Form 540 and determined that appellants were California residents and therefore the IRA distribution was subject to California tax. FTB issued a Notice of Proposed Assessment (NPA) proposing \$1,887 of additional tax and applicable interest.
 3. Appellants protested the NPA. After review, FTB issued appellants a Notice of Action affirming the NPA.
 4. Appellants timely filed this appeal.
 5. Appellants received one-year Bolivian visas for 2015, and then two-year Bolivian visas in January 2016.² Appellants obtained Bolivian foreigner’s identification cards and driver’s licenses.³ Appellants purchased a car in Bolivia in December 2017. Appellants state they renewed their U.S. passports in 2017. Appellants state they received a five-year Bolivian residency in 2018. Appellants state they had doctors and dentists in Bolivia.
 6. Appellants returned to California from November 23, 2016, to January 25, 2017, for their son’s wedding in December 2016. J. Gillette states she returned to California to check on her mother⁴ from September 6, 2017, to October 3, 2017, but that S. Gillette remained in Bolivia. Appellants state they maintained a locker box in California, and that they would sometimes purchase and ship items to the locker box so they could pick them up when visiting California and bring them back to Bolivia.
 7. Appellants state they do not have old paperwork, such as a rental agreement, car insurance, or other records because they did not have space for documents when they returned to California.

² Appellants assert that the visa process is very complicated and that the authorities came to their house and met with the landlord to verify where they lived.

³ Appellants submitted copies of Bolivian identification cards issued to J. Gillette and S. Gillette, valid through July 17, 2021, and an identification card issued to S. Gillette, valid through July 1, 2018. The back of the identification cards states in Spanish that the bearer of this document has not applied for a driver’s license. (“El portador de este documento no ha solicitado licencias para conducir.”) Appellants also submitted a copy of Bolivian driver’s licenses issued to J. Gillette and S. Gillette on August 9, 2018, and valid through July 17, 2023, and July 30, 2023, respectively.

⁴ Appellants state that S. Gillette’s brother and two nieces live near her mother.

8. Appellants' 2017 bank statements reflect transactions made in Bolivia and California. The bank records show a California address for appellants.

DISCUSSION

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 their entire taxable income earned while residents of this state, as well as on all income derived from California sources while nonresidents. (R&TC, § 17041(b), (i).) California does not tax the IRA distributions of nonresidents. (R&TC, § 17952.5.)

California defines a “resident” as: (1) every individual who is in California for other than a temporary or transitory purpose; and (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.) A “nonresident” is every individual other than a resident. (R&TC, § 17015.)

FTB's determination of residency is presumptively correct, and the taxpayer bears the burden of showing error in the determination. (*Appeal of Mazer*, 2020-OTA-263P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*)

There are two alternative tests for determining residency. (*Appeal of Mazer, supra.*) In determining residency for an individual not domiciled in California, the inquiry is whether the individual was in California “for other than a temporary or transitory purpose.” (R&TC, § 17014(a)(1); *Appeal of Mazer, supra.*) For an individual domiciled in California, the inquiry is whether the individual is outside California for a temporary or transitory purpose. (R&TC, § 17014(a)(2); *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. (*Appeal of Mazer, supra.*)

On appeal, appellants state that they lived in Bolivia from 2015 to 2020. Appellants state that their daughter moved to Bolivia in 2013 and that they moved to Bolivia in February 2015 to

be closer to their daughter.⁵ Appellants state they quit their jobs and sold their belongings before moving to Bolivia. Appellants state they joined a local religious congregation. Appellants state they returned to California in 2020.

Domicile

A domicile is the one location where an individual has the most settled and permanent connection, and the place to which the individual intends to return when absent. (Cal. Code Regs., tit. 18, § 17014(c); see *Appeal of Mazer, supra.*) Domicile refers to the place where individuals have their true, fixed, permanent home and principal establishment. (Cal. Code Regs., tit. 18, § 17014(c).) Domicile is the place in which an individual has voluntarily fixed habitation of themselves and their family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event occurs to induce the individual to adopt some other permanent home. (*Ibid.*) An individual can have only one domicile at any given time. (*Ibid.*) An individual who is domiciled in California and then leaves the state retains his or her California domicile as long as there is a definite intention of returning to California, regardless of the length of time or the reasons for the absence. (*Ibid.*)

A domicile once acquired is presumed to continue until it is shown to have been changed. (Cal. Code Regs., tit. 18, § 17014(c); *Appeal of Mazer, supra.*) In order to change domicile, a taxpayer must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Appeal of Mazer, supra.*) The burden of proof as to a change of domicile is on the party asserting such change. (*Ibid.*) Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Ibid.*) An individual's acts must give clear proof of a current intention to abandon the old domicile and establish a new one. (*Appeal of Beckwith, 2022-OTA-332P.*) 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 appellants' domicile was California prior to leaving for Bolivia in February 2015. Accordingly, appellants' domicile in 2017 is presumed to be California unless appellants can show they changed their domicile to Bolivia. Appellants assert that they visited Tarija, Bolivia in October 2014 to secure an apartment with their daughter. Appellants assert

⁵ Appellants claim they visited their daughter in October 2014, and rented an apartment with her in Bolivia.

that they quit their jobs and sold their belongings before moving permanently to Bolivia in February 2015. While the evidence in the record suggests that appellants lived in Bolivia in 2017, appellants have not provided evidence establishing that they intended to remain in Bolivia indefinitely.

Appellants obtained Bolivian identification cards and purchased a car in December 2017, which suggests an intent to move to Bolivia. However, appellants stayed in Bolivia on temporary visas with defined end dates. Appellants have not presented evidence that they applied for or received permanent residency in Bolivia during the time they were in Bolivia. Appellants state they do not have any old paperwork from Bolivia because they had limited luggage space when they returned to California in 2020. However, the lack of records does not excuse appellants' burden to demonstrate that they changed domiciles. In addition, appellants returned to California in 2017. Appellants returned to California from November 23, 2016, to January 25, 2017, because their son was getting married. J. Gillette returned to California from September 6, 2017, to October 3, 2017, to check on her mother. Appellants maintained family connections in California, including a son, a mother, a brother, and two nieces. Although appellants state their daughter lived in Bolivia, they also maintained close family connections in California. Appellants maintained their California bank account and a mailbox in California. Appellants continued to file California tax returns while in Bolivia, either as residents or nonresidents/part-year residents. Finally, appellants returned to California in 2020, and filed resident tax returns for 2020 and 2021. In weighing the evidence, OTA finds that appellants have not demonstrated that they changed their domicile to Bolivia, and thus, appellants' domicile remains in California.

Residency

For an individual domiciled in California, the inquiry is whether the individual is outside California for a temporary or transitory purpose. (R&TC, § 17014(a)(2); *Appeal of Mazer*, *supra*.) Whether an individual is outside California for a temporary or transitory purpose is a question of fact to be determined by examining all the circumstances of each particular case. (Cal. Code Regs., tit. 18, § 17014(b).) The determination cannot be based solely on the individual's subjective intent, but instead must be based on objective facts. (*Appeal of Mazer*, *supra*.)

In situations where a taxpayer has significant contacts with more than one state or country, the place with the closest connections during the taxable year is the place of residence. (Cal. Code Regs., tit. 18, § 17014(b).) The contacts that a taxpayer maintains in California and other places are important objective indications whether their presence in, or absence from, California was for a temporary or transitory purpose. (*Appeal of Bracamonte*, 2021-OTA-156P.) Such contacts are a measure of the benefits and protection that a taxpayer has received from the laws and government of California and as objective indicia of whether the taxpayer entered or left this 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 (*Bragg*), provides a list of nonexclusive factors that are helpful in determining which state an individual had the closest connection during the period in question. The *Bragg* factors can be organized into three categories: (1) registrations and filings with a state or other agency;⁶ (2) personal and professional associations;⁷ and (3) physical presence and property.⁸ These factors serve merely as a guide, and the weight given to any particular factor depends upon the totality of the circumstances. (*Appeal of Mazer, supra.*)

Here, appellants assert they moved from California to Bolivia in 2015, and that they traveled through Bolivia teaching at different congregations from 2015 through 2020. However, appellants have not presented evidence that they were employed by the congregations and earning compensation, and in the absence of such evidence, it appears that appellants volunteered their time by working at the Bolivian congregations. Such volunteer work suggests that appellants' visit to Bolivia was temporary or transitory in nature, especially considering appellants appear to have funded the trip to Bolivia by taking early distributions from their IRAs.

An examination of the *Bragg* factors shows that appellants had connections to both California and Bolivia during 2017. First, regarding registrations and filings, appellants obtained

⁶ For example, homeowner's property tax exemption, automobile registration, driver's license, voter registration/participation history, and address used and state of residence claimed on federal and state tax returns.

⁷ For example, state of employment, children's school, bank and savings accounts, memberships in social/religious/professional organizations, use of professional services (e.g., doctors, dentists, accountants, and attorneys), maintenance/ownership of business interests, professional licenses, ownership of investment real property, and presence/connections/residency as indicated by third-party affidavits and declarations.

⁸ For example, location and approximate sizes and values of residential real property, where the taxpayer's spouse and children reside, taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls), origination point of the taxpayer's checking account/credit card transactions, and number/general purpose (vacation, business, etc.) of days the taxpayer spends in California versus other states.

Bolivian visas and Bolivian foreigner's identification cards, registered a car, and obtained Bolivian driver's licenses. However, the visas were issued for limited terms with defined end dates. The two-year visas issued in 2016 would have expired in January 2018. Appellants assert they received Bolivian residency for five years in 2018 but have not provided any supporting documentation of such residency. Additionally, foreigner's identification cards are required for every foreign person with temporary or permanent residency in Bolivia,⁹ and they do not indicate whether appellants' stay in Bolivia was for permanent or temporary purposes. In addition, appellants were not issued their driver's licenses until after the tax year at issue, on August 9, 2018. Further, appellants filed California tax returns for each year they were in Bolivia.¹⁰ Appellants ultimately returned to California in 2020 and filed California resident tax returns for 2020 and 2021.

Second, regarding personal and professional associations, appellants assert that they were working in Bolivian congregations and used professional services in Bolivia, but have not provided any evidence, such as proof of doctor visits or an employment agreement. Appellants also did not submit any third-party declarations or affidavits regarding their residency in Bolivia. Appellants continued to maintain a California mailbox and a California bank account. Although appellants' daughter lived in Bolivia at the time, appellants also had extensive family connections who lived in California in 2017, including their son and J. Gillette's mother, brother, and two nieces.

Third, regarding physical presence and property, appellants were physically in Bolivia during most of 2017. Appellants provided visa documents showing entry and exit from Bolivia, and bank statements showing withdrawals originating in Bolivia. However, appellants did not provide any evidence that they owned or leased real property in Bolivia, or that they otherwise secured long-term housing in Bolivia. Appellants spent about two months in California in 2017 (from January 1 to January 25, 2017, and from September 6 to October 3, 2017), visiting family, attending their son's wedding, and picking up packages from their mailbox.

⁹ "Foreign migrants who obtain temporary or permanent residence must obtain their Foreigner Identity Card before the competent authority within the term and conditions established in current regulations." (Bolivian General Service of Personal Identification (SEGIP), <https://www.segip.gob.bo/inicio/extranjeros/>, Frequent questions 2; see <https://www.refworld.org/docid/55b636204.html>.)

¹⁰ Appellants filed as residents for 2016, 2017, and 2020, but as nonresidents for 2015, 2018, and 2019. As previously mentioned, appellants did not provide an explanation for the different filing statuses.

Based on the foregoing, appellants have not provided sufficient evidence showing that their time in Bolivia was not temporary or transitory in nature. Although appellants had some connections to Bolivia, including Bolivian visas and identification cards, appellants have not presented evidence of housing, employment, or other factors that would suggest that their visit to Bolivia was not temporary or transitory in nature. Further, appellants maintained extensive connections to California. Therefore, appellants have not rebutted the presumption that they were California residents in 2017.

HOLDING

Appellants have not established that they were not California residents in 2017.

DISPOSITION

FTB’s action is sustained.

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Veronica I. Long
Administrative Law Judge

We concur:

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Andrea L.H. Long
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Andrea L.H. Long
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

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