

**OFFICE OF TAX  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
J. OMIDI ) OTA Case No. 20076334  
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**OPINION**

Representing the Parties:

For Appellant: Maureen Jaroscak, Attorney

For Respondent: Ron Hofsdal, Attorney

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Omidì (appellant) appeals actions by respondent Franchise Tax Board (FTB) proposing additional tax of \$26,583, a late filing penalty of \$6,645.75, and applicable interest for the 2008 tax year; additional tax of \$188,981, a late filing penalty of \$47,245.25, and applicable interest for the 2009 tax year; and additional tax of \$2,153,004 and applicable interest for the 2010 tax year.

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

**ISSUES**

1. Whether appellant has established that he was a nonresident of California for the 2008, 2009, and 2010 tax years.
2. Whether appellant has established reasonable cause for failing to file timely returns for the 2008 and 2009 tax years.

**FACTUAL FINDINGS**

**Background**

1. Appellant was a resident of Los Angeles, California, until at least October 1, 2008. Appellant’s residence was located on Wilshire Boulevard.

2. During October 2007, appellant's license to practice medicine was revoked. In July 2009, following an appeal, the Medical Board of California upheld the revocation.
3. On May 14, 2008, Top Surgeons, LLC (Top Surgeons) registered with the California Secretary of State's (SOS) office, listing appellant as the agent for service of process for the business in California.<sup>1</sup> Top Surgeons listed appellant as agent for service of process on its limited liability company articles of organization.<sup>2</sup> Appellant's home address on Wilshire Boulevard is listed as his address on the filing. Top Surgeons advertised its services in California via billboard, bus advertisement, and television commercial. Articles published by the Los Angeles Times in 2010 and 2011 identify appellant as the owner, a member, and president of Top Surgeons. A Los Angeles Times article dated February 14, 2010, states that, as of that date, Top Surgeons had eleven offices in Southern California.
4. On December 10, 2008, Top Surgeons registered with the State of Nevada (Top Surgeons Nevada). Appellant was listed as a manager of the business.
5. A lease agreement indicates that appellant leased an apartment from Noble Park Apartments in Las Vegas, Nevada. The lease agreement is for the term "[c]ommencing on the 30th day of December 2008 and terminates on the 31st day of March 2009." Appellant entered into additional lease agreements for periods commencing in 2010 and 2011.<sup>3</sup> Records maintained by Noble Park Apartments state that appellant moved into the Las Vegas apartment on March 9, 2009. Appellant's utility bills indicate that utility services were rendered and billed to appellant at his Nevada apartment from May 2009 through July 2012.

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<sup>1</sup> Top Surgeons filed a Limited Liability Company Articles of Organization – Conversion on May 14, 2008. Prior to conversion, Top Surgeons was a corporation known as Top Surgeons Incorporated.

<sup>2</sup> The record is unclear as to whether or when appellant resigned as agent for service of process. According to FTB, appellant resigned as of January 31, 2011. However, a review of the Resignation of Agent Upon Whom Process May Be Served form filed with the SOS office reveals the resigning agent to be CT Corporation System.

<sup>3</sup> On appeal, appellant provided lease agreements commencing in 2008, 2010, and 2011. The first lease agreement is for the term December 30, 2008, through March 31, 2009. Appellant did not provide a lease agreement for the period commencing April 1, 2009.

6. During each year on appeal, appellant received bank statements at various California addresses. Appellant received bank statements for the months of December 31, 2009, and March 31, 2010, at his Nevada apartment.
7. On or about August 14, 2009, appellant obtained a Nevada driver's license. Appellant also registered a 1998 Ford Mustang with Nevada's Department of Motor Vehicles (DMV) on August 2, 2010.<sup>4</sup> Appellant also maintained ownership of a Jeep, which was registered and renewed with the California DMV on January 10, 2008, and January 10, 2010.
8. Appellant asserts that he relocated to California to live with his mother, C. Omidi, during October 2010. There is no dispute that appellant was a California resident after November 1, 2010.

### **Procedural History**

9. Appellant filed a 2007 California Resident Income Tax Return.
10. Appellant did not file a 2008 California tax return.
11. On December 24, 2010, appellant filed an untimely California Nonresident or Part-Year Resident Return for the 2009 tax year, listing his Nevada address. On the return, appellant reported tax of \$115,823. After applying estimated tax payments of \$360,000, appellant claimed a refund of \$244,177. Appellant requested that the claimed overpayment be credited to his account for the 2010 tax year.
12. On October 17, 2011, appellant filed a California Nonresident or Part-Year Resident Return for the 2010 tax year, listing his California address. On the return, appellant reported tax of \$100,308. After applying estimated tax payments of \$323,377, appellant claimed a refund of \$223,069. Appellant requested that the overpayment be credited to his account for the 2011 tax year.
  - For 2010, appellant received a W-2 Wage and Tax Statement reporting income from Top Surgeons Nevada. The address listed for Top Surgeons Nevada is the

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<sup>4</sup> On appeal, appellant provided incomplete vehicle registration documents dated August 2, 2010, with an expiration date of August 22, 2011. Appellant subsequently registered what appears to be the same vehicle with the Nevada DMV on August 2, 2012. It is unclear whether appellant registered a vehicle with the Nevada DMV upon receiving a Nevada driver's license in 2009. It is also unknown whether appellant registered a vehicle with the Nevada DMV for the period August 2, 2011, through August 2, 2012.

same as appellant's Nevada apartment. Top Surgeons Nevada issued the W-2 to appellant at an address in Beverly Hills, California.

13. FTB audited appellant for 2008, 2009, and 2010. Beginning on February 17, 2012, FTB requested information from appellant.
14. On July 16, 2013, appellant and FTB met to discuss the audits. The parties disagree about what occurred at the meeting. On that same day, FTB issued a letter, which extended the due date for appellant to furnish information in response to FTB's February 17, 2012 request. Thereafter, FTB issued a letter dated July 1, 2014, informing appellant that his audit had been reassigned. FTB issued additional letters requesting information on August 20, 2014, October 22, 2014, December 4, 2014, and March 10, 2015. FTB did not receive responses from appellant.
15. On September 1, 2015, FTB issued a Notice of Proposed Assessment (NPA) for the 2008 tax year proposing additional tax of \$26,483. FTB also imposed a late filing penalty of \$6,645.75.<sup>5</sup>
16. On September 1, 2015, FTB issued an NPA for the 2009 tax year. FTB proposed to disallow appellant's claimed nonresident status, which resulted in an increase to appellant's California taxable income of \$1,805,882. This resulted in a proposed additional tax of \$188,981. FTB also imposed a late filing penalty of \$47,245.25
17. On September 1, 2015, FTB issued an NPA for the 2010 tax year. FTB proposed to disallow appellant's claimed nonresident status, which resulted in an increase to appellant's California taxable income of \$20,431,834. This resulted in a proposed additional tax of \$2,153,004.
18. Appellant protested the NPAs. In response, on August 23, 2016, FTB issued an Information Document Request, requesting information with respect to appellant's residency during the years 2008 through 2010. Thereafter, appellant provided some information including warrants and a list of seized items. On August 29, 2019, FTB

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<sup>5</sup> As noted above, appellant did not file a return for 2008. The NPA is based on FTB's determination that appellant had California taxable income of \$311,677. It is unclear how FTB came to such determination. However, in a letter from FTB to appellant dated January 22, 2020, FTB states "In 2008, [appellant's] federal income tax return reported wages of \$250,000 from Pacific West Dermatology ..." As such, it appears that FTB's determination is based at least in part on appellant's federal return. Nevertheless, appellant has not disputed FTB's estimate of income. Instead, appellant only disputes that he was a resident of California during 2008. As such, OTA will not discuss the estimate of income further.

extended the due date for response to the Information Document Request until September 29, 2019.

19. On March 24, 2020, FTB issued Notices of Action for the 2008, 2009, and 2010 tax year affirming the NPAs on the basis that appellant did not completely respond to the Information Document Requests.
20. This timely appeal followed.

### DISCUSSION

Issue 1: Whether appellant has established that he was a nonresident of California for the 2008, 2009, and 2010 tax years.

#### Burden of Proof

A determination by FTB 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, that respondent's determination is erroneous. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Mazer*, *supra*.) Here, FTB determined that appellant was a California resident in 2008, 2009, and 2010; thus, the Office of Tax Appeals (OTA) must presume that 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 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 question is whether the individual is outside California only for a temporary or transitory purpose. (*Appeal of Mazer*, *supra*.) OTA turns first to the determination of appellant's domicile in 2008, 2009, and 2010.

### 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, a taxpayer 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. (*Ibid.*) 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.)

A domicile, once acquired, is presumed to continue until it is shown to have been 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 presentation of the facts and circumstances, then domicile must be found to have not changed. (*Ibid.*)

Here, there is no dispute that appellant was a resident of California prior to October 1, 2008. Appellant argues that he changed his domicile and became a resident of Nevada during the period 2008 through 2010. Appellant argues that in 2008, his medical practice, Pacific West Dermatology, Inc., terminated operations, and appellant decided to change his residence to Las Vegas, Nevada. Appellant argues that in October 2008, he leased an apartment and took up residency.

In support, appellant provides a declaration from F. Newton. In the declaration, which is signed under penalty of perjury, Mr. Newton states the following: Mr. Newton was appellant's accountant from 2008 until 2010; Mr. Newton lived in Noble Park Apartments during the years in question and assisted appellant in finding an apartment in the same complex; Mr. Newton states that appellant kept a home office, but that appellant often used Mr. Newton's printer and fax machine; Mr. Newton estimates that he spoke with appellant once per day each week while appellant lived nearby; Mr. Newton traveled with appellant to multiple surgical centers and appellant made an offer on one surgical center; appellant made regular trips to California to see

his family;<sup>6</sup> appellant's work and social life prevented appellant from joining any civic or membership clubs, and appellant subsisted on one meal per day, which were usually provided without charge by Las Vegas casinos due to appellant's connection with Mr. Newton; Mr. Newton paid for meals that were not provided for by casinos, and Top Surgeons would reimburse him; the IRS seized Mr. Newton's records in June 2014, and those records were subsequently lost by the IRS.<sup>7</sup>

Appellant also provided several documents including lease agreements for several terms showing the lease of an apartment in Las Vegas, Nevada. The earliest of these lease agreements is dated December 26, 2008, commencing on December 30, 2008, and continuing through March 31, 2009. Appellant also registered Top Surgeons Nevada in December 2008. However, OTA notes that Noble Park Apartments' records indicate that appellant moved into the apartment during March 2009, well after the lease's commencement. Moreover, the available evidence does not establish that appellant was billed for utility services in Nevada until May 2009. There is no evidence that appellant actually and physically moved to the Las Vegas apartment during 2008. There is also no evidence that Top Surgeons had any business operations in Nevada during 2008. As such, OTA finds that appellant has not met his burden of showing that his domicile changed from California to Nevada during 2008.

For the remaining years, there is conflicting evidence. For example, in 2009, appellant took several steps including obtaining a Nevada driver's license, moving into the Las Vegas apartment, and paying utilities. Appellant also registered a vehicle with the Nevada DMV in 2010. On the other hand, there is little evidence that appellant attempted to do business in

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<sup>6</sup> Mr. Newton asserts that if appellant made frequent visits from Paso Robles, California, to Los Angeles, California, no one would question his intent to reside in Paso Robles. However, if that were the case, appellant's California residency would not be in question and there would be no question of whether appellant's income was subject to tax. Here, the question is whether appellant has given clear proof of his current intention to abandon his domicile in California and establish a new one in Nevada.

<sup>7</sup> Mr. Newton's declaration does not contain any substantiating evidence that his books and records were seized by the IRS. OTA notes that appellant has provided a letter dated October 3, 2018, discussing the search and seizure of appellant's property, which outlines the following evidence: (1) Face Page from Search & Seizure Warrant, United States District Court, Central District of California Case No. 14-1023 for the [California] home [appellant] shares with his mother; Inventory Listing of Items seized at [appellant's California home]; Face Page from Search and Seizure Warrant, United States District Court, Central District of California Case No. 14-1034, for the business office and bookkeepers at Wilshire Blvd; three (3) Inventory Listings of Items seized at Wilshire Blvd on June 4, 2014. Appellant did not include these documents with his appeal to OTA. None of the exhibits included in the appeals file discuss a search and seizure of Mr. Newton's property.

Nevada. As discussed above, Top Surgeons Nevada was registered in December 2008. Also, Mr. Newton's statement asserts that appellant searched for, and made an offer to purchase, a surgical practice. Despite this statement, it is undisputed that appellant did not purchase a Nevada surgical practice. Indeed, there is no evidence that appellant made any verifiable effort to start or market his business in Nevada, despite having leased an apartment and registered his vehicle there.

By comparison, appellant remained closely associated with the State of California for all relevant years. For example, appellant continued to receive financial statements at his Wilshire Boulevard residence through at least December 2009. Additionally, Mr. Newton's statement indicates that appellant made regular visits to this state during the years at issue. OTA notes that appellant also maintained personal property in this state by renewing his vehicle registration with the California DMV during 2008, 2009, and 2010.

Appellant also continued his professional pursuits throughout the years at issue. Appellant pursued the reinstatement of his license to practice medicine in California through July 2009. Appellant's business, Top Surgeons, also remained active in this state for each of the years at issue, maintaining eleven offices and advertising its operations throughout Southern California. Appellant earned \$350,000 of wage income from a California company, Top Surgeons LLC, in 2010, and appellant was issued a Form W-2 at his California residence. Appellant's frequent visits to California, as well as the maintenance of personal property (a vehicle), and his continued business activities suggest that he did not intend to move to and remain in Nevada indefinitely.

Considering the foregoing, OTA finds that appellant has not met his burden of showing that there was a change to his domicile during the years 2008, 2009, and 2010.

#### Residency Determination

For an individual domiciled in California to be a nonresident of California, the individual must show that he or she 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, if the California domiciliary is outside of California for only temporary or transitory purposes, then he or she 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 Nevada during 2008, 2009, and 2010.<sup>8</sup> Nevertheless, appellant's own evidence (i.e., Mr. Newton's statement) indicates that appellant spent significant time in this state. Although appellant contends that he intended to move to purchase a surgical center and stay in Nevada permanently, the available evidence does not support this contention. As previously discussed, appellant pursued the reinstatement of his California license to practice medicine during 2009, maintained personal property in the form of a vehicle, the registration of which was renewed with the California DMV, received mail at California addresses, and operated a business with several locations in the state during each of the years at issue.

Thus, the available evidence shows that appellant maintained important connections to California, which greatly outweighed any connections established in Nevada throughout 2008, 2009, and 2010. For these reasons, OTA finds that appellant was not in Nevada during 2008, 2009, or 2010 for other than a temporary or transitory purpose. Therefore, OTA finds that appellant was a resident of California during each of the years at issue.

Additionally, appellant's contention that FTB lost documents that he allegedly submitted on July 16, 2013, is unavailing. First, spoliation refers to the destruction, alteration, or failure to

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<sup>8</sup> As discussed above, there is no dispute that appellant was a resident of California before October 1, 2008 (the first nine months of 2008). As to 2009, in a letter dated January 22, 2020, FTB asserted that appellant reported spending 125 days in California on his 2009 return. It is unclear whether appellant disputes the number of days asserted by FTB. Finally, there is no dispute that appellant was a resident of California after November 1, 2010, although he maintained the same Nevada apartment lease and registered a vehicle in Nevada.

preserve evidence, either in a pending or future civil litigation or criminal matter. (*Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907.) An appeal before OTA is neither a civil nor a criminal case in a court of law. Secondly, appellant claims that his representatives submitted “*extra copies* of [appellant’s] Nevada-related records for 2008-2010 to FTB” (italics added), yet appellant has been unable to produce the original or duplicates of any of those documents on appeal. Appellant also requested to stay these proceedings until he could obtain records that the federal government seized. However, appellant also states that he does not “believe any of the July 16, 2013, documents exist” in the seized records. In other words, appellant’s conflicting statements cast doubt on the existence of evidence in support of his claim.

Lastly, following the July 16, 2013 meeting, FTB granted appellant’s request for additional time to produce responsive documents, extending the due date to August 15, 2013. Had appellant produced documents at the July 16, 2013 meeting, it would not be necessary to obtain an extension to produce responsive documents. In fact, according to FTB, at the July 16, 2013 meeting, appellant requested settlement, which FTB declined, after which appellant requested additional time to submit responsive records. In short, neither applicable law nor the appeals record supports appellant’s claim that he submitted evidence on July 16, 2013, which FTB subsequently lost.

Accordingly, appellant has not met his burden of showing that he was not a California resident for the tax years at issue.

Issue 2: Whether appellant has established reasonable cause for failing to file timely returns for the 2008 and 2009 tax years.

California imposes a penalty for failing to file a valid return on or before the due date, unless the taxpayer can show that the failure is due to reasonable cause and not due to willful neglect.<sup>9</sup> (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that it has been correctly imposed, and the burden of proof shifts to the taxpayer to establish reasonable cause to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To establish reasonable cause, the taxpayer must show that the failure to file the return occurred despite the exercise of ordinary business care and prudence. (*Appeal of Belcher*, 2021-OTA-284P.) The taxpayer must provide credible

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<sup>9</sup> Willful neglect, which is defined as a “conscious, intentional failure or reckless indifference,” is not alleged here, and OTA sees no evidence of such. (See *Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P; *U.S. v. Boyle* (1985) 469 U.S. 241.)

and competent evidence to support the claim of reasonable cause; otherwise, the penalty will not be abated. (*Ibid.*) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.* (1993) 508 U.S. 602, 622.) Whether the elements that constitute “reasonable cause” are present in a given situation is a question of fact. (*U.S. v. Boyle* (1985) 469 U.S. 241, 249.)

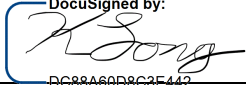
For tax year 2008, it is undisputed that appellant did not file a California tax return. For tax year 2009, appellant’s California tax return was filed on December 24, 2010, more than eight months after the due date of April 15, 2010. In short, appellant has not provided any evidence or argument to show that he had reasonable cause for failing to timely file these tax returns. As such, FTB properly imposed the late filing penalty, and there is no basis to abate the penalties.

HOLDINGS

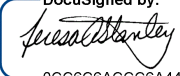
1. Appellant has not established that he was a nonresident of California for the 2008, 2009, and 2010 tax years
2. Appellant has not established reasonable cause for failing to file timely returns for the 2008 and 2009 tax years.

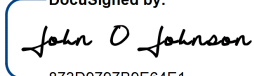
DISPOSITION

FTB's actions are sustained.

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 Keith T. Long  
 Administrative Law Judge

We concur:

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 Teresa A. Stanley  
 Administrative Law Judge

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 John O. Johnson  
 Administrative Law Judge

Date Issued: 11/4/2024