

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
N. BASILIO AND)
S. BASILIO)
)
)
)
)

OTA Case No. 230513269

OPINION

Representing the Parties:

For Appellants: N. Basilio
S. Basilio

For Respondent: Mina Mohaddress, Attorney
Adam Susz, Attorney Supervisor

For Office of Tax Appeals: Louis Ambrose, Attorney

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, N. Basilio (appellant-husband) and S. Basilio (appellant-wife) (collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$9,812 and applicable interest for the 2018 tax year.¹

Office of Tax Appeals (OTA) Administrative Law Judges Sara A. Hosey, Eddy Y. H. Lam, and Natasha Ralston held an oral hearing for this matter in Cerritos, California, on October 9, 2024. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUE

Whether appellant-wife’s community property share of appellant-husband’s income is California taxable income.

¹ During the appeal process, FTB reduced its proposed additional tax to \$4,340.

FACTUAL FINDINGS

1. During 2018, appellant-husband lived and worked in Oregon. In Oregon, he lived in the home of a friend and coworker. Appellants owned a home in Norwalk, California, where appellant-wife and their youngest daughter lived, and appellant-husband returned to California to visit them on holidays and other special occasions.
2. Appellants timely filed a 2018 California Individual Resident Tax Return (Form 540). The return listed an address in Norwalk, California, as their address. On Schedule CA, appellants removed appellant-husband's wages from an Oregon-based employer from their reported California taxable income. Appellant-husband's Oregon employer issued a Form W-2 to him at his address in Norwalk, California. According to a Form 1099-R attached to appellants' tax return, appellant-husband also received a taxable distribution of pension, annuity, or retirement income. The Form 1099-R was issued to appellant-husband at Norwalk, California. Appellants included this income in their California taxable income.
3. FTB audited appellants' Form 540 and added back appellant-husband's wages from the Oregon-based employer. FTB then issued a Notice of Proposed Assessment (NPA) proposing additional tax of \$9,812.00, plus interest.
4. Following protest proceedings, FTB issued a Notice of Action (NOA) affirming its NPA.
5. Appellants then filed this timely appeal.
6. Based on documentation appellants provided during the appeal process, FTB subsequently determined that appellant-husband was not a California resident during tax year 2018 and that only appellant-wife's community property share of appellants' income was taxable by California. As a result of this determination, FTB reduced its proposed additional tax to \$4,340.

DISCUSSION

In general, California residents, such as appellant-wife, are taxed on their entire taxable income regardless of source, while California nonresidents, such as appellant-husband, are taxed only on income from California sources. (R&TC, § 17041(a), (b), & (i), 17951; *Appeal of Acosta and Castro*, 2022-OTA-235P.) Because appellant-wife was a California resident during the tax years at issue, all her income, including her one-half community property interest in appellant-husband’s out-of-state wages, is subject to California income tax regardless of source. (*Ibid.*) Appellants argued at the hearing that appellant-wife is not taxable on her community property interest in appellant-husband’s income because appellant-husband was not a California resident and that Publication 1031 improperly misled them on what to include in their tax return. Appellants assert that “[t]he IRA, pension and annuities are exempted as identified in FTB [P]ublication 1031.” In that regard, appellants note that FTB’s Publication 1031, 2018 *Guidelines for Determining Resident Status*, at page 7, states that, for nonresidents, “[d]istributions are not taxable by California if received after December 31, 1995.”²

Unfortunately, appellants misread the guidance as it pertains to taxation of income of California residents. The section titled “Income Taxable by California” states that, “Residents of California are taxed on ALL income, including income from sources outside California.” (FTB Publication 1031 (2018), p. 6, original all capitalization.) The section titled “Pensions and Keoghs” states that for California residents: “Distributions from employer-sponsored and self-employment (Keogh) pension, profit-sharing, stock bonus plans, or other deferred compensation arrangements are taxable by California regardless of where the services were performed.” (*Id.* at p. 7.)

The portion of Publication 1031 that appellants cite, regarding distributions after 1995, addresses the taxation of nonresidents on their pension income. As appellant-husband was a nonresident of California during 2018, it applies to him. However, it does not apply to appellant-wife, who was a California resident, and therefore taxable on all her income, including her share of community property income. (See *Appeal of Bailey* (76-SBE-016) 1976 WL 4032 (*Bailey*)). Appellants also argued at the hearing that Publication 1031 only applies when separate returns are filed. However, this is incorrect, as pages four to five of the publication describe the

² The publication, which is referenced by both parties, can be found online at: www.ftb.ca.gov/forms/search/

taxation of community property income, regardless of whether a joint return or a separate return is filed. To the extent appellants allege that Publication 1031 is misleading, it is well settled that, where “FTB’s instructions are alleged to be unclear or misleading, taxpayers must follow the law and not the instructions.” (*Appeal of Sedillo*, 2018-OTA-101P.)

Under California law, the out-of-state income of a nonresident spouse who is domiciled in California is community property and the other spouse, who is a California resident, is liable for the California income tax on his or her one-half community property interest in that income. (*Bailey, supra.*) An individual may be domiciled in California even if the individual is not a resident of California. (*Appeal of Mazer*, 2020-OTA-263P.) If there is any doubt as to whether an individual has changed his domicile, domicile must be found not to have changed. (*Ibid.*)

Here, appellant-husband was a nonresident and thus not taxable on his one-half community property interest of the couple’s income. However, because appellant-husband was domiciled in California during 2018, appellant-wife’s community property interest in her one-half of appellant-husband’s income is taxable in California.³ (See *Appeals of Cremel and Koepfel*, 2021-OTA-222P [an individual’s marital property interest in personal property is determined by the laws of the earning or acquiring spouse’s domicile].)

³ Appellants contend that the NPA should be withdrawn or that the burden of proof should shift because the NPA stated that it considered appellants to be residents of this state. However, the NPA and NOA provided appellants with adequate notice of the income sought to be taxed by FTB and the basis for its proposed assessment. Even if the burden of proof has shifted as to domicile, FTB has shown that appellant-husband remained domiciled in Norwalk, California, where he owned a home with appellant-wife, and where his spouse and youngest daughter continued to reside. Appellants also argue that the home was not purchased by appellant-husband and was not purchased as community property. They further contend that appellants did not marry until 1999, which was after the property was acquired. However, appellants have not provided evidence to support these assertions, and, assuming the assertions are true, they do not establish that appellant-husband changed his domicile to Oregon. (See *Mazer, supra*, at p *5.)

HOLDING

Appellant-wife’s community property share of appellant-husband’s income is taxable by California.

DISPOSITION

FTB’s determination, as modified by it on appeal to reduce the proposed additional tax to \$4,340, is sustained.

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

We concur:

DocuSigned by:
Phyllis Mallard
91249DEC8EC84E4...

For
Eddy Y. H. Lam
Administrative Law Judge

Signed by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

Date Issued: 11/22/2024