OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **R. PETERS**[1]	)	OTA Case No. 22019564

OPINION

Representing the Parties:

For Appellant: Kent Strader, Attorney

For Respondent: Ron Hofsdal, Attorney

For Office of Tax Appeals: Andrew Jacobson, Attorney

V. LONG, Administrative Law Judge: These consolidated appeals are made pursuant to Revenue and Taxation Code (R&TC) section 19045. R. Peters (appellant) appeals the actions by respondent Franchise Tax Board (FTB) proposing additional tax of $954,105 and applicable interest for the 2012 tax year, additional tax of $538,074 and applicable interest for the 2013 tax year, and additional tax of $625,923 and applicable interest for the 2014 tax year.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellant has shown error in FTB's determinations that he was a California resident during the 2012, 2013 and 2014 tax years.
2. Whether appellant has established a basis to abate additional interest.

FACTUAL FINDINGS

1. Appellant is an entertainer who was born and raised in Canada and now performs worldwide. Appellant married his former wife in Nevada in 2010, and the couple's

[1] Appellant's former wife jointly filed a 2012 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) with appellant. However, she did not sign the appeal letter and is therefore not a party to this appeal.

daughter was born later the same year in Los Angeles, California. In November of 2011, appellant and his former wife separated and filed for legal separation in the Superior Court of the County of Los Angeles (Superior Court).

Business Interests

2. During the years at issue, appellant was the sole shareholder of Just the Tip Inc. (Just the Tip), a corporation registered with the Nevada Secretary of State (Nevada SOS) and represented by an agent with an address in Carson City, Nevada.
3. During the years at issue, Just the Tip was the sole member of Back to Business LLC (Back to Business), a limited liability company (LLC) registered with the Nevada SOS and represented by an agent with an address in Carson City, Nevada.
4. During the years at issue, appellant was the sole member of New Freedom, LLC (New Freedom), an LLC registered with the Nevada SOS and represented by an agent with an address in Carson City, Nevada.

Real Property Ownership[2]

5. During the years at issue, appellant owned a residence located in Henderson, Nevada, that he purchased in 2007 for $710,000 (Henderson Residence). The Henderson Residence contains 4,052 square feet with four bedrooms and sits on a 0.25-acre lot.
6. During the years at issue, appellant owned a residence located in Studio City, California (Studio City Residence), that he purchased in 2009 for $1,960,000. The Studio City Residence contains 5,857 square feet with four bedrooms and sits on a 0.47-acre lot.[3]
7. During the years at issue, appellant owned a two-bedroom condominium in Las Vegas, Nevada, that he purchased in 2011 for $245,000 (Las Vegas Condominium).
8. On July 24, 2012, appellant purchased a residence in Woodland Hills, California (Woodland Hills Residence), for $1,460,000. The Woodland Hills Residence contains 3,974 square feet and sits on a 0.4-acre lot.
9. On April 3, 2014, appellant leased the Studio City Residence to an unrelated lessee, whose two-year lease term began on May 1, 2014.

[2] It is undisputed that appellant owned or had partial ownership interests in real property and business interests located in Ontario, Canada. Because appellant concedes that he was a United States resident during the whole of the period at issue in this appeal, OTA does not further discuss these properties.

[3] Los Angeles County Assessor's data shows that the Studio City Residence has a lot size of 20,529 square feet, which equals 0.47 acres (1 acre = 43,560 sq. ft.; 20,529 sq. ft. ÷ 43,460 sq. ft. = 0.47 acres).

10. On April 11, 2014, New Freedom purchased a residential property located in Malibu, California (Malibu Residence), for approximately $4,950,000. The Malibu Residence is an 8,633 square-foot, five-bedroom home that sits on 1.35 acres.

Legal Matters

11. During the years at issue, appellant held a Nevada driver's license which listed the Henderson Residence as his mailing address.
12. In November 2012, the Superior Court granted a legal separation between appellant and his former wife, and awarded appellant the Henderson Residence, the Studio City Residence, the Las Vegas Condominium, City National Bank accounts, and all ownership interests in Just the Tip and Back to Business. As a form of child support, appellant agreed to purchase the Woodland Hills Residence and hold joint title with the couple's daughter. Appellant's former wife was permitted to reside in the Woodland Hills Residence until the couple's daughter reached the age of majority. Appellant and his former wife were awarded joint custody with the stipulation that "[n]either Party shall change the children's residence from Los Angeles County without the written consent of the other or order of the court."
13. In October of 2014, a declaration by appellant's former wife filed in the couple's child custody case lists the Studio City Residence as appellant and his former's wife's residence from December 2010 until November 2012, when appellant's former wife and the couple's daughter moved into the Woodland Hills Residence.
14. On August 14, 2014, appellant filed for divorce from his former wife in the Superior Court. The divorce was finalized after the tax years at issue.

2012 Tax Year Return

15. On October 10, 2013, appellant and his former wife jointly filed a 2012 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR), which lists a Canadian address.
16. On April 28, 2014, appellant and his former wife filed a 2012 Amended California Individual Tax Return (Form 540X), which lists the Canadian address.
17. On August 31, 2017, FTB issued a Notice of Proposed Assessment (NPA) to appellant and his former wife that proposed additional tax of $954,105, plus applicable interest, for the 2012 tax year. The NPA stated that FTB determined that appellant and his former wife were domiciled in California and were California residents during the 2012 tax year.

18. At audit, FTB used appellant's personal credit card to determine his physical presence during 2012. Using this approach, FTB determined that appellant was present in California for 113 days, Nevada for 21 days, and in other locations for the remaining days.
19. On December 8, 2021, FTB issued a Notice of Action (NOA) to appellant and his former wife that affirmed the NPA for the 2012 tax year.

2013 Tax Year Return

20. On October 21, 2014, appellant filed a 2013 Form 540NR using the married filing separately status, which lists the Canadian address.
21. On August 31, 2017, FTB issued an NPA to appellant that proposed additional tax of $538,074, plus applicable interest, for the 2013 tax year. The NPA states that FTB determined that appellant was domiciled in California and was a California resident during the 2013 tax year.
22. At audit, FTB used appellant's personal credit card to determine his physical presence during 2013. Using this approach, FTB determined that appellant was present in California for 144 days, Nevada for 13 days, and in other locations for the remaining days.
23. On December 8, 2021, FTB issued an NOA to appellant that affirmed the NPA for the 2013 tax year.

2014 Tax Year Return

24. On October 15, 2015, appellant filed a 2014 Form 540NR using the married filing separately status, which lists the Canadian address.
25. On August 31, 2017, FTB issued an NPA to appellant that proposed additional tax of $625,923, plus applicable interest, for the 2014 tax year. The NPA states that FTB determined that appellant was domiciled in California and was a California resident during the 2014 tax year.
26. At audit, FTB used appellant's personal credit card to determine his physical presence during 2014. Using this approach, FTB determined that appellant was present in California for 120 days, Nevada for 9 days, and in other locations for the remaining days.
27. On December 8, 2021, FTB issued an NOA to appellant that affirmed its NPA for the 2014 tax year.

Current Appeal

28. On appeal, appellant requests interest abatement.

29. FTB agrees to abate interest from March 2, 2018, through November 12, 2019, and from August 18, 2020, through February 22, 2021.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's determination that he was a California resident during the 2012, 2013 and 2014 tax years.

Burden of Proof

FTB's determinations of residency are presumptively correct, and the taxpayer bears the burden of showing error in those determinations. (*Appeal of Bracamonte,* 2021-OTA-156P.) This presumption is a rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary. (*Ibid*.) Respondent's determinations cannot be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in dispute. (*Ibid*.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219.)

Taxation of Residents

R&TC section 17041(a)(1) provides, in pertinent part, that a tax shall be imposed for each taxable year upon the entire taxable income of every resident of California who is not a part-year resident. Part-year residents are taxed on their income earned while residents of this state, as well as all income derived from California sources. (R&TC, § 17041(b), (i).) R&TC section 17014(a) provides that the term "resident" includes: (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. Thus, an individual domiciled in California remains a resident until he or she leaves for other than a temporary or transitory purpose. (See also Cal. Code Regs., tit. 18, § 17014.)

Domicile Determination

To determine appellant's residency, the first question is whether appellant was domiciled in California. An individual can have only one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c).) Domicile is defined as the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when

absent. (*Appeal of Bracamonte*, *supra*; Cal. Code Regs., tit. 18, § 17014(c).) An individual who is domiciled in California and 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. (Cal. Code Regs., tit. 18, § 17014(c).) 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 Bracamonte*, *supra*.) A domicile, once acquired, is presumed to continue until it is shown to have been changed. (*Ibid*.) The burden of proof as to a change of domicile 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*.)

There are a number of factors to consider in determining the location of an individual's domicile. (*Appeal of Beckwith*, 2022-OTA-332P, citing *Fenton v. Board of Directors* (1984) 156 Cal.App.3d 1107, 1116.) The acts and declarations of the individual involved are factors that must be taken into consideration in determining the intent to change domicile. (*Estate of Phillips*, 269 Cal.App.2d 656, 659; *Fenton v. Board of Directors*, *supra*, 156 Cal.App.3d at p. 1116; see also Cal. Code Regs., tit. 18, § 17014(d)(1).) The maintenance of a marital abode is a significant factor in determining the location of an individual's domicile. (*Appeal of Mazer*, 2020-OTA-263P, citing *Appeal of Bailey* (76-SBE-016) 1976 WL 4032.)

FTB contends that appellant was domiciled in California. FTB bases its determination on appellant's maintenance of a familial abode in California and physical presence in California.

Appellant contends he was always domiciled in Nevada and that he did not change his domicile to California. As support, appellant points to his Nevada driver's license and Nevada businesses, asserts that his primary residence was in Nevada, and claims that his credit card usage is not a reliable indicator of his physical presence because his staff used his credit cards without his physical presence.

Familial Abode

While appellant and his former wife married in Nevada, based on the contemporaneous declaration filed by appellant's former wife in the couple's child custody case, it appears that appellant and his former wife established a family abode at the Studio City Residence in 2010, which remained the family abode until November 2012, when appellant's former wife and the couple's daughter moved into the Woodland Hills Residence, while appellant remained at the Studio City Residence. In 2014, when appellant filed for divorce from his former wife, appellant

indirectly purchased the nearby Malibu Residence.[4] It appears that appellant's former wife and the couple's daughter remained in California, the location of the familial abode, and appellant, an entertainer who conducted extensive travel and touring during the years at issue, visited them whenever his business schedule would allow.[5] Appellant's establishment of a familial abode in California weighs in favor of California domicile.

Physical Presence

Appellant contends that using his credit card records to reconstruct his physical presence is an unreliable method because he has staff members that made purchases on his behalf, there is no other proof of his presence, and even if the days were accepted, the days in California were less than the time outside of California.

However, FTB noted that on one of appellant's credit cards, he was the sole authorized user. FTB used this single credit card to reconstruct appellant's physical presence. Using this method, appellant spent 113 days, 143 days, and 120 days in California in 2012, 2013, and 2014, respectively. In contrast, appellant spent 21 days, 12 days, and 9 days in Nevada. The remaining days were spent in other locations, including on appellant's international work tours. Appellant has not provided evidence showing error in FTB's reconstruction of his physical presence during the years at issue, such as proof of appellant being out of state during days FTB determined him to be present in California. Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Bracamonte*, *supra*.) The place of a taxpayer's domicile is the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when absent. (*Ibid*.) Appellant's physical presence reconstruction shows that he regularly departed from and returned to California for business. Accordingly, appellant's physical presence in California supports a California domicile.

While appellant did maintain a Nevada driver's license and Nevada business interests, on balance, appellant's familial abode and physical presence more strongly indicate that his most settled and permanent connection was in California. Further, the burden is on appellant to show error in FTB's determination, and appellant has not met his burden. Accordingly, OTA finds that appellant was domiciled in California during the years at issue.

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[4] Notably, at 8,633 square feet, the Malibu Residence is significantly larger than appellant's asserted primary residence in Nevada, the Henderson Residence, which is 4,052 square feet.

[5] See, e.g., *Appeal of Bailey*, *supra* [appellant considered California abode as the marital abode, where his wife and child remained, and where he visited whenever business circumstances allowed].

Residency Determination

Since appellant was domiciled in California, OTA turns to the question of whether appellant was outside California for a temporary or transitory purpose, such that he will continue to be treated as a California resident. (R&TC, § 17014(a)(2); Cal. Code Regs., tit. 18, § 17014.) 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 Bracamonte*, *supra*.)

In situations where the taxpayer has significant contacts with more than one state, as appellant does here, the state with the closest connections during the taxable year is the state of residence. (Cal. Code Regs., tit. 18, § 17014(b).) The contacts that the taxpayer maintains in California and other states are important objective indications of whether their 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 this state for temporary or transitory purposes. (*Ibid*.)

To evaluate a taxpayer's contacts with a state, *Appeals 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 during the period in question. These factors can be separated into three categories: (1) registrations and filings with a state or other agency; (2) personal and professional associations; and (3) physical presence and property. (*Appeal of Bracamonte*, *supra*.) 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*.)

Registrations and Filings

It is undisputed that appellant was a citizen of Canada during 2012 through 2014, that appellant's federal and state tax returns for the years at issue listed appellant's Canadian address, and that appellant was not registered to vote in either California or Nevada. Appellant was married in Nevada, but filed for divorce in California, which renders these two facts neutral. However, appellant maintained a Nevada driver's license during the years at issue, which tends to support Nevada residency.

Appellant provided a list of seven luxury vehicles that were owned or leased by Just the Tip, which appellant concedes were registered in California. The evidence shows that

appellant, Just the Tip, or Back to Business also registered seven vehicles in Nevada using the Henderson Residence as the address on the registration. Thus, the evidence shows that appellant registered a substantial number of vehicles in both California and Nevada. Appellant asserts that the California automobiles were vintage cars that were kept in storage. However, all the vehicles were purchased or leased in the model year or close to the model year, which undercuts appellant's claim. Moreover, appellant signed several lease agreements for cars in California that allowed for a maximum number of miles to be driven each year, which suggests that appellant leased these vehicles in order to drive them rather than to display or store them. OTA finds that appellant's vehicle purchases, leases and registrations are a neutral factor here.

Personal and Professional Associations

Appellant's principal business was working as an entertainer who performed around the world and who also appeared periodically on television shows. The parties have provided a limited amount of information with respect to appellant's entertainment business activities. While appellant spent much of his time performing, there is little evidence showing what portion of his income derived from this business or what portion of that income was earned in California or Nevada. Therefore, appellant's professional work is a neutral factor.

Appellant's three business entities, Just the Tip, Back to Business, and New Freedom, were registered with the Nevada SOS. All three entities listed appellant as the sole shareholder or member with an address in Canada, rather than in Nevada or California. Indeed, when New Freedom purchased the Malibu Residence, it listed the same Canadian address on the deed. This suggests that while registered in Nevada, these entities were substantially managed in Canada. Therefore, this factor weighs slightly in favor of Nevada residency.

Physical Presence and Property

As previously discussed, the couple's daughter resided in California, and FTB reconstructed appellant's physical presence using appellant's credit card for which he was the sole authorized user. FTB determined that appellant spent 113 days, 143 days, and 120 days in California in 2012, 2013, and 2014, respectively. In contrast, appellant spent only 21 days, 12 days, and 9 days in Nevada. Appellant spent the remaining days in other locations, including during his international work tours. Appellant has not provided evidence showing error in FTB's reconstruction of his physical presence during the years at issue. This factor weighs heavily in favor of California residency.

During the years at issue, appellant owned properties in both Nevada and California. In Nevada, appellant owned the Henderson Residence, which is 4,052 square feet with

four bedrooms. Appellant additionally owned a condominium in Las Vegas, which he asserts was used solely by a family member and is thus not relevant to this appeal.

In California, appellant owned the Studio City Residence, a 5,857 square feet property with four bedrooms, which he rented out to a third party in 2014. Appellant also owned the Woodland Hills Residence, in which his daughter and former wife resided, and the Malibu Residence, an 8,633 square-foot property with five bedrooms. This factor also weighs in favor of California residency.

In sum, appellant's physical presence and property heavily support California residency, while appellant's Nevada driver's license and Nevada-registered business entities slightly support Nevada residency. OTA finds that appellant's significant California physical presence during 2012, 2013, and 2014, of 113 days, 143 days, and 120 days, respectively, in contrast to 21 days, 12 days, and 9 days in Nevada during the respective periods, overwhelmingly supports California residency. Physical presence is a factor of greater significance than mental intent and the formalities that tie one to a particular state. (*Appeal of Bracamonte*, *supra*.) Therefore, OTA finds that during the years at issue, appellant was a California domiciliary who left California only for temporary or transitory purposes. Accordingly, appellant was a California resident during the 2012, 2013 and 2014 tax years.

Issue 2: Whether appellant has established a basis to abate interest.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) Imposing interest is mandatory; it is not a penalty, but it is compensation for the taxpayers' use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) Generally, to obtain relief from interest, taxpayers must qualify under R&TC section 19104 or 21012.[6] R&TC section 21012 does not apply because FTB did not provide appellant with any requested written advice. Pursuant to R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB.

In Treasury Regulation section 301.6404-2(b), a "ministerial act" is defined as a "procedural or mechanical act that does not involve the exercise of judgment or discretion," whereas a "managerial act" is defined as an "administrative act that occurs during the

[6] Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual or fiduciary is unable to pay interest due to extreme financial hardship. OTA does not have authority to review FTB's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy*, *supra*.)

processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel."[7]

OTA's jurisdiction in an interest abatement case is limited to a review of whether there was an abuse of discretion in FTB's determination. (R&TC, § 19104(b)(2)(B); *Appeal of Gorin*, 2020-OTA-018P.) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, *supra*.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Ibid*, citing *Lee v. Commissioner* (1999) 113 T.C. 145, 149.)

The mere passage of time does not establish an unreasonable error or delay. (*Ibrahim v. Commissioner*, T.C. Memo. 2011-215.) A taxing agency's decision of how and when to work on a case, based on an evaluation of its entire caseload and its workload priorities, is not a ministerial act. (*Jean v. Commissioner*, T.C. Memo. 2002-256, citing *Strang v. Commissioner*, T.C. Memo. 2001-104, and *Leffert v. Commissioner*, T. C. Memo. 2001-23.) Where the administrative record is silent regarding the actions taken on a taxpayer's matter and FTB does not come forth with evidence to show that the employees assigned to the matter or involved in its review were actively working on it, there may be no apparent basis to support FTB's determination not to abate interest, and the unsupported determination may constitute an abuse of discretion. (*Appeal of Gorin*, *supra*.)

Appellant requests interest abatement for the duration of the protest, which ran from September 25, 2017, through November 9, 2021, with the exception of the period from February 14, 2020, through July 30, 2020, during which time appellant concedes the delay was attributable to him. On appeal, FTB abated interest for two periods, March 2, 2018, through November 12, 2019, and August 18, 2020, through February 22, 2021. Thus, four remaining periods are in dispute; September 25, 2017, through March 2, 2018 (158 days); November 12, 2019, through February 14, 2020 (94 days); July 30, 2020, through August 18, 2020 (19 days); and February 22, 2021, through November 9, 2021 (260 days). As support, appellant provides a copy of FTB's worklog associated with his case.

FTB contends that assigned staff were working on appellant's case by reviewing and drafting documents, conducting research, and communicating with appellant. FTB asserts that

[7] While the R&TC does not define the terms ministerial or managerial acts, when a CA statute is substantially identical to a federal statute, as here, federal law may be considered highly persuasive. (*Douglas v. State* (1942) 48 Cal.App.2d 835, 838.)

any purported delays which it has not abated were either reasonable or caused by the workload constraints of the assigned FTB staff.

A review of FTB's worklog shows that during the first time period at issue, FTB received appellant's protest letter, sent an acknowledgement letter, and assigned staff who worked on the case. During the second contested time period, the worklog shows that FTB staff worked on the case and mailed record requests. During the third time period in dispute, the worklog shows that FTB staff worked on the case. During the fourth time period at issue, the worklog shows that FTB staff worked on the case and issued a determination letter to appellant. FTB has established that the employees assigned to the matter or involved in its review were actively working on the case. Therefore, appellant has not established that FTB abused its discretion in not abating additional interest.

HOLDINGS

1. Appellant has not shown error in FTB's determinations that he was a California resident during the 2012, 2013 and 2014 tax years.
2. Appellant has not established a basis to abate additional interest.

DISPOSITION

FTB agrees to abate interest from March 2, 2018, through November 12, 2019, and from August 18, 2020, through February 22, 2021. FTB's actions are otherwise sustained.

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

We concur:

Signed by:
Josh Lambert
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

DocuSigned by:
Asaf Kletter
D17AEDDCAAB045B...
Asaf Kletter
Administrative Law Judge

Date Issued: 6/27/2025