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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:

) **HEARING SUMMARY**
) **PERSONAL INCOME TAX APPEAL**

12 **HEXU ZHAO**

) Case No. 849110

14 Year
2008

13 Proposed
Assessment
\$676,073

16 Representing the Parties:

17 For Appellant: Joseph M. Bray, Moskowitz LLP

18 For Franchise Tax Board: Jason Riley, Tax Counsel III

20 QUESTION: Whether appellant has shown error in respondent's proposed assessment which is
21 based on its determination that appellant retained his California domicile and was
22 a California resident during 2008.¹

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26 ¹ Respondent presents on appeal an alternative argument that, if appellant is not found to be a California resident for 2008,
27 that one-half of his income is attributable to his wife pursuant to community property laws and therefore taxable since she
28 was a California resident in 2008. (Resp. Op. Br., p. 15.) Appellant objected to this alternative argument as being outside of
the statute of limitations for an assessment against his wife. (App. Reply Br., p. 16.) Respondent indicates that, while this
argument was discussed internally, it was apparently not conveyed to the taxpayer during the audit and protest, and
respondent states that it will not pursue this secondary argument on appeal. (Resp. Reply Br., p. 9.)

1 HEARING SUMMARY

2 This appeal involves an amount in controversy that is \$500,000 or more and thus is
3 covered by Revenue and Taxation Code (R&TC) section 40. Please see Staff Comments below for
4 details.

5 Background

6 The proposed assessment is based on the date range from May 11, 2008, through the end
7 of 2008. Appellant is a Chinese and U.S. citizen who resided in California for approximately 11 years²
8 prior to moving to China to work as the Chief Financial Officer (CFO) for JA Solar in July of 2006.
9 (App. Reply Br., p. 2; Resp. Op. Br., p. 1.) While appellant was working for JA Solar in China, his
10 wife and two children remained in their home in Fremont, California. Respondent determined that
11 appellant was a nonresident of California during 2007 and up to May 10, 2008. (App. Op. Br., p. 2.) In
12 April of 2008, appellant left his employment with JA Solar and entered into an employment agreement
13 with Legend Silicon, a Fremont, California company.³ (Resp. Op. Br., p. 1.) Appellant returned to
14 California on May 11, 2008, and began working as the CFO for Legend Silicon on either May 12,
15 2008, or May 19, 2008. (Resp. Op. Br., p. 1; App. Reply Br., p. 3.) The actual date that employment
16 began is a fact disputed by the parties. While working for Legend Silicon in 2008, appellant traveled
17 between California and Asia for both business and personal reasons. (Resp. Reply Br., p. 8.) On
18 May 16, 2008, appellant sold JA Solar stock which resulted in capital gain income to him of
19 \$6,731,242. (App. Op. Br., p. 2.)

20 Appellant filed a California Form 540NR, for nonresidents and part-year residents, under
21 the married filing separately status for 2008. Appellant listed adjusted gross income (AGI) from all
22 sources of \$6,888,034, but a California AGI of only \$155,279. (Resp. Op. Br., exhibit B.) Appellant
23 reported on his return that he became a nonresident when he moved to China on November 12, 2008.
24 (*Id.* at exhibit B, p. 4, ln. 3.) Respondent audited appellant's return and determined that he was a
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26 ² Appellant reported on his 2008 California nonresident or part-year resident tax return that he was a California resident from
27 July of 1995 to July of 2006. (Resp. Op. Br., exhibit B, p. 4.)

28 ³ Legend Silicon currently operates out of Sunnyvale, California, but was previously headquartered in Fremont, California.
(See Resp. Reply Br., exhibit AA.) Respondent noted at protest that the company also had offices in Beijing, Shanghai, and
Shenzhen in China. (App. Reply Br., exhibit A, p. 6.)

1 resident and domiciliary of California beginning on May 12, 2008. (App. Op. Br., exhibit C.) As a
2 result, respondent issued a Notice of Proposed Assessment (NPA) for the 2008 tax year on March 20,
3 2012, revising his taxable income to include all of the income he earned after May 12, 2008, including
4 the \$6,731,242 gain on the sale of stock, and proposed an assessment of \$682,756 in additional tax, plus
5 interest. (Resp. Op. Br., exhibit D.)

6 Appellant protested the NPA. Respondent considered the information from the audit file
7 and information provided at protest, and determined that respondent's determination that appellant was
8 a California resident beginning May 12, 2008, was correct. Respondent did make adjustments to
9 reduce the proposed assessment, however, to reflect a finding that some of the wages earned while not a
10 resident of California were incorrectly sourced to California. (App. Op. Br., exhibit D.) Respondent
11 issued an NOA to this effect on September 17, 2014, providing a revised proposed assessment of
12 \$676,073 in additional tax, plus interest. (*Id.* at exhibit A.) This timely appeal followed.

13 Contentions

14 Appellant's Contentions

15 Appellant concedes that he was domiciled in California prior to and during the time
16 period at issue, but asserts that he was not a resident of California for any part of 2008. (App. Reply Br.,
17 p. 4 & exhibit B; App. Op. Br., pp. 3-6.) Appellant cites Revenue and Taxation Code (R&TC) section
18 17014, *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278 (*Whittell*), and *Noble v. Franchise Tax*
19 *Bd.* (2004) 118 Cal.App.4th 560 (*Noble*) when asserting that residency can be found when an individual
20 is in California for other than a temporary or transitory purpose, based on the facts and circumstances of
21 each case. Appellant contends that his primary connections during the time period at issue were with
22 China, and not California. (App. Op. Br., p. 3.)

23 Appellant disagrees with the audit and protest determinations in which respondent
24 contends that having a California driver's license and a larger home in California than in China are signs
25 of California residency. Appellant asserts that residency determinations for the purpose of requiring a
26 California driver's license are different than residency determinations for taxation, and indicates that he
27 maintained the same living arrangements prior to the time period in question, in 2007 and early 2008,
28 when respondent determined that he was not a California resident. (App. Op. Br., pp. 3-4.) Appellant

1 also points out that he owned a home in China and had a Chinese driver's license, and that his work
2 qualifications and ability to find employment were in China, not California, asserting that there are
3 material facts differentiating his appeal from the *Appeal of Nathan H. and Julia M. Juran*, 1968-SBE-
4 004, decided on January 8, 1968 (*Juran*), and the *Appeal of Pierre E. G. and Nicole Salinger*, 1980-
5 SBE-080, decided June 30, 1980 (*Salinger*).⁴ (*Id.* at pp. 5-6.) Appellant contends that his appeal is
6 factually similar to the *Appeal of Stephen D. Bragg*, 2003-SBE-002, May 18, 2003 (*Bragg*), wherein the
7 taxpayer had homes, business activities, personal bank accounts, vehicles, and professional services
8 utilized in two jurisdictions, yet the taxpayer was found to not be a resident of California. (*Id.* at p. 5;
9 App. Reply Br., at pp. 15-16.)

10 Appellant asserts that he did not retire from JA Solar, but rather quit voluntarily. (App.
11 Reply Br., pp. 4-5.) Appellant contends that he didn't start his employment with Legend Silicon until
12 May 19, 2008. Appellant provides his employment offer letter from Legend Silicon, dated April 10,
13 2008, with a handwritten expected start date of May 19, 2008, next to his signature, and two letters
14 from Legend Silicon's human resources administrator dated June of 2011 and January of 2012 which
15 provide conflicting start dates of May 12, 2008, and May 19, 2008, respectively.⁵ (*Id.* at p. 3 & exhibits
16 C, D & E.) Appellant asserts that his employment with Legend Silicon required that he be in China as
17 well as in California during the approximately five months that he worked at the Fremont office.
18 Appellant contends that his employment at the Fremont office was temporary and was only intended to
19 last until Legend Silicon's initial public offering (IPO) occurred, which was sought to be completed in
20 2008, and after which time appellant would return to China to work in Legend Silicon's offices in
21 China. (*Id.* at p. 3 & exhibit B.) Appellant indicates that he continued to travel back to China while
22 working in California at Legend Silicon. (App. Supp. Br., p. 6.) Appellant asserts that he never
23 intended to become a resident of California when he started his employment with Legend Silicon, and a
24 change of residence requires a "union of act and intent," citing *Noble, supra*, 118 Cal.App.4th at p. 568.

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26 ⁴ Appellant presents factual distinctions between his appeal and these two appeals which were raised by respondent at protest.
27 Respondent does not directly raise these decisions on appeal.

28 ⁵ Appellant notes that the January 2012 letter also has a different end date of October 28, 2008, rather than October 31, 2008,
as reflected on the June 2011 letter. Appellant contends that this shows that the January 2012 letter sets forth the actual work
period based on when he actually started and stopped working at Legend. (App. Reply Br., pp. 6-7.)

1 (App. Reply Br., p. 5.)

2 Appellant asserts that he maintained significant ties with China during his employment
3 at Legend Silicon's Fremont offices, including a home in China, a Chinese driver's license, primary
4 bank accounts, a majority of his business transactions, and the filing of income tax returns with the
5 Chinese taxing authorities. (App. Reply Br., p. 3 & exhibit G.) Appellant contends that the purchase of
6 a second, larger home in California on July 18, 2008, buying a new 2008 BMW X5 sport utility vehicle
7 on May 11, 2008, and accepting the job with Legend Silicon in California does not trigger California
8 residency. (*Id.* at p. 7) Appellant asserts that he cashed in stock options for a large capital gain, and
9 therefore acquired new property and a vehicle primarily for his wife to use, noting that his wife was
10 also on the registration for the BMW X5. (*Id.* at pp. 14-15.) Appellant asserts that the job was not
11 "permanent" as suggested by respondent, and instead the employment was stated as not being for a
12 specific term, and the presence of stock options does not contradict appellant's assertion that the
13 contract was not for permanent employment. (*Id.* at pp. 8-10.) Furthermore, appellant contends that
14 the employment agreement with Legend Silicon does not specify California as the place of
15 employment, and therefore signing the contract cannot show an intent to acquire California residency.
16 (App. Supp. Br., pp. 3-5.)

17 Appellant states that, in 2008, he spent 206 days in Asia, most of which were in China,
18 and approximately 160 days in the United States, and finds problems with respondent's tallies of 81
19 days in Asia and 153 days in California for the more limited period of May 12, 2008, through the end of
20 the year. (App. Reply Br., p. 2.) Appellant contends that the length of time someone spends in
21 California does not necessarily compel a determination that he has acquired residency. Moreover,
22 appellant contends that respondent's specific date range does not include all of 2008. (*Id.* at pp. 12-13.)

23 Respondent's Contentions

24 Respondent asserts that appellant was a California resident during the 2008 tax year at
25 issue, beginning on May 11, 2008. Respondent contends that, contrary to appellant's assertions, his ties
26 to California did not remain the same. Instead, respondent contends that, appellant's ties to California
27 increased in real and significant ways that justify respondent's position. (Resp. Op. Br., p. 11.)
28 Respondent quotes *Noble* in stating that, "to the extent residence and domicile depend upon intent, that

1 intention is to be gathered from one's acts." (Resp. Reply Br., p. 2, internal citations omitted.)
2 Respondent asserts that appellant formed an intent to return to California more than a month before
3 returning, as illustrated by him leaving his employment in China and interviewing for and accepting
4 new employment in Fremont, California. (Resp. Op. Br., p. 11.) Respondent contends that there is a
5 unity of intent and action in appellant's acceptance of the job position in California and his return to
6 California to live and work. (Resp. Reply Br., p. 3.) Respondent argues that the only evidence which
7 shows that appellant was intending to return to China full-time for employment after Legend Silicon's
8 IPO are his own statements at protest and on appeal. (*Id.* at pp. 6-7; see, e.g., Resp. Op. Br., exhibit G.)

9 Respondent asserts that appellant was physically present in California for 153 days
10 during the time period at issue, compared to only 81 days in Asia. (Resp. Op. Br., p. 5.) Respondent
11 argues that, of those 81 days spent in Asia, 25 of those days were spent in Taiwan, a distinct taxing
12 authority from China, for personal reasons, and therefore only 56 days were actually spent in China
13 during the period at issue. (Resp. Reply Br., p. 8.) Respondent asserts that appellant's physical
14 presence supports a finding of California residency. Furthermore, respondent contends, appellant's
15 2008 nonresident and part-year resident California tax return indicates that he became a California non-
16 resident on November 18, 2008, which is an admission that appellant was a California resident prior to
17 this date. Respondent contends that appellant used a California-based accountant to file his California
18 return. Respondent states that appellant filed a tax statement with China, but asserts that there is no
19 evidence appellant paid tax to any jurisdiction on the gain from the sale of stock. (Resp. Op. Br., p. 9.)

20 Respondent states that appellant worked for JA Solar prior to the time period at issue on a
21 series of temporary Chinese work visas, and renewed a temporary work visa for the period of April 17,
22 2008, to April 11, 2009. Respondent contends that appellant accepted the job offer from Legend Silicon
23 on April 10, 2008, with the clear intention to work in California as the company's CFO. Respondent
24 references the terms of the employment contract, contending that the position was permanent⁶ in nature,
25 and also states that the offer was mailed to appellant at his family's home in Fremont, California. (Resp.
26

27 ⁶ Respondent clarifies in its reply brief that its description of "permanent" employment merely describes the nature of
28 appellant's at-will employment status with Legend Silicon, and contrasts his employment with any kind of limited or
specified term employment relationship. (Resp. Reply Br., pp. 1-2.)

1 Op. Br., p. 6 & exhibit A.) Respondent argues that the employment contract for Legend Silicon
2 included specific language that would only be required if the position was intended to be in California,
3 such as requiring compliance with the U.S. Immigration Reform and Control Act which provides
4 specifics for eligibility to work in the U.S., and that the contract contains no reference to China. (Resp.
5 Reply Br., pp. 3-6.) Respondent alleges that the term of employment with Legend Silicon in Fremont
6 was likely expected to last three years or more, based on when his stock options with the company
7 would vest. Respondent asserts that appellant's employment with Legend Silicon began on May 12,
8 2008, and could not have commenced on May 19, 2008, because appellant traveled to Taiwan for
9 personal reasons on May 18, 2008, and returned to California on May 23, 2008. (Resp. Op. Br., p. 13.)

10 Respondent contends that appellant's primary residence during the time period at issue
11 was his family home on Amberwood Drive in Fremont (Amberwood home). The Amberwood home
12 was a 2,080 square foot home with three bedrooms and three bathrooms, which respondent suggests was
13 worth roughly \$780,000. Respondent indicates that appellant purchased a second home in Fremont, on
14 Hunter Place (Hunter home), on July 18, 2008, for \$1,990,000, with 4,268 square feet, five bedrooms,
15 and four and a half bathrooms. Respondent asserts that appellant's spouse and two children lived in the
16 Amberwood home prior to the year at issue and lived in the Hunter home during the months at issue.
17 (Resp. Op. Br., pp. 5-7.) Respondent states that appellants apparently rented out the Amberwood home
18 beginning October 1, 2008, and claimed rental income in 2008. Respondent also reports that appellant
19 claimed a homeowner exemption in California for tax years 2007 through 2010. (*Id.* at p. 10.)
20 Respondent indicates that appellant did buy an apartment in China, but that he never severed his ties
21 with California. (*Id.* at p. 8.)

22 Respondent indicates that appellant purchased a 2008 BMW X5 on May 11, 2008,
23 immediately upon his return to California. (Resp. Op. Br., pp. 6-7.) Respondent asserts that the vehicle
24 has been continually registered in California in either appellant's or appellant's spouse's name through
25 May of 2014. (*Id.* at p. 9.) Respondent reports that appellant has maintained his California driver's
26 license since 1986, including a renewal of his driver's license on March 24, 2008. (*Id.* at p. 10.)

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1 Applicable Law

2 Burden of Proof

3 It is well established that a presumption of correctness attends respondent's
4 determinations of fact, including determinations of residency, and that an appellant has the burden of
5 proving such determinations erroneous. (*Appeal of George H. and Sky Williams, et al.*, 82-SBE-018,
6 Jan. 5, 1982; *Appeal of Joe and Gloria Morgan*, 85-SBE-078 July 30, 1985.) This presumption is a
7 rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary.
8 (*Appeal of George H. and Sky Williams, et al., supra.*) Respondent's determinations cannot, however,
9 be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence
10 as to the issues in dispute. (*Appeal of George H. and Sky Williams, et al., supra.*) It is also well
11 established that the failure of a party to introduce evidence which is within his control gives rise to the
12 presumption that, if provided, it would be unfavorable. (*Appeal of Don A. Cookston*, 83-SBE-048,
13 Jan. 3, 1983.)

14 In the case of individuals who claim to be nonresidents by virtue of being outside of the
15 state for other than temporary or transitory purposes, affidavits of friends and business associates as to
16 the reasons for being outside of the state should be submitted. (Cal. Code Regs., tit. 18, § 17014.)

17 Residency Determination

18 R&TC section 17041, subdivision (a)(1), provides, in pertinent part, that a tax shall be
19 imposed for each taxable year upon the entire taxable income of every resident of California who is not
20 a part-year resident. R&TC section 17014, subdivision (a), provides that the term "resident" includes:
21 (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every
22 individual domiciled in California who is outside California for a temporary or transitory purpose.
23 Thus, if an individual is domiciled in California, he or she remains a resident until he or she leaves for
24 other than temporary or transitory purposes. (Cal. Code Regs., tit. 18, § 17014; see also Rev. & Tax.
25 Code, § 17014.)

26 Regulation 17014, subdivision (b), discusses the term "temporary or transitory purpose,"
27 as used in R&TC section 17014 with regard to residency, in the following manner:

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1 It can be stated generally, however, that if an individual is simply passing through this
2 State on his way to another state or country, or is here for a brief rest or vacation, or to
3 complete a particular transaction, or perform a particular contract, or fulfill a particular
4 engagement, which will require his presence in this State for but a short period, he is in
5 this State for temporary or transitory purposes, and will not be a resident by virtue of his
6 presence here.

7 If, however, an individual is in this State . . . for business purposes which will require a
8 long or indefinite period to accomplish, or is employed in a position that may last
9 permanently or indefinitely, or has retired from business and moved to California with no
10 definite intention of leaving shortly thereafter, he is in the State for other than temporary
11 or transitory purposes, and accordingly, is a resident taxable upon his entire net income . .

12 Regulation 17014, subdivision (b), also states that the underlying theory of R&TC
13 sections 17014 to 17016 is that the state with which a person has the closest connection during the
14 taxable year is the state of his residency. The contacts a taxpayer maintains in California and other
15 states are important factors to be considered in determining California residency. (*Appeal of*
16 *Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.) Although the actual or potential
17 duration of the taxpayer's presence in, or absence from, California is very significant in determining his
18 residency, it is also important in each case to examine the connections with California and compare
19 them with those she maintains in other places. (*Appeal of Anthony V. and Beverly Zupanovich, supra.*)
20 Where a California domiciliary leaves the state for employment purposes, it is particularly relevant to
21 determine whether the taxpayer substantially severed his California connections upon his departure and
22 took steps to establish significant connections with his new place of abode, or whether he maintained
23 his California connections in readiness for his return. (*Appeal of Terance and Brenda Harrison*,
24 85-SBE-059, June 25, 1985 (*Harrison*).)

25 In *Bragg*, the Board listed nonexclusive factors to aid it in determining with which state
26 an individual has the closest connection. (*Appeal of Stephen D. Bragg*, 2003-SBE-002, May 18, 2003.)
27 The Board in *Bragg* cautioned that these nonexclusive factors “. . . serve merely as a guide in our
28 determination of residency,” and “. . . [t]he weight given to any particular factor depends upon the
totality of the circumstances” unique to each taxpayer for each tax year. The *Bragg* factors can be
organized into three categories for a more cohesive discussion, as provided below. As will be seen
below, many factors overlap one another.

1 *Registrations and Filings*

2 This group of factors includes items which the taxpayer has filed with the state or other
3 agency. These factors represent how the taxpayer portrays himself to governments, and generally
4 includes factors which the taxpayer can change merely by filing or cancelling a registration or license
5 with a government agency. The factors in this category include:

- 6 • The state wherein the taxpayer claims the homeowner's property tax exemption on a
7 residence;
- 8 • The address the taxpayer uses on his tax returns, both federal and state, and the state of
9 residence claimed by the taxpayer on such returns;
- 10 • The state wherein the taxpayer registers his automobiles;
- 11 • The state wherein the taxpayer maintains a driver's license; and
12 The state wherein the taxpayer maintains voter registration and the taxpayer's voting
13 participation history.

14 *Personal and Professional Associations*

15 The factors in this group help show where the taxpayer had his day-to-day contacts in
16 both his occupational life as well as in his personal life. More specifically, these factors show where
17 the taxpayer reaped the benefits of occupational endeavors as well as personal relationships and
18 community involvement. These factors include:

- 19 • The state wherein the taxpayer's children attend school;
- 20 • The location of the taxpayer's bank and savings accounts;
- 21 • The state wherein the taxpayer maintains memberships in social, religious, and professional
22 organizations;
- 23 • The state wherein the taxpayer obtains professional services, such as doctors, dentists,
24 accountants, and attorneys;
- 25 • The state wherein the taxpayer is employed;
- 26 • The state wherein the taxpayer maintains or owns business interests;
- 27 • The state wherein the taxpayer holds a professional license or licenses; and
- 28 • The state wherein the taxpayer owns investment real property; and
 • Affidavits from third parties attesting to the taxpayer's presence and community
 involvement.

Physical Presence and Property

 This group includes the factors showing where the taxpayer was physically located
 during the time in question, and where his tangible and real property were located. Many of the factors
 in this group attempt to pinpoint the taxpayer's location, and therefore may be redundant or used to

1 corroborate location statistics. These factors include:

- 2 • The location of all of the taxpayer’s residential real property, and the approximate sizes and values of each of the residences (i.e., indicating the nature of the use of the property)
- 3 including whether the taxpayer sold or rented any residential property around the time of the alleged residency change;
- 4 • The state wherein the taxpayer’s spouse and children reside;
- 5 • The taxpayer’s telephone records (i.e., the origination point of taxpayer’s telephone calls);
- 6 • The number of days the taxpayer spends in California versus the number of days the taxpayer spends in other states, and the general purpose of such days (i.e., vacation, business, etc.); and
- 7 • The origination point of the taxpayer’s checking account transactions and credit card transactions.
- 8

9 In *Noble, supra*, 118 Cal.App.4th 560, the taxpayers intended to permanently relocate
10 from California back to Colorado after living in California for several years. The taxpayers began
11 searching for a suitable residence to purchase and bought one property but determined not to live in it,
12 and ultimately purchased a residence in June of 1994 and moved into this Colorado residence in July of
13 1994. During this period wherein the taxpayers had the intent to leave California and took some
14 actions in preparation for that move, they sold stock for a capital gain. The taxpayers and the Franchise
15 Tax Board argued over whether appellants were still California residents in March of 1994 when the
16 stock was sold. The court found that, despite their intentions to move and some steps taken toward that
17 intention, the taxpayers had not, in action, relocated to Colorado as of March 1994, and therefore could
18 not be considered in California for a temporary or transitory purpose. (*Noble, supra*, 118 Cal.App.4th
19 at p. 569.) The court found several connections to California, such as still owning their home in
20 California, maintaining cars and driver’s licenses in the state, using their California address and bank
21 accounts for business, and the fact that they spent no time in Colorado during March of 1994.
22 Therefore, the court determined that the taxpayers were “physically present in this State enjoying the
23 benefit and protection of its laws and government,” and had not relinquished their California residency.
24 (*Ibid*, quoting Cal. Code Regs., tit. 18, § 17014.)

25 In the *Appeal of Terance and Brenda Harrison*, the taxpayers had moved to California,
26 purchased a home, had a child, and along the way became domiciliaries and residents of California well
27 prior to 1973. (*Appeal of Terance and Brenda Harrison, supra*, 85-SBE-059.) In 1973, the husband
28 accepted an offer for a job in Canada which was contractually expected to last at least two years, and in

1 fact worked in Canada from 1973 to 1977. During this time, the husband spent the bulk of his time
2 working in Canada and other foreign countries, and visited his wife and child in California two or three
3 weeks each year. The Board first determined that the husband was still domiciled in California, and
4 then discussed whether he was a resident of California or Canada. The Board stated that “the precise
5 question presented with respect to residency, therefore, is whether appellant-husband’s absence from
6 this state was for a temporary or transitory purpose.” The Board quoted Regulation 17014, subdivision
7 (b), noting that the standard for whether a taxpayer is in California for a temporary or transitory
8 purpose applies equally to the question of whether a taxpayer is outside of California for a temporary or
9 transitory purpose. The Board took note of the permanent or indefinite nature of his Canadian
10 employment, as well as the fact that he rented a home in Canada, purchased a car in Canada, obtained a
11 Canadian driver’s license, maintained banking relationships in Canada, and participated in social and
12 civic activities in Canada, and compared those connections to the limited time in which he visited
13 California for vacation purposes. The Board found that the husband was domiciled in California, but
14 that his closest connections were in Canada, and concluded that he was therefore a nonresident of
15 California during 1976.

16 In the *Appeal of William G. and Susan G. Crozier*, the taxpayers were domiciled in
17 California. (*Appeal of William G. and Susan G. Crozier*, 92-SBE-005, Apr. 23, 1992 (*Crozier*.) They
18 moved overseas in connection with Mr. Crozier’s employment and asserted that they were not residents
19 during this period. The Board analyzed the facts to determine whether the Croziers were outside of
20 California for a temporary or transitory purpose. The Board noted that the Croziers maintained some
21 property and connections to California during their sixteen-month time overseas for the husband’s
22 indefinite employment, but they sold and rented other property upon their departure. The Board found
23 that the taxpayers in *Crozier* severed some ties to California and established significant new bonds
24 overseas. On the facts before it, the Board found that the Croziers intended to be overseas for an
25 indefinite period of at least two years. Consequently, the Board found that the Croziers were outside of
26 California for other than temporary or transitory purposes, and ruled in favor of the Croziers.

27 STAFF COMMENTS

28 The parties agree that appellant retained a California domicile during the year at issue,

1 meaning that he intended to ultimately return to California. It appears to staff that this fact may be
2 critical to the legal analysis.

3 Under R&TC section 17014, a taxpayer who is domiciled in California is a California
4 resident unless he can show that he was outside of California for other than a temporary or transitory
5 purpose. For example, if a California domiciliary was in England for several months pursuant to a
6 limited term work assignment (a temporary purpose), he would remain a California resident even if he
7 was not in California at all during the period. (See *Appeal of Robert J. Addington Jr.*, 82-SBE-001,
8 Jan. 5, 1982.) This example is intended to illustrate the fact that, for a taxpayer who is domiciled in
9 California, the critical inquiry is whether he was outside of California for a temporary or transitory
10 purpose, rather than whether he was inside California for a temporary or transitory purpose.

11 Here, prior to the period in question, appellant was outside of California for other than a
12 temporary or transitory purpose. Accordingly, under R&TC section 17014, he was treated as a
13 nonresident. At the beginning of the period at issue, appellant left China and returned to California to
14 start a new job. It appears that, for most of the period at issue, appellant was physically present in
15 California, though he took some trips outside of California during the period at issue. At the hearing,
16 appellant will want to explain how, for the period at issue in this appeal, the Board could find that
17 appellant was outside of California for other than a temporary or transitory purpose.

18 While residency determinations are highly fact-specific, case law provides guidance as to
19 how to weigh factors and approach the decision as to residency. Therefore, the parties should be
20 prepared to discuss relevant case law. In the *Harrison* and *Crozier* decisions, the Board was charged
21 with deciding whether taxpayers who were domiciled in California should be considered nonresidents of
22 California. Both decisions discussed the taxpayers' severing of ties with California, the time spent in
23 California versus other jurisdictions, and the reasons behind the time spent in each place. The parties
24 may wish to discuss the importance that employment played in those appeals, and whether appellant's
25 employment in California is a distinguishing factor from the taxpayers' employments in other countries
26 in *Harrison* and *Crozier*.

27 The parties should also be prepared to discuss the *Bragg* factors. With regard to
28 registrations and filings, appellant should be prepared to explain why he reported on his California tax

1 return that he became a nonresident when he moved to China on November 12, 2008. (See Resp. Op.
2 Br., exhibit B, p. 4, ln. 3.) Respondent should be prepared to address the fact that appellant maintained
3 a renewed temporary work visa in China, filed tax documents with China, listed his Chinese apartment
4 on his California nonresident tax return, and maintained his Chinese driver's license. Appellant
5 claimed the homeowner's property tax exemption for his newly purchased California home (Hunter
6 home), purchased and registered a new car in California at the beginning of the period at issue (BMW
7 X5), and maintained and had recently renewed his California driver's license.

8 With regard to his personal and professional associations, appellant asserts that China
9 was the location for a majority of his business transactions and his primary bank accounts. Appellant's
10 children presumably attended school in California, he used a California accountant for his tax return
11 preparation, he was employed by Legend Silicon and stated that he needed to work in Fremont to
12 complete the IPO process, and he began renting his family's former primary residence (Amberwood
13 home) during this time period. With regard to factors surrounding his physical presence, appellant
14 owned an apartment in China, spent approximately 25 days in China for work reasons and 31 days at
15 the end of the year in China while not working for any company, and also spent 25 days in Taiwan over
16 two personal trips.⁷ Appellant spent 153 days in California, of which 9 were after he resigned from
17 Legend Silicon, owned two homes in Fremont with the larger being a 4,286 square foot five-bedroom
18 home, and his wife and his two children lived in his California homes.

19 The parties dispute the actual date employment began with Legend Silicon in Fremont,
20 California. Respondent argues that the start date was May 12, 2008, while appellant asserts that it was
21 May 19, 2008. The majority of the income at issue was received pursuant to a stock sale on May 16,
22 2008, a date in between the two purported start of employment dates. The job offer includes an
23 expected start date of May 19, 2008, apparently filled in by appellant, and a 2012 letter from Legend
24 Silicon asserts that start date as well. (App. Reply Br., exhibits D & E.) However, a 2011 letter from
25 Legend Silicon asserts that appellant started his employment on May 12, 2008, and respondent notes
26 that appellant was in Taiwan for personal reasons on May 19, 2008, and therefore could not have started
27

28 ⁷ For a complete breakdown of appellant's location during 2008, please see page 9 of exhibit A to appellant's reply brief.
The day counts used in these comments are the days from the period of May 12, 2008, through the end of the 2008 tax year.

1 employment on that date. (*Id.* at exhibit C; Resp. Op. Br., p. 13.) The parties should be prepared to
2 discuss which date should be considered the start of employment. More importantly, the parties should
3 discuss whether the starting date of employment should be controlling for a date of residency change, if
4 a residency change is found here, or whether some other indicator is more appropriate (e.g., date of
5 arrival in California immediately prior to the start of employment). It appears to staff that many of
6 appellant's California connections were in place prior to the sale of stock on May 16, 2008, including
7 appellant's physical return to California to begin a new job, his purchase of a car, and his continued
8 ownership of a home in California. It further appears to staff that the date appellant actually started
9 work is but one fact, among others, that the Board may wish to consider in evaluating appellant's
10 residency. If the Board finds that appellant became a resident of California at some point in 2008, the
11 defining date of that change in residency should reflect the date upon which appellant ceased to be
12 outside of California for other than temporary or transitory purposes.

13 Section 40

14 As noted above, this matter is subject to Revenue and Taxation Code section 40.
15 Therefore, within 120 days from the date the Board's vote to decide the appeal becomes final, a written
16 opinion (i.e., Summary Decision or Formal Opinion) must be published on the Board's website.
17 (Cal. Code Regs., tit. 18, § 5552, subds. (b), (f).) The Board's vote to decide the appeal will become
18 final 30 days following the date of the Board's vote, except when a petition for rehearing is filed within
19 that period.⁸ (Cal. Code Regs., tit. 18, § 5460, subd. (a).)

20 Following the conclusion of this hearing, if the Board votes to decide the appeal, but
21 does not specify whether a Summary Decision or a Formal Opinion should be prepared, staff will
22 expeditiously prepare a nonprecedential Summary Decision and submit it to the Board for consideration
23 at a subsequent meeting. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(2).) Unless the Board directs
24 otherwise, the proposed Summary Decision would not be confidential pending its consideration by the
25 Board (Cal. Code Regs., tit. 18 § 5551, subd. (b)(5)); accordingly, it would be posted on the Public
26 Agenda Notice for the meeting at which the Board will consider and vote on the Summary Decision.

27 _____
28 ⁸ If a petition for rehearing is filed, the Board's decision will not become final, and no written opinion under Section 40 will be considered until after the petition for rehearing is resolved.

1 A taxpayer may request that the Board hold in abeyance its vote to decide the appeal so
2 the taxpayer may review the Board’s written opinion prior to the expiration of the 30-day period for the
3 filing of a petition for rehearing. If the vote is held in abeyance, the proposed Summary Decision will
4 be confidential until it is adopted by the Board. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(5).) Any
5 request that the Board’s vote be held in abeyance should be made in writing to the Board Proceedings
6 Division prior to the hearing or as part of oral argument at the hearing. Any such request would then be
7 considered by the Board during its deliberations on the appeal.

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