

1 William J. Stafford  
Tax Counsel III  
2 Board of Equalization, Appeals Division  
450 N Street, MIC:85  
3 PO Box 942879  
Sacramento CA 95814  
4 Tel: (916) 323-3154  
5 Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **YOLANDA MOLINA AND** ) Case No. 553853  
13 **ALEJANDRO MOLINA**<sup>1</sup> )

14 \_\_\_\_\_  
15 Year Proposed  
2007 \$2,448  
16

17 Representing the Parties:

18 For Appellants: Karen Humphreys, CPA  
Richard Page, CPA

20 For Franchise Tax Board: Jaelyn N. Appleby, Tax Counsel

22 QUESTION: Whether appellants have shown that respondent erred by apportioning to California  
23 appellant-wife's community property interest in appellant-husband's wages.

24 HEARING SUMMARY

25 Introduction

26 Appellants' position with respect to their objection to the proposed additional tax has  
27 \_\_\_\_\_

28 <sup>1</sup> Appellant-wife resides in Los Angeles County, California.

1 changed during the course of this appeal. Initially, appellant-wife filed an appeal of respondent's denial  
2 of her head of household filing status. Each party filed an opening brief and reply brief and presented  
3 facts and arguments regarding appellant-wife's qualification for head of household filing status.  
4 However, by letter dated January 3, 2012, and accompanying documents, including an amended 2007  
5 California return with a married filing jointly status, appellants argued that the proposed assessment was  
6 incorrect because not all of appellant-wife's community property share of appellant-husband's wages  
7 was taxable to California. Appellants state that appellant-husband works as a pilot for Mexicana  
8 Airlines and has dual citizenship but is not domiciled in California. Appellants also state the amended  
9 return reports California income based on apportionment of his flight time in California and takes a  
10 standard deduction because "most of the employee business expenses are non California apportioned."  
11 Accordingly, this Hearing Summary will focus on appellants' current arguments and the Franchise Tax  
12 Board's (FTB or respondent's) responses thereto.

13           The parties agree that appellant-husband was a nonresident of California in 2007 but  
14 appellants assert that appellant-husband was domiciled in Mexico (and not California) in 2007 and the  
15 FTB asserts that appellant-husband was domiciled in California in 2007. Moreover, the FTB asserts  
16 that, even if the Board should find that appellant-husband was domiciled in Mexico (not California) in  
17 2007, appellants must still apportion his income to California based on community property laws  
18 because (i) Mexico is a community property law jurisdiction, and (ii) it is undisputed that appellant-wife  
19 was a resident and domiciliary of California in 2007 and, thus, the FTB properly apportioned half of  
20 appellant-husband's wages to her for the 2007 tax year.

### 21           Background

22           Appellants filed a timely joint 2007 California resident income tax return (Form 540) on  
23 April 10, 2008, reporting (i) appellant-husband's wages of \$141,445, which he earned as a pilot for  
24 Mexicana Airlines, (ii) an adjustment (subtraction) of \$70,722 on Schedule CA (i.e., one-half of  
25 appellant-husband's wages), (iii) a dependent exemption for their 17 year old daughter, and (iv) a  
26 California taxable income of \$48,578. (FTB opening brief (OB), pp. 1-2 & Ex. A.)

27           On December 2, 2009, the FTB issued a Notice of Proposed Assessment (NPA) that  
28 disallowed appellants' \$70,722 adjustment. (FTB OB, Ex. B.) The NPA increased appellants'

1 California taxable income from \$48,578 to \$119,300 and listed an additional tax of \$5,546. (*Id.*)

2 In response, appellants filed a timely protest on January 21, 2010, in which they argued  
3 that appellant-husband was a resident of Mexico in 2007. (*Id.* p. 2 & Ex. C.) With appellants' protest,  
4 they submitted a joint 2007 nonresident or part-year resident California return (Form 540NR), reporting  
5 a total tax of \$430. (*Id.* & Ex. D.)

6 On August 20, 2010, the FTB contacted appellants' representative, Ms. Karen  
7 Humphreys, via telephone and stated that appellant-husband's nonresident status "had been accepted."  
8 (*Id.*) In addition, the FTB sent Ms. Humphreys a *draft* joint 2007 nonresident or part-year resident  
9 California return, reflecting a foreign earned income exclusion of \$85,700 and a total tax of \$3,126. (*Id.*  
10 & Appeal Letter (AL.)

11 Ms. Humphreys and the FTB had a telephone conversation on September 28, 2010.  
12 (FTB OB, p. 2.) In that telephone conversation, the FTB alleges that Ms. Humphreys stated that  
13 appellant-husband's income should be excluded on the Form 540NR because he was an airline  
14 employee who spent less than half of his flight time in California. (*Id.*) In addition, the FTB asserts that  
15 Ms. Humphreys faxed the FTB a copy of a page from a California tax guide summarizing Public Law  
16 101-322, which, according to appellants, prohibits California from taxing income received by a  
17 nonresident employee of an airline if 50 percent or less of the pay is earned in California. (*Id.* & Ex. E.)

18 Subsequently, on September 30, 2010, the FTB contacted Mr. Humphreys via telephone  
19 and stated that (i) appellant-husband's wage income had been excluded for California purposes because  
20 appellant-husband was a nonresident in 2007, and (ii) half of appellant-husband's wage income was  
21 taxable to appellant-wife under community property rules because appellant-wife was a resident of  
22 California in 2007. (*Id.*)

23 On October 8, 2010, the FTB issued a Notice of Action (NOA), listing an additional tax  
24 owed of \$2,448, plus applicable interest. (*Id.*)

25 Shortly thereafter, on October 31, 2010, Ms. Humphreys sent the FTB a facsimile,  
26 indicating that appellant-wife would like to amend her filing status to head-of-household. Included with  
27 the facsimile was a revised 2007 Form 540, listing appellant-wife as head-of-household and setting forth  
28 an additional tax owed of \$284. (*Id.* pp. 2-3.)

1           On November 17, 2010, the FTB sent Ms. Humphreys a letter, informing her that  
2 appellant-wife's 2007 return, listing appellant-wife as head-of-household, was rejected. The FTB's  
3 letter explained that appellant-wife did not meet the requirements to be a head-of-household because  
4 appellant-husband lived with appellant for all or part of the last six months of 2007. (*Id.* p. 3 & Ex. G.)  
5 In response, appellants filed this timely appeal. (*Id.* p. 3 & AL.)

#### 6           Subsequent Proceedings

7           After filing this appeal, appellants then filed an amended joint 2007 California return on  
8 January 3, 2012, in which (i) appellants changed the filing status from head-of-household to married  
9 filing jointly, and (ii) appellants apportioned appellant-husband's wages based on appellant-husband's  
10 flight time in California. (Appellants' supplemental brief dated January 3, 2012 (App. Br., 1/3/12).) In  
11 response, Appeals Division staff (staff) requested further briefing from the FTB to address appellants'  
12 new arguments. Accordingly, the FTB submitted further briefing. (FTB additional brief dated May 24,  
13 2012 (FTB. Br., 5/24/12).) Afterwards, appellants filed a reply brief. (Appellants' reply brief dated  
14 May 29, 2012 (App. Br., 5/29/12).) Appellants' arguments based on the amended 2007 return filed on  
15 January 3, 2012, and the FTB's responses thereto, are summarized below.

#### 16           Contentions

##### 17           Appellants

18           Appellants assert that they originally filed a 2007 California return, incorrectly  
19 apportioning one-half of appellant-husband's wages to California under California community property  
20 law. (App. Br., 1/3/12, p.1 & App. Br., 5/29/12, p. 1.) On appeal, appellants take the position that  
21 instead of apportioning appellant-husband's wages under California community property law, appellant-  
22 husband's wages should be apportioned based on appellant-husband's flight time in California. (App.  
23 Br., 5/29/12, p. 1.) Appellants assert that "[b]ased on detailed flight plans, 5.7% of [appellant-  
24 husband's] pilot income could be deemed earned in California in 2007" and "[t]he balance of his income  
25 was earned outside of California and mostly outside the United States." (*Id.*) In support of this  
26 assertion, appellants cite (i) 49 USC section 14503(a)(1), and (ii) Revenue and Taxation Code (R&TC)  
27 section 17951. (*Id.*)

28           Appellants state that 49 USC section 14503(a)(1) deals with "payments for transportation

1 carriers providing transportation services in two or more states,” and appellants argue that the payments  
2 will be taxed in the state of residence unless more than 50 percent of the time worked is in another state.  
3 (*Id.*) In addition, appellants assert that even though Mexico is a country and not a state, the policy  
4 underlying 49 USC section 14503(a)(1) is “consistent with NAFTA between Mexico and the United  
5 States where the federal law should not be ignored by California.” (*Id.*)

6 Appellants assert that R&TC section 17951 provides that nonresidents of California are  
7 only taxed on income derived from California sources. (*Id.*) In this respect, appellants assert that only  
8 5.7 percent of appellant-husband’s pilot income was based on flights in California. Accordingly,  
9 appellants state that they filed an amended return apportioning 5.7 percent of appellant-husband’s pilot  
10 income to California. (*Id.*) Appellants contend that their apportionment is fair and reasonable because  
11 the allocation of appellant-husband’s pilot income was “based on facts and circumstances determined by  
12 actual flight logs of Mexicana Airlines.” (*Id.*) Along with their appeal brief dated May 9, 2011 (App.  
13 Br. 5/9/11), appellants provided flight records from Mexicana Airlines for the months of January 2007  
14 through December 2007.

15 *Appellant-husband’s citizenship, residency, and domicile*

16 Appellants assert that appellant-husband “is a dual citizen of Mexico and the United  
17 States.” (App. Br., 1/3/12.) As noted in the introduction above, appellants and the FTB agree that  
18 appellant-husband was a resident of Mexico in 2007 (the applicable year at issue in this appeal). (FTB  
19 OB, p. 2.) The parties disagree, however, as to whether appellant-husband was domiciliary of California  
20 in 2007. Appellants contend that appellant-husband was domiciled in Mexico (not California) in 2007.  
21 (App. Br. 5/29, 12.) In their reply brief dated May 9, 2011, appellants make the following statements in  
22 support of their position that appellant-husband was domiciled in Mexico in 2007:

- 23 1. Mr. Molina has been a full-time pilot of Mexicana airlines for over 30 years. He intended  
24 to work until retirement for Mexicana Airlines and had no intention of moving to  
25 California in the near future or ever. Mexicana Airlines went bankrupt in 2010 and  
26 Alejandro Molina is currently unemployed. However, in 2007 Mr. Molina was employed  
27 full-time as a pilot in Mexico. (App. Br. 5/9/11, p. 1.)  
28 2. Mr. Molina is a Mexican citizen. He has lived in Mexico his entire life. All his extended

1 family (excluding Yolanda and his daughter Alessandra) live in Mexico. (*Id.*)

2 3. All Mr. Molina's professional and personal contacts are in Mexico (excluding Yolanda  
3 and Alessandra). (*Id.*)

4 4. Mr. Molina owns his house in Mexico. His car is also registered in Mexico. He does not  
5 own any property or vehicles in California. (*Id.*)

6 5. Mr. Molina has never been absent from California because he never established a  
7 residence in California in the first place. He never stated he maintained a home in the  
8 U.S. while living abroad. Yolanda's U.S. address was used on his Federal Tax Return for  
9 convenience. Mr. Molina visits his daughter and wife in California on vacations and  
10 some days off. The total was 81 days in 2007 per Yolanda's attached list. Mr. Molina  
11 spends time with his daughter while in California. He does not feel it is safe for her to  
12 come to Mexico to visit him. (*Id.*)

13 6. Mr. Molina mostly works/flies in parts of the world other than California. Flight time in  
14 California was 5.7% of total flight time for 2007 per Mexicana Airline records for 2007.  
15 (*Id.* p. 2.)

16 The FTB

17 The FTB argues that appellant-husband was domiciled in California in 2007 and, thus,  
18 appellant-husband's wages were community property, such that appellant-wife is taxable on her  
19 community property share of her husband's wages. (FTB Br. 5/24/12, pp. 1-3.) The FTB asserts that  
20 this conclusion is consistent with the Board's decisions holding that foreign earnings by a nonresident  
21 spouse are community property when both spouses are California domiciliaries, citing *Appeal of*  
22 *Richard and Eva Taylor*, 88-SBE-028, decided on November 29, 1988; *Appeal of Robert M. and*  
23 *Mildred Scott*, 81-SBE-020, decided on March 2, 1981.<sup>2</sup> (*Id.*) In the FTB's opening brief, the FTB  
24 makes the following assertions, as to appellant-husband's presence (or absence) in California:

- 25 • Appellants have not proven that appellant-husband did not live with appellant-wife for all or  
26 part of the last six months of the taxable year. (FTB OB, p 4.)

27  
28 <sup>2</sup> Board of Equalization cases are generally available for viewing on the Board's website ([www.boe.ca.gov](http://www.boe.ca.gov)).

- 1 • Appellants filed a federal Form 2555 under penalty of perjury in which the couple stated that  
2 (i) appellant-husband maintains a home in the United States while living abroad,  
3 (ii) appellant-husband's address in the United States is located on North Sycamore, in Los  
4 Angeles, and (iii) appellant-wife and her daughter occupy the home on North Sycamore. In  
5 support, the FTB provides a copy of appellants' federal Form 2555. (*Id.*)
- 6 • Appellants filed an amended joint California nonresident return, on which appellants  
7 indicated that appellant-husband spent 60 days of the 2007 taxable year in California. (*Id.*)
- 8 • During a January 31, 2011 telephone conversation, appellant's representative,  
9 Ms. Humphreys, indicated that appellant-husband spent his work vacations at the North  
10 Sycamore address with his wife and daughter. In addition, the FTB asserts that  
11 Ms. Humphreys indicated that appellant-husband would stay at the North Sycamore address  
12 when he had a flight layover in Los Angeles. (*Id.*)
- 13 • In an email dated February 1, 2011, appellant-wife indicated that appellant-husband spent 81  
14 days in California in 2007, including 40 days in the last six months of the year. (*Id.* p 5.) In  
15 support, the FTB provided a copy of the email dated February 1, 2011.
- 16 • Appellants have not provided any documentation showing that appellant-husband's absence  
17 from the North Sycamore home was not a temporary absence. The FTB notes that Treasury  
18 Regulation section 1.7703-1(b)(5) provides that an "individual's spouse will be considered to  
19 be a member of the household during temporary absences from the household due to special  
20 circumstances. . . .[such as business reasons]." (*Id.* p 5.) ". . . [Appellant-husband's] absence  
21 from his California home is due to his special circumstance of working for an airline flying  
22 out of Mexico." (*Id.*) Thus, appellants have not met their burden of showing that appellant-  
23 husband's absence was other than temporary.
- 24 • "Domicile" is the place where, whenever you are absent, you intend to return. (*Id.* p 6;  
25 citing *Whittell v. Franchise Tax Board* (1964) 231 Cal.App.2d 278.) The burden of proving  
26 a change of domicile is on the person asserting that domicile has been changed. (Citing  
27 *Appeal of Frank J. Milos*, 84-SBE-042, Feb. 28, 1984.) Appellants have not provided any  
28 evidence indicating that appellant-husband ever abandoned his intention of returning to

1 California. (*Id.* p 7.)

2 The FTB contends that, even if the Board finds that appellant-husband was domiciled in  
3 Mexico in 2007, his wages constitute community property and, thus, appellant-wife is liable for  
4 California income tax on her community property interest in appellant-husband's wages. (FTB Br.  
5 5/24/12, pp. 1-3.) In support of this alternate contention, the FTB asserts that "[i]t is well settled that  
6 marital property rights are determined under the laws of the domicile of the acquiring spouse, citing  
7 *Schechter v. Superior Court* (1957) 49 Cal.2d 3, 10; *Rozan v. Rozan* (1957) 49 Cal.2d 322, 326. (*Id.*)  
8 Thus, the FTB asserts that appellant-husband must be domiciled in a community property jurisdiction  
9 (e.g., either California or Mexico) for his earnings to be deemed community property. (*Id.*)

10 As to the facts of this appeal, the FTB contends that while it is not willing to concede that  
11 appellant-husband was domiciled in Mexico in 2007, appellant-husband's wages would still be  
12 classified as community property even if appellant-husband was domiciled in Mexico in 2007. (*Id.*) In  
13 addition, the FTB asserts that appellant-husband's wages are classified as community property if he was  
14 domiciled in California in 2007. Specifically, the FTB cites California Family Code section 760 for the  
15 rule that all property, regardless of location, acquired by married persons during marriage while  
16 domiciled in California is community property. (*Id.*) As for Mexico, the FTB cites section 21.8.1.15 of  
17 the Internal Revenue Manual in support of the FTB's assertion that a nonresident of the United States is  
18 subject to community property rules if he or she earns community property income and is domiciled in a  
19 community property state or country, including Mexico. (*Id.*) Internal Revenue Manual section  
20 21.8.1.15 provides:

- 21 1. Community property laws can relate to U.S. taxation.
- 22 2. Special tax rules for property apply to a U.S. citizen who is married to a nonresident  
23 alien spouse and domiciled in a community property state of the United States, Guam,  
24 Puerto Rico or a foreign country. In addition, nonresident aliens are subject to these  
special rules if they earn community property income and are domiciled in a community  
property state or country.

25 As additional support, the FTB cites the Board's decision in the *Appeal of Roy L. and Patricia A.*  
26 *Misskelley*, 84-SBE-077, decided on May 8, 1984, for its position that even if appellant-husband is  
27 domiciled in a community property jurisdiction outside of California (such as Nevada in the Board's  
28 *Misskelley* decision—or, as appellants allege, Mexico), appellant-husband's wages still constitute

1 community property and, thus, appellant-wife (who was a resident and domiciliary of California in  
2 2007) is liable for California income tax on her one-half community property interest in appellant-  
3 husband's wages. (*Id.*)

4 As to appellants' citation of 49 USC section 14503(a)(1), the FTB asserts that Public Law  
5 101-322 provides that California cannot tax a nonresident airline employee on the basis of flight time  
6 spent in California if the flight time in California is less than 50 percent of total flight time. (*Id.*) Here,  
7 the FTB contends that it is not taxing appellant-husband on *his* community property share of his wages.  
8 Instead, the FTB contends that it is taxing appellant-wife (who was a resident and domiciliary of  
9 California in 2007) on her community property share of appellant-husband's wages.<sup>3</sup> (*Id.*)

10 The FTB asserts that, after considering only appellant-wife's community property interest  
11 in her husband's wages, it properly applied the "California method" to perform the calculation of  
12 California tax liability. (*Id.* pp. 3-4.) Specifically the FTB asserts that "[t]he California method uses  
13 total income from all sources to determine the rate of tax, and then applies that rate of tax to the  
14 taxpayers' California taxable income, which includes any income from a source within California and  
15 income from non-California sources while the taxpayer was resident of California." (*Id.* p. 3.) As to the  
16 facts of this appeal, the FTB contends that "[t]hrough use of the California method, appellant-husband's  
17 community property share of his non-California source income is not taxed, it is used only to determine  
18 the rate of tax which is then applied to California taxable income, which includes appellant-wife's  
19 community property share, to determine the California tax." (*Id.*)

20 Finally, the FTB concludes that its assessment is presumed to be correct and appellants  
21 have the burden of showing that the assessment is erroneous, citing *Todd v. McColgan* (1949) 89  
22 Cal.App.2d 509, 514; *Appeal of Ismael R. Manrique*, 79-SBE-077, decided on April 10, 1979. (*Id.* p. 4.)

### 23 Applicable Law

#### 24 Residency and Domicile

25 California residents are taxed upon their entire net income (regardless of source), while  
26 non-residents are only taxed on income from California sources. (Rev. & Tax. Code, §§ 17041, subds.  
27

28 <sup>3</sup>Although the FTB cites Public Law 101-322, it appears to staff that the FTB intended to cite 49 USC section 40116(f) which applies to air transportation employees rather than Public Law 101-322 which governs "rail carriers" and "motor carriers".

1 (a), (b), and (i); 17951.) Part-year residents are taxed on their income earned while residents of this  
2 state, as well as all income derived from California sources. (Rev. & Tax. Code, §§ 17041, subs. (b) &  
3 (i).) R&TC section 17951, subdivision (b)(4) provides that, for purposes of computing “taxable income  
4 of a nonresident or part-year resident” under section 17041, subdivision (i), the gross income of a non-  
5 resident taxpayer does not include income not subject to California personal income tax laws by  
6 operation of “[s]ection 40116 of Title 49, United States Code, relating to the pay of an employee of an  
7 air carrier.”

8 A California resident includes (i) every individual who is in this state for other than a  
9 temporary or transitory purpose, and (ii) every individual domiciled in this state who is outside this state  
10 for a temporary or transitory purpose. (Rev. & Tax. Code, § 17014.) The California Court of Appeal  
11 and the FTB’s regulations define “domicile” as the location where a person has the most settled and  
12 permanent connection, and the place to which a person intends to return when absent. (*Whittell v.*  
13 *Franchise Tax Board, supra*; Cal. Code Regs., tit. 18, § 17014, subd. (c).) An individual may claim  
14 only one domicile at a time. (Cal. Code Regs., tit. 18, § 17014, subd. (c).) While an individual’s intent  
15 will be considered when determining domicile, intent will not be determined merely from  
16 unsubstantiated statements; the individual’s acts and declarations will also be considered. (*Appeal of*  
17 *Joe and Gloria Morgan, 85-SBE-078, July 30, 1985.*) In order to change domicile, a taxpayer must  
18 actually move to a new residence and intend to remain there permanently or indefinitely. (*In re*  
19 *Marriage of Leff (1972) 25 Cal.App.3d 630, 642; Estate of Phillips (1969) 269 Cal.App.2d 656, 659.*)

#### 20 Community Property

21 California and Mexico are community property law jurisdictions. Marital property  
22 interests in personal property are determined under the laws of the acquiring spouse’s domicile.  
23 (*Schecter v. Superior Court, supra; Rozan v. Rozan, supra*). If one spouse is a resident of California and  
24 the other spouse is domiciled in a community property state outside of California, the California resident  
25 spouse is liable for California income tax on his or her one-half community property interest in the other  
26 spouse’s earnings. (*Appeal of Roy L. and Patricia A. Misskelley, supra.*)

#### 27 Public Law 101-322 and 49 USC section 40116(f)

28 On July 6, 1990, President Bush signed into law Public Law 101-322, the Amtrak

1 Reauthorization and Improvement Act of 1990, (codified as amended at 49 USC § 11502 (rail carriers)  
2 49 USC § 14503 (motor carriers)). Air transportation employees are covered by a similar law codified  
3 at 49 USC section 40116(f), which provides in part:

4 (f) Pay of air carrier employees.

5 (1) In this subsection--

6 (A) "pay" means money received by an employee for services.

7 (B) "State" means a State of the United States, the District of Columbia, and a  
8 territory or possession of the United States.

9 (C) an employee is deemed to have earned 50 percent of the employee's pay in a  
10 State or political subdivision of a State in which the scheduled flight time of the  
11 employee in the State or subdivision is more than 50 percent of the total scheduled flight  
12 time of the employee when employed during the calendar year.

13 (2) The pay of an employee of an air carrier having regularly assigned duties on aircraft  
14 in at least 2 States is subject to the income tax laws of only the following:

15 (A) the State or political subdivision of the State that is the residence of the employee.

16 (B) the State or political subdivision of the State in which the employee earns more  
17 than 50 percent of the pay received by the employee from the carrier.

18 (3) Compensation paid by an air carrier to an employee described in subsection (a) in  
19 connection with such employee's authorized leave or other authorized absence from  
20 regular duties on the carrier's aircraft in order to perform services on behalf of the  
21 employee's airline union shall be subject to the income tax laws of only the following:

22 (A) The State or political subdivision of the State that is the residence of the  
23 employee.

24 (B) The State or political subdivision of the State in which the employee's scheduled  
25 flight time would have been more than 50 percent of the employee's total scheduled  
26 flight time for the calendar year had the employee been engaged full time in the  
27 performance of regularly assigned duties on the carrier's aircraft.

#### 28 California Method

29 R&TC section 17041, subdivision (b), imposes a tax upon the California-source income  
30 of a part-year resident for periods when that person is a nonresident and upon the person's income from  
31 all sources for periods when he or she is a California resident. The rate of tax on part-year residents is  
32 determined by taking into account the taxpayer's worldwide income. Through a nine-step process,  
33 known as the "California Method," the taxpayer's total income is used to compute the appropriate  
34 California tax rate, and that California tax rate is applied only to the California-source income. In  
35 addition, the taxpayer's exemption credits and deductions are pro-rated as part of this process. This  
36 method does not tax out-of-state income; it merely takes out-of-state income into consideration in  
37 determining the tax rate that should apply to the California-source income. (*Appeal of Dennis L. Boone*,  
38 93-SBE-015, Oct. 28, 1993, *Appeal of Louis N. Million*, 87-SBE-036, May 7, 1987). The purpose of the

1 “California Method” is to preserve the progressive nature of the income tax system for all persons, not  
2 just for those who live in California for the full year. By applying graduated tax rates on the basis of  
3 income, this method apportions the tax burden according to the ability to pay. The fundamental fairness  
4 and constitutionality of this method has been upheld by New York’s highest court, and the United States  
5 Supreme Court refused to grant review of the New York decision. (*Brady v. New York* (1992) 80  
6 N.Y.2d 596, *cert. den.* (1993) 509 U.S. 905.) The federal courts have determined that such methods do  
7 not violate federal law or constitutional rights. (See, e.g., *United States v. State of Kansas* (10th Cir.  
8 1987) 810 F.2d 935).

### 9 Burden of Proof

10 An FTB assessment is presumed correct, and a taxpayer has the burden of proving it to be  
11 wrong. (*Todd v. McColgan, supra; Appeal of Ismael R. Manriquez, supra.*) In particular, the FTB’s  
12 determination of residency is also presumptively correct. (*Appeals of John R. Young*, 86-SBE-199,  
13 Nov. 19, 1986.) The party asserting a change in domicile bears the burden of proving such change.  
14 (*Sheehan v. Scott* (1905) 145 Cal. 684; *Appeal of Terance and Brenda Harrison*, 85-SBE-059, June 25,  
15 1985.) If there is doubt on the question of domicile after the facts and circumstances have been  
16 presented, domicile is presumed not to have changed. (*Whitmore v. Commissioner* (1955) 25 T.C. 293;  
17 *Appeal of Anthony J. and Ann S. D'Eustachio*, 85-SBE-040, May 8, 1985.)

### 18 STAFF COMMENTS

#### 19 Domicile and Community Property

20 Based on the authorities cited above, marital property interests in personal property are  
21 determined under the laws of the acquiring spouse’s domicile. In this appeal, appellant-wife was  
22 domiciled in California, a community property state, so she is taxable on her community property  
23 interest in appellant-husband’s wages. In addition, section 21.8.1.15 of the Internal Revenue Manual  
24 states that a nonresident of the United States is subject to community property rules if he or she earns  
25 community property income and is domiciled in a community property state or country, including  
26 Mexico. At the oral hearing, appellants should be prepared to present any additional authority to support  
27 their position that appellant-wife’s community property interest in her husband’s wages is not taxable by  
28 California.

1 Appellants contend that their apportionment of appellant-husband's wages based on  
2 flights in California is a fair and reasonable application of R&TC section 17951 which provides that  
3 nonresidents are only taxed on income derived from California sources. At the hearing, appellants  
4 should be prepared to present any legal authority supporting their interpretation of R&TC section 17951  
5 as contemplating such an apportionment formula.

6 California Method

7 As noted above, the FTB asserts that, after considering only appellant-wife's community  
8 property interest in her husband's wages, it then properly used the "California method" to perform the  
9 calculation of the California tax liability. At the oral hearing, appellants should be prepared to discuss  
10 whether they disagree with the FTB's use of the "California method," as appellants do not expressly  
11 discuss the "California method" in their briefing.

12 ///

13 ///

14 ///

15 MolinaY\_wjs

16

17

18

19

20

21

22

23

24

25

26

27

28