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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**
9

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **SANDY ROWE AND SYLVIA ROWE¹**) Case No. 467791
13

	<u>Year</u>	<u>Proposed</u>
	2005	<u>Assessment²</u>
		\$558

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16 Representing the Parties:

17 For Appellants: Sandy Rowe and Sylvia Rowe
18 For Franchise Tax Board: Dee Garcia, Legal Analyst
19

20 QUESTION: Whether appellant-husband's pension income of \$36,590 (or any portion thereof) is
21 subject to tax by California in 2005.

22 HEARING SUMMARY

23 Background

24 Appellants filed a timely 2005 California resident income tax return (Form 540A),
25 reporting a federal adjusted gross income (AGI) of \$62,785, a California AGI of \$62,124, and a
26

27 ¹ Appellants currently reside in Henderson, Nevada.

28 ² At the oral hearing, the Franchise Tax Board (FTB or respondent) should be prepared to provide the amount of accrued interest.

1 California taxable income of \$14,989. Appellants also reported an \$882 overpayment, which the
2 Franchise Tax Board (FTB or respondent) refunded.

3 Later, the FTB learned that the Internal Revenue Service (IRS) revised appellants' federal
4 AGI from \$62,785 to \$90,405. Subsequently, the FTB issued a Notice of Proposed Assessment (NPA)
5 that (i) conformed to the federal adjustment, and (ii) explained that the information appellants provided
6 on their return showed that appellants were part-year residents of California in 2005. The FTB also
7 recalculated appellants' 2005 California tax liability utilizing a 2005 California non-resident return
8 (Form 540NR), which indicated a total tax owed of \$558. Appellants timely protested the NPA.

9 In their protest letter, appellants stated that (i) all of appellants' 2005 California income
10 was reported on their 2005 return, and (ii) appellants were not California residents when their
11 pension/annuity distributions were made in 2005. Specifically, appellants' protest letter states in part:

12 All income earned in California for the year 2005 was reported. After
13 moving to Henderson, Nevada there were distributions Annuities and
14 reported to the Federal Government. Copies of 1099-R are enclosed. We
15 were not California residents when these distributions were made.

16 When their protest was denied, appellants filed this timely appeal.

17 Contentions

18 On appeal, the only issue apparently in dispute is whether appellant-husband's 2005
19 pension/annuity income (hereinafter "pension income") of \$36,590 is subject to tax by California.³

20 Appellants

21 Appellants assert that appellant-husband retired from his California job in 1999 and
22 resided outside of California (i.e., in Nevada and/or Mexico) during all of 2005. Thus, appellants argue
23 that appellant-husband's pension income of \$36,590 is not subject to tax by California. In addition,
24 appellants argue that under the provisions of Revenue and Taxation Code (R&TC) section 17952.5,
25 appellant-husband's pension is not taxable. As proof that appellant-husband resided outside of
26 California during all of 2005, appellants refer to the following documents:

- 27 • A retirement report dated January 3, 1999, showing that appellant-husband retired

28 ³ Appellants included a revised non-resident return with their Appeal Letter. In that return, appellants appear to indicate that the only amount in dispute is appellant-husband's 2005 pension income of \$36,590.

1 from his California job in January 1999;

- 2 • An electric bill dated December 2004, from a utility company in Mexico;
- 3 • A Nevada deed of trust, indicating that the couple purchased a parcel on or about
- 4 January 10, 2005; and
- 5 • A copy of appellant-husband's 2005 Form 1099-R, which lists a Los Angeles
- 6 address.⁴

7 The FTB

8 On appeal, the FTB (apparently) makes six arguments. First, the FTB contends that if
9 appellant-husband truly changed his domicile before 2005 to Nevada and/or Mexico, he would have
10 taken actions consistent with such a change, such as obtaining a Nevada driver's license or visa. The
11 FTB notes, however, that appellants have not provided such documents.

12 Second, the FTB contends that the Nevada deed of trust and the Mexican utility bill that
13 appellants provided on appeal are inconclusive proof as to appellant-husband's residence in 2005.
14 Specifically, the FTB asserts that: (i) the Nevada deed of trust does not show the date that appellant-
15 husband moved into the Nevada residence; and (ii) the Mexican utility bill merely indicates a temporary
16 absence from California in 2004, whereas the year at issue is 2005 (not 2004).

17 Third, the FTB notes that the address on the 2005 Form 1099-R is irrelevant to the facts
18 at hand because that 1099-R was (probably) mailed in January of 2006, and the year at issue is 2005.

19 Fourth, in the FTB's Opening Brief, the FTB makes the following statements, which
20 seem to imply that the FTB is taking the position that appellants were residents through February or
21 April 2005:

22 As explained on the NOA your absence from California for the period
23 from December 2004 to February 2005 is considered to be a temporary
24 absence. As a result, you were California residents during that period
and your pension income would be considered California sourced
income.

25 . . . your 2004 California tax refund was mailed to you on April 1,
26 2005 to a California address. . . . As such, it appears that you were
27 still residing in California at this time and the pension income you
receive would be California sourced income.

28 ⁴ Appellants assert that the Form 1099-R was sent to their son's address in Los Angeles because appellant-husband was not living in California in 2005.

1 Fifth, the FTB contends that appellant-wife was a California resident for part of 2005,
2 and therefore, her community property portion of appellant-husband's pension income of \$36,590 is
3 taxable as California source income under California's community property laws. As proof that
4 appellant-wife was a resident of California for part of 2005, the FTB states that Employment
5 Development Department (EDD) records show appellant-wife earned wages from the County of Los
6 Angeles during the first two quarters (January through June) of 2005.

7 Finally, in the NOA, the FTB apparently takes the position that income of only \$36,590 is
8 in dispute and that income of \$71,481 (as set forth in Forms 1099-Rs) is not taxable to California:

9 The income of \$71,481 issued on Forms 1099-R was included as
10 income on your federal tax return and is taxable to the federal
11 [government]. This income was earned when you were not a resident
12 of California and is not taxable to California.

13 Appellants' Reply

14 In reply, appellants make the following arguments: First, appellants state that their mail
15 was forwarded from their prior address in Inglewood, California, to their new address in Henderson,
16 Nevada. Thus, appellants (apparently) argue that the EDD records showing an Inglewood address in
17 2005 are not conclusive proof that appellant-husband was a California resident in 2005.

18 Second, appellants dispute that appellant-wife worked in California for the "first two
19 quarters of 2005." Specifically, appellants state in part:

20 We are enclosing copies of our retirement information to clear up the
21 assumption made in the reply brief that Sylvia Rowe worked in California
22 for the "first two quarters of 2005". Sylvia Rowe's retirement form shows
23 it was signed on December 21, 2004. With an effective date of 3-21-2005.
24 Some of the difference in time between the signing date and the effective
25 date was due to vacation time taken before the effective retirement date.

26 Applicable Law

27 Residency

28 California residents are taxed upon their entire net income (regardless of source), while
non-residents are only taxed on income from California sources. (Rev. & Tax. Code, §§ 17041, subds.
(a), (b), and (i); 17951.) Part-year residents are taxed on their income earned while residents of this
state, as well as all income derived from California sources. (Rev. & Tax. Code, §§ 17041, subds. (b) &

1 (i.) However, for purposes of computing the “taxable income of a nonresident or part-year resident”
2 pursuant to R&TC section 17041 (gross income of a nonresident) from sources within California does
3 not include “qualified retirement income” received on or after January 1, 1996, for any part of the
4 taxable year during which the taxpayer was not a resident of this state. (Rev. & Tax. Code, § 17952.5.)

5 A California resident includes (i) every individual who is in this state for other than a
6 temporary or transitory purpose, and (ii) every individual domiciled in this state who is outside this state
7 for a temporary or transitory purpose. (Rev. & Tax. Code, § 17014.)

8 The key question under either facet of the “resident” definition is whether the individual
9 is present in California, or absent from California, for a temporary or transitory purpose. (*Appeal of*
10 *Stephen D. Bragg*, 2003-SBE-002, May 28, 2003.)⁵ This determination cannot be based on the
11 individual’s subjective intent, but must instead be based on objective facts. (*Appeal Anthony V. and*
12 *Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.) In situations where an individual has significant
13 contacts with more than one state, the state with which the individual maintains the closest connections
14 during the taxable year is the state of residence. (Cal. Code Regs., tit. 18, § 17014, subd. (b); *Appeal of*
15 *Raymond H. and Margaret R. Berner*, 2001-SBE-006-A, Aug. 1, 2002.) In the *Appeal of Stephen D.*
16 *Bragg, supra*, the Board compiled a non-exhaustive list of objective factors used to determine with
17 which state an individual maintains his closest connections. Those factors include:

- 18 • The location of all of the taxpayer’s residential real property, and the approximate sizes and
19 values of each of the residences;
- 20 • The state wherein the taxpayer’s spouse and children reside;
- 21 • The state wherein the taxpayer’s children attend school;
- 22 • The state wherein the taxpayer claims the homeowner’s property tax exemption on a
23 residence;
- 24 • The number of days the taxpayer spends in California versus the number of days the taxpayer
25 spends in other states, and the general purpose of such days (i.e., vacation, business, etc.);
- 26 • The location where the taxpayer files his tax returns, both federal and state, and the state of
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28 ⁵ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 residence claimed by the taxpayer on such returns;

- 2 • The location of the taxpayer's bank and savings accounts;
- 3 • The state wherein the taxpayer maintains memberships in social, religious, and professional
- 4 organizations;
- 5 • The state wherein the taxpayer registers his automobiles;
- 6 • The state wherein the taxpayer maintains a driver's license;
- 7 • The state wherein the taxpayer maintains voter registration, and the taxpayer's voting
- 8 participation history;
- 9 • The state wherein the taxpayer obtains professional services, such as doctors, dentists,
- 10 accountants, and attorneys;
- 11 • The state wherein the taxpayer is employed;
- 12 • The state wherein the taxpayer maintains or owns business interests;
- 13 • The indications in affidavits from various individuals discussing the taxpayer's residency;
- 14 • The taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls);
- 15 • The origination point of checking account transactions and credit card transactions;
- 16 • The state wherein the taxpayer holds a professional license or licenses; and
- 17 • The state wherein the taxpayer owns investment real property.

18 The California Court of Appeal and the FTB's regulations define "domicile" as the
19 location where a person has the most settled and permanent connection, and the place to which a person
20 intends to return when absent. (*Whittell v. Franchise Tax Board* (1964) 231 Cal.App.2d 278, 284; Cal.
21 Code Regs., tit. 18, § 17014, subd. (c).) An individual may claim only one domicile at a time. (Cal.
22 Code Regs., tit. 18, § 17014, subd. (c).) While an individual's intent will be considered when
23 determining domicile, intent will not be determined merely from unsubstantiated statements; the
24 individual's acts and declarations will also be considered. (*Appeal of Joe and Gloria Morgan*, 85-SBE-
25 078, July 30, 1985.) In order to change domicile, a taxpayer must actually move to a new residence and
26 intend to remain there permanently or indefinitely. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630,
27 642; *Estate of Phillips* (1969) 269 Cal.App.2d 656, 659.)

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1 Community Property

2 It appears to be undisputed that Nevada (as well as Mexico) adheres to community
3 property laws. Marital property interests in personal property are determined under the laws of the
4 acquiring spouse's domicile. (*Schecter v. Superior Court* (1957) 49 Cal.2d 3, 10; *Rozan v. Rozan* (1957)
5 49 Cal.2d 322, 317). If one spouse is a resident of California and the other spouse is a resident of a
6 community property state, the California spouse is liable for California income tax on his or her one-half
7 community property interest in the other spouse's earnings. (*Appeal of Roy L. and Patricia A.*
8 *Misskelley*, 84-SBE-077, May 8, 1984.)

9 Burden of Proof

10 An FTB's assessment is presumed correct, and a taxpayer has the burden of proving it to
11 be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Ismael R. Manriquez*, 79-SBE-077,
12 Apr. 10, 1979.) In particular, the FTB's determination of residency is also presumptively correct.
13 (*Appeals of John R. Young*, 86-SBE-199, Nov. 19, 1986.) The party asserting a change in domicile
14 bears the burden of proving such change. (*Sheehan v. Scott* (1905) 145 Cal. 684; *Appeal of Terance and*
15 *Brenda Harrison*, 85-SBE-059, June 25, 1985.) If there is doubt on the question of domicile after the
16 facts and circumstances have been presented, domicile is presumed not to have changed. (*Whitmore v.*
17 *Commissioner* (1955) 25 T.C. 293; *Appeal of Anthony J. and Ann S. D'Eustachio*, 85-SBE-040, May 8,
18 1985.)

19 STAFF COMMENTS

20 Retirement Income

21 The FTB should clarify the manner that it has computed appellants' income for the part
22 of 2005 it contends appellants were residents of California (which appears to be through either February
23 or April 2005.) It appears the FTB determined that some of appellants' 2005 retirement income was
24 received while they were not California residents (the \$71,481 per the NOA), while the \$36,590 that
25 appellants appear to contend they received in December of 2005 is included in their California taxable
26 income. The FTB should be prepared to explain the basis for its position, noting appellants contend that
27 they filed their original return reporting all of their income as California income in error. In addition,
28 although Los Angeles County reported on the 1099R that the income was taxable by California, the

1 1099R (nor any other documentation) indicates that the income was distributed in the first part of 2005,
2 when FTB (apparently) contends appellant-husband was a California resident.

3 It appears that the \$36,590 may have been received when appellants were not California
4 residents, as appellants contend they made this “withdrawal” from a retirement account later in the year.
5 Appellants should specify the date they received the retirement distribution and provide substantiating
6 documentation of the date of distribution. Appellants may wish to provide a statement, made under
7 penalty of perjury, as to the circumstances (including the date) of the retirement distribution and their
8 subsequent “withdrawal” of the \$36,590. Staff notes the FTB does not contend that the \$36,590 was
9 distributed during the time it asserts appellants were California residents (through February or April
10 2005), but rather argues that the income is California source income. FTB should be prepared to discuss
11 R&TC section 17952.5, and clarify its arguments with respect to whether the retirement income of
12 \$36,590 is subject to tax by California.

13 Should the Board find that the \$36,590 was received while appellant-husband was a
14 resident of California, the retirement income would be taxable by California. Otherwise, should the
15 Board find that only appellant-wife was a resident of California during all or some part of 2005, then her
16 share of the community property income for 2005 (not otherwise excluded by R&TC section 17952.5)
17 would be includable in her California taxable income. FTB should be prepared to provide a calculation
18 of the tax liability under these circumstances.

19 Residency

20 Appellants should clarify whether they contend that neither of them was a California
21 resident at any time during 2005. While appellants provide specific statements as to where appellant-
22 husband lived in December 2004 and January 2005 (and the rest of 2005), appellants have not clearly
23 stated where appellant-wife resided during those time periods. Appellants also appear to argue that
24 appellant-husband changed his domicile in December of 2004 to Mexico, or alternatively, either
25 appellant-husband or both appellants changed his/their domicile to Nevada in January or February of
26 2005. To support these contentions, staff has enclosed charts for the parties to complete with respect to
27 appellant-husband’s purported move/change of domicile to Mexico; as well as his/their purported
28 move/change of domicile to Nevada. The charts should be returned to the Board with documentation

1 supporting the information provided therein, at least two weeks prior to the oral hearing, as instructed
2 below.

3 Should the Board find that appellant-husband changed his domicile to Mexico in
4 December 2004, then the only basis to find his retirement income subject to California tax would be
5 because the Board finds that appellant-wife was a part-year resident of California, so that her community
6 property share of appellant-husband's income is subject to California tax. As noted above, the FTB
7 should clarify whether, under these circumstances, appellant-husband's retirement income of \$36,590
8 would be includable in any portion of the community property.

9 With respect to whether appellant-wife was a California resident for part of 2005,
10 appellants should provide information and supporting documentation as to where appellant-wife lived
11 during 2005. Staff notes that the "Retirement Benefit Estimate and Election Form" provided by
12 appellants in their reply brief indicates that appellant-wife's retirement date was March 28, 2005, which
13 is crossed out and corrected to March 21, 2005. In addition, the EDD records indicate quarterly "wages"
14 for the first and second quarter of 2005, as well as California withholding amounts. Finally, the W-2
15 issued by the County of Los Angeles to appellant-wife reports wages of \$25,333.86, and California
16 withholding. It is not clear to staff what documentation appellants are relying on to demonstrate that
17 these amounts were paid for accrued vacation instead of wages earned while working in California.
18 Appellants may wish to provide additional evidence in this regard, including but not limited to,
19 statements made under penalty of perjury from third parties with knowledge of the facts, and/or
20 themselves. Should the Board find that appellant-wife was a California resident for part of 2005, then it
21 appears that a portion of appellant-husband's income is subject to tax by California under community
22 property laws, unless it is otherwise excluded by law (i.e., as retirement income from sources within
23 California received for any part of the taxable year during which appellant-husband was not a resident of
24 this state).

25 Alternatively, should the Board find that appellants were both part-year residents through
26 February or April 2005, than appellants' income received while California residents would be subject to
27 tax, apportioned as provided in R&TC section 17041, subdivision (b), except as excluded by law (again,
28 as retirement income from sources within California received for any part of the taxable year during

1 which appellant-husband was not a resident of this state). Again, FTB should be prepared to discuss
2 R&TC section 17952.5, clarify its arguments with respect to whether the retirement income is subject to
3 tax by California, and discuss its calculation of appellants' California tax liability under these
4 circumstances.

5 Pursuant to California Code of Regulations, title 18, section 5523.6, the parties should
6 provide any additional evidence exhibits to Board Proceedings at least 14 days prior to the oral hearing.⁶

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⁶ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 (MIC:80), Sacramento, California, 94279-0080.