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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **JOHN J. SKILLINGS<sup>1</sup>** ) Case No. 515852  
13 )

<u>Year</u>	<u>Proposed Assessment</u>
2005	\$2,910

17 Representing the Parties:

18 For Appellant: Michael S. Sy  
19 For Franchise Tax Board: Claudia L. Cross, Legal Analyst

21 QUESTION: Whether respondent properly determined appellant's tax liability for tax year 2005.

22 HEARING SUMMARY

23 Background

24 Appellant filed a timely California nonresident or part-year resident return (540NR) for  
25 the 2005 tax year. He used the single filing status and reported federal adjusted gross income (AGI) of  
26 \$181,314, California adjustments (subtraction) of \$164,546 and AGI from all sources of \$16,768.

28 <sup>1</sup> Appellant currently resides in Pennsylvania.

1 Appellant claimed itemized deductions of \$20,060 and reported California AGI of \$40,698, California  
2 taxable income of \$20,638, and a zero tax rate. He also claimed income tax withholdings of \$2,551  
3 and an overpayment of \$2,551. Respondent accepted appellant's 2005 return and remitted a refund of  
4 \$2,551 on March 21, 2006. (Resp. Opening Br., p. 1, exhibit A.)

5 Respondent later audited appellant's 2005 return and determined that appellant  
6 incorrectly subtracted wages of \$164,546 from his California AGI when he completed column B of  
7 Schedule CA. (Resp. Opening Br., p. 1, exhibit A.) On March 5, 2009, respondent issued a Notice of  
8 Proposed Assessment (NPA) for tax year 2005, which proposes additional tax in the amount of \$2,910  
9 plus interest. The NPA states that respondent added back the non-California sourced income that  
10 appellant subtracted in column B of Schedule CA of the return and revised his itemized deductions, or  
11 standard deduction, and credit computation based on his revised AGI. (*Id.*, exhibit B.)

12 Appellant protested the NPA. (Resp. Opening Br., p. 2, exhibit C.) Respondent sent  
13 appellant a letter in which it acknowledged receipt of appellant's protest and explained the proposed  
14 assessment; respondent also submitted to appellant a relevant Law Summary. (*Id.*, exhibit D.)  
15 Appellant sent respondent a subsequent letter dated July 2, 2009, in which he stated that the wages  
16 reported in California are not accurate and the company of employment should have only reported two  
17 months, rather than six months because appellant moved out of California at the end of February;  
18 appellant further stated that he needed at least two more weeks to verify the amount of wages. (*Id.*,  
19 exhibit E.) Respondent affirmed the NPA by issuing a Notice of Action dated October 26, 2009. This  
20 timely appeal followed.

### 21 Contentions

22 Appellant contends that respondent erroneously recomputed his tax liability by taking a  
23 ratio of total wages earned in California and gross wages. Appellant contends that respondent is  
24 considering the wrong gross ratio with respect to the wages he earned in California. In his appeal  
25 letter, appellant asserts that in 2005 he was based in Pennsylvania but due to a previous contractual  
26 arrangement the company issued a W-2 Wage and Tax Statement listing California wages, as well as  
27 Pennsylvania wages. (Appeal Letter; Resp. Opening Br., exhibit A, p. 3.) According to appellant's  
28 reply brief, he left California in February 2005 and the wages he subsequently earned were earned in

1 Pennsylvania and thus Pennsylvania-source income. Appellant argues, “The rule states that you pay  
2 state taxes on the state where TP earned it.”

3 Respondent contends that based on the W-2 Wage and Tax Statement attached to his  
4 2005 return appellant incorrectly calculated his 2005 tax liability. Respondent asserts that appellant  
5 may submit a corrected W-2 Wage and Tax Statement for its consideration, if the original one is  
6 incorrect. Otherwise, respondent contends that it properly proposed appellant’s tax liability according  
7 to Revenue and Taxation Code (R&TC) section 17041, subdivision (b), for part-year residents.  
8 Respondent contends that its proposed assessment does not tax out-of-state income, but rather uses  
9 total income to determine the *rate* of tax, and appellant incorrectly excluded the Pennsylvania sourced  
10 income of \$164,546 from the calculation of his tax liability altogether.

### 11 Applicable Law

#### 12 Burden of Proof

13 Respondent’s determinations are generally presumed to be correct and an appellant  
14 generally bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-  
15 109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Unsupported assertions are  
16 not sufficient to satisfy an appellant’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-  
17 SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent, and relevant  
18 evidence showing that respondent’s determinations are incorrect, they must be upheld. (*Appeal of*  
19 *Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to produce  
20 evidence that is within his control gives rise to a presumption that such evidence is unfavorable to his  
21 case. (*Appeal of Don Cookston*, 83-SBE-048, Jan. 3, 1983.)

#### 22 Taxation of Part-Year Residents

23 R&TC section 17041, subdivision (a), imposes a tax upon the entire income, from all  
24 sources, of every California resident. For part-year residents, R&TC section 17041, subdivision (b),  
25 imposes a tax upon their California-source income and all income, regardless of source, earned during  
26 the period when they were a California resident. The tax on part-year residents is determined first by  
27 calculating the tax on all income, regardless of source, as though the taxpayer were a full-year  
28 resident. (*Appeal of Louis N. Million*, 87-SBE-036, May 7, 1987.) The actual California tax liability

1 is then determined by applying the ratio of California AGI to total AGI from all sources. (Rev. & Tax.  
2 Code, § 17041, subd. (b).) The purpose of the method is to apply the graduated tax rates to all  
3 persons—not just those who live in California for the full year; the method does not tax out-of-state  
4 sources of income, but merely takes the out-of-state income into consideration when determining the  
5 tax rate that should apply to California-sourced income.<sup>2</sup> (*Appeal of Louis N. Million, supra.*)

6 To properly assess a part-year resident's tax liability, that taxpayer is required to  
7 calculate three ratios in accordance with R&TC section 17041, subdivision (b). These ratios and the  
8 way they were calculated and applied by respondent to appellant's 2005 income are shown below:

- 9 1. Prorated Deductions. To calculate the percentage of itemized deductions or a prorated  
10 standard deduction, a part-time resident's California AGI is divided by the total AGI.  
11 The resulting rate is then applied to the itemized deductions to find the prorated  
12 deductions.

$$13 \quad \$40,698 \text{ (California AGI)} / \$181,314 \text{ (federal AGI)} = .2245$$

$$14 \quad \$20,060 \text{ (itemized deductions)} \times .2245 = \$4,503 \text{ (prorated deductions)}$$

- 15 2. Tax Rate. To calculate the tax rate for California, a part-time resident's tax on the total  
16 income is calculated as if the taxpayer was a California resident, and then divided by  
17 the taxpayer's total taxable income as if the taxpayer was a California resident. The  
18 resulting rate is then applied to the part-time resident's California taxable income to  
19 determine the taxpayer's California tax.

$$20 \quad \$12,965 \text{ (tax on total income)} / \$161,254 \text{ (total taxable income)} = .0804$$

$$21 \quad \$36,195 \text{ (California taxable income)} \times .0804 = \$2,910 \text{ (California prorated tax)}$$

- 22 3. Prorated Credits. To calculate the percentage of credits allowed on a part-time  
23 resident's California return, the California taxable income is divided by the total  
24

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25 <sup>2</sup> The fundamental fairness and constitutionality of the above-described method of taxing the California-source income of  
26 part-year residents has been upheld by New York's highest court, and the United States Supreme Court refused to hear an  
27 appeal from the New York decision. (*Brady v. New York* (1992) 80 N.Y.2d 596, cert. den. (1993) 509 U.S. 905.) The *Brady*  
28 court reasoned that similarly situated taxpayers were those with the same total income. For example, a nonresident earning  
\$20,000 in New York, but with \$100,000 of reported total income, should be taxed on the \$20,000 of New York-source  
income at the same rate as a New York resident with \$100,000 of total income (and not at the same rate as a New York  
resident with \$20,000 of total income).

1 taxable income. The resulting rate is then applied to the total exemption amount to  
2 find the prorated credits.

3  $\$36,195$  (California taxable income) /  $\$161,254$  (total taxable income) = .2245

4  $\$87$  (total exemption amount) X .2245 =  $\$19.53$  (prorated credits)

5 Where, as in this case, the federal AGI for a taxpayer using single filing status exceeds  
6  $\$143,839$ , the prorated credits are reduced to zero. (Rev. & Tax. Code, § 17054.1.)

7 Where income tax is paid to another state on income that is also subject to California  
8 tax, a taxpayer may be eligible for an Other State Tax Credit (OSTC). (See Rev. & Tax. Code,  
9 §§ 18001, 18002.)<sup>3</sup> For income earned during periods when an individual is a California resident, an  
10 OSTC may be available for net income taxes imposed by and paid to another state for income derived  
11 from sources within the other state (i.e., income that is not California-source income) that is also taxed  
12 by California. (Rev. & Tax. Code, § 18001, subs. (a) & (c).) For income earned during periods  
13 when an individual is not a resident of California, California may provide an OSTC if, among other  
14 things, the other state would allow California residents an OSTC against that state's tax for tax paid to  
15 California. (Rev. & Tax. Code, § 18002, subd. (a)(1).) However, California does not allow  
16 nonresidents an OSTC for taxes paid to a state that allows its residents a credit for taxes paid to  
17 California. (Rev. & Tax. Code, § 18002, subd. (a)(2).) For this reason, a nonresident cannot obtain a  
18 California OSTC for taxes paid to his or her home state if that state would allow the individual an  
19 OSTC for taxes paid to California. (*Ibid.*)<sup>4</sup> No credit will be allowed for income taxes imposed by  
20 another state until such taxes are actually paid. (Cal. Code Regs., tit. 18, § 18001-1, subd. (b).)

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26 <sup>3</sup> See also Instructions for 2005 California Schedule S, Other State Tax Credit, which can be found at:  
27 [http://www.ftb.ca.gov/forms/05\\_forms/05\\_540s.pdf](http://www.ftb.ca.gov/forms/05_forms/05_540s.pdf).

28 <sup>4</sup> Staff notes that Pennsylvania provides a credit to its residents for tax paid to another state and it did so during 2005 as well.  
(See 61 Pa. Code § 111.5.)

1 Receipts of such payments must be filed with the FTB at or prior to the time the OSTC is claimed.

2 *Ibid.*)<sup>5</sup>

3 STAFF COMMENTS

4 Appellant has the burden of providing evidence demonstrating error in respondent's  
5 assessment, which appears to have been based on the W-2 attached to appellant's tax return. At the  
6 hearing, appellant should be prepared to provide any evidence showing that respondent erred in its  
7 calculation of his tax obligation for the 2005 tax year. Appellant may want to be prepared to discuss  
8 and provide supporting evidence regarding the dates, if any, when he resided in California in 2005,  
9 and when he worked in California. If appellant contends that the W-2 Tax and Information Statement  
10 for 2005 attached to his 2005 tax return is incorrect, he should be prepared to provide evidence  
11 demonstrating how it is incorrect and indicating whether he sought a corrected W-2 Tax and  
12 Information Statement (and if so, what was the company's response).<sup>6</sup>

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24 <sup>5</sup> Appellant has not argued on appeal that he is entitled to an OSTC, and it is not clear that he would be entitled to an OSTC.  
25 If the Board determines that respondent is only proposing tax on California-source income as reported on the Form W-2  
26 issued by Merck, then it appears that California's OSTC would not be an issue. If appellant believes he is entitled to an  
OSTC from California, he should be prepared to establish at the hearing that he meets the requirements for California's  
OSTC.

27 <sup>6</sup> Evidence exhibits should be provided to the opposing party and the Board Proceedings Division at least 14 days prior to the  
28 hearing pursuant to California Code of Regulations, title 18, section 5523.6. 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.