

1 Charles E. Potter, Jr.
Tax Counsel
2 Board of Equalization, Appeals Division
450 N Street, MIC:85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 324-2630
Fax: (916) 324-2618

5
6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **BRENT C. WELLING AND**) Case No. 348029
13 **VIKI LEE WELLING¹**)
14 _____)

<u>Years</u>	<u>Proposed Assessment</u>	<u>Late Filing Penalty</u>	<u>Failure to Furnish Penalty</u>
1998	\$188,585	\$47,146	\$47,146
1999	\$39,636	\$9,909	\$9,909
2000	\$192,559	\$48,140	\$48,140

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18 Representing the Parties:

19
20 For Appellants: Minna C. Yang
21 For Franchise Tax Board: John Penfield, Tax Counsel III
22 Terry Collins, Tax Counsel IV

23 QUESTIONS: (1) Whether appellants were California residents during the years at issue.
24

25 _____
26 ¹ Appellants state they reside in Incline Village, Nevada.

27 ² This appeal was heard by the Board on August 14, 2007, at which time the Board requested additional information from the
28 parties regarding appellants' purported change of domicile from California to Nevada. Following additional briefing, respondent accepted the appeal into settlement; when the parties' negotiations did not result in a settlement, the appeal was reactivated and scheduled for the October 6, 2009 calendar. The Board subsequently requested additional briefing from both parties to provide a residency chart summarizing appellants' contacts with California and Nevada.

1 (2) Whether appellants had a California filing requirement, and if so, whether there was
2 reasonable cause for appellants' failure to file timely California returns.

3 (3) Whether appellants complied with respondent's demands for information, and if not,
4 whether there was reasonable cause for such failure.

5 (4) Whether respondent's position with respect to residency is without merit, so that
6 appellants are entitled to attorney fees under Revenue & Taxation Code (R&TC)
7 section 21013.

8 HEARING SUMMARY

9 Procedural Background

10 Respondent contends appellants filed their last joint California resident income tax return
11 for the 1996 tax year and did not file any California returns for 1997 or subsequent tax years.
12 (Respondent's Opening Brief (ROB) at p. 2.) Respondent conducted a residency audit and subsequently
13 issued its Notices of Proposed Assessments (NPAs) on July 6, 2004. (Appellants' Opening Brief (AOB)
14 at p. 1.) Appellants protested the NPAs on or about September 7, 2004. (*Id.*) Respondent then issued
15 its Notices of Action on March 1, 2006. (*Id.*) This timely appeal followed.

16 I. First Issue – Residency

17 Factual Background Prior to the Years at Issue

18 Appellants moved to California in 1975. It is uncontested that they became domiciled in
19 California and remained so until at least 1996. Mr. Welling was an executive with National
20 Semiconductor Corporation until 1981, when he left to help a start-up company called Linear
21 Technology Corporation. Linear Technology held a public stock offering in June 1986. As a founding
22 shareholder of a successful company, Mr. Welling benefited significantly from the public offering, and
23 he decided to retire from private industry in order to pursue his passion for teaching. From 1987
24 through 1996, Mr. Welling taught electrical engineering at San Jose State University.

25 In 1991, appellants purchased a 2,940-square-foot home in Aptos, Santa Cruz County.
26 Appellants lived primarily in the Aptos home at least through 1996, and they continued to own the home
27 and return there periodically through the tax years at issue. From 1982 through late 1995, appellants
28 owned a vacation condo in Donner, California.

1 In December 1995, appellants purchased a 3,491-square-foot home in Incline Village,
2 Nevada. Appellants assert that they purchased the Incline Village home with the intention of making it
3 their retirement residence. (AOB at p. 2.)³

4 Mr. Welling completed his commitment at San Jose State in May 1996. During the
5 remainder of 1996, appellants prepared their new home in Incline Village for occupancy. They moved
6 their clothing, personal effects, and artwork to the Nevada home. They purchased new furniture for the
7 Nevada home, while leaving their old furniture at the Aptos residence. According to appellants, they
8 spent about \$50,000 to \$60,000 to furnish their new home. (AOB, pp. 2-3 & exhibit G.)

9 Appellants submitted documents showing that by the end of 1996, they had:

- 10 • Registered to vote in Nevada. Appellants' voter registration applications listed their new
11 home as their place of residence, and listed an Incline Village P.O. box as their mailing
12 address. (AOB, exhibit H.)
- 13 • Obtained Nevada drivers' licenses. Nevada DMV records show that they used an Incline
14 Village P.O. box as their address. (*Id.*, exhibit I.)
- 15 • Obtained hazard insurance on the Incline Village home. The declarations page of the
16 insurance policy listed the Incline Village home as the covered property, but the Aptos home
17 as appellants' mailing address. (*Id.*, exhibit K.)
- 18 • Opened a checking account in Incline Village. (ROB, exhibit A at p. 29.)

19 Appellants submitted declarations stating that, by the end of 1996, they also had:

- 20 • Registered their automobiles in Nevada;
- 21 • Surrendered their California drivers' licenses;
- 22 • Established a checking account at a bank in Incline Village;
- 23 • Notified creditors, magazines, and friends of their change in address; and
- 24 • Had the Post Office forward mail to Incline Village. (AOB, exhibit J.)

25 ///

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27
28 ³ Appellants provided photographs of the Aptos home and a photo of their home in Incline Village in exhibits provided on
October 1, 2009. Appellants' caption to the Incline Village photograph is that it is a 4 bedroom, 3.5 bath single family, 3
story home with an elevator and 3 car garage, i.e., that it is "Not a 'condo' as depicted by the FTB." (Appellants' Exhibits
submitted October 1, 2009.)

1 Factual Background during the Years at Issue⁴

2 *Real Property*

3

Year	California	Nevada		Colorado
	4	2,940 square foot home in Aptos	3,491 square foot home in Incline Village	4,684 square foot home in Incline Village
5	1998 Yes; claimed homeowner's exemption	Yes; Mr. Welling on board of directors of HOA	--	Yes; Residence of Mrs. Welling's parents
6	1999 Yes; claimed homeowner's exemption	Yes; Mr. Welling on board of directors of HOA	--	Yes; Residence of Mrs. Welling's parents
7	2000 Yes; No homeowner's exemption	Yes; sold in October	Yes; Purchased in October	Yes; Residence of Mrs. Welling's parents

8 *Vehicles (Credit card charges during the years at issue)*

9

Year	State of Registration			
	1990 Nissan	1993 Toyota	1997 Toyota	2000 Mercedes
10	?	?	Nevada	n/a
11	?	?	Nevada	n/a
12	2000 Nevada	Nevada	Nevada	Nevada

13 *Credit Card Transactions*⁵

14 The following table shows credit card charges of selected types that may tend to show
15 how much time appellants spent in California:

16

Year	California Payees (by category)							
	Home & hardware	Auto (fuel, wash, & repair)	Pet products & veterinary services	Recreation (golf, skiing, photography)	Culture (ballet and wineries)	Personal (stylists, spas, cleaners)	Retail	Groceries
17	47	139	30	39	34	30	253	62
18	41	115	26	33	27	20	186	82
19	32	128	17	22	11	6	166	60

20 ⁴ Some of the following information was summarized in Appellants' Residency Chart, provided by appellants, as requested by the Board. Respondent provided a three-page summary of the information the Board requested as part of respondent's residency chart response.

21 ⁵ During the audit, appellants refused to provide credit card statements. Respondent obtained the statements by issuing subpoenas directly to the credit card companies Citibank and United First Bank. Respondent's auditor examined the credit card statements and categorized the activity. (ROB, exhibit A.)

1 According to respondent's auditor, the foregoing transactions generally were in and around Santa Cruz
2 area and the San Francisco Bay Area. (ROB, exhibit A.) The auditor stated that the ski resorts were not
3 on the Nevada border near Incline Village. (*Id.*, exhibit A at p. 38.)

4 The following table shows credit card charges of selected types that may tend to show
5 how much time appellants spent in Nevada:

Year	Nevada Payees (by category)							
	Home & hardware	Auto (fuel, wash, & repair)	Pet products & veterinary services	Recreation (golf, skiing, fishing)	Recreation (festivals)	Personal (stylists, spas, cleaners)	Retail	Groceries
1998	21	30	8	12	--	1	11	41
1999	13	33	8	35	3	3	23	33
2000	32	38	7	23	1	4	20	38

12 The following table shows total credit card charges by location:

Year	California	Nevada	Other	Unknown
1998	756	162	95	13
1999	629	183	111	18
2000	536	188	155	6

17 According to respondent's auditor, transactions in South Lake Tahoe, California, were treated as
18 occurring in Nevada. (ROB, exhibit A at p. 34.)

19 *Medical Services*

20 During the years at issue, appellants continued to see their physicians, including dentists
21 and eye doctors, in California. They stated that it was too hard to find new doctors, so they scheduled
22 their medical appointments to coincide with California visits. (ROB, exhibit A at p. 38.) Appellants
23 gave no information of any medical services in Nevada, and their credit card statements showed no
24 charges to Nevada doctors. (*Id.*, exhibit A at p. 44.)

25 *Physical Presence Charts*

26 The parties' analysis of physical presence differs. Appellants told respondent's auditor
27 that they determined physical-presence from credit card statements, phone bills, a calendar, and other
28 miscellaneous items. Appellants' analysis resulted in the following physical presence charts (AOB,

1 exhibit N):

	<u>Brent Welling</u>		
<u>Year</u>	<u>California Days</u>	<u>Nevada Days</u>	<u>Other Days</u>
1998	160	182	23
1999	201	142	22
2000	133	187	45

	<u>Viki Welling</u>		
<u>Year</u>	<u>California Days</u>	<u>Nevada Days</u>	<u>Other Days</u>
1998	193	139	33
1999	233	110	22
2000	165	144	56

8 Respondent states that its physical presence charts are derived from credit card transactions and
9 appellants' own admissions of presence. (ROB at p. 8, & exhibits F & G.) Respondent offers these
10 presence charts:

	<u>Brent Welling</u>			
<u>Year</u>	<u>California Days</u>	<u>Nevada Days</u>	<u>Other Days</u>	<u>Unknown</u>
1998	189.5	152.5	23	
1999	194	131.5	18.5	22
2000	151	131	43	42

	<u>Viki Welling</u>			
<u>Year</u>	<u>California Days</u>	<u>Nevada Days</u>	<u>Other Days</u>	<u>Unknown</u>
1998	257.5	81.5	26	
1999	300.5	0	14	50.5
2000	297.5	29	38.5	2

17 *Statements from friends and acquaintances*

18 Appellants have submitted letters (not signed under penalty of perjury) from people they
19 know in Aptos, California:

- 20 • A letter dated March 14, 2006, from a neighbor who lived across the street states that
21 appellants moved to Nevada in 1997 and infrequently returned to Aptos. When they did
22 return, it was to see their daughters and grandchildren. (*Id.*, exhibit O.)
- 23 • A letter dated March 13, 2006, from the next-door neighbor states that appellants were rarely
24 at the Aptos house, visiting only a few weeks a year. The neighbor reported a water leak in
25 December 2000 and "more recently," disarmed the alarm system after a series of false
26 alarms. (*Id.*)
- 27 • A letter dated March 19, 2006, from the person who took care of appellants' yard states that
28 appellants rarely visited the Aptos home beginning in 1998. He sent invoices to Incline

1 Village for payment. (*Id.*)

- 2 • A letter dated March 23, 2006, from a postal worker in Aptos states that she knew appellants
3 from working their postal route. The postal worker suggested that appellants remove their
4 physical mailbox, which they did. She also states that appellants had all mail forwarded to
5 Incline Village. (*Id.*, exhibit Q.)

6 Appellants also have submitted letters (not signed under penalty of perjury) from people they know in
7 Incline Village, Nevada:

- 8 • A letter dated March 22, 2006, from a neighbor in Incline Village states that Mr. Welling was
9 on the board of directors of the homeowners association and was active in promoting causes
10 that were important to residents. (*Id.*, exhibit P.)
- 11 • A letter dated March 24, 2006, from a next-door neighbor states that Mr. Welling was active
12 in the homeowners association and attended all board meetings. The neighbor played golf
13 with Mr. Welling several times from 1996 to 2000. (*Id.*)
- 14 ▪ *Miscellaneous Activity during the Years at Issue*
 - 15 ▪ The record reveals the following miscellaneous activity during the years at issue:
- 16 • Mr. Welling had a Nevada resident fishing license and California nonresident fishing
17 licenses. (AOB, exhibit M.)
- 18 • On March 8, 1998, the *San Francisco Examiner* published a letter-to-the-editor from Mr.
19 Welling regarding California's smoking laws. Mr. Welling signed the letter as "Brent
20 Welling Aptos." (ROB, exhibit P.)
- 21 • From 1996 through 1999, Mr. Welling held a note receivable with Grace Cathedral in San
22 Francisco. On his federal tax returns, he reported \$29,000 per year in interest received on the
23 note. It was paid in full in 2000. (*Id.*)
- 24 • Appellants' children and grandchildren continued to reside in California and appellants
25 visited them regularly.

26 Applicable Law – Residency

27 *Residency Definition*

28 California imposes income tax liability upon the entire taxable income of every resident, and

1 upon the entire taxable income derived from sources in California of every nonresident or part-year resident.
2 (Rev. & Tax. Code, § 17041, subds. (a) & (b).) California has two distinct subtests for determining whether
3 an individual is a California resident. Under R&TC section 17014, subdivision (a)(1), an individual will be a
4 California resident, if the individual is in California for other than a temporary or transitory purpose."
5 (the In-State Residency Test). Under R&TC section 17014, subdivision (a)(2) an individual will be a
6 California resident if they are (a) domiciled in this state; and (b) whose visits outside of California were
7 for a temporary or transitory purpose" (the Domicile Residency Test.) The purpose of the two-pronged
8 definitional approach to defining residency is to treat all individuals as residents if they are physically
9 present in California enjoying the benefits and protections of its laws and government. (*Id.*; *Appeal of*
10 *Stephen D. Bragg*, 2003-SBE-002, May 28.)

11 *Burden of Proof*

12 As a general matter, respondent's assessment is presumed correct and the taxpayer has the
13 burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Ismael R. Manriquez*,
14 79-SBE-077, Apr. 10, 1979.) In particular, the Board has long held that respondent's determination of
15 residency is presumed correct. (*Appeal of John R. Young*, 86-SBE-199, Nov. 19, 1986.) Affidavits and
16 declarations from an individual's friends, family, and business associates stating that the individual was
17 in California for temporary or transitory purposes ordinarily are sufficient to overcome a presumption of
18 residency. (Cal. Code Regs., tit. 18, § 17014, subd. (d); *Appeal of Raymond H. and Margaret R. Berner*,
19 2001-SBE-006-A, Aug. 1, 2002.)

20 *The Concept of Domicile under the Domicile Residency Test*

21 California's income tax regulations define "domicile" as "the place in which a man has
22 voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with
23 the present intention of making a permanent home" (Cal. Code Regs., tit. 18, § 17014, subd. (c).)
24 California courts have similarly described domicile as "the concurrence of physical presence in a
25 particular place with the intention to make that place one's home." (*Estate of Glassford* (1952) 114
26 Cal.App.2d 181, 186.) The California Supreme Court has described the difference between "domicile"
27 and "residence" thusly:

28 "[D]omicile is the one location with which for legal purposes a person is
considered to have the most settled and permanent connection, the place where he

1 intends to remain and to which, whenever his is absent, he has the intention of
2 returning, but which the law may also assign to him constructively; whereas
3 'residence' connotes any factual place of abode of some permanency, more than a
4 mere temporary sojourn." (*Smith v. Smith* (1955) 45 Cal.2d 235, 239.)

5 Although a person may have several "residences" for different legal purposes, he or she may have only
6 one domicile at a time. (*Id.*)

7 In order to change one's domicile, a person must actually move to a new state and intend
8 to remain there permanently or indefinitely. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 642.)
9 The person's actions must clearly indicate a current intention to abandon the old domicile and establish a
10 new one. (*Chapman v. Superior Court* (1958) 162 Cal.App.2d 421.) While an individual's intent will
11 be considered when determining domicile, intent will not be determined merely from unsubstantiated
12 statements; the individual's acts and declarations will also be considered. (*Appeal of Joe and Gloria*
13 *Morgan, supra.*) 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, supra.*) If there is
15 doubt on the question of domicile after presentation of all the facts and circumstances, domicile is
16 presumed not to have changed. (*Whitmore v. Commissioner* (1955) 25 T.C. 293; *Appeal of Anthony J.*
17 *and Ann S. D'Eustachio*, 85-SBE-040, May 8, 1985.)

18 *Factors Affecting Residency under the In-State Residency and Domicile Residency Tests*

19 Under both tests for residency, a key question is whether the individual is present in
20 California (In-State Residency Test), or absent from California (the Domicile Residency Test), for a
21 temporary or transitory purpose. (Rev. & Tax. Code, § 17014, subd. (a); *Appeal of Stephen D. Bragg,*
22 *supra.*) The "temporary or transitory" nature under both tests cannot be based on the individual's
23 subjective intent, but must instead be based on objective facts. (*Appeal of Stephen D. Bragg, supra;*
24 *Appeal Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.) In situations where an
25 individual has significant contacts with more than one state, the state with which the individual
26 maintains the closest connections during the year at issue is the state of residence. (Cal. Code Regs., tit.
27 18, § 17014, subd. (b); *Appeal of Raymond H. and Margaret R. Berner, supra.*) In the *Appeal of*
28 *Stephen D. Bragg, supra*, the Board recently compiled a non-exhaustive list of objective factors used to
determine the state with which an individual maintains his or her closest connections. Those factors

1 include:

- 2 • The location of all of the taxpayer's residential real property, and the approximate sizes and values of each of the residences;
- 3 • The state wherein the taxpayer's spouse and children reside;
- 4 • The state wherein the taxpayer's children attend school;
- 5 • The state wherein the taxpayer claims the homeowner's property tax exemption on a residence;
- 6 • The taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls);
- 7 • 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.);
- 8 • The location where the taxpayer files his tax returns, both federal and state, and the state of residence claimed by the taxpayer on such returns;
- 9 • The location of the taxpayer's bank and savings accounts;
- 10 • The origination point of the taxpayer's checking account transactions and credit card transactions;
- 11 • The state wherein the taxpayer maintains memberships in social, religious, and professional organizations;
- 12 • The state wherein the taxpayer registers his automobiles;
- 13 • The state wherein the taxpayer maintains a driver's license;
- 14 • The state wherein the taxpayer maintains voter registration, and the taxpayer's voting participation history;
- 15 • The state wherein the taxpayer obtains professional services, such as doctors, dentists, accountants, and attorneys;
- 16 • The state wherein the taxpayer is employed;
- 17 • The state wherein the taxpayer maintains or owns business interests;
- 18 • The state wherein the taxpayer holds a professional license or licenses;
- 19 • The state wherein the taxpayer owns investment real property; and
- 20 • The indications in affidavits from various individuals discussing the taxpayer's residency.

21 Every individual who spends in the aggregate more than nine months (i.e., 274 days) of
22 the taxable year within California shall be presumed to be a resident. (Rev. & Tax. Code, § 17016.)
23 This presumption may be overcome by satisfactory evidence that the individual is in the state for a
24 temporary or transitory purpose. (*Id.*)

25 Contentions – Residency

26 *Respondent*⁶

27 Respondent appears to be relying on the Domicile Residency Test in this appeal and
28 believes it is the relevant law.⁷ Respondent's position is that the Domicile Residency Test governs

⁶ Given the nature of the residency discussion, staff believes it is useful to summarize respondent's contentions first.

⁷ See ROB at pp. 14-15.

1 situations where individuals have clearly establish a California domicile and then looks at the "out-
2 bound" visits (in this case to Nevada) to determine whether such visits were for a temporary or transitory
3 purpose. (ROB at p. 15.) Respondent's approach is to contend that appellants have not changed their
4 domicile and then to present factors to demonstrate that all visits to Nevada were for a temporary or
5 transitory purpose. Respondent notes that appellants sold their prior vacation retreat in Donner and
6 purchased a new home without a private yard in Incline Village. Respondent then asserts that, while
7 appellants established formalistic connections with Nevada, appellants maintained personal, social, and
8 residential connections to California from 1998 through 2000, including the substantial and regular use
9 of the family home in Aptos. As such, respondent contends that appellants did not change their
10 domicile, but merely upgraded their vacation home. (ROB at pp. 16-17.)

11 In support of its argument that appellants remained domiciled in California, respondent
12 emphasizes the following connections with this state:

- 13 • Appellants retained their Aptos home and returned there often.
- 14 • Appellants' children and grandchildren live in the Santa Cruz and Bay areas, and appellants
15 spent substantial time with them.
- 16 • Appellants admit to using almost exclusive use of California medical and dental services.
- 17 • Most of appellants' pet-related expenses were in California.
- 18 • Appellants' retail and grocery transactions are predominantly in California.
- 19 • Appellants used their vehicles in California regularly. Purchases of fuel and maintenance
20 services were predominantly in California.

21 Having concluded that appellants remained domiciled in California, respondent next
22 contends that appellants' visits to Nevada were for temporary and transitory purposes. (ROB at pp. 22-
23 25.) Respondent states that appellants' most significant connection with Nevada was their home in
24 Incline Village, but further asserts that the significance of that connection is greatly reduced by other
25 factors. Specifically:

- 26 • Appellants had a long history of vacationing in the Tahoe area, and their purchase of the
27 Incline Village home was simply a continuation of that activity.
- 28 • Appellants kept the Aptos house furnished and maintained where they resided during

1 portions of April, May, November and December. (AOB at p. 3.)

- 2 • Appellants had regular, substantial, and voluntary physical presence in California.

3 Respondent acknowledges other connections with Nevada, including drivers' licenses and voter
4 registration. However, respondent argues that those connections should be given little weight because
5 they are formalistic, easily-controlled, and require only a one-time effort to establish. Appellants' more
6 intimate and substantial connections, which should be given more weight, were with California.

7 *Appellants*

8 Appellants contend they established their domicile in Nevada by the end of 1996. In this
9 regard, they assert that once they fully furnished the Incline Village home, they had no intention of
10 returning to California except as seasonal visitors. In support of their assertion that they intended a
11 permanent move to Nevada, appellants cite:

- 12 • The statements in letters from neighbors and acquaintances in Aptos;
13 • They surrendered their California drivers' licenses and obtained Nevada drivers licenses;
14 • They registered their cars in Nevada;
15 • They registered to vote in Nevada;
16 • Their involvement in the Incline Village homeowners association;
17 • The Nevada bank accounts; and
18 • Mail forwarding to Nevada.

19 Appellants also emphasize that they discontinued their employment in California before moving to
20 Nevada. Mr. Welling stopped teaching at San Jose State, and Mrs. Welling did not make use of a
21 California nursing license, so that they could permanently retire to Nevada. They argue that an
22 indefinite, full-time retirement in California would have made them California domiciliaries, so in this
23 case, their indefinite, full-time retirement to Nevada made them Nevada domiciliaries.

24 Having established a Nevada domicile, appellants argue, their return trips to California
25 were for temporary and transitory purposes. They assert that each trip to California was for a specific
26 purpose, after which they would return to Nevada. Appellants offer the following explanations of their
27 presence in and contacts with, California during the years at issue:

28 ///

- 1 • The Aptos home:
- 2 ▪ Appellants had the financial resources to travel frequently and own multiple homes.
- 3 They kept the Aptos home as a vacation residence for themselves and their family.
- 4 Appellants were not aware of their duty to terminate the homeowner's exemption when
- 5 they moved. When they learned of that duty, they promptly cancelled the exemption.⁸
- 6 • California credit card transactions:
- 7 ▪ As noted above, Mrs. Welling came to California to be with her daughters during and
- 8 after their pregnancies; at those times, she often did grocery shopping for her daughters
- 9 and their families.
- 10 ▪ Appellants would do much of their own shopping in California because they were not
- 11 satisfied with the retail choices in Incline Village.
- 12 ▪ While in Aptos, appellants had access to a number of specialty stores and would make
- 13 more transactions on any given day as compared to Incline Village.
- 14 ▪ Appellants assert that many of the transactions were made over the internet with
- 15 California businesses, and do not reflect physical presence in California. For example,
- 16 transactions with wineries were wine-club memberships, automatically billed to a credit
- 17 card, whereby the winery would deliver wine to appellants' home in Nevada.
- 18 ▪ Appellants incurred substantial credit card charges while visiting tourist locations such as
- 19 Disneyland, San Diego, and Napa; those visits were clearly temporary or transitory in
- 20 nature.
- 21 ▪ The large number of gasoline charges is actually indicative that appellants were traveling
- 22 away from home.
- 23 • Physical presence in California:
- 24 ▪ In January, March, and September of 1998, Mrs. Welling came to California to spend
- 25 time with her daughters (who were pregnant at the time) and to be present for the birth
- 26

27 ⁸ In support of their argument that the homeowner's exemption is not determinative, appellants refer to the Board's summary
28 decision in the *Appeal of Robert J. Murphy*, Case No. 255127, decided on January 25, 2005. As a summary decision, the
Murphy decision cannot be afforded any precedential weight. (*Appeal of Charles W. Fowlks*, opn. on pet. for reh'g., 88-SBE-
023-A, Oct. 31, 1989.)

1 of her grandchildren. Mrs. Welling stayed for an extended period in September and
2 October of 1998 because her daughter was hospitalized with a difficult pregnancy.

- 3 ■ Beginning in April 1999, appellants spent six weeks in Aptos to plan and attend their
4 daughter's wedding.
- 5 ■ In September 1999, Mrs. Welling spent 10 days in California to care for her daughter,
6 who was bedridden while undergoing chemotherapy.
- 7 ■ From October 1999 through January 2000, appellants stayed in Aptos (which had a
8 better climate than the mountains) while Mr. Welling was undergoing treatment for
9 Bilateral Avascular Necrosis.
- 10 ■ From May through August 2000, appellants stayed in San Diego intermittently for an
11 aggregate 29 days to spend time with a close friend, who was dying of cancer, and to
12 arrange and attend his funeral.
- 13 ■ In May and June 2000, Mrs. Welling again came to California to care for her pregnant
14 daughter and to witness the birth of a grandchild.
- 15 ■ In October 2000, their daughter had a biopsy and their son-in-law had back surgery;
16 Mrs. Welling came to California to care for the family.
- 17 ■ In December 2000, a pipe broke in the kitchen of the Aptos home and caused extensive
18 water damage. Mr. Welling returned to the Aptos home to supervise clean-up and repair
19 work.
- 20 • California medical services: Appellants retained their California physicians and dentist
21 for regular check-ups because they had difficulty locating new physicians in Nevada who
22 were open to taking new patients. Appellants did, however, use local doctors in Nevada
23 when they needed immediate treatment.
- 24 • Presence of close family in California: The fact that appellants' children and
25 grandchildren lived in California is not determinative. Appellants' children were adults
26 with families of their own; appellants cannot and do not dictate where their adult children
27 live. If appellants' children chose to live in Nebraska instead of California, then
28 appellants would have traveled to Nebraska to be with their children in time of need –

1 that would not make appellants Nebraska residents.

- 2 • Use of pet services in California: Appellants state that when they went on long trips, they
3 would use long-term pet boarding in Aptos.
- 4 • Use of salons and spas in California: Given that appellants used their Aptos home as a
5 vacation home, they argue it is reasonable to expect that they took advantages of spas and
6 salons while vacationing in California. In addition, many of the transactions were merely
7 purchases of hair-care products.
- 8 • The letter-to-the-editor: Mr. Welling's use of "Aptos" in his signature was intended to
9 increase the likelihood of the letter getting published, not as a statement of residency.

10 Contentions made upon Supplemental Briefing

11 After the original oral hearing, in a letter dated October 9, 2007, the Board requested
12 additional briefing from appellants to submit any additional evidence, along with related arguments and
13 explanations, that they feel demonstrates their change in domicile from California to Nevada.

14 *Appellants' Domicile Contentions*

15 In response, appellants provided a supplemental brief on November 26, 2007. In this
16 brief, appellants contend respondent failed to adequately distinguish between the concepts of domicile
17 and residency. (Appellants' Supplemental Brief (ASB) at p. 1.) Appellants contend that domicile is a
18 relationship created by law between an individual and a particular location and is inclusive of residence,
19 having a broader more comprehensive meaning. (ASB at pp. 1-2.) Appellants contend respondent has
20 failed to acknowledge the "true and substantial significant of 'intent.'" (ASB at p. 2.) Appellants state
21 respondent limited its analysis to the objective factors and failed to give adequate consideration and
22 weight to appellants' intentions. (*Id.*)

23 Appellants contend the definition of domicile found in California Government Code
24 sections 242 and 243 apply for income tax purposes, (citing *Nobel v. Franchise Tax Bd.*, (2004) 118 Cal.
25 App. 4th 560), but that the Government Code definition is confusing since it uses the term "residence"
26 as synonymous with "domicile." (ASB at p. 3.) Thus, appellants contend the following rules apply: (1)
27 The place of residence is the place where one remains when not called elsewhere for labor or other
28 special or temporary purposes, and to which he or she returns in seasons of repose; (2) There can be only

1 one domicile [residence]; (3) a domicile [residence] cannot be lost until another is gained; (4) Domicile
2 can only be changed by the union of act and intent; and (5) a married person has the right to retain his or
3 her legal domicile [residence] in California notwithstanding the legal residence or domicile of his or her
4 spouse. (*Id.*) Appellants contend California tax regulation 17014, subdivision (c) defines "domicile" as
5 the place where an individual has his true, fixed, and permanent home and principal establishment, and
6 to which place he has, whenever he is absent, the intention of returning. (*Id.*) Appellants contend this
7 regulatory definition is not inconsistent with the Government Code definition. (*Id.*)

8 Appellants contend the Nevada residence satisfies the definition of domicile under
9 Regulation 17014, subdivision (c) and Government Codes sections 243 and 244, since that is the place
10 where appellants remain for indefinite periods, when not called elsewhere or for other special or
11 temporary purposes, the Nevada residence is appellants' only intended domicile. (*Id.*)

12 Appellants contend respondent fails to fully acknowledge the limitation of the concept of
13 "the most settled and permanent connection" when applying this aspect of domicile. (ASB at p. 4.)
14 Appellants contend that the courts have been consistent in acknowledging that "the most settled and
15 permanent connections" are related to "ones location for legal purposes." (*Id.*) Thus, respondent's
16 contention that the presence of appellants' adult children in California, as a factor in determining
17 domicile/residency is too broad. (*Id.*) Appellants assert that since a taxpayer has no responsibility to his
18 or her adult children and no ability to control where they reside, then such cannot be a factor
19 determinative of domicile. (*Id.*) Thus, appellants contend that adult children do not create a settled and
20 permanent connection to a state for legal purposes. (*Id.*) In sum, appellants contend the determination
21 of domicile necessitates a determination of intention, whereas residency (as a separate concept) may be
22 determined based solely on the objective facts. (ASB at p. 5.)

23 Appellants contend that where a person maintains two residences, determination of
24 domicile depends to a great extent upon a person's intentions. (*Id.*) Appellants, citing *Briggs v. Sup. Ct.*
25 *of Alameda County*, (1946) 81 Cal. App. 2d 240, contend that many courts place greater importance on
26 the intent requirement, than the residence requirement, holding that the controlling factor in determining
27 a person's domicile is his intent. (ASB at p. 6.) Appellants also cite *Chambers v. Hathaway*, (1921) 187
28 Cal. 104, for the proposition that where a person has two dwellings in different places and resides a part

1 of the time in one place and a part of the time in another alternatively, the question of which of the two
2 places is his legal domicile is almost altogether a question of intent. (*Id.*) Appellants contend that in
3 order to change domicile, the Board has required a showing that the taxpayer (1) left the state without
4 any intention of returning; and (2) was located elsewhere with the intention of remaining there
5 indefinitely (citing *Appeal of Terrance and Brenda Harrison*, 85-SBE-059, June 25, 1985). Appellants,
6 citing *Appeal of Joe and Gloria Morgan*, 85-SBE-078, July 30, 1985, state that in determining the
7 taxpayer's intent, "the acts and declarations of the party must be taken into consideration." (ASB at p.
8 7.) Appellants contend that during the course of the audit, appellants gave detailed descriptions to
9 respondent as to how and why appellants chose to establish Nevada as their domicile. Appellants
10 claimed that exhibit Q of their supplemental brief contains a declaration of Dr. James Freeman
11 indicating that appellant-husband declared his intention to Dr. Freeman when resigning from his position
12 at San Jose State University. (*Id.*) Appellants also claim exhibit P to their supplemental brief contains a
13 declaration from Ms. Elizabeth Harter, indicating that appellants hired her to help them relocate to a new
14 home. (*Id.*) Thus, appellants contend they demonstrated an intent to occupy the Nevada residence as
15 their domicile. (ASB at p. 9.)

16 In addition to the intent to change domicile to Nevada, appellants contend a change in
17 residence or domicile requires a "union of act and intent," (citing Government Code section 244,
18 subdivision (b) and *Chambers v. Hathaway, supra*). Thus, to change domicile, appellants contend there
19 must be a move to a new locality. (*Id.*) Appellants contend that the fact that one's original residence
20 was in a certain locality carries no presumption of its continuance as against positive evidence that the
21 person deliberately changed residence (citing *In re Mosier's Estate*, (1966) 246 Cal.App.2d 164).
22 Appellants also contend that generally whether a person is domiciled in a certain place is a mixed
23 question of law and fact, (citing *In re Weed's Estate* (1898) 120 Cal. 634) and that the burden of proof is
24 on the party asserting a change of domicile to provide the acquisition of a domicile in another place
25 (citing *Sheehan v. Scott* (1905) 145 Cal. 684 and *Zeilinga v. Nelson* (1971) 4 Cal. 3d 716.) (ASB at p.
26 10.)

27 Appellants agree that abandonment of one's current domicile requires a "mental"
28 intention to abandon the current domicile and then to engage in objective manifestations of such

1 intention. (*Id.*) Appellants contend they met their burden of proof with respect to the issue of intent by
2 an affirmative declaration to establish Nevada as their state of domicile, as well as multiple declarations
3 of persons known by them. (ASB at p. 11.) Appellants also state that the following evidence also
4 supports their domicile change: (1) acquisition of a new residence; (2) moving their personal property to
5 that residence; (3) voter registration in Nevada; (4) drivers' licenses and vehicle registration in Nevada;
6 (5) Nevada bank accounts; (6) resignation of post with San Jose State University; social contacts (such
7 as being on the Board of Directors of the HOA in Incline Village, member of Nevada golf club; Nevada
8 church membership); (7) Nevada insurance agents; (8) mail and call forwarding to Nevada and removal
9 of a mailbox at the Aptos residence; and (9) Nevada resident fishing licenses (California nonresident
10 fishing licenses).⁹ (ASB at pp. 11-13.) Appellants believe the proof of their intent coupled with these
11 overt acts demonstrate they changed their domicile to Nevada. (ASB at p. 14.)

12 Appellants contend they provided the available financial information they had regarding
13 the audit period and years before the audit period. (*Id.*) Appellants indicate that the following exhibits
14 were attached to their supplemental brief:¹⁰

15 Exhibit A – summary of appellants' presence in California in 2001;

16 Exhibit B – health care records from Incline Health Center;

17 Exhibit C – correspondence from Santa Cruz Tax Assessor regarding the homeowner's exemption;

18 Exhibit D – copies of correspondence from respondent and appellant-wife regarding her tax status;

19 Exhibit E – copies of hospital records for Good Samaritan Hospital confirming the number of
20 medical emergencies involving appellants' daughter and family;

21 Exhibit F – copies of correspondence from various financial institutions confirming access to past
22 financial records is no longer available;

23
24 ⁹ Appellants concede Mrs. Welling retained her California nursing license, but that she never practiced nursing in California
25 and retained it out of caution as their daughter was chronically ill in California. (ASB at p. 12.)

26 ¹⁰ The exhibits to appellants' supplemental brief were not attached to the copy on file. Respondent's comment regarding these
27 exhibits was "...appellants provide a list of documents they have 'provided.' Apparently these have been previously
28 submitted..." (Respondent's Reply to Appellants' Supplemental Brief (RRASB) at p. 3.) To the extent appellants indicate
new information was contained in the exhibits related to their supplemental brief (i.e., information that was not summarized
above), appellants should provide a copy of such exhibits at least 14 days prior to the oral hearing to Claudia Madrigal, Board
Proceedings Division, State Board of Equalization, P.O. Box 942879 (MIC: 80), Sacramento, CA 94279-0080

1 Exhibit G – summary of activity, check register and copies of checks for the First Interstate Account
2 for 1997;

3 Exhibit H – copy of check register and bank statements for the Wells Fargo Bank account for 1998;

4 Exhibit I – copy of check register for the Wells Fargo account for a portion of 1999;

5 Exhibit J – summary of activity and copies of check registers for the Wells Fargo account for 2000;

6 Exhibit K – summary of activity and statements for the SAFECO investment account for the years
7 1999 and 2000;

8 Exhibit L – summary of activity account statements and check registers for the Dreyfus account for
9 the years 1996 through 2000;

10 Exhibit M – summary and account activity for the Aptos residence PG&E bills;

11 Exhibit N – a phone call log and copies of AT&T records indicating that calls to the Aptos residence
12 were forwarded to the Nevada residence.

13 Appellants contend respondent relies heavily on the number of days spent in California
14 and that respondent in arguing its position attempts to distract from the more relevant issues by
15 criticizing the quality of the financial records available. (ASB at p. 15) Appellants believe respondent's
16 method of calculating the number of days in California "is flawed and that their methodology overstates
17 the number of days present in the state of California." (*Id.*) Appellants contend that respondent's
18 conclusion that appellants retained domicile in California gives little weight to appellants' intent:

19 In doing so, FTB attempts to apply only a fact based analysis. Essentially, the FTB
20 applied a residence analysis to determine domicile. The determination of domicile
requires a determination of intent, whereas residency is merely a question of fact.

21 (*Id.*) Appellants contend that although the number of days in California remains in conflict, each visit
22 was for a "temporary or transitory" purpose. Thus, appellants claim they are nonresidents for income
23 tax purposes. (ASB at pp. 16-17.)

24 *Respondent's Response to Appellants' Supplemental Brief*

25 Respondent contends that it has properly distinguished between the concept of domicile
26 and residency and that the terms and meaning of a "resident" and "domicile" are contained in R&TC
27 section 17014 and the regulation thereunder. (RRASB at p. 1.) Respondent disagreed with appellants'
28 legal argument that *Nobel v. Franchise Tax Bd., supra*, requires the Government Code section definition

1 of "domicile" to be used for tax purposes. Respondent contends that the court stated that these
2 definitions are relevant, because every statute is to be read with reference to the entire scheme of law,
3 but did not direct that the Government Code section definitions be used instead of Regulation 17014,
4 subdivision (c). (RRASB at p. 2.)

5 Respondent also contends that "domicile is 'intent' as reflected by action." (*Id.*)
6 Respondent disagrees with appellants' characterization of its (respondent's) domicile position, i.e., that
7 respondent "places too much emphasis on the 'actions' element in derogation of the 'intent' element."
8 (*Id.*) In response, respondent quotes from the *Nobel v. Franchise Tax Bd.* opinion:

9 ... A resident's intent to move unsupported by physical acts is not the determinative
10 factor as to whether a taxpayer has changed his or her residence or domicile for tax
11 purposes. Physical presence in the state has been 'a factor of greater significance than the
12 mental intent or outward formalities of ties to another state.' (*Whittell, supra*, 231 Cal.
13 App. 2d at p. 285.) To the extent residence and domicile depend upon intent, 'that
14 intention is to be gathered from one's acts.' (*Chapman v. Superior Court* (1958) 162 Cal.
15 App. 2d 421, 426 [328 P.2d 23]; see Hellerstein & Hellerstein, *State Taxation* (3d ed.
16 2003) *Personal Income Taxes*, ¶ 20.03, p. 20-15 ['The cases addressing the question of
17 whether a taxpayer is domiciled in the state are legion, and they *generally focus on the*
18 *objective indicia of the taxpayer's subjective intention to make a particular state his or*
19 *her home*'].)

20 (*Nobel* at p. 567-68; as quoted by respondent, RRASB at p. 2 (emphasis added by respondent).)

21 Respondent states that this quote places the matter or intent versus action in context, but it also
22 emphasizes the important of physical presence as a factor. (RRASB at p. 2.)

23 STAFF COMMENTS

24 *The Domicile Residency Test*

25 If the Board determines that appellants (1) were domiciled in California and (2) that their
26 stays in Nevada were for temporary or transitory purposes, then appellants will be deemed residents
27 under the Domicile Residency Test.

28 *Domicile*

There is no dispute that appellants retired from employment, purchased property in
Incline Village, moved some of their personal belongings there, and set up some formal ties to Nevada
through voter registration and drivers licenses. Those are indications that appellants moved to Nevada
with the intent to retire there permanently. Those facts, combined with appellants' declarations under
penalty of perjury and letters from acquaintances, support appellants claim that they changed their

1 domicile to Nevada.

2 Respondent argues that several factors indicate that appellants did not abandon their
3 California domicile to make Nevada their permanent home. For example, respondent emphasizes that
4 appellants retained ownership of the Aptos home. Appellants counter that their financial resources
5 allowed them to travel frequently and own multiple homes, and they wanted a place to stay while
6 visiting family in California. Retaining a home in California supports respondent's contention that
7 appellants did not sever their ties with California, but actually ensured appellants permanent ability to
8 come back to California at any time. Respondent also emphasizes appellants had strong reasons to come
9 back to California; namely, strong family ties that caused appellants to return frequently to be with their
10 children and grandchildren. Appellants' counterargument is that their children are adults who can
11 choose to live where they want and that since they live in California, that is where appellants visited
12 them. It appears to staff that respondent has pointed to connections with California that supports its
13 position that appellants did not abandon their California domicile. On the other hand, appellants have
14 offered reasonable explanations for why their California home and California family ties did not prevent
15 them from changing domicile. At the hearing, appellants should be prepared to identify the precise date
16 their domicile changed to Nevada,¹¹ and respondent should be prepared to identify why domicile did not
17 change. Finally, if the Board still has doubts on the question of domicile after presentation of all the
18 facts and circumstances, domicile is presumed not to have changed. (*Whitmore v. Commissioner* (1955)
19 *25 T.C. 293; Appeal of Anthony J. and Ann S. D'Eustachio, supra.*) In addition, when a taxpayer has
20 two dwellings (in this case one in Aptos, California and another in Nevada) and it cannot be clearly
21 determined which is his domicile, the domicile remains at the one first established until it can be clearly
22 shown that the prior domicile has been changed. (*Appeal of Anthony, J. and Ann A. D'Eustachio,*
23 *supra.*)

24
25
26 ¹¹ Appellants and respondent apparently agree that at some point appellants were domiciled in California. Since an individual
27 cannot be domiciled in two states at once, appellants bear the burden of proof to establish that they changed their domicile.
28 (*Sheehan v. Scott* (1905) 145 Cal. 684; *Appeal of Terance and Brenda Harrison*, 85-SBE-059, June 25, 1985.) Respondent
contends that although requested, appellants did not provide any documentary evidence regarding physical presence in
Nevada and California in 1997 to support appellants' claim that they changed domicile that year. (ROB at p. 7, lines 18-19.)
Appellants contend that such information related to 1997 was not requested because respondent was not auditing that tax
year.

1 *The In-State Residency Test*

2 Even if no residency is determined under the Domicile Residency Test, residency can be
3 found if the appellants were in California during the tax years for other than a temporary or transitory
4 purpose. Respondent points out that appellants spent substantial amounts of time in California.
5 Appellants note that, for the most part, the time spent in California was grouped in short periods,
6 followed by a return to Nevada. In addition, appellants have offered explanations for the temporary
7 nature of each visit. Moreover, many of the visits were not to Aptos; they appear to be limited trips to
8 Disneyland and San Diego. Again, in judging the facts of this case, the Board may want to consider the
9 facts with a view towards identifying whether California or Nevada was the location where appellants
10 had the closest connections during the taxable years at issue. In addition, staff notes that California's
11 rationale for identifying individuals as residents and seeking to tax them upon their entire income is
12 because residents are physically present in the state enjoying the benefits and protection of its laws and
13 government – this principle does not apply to individuals (nonresidents) who are here temporarily
14 (visitors, etc.) or for domiciliaries who are outside this state for other than a temporary or transitory
15 purpose.¹²

16 Given the foregoing, staff has attempted to identify and summarize the specific legal
17 issues, which if answered would assist in determining whether appellants were residents:

18 *Domicile Residency Test*

- 19 1. Determine whether appellants changed their domicile to Nevada, and if so, when.
20 a. If the Board has doubts on the question of domicile after presentation of all of the
21 facts and circumstances, then domicile is presumed not to have changed.¹³

22 *In-State Residency Test*

- 23 2. If the Board determines that appellants changed their domicile to Nevada, then the
24 Board should determine whether appellants were in California for other than a
25 temporary or transitory purpose (based on the contact factors discussed above).

26
27
28 ¹² Cal. Code Regs., tit. 18, § 17014, subd. (a).

¹³ *Appeal of Anthony J. and Ann S. D'Eustachio, supra.*

1 Board staff suggests the parties be prepared to address the following questions:

- 2 1. Be prepared to identify and discuss each particular contact factor (location of houses,
3 expenses, number of days spent at each location, by tax year) and discuss the relative
4 weight that should be assigned to that factor.
- 5 2. In addition, discuss the weight the Board should give to the following contacts within
6 California:
- 7 a. Location of children and grandchildren, who are often visited, coupled with
8 maintaining a home in California for such visits.
- 9 b. Location of medical doctors.
- 10 c. Location of shopping.
- 11 3. The parties should discuss whether discrete temporary visits to California can become
12 so frequent and on-going that they can be aggregated to show that on the whole an
13 individual's purpose within the state was for more than a temporary or transitory
14 purpose?

15 **II. Second Issue – Late Filing Penalty**

16 Factual Background – Late Filing Penalty

17 Appellants filed California resident income tax returns through the 1996 tax year.
18 Beginning with the 1997 tax year, appellants concluded that they no longer had a California filing
19 requirement because they were no longer California residents. Thus, appellants did not file California
20 returns for the years at issue.

21 Respondent, having concluded that appellants were California residents, further
22 concluded that they had a California filing requirement. Respondent therefore assessed penalties for
23 failure to file returns for 1998, 1999, and 2000.¹⁴

24 Applicable Law – Late Filing Penalty

25 R&TC section 19131 imposes a penalty when a taxpayer fails to file a return on or before
26 the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

27 _____
28 ¹⁴ Respondent apparently did not audit 1997 because appellants had little or no taxable income during that year, so the audit would not have been cost-effective.

1 To establish reasonable cause, the taxpayer "must show that the failure to file timely returns occurred
2 despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an
3 ordinary intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of*
4 *Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

5 The "uninformed and unsupported belief" that a return need not be filed, no matter how
6 sincere is not reasonable cause. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967.)
7 Reliance on erroneous advice from a tax professional is not reasonable cause where an unambiguous
8 deadline is at issue. (*United States v. Boyle* (1985) 469 U.S. 241; 249-250.) However, reliance on
9 advice regarding a matter of substantive tax law, such as whether it is necessary to file a return, may be
10 reasonable cause. (*Id.*, at p. 250.)

11 Contentions – Late Filing Penalty

12 Appellants assert that they had a reasonable belief that they were not residents and did
13 not have filing requirements. They therefore contend that there was reasonable cause for their failure to
14 file returns.

15 Respondent contends that appellants were California residents and, therefore, they had a
16 filing requirement for the years at issue. Appellants' belief that they were not residents does not excuse
17 their failure to file because ignorance of the law or misunderstanding of the filing requirement is not
18 reasonable cause.

19 STAFF COMMENTS

20 Late Filing Penalty

21 If the Board concludes that appellants were not California residents, then appellants had
22 no filing requirement and the late filing penalty is moot. If the Board concludes appellants were
23 California residents, then appellants must be prepared to demonstrate reasonable cause existed for not
24 filing, e.g., that they relied upon professional tax advice to the effect that they were Nevada residents, to
25 the extent any such advice was requested and provided.

26 **III. Third Issue – Failure to Furnish Information Penalty**

27 Factual Background – Failure to Furnish Information Penalty

28 The following chronology describes actions and events that are relevant to the failure to

1 furnish information penalty:

- 2 • At some point, respondent sent letters to appellants asking them to file 1997 and 1998
3 California returns. Appellants apparently replied to the notices by indicating that they were
4 residents of Nevada.
- 5 • May 12, 1999: respondent sent a letter, regarding the 1997 tax year, that stated:
6 "Thank you for your reply to our notice requesting that you file a California
7 personal income return. Based upon the information provided, no further
8 action is required at this time." (Appellants' Reply Brief (ARB) exhibit BB.)
- 9 • On January 4, 2000, respondent sent a substantially similar letter regarding the 1998 tax year.
10 (*Id.*, exhibit CC.)
- 11 • June 4, 2001: respondent notified appellants that it would be examining their filing
12 requirement for 1998 through 2000. The notice asked appellants to complete FTB Form
13 3805F, *Information Concerning Residency Status*. (*Id.*, exhibit DD.)
- 14 • June 11, 2001: appellants completed Form 3805F (essentially a residency questionnaire) and
15 returned it to respondent. (*Id.*, exhibit EE.)
- 16 • July 27 and August 25, 2001: appellants wrote to respondent and explained why they
17 believed they were Nevada residents. (ROB, exhibit M at pp. 4-9.) Appellants described
18 their activities in California and Nevada, their real and personal property, and their
19 employment history. Appellants listed their financial accounts but gave no specific financial
20 data. (*Id.*)
- 21 • August 21 and November 31, 2001: respondent asked appellants to provide copies of bank
22 and credit card statements for the years at issue. (*Id.*, exhibit N.)
- 23 • January 30, 2002: Mr. Welling called respondent's auditor. (*Id.*, exhibit O at p. 1.) It appears
24 there was a productive discussion. However, Mr. Welling stated that he would not provide
25 financial records or federal tax returns. (*Id.*)
- 26 • April 12, 2002: appellants met with respondent's auditor at the Incline Village home. (*Id.* at
27 pp. 2-4.) It appears there was again a productive discussion, but again appellants refused to
28 provide financial records or federal tax returns. (*Id.* at p. 2) Mr. Welling asked the auditor

1 what triggered the audit, and the auditor replied that was proprietary information. (*Id.* at p.
2 4.)

- 3 • April 17, 2002: the auditor called Mr. Welling to state that she would again be requesting
4 financial documents and would not accept a sampling. (*Id.* at p. 6.) She warned that she
5 would be issuing a formal demand and would impose penalties if he failed to comply. Mr.
6 Welling stated that he would not respond to further requests and that he would be hiring an
7 attorney. Mr. Welling also stated that he would spend what it took to fight this, that he
8 would sue for damages, and that he wanted the auditor and her supervisor fired. Mr. Welling
9 stated that respondent had no right to request financial information. He again asked why he
10 was chosen for audit, and the auditor again replied that was proprietary information. Mr.
11 Welling asked for the supervisor's name, which the auditor gave him. (*Id.*)
- 12 • April 18, 2002: Mr. Welling left a voicemail message for the auditor's supervisor stating that
13 he would not comply with respondent's request for information. (*Id.* at p. 5.)
- 14 • April 24, 2002: the auditor's supervisor called Mr. Welling. (*Id.* at p. 7.) Mr. Welling
15 expressed concern about the audit process and indicated that he thought he had supplied
16 sufficient information. Mr. Welling expressed concern about the confidentiality of any
17 information he provided. The supervisor explained that respondent would only use the
18 information in the course of its examination, that it had strict rules to protect taxpayer
19 confidentiality, and that staff was subject to dismissal for inappropriate use of confidential
20 information. The supervisor stated that, if appellants did not supply the requested
21 information, respondent would obtain it by subpoena. (*Id.*)
- 22 • May 17, 2002: respondent issued a formal legal demand to appellants for the production of
23 bank and credit card statements. The demand letter warned of the imposition of a penalty
24 under R&TC section 19133. (*Id.*, exhibit N.)
- 25 • Appellants then hired a Nevada attorney (not the same as the representative on appeal.)
- 26 • December 12, 2002: a new auditor and appellants' attorney spoke by telephone. The
27 conversation appears to have been cordial and productive. The attorney explained that Mr.
28 Welling was not angry at any individual, but was frustrated with the process. (*Id.*, exhibit O

1 at pp. 8-12.) The attorney stated that he knew the audit would go more quickly if appellants
2 provided their financial information, but they felt it violated their privacy and were
3 uncomfortable turning over the information. The auditor explained that she needed to
4 examine financial records to determine whether there were connections with, or physical
5 presence in, California. The attorney stated that he wanted respondent to reduce the scope of
6 its request and that appellants may try to quash any subpoenas. (*Id.*)

- 7 • When it was clear that appellants would not comply with respondent's demands for
8 information, respondent issued subpoenas and obtained financial information directly from
9 appellants' credit card companies. Appellants did not try to quash the subpoenas.
- 10 • Respondent issued proposed assessments that included penalties for failure to furnish
11 information under R&TC section 19133.

12 Applicable Law – Failure to Furnish Information Penalty

13 Respondent is tasked with the administration and enforcement of the Personal Income
14 Tax Law. (Rev. & Tax. Code, § 19501.) Respondent has the express authority to demand the
15 production of any information that "may be relevant" to its administration of the law. (Rev. & Tax.
16 Code, § 19504, subd. (a).) Respondent has the power to serve a subpoena "on any person for any
17 purpose." (*Id.*, subd. (b).) Where no return is filed, respondent the express authority to make an
18 assessment based upon "any available information." (Rev. & Tax. Code, § 19087.)

19 A penalty is imposed when the taxpayer fails to comply with respondent's written request
20 for "any information" unless that failure is due to reasonable cause. (Rev. & Tax. Code, § 19133.) For
21 purposes of R&TC section 19133, "reasonable cause" means the taxpayer's circumstances prevented him
22 from complying with respondent's demand, despite the exercise of ordinary care. (*Appeal of Elmer R.*
23 *and Barbara Malakoff*, 83-SBE-140, June 21, 1983; *Appeal of Stephen C. Bieneman*, 82-SBE-148, July
24 26, 1982.)

25 Contentions – Failure to Furnish Information Penalty

26 Appellants contend that they substantially complied with respondent's requests for
27 information. To the extent they failed to provide information, they contend the failure was due to
28 reasonable cause. Appellants contend that they were not intentionally uncooperative, but were just

1 people who moved to Nevada with a good-faith belief that they no longer had a California filing
2 requirement.

3 Appellants point out that, before the audit that led to this appeal, they had received prior
4 inquiries from respondent, to which they replied, and each time respondent told appellants that no
5 further action was necessary. Given the simple resolutions to those prior inquiries, appellants assert that
6 they believed the notice of the examination for 1998-2000 was just another routine inquiry which did not
7 require action on their part.

8 Appellants further contend that their failure to comply was reasonable because
9 respondent repeatedly failed to explain why appellants were chosen for audit, why specific financial
10 information was necessary, and why respondent had the authority to demand that information.
11 Appellants reasonably believed that they had provided respondent with sufficient information to make a
12 residency determination and, not only was the financial information unnecessary, but disclosing it would
13 have violated their privacy rights.

14 Finally, appellants assert that they could not comply with the demands for financial data.
15 They routinely destroy their bank and credit card statements and thus no longer had custody of the
16 requested documents.

17 Respondent contends that it properly assessed the penalty because appellants repeatedly
18 failed to comply with respondent's written requests for information. Respondent issued a formal legal
19 demand for bank and credit card statements, but appellants continued to expressly refuse to cooperate.
20 Respondent asserts that appellants' repeated refusals were imprudent and unreasonable, and demonstrate
21 willful neglect on their part. Respondent contends that there is no authority for the proposition that
22 appellants' refusals to comply constitute reasonable cause.

23 STAFF COMMENTS

24 Failure to Furnish Information Penalty

25 As with the late filing penalty, this penalty is moot if the Board determines that appellants
26 were not California residents. The penalty is calculated as a percentage of tax liability; if there is no
27 liability, then there is no penalty. (Rev. & Tax. Code, § 19133.)
28

1 If the Board concludes that appellants were California residents, then appellants must be
2 prepared to show that they were unable to comply with respondent's demands for information. It is not
3 sufficient that appellants were reluctant to comply, no matter how strongly they believed that it was not
4 necessary to comply with respondent's demands. It is clear that respondent has broad authority to
5 demand and obtain the information it believes is relevant to determining a taxpayer's liability under the
6 Personal Income Tax Law. (Rev. & Tax. Code, §§ 19087, 19133, & 19504.) Staff is unaware of any
7 precedent for abating the penalty under R&TC section 19133 due to a taxpayer's belief, reasonable or
8 otherwise, that respondent did not have the authority to demand particular information. Rather, Board
9 precedent holds that the taxpayer's circumstances must have prevented compliance with respondent's
10 demands. (*Appeal of Elmer R. and Barbara Malakoff, supra*; *Appeal of Stephen C. Bieneman, supra*.)
11 Therefore, appellants' refusals to comply with respondent's demands for information cannot be
12 reasonable cause. They must instead show that they attempted to comply, but their circumstances
13 prevented them from doing so.

14 Appellants' only argument that may indicate an inability to comply with respondent's
15 demands is their argument that they did not have custody of certain financial records. Staff notes that
16 appellants did not make that argument during audit; rather, they expressly refused to comply because
17 they apparently believed respondent did not need, or could not request, the records in question.

18 **IV. Fourth Issue – Appellants' Request for Attorney Fees**

19 In appellants' opening brief, appellants requested attorney fees in this appeal under
20 R&TC section 21013 on the grounds that respondent's action in this appeal was unreasonable. (AOB at
21 p. 1.) Respondent contends, however, that this claim is premature because such a request may only be
22 made after the decision of the Board has become final. (ROB at p. 28.)

23 Applicable Law – Request for Attorney Fees

24 Under R&TC section 21013, a taxpayer is entitled to be reimbursed for any reasonable
25 fees and expenses related to an appeal before the State Board of Equalization if the Board, in its sole
26 discretion, finds that the action taken by respondent was unreasonable. California Code Regulations title
27 18, (CCR) section 5603, subdivision (b) provides the procedures for making such a claim, requiring that
28 the claim form be filed within one year after the decision of the Board becomes final. Subdivision (c) of

1 CCR section 5603 provides that a claim is ineligible and must be dismissed "when the Board previously
2 disposed of the case at hearing without granting the petition for redetermination or claim for refund."

3 STAFF COMMENTS

4 Request for Attorney Fees

5 CCR section 5603, subdivisions (b) and (c), indicate that a claim for reasonable attorney's
6 fees may be made only after a decision on the appeal has become final. At the oral hearing, appellants
7 should be prepared to discuss why their claim for attorney's fees is not premature pursuant to CCR
8 section 5603.

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