

1 Steven Mark Kamp
Tax Counsel III
2 Board of Equalization, Appeals Division
450 N Street, MIC:85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 322-8525/203-5661
Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **ANDRA R. SACHS**¹) Case No. 446027
13)

	<u>Year</u>	<u>Assessment</u>	
		<u>Tax</u>	<u>Post Amnesty Penalty</u>
	2000	\$688,300.00	\$50,379.30

17 Representing the Parties:

18 For Appellant: Walter Weiss, Attorney at Law

19 For Franchise Tax Board: Christopher Haskins, Tax Counsel III

21 **QUESTION:** (1) Whether appellant was a California resident at the time she received the proceeds
22 from her sale of \$9,000,000 worth of Flashcom stock on the apparent February 11,
23 2000 sale date?

24 **HEARING SUMMARY**

25 While living in California in 1998, appellant Andra R. Sachs and her then husband Bradford H.

26 ///

28 ¹ Appellant claims to have been a resident of Nevada in the tax year (2000), but the Franchise Tax Board Notice of Action was sent both to her attorney in Los Angeles and to her personally at an address in Irvine, Orange County, California.

1 Sachs (“Mr. Sachs”)² incorporated Flashcom, Inc. (“Flashcom”), a provider of high-speed Digital
2 Subscriber Line broadband Internet service to homes and businesses.³ In May 1998, Flashcom sold
3 22,500,000 Flashcom shares to appellant and Mr. Sachs in exchange for services both provided to the
4 company. Appellant’s then-husband served as the Chief Executive Officer⁴, and appellant was Chief
5 Marketing Officer of Flashcom until July or August 1999, when according to her, “I was fired by my ex-
6 husband.”⁵ On February 8, 2000, appellant and Flashcom entered into a Stock Purchase Agreement
7 whereby Flashcom agreed to purchase 1,612,903 Flashcom shares held by appellant for \$9,000,000,
8 under the following stipulation stated in the Stock Purchase Agreement:

9
10 “[t]he purchase and sale of the Common Stock shall take place at the offices of Stradling,
11 Yocca Carlson & Rauth, Counsel to the Company, in Newport Beach, California, at 5:00
12 p.m. on February 11, 2000 or at such other time and place as the Company and Seller
13 shall mutually agree.”⁶

14 The immediately succeeding language in the Stock Purchase Agreement states:

15 ///

16
17 ² In 1999 (which is not at issue in this appeal), appellant and her husband filed a married filing jointly status California
18 partial-year resident return, stating that they became Nevada residents on November 1, 1999. In 2000 (the year at issue in
19 this appeal), appellant Andra R. Sachs filed a head of household status California return stating that she became a Nevada
20 resident on February 28, 2000. See Respondent’s Opening Brief, Exhibit T, page 3, Part I, line 3 (1999 return, Schedule
21 CA); Exhibit U, page 3, Part I, line 3 (2000 return, Schedule CA). Mr. Sachs is not a party to this appeal. In the Orange
22 County (California) Superior Court, Mr. Sachs filed for dissolution of marriage from appellant on February 28, 2000, and the
23 dissolution became final on May 24, 2000. See Respondent’s Opening Brief, Exhibit D. Appellant was awarded custody of
24 the couple’s three minor children (two of whom were of school age in 2000), as well as two parcels of California real
25 property, a specific address on Ridgeline Drive in Newport Beach and a specific address on Coast Highway in Sunset Beach.

26 ³ Respondent’s Opening Brief, Exhibit A (*San Jose Mercury News*, December 18, 2000, “Stocks.comment” column by Scott
27 Herhold.); Exhibit B (Flashcom, Inc. Securities and Exchange Commission EDGAR-Plus Type S-1 filed May 12, 2000). The
28 predecessor of Flashcom was an unspecified Nevada corporation that incorporated on May 18, 1998. In March 1999,
Flashcom stated that it was “reincorporated as a Delaware corporation.” Respondent’s Opening Brief, Exhibit B.

⁴ Respondent’s Opening Brief, Exhibit B, page 3, Item 15 (Securities and Exchange Commission EDGAR-Plus Form Type
S-1 filing by Flashcom, Inc. on May 12, 2000).

⁵ Respondent’s Opening Brief, Exhibit F, page 6, item 3, a response by appellant to a Franchise Tax Board information and
documents request (IDR), where appellant lists the date of this event as “July of 1999.” In Exhibit C, page 4 (an earlier
response by appellant to another Franchise Tax Board IDR), appellant stated: “I was fired by Flashcom in August, 1999.”
According to Exhibit A to Respondent’s Opening Brief, the *San Jose Mercury News* reported on December 18, 2000 that Mr.
Sachs “lost his job as CEO [Chief Executive Officer], [and was] replaced in February [2000] by Richard Rasmus, a former
executive with Comcast Corp., the big cable television company.” The *San Jose Mercury News* article of December 18, 2000
states that appellant was the chief marketing officer of Flashcom.

⁶ Respondent’s Opening Brief, Exhibit B, pages 6-7 (Flashcom Securities and Exchange Commission Form S-1 filing dated
May 12, 2000). The quoted language appears on page 7, paragraph 2 (“Closing”).

1 “At the Closing, the Seller [appellant] shall deliver to each Lender and to the Company
2 certificates representing the shares of Common Stock that Seller is selling, against
3 payment of the purchase price therefore by check, wire transfer, cancellation of
indebtedness, or such other form of payment as shall be mutually agreed upon by such
Lender, the Company and Seller.”

4 There is no evidence that the sale was consummated on any date other than February 11, 2000,⁷ or at
5 any location other than the Newport Beach, CA law office mentioned in the Stock Purchase Agreement.
6 On May 11, 2000, Flashcom filed the Stock Purchase Agreement reflecting the February 8-11 share
7 buyback transaction with the U.S. Securities and Exchange Commission EDGAR electronic reporting
8 system in a document that uses the past tense to describe the transaction.⁸ In her federal 2000 return,
9 appellant listed the capital gain from the Flashcom shares sale as \$8,050,000.⁹ Using the automatic
10 extension statute, appellant on August 15, 2001 timely filed a 2000 California 540NR partial year
11 resident return that in Schedule CA listed her total capital gains as \$7,924,715; after other adjustments,
12 her total Schedule CA Section B (“Adjustments to Income”) amount was \$7,373,054.¹⁰ In Schedule
13 CA, appellant in line 3 stated that she became a Nevada resident on February 28, 2000; in Step 1 of her
14 return, appellant listed her address as a specific address on Emerald Heights Street in Las Vegas,
15 Nevada. Appellant did not do the California income ratio calculation required in Line 34 of Schedule
16 CA, but in Form 540NR lines 25b, 27 and 59, listed her “tax” and “tax due” amounts as zero.

17 _____
18 ⁷ According to Respondent’s Opening Brief, page 1: 8-9, “[a]ppellant’s 2000 federal return lists an \$8,050,000 gain from the
19 sale of the Flashcom stock.” The federal Form 1040, Schedule D requires taxpayers to report both the purchase and sale date
20 of capital assets. However, neither respondent nor appellant have included the 2000 federal return or Schedule D thereof.
21 Respondent’s Opening Brief, Exhibit U, includes only the California return, even though appellant was required to attach her
22 federal return to this document (and presumably did so). In addition, appellant gave respondent a signed written
23 authorization to obtain from the U.S. Bankruptcy Court hearing the Flashcom bankruptcy copies of documentation regarding
24 “[v]erification of the cost basis and the date the sales proceeds were received.” See Respondent’s Opening Brief, Exhibits C,
25 pages 3 (FTB request 1.a) and 4 (appellant’s second response “a” which says “signed and returned”). However, respondent
has not included any of this information in any of its briefs, and neither has appellant.

26 ⁸ Respondent’s Opening Brief, Exhibit B, pages 1, 6-7 (Flashcom Securities and Exchange Commission Form S-1 filing
dated May 12, 2000). On page 1, the filing states: “In February 2000...under such agreement [Flashcom] entered into a Stock
Purchase Agreement with Andra Sachs, pursuant to which we repurchased 1,612,903 shares of common stock held by Ms.
Sachs for a purchase price of \$9,000,000.”

27 ⁹ According to appellant’s information response, the cost basis was \$950,000 and the sales price was \$9,000,000. See
28 Respondent’s Opening Brief, Exhibit F, page 3, response to Question 1.a.

¹⁰ Appellant’s total capital gains in 2000 were \$7,924,715 (line 13), plus \$79,358 in line 14 other gains; \$20,341 in ordinary
dividends; \$107,344 in taxable interest income; plus \$37,000 in California disallowed net operating losses, offset by
\$795,704 in losses on line 17 from rental real estate, royalties, S corporations, partnerships and trusts. See Respondent’s
Opening Brief, Exhibit U, page 3.

1 Therefore, appellant requested a refund of \$280,000 in overpaid tax.¹¹ Respondent audited appellant's
2 2000 return and after receiving complete responses to its two information and document requests (IDR)
3 from appellant, determined that appellant was a California resident when she sold the Flashcom shares
4 and hence for 2000 owed \$688,300 in unpaid tax, based on the net capital gain from the Flashcom shares
5 sale and another \$112,757 in disallowed capital losses.¹² Respondent issued a Notice of Proposed
6 Assessment (NPA) and after considering appellant's arguments and evidence, issued a Notice of Action
7 (NOA). This timely appeal followed.

8 Because 2000 was a pre-2003 year, and because appellant did not apply for amnesty,
9 make amnesty payments, or enter into an amnesty installment payment agreement by the 2005 deadline
10 dates for these transactions, respondent's NOA imposed an estimated post-amnesty penalty of
11 \$50,379.30, based on 50 percent of the interest due between April 15, 2001 and March 31, 2005. The
12 actual post-amnesty penalty is not imposed until the assessment becomes final, and this Board has no
13 jurisdiction to consider the penalty until that time and then only after payment in full by appellant. See
14 Revenue & Taxation Code (R&TC)¹³ section 19777.5, subdivision (a)(2). In her Appeal Letter,
15 appellant does not address this issue, provide any basis for Board jurisdiction over this issue at this time,
16 or explain why she believes the penalty was incorrectly calculated.

17 Respondent's NOA also imposes the following interest amounts:

- 18 (1) \$100,758.60, for the period between April 15, 2001 and February 15, 2003; and
19 (2) \$149,427.09, for the period between December 23, 2005 and March 21, 2008.

20 The NOA states that pursuant to section 19116, interest was suspended between February 16, 2003 and
21 December 22, 2005. In her Appeal Letter and subsequent briefing, appellant does not raise any issues
22 related to the imposition of interest or its calculation, other than to make the following general
23

24 _____
25 ¹¹ See Respondent's Opening Brief, Exhibit U, page 2, lines 56, 58 and 74.

26 ¹² According to respondent, appellant's "Opening Brief does not address this [capital loss adjustment] issue", and respondent
27 therefore "deem[s] it waived." Respondent's Opening Brief, page 1, footnote 1. Appellant's Appeal Letter states on page 2
28 thereof: "Additionally, Taxpayer will be able to substantiate her tax basis is higher than the amount allowed to her by the
Franchise Tax Board per its audit done on July 26, 2005." However, appellant does not state what her claimed basis is, nor
does she explain why any California basis should be different from the basis reported to the IRS on her 2000 Form 1040
Schedule D.

¹³ All statutory references are to the Revenue and Taxation Code unless otherwise noted.

1 statement: "Taxpayer should not have been taxed, nor should have penalties or interest assessed on the
2 deficiency..." Nor does appellant attempt to demonstrate any ministerial or managerial act by
3 respondent that would allow interest abatement under the only applicable statute, section 19104.¹⁴

4 Factual Background Prior to the Year at Issue (1994-1999)

5 As discussed above, in 1998 appellant and her then-husband incorporated Flashcom, and
6 appellant went to work for Flashcom as Chief Marketing Officer. Appellant also served on the
7 Flashcom Board of Directors until 1999. In her 1998 California resident tax return, filed late on
8 March 15, 2000, appellant listed her address as a specific address on Ridgeline Drive in Newport Beach,
9 California. The signature on this 1998 return is dated January 14, 2000, and the return is marked as
10 received on March 15, 2000.¹⁵

11 In 1999, appellant acquired a California Driver's License that was valid through 2001.¹⁶

12 In 1999, appellant claims to have lived part time in both California (at the Ridgeline
13 Drive, Newport Beach address) and in Nevada (at the Emerald Heights Street address in Las Vegas).¹⁷
14 In her 1999 California partial year resident return, appellant stated under penalty of perjury that she
15 changed her residence to Nevada on November 1, 1999.¹⁸

16 In 1994, Minority Electronics, Inc. incorporated in California. Appellant is the President
17 of this entity, which was not suspended by the California Secretary of State until 2002.¹⁹ In 1999,
18 appellant was the sole shareholder of Call Home, Inc., which she describes as a telemarketing company.
19 The State Board of Equalization issued a seller's permit to Call Home, Inc. at an Irvine, California

20 _____
21 ¹⁴ Interest has already been suspended for the 18 months between February 16, 2003 and December 22, 2005, pursuant to
22 section 19116.

23 ¹⁵ See Respondent's Opening Brief, Exhibit S.

24 ¹⁶ See Respondent's Opening Brief, Exhibit P (California Department of Motor Vehicles driving record printout). The
25 license was issued to appellant using an address on Suzi Lane in Westminster, Orange County, California; *ibid.* As noted
26 below, this address is described by the Franchise Tax Board from LEXIS public records as a commercial building.

27 ¹⁷ See Respondent's Opening Brief, Exhibit F.

28 ¹⁸ Respondent's Opening Brief, Exhibit T, page 3 (Schedule CA). As discussed *infra*, appellant's
2000 return states that she began Nevada residency on February 28, 2000.

¹⁹ See respondent's Opening Brief, Exhibit O.

1 address when it commenced business in 1999.²⁰

2 Factual Background During the Year at Issue (2000)

3 On January 14, 2000, appellant signed a late 1998 California resident tax return in which
4 she swore under penalty of perjury that her business address was in Newport Beach, California.

5 Appellant filed this return and it was received by respondent on March 15, 2000.

6 On February 8, 2000, appellant entered into the stock purchase agreement with Flashcom
7 discussed above. As discussed above, the agreement required the purchase to close at 5:00 p.m. on
8 February 11, 2000 at a specific law office located in Newport Beach, California, unless the parties
9 mutually agreed to another date, time or location. There is no evidence of any such agreement to change
10 the sale date and location. Appellant's stock sale date should be listed on her federal Schedule D for
11 2000, but neither respondent nor appellant has provided this document.

12 Appellant filed a 2000 partial year resident return on August 15, 2001 listing a Las Vegas
13 address as her residence, and stated in Schedule CA thereof that she became a Nevada resident on
14 February 28, 2000.²¹

15 Appellant's husband (Mr. Sachs) filed for dissolution of marriage on February 28, 2000,
16 and the dissolution became final on May 24, 2000. The judgment of dissolution of marriage was entered
17 by the Orange County, California Superior Court. It awarded appellant custody of the three minor
18 children, two of whom attended school in California during 2000. It also awarded appellant two
19 properties: the Ridgeline Drive Newport Beach address listed as her residence on her 1998 and 1999
20 returns, and a property located at an address in Sunset Beach, California.²²

21 Appellant acquired three other California properties either individually or with Mr. Sachs
22 in 2000: a Pelican Drive address in Newport Beach; a property in Tustin; and a property on Langley
23 Avenue in Irvine, which appellant acquired through the Max Singer Partnership.

24
25
26 ²⁰ See Respondent's Opening Brief, page 4: 4-7 and Exhibits C (appellant's responses to question 3.a), M (State Board of
Equalization records from LEXIS), and N (federal form 1120S and Schedule K-1 for Call Home, Inc.).

27 ²¹ See Respondent's Opening Brief, page 5: 9-12, footnotes 39-40, and Exhibit U, page 3.

28 ²² See Respondent's Opening Brief, page 2: 5 – 9, and Exhibits D (final judgment of dissolution of marriage), E (Proposed
Second Amended Complaint in Sachs v. Solomon Smith Barney, page 2), and F (appellant's response to Franchise Tax
Board information request).

1 Appellant owns a combined 66.66 percent interest in the Max Singer Partnership, 33.33
2 percent individually and 33.33 percent through the Marlene Mass Trust²³, which is 100 percent owned
3 by appellant.²⁴ The remaining 33.34 percent interest in the Max Singer Partnership is owned by Mr.
4 Sachs.²⁵ The Max Singer Partnership is in the business of leasing real estate, and owned seven
5 California properties in 2000.²⁶

6 Appellant is the sole shareholder of Memory Max, Inc., a Nevada corporation which
7 owned a California liquor licensed establishment in 2000, doing business as “A Taste of Napa”.²⁷

8 On July 25, 2000, appellant opened Post Office Box 11279 in Zephyr Cove, Nevada.²⁸
9 There is no record of appellant purchasing, renting, or using any home in Nevada at any time in 2000,
10 nor is there any record of her renting a residence in Nevada at any time in 2000. Appellant used 230 Old
11 Highway 50 in Glenbrook, Douglas County, Nevada as her physical address when she opened the post
12 Office Box, but she admitted in response to a FTB IDR that she did not occupy this property.²⁹

13 Factual Background After The Year at Issue (2001)

14 On June 14, 2001, appellant through Newport Beach attorney Steven Brower filed two
15

16 ²³ See Respondent’s Opening Brief, Exhibit H, federal form 1065 for the Max Singer Family Limited Partnership, Schedule
17 K-1.

18 ²⁴ See Respondent’s Opening Brief, Exhibit J, federal form 1120S for Marlene Mass Trust, Inc., Schedule K-1.

19 ²⁵ See Respondent’s Opening Brief, Exhibit H, federal form 1065 for the Max Singer Family Limited Partnership, Schedule
20 K-1.

21 ²⁶ See Respondent’s Opening Brief, Exhibit H, federal form 1065 for Max Singer Family Limited Partnership, Schedule K-1
and Form 8825, pages 5-6. The properties are as follows:

22 Amigos Way in Newport Beach – apartments.
23 Suzi Lane in Westminster – commercial building.
24 Hillcrest Drive in Hermosa Beach – house.
25 Anaheim Avenue in Costa Mesa – house.
26 Coast Highway in Sunset Beach – commercial building.
27 Adams in Newport Beach -- duplex.
28 Bolsa in Huntington Beach – Flashcom headquarters.

²⁷ See Respondent’s Opening Brief, Exhibit K, federal form 1120S for Memory Max, Inc., and LEXIS public records.

²⁸ See Respondent’s Opening Brief, Exhibit R (handwritten United States Postal Service responses to Franchise Tax Board
questions).

²⁹ See Respondent’s Opening Brief, Exhibit F, page 5.

1 Orange County, California Superior Court lawsuits:

2 (1) *Andra Sachs v. Salomon Smith Barney, Inc., et al.*, where appellant alleged in paragraph 1 of the
3 Complaint as follows: “Andra Sachs is an individual presently living in Orange County,
4 California.”³⁰ This lawsuit for slander of title and abuse of process related to two *lis pendens*
5 allegedly filed by Salomon Smith Barney on the Ridgeline Drive property in Newport Beach and
6 on a property owned by appellant and Mr. Sachs in Hawaii, on March 23 and 29 of 2001,
7 respectively.³¹

8 (2) *Andra Sachs v. Chicago Title Company et al.*, where appellant alleged in paragraph 1 of the
9 Complaint as follows: “Plaintiff Andra Sachs is an individual presently residing in Newport
10 Beach, California.”³² This lawsuit for intentional interference with contractual relationship
11 related to actions allegedly taken by the defendants in 2001 regarding the Hawaii property
12 referenced above.³³

13 In 2001, appellant acquired two Nevada properties:

- 14 (1) on February 20, 2001, through the Max Singer Partnership, the Emerald Heights address in Las
15 Vegas that she claimed was her residence on her 1999 and 2000 returns; and
16 (2) on December 14, 2001, a property in Spring Valley, Nevada.³⁴

17 On October 12, 2001, the Nevada Department of Motor Vehicles issued appellant a
18 Nevada Driver’s License valid through July 20, 2004, listing on the license the Zephyr Cove Post Office
19 Box as appellant’s address.³⁵ Appellant used a specific address on Old Highway 50 in Glenbrook,
20 Nevada as her physical address.³⁶ In response to a written question in a Franchise Tax Board IDR,
21

22 ³⁰ See Respondent’s Opening Brief, Exhibit V, page 1.

23 ³¹ See Respondent’s Opening Brief, Exhibit V, pages 2-3.

24 ³² See Respondent’s Opening Brief, Exhibit W, page 1.

25 ³³ See Respondent’s Opening Brief, Exhibit W, pages 1-2.

26 ³⁴ See Respondent’s Opening Brief, page 3: 18-20 and Exhibit J (LEXIS deed transfer records from Clark County, Nevada).

27 ³⁵ See Respondent’s Opening Brief, Exhibit Q, page 1.

28 ³⁶ See Respondent’s Opening Brief, Exhibit Q, page 2.

1 appellant states that she did not occupy the Glenbrook, Nevada address.³⁷

2 On January 20, 2004, appellant submitted to respondent a copy of her Nevada Voter
3 Registration Application, which respondent stated was “illegible.”³⁸ Appellant responded: “will try and
4 provide better copy.”³⁹ Respondent asked appellant to “[p]rovide a legible copy of the Nevada Voter
5 Registration Application” to which appellant responded: “I cannot find.”⁴⁰

6 It should be noted that appellant is claiming a Nevada residence in southern Nevada: Las
7 Vegas (Clark County) on Emerald Heights Street, but obtained a Nevada driver’s license using
8 addresses (the Glenbrook Old Highway 50 address and the Zephyr Cove Post Office Box) in Douglas
9 County, which is located in northern Nevada on the eastern shore of Lake Tahoe.⁴¹

10 Appellant’s Evidence

11 In her Appeal Letter, appellant states:

12 “It is Taxpayer’s position that at the time of the sale, Taxpayer was a Nevada
13 resident...Taxpayer will provide the testimony of witnesses to support her position. She
14 will also produce written documentation to substantiate her position including, but not
15 limited to: bank statements, utility statements and/or credit card statements, as well as
16 any other items that will support her claim that she was a Nevada resident at the time of
17 the sale.”

18 In response to this Board’s request for additional briefing, appellant submitted three
19 unsworn “affidavits” from the following persons:

- 20 (1) Mr. Sachs, who states in pertinent part: “I moved out of the house located at [number
21 deleted] Ridgeline Drive, Newport Beach in November 1999. She [appellant] lived with my
22 mother [name deleted] while she was searching for a property to purchase for her residence.
23 She eventually purchased 2 houses in Las Vegas. . . . I did allow the kids to visit with her in
24

25 ///

26 ³⁷ See Respondent’s Opening Brief, pages 4: 13 – 6:4, and Exhibits Q (Nevada Driver’s License), R (United States postal
27 Service information) and F (appellant’s statement regarding the Glenbrook, Nevada address).

28 ³⁸ See Respondent’s Opening Brief, Exhibit F, page 3 (FTB request 6-c).

³⁹ See Respondent’s Opening Brief, Exhibit F, page 5, response “C” at very bottom of the page.

⁴⁰ See Respondent’s Opening Brief, Exhibit C, pages 2 (FTB request 5-d) and 4 (appellant’s response 5-d).

⁴¹ See Glenbrook and Zephyr Cove community profiles at <http://nevada.hometownlocator.com/nv/douglas>

1 (2) Las Vegas to during [sic] 2000 over weekends and holidays.”⁴²

2 (3) Lesley Summers, who states in pertinent part: “I am the sister of Andra Sachs. During the
3 period of 1999-2000, I lived in Las Vegas with my 3 children. Andra moved there in 2000
4 and purchased a house. I visited her several times in Las Vegas while she was living
5 there...She lived in Las Vegas for approximately 2 years.”⁴³

6 (4) Nina Lifschutz, who states in pertinent part: “I have known Andra Sachs for over 30 years.
7 During this time we have remained close. ... In 2000 she moved to Las Vegas and lived
8 there for about 2 years. I visited her at her house and also met with her several times at the
9 local casino’s [sic] when I was in town.”⁴⁴

10 Appellant has not submitted any other evidence.

11 Applicable Law – Residency

12 *Residency Definition*

13 California imposes tax upon a resident’s entire taxable income from all sources and
14 imposes income tax upon a nonresident or part-year resident’s taxable income derived from sources in
15 California. (Rev. & Tax. Code, § 17041, subs. (a) & (b)(1).). The definition of a California “resident”
16 is two-pronged. First, a “resident” includes “every individual who is in this state for other than a
17 temporary or transitory purpose.” (Rev. & Tax. Code, § 17014, subd. (a)(1).) Second, a “resident”
18 includes “every individual domiciled in this state who is outside the state for a temporary or transitory
19 purpose.” (*Id.*, subd. (a)(2).) Under that definition, an individual may be a resident of California
20 without being domiciled here, and conversely may be domiciled here without being a resident.
21 (California Code of Regulations (CCR)., title 18, § 17014, subd. (a).) The purpose of the two-pronged
22 definition is to include all people who are physically present in California enjoying the benefits and
23 protections of its laws and government. (*Id.*; *Appeal of Stephen D. Bragg*, 2003-SBE-002, May 28,
24 2003).

25
26

⁴² Appellant’s Supplemental Brief, Exhibit A.

27 ⁴³ Appellant’s Supplemental Brief, Exhibit B.

28 ⁴⁴ Appellant’s Supplemental Brief, Exhibit C.

1 *Burden of Proof*

2 As a general matter, respondent's assessment is presumed correct and the appellant has
3 the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Ismael R.*
4 *Manriquez*, 79-SBE-077, Apr. 10, 1979.) In particular, the Board has long held that respondent's
5 determination of residency is presumed correct. (*Appeal of John R. Young*, 86-SBE-199, Nov. 19,
6 1986.) Affidavits and declarations from an individual's friends, family, and business associates stating
7 that the individual was in California for temporary or transitory purposes ordinarily are sufficient to
8 overcome a presumption of residency. (CCR, title. 18, § 17014, subd. (d); *Appeal of Raymond H. and*
9 *Margaret R. Berner*, 2001-SBE-006-A, Aug. 1, 2002.)

10 *Domicile*

11 California's income tax regulations define "domicile" as "the place in which a man has
12 voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with
13 the present intention of making a permanent home" (CCR, title 18, § 17014, subd. (c).) California
14 courts have similarly described domicile as "the concurrence of physical presence in a particular place
15 with the intention to make that place one's home." (*Estate of Glassford* (1952) 114 Cal.App.2d 181,
16 186.) The California Supreme Court has described the difference between "domicile" and "residence"
17 as follows:

18 "[D]omicile is the one location with which for legal purposes a person is
19 considered to have the most settled and permanent connection, the place where he
20 intends to remain and to which, whenever his is absent, he has the intention of
21 returning, but which the law may also assign to him constructively; whereas
'residence' connotes any factual place of abode of some permanency, more than a
mere temporary sojourn." (*Smith v. Smith* (1955) 45 Cal.2d 235, 239.)

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

24 In order to change one's domicile, a person must actually move to a new state and intend
25 to remain there permanently or indefinitely. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 642.)
26 The person's actions must clearly indicate a current intention to abandon the old domicile and establish a
27 new one. (*Chapman v. Superior Court* (1958) 162 Cal.App.2d 421.) The party asserting a change in
28 domicile bears the burden of proving such change. (*Sheehan v. Scott* (1905) 145 Cal. 684; *Appeal of*

1 *Terance and Brenda Harrison*, 85-SBE-059, June 25, 1985.) If there is doubt on the question of
2 domicile after presentation of all the facts and circumstances, domicile is presumed not to have changed.
3 (*Whitmore v. Commissioner* (1955) 25 T.C. 293; *Appeal of Anthony J. and Ann S. D'Eustachio*, 85-SBE-
4 040, May 8, 1985.)

5 *Factors Affecting Residency*

6 Under both prongs of the residency definition, the key question is whether the individual
7 is present in California, or absent from California, for a temporary or transitory purpose. (Rev. & Tax.
8 Code § 17014, subds. (a) and (b); *Appeal of Stephen D. Bragg, supra.*) This determination cannot be
9 based on the individual's subjective intent, but must instead be based on objective facts. (*Appeal of*
10 *Stephen D. Bragg, supra*; *Appeal of Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.)
11 In situations where an individual has significant contacts with more than one state, the state with which
12 the individual maintains the closest connections during the year at issue is the state of residence. (CCR
13 title 18, § 17014, subd. (b); *Appeal of Raymond H. and Margaret R. Berner, supra.*) In the *Appeal of*
14 *Stephen D. Bragg, supra*, the Board recently compiled a non-exhaustive list of objective factors used to
15 determine the state with which an individual maintains his or her closest connections. Those factors
16 include:

- 17
- 18 • The location of all of the taxpayer's residential real property, and the approximate
19 sizes and 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
23 on a residence;
- 24 • The taxpayer's telephone records (i.e., the origination point of taxpayer's
25 telephone calls);
- 26 • The number of days the taxpayer spends in California versus the number of days
27 the taxpayer spends in other states, and the general purpose of such days (i.e.,
28 vacation, business, etc.);
- 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;
- The location of the taxpayer's bank and savings accounts;

- 1 • The origination point of the taxpayer's checking account transactions and credit
2 card transactions;
- 3 • The state wherein the taxpayer maintains memberships in social, religious, and
4 professional 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
8 voting participation history;
- 9 • The state wherein the taxpayer obtains professional services, such as doctors,
10 dentists, accountants, and attorneys;
- 11 • The state wherein the taxpayer is employed;
- 12 • The state wherein the taxpayer maintains or owns business interests;
- 13 • The state wherein the taxpayer holds a professional license or licenses;
- 14 • The state wherein the taxpayer owns investment real property; and
- 15 • The indications in affidavits from various individuals discussing the taxpayer's
16 residency.

17 In this case, the most relevant pieces of information are: (1) the date of the Flashcom stock sale;
18 (2) appellant's physical residence and domicile on that date; (3) appellant's property use record
19 in Nevada and California during 2000 and 2001; and (4) appellant's motor vehicle licenses in
20 California and Nevada in 1999-2001.

21 Contentions – Residency

22 *Respondent*⁴⁵

23 Respondent states in its Reply Brief: "There is no evidence that when appellant sold her
24 shares in Flashcom in early February 2000 that she lived in Las Vegas; in fact, all of the evidence and
25 appellant['s] own sworn statements point[s] to her living in California through 2000, and then
26 purchasing a house in Las Vegas in 2001." (footnotes omitted). In its Opening Brief, respondent argues
27 that appellant was a California resident during 2000 at the time she sold the Flashcom stock, because on
28 January 10, 2000, she filed a 1998 California resident return listing the Ridgeline Drive address in

⁴⁵ Given the nature of the residency discussion, staff believes it is useful to summarize respondent's contentions first.

1 Newport Beach as her business address, and in her 2000 nonresident return, she states under penalty of
2 perjury that she did not become a Nevada resident until February 28, 2000. Respondent further argues
3 that appellant in 2000 had a 1999 California Driver's License that was valid until 2001. Appellant did
4 not own any real property in Nevada in 2000, and did not purchase her purported Emerald Heights Street
5 address in Las Vegas, Clark County, Nevada until 2001. Appellant did not apply for or receive a
6 Nevada Driver's License until 2001, and did so using a Douglas County, Nevada physical address near
7 Lake Tahoe that she admits she did not occupy. Two of appellant's children attended school in
8 California in 2000, based on the dissolution award of physical custody to appellant.

9 Respondent further contends that appellant has not proffered any evidence that she
10 became a Nevada resident prior to her sale of the Flashcom stock, establishes the precise date of the
11 Flashcom stock sale,⁴⁶ or the precise date she became a resident of Nevada.⁴⁷ If anything, the evidence
12 shows that she was a California resident at the time she sold the Flashcom stock. The burden of proof is
13 on appellant as the party asserting as change in domicile to demonstrate Nevada residency prior to the
14 Flashcom stock sale, and she has failed to meet this burden.

15 *Appellant*

16 Appellant in her Reply Brief asserts:

17 "Petitioner was not a resident of California during the relevant period for the tax year
18 ending December 31, 2000, and in fact, had begun her domicile in Nevada when the sale
19 occurred. . . . Petitioner was domiciled in Nevada during the relevant period and her
20 dealings in California are not determinative of her domicile."

21 Appellant further states:

22 "The key determining factor is not the actions performed in a certain state but the nature
23 of those actions and dealings in the state. Respondent has filled its brief with evidence of
24 dealings in California, but it does not address that [sic] fact that those actions were
25 transitory in some cases and temporary in other cases."

26 Other than the three unsworn affidavits provided through this Board's requested supplemental briefing,
27 appellant has not provided any evidence.

28 ⁴⁶ Even though she was required to list it on federal Form 1040 Schedule D.

⁴⁷ Even though her Appeal Letter states that "[i]t is taxpayer's position that at the time of the sale, Taxpayer was a Nevada resident" and in her Reply Brief (page 2: 9) she claims that she "was domiciled in Nevada during the relevant period."

1 Staff Comments – Residency

2 This case turns on two questions:

3 (1) on what precise date in 2000 was a gain received by appellant from the sale of the Flashcom stock by
4 appellant?

5 (2) where was appellant residing on that date?

6 Surprisingly, neither party’s briefing expressly states the precise date of the Flashcom stock sale, even
7 though only one sale date is apparent in the one record document⁴⁸, the Stock Purchase Agreement
8 included in Exhibit B to Respondent’s Opening Brief. As discussed above, page 7, paragraph 2(a) of the
9 agreement expressly states that “[t]he purchase and sale of the Common Stock shall take place . . . at
10 5:00 p.m. on February 11, 2000” at a specific law office in Newport Beach, California, unless the parties
11 (appellant and Flashcom) “shall mutually agree” otherwise. There is no evidence of such an agreement,
12 or of the sale taking place on any date other than February 11, 2000.⁴⁹

13 At no point has appellant (or respondent) stated the precise date of the Flashcom stock
14 sale by appellant, other than agreeing that it was made pursuant to a Stock Purchase Agreement that
15 fixed the sale date as February 11, 2000. As discussed above, appellant’s 2000 California return states
16 under penalty of perjury that she became a Nevada resident on February 28, 2000.

17 The Stock Purchase Agreement lists the sale closing date as February 11, 2000, which is
18 19 days before the first day of Nevada residency claimed on the 2000 return.

19 Appellant in her Appeal Letter and briefs claims that she was a resident of Nevada at the
20 time of the sale (but does not state when or where the sale took place, or the precise date she ended her
21 California residency and the precise date she began her Nevada residency). In her Reply Brief, appellant
22 states: “Petitioner [sic] was not a resident of California *during the relevant period* for the tax year
23 ending December 31, 2000 *and in fact, had begun her domicile in Nevada when the sale occurred.*”

24 _____
25 ⁴⁸ The document was executed as an agreement on February 8, 2000, but includes a sale date of February 11, 2000.

26 ⁴⁹ As discussed above, the exact sale date should have been reported by appellant on her 2000 federal Form 1040 Schedule D,
27 but neither party has included this document in its briefing. Respondent in Exhibit U to its Opening Brief included only the
28 California return pages, even though the instructions in this return expressly require taxpayers to attach a copy of the federal
return to the California return.

1 (emphasis added). Appellant should provide at least 14 days prior to the oral hearing (pursuant to CCR,
2 title 18, § 5523.6, subd. (b)), the date of the stock sale as listed on her federal 1040 Schedule D for
3 2000⁵⁰, and also be prepared to explain why on her 2000 return (that gave rise to this matter) she stated
4 under penalty of perjury that her first date of Nevada residency was February 28, 2000.⁵¹

5 Appellant's unsworn affidavit from her sister Lesley Summers states: "Andra moved
6 there [to Las Vegas] in 2000 and purchased a house." However, according to public real estate
7 transaction records, the only two houses appellant purchased in Clark County, Nevada were purchased
8 in 2001, including the Emerald Heights Street house appellant listed as her address on her 2000 return.
9 The Summers affidavit also makes the vague claim that Summers visited appellant in Las Vegas "while
10 she [appellant] was living there" and while "she [appellant] was going through a divorce with her
11 husband at the time." The Summers affidavit does not list any specific dates or travel receipts, and the
12 dissolution of marriage proceeding records show that the dissolution proceedings between appellant and
13 her ex-husband started on February 28, 2000; that the dissolution was final on May 24, 2000; and the
14 stock sale closing date in the Stock Purchase Agreement is February 11, 2000 – a date that is prior to
15 both the beginning and the end of the dissolution proceedings, as well as the initial February 28, 2000
16 date of Nevada residency claimed in the 2000 return. Thus, even if it were sworn and otherwise
17 credible, the Summers Affidavit does not appear to prove appellant was a Nevada resident at the time of
18 the stock sale.

19 The other two unsworn affidavits are equally vague and unsupported. Mr. Sachs' unsworn
20 affidavit says:

21 "[s]he [appellant] lived with my mother [name deleted] while she was searching for a
22 property to purchase for her residence. She eventually purchased 2 houses in Las Vegas.
23 . . . I did allow the kids to visit with her in Las Vegas to during [sic] 2000 over weekends
24 and holidays."

25 ///

26 ⁵⁰ Together with a copy of this document, or a copy provided by respondent.

27 ⁵¹ Documentary evidence should be sent to: Claudia Madrigal
28 Board Proceedings Division
State Board of Equalization
P. O. Box 942879
Sacramento, CA 94279-0080

1 However, the affidavit does not give a specific address for the mother's residence, nor does it give any
2 specific dates in 2000. In addition, there is no evidence of plane tickets, gas receipts, restaurant receipts
3 or anything else that would show a specific visit to Las Vegas to stay with a Las Vegas resident at any
4 time "during the relevant part of 2000", whatever the precise dates of such "relevant part." Friend Nina
5 Lifschutz states in her unsworn affidavit:

6
7 " [i]n 2000 she [appellant] moved to Las Vegas and lived there for about 2 years. I visited
8 her at her house and also met with her several times at the local casino's [sic] when I was
in town."⁵²

9 Like the unsworn affidavits of Mr. Sachs and Lesley Summers, this affidavit fails to list a specific date
10 in 2000 that appellant's purported Las Vegas residency began, and does not list any address occupied by
11 appellant in Las Vegas.

12 In her Reply Brief, appellant states: "...she [appellant] actually lived in Nevada during
13 the relevant period and applied for a driver's license." In fact, Nevada Department of Motor Vehicles
14 records show she applied for a Nevada Driver's License in 2001, not 2000. As to appellant's claim that
15 "she actually lived in Nevada during the relevant period", there is no record of appellant purchasing any
16 Nevada property prior to 2001, and if appellant rented or otherwise lived in a Nevada property as her
17 residence at any time in 2000, appellant has not proffered any evidence of her actual rental or use of
18 such property, its precise location, and the beginning and ending dates of such rental or use.

19 In her Reply Brief, appellant also states: "Petitioner will offer multiple affidavits as well
20 as live testimony that vouch for these facts from individuals who saw her on a daily basis and knew of
21 her residence." Appellant is apparently referring to the three unsworn affidavits she submitted in
22 response to the additional briefing request. None of these affidavits purport to state precisely when and
23 where appellant began and ended her purported residency in Las Vegas, Nevada.

24 As discussed above, in 2001 appellant filed two lawsuits in Orange County, California
25 Superior Court relating to actions taken by a real estate lender and a title company on properties owned
26 by appellant, in which she stated that she "is an individual presently living in Orange County,
27

28 _____
⁵² Appellant's Supplemental Brief, Exhibit C.

1 California”⁵³ or “residing in Newport Beach, California.”⁵⁴ Appellant states as follows in her Reply
2 Brief:

3
4 “Petitioner does not deny that she signed certain boilerplate court documents for
5 purposes of litigation. The fact that the boilerplate language suggested that Petitioner
6 was a resident of a certain state should not be cited as evidence of domicile in a
7 completely unrelated case. Once again, these lawsuits were transitory in nature and were
8 brought as a result of Petitioner’s dealings with California before her move to Nevada.”

9 In effect, appellant is asking this Board to allow her to simultaneously claim California residency for
10 lawsuit purposes on June 14, 2001 and Nevada residency for tax purposes “during the relevant period
11 for the tax year ending December 31, 2000.”⁵⁵ Moreover, appellant claims she moved to Nevada on an
12 unspecified date in 2000, whereas the two lawsuits were filed on June 14, 2001. Thus, if appellant
13 moved to Nevada in 2000, why did she need to bring two lawsuits in which she affirmatively stated
14 through her attorney that she was a resident of California? The California courts would have been
15 equally open to her had she stated that she was currently a resident of Nevada but that the lawsuits
16 involved actions by the defendants taken in California regarding California and Hawaii real property that
17 she owned. Code of Civil Procedure⁵⁶ section 392, subdivision (a) states that the county in which the
18 property is located or in which the cause of action arose is the proper venue:

19 “(1) For the recovery of real property, or of an estate or interest
20 therein, or for the determination in any form, of that right or
21 interest, and for injuries to real property.
22 (2) For the foreclosure of all liens and mortgages on real
23 property.”

24 The Exhibit V complaint related to *lis pendens* filed on properties in Orange County, California and
25 Hawaii; the Exhibit W complaint relates to actions taken regarding a Hawaii property. There is nothing
26 in the Code of Civil Procedure that limits the Code of Civil Procedure section 392 remedy to California
27

28 _____
⁵³ Respondent’s Opening Brief, Exhibit V, page 1: 21 (paragraph 1).

⁵⁴ Respondent’s Opening Brief, Exhibit w, page 1: 22-23 (paragraph 1).

⁵⁵ Appellant’s Reply Brief, page 2: 5-6.

⁵⁶ Not Civil Code sections 392-395, as erroneously stated in Respondent’s Opening Brief, page 9: 9. There is no section of
the Civil Code between sections 86 and 643; see www.leginfo.ca.gov, “California Law.”

1 residents.

2 As for the California properties purchased and businesses operated by appellant in 2000,
3 by themselves they do not prove appellant was a California resident in 2000, but they appear to detract
4 from appellant's largely unsupported claim to have been a Nevada resident "for the relevant period"
5 during 2000.

6 Appellant responded completely to both of respondent's Information and Documents
7 Requests. She provided a copy of her Nevada Voter Registration Application, but respondent found it to
8 be illegible, appellant did not provide the clear copy that she said she would try to find, and respondent
9 is not addressing the issue of appellant's voter registration. Respondent has also not addressed the issue
10 of whether appellant claimed the homeowner's exemption for the Orange County properties on
11 Ridgeline Drive or Coast Highway in 2000; in a June 29, 2009 telephone conversation with the Orange
12 County Assessor Exemptions Division, Board staff was advised that a homeowner's exemption was not
13 claimed on either property during 2000. As to the Emerald Heights Street address in Las Vegas
14 apparently claimed by appellant to be her residence at the time of the Flashcom stock sale, Clark
15 County, Nevada Assessor records⁵⁷ show that between December 28, 1983 and the present date it has
16 been through 16 owners. The first 13 owners (between December 28, 1983 and July 3, 2000) were the
17 Howard Hughes Properties, Lewis Homes Nevada, LHN Platte LLC, Saybrook Land Fund LLC (on
18 January 7, 1999), Kaufman & Broad Nevada (on July 3, 2000), and KB Home Nevada Inc (also on
19 July 3, 2000). On February 20, 2001, the Emerald Heights Street property was purchased by the Max
20 Singer Ltd. Partnership, which as discussed above is owned by appellant. On June 30, 2003, it was sold
21 to another individual, and sold again to another individual on July 6, 2005. If appellant was using this
22 home as her residence in 2000, it appears she must have been paying rent to or getting free occupancy
23 from Saybrook Land Fund, Kaufman & Broad Nevada, or K B Home Nevada, Inc., but there is no
24 evidence of such payment or free occupancy.

25 ///

26 Sachs_smk
27 _____
28

⁵⁷ Available at <http://www.sandgate.co.clark.nv.us/servlet/Assessor>, or through the general Clark County website, www.accessclarkcounty.com