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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
JOHNNIE F. LAU AND	Case No. 739838
GAY L. LAU[1]	

Deficiency

Years	Additional Tax
2007	$640,416
2008	$409,580

Representing the Parties:

For Appellants: Rex W. Halverson, Rex Halverson and Associates

For Franchise Tax Board: Brian C. Miller, Tax Counsel III

QUESTION: Whether appellants have established error in respondent Franchise Tax Board's determination that appellants were residents of California for the entire year of 2007 and of 2008.

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[1] Appellants' appeal letter lists a street address in Las Vegas, Nevada.

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HEARING SUMMARY

SECTION 40 APPEAL

This appeal involves an amount in controversy that is $500,000 or more and thus is covered by Revenue and Taxation Code (R&TC) section 40. Please see Staff Comments below for details.

Procedural Background

Appellants filed a joint 2007 federal income tax return, reporting a federal adjusted gross income (AGI) of $11,709,950 and a federal taxable income of $10,381,232. Appellants filed a 2007 California part-year resident return reporting AGI of $5,819,994 and California taxable income of $5,601,606 from capital gains and pass-through income from subchapter S corporations and partnerships for a total California tax of $353,621. The 2007 California return included a Schedule CA (540NR) on which appellants reported that they became residents of Nevada on May 1, 2007. Appellants filed a 2008 federal income tax return reporting federal AGI of $6,800,767 and federal taxable income of $6,016,704. Appellants reported on their 2008 California nonresident return AGI of $3,735,460 and California taxable income of $3,663,104 for a total California tax of $231,582. (Respondent's Opening Brief (Resp. Op. Br.), p.1 and Exhs. A, B, C and D.)

On August 10, 2007, appellants received a dividend payment of $5,389,663 from Yosemite Meat and Locker Service (Yosemite Meat) which appellants did not report on their 2007 California part-year resident return. Yosemite Meat is a subchapter S corporation in which appellants' revocable trust held approximately a 74 percent ownership interest. Appellants claimed that they were not domiciled in nor residents of California as of the date of receiving the dividend payment. Appellants also received a dividend payment of $3,360,286 from Yosemite Meat in 2008 and excluded this income from their California nonresident return claiming that they were domiciled in and residents of Nevada in 2008. Respondent audited appellants' 2007 and 2008 California returns and concluded that appellants did not abandon their California domicile in either year and remained California residents throughout 2007 and 2008. Respondent adjusted appellants' income by the amounts of the dividend payments for each of those years and proposed additional tax of $640,417 for 2007 and $409,580 for 2008. Respondent issued Notices of Proposed Assessment (NPAs) for each of those years.

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(Resp. Op. Br., pp. 1-2, 4 and Exhs. E and F.)

Appellants timely protested the NPAs and at protest respondent determined that appellants had not abandoned their California domicile and were California residents in 2007 and 2008. Respondent affirmed the NPAs in Notices of Action dated May 20, 2013. Appellants filed this timely appeal. (Resp. Op. Br., p. 2.)

Factual Background

Appellants completed construction on a 6,820 square foot home in El Dorado Hills, California in 2001 and El Dorado County Assessor's records show that they claimed the homeowners' property tax exemption in 2007, 2008 and 2009. Appellants state that they occasionally stayed at the home in 2007 and 2008, did not rent the property, and paid for housekeeping, pool, landscaping and utility services during 2007 and 2008. Appellants purchased a 2,595 square foot home in Henderson, Nevada in March 2007 for $950,000. Clark County, Nevada property tax records show that this property received the "primary residence/owner occupied tax abatement status for fiscal years 2005/2006 thru 2012/2013." Appellants paid for pool cleaning services at this residence. In response to respondent's information request, appellant stated that they had no moving expenses from El Dorado Hills to Henderson because they purchased new furniture for the Henderson, Nevada residence. They further stated that they packed and moved clothing and personal items in their own vehicles. Appellants registered two vehicles in California in 2007 and 2008, the registration address was the El Dorado Hills residence and appellants kept the vehicles in El Dorado Hills during that period. (Resp. Op. Br., pp. 2-4, exhs. M, N and O; Appeal Letter, p. 7.)

A sedan owned by Yosemite Meat was registered in California to an address in Modesto from June 2007 through June 2010 and in July 2007 appellants registered a 2003 Cadillac Escalade owned by Yosemite Meat. The same vehicle was registered in California by Yosemite Meat until March 2008. Appellant-husband was issued a Nevada driver's license in July 2007 with a Henderson, Nevada address and surrendered his California license. Appellant-wife maintained a valid California driver's license through 2009 and did not apply for a Nevada license by the end of 2008. Appellant-husband registered to vote in Clark County, Nevada and voted once in Nevada during the period from 2007 to April 2010 in the 2008 general election. Appellant-wife never registered to vote in either state.

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Two of appellants' children and three minor grandchildren lived in California during 2007 and 2008 and appellants did not have any relatives living in Nevada during those years. (Resp. Op. Br., pp. 5-7, Appeal Letter, p.5 and p.7.)

Contentions

Appeal Letter

In their appeal letter, appellants state that were born in Hong Kong and moved to California in the middle to late 1960s and raised their three children in this state. Appellants further state that appellant-husband has business interests in China, Idaho, Nevada and California and number of close relatives who live in California, including appellant-husband's six brothers and sisters and appellant-wife's mother and eight brothers and sisters. Appellants state that they considered moving from El Dorado Hills in 2003 and 2004 and that before deciding to move to the greater Las Vegas area in 2007, they considered moving to San Diego, Newport Beach, Sherman Oaks or Thousand Oaks, California. Appellants state they decided to move to Henderson, Nevada for several reasons including a desire to slow down their lives, be closer to their grandchildren in San Diego, avoid the Northern California allergy season, the warmer climate, golfing and entertainment and gambling in Las Vegas. (Appeal Letter, pp. 1-2.)

Appellants assert that they purchased the Henderson, Nevada house on March 8, 2007 and moved into it in April 2007. They state that they considered this a permanent move to Nevada as confirmed by their subsequent purchase of a new home in Las Vegas. Appellants state that the drive time to San Diego is two hours and 43 minutes shorter than when they lived in El Dorado Hills. In addition, appellants state that appellant-husband's many allergies are now under control since moving to Nevada, the weather is warmer in Henderson than in El Dorado Hills and the Las Vegas area has far more golf courses. Appellants state that they also visit the casinos in Las Vegas three or four times a week and appellant-wife is a "high roller" who enjoys gambling. (Appeal Letter, pp. 2-3.)

Appellants state that appellant-husband started Yosemite Meat in Modesto in 1981and built a very successful business. The day-to-day operations are handled by a general manager assisted by appellants' son, Steven Lau. Appellant-husband also started up a successful business called Nature Farm which raises livestock pigs in Idaho in 2001. Appellant-husband owns 60 percent of the

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land and buildings and 50 percent of the business and a manager runs the business operations. Appellants further state that appellant-husband started a new business venture in China to introduce modern pig farming in that country. Appellant-husband spent much of 2007 and 2008 in China to set up this business and his flights to China often originated and/or terminated in San Francisco International Airport (SFO). Appellants state that their 2007 and 2008 calendars reflect additional days present in California due to his departure or arrival at SFO. Appellants state that they own 73 percent of Yosemite Meats and that the payment of the dividends in 2007 and 2008 was "strictly within their control" and "could have been paid out anytime." (Appeal Letter, p. 3.)

Appellants recite the legal definition of "domicile" and assert that a new domicile is established by "the actual change of residence to a new place of abode, coupled with the intention to remain there permanently or indefinitely without any fixed or certain purpose to return to the former place of abode." Appellants contend that they had the intent to make the residence in Henderson, Nevada house their new domicile in April 2007 by the act of abandoning the El Dorado Hills home as their primary residence. Appellants state that they purchased new furniture and moved their personal items including heirlooms and keepsakes. They further state that they left the furniture in the El Dorado Hills home to show the house to potential buyers when the real estate market improved. Appellants note that much of the furniture in the El Dorado Hills home was custom built for the Mediterranean style of the home and would not fit the contemporary style of the Henderson home. Appellants also dispute respondent's "insinuation" that the household personal property in the El Dorado Hills home had a value of $1,512,000 based on an insurance document and the actual value was closer to $10,000. (Appeal Letter, pp. 4-5.)

In addition to moving into the Henderson home in April 2007, appellants state that they opened bank accounts in Nevada, appellant-husband registered to vote in May 2007 and later voted there, received a Nevada driver's license in May or June 2007, surrendered his California license, registered his car in Nevada and joined a local golf country club near the home. Appellant-wife did not apply for a Nevada license in 2007 or 2008 because she intended to visit her grandchildren in San Diego and she rarely drives and she has never registered to vote in any state. Appellants deny that they claimed the property tax homeowner's exemption for their El Dorado Hills home during 2007 and

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2008. (Appeal Letter, p. 5.)

Appellants summarize California tax law and respondent's guidelines with respect to a residency determination and analyze the relevant factors as follows:

- Time spent in California versus time spent outside California – Since their move to Nevada in April 2007 they have spent more time outside California than in the state. Appellants will provide calendars reconstructing their "whereabouts".
- Location of spouse and children – Appellants live together in Las Vegas although appellant-husband works and travels extensively to China. Their children are adults and their location has no bearing on appellants' residency.
- Location of principal residence – Appellants moved to a new principal residence in Henderson in April 2007 and purchased another home of approximately 7,400 square feet in Las Vegas in December 2010 and moved into that residence in February 2011. With regard to respondent's argument that the Henderson home was smaller than the El Dorado Hills home, appellants note the Las Vegas home is larger than the El Dorado Hills home.
- Driver's license state – Appellant-husband was issued a Nevada license in May or June 2007 and appellant-wife retained her California license in 2007 and 2008 to drive to San Diego to visit relatives. Appellant-wife now has a Nevada license.
- Vehicle registration – Appellants owned two vehicles in 2007 and 2008 and both were registered in California and stored at the El Dorado Hills residence. One of the vehicles is a "collectible" automobile and was not running during that time. One of the vehicles was later registered in Nevada and the other was registered in Hawaii. Appellant-husband also used two other vehicles registered to Yosemite Meat during this time period. One of those vehicles was registered in California and the other was registered in Nevada "during 2007-2008".
- Professional licenses – Appellants do not hold professional licenses.
- Voter registration – Appellant-husband registered to vote in Nevada in May 2007. Appellant-wife has never registered to vote.
- Location of bank accounts – Appellants have bank and brokerage accounts in California and Nevada and upon moving to Nevada did not close their California accounts, cancel their credit

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cards or change "their trusted money management and stock advisors."

- Origination point of financial transactions – Appellants write checks for California bills from a California account and for Nevada bills from a Nevada account because appellant-wife "finds it easier to keep her bookkeeping straight" in this manner. This factor is not "dispositive of residency or domicile" because many purchases were made by telephone or online with California retailers and golf shops owned by friends.
- Location of doctors, dentists, lawyers and accountants – Appellants do not have a personal physician in either state. They are members of Kaiser Permanente which is more convenient and less expensive for them but that medical group has facilities in California but none in Nevada. The other professionals are also located in California although appellant-husband used a dentist in Nevada.
- Location of religious organization, professional associations or social and country club membership – Appellants did not belong to a religious organization in California or Nevada nor do they belong to any professional or social associations. Appellants are members of two country clubs in Henderson and Las Vegas and one country club in El Dorado Hills. Appellants were not able to sell their El Dorado Hills country club membership in 2007 and 2008 and during that period "it was taking more than two years to sell a membership."
- Location of real property and investments – Appellants own single family residences in California and Nevada and their businesses have real estate investments in Idaho and California. Their family trust owns real estate investments in California.
- Permanence of work assignments in California – Although appellant-husband is the President of Yosemite Meat he does not participate in the business which is managed by another individual and appellants' son. Prior to moving to Nevada, appellant-husband would travel to Modesto once a week and after moving to Nevada his "workdays in Modesto dropped significantly" and now he spends less than one day per month on site. Appellant-husband also has pig farms in Idaho and China and a business in Nevada.
- Location of social ties – Appellants have friends and relatives in California and fewer friends in Nevada because they have lived there a shorter time. Appellants cannot control whether their

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friends and relatives live.

(Appeal Letter, pp. 6-9.)

Appellants contend that the fact that they owned a home, maintained a vehicle, held bank and brokerage accounts and were members of a country club in California are not factors sufficient to establish California residency. Appellants assert they provided thousands of documents requested by respondent and thus respondent may not aver that they have been uncooperative. In addition, appellants assert that "some of these documents contain obvious mistakes by home insurers" that allow respondent to "twist the facts" in respondent's favor. Finally, appellants maintain that they "reconstructed their whereabouts during 2007 and 2008 utilizing all the evidence that they could locate" which allowed them to produce more accurate calendars than the "sketchy ones" compiled by respondent. (Appeal Letter, p. 9.)

Respondent

Respondent states that it examined checking account statements and canceled checks submitted by appellants "to calculate the number of payees from those accounts in California and the number of payees from those accounts in Nevada." Respondent further states that it only included transaction types within one of the following categories because "the physical location of the purchase of goods or services is clear."

- General Service – payments to companies providing services such as florists, locksmiths, etc.
- Golf – purchase of golf equipment, club memberships, course privileges and the like.
- Home and Maintenance – payments for landscaping and cleaning, home furnishing purchases and homeowners' association fees.
- Personal, medical and professional services.
- Retail purchases excluding online and other purchases not made in person.
- Travel and entertainment – lodging, restaurant, travel agents, and similar items and services but excluding golf, airfare and online purchases.

Respondent states that it excluded the following categories of transactions from the residency analysis of appellants' California and Nevada checking accounts:

- Airfare

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- Charitable donations
- Financial transactions, such as payments to credit card companies, banks and other financial institutions
- Insurance
- Magazines
- Online and catalog purchases
- Rent and mortgage payments
- Taxes
- Utilities

After excluding transactions that were not purchases in California or Nevada, respondent concluded that during calendar year 2007, appellants' California checking account had 94 California transactions, 9 Nevada transactions, 7 "Other" transactions and 10 "unknown" transactions. During calendar year 2008, appellants' California checking account had 75 California transactions, 0 Nevada transactions, 6 Other transactions and 5 Unknown transactions. For the period from March 28, 2007 through December 31, 2007, appellants' Nevada checking account had 11 California transactions, 45 Nevada transactions, 3 Other transactions, and 8 Unknown transactions. For calendar year 2008, appellants' Nevada checking account had 12 California transactions, 44 Nevada transactions, 4 Other transactions and 13 Unknown transactions. Respondent also reviewed appellants' credit card purchases for 2007 and 2008 which showed 157 transactions, 72 California purchases and 26 Nevada purchases and the remainder not in either state. (Resp. Op. Br., pp. 6-7.)

Respondent notes that appellants maintain memberships in several social organizations in California, mainly golf clubs, and participate in events of the Federation of Chinese Golf Clubs, and are members of California local affiliates and of "golf clubs in northern, central and southern California." Respondent further notes that during 2007 and 2008, appellants attended golf club events both inside California and outside California. Respondent states that appellants maintained memberships at country clubs in El Dorado Hills and Henderson during 2007 and 2008. Respondent states that appellant made 10 payments to two Modesto dentists during 2007 and 2008 and paid an attorney in Modesto during 2007. Appellants' 2007 and 2008 tax returns were prepared by a firm in

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Modesto. Appellants records do not indicate any professional services provided in Nevada. (Resp. Op. Br., pp. 7-8, exhs. BB and CC.)

Respondent states that on January 3, 2011, appellants provided calendars which respondent accepted during protest as representative of the number of days spent in California versus the number of days spent outside California. A table provided by respondent shows that in 2007, both appellants were in California 76 days, and both were in Nevada 43 days, one appellant was in another state and one was in Nevada on 7 days, one was in another state and one was in California on 23 days and there were 116 days for which appellants do not recall their location. In 2008, both appellants were in California 88 days, and both were in Nevada 38 days, one appellant was in another state and one was in Nevada on 5 days, one was in another state and one was in California on 23 days and there were 138 days for which appellants do not recall their location of physical presence. Respondent states that appellants assert that the dates on which physical presence is unknown should be presumed to be in Nevada but respondent declines to make such a presumption. With respect to appellants' assertion in the appeal letter that they will prepare updated calendars, respondent states that such calendars have not been provided. (Resp. Op. Br., pp. 8-9, exh. BB and fn. 10.)

Respondent cites California code and case law of domicile and residency as follows: Courts have defined domicile as "the place in which a person has the most permanent and settled connection, the place where he intend to remain and to which, whenever he is absent, has the intention of returning." Respondent further states that a person may only have one domicile at a time which he or she retains until a new one is established. A new domicile is established by leaving California and abandoning any intention of returning here while locating elsewhere with the intention of remaining there indefinitely. The retention of significant California connections is relevant to determining whether one has changed his or her domicile. The party asserting a change in domicile bears the burden of proof and if there is any doubt then a court must find that domicile has not changed. (Resp. Op. Br., pp. 9-10.)

A resident is a person in this state for other than a temporary or transitory purpose and has a "place of abode with some permanency, or more than a mere temporary sojourn." The primary consideration is whether the person is present in California or absent from California for a temporary or

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transitory purpose which is question of fact determined from facts and circumstances. A person may have more than one legal residence. Respondent states that the initial inquiry is whether appellants established domicile in Nevada and, if not, whether appellants were outside California for a temporary or transitory purpose during 2007 and 2008. Respondent further states that if appellant established domicile in Nevada, then appellants were California residents if they were in this state for other than temporary or transitory purposes. (Resp. Op. Br., pp. 10-11.)

Respondent contends that appellants "maintained deep roots in California" throughout 2007 and 2008 which is relevant to the determination of California domicile. Respondent states that appellants purchased new furniture for their Henderson house purchased in March 2007 and moved "only a handful of family heirlooms". Respondent further states that contrary to appellants' claims the El Dorado County Assessor's records show that appellants' El Dorado Hills home received the property tax homeowner's exemption in 2007 and 2008. Respondent also notes that appellant-husband surrendered his California driver's license in July 2007 while appellant-wife kept her California license. Respondent also notes that appellants opened bank accounts in Nevada and continued to use their California bank accounts, including checking, to pay expenses. Respondent states that both accounts were established through Bank of the West and could be accessed throughout California or Nevada. Respondent notes that appellants made at least 10 transfers from the California checking account to the Nevada checking account, some of which were made by telephone but the location of calls is not in the record. (Resp. Op. Br., pp. 11-12.)

Respondent further notes the following facts and circumstances regarding appellants' contacts with California and Nevada:

- Appellants joined a country club near their Henderson house and retained their membership in the El Dorado Hills country club and they probably golfed at both country clubs in 2007 and 2008.
- Appellants had the use of a single vehicle registered in Nevada but owned and registered several vehicles in California during 2007 and 2008.
- Appellant-husband registered to vote in Nevada in March 2007 and voted in person in the November 2008 general election. Appellant-wife was not registered to vote in either state.

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Registration and voting are important but not necessarily conclusive "formal acts weighed in ascertaining a person's assertion of a domicile change." (*Appeal of Richard and Doris May*, 87-SBE-031, Apr. 7, 1987.)

- Appellants retained ownership of business interests in California and appellant-husband continued to act as the registered agent for service of process for these businesses. Appellants do not identify any business interests in Nevada in 2007 and 2008.
- Appellants maintained a furnished, unrented El Dorado Hills home, claimed the homeowner's exemption on that residence, kept their California bank accounts, procured professional services in California, including income tax return preparation, and retained significant business interests in California.
- Little weight should be given to appellants' ownership of a Nevada home in 2013 because they also owned a home in California.

Respondent concludes that appellants have not provided clear and substantial evidence that they severed their connection with California and established domicile in Nevada. Respondent asserts that appellants "provided scant objective evidence" that in 2007 they did not intend to return to California. (Resp. Op. Br., pp. 13-14.)

Respondent contends that appellants as California domiciliaries were also California residents in 2007 and 2008 because their absences from this state were temporary and transitory. However, even if the Board finds that appellants were not domiciled in California, respondent contends that appellants were California residents because their presence in California during those years was for other than a temporary or transitory purpose. Respondent cites the *Appeal of Stephen Bragg*, 2003-SBE-002, decided on May 28, 2003, in which the Board identified 19 factors for determining whether a person was present for other than a temporary or transitory purpose. Respondent applies those factors to the facts presented as follows:

- Ownership or maintenance of business interests – The evidence shows that appellants owned business interests, Yosemite Meat and Yosemite Gourmet, in California but none in Nevada. Appellant-husband was also the designated agent for service of process for Yosemite Meat and the Statement of Information filed with the California SOS states that an agent who is an

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individual must reside in California. A 2009 filing with the SOS identified appellants as directors of Yosemite Meat listing a Modesto address and Yosemite Gourmet filed an amended statement with the SOS in October 2012 identifying appellant-husband as the agent for service of process with a Modesto address. This factor weighs in favor of California residency.

- Ownership of investment real property – Through their trust, appellants own at least 10 rental properties in California but do not own any investment property in Nevada. This factor weighs in favor of residency.
- Vehicle registration – Appellants registered several vehicles in California in 2007 and 2008, the two cars at the El Dorado Hills home and a sedan and Cadillac Escalade owned by Yosemite Meat. The Escalade was also registered in Nevada in July 2007 "under a California company name" and was presumably used by two people. This factor weighs in favor of residency.
- Bank and savings accounts – Appellants maintained checking and savings accounts in California and opened a checking account in Nevada in March 2007 but provided no information about any savings accounts in Nevada. This factor is neutral.
- Origination point of checking and credit card transactions – As described above, appellants' checking account records show 192 purchases in California and 98 purchases in Nevada in 2007 and 2008. The credit card account records show 72 California purchases and 26 Nevada purchases in 2007 and 2008. While appellants argue that many purchases were made online or by telephone, appellants provide no analysis nor do they identify such transactions. This factor weighs in favor of residency.
- Memberships in social, religious, and professional organizations – Appellants maintained memberships in several social organizations, mainly golf organizations, in California and they participate in events of the Federation of Chinese Golf Clubs and are members of local affiliates. Appellants were also members of a country club in El Dorado Hills and spent at least $27,206 for club memberships and tournament fees in California during 2007 and 2008. Appellants were also member of a country club in Nevada and paid a total of $28,167 from April 2007 through December 2008. Thus, appellants maintained their California connections

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while making a new one in Nevada. This factor weighs in favor of California residency.

- Professional service providers – Appellants made 10 payments to California dentists and they state they received medical care in California in 2007 and 2008. The also paid an attorney in California in 2007 and their 2007 and 2008 tax returns were prepared by a Modesto firm. This factor weighs in favor of residency.
- Number and general purpose of days spent in California versus other states – According to appellants' calendars, appellants were in California 76 days and in Nevada 43 days in 2007 and in California 88 days and in Nevada 38 days in 2008. One of the appellants, usually appellant-wife was in California 23 days and in Nevada 7 days in 2007 and in California 23 days and in Nevada 5 days in 2008. Appellants stated they had no information for 116 days in 2007 and 138 days in 2008. There were "substantive" reasons for appellants' time spent in California which were appellant-husband's flight departures from SFO and visits to their children and grandchildren. Appellants also owned "major business ventures" and played golf in California and had access to their El Dorado Hills home and two cars. Appellants assert that their revised calendars indicate that they spent more days outside California than in the state but this factor weighs appellants' presence in California against their presence in Nevada so presence elsewhere has "little bearing" on domicile or residency. This factor weighs in favor of California residency.
- Federal and state tax return filing and residence claimed on returns – Appellants filed California nonresident returns and federal returns for 2007 and 2008 with a Henderson, Nevada address. Appellants did not file returns in Nevada because that state has no income tax. This factor weighs against California residency.
- Location of residential real property and size and value of residences – Appellants owned a 6,820 square foot home in California valued at $1.5 million in 2007 and a 2,595 square foot home in Nevada purchased for $950,000 in 2007. Appellants purchased new furnishings for Nevada home, incurred expenses for California home through 2007 and 2008, did not rent out California home and stayed there during 2007 and 2008. Appellants' purchase of another house in Nevada in 2010 has no bearing on the residency determination for 2007 and 2008. Based on

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the relatively similar size and value of the homes adjusted for location, this factor is neutral.

- Homeowner's exemption claim – According to public records, appellants claimed the Nevada house as their primary residence as of May 2007 but they also claimed the homeowner's exemption for the El Dorado Hills house in 2007 and 2008. Appellant-husband's registration as an agent for service of process in California is objective evidence appellants considered California as their residence. This factor is neutral.
- Driver's license – Appellant-husband held a Nevada license and appellant-wife held a California license. This factor weighs against residency for appellant-husband and in favor of residency for appellant-wife.
- Voter registration and voting history – Appellant-husband registered to vote in Nevada in May 2007 and voted in Nevada in November 2008 and appellant-wife was not registered to vote in either state. This factor weighs slightly in favor of Nevada residency.

Respondent asserts that its determination of California residency in 2007 and 2008 is presumed to be correct and appellants have failed to meet their burden of proof to show error in that determination, citing various authorities. (Resp. Op. Br., pp. 15-21.)

Appellants' Reply Brief

Appellants contend that respondent's opening brief includes "numerous misstatements of facts and inferences" as follows:

- Appellants were entitled to claim the homeowner's exemption for their El Dorado Hills home for fiscal year 2007-2008 because they lived there on January 1, 2007 and the exemption is automatically renewed annually. Appellants subsequently notified the Placer County Assessor that they were not entitled to the homeowner's exemption for 2008-2009 and 2009-2010 and paid the tax, penalties and interest due on March 17, 2010.
- While appellants stayed at the El Dorado Hills home in 2007 and 2008, they also stayed at the homes of friends and relatives when visiting California as well as an apartment in Modesto owned by Lau Family Partners, a partnership in which appellant and their children are partners.
- The furnishings left in the El Dorado Hills home would have sold for less than $10,000 in a yard sale and all family heirlooms were moved to the Henderson house. The heirlooms were

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more important than the furnishings which did not fit the décor of the Henderson house.

- Respondent "exaggerates the importance" of Yosemite Gourmet because it is a subchapter C corporation "exists in name only" and "has never sold any product, or had any assets or generated any income." Respondent was aware of those facts because Yosemite Gourmet filed income tax returns every year since formation.
- Although California law requires designation of an agent for service of process and that, if a natural person is the agent, he or she must reside in California, respondent is "well aware that many businesses and business owners do not always keep their business filings up to date." This was a "ministerial error" by appellants' representative and even the SOS who is required to file business information statements under the law admitted that she could not timely process those statements.
- Respondent does not mention that one of appellants' vehicles registered to the El Dorado Hills home address is a "classic collector car" that was not operable or used in 2007 and 2008 and the other vehicle was stored there because it was not needed after appellants moved to Nevada and has been driven very little since the move. Appellant-wife drove a different vehicle in Nevada. Appellants did not register the other vehicle as "non-operative only" because they could afford the operational registration fees. In addition, it was convenient to store these cars in El Dorado Hills because the garage was empty and appellant normally drove to California from Nevada so they did not use either of those vehicles.
- The reason that there were more checks written from the California bank account were the greater number of maintenance items required for the El Dorado Hills home than the Henderson home. Appellant-wife cleaned the Henderson home but hired cleaning services for the El Dorado Hills and Tahoe homes. In addition, many of the checks were for payments to family members, friends, Chinese golf associations, dentists, insurance companies, auto dealers for vehicle maintenance, credit card companies, golf equipment retailers, travel agencies and charitable organizations. Due to the greater number of California family members, friends and others with whom appellants have associated "for years and years", checks written from the California account might always be greater than those written to Nevada residents. Furthermore,

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respondent includes checks dated in 2007 prior to appellants' move from California in April 2007 which "exaggerates the days in California". Respondent also lists 15 checks from the California account and 21 checks from the Nevada account as unknown when respondent could have asked appellants for the payee location information.

- For the credit card transactions, respondent exaggerates appellants' days spent in California by including January 1, 2007 through March 31, 2007, which was prior to the change in domicile. (App. Reply Br., pp. 3-9.)

As evidence that appellants changed their domicile in April 2007, appellants cite the fact that they have resided in the Las Vegas area for almost seven years and have acquired two homes there since leaving California. Appellants also take issue with respondent's assertion that "[r]etention of significant California connections is relevant to the determination of domicile" and contend that such connections are relevant to a residency determination. Appellants argue that their visits to California since April 2007 have been for temporary or transitory purposes, such as golfing, visiting relatives and friends, weddings and a birth, vacations and flight departures. (App. Reply Br., pp. 10-11, exhs. G and H.)

Appellants cite the 19 factors from the *Appeal of Stephen Bragg*, *supra* and apply them as follows:

- Location of residential real property and size and value of residences – Appellants owned residential real property in Nevada and California in 2007 and 2008. They purchased a new principal residence in Nevada in February 2007 for $950,000 but they did not sell the El Dorado Hills home because the real estate market was "abysmal" and they could afford to wait until the market recovered. They also own a half interest in a "cabin at Tahoe" and their partnership owns multiple apartment buildings in California. The Henderson home was smaller than the El Dorado Hills home because they were down-sizing but the Henderson home is "no dump or mere condo" as proven by the fact that they rented it to a former professional baseball player when they acquired their Las Vegas home. In addition, the Las Vegas home is larger than the El Dorado Hills home. Appellants often stay in the Lau Family Partners' apartment Modesto when visiting their son and his wife there. This factor is neutral or weighs in favor of Nevada

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residency. (App. Reply Br., pp. 13-14.)

- State in which taxpayer's spouse and children reside – Appellants lived together in Henderson in 2007 and 2008 and currently live in Las Vegas. Appellant-husband works and travels extensively to China and their children are adults and have no bearing on appellants' residency. This factor favors Nevada residency. (App. Reply Br., pp. 14-15.)
- State in which taxpayer's children attend school – Not applicable. (App. Reply Br., p. 15.)
- Homeowner's property tax exemption - Appellants were entitled claim the homeowner's exemption for the El Dorado Hills home in 2007 because they resided there on January 1, 2007 and the exemption automatically renewed in the following two years. Appellants notified the assessor the property was not eligible for fiscal years 2008-09 and 2009-10 and paid the tax, penalties and interest on March 17, 2010. This factor weighs in favor of Nevada residency. (App. Reply Br., p. 15.)
- Origination point of telephone calls – Not applicable because phone records are not available.
- Number and general purpose of days spent in California versus other states – Appellants frequently visited family in California because "the family unit is the nucleus of a Chinese social structure and network" and appellants are "first generation Chinese living in American and embody traditional centuries-old Chinese family values." In addition, appellants often travel to China for business and abroad for golf outings and coordinated family visits before departure from or arrival at SFO. Appellants would normally drive to Modesto (which took about the same amount of time as flying), visit with their son and then would be driven to SFO the following day. They would also visit family members on the way to SFO. Due to appellant-husband's business venture in China they were often not in the same state which makes reconstruction of a calendar "extremely difficult." Appellants have reconstructed a more accurate calendar which shows that they were in California 39 percent of the time in 2007 and 49 percent of the time in 2008. Appellants' physical presence in California was for "a temporary non-substantive purpose" and this factor weighs in favor of Nevada residency. (App. Reply Br., pp. 16-18.)
- Federal and state tax return filing and residence claimed on returns – Appellants filed California

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nonresident returns and federal returns for 2007 and 2008 with a Henderson, Nevada address. This factor weighs in favor of Nevada residency. (App. Reply Br., pp. 18-19.)

- Bank and savings accounts – Appellants have many more accounts in California than in Nevada and many of those are family trust accounts. It is important to note that appellants opened a Nevada checking account on March 28, 2007 before they moved to Henderson. Appellants paid all Nevada expenses from that account and all California expenses from a California checking account. The opening of a new checking account indicates a change in residency so this factor weighs in favor of Nevada residency. (App. Reply Br., pp. 19-20.)
- Origination point of checking and credit card transactions – The explanation for the greater number of California transaction is that appellants continued to own the El Dorado Hills home and maintenance of this property and the Tahoe cabin entailed numerous monthly services while they had fewer maintenance items in Nevada and could perform maintenance themselves because they lived there. Appellant also incurred travel expenses and purchased numerous gifts during brief family visits in California in accordance with "Chinese culture". Also, the records reflect "many reimbursements of friends for golf related reservations" incurred in California or other vacation locations. A "purpose-driven analysis" is more effective and weighs against California residency but appellants agree this factor is neutral. (App. Reply Br., pp. 20-21, exh. M.)
- Memberships in social, religious and professional organizations – The fact that they played in Chinese golf clubs with friends in California does not indicate California residency. In 2007 and 2008, appellant held a membership in country club in El Dorado Hills and a country club in Henderson. They were able to sell the El Dorado Hills country club membership six years later in 2013 for $10,000, far below its publicized value, and during those six years they were required to spend a minimum of $640 a month for golf and $250 a quarter for food and drink, which explains the high number of golf and dining days at that country club during 2007 and 2008. They also allowed a friend to charge meals there on their membership. This factor weighs slightly in favor of Nevada residency. (App. Reply Br., pp. 21-22 and exh. N.)
- Vehicle registration - Appellants owned two vehicles registered to the El Dorado Hills home,

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one of which was collectible and was not operable in 2007 and 2008. After the move, appellants used two other vehicles on a day-to-day basis registered in the name of Yosemite Meat, one registered in California and the other registered in Nevada. Their decision to store their vehicles in California is not indicative of California domicile as appellants could only drive one vehicle at a time. This factor should be regarded as neutral. (App. Reply Br., pp. 22-23 and exh. F.)

- Driver's license – Because appellant-husband obtained a Nevada license in July 2007, this factor strongly favors his Nevada residency. Appellant-wife did not obtain a Nevada license because she knew that she would be traveling frequently to California to visit her children and grandchildren. This factor is neutral. (App. Reply Br., pp. 23-24 and exh. N.)
- Voter registration – Appellant-husband registered to vote in Nevada in May 2007 and voted there in 2008 and appellant-wife has never registered to vote. This factor weighs in favor of Nevada residency. (App. Reply Br., p. 24.)
- Professional service providers – Appellants have no personal physician but are members of Kaiser Permanente medical group which has no facilities in Nevada. Appellants chose to retain the longtime professional service providers in California as they are accustomed to Chinese social norms in which "guanxi" or relationships are of "paramount importance". Moreover, appellants' frequent family visits to California made it convenient to schedule visits with those providers and some contacts with those professionals did not require in-person meetings. This factor favors California residency but it would be "wrong" to "overemphasiz[e] the importance of this factor". (App. Reply Br., pp. 24-26 and exh. G.)
- Employment – Appellant-husband was self-employed in Nevada and had a consulting business founded in March 2007 which held a Henderson city business license. This factor weighs in favor of Nevada residency. (App. Reply Br., p. 26 and exh. O.)
- Ownership or maintenance of business interests – Appellants formed JGL Consulting, LLC in Nevada before they moved to Henderson as evidenced by copies of checks for business licenses for that business were provided to respondent. Appellants are majority shareholders in Yosemite Meat but that business is managed by a third party with assistance from appellants' son. Yosemite Gourmet exists on paper only and was formed only for the rights to the name in

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the event appellants decided "to start a line of pork products." Appellant-husband's designation as agent for service of process for Yosemite Meat was a "harmless error" and "trivial" which occurred because the Business Information Statement filing "is perfunctory and rarely amended" as it includes a "no change" response option. Appellants are partners in a business of raising livestock which owns a farm in Idaho managed by a third party and a farm in China established by appellant-husband. Because they have business interests in China, Idaho, California and Nevada, this factor is neutral. (App. Reply Br., pp. 26-28 and exhs. A and O.)

- Professional licenses – Not applicable as appellants hold no licenses. (App. Reply Br., p. 28.)
- Investment real property – Appellants and Lau Family Partners held investment real property in California in 2007 and 2008. The factor weighs in favor of California residency. (App. Reply Br., p. 28.)
- Affidavits of individuals regarding appellants' residency – Not applicable. (App. Reply Br., p. 28.)

Appellants conclude that the balance of the factors show that they abandoned their California domicile when they moved to Nevada in April 2007 and that they were not California residents during 2007 and 2008. Therefore, the dividends paid to appellants by Yosemite Meat after the move are not taxable by California. (App. Reply Br., pp. 29-30.)

Respondent's Reply Brief

Respondent summarizes facts that are relevant to the discussion therein. Respondent states that appellants contend that they established domicile in Nevada in April 2007 whereas respondent takes the position that appellants have not proven a change in domicile during 2007 or 2008. Respondent contends that the party asserting a change in domicile has the burden of proof and any doubt is resolved in favor of finding no change. Respondent states that appellants cite as support for the change of domicile in 2007 both the purchase of a new home in Las Vegas in 2010 and the fact that respondent has not assessed tax on them as California residents after appeal year 2008. Respondent asserts that the inquiry is whether the facts presented prove appellants established Nevada domicile in 2007 with the requisite elements of physical presence and intent and whether appellant purchased property in Nevada. Thus, respondent contends, appellants' purchase of a home in Las Vegas in 2010

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has no bearing on the determination of domicile in 2007. In addition, respondent asserts that whether a taxpayer is audited and assessed in years subsequent to those on appeal has no bearing on whether respondent assesses the taxpayer for a year that was audited. Respondent states that it has not opened an audit of appellants' return for any subsequent years. (Resp. Reply Br., pp. 2-3.)

Respondent further asserts that appellants seem to argue that retaining contacts in California is not relevant to a change of domicile analysis but respondent cites *Appeal of Anthony V. and Beverly Zupanovich*, 76-SBE-002, decided January 6, 1976, in which the Board held that maintaining a "California tie" was relevant to that determination. Respondent contends that facts and circumstances after 2007 do not reflect appellants' intent or physical presence in 2007 and maintaining California connections during the years in issue is relevant to a domicile analysis. (Resp. Reply Br., pp. 3-4.)

Respondent states that appellants submitted a calendar in 2011 to respondent's auditor which they stated was based on review of receipts, calendars, photographs, airline ticket and other documentation as well as the recollections of friends, family and relatives. They also stated that any days unaccounted for were probably days in Henderson. Respondent contends that appellants now claim three years later to have reconstructed a more accurate calendar of events in 2007 and 2008 which was attached to their reply brief. Respondent states that the new calendars differ from the original calendars "largely by declaring previously unknown location days to be Nevada days." Respondent asserts that appellants have not "identified substantiation to support their fresh recall of their location on specific dates in 2007 and 2008." In this regard, respondent states that appellants submitted more than 300 pages of financial transaction information with their reply brief but do not specify which documents support their new assertions or explain whether any of those documents have been submitted previously during the audit or at protest. For those reasons, respondent contends that the new calendars are not probative of a determination as to whether appellants were absent from California for a temporary or transitory purpose. (Resp. Reply Br., pp. 4-6.)

Respondent states that appellants claim that the new calendars support Nevada residency because they show that appellants were outside California 61 percent of the days in 2007 and 51 percent of the days in 2008. While a comparison of the number of days in California to days spent

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outside California is one of the *Bragg* factors, respondent contends that a proper residency analysis requires a comparison of the number of days spent in California with the number of days spent in the alleged state of residency. Respondent notes that the calendars submitted in 2011 show that in 2007 both appellants were in California 76 days and both were in Nevada 43 days, one appellant was in California while the other was outside either state 23 days and one appellant was in Nevada while the other was outside either state 7 days. In 2008 both appellants were in California 88 days and both were in Nevada 38 days, one appellant was in California while the other was outside either state 23 days and one appellant was in Nevada while the other was outside either state 5 days. Respondent concludes that this evidence indicates closer connection with California as the state of domicile and residency in 2007 and 2008. Respondent contends that appellants failed to meet their burden of proving that respondent erred in its determination that appellants closest connections were with California. (Resp. Reply Br., pp. 6-7.)

Respondent contends that appellant-husband's registration as a natural person to receive service of process is objective evidence that he continued to reside in California. If he no longer resided in California, respondent asserts that appellant-husband was required to identify a new agent for service of process pursuant to California Corporations Code section 1502, subdivision (b). Contrary to appellants' explanation that their "CPA or business attorney" made a "ministerial error", respondent contends that designating a new agent is not a mere ministerial act. Respondent asserts that a corporate defendant may only receive service of process through an individual because a corporation cannot be personally served. Respondent further asserts that a California resident who files a civil action against a California company is required to serve notice on an individual and without an agent who resides in state the plaintiff would be required to serve an officer or employee of the company which might be a difficult task. For that reason, respondent contends that designation of an agent is not a ministerial act and registration as an agent is an indicator that the person resides in California. (Resp. Reply Br., pp. 7-8.)

Respondent contends that appellants provide no legal authority to support their assertion that opening a bank account in Nevada indicates Nevada residency. Respondent asserts that appellants reason that the Nevada checking account would not have been necessary if the Henderson house was a

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vacation home. Furthermore, respondent asserts that the record of writing checks from the California and Nevada accounts is consistent with appellants' representation that they paid Nevada bills from the Nevada account and California bills from the California account. Nonetheless, respondent notes that appellants wrote far more checks from their California account which indicates that appellants had far more bills, and ties with California than they had with Nevada. Respondent concludes that opening a checking account in Nevada which could have been for entertainment or convenience while appellants had a "variety of long-term accounts in California" is not a basis for weighing this factor in favor of Nevada residency. (Resp. Reply Br., pp. 8-9.)

Applicable Law

Burden of Proof

It is well established that a presumption of correctness attends respondent's determinations of fact and that an appellant has the burden of proving such determinations erroneous. (*Appeal of George H. and Sky Williams, et al.*, 82-SBE-018, Jan. 5, 1982.) This presumption is a rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary. (*Appeal of George H. and Sky Williams, et al., supra*.) Respondent's determinations cannot, however, be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of George H. and Sky Williams, et al., supra*.) It is also well established that the failure of a party to introduce evidence which is within his control gives rises to the presumption that, if provided, it would be unfavorable. (*Appeal of Don A. Cookston, supra*.)

Furthermore, respondent's determinations of residency are presumptively correct. (*Appeal of Morgan, supra*.) The party asserting a change in domicile bears the burden of proving such change. (*Appeal of Terance and Brenda Harrison*, 85-SBE-059, June 25, 1985.) If there is doubt on the question of domicile after the facts and circumstances have been presented, the domicile must be found to have not changed. (*Whitmore v. Commissioner* (1955) 25 T.C. 293; *Appeal of Anthony J. and Ann S. D'Eustachio*, 85-SBE-040, May 8, 1985.) California Code of Regulations, title 18, section (Regulation) 17014, subdivision (d)(1), states that the type and amount of proof required to show domicile cannot be specified by general regulation, but will depend largely on the circumstances of each particular case. In the case of individuals who claim to be nonresidents by virtue of being outside

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of the state for other than temporary or transitory purposes, affidavits of friends and business associates as to the reasons for being outside of the state should be submitted. (*Ibid.*)

Taxation of Residents

R&TC section 17041, subdivision (a)(1), provides, in pertinent part, that a tax shall be imposed for each taxable year upon the entire taxable income of every resident of California who is not a part-year resident. R&TC section 17014, subdivision (a), provides that the term "resident" includes: (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. Thus, an individual domiciled in California remains a resident until he or she leaves for other than a temporary or transitory purpose. (Cal. Code Regs., tit. 18, § 17014; see also Rev. & Tax. Code, § 17014.)

Domicile Determination

The term "domicile" refers to one's permanent home, the place to which he or she intends to return after an absence. (*Appeal of Anthony V. and Beverly Zupanovich, supra* (citing *Whittell v. Franchise Tax Board* (1964) 231 Cal.App.2d 278, 284).) An individual can have but one domicile at any one time. (Cal. Code Regs., tit. 18, section 17014, subd. (c).) To change a domicile, a taxpayer must move to a new residence and intend to remain there permanently or indefinitely. (*Appeal of Stephen D. Bragg, supra*; Cal. Code Regs., tit. 18, § 17014, subd. (c).) The burden of proof as to a change in domicile is on the party asserting such change. (*Appeal of Stephen D. Bragg, supra*.) If there is doubt on the question of domicile after the presentation of the facts and circumstances, the domicile must be found to have not changed. (*Appeal of Stephen D. Bragg, supra*.)

Residency Determination

If a taxpayer is domiciled in California, the facts must be examined to determine whether the taxpayer is outside of the state for a temporary or transitory purpose, such that the taxpayer should continue to be treated as a California resident. (*Whittell v. Franchise Tax Board, supra*.) Regulation section 17014, subdivision (b), discusses the term "temporary or transitory purpose," as used in R&TC section 17014 with regard to residency, in the following manner:

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> It can be stated generally, however, that if an individual is simply passing through this State on his way to another state or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here.
>
> If, however, an individual is in this State . . . for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely . . . he is in the State for other than temporary or transitory purposes, and accordingly, is a resident taxable upon his entire net income . . .

Regulation section 17014, subdivision (b), also states that the underlying theory of R&TC sections 17014 to 17016 is that the state with which a person has the closest connection during the taxable year is the state of his residency. The contacts a taxpayer maintains in California and other states are important factors to be considered in determining California residency. (*Appeal of Anthony V. and Beverly Zupanovich*, *supra*.) Although the actual or potential duration of the taxpayer's presence in, or absence from, California is very significant in determining his residency, it is also important in each case to examine the connections with California and compare them with those he maintains in other places. (*Appeal of Anthony V. and Beverly Zupanovich*, *supra*.)

In *Bragg*, the Board listed nonexclusive factors to aid in determining with which state an individual has the closest connection. The Board in *Bragg* noted that these nonexclusive factors ". . . serve merely as a guide in our determination of residency," and ". . . [t]he weight given to any particular factor depends upon the totality of the circumstances" unique to each taxpayer for each tax year. The *Bragg* factors can be organized into three categories for a more detailed discussion, as provided below. As will be seen below, many factors overlap one another.

Registrations and Filings

This group of factors is representative of the taxpayer's compliance with state legal requirements which is usually a change of status effected by an application for or cancellation of such status with a government agency. The factors in this category include:

- Homeowner's property tax exemption claim;
- State of residence reported on federal and state tax returns and address listed on such returns;
- Automobile registration;
- State driver's license; and
- State of voter registration and voting history.

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Personal and Professional Associations

The factors in this group indicate day-to-day contacts in both the taxpayer's occupational life as well as personal life. These factors show where the taxpayer engaged in occupational endeavors and maintained personal relationships and community involvement. These factors include:

- Where the taxpayer's children attend school;
- The location of the taxpayer's bank and savings accounts;
- Where the taxpayer maintains memberships in social, religious, and professional organizations;
- Where the taxpayer obtains professional services, such as doctors, dentists, accountants, and attorneys;
- Where the taxpayer is employed;
- Where the taxpayer maintains or owns business interests;
- The state wherein the taxpayer holds a professional license or licenses; and
- The state wherein the taxpayer owns investment real property.

Physical Presence and Property

This group includes the factors showing where the taxpayer was physically located during the time in question, and where his or her tangible and real property were located. Many of the factors in this group attempt to pinpoint the taxpayer's location, and therefore may be redundant or used to corroborate the taxpayer's location. These factors include:

- The location of all of the taxpayer's residential real property, and the approximate sizes and values of each of the residences (i.e., indicating the nature of the use of the property) including whether the taxpayer sold or rented any residential property around the time of the alleged residency change;
- Where the taxpayer's spouse and children reside;
- Origination point of taxpayer's telephone calls;
- 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.); and
- Origination point of the taxpayer's checking account transactions and credit card transaction.

STAFF COMMENTS

Appellants assert that they established Nevada domicile when they moved into their Henderson, Nevada home in April 2007 and that visits to California after that date were only for temporary or transitory purposes. The evidence shows that appellants owned the El Dorado Hills home

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through at least 2010 although they assert that they abandoned that home as their primary residence but stayed there occasionally during 2007 and 2008. At protest, appellants stated that none of their family members occupied the home during 2007 and 2008. Appellants state that they left the furnishings in the home for the purpose of showing the home "if and when the real estate market improved." Appellants also continued to make monthly housecleaning payments for the home. At the hearing, appellants should be prepared to discuss further why they determined to keep the home and how they used the home.

Among the evidence submitted by appellants are American Express Credit Card statements with closing dates in each month of 2008 addressed to appellant-wife at the El Dorado Hills home. There are also statements from Bank of the West in 2007 and 2008 addressed to appellants at that home. (App. Reply Br., exh. M.) At the hearing, appellants should explain why they continued to receive credit card and bank statements at a house that they only visited occasionally.

With respect to respondent's computation of days spent and numbers of transactions in California in 2007, respondent should be prepared to clarify whether it included the period prior to May 1, 2007, as the parties agree appellants were California residents prior to this date.

Pursuant to Corporations Code section 1502, subdivision (b), every corporation registered in California is required to file a statement with the SOS that designates an agent for the purpose of service of process and is either a natural person residing in California or a corporation meeting other requirements. If a natural person is designated the statement is required to set forth the person complete business or residence street address. The statement filed by Yosemite Gourmet dated October 5, 2012 designated appellant-husband as the agent for service of process and lists a Modesto address. Appellants' explanation for listing appellant-husband (whom they contend is a non-resident of California" as the agent is that "many businesses and business owners do not always keep their business filings up to date" or that this was a "ministerial error" by appellants' representative. The Appeals Division notes that this filing was not merely an annual renewal of the statement but rather was completed in 2012. The form states on its face that an agent who is an individual must reside in California and appellant-husband certified that the information was true and correct. At the hearing, appellants should be prepared to explain why appellant-husband was designated as the agent if he was

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not a resident of California.

Appellants assert that appellant-wife did not obtain a Nevada license in 2007 or 2008 because she knew that she would be traveling frequently to California to visit her children and grandchildren. At the hearing, appellants should be prepared to explain why they believed it was necessary for appellant-wife to keep her California license to drive in California.

Additional Evidence

If either party has additional evidence that the party wants the Board to consider, then pursuant to California Code of Regulations, title 18, section 5523.6, that party should provide such evidence to the Board Proceedings Division at least 14 days prior to the oral hearing.[2]

Section 40

As noted above, this matter is subject to R&TC section 40. Therefore, within 120 days from the date the Board's vote to decide the appeal becomes final, a written opinion (i.e., Summary Decision or Formal Opinion) must be published on the Board's website. (Cal. Code Regs., tit. 18, § 5552, subds. (b), (f).) The Board's vote to decide the appeal will become final 30 days following the date of the Board's vote, except when a petition for rehearing is filed within that period.[3] (Cal. Code Regs., tit. 18, § 5460, subd. (a).)

Following the conclusion of this hearing, if the Board votes to decide the appeal, but does not specify whether a Summary Decision or a Formal Opinion should be prepared, staff will expeditiously prepare a nonprecedential Summary Decision and submit it to the Board for consideration at a subsequent meeting. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(2).) Unless the Board directs otherwise, the proposed Summary Decision would not be confidential pending its consideration by the Board (Cal. Code Regs., tit. 18 § 5551, subd. (b)(5)); accordingly, it would be posted on the Public Agenda Notice for the meeting at which the Board will consider and vote on the Summary Decision.

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[2] Evidence exhibits should be sent to: Khaaliq A. Abd'Allah, Associate Governmental Program Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC: 80, Sacramento, California, 94279-0080.

[3] If a petition for rehearing is filed, the Board's decision will not become final, and no written opinion under Section 40 will be considered until after the petition for rehearing is resolved.

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A taxpayer may request that the Board hold in abeyance its vote to decide the appeal so the taxpayer may review the Board's written opinion prior to the expiration of the 30-day period for the filing of a petition for rehearing. If the vote is held in abeyance, the proposed Summary Decision will be confidential until it is adopted by the Board. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(5).) Any request that the Board's vote be held in abeyance should be made in writing to the Board Proceedings Division prior to the hearing or as part of oral argument at the hearing. Any such request would then be considered by the Board during its deliberations on the appeal.

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