In the Matter of the Appeal of:  

GILBERT P. HYATT  

HEARING SUMMARY

FRANCHISE AND INCOME TAX APPEAL  

Case No. 435770 (1991)

<table>
<thead>
<tr>
<th>Year</th>
<th>Proposed Assessment</th>
<th>Tax</th>
<th>Fraud Penalty</th>
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<tbody>
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<td>1991</td>
<td>$1,876,471.00</td>
<td>$1,407,353.25</td>
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Representing the Parties:

For Appellant: Edwin P. Antolin, Antolin Law Group  
Michael W. Kern, Piercy Bowler Taylor & Kern  
Bill Leonard

For Franchise Tax Board: William C. Hilson, Jr., Deputy Chief Counsel  
Scott DePeel, Tax Counsel IV  
Ann Hodges, Tax Counsel IV

ISSUES: (1) Whether appellant is taxable as a resident of California on all of his income from

1 Appeals Bureau attorneys Grant S. Thompson and Josh Lambert prepared this Hearing Summary.

2 Appellant also has an appeal pending for the 1992 tax year (Case No. 446509). This appeal (Case No. 435770) and the appeal for 1992 (Case No. 446509) were previously scheduled to be heard on May 23, 2017. The Franchise Tax Board (FTB or respondent) requested a two-month continuance due to a family medical emergency. Appellant did not object but requested that the hearings be held on the calendar commencing on August 29, 2017. In light of the foregoing, the appeals were rescheduled for the August 29, 2017 calendar.
Appeal of Gilbert P. Hyatt

STATE BOARD OF EQUALIZATION
FRANCHISE AND INCOME TAX APPEAL

(2) Whether appellant’s income is taxable as California source income.
(3) Whether respondent Franchise Tax Board (FTB) has shown that it properly imposed a fraud penalty.
(4) Whether appellant has shown a legal basis for the abatement of interest under Revenue and Taxation Code (R&TC) section 19104.

HEARING SUMMARY

Section 40 Appeal

This appeal involves an amount in controversy that is $500,000 or more and thus is covered by R&TC section 40, as explained below in Staff Comments under Issue 4.

ISSUE (1): Whether appellant is taxable as a resident of California on all of his income from September 26, 1991, to December 31, 1991.

Background

Prior to September 26, 1991, appellant was a California resident and domiciliary living on Jennifer Circle in La Palma, California. During 1991 and 1992, appellant earned a substantial amount of income from the licensing of patents.

According to appellant, he moved to Las Vegas on September 26, 1991, and initially resided in the Continental Hotel. Appellant contends that, on October 1, 1991, he sold his La Palma home to Grace Jeng, and that, on October 21, 1991, he moved from the Continental Hotel into an apartment at the Wagon Trails apartment building in Las Vegas. Appellant argues that he resided in that

3 Appellant also asserts that the amnesty penalty should not be imposed, but acknowledges that the Board has held that it does not have the jurisdiction to review the penalty. (App. 1991 Opening Brief (App. 1991 Op. Br.), pp. 86-87.) Pursuant to R&TC section 19777.5, there is no legal basis for the Board to review the post-amnesty penalty at this time, because the penalty has not been assessed and paid and the taxpayer is not appealing from a timely refund claim that raises a computational error.

apartment until April 3, 1992, when he moved into his newly purchased home on Tara Avenue in Las Vegas.\(^5\)

In contrast, the FTB argues that appellant continued to live and work at his La Palma home throughout all of 1991 and through April 2, 1992. The FTB argues that appellant continued to own his La Palma home throughout 1991 and that, on June 10, 1993, appellant caused a notary to backdate documents to indicate an October 1, 1991 sale. The FTB further asserts that appellant operated a California business.\(^6\)

On June 2, 1993, the FTB initiated an examination of appellant’s residency status with regard to appellant’s 1991 tax return.\(^7\) On June 17, 1993, the FTB issued an initial audit contact letter for 1991. (App. 1991 Op. Br., Ex. 94.) The parties dispute whether appellant cooperated during the audit and the relevance of internal FTB documents showing the FTB’s consideration of various issues during the audit.\(^8\)

On April 23, 1996, the FTB issued a Notice of Proposed Assessment (NPA) to appellant for the 1991 tax year, assessing additional tax of $1,876,471 and a fraud penalty of $1,407,353. The NPA notes the statutory definition of resident, provides citations to Board decisions on residency, and states the fraud penalty is imposed pursuant to R&TC section 19164, subdivision (b). On June 20, 1996, appellant protested the NPA.\(^9\)

On January 6, 1998, appellant sued the FTB in Nevada claiming the FTB committed tortious acts during the audit, including fraud and the intentional infliction of emotional distress. During the protest period with regard to the FTB’s proposed assessment of additional income tax, the FTB and 


appellant were engaged in this litigation. A trial was not held until 2008. Following the trial, the jury
awarded appellant over $388 million in compensatory and punitive damages, plus costs and interest.
However, this award amount was substantially reduced by the Nevada Supreme Court, and the
United States Supreme Court subsequently capped the FTB’s liability.10 The parties dispute the
relevance of that litigation to the issues on appeal.

On December 27, 1999, appellant obtained a protective order from the Nevada court
allowing appellant to designate information as confidential information which could not be shared
outside the FTB’s litigation team except in certain circumstances. (FTB 1992 Op. Br., p. 50 & Ex. H,
Tab 27.)

Protest hearings were held on September 27, 2000 and October 4, 2000. 11 On May 31,
III which contains the protest supplement].)

Between September 2000 and November 2007, the parties were involved in a number of
disputes regarding the scope and application of the Nevada protective order and various subpoenas
issued by the FTB. It appears that, during some portion of this time, the FTB had difficulty organizing
its audit and protest records and, due to the Nevada litigation, deferred action on the processing of the
protest for a period. As discussed under Issue (4), regarding interest abatement, the parties dispute the
length of any delays and which factors contributed to the length of the protest period.12

On November 1, 2007, the FTB issued a Determination Letter for both the 1991 and 1992

10 The jury ruled for appellant for causes of action including fraud. In 2003, the United States Supreme Court held that the
FTB could be sued in Nevada courts. (FTB v. Hyatt (2003) 538 U.S. 488.) In 2014, the Nevada Supreme Court partially
reversed the trial court, sustaining only a $1 million award for fraud and an award for the intentional infliction of emotional
distress that it remanded for a new trial. (FTB v. Hyatt (Nev. 2014) 335 P.3d 125.) In 2016, the United States Supreme Court
found, in its second opinion in the litigation, that damages must be limited to the statutory liability limit for Nevada agencies
($50,000), and remanded the case back to the Nevada Supreme Court. (FTB v. Hyatt (2016) 136 S.Ct. 1277.) The parties are
currently disputing in the Nevada Supreme Court how the United States Supreme Court’s 2016 ruling should be applied.

11 The FTB argues that both hearings covered both years while appellant contends that the 1991 protest hearing was held on
October 4, 2000 and the 1992 protest hearing was held on September 27, 2000. (See FTB 1992 Reply Br., p. 81; App. 1991
October 4, 2000 letter from the FTB noting that protest hearings were held on September 27, 2000, and October 4, 2000 and
setting forth issues].)

12 Additional information regarding events during the protest is provided under the section entitled “Background” for Issue
(4).
tax years in which the FTB stated it would affirm the NPA for 1991 as well as the NPA for 1992. The
Determination Letter also advanced “an additional and alternative basis for the assessments that the
patent licensing income received by the taxpayer is, in whole or in large part, California source income
taxable by California."  

On December 26, 2007, the FTB issued a Notice of Action (NOA) for the 1991 tax year,
affirming the NPA. The NOA references the November 1, 2007 determination letter. It finds appellant
to be a resident of California through April 2, 1992 and, as such, taxable on his income from all sources
through that date. The assessment is alternatively sustained on the basis that appellant’s income was
generated from intellectual property that had a business situs in California for the entire taxable year and
was derived from sources within California. Appellant then filed this timely appeal. 

Appellant’s Contentions – Issue (1) - Residency

Appellant contends that he permanently moved to and became a domiciliary and resident
of Las Vegas, Nevada, on September 26, 1991. Appellant contends that he needed a change in his life
because 1990 was a difficult year due to personal issues and a depression in the aerospace industry in
which he worked as a consultant.

Appellant asserts that Sheldon Adelson invited him to speak at the Comdex trade show in
Las Vegas in November 1990, and offered him a job if he moved to Las Vegas. Appellant contends
that, while present at the Comdex trade show, he explored Las Vegas and decided to move there.

Appellant contends that he prepared to move for over 9 months by visiting Las Vegas several times

14 This appeal was deferred many times at the request of one party or both parties and in order to allow evidence to be
presented and to obtain additional briefing. During the appeal, appellant and the FTB were involved in litigation in
New York courts in which appellant sought to prevent the FTB from introducing evidence in this appeal (sometimes referred
to as “Philips documents”). Once the New York litigation resolved, additional briefing was obtained with regard to the
Philips documents that had been the subject of the New York litigation as well as evidence provided by appellant with his
final brief prior to additional briefing.
15 Each party’s concluding summary contains citations to exhibits and portions of its other briefs supporting its arguments.
For brevity, footnotes are generally omitted when quoting from a party’s contentions.
during 1991. Appellant contends that he fixed up his California house and gave away, stored, threw away, and packed up his possessions. Appellant contends that he sold the house on October 1, 1991. Appellant contends that, after signing and delivering the grant deed to the purchaser (Ms. Jeng) and receiving a down payment from her, he moved his remaining belongings to Las Vegas. Appellant asserts that he had no other abode in California. Appellant asserts that his finances were very uncertain at the time that he moved. Appellant contends that he stayed in a Las Vegas hotel for several weeks, leased a Las Vegas apartment for six months, and purchased a house in Las Vegas on April 3, 1992, where he still resides today.\(^{17}\)

Appellant asserts that, in December 1990, he engaged Mahr Leonard Management Company (Mahr Leonard or MLMC) to license his patents, but Mahr Leonard failed to get any licenses. Appellant asserts that, into October 1991, the Mahr Leonard negotiations with Fujitsu Ltd. (Fujitsu) and Oki Electric Industry Co., Ltd. (Oki) were continuing and changes were being made to the patent agreements. Appellant asserts that, in July 1991, he licensed U.S. Philips Corporation (Philips) with exclusive authority to sublicense his patents, and that Philips told him that it could take years of litigation before his patents were licensed. Appellant asserts that, as a result, he did not know that the Philips licensing program would be a rapid success. Therefore, appellant asserts, Philips agreed to pay appellant a minimum annual license fee for up to 10 years to sustain him until Philips could license his patents. However, appellant asserts that Philips unexpectedly started to license his patents, which permitted him to concentrate more of his time on his research and building his life in Las Vegas. (App. 1991 CS, p. 1; see also App. 1991 Reply to FTB CS, pp. 3 - 6.)

Appellant argues that he has produced “overwhelming eyewitness and documentary evidence” in support of his appeals, including 220 declarations, affidavits from more than 150 witnesses, and thousands of pages of contemporaneous documentary evidence. Appellant sets forth the number of witnesses testifying about various topics. For example, appellant argues that: (1) 26 witnesses testified about his decision to move to Las Vegas; (2) 32 witnesses testified about his preparations to move; (3) 21 witnesses testified that he lived alone at his former Jennifer Circle house before he moved; and

\(^{17}\) App. 1991 CS, pp. 1, 3, 6, & 7; see also App. 1991 Reply to FTB CS, pp. 2-3.
(4) 17 witnesses testified about his former Jennifer Circle house having little furniture and/or having packed boxes before he moved.\(^{18}\) (App. 1991 CS, pp. 2, 6, & 16.)

Appellant contends that, during the 190-day disputed period in 1991 and 1992 (September 26, 1991, to April 2, 1992), he had “125 full days in Nevada as a resident, zero full days as a California resident, and 37 days partly in Nevada as a resident and partly in California for temporary or transitory purposes.” Appellant argues that, during the 1991 disputed period, he had “71 full days in Nevada and zero full days in California.” (App. 1991 CS, pp. 2-3; App. 1991 Reply to FTB CS, p. 7.)

Appellant provides an overhead photograph of the Jennifer Circle neighborhood which indicates the homes of neighbors who provided declarations. Appellant notes that the photograph indicates that the neighborhood is a compact cul-de-sac with 16 houses, and argues that 22 former Jennifer Circle neighbors testified that he moved away in 1991, and 23 former neighbors testified that they did not see him again at Jennifer Circle after he moved away in 1991. Appellant argues that the testimony of his former neighbors alone defeats the FTB’s residency case. Appellant asserts that seven eyewitness neighbors (members of the Kim family and the Neuner family) lived next door to appellant and testified that he moved away in 1991. Appellant notes that Mr. Neuner testified that he saw appellant leave for Las Vegas in his brown Toyota pulling a trailer. Appellant argues that this eyewitness testimony corroborates his contention that he moved away and was not present at the Jennifer Circle house during the disputed period or thereafter. (App. 1991 CS, pp. 4 & 5.)

Appellant contends that dozens of additional witnesses testified to his presence in Las Vegas, visiting him and telephoning him at his Las Vegas apartment, worshiping with him, and house hunting with him in Las Vegas. Appellant asserts that: (1) 37 witnesses testified about his stay at a Las Vegas hotel after he moved; (2) 39 witnesses testified about telephoning him at his Las Vegas apartment; (3) 20 witnesses testified about his move into his Las Vegas house in April 1992; (4) 16 witnesses testified about the sale of his California house in October 1991; and (5) two former Orange County Assessors testified that the documentation for the sale of the California house satisfied the

\(^{18}\) Most declarants and affiants provided statements about more than one topic.

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\textbf{NOT TO BE CITED AS PRECEDENT} - Document prepared for Board review. It does not represent the Board’s decision or opinion.
requirements of the Orange County Assessor’s Office for the sale of a house in 1991.19

Appellant argues that the FTB is resorting to fabricating fantastic stories, mischaracterizing and misquoting documents, relying on an address on correspondence as “proof” of appellant’s location, calling appellant’s witnesses perjurers, drawing illogical inferences, and disregarding overwhelming evidence. Appellant argues that his evidence “is so extensive that it is virtually immeasurable.” Appellant states that he has produced more than 220 affidavits, with affidavits summarized in more than 150 Testimonial Topics. Appellant contends that the FTB completely disregarded the more than 10,000 pages of exhibits to the declarations that he submitted and challenged the integrity of dozens of eyewitnesses without considering the enormous amount of documentary support. (App. 1991 CS, pp. 7-8.)

Appellant asserts that the FTB took 20 formal depositions but did not use that evidence to support its case, while appellant created 27 deposition tables with more than 800 excerpts to support his appeals. Appellant states that he produced more than 15 Philips document tables with excerpts from more than 5,000 pages of Philips documents, some duplicates, supporting his appeals, and that more than one thousand pages of agreements in Philips documents support his appeals. Appellant argues that he produced “more than 15,000 pages of licensing documents to the FTB about a decade before the FTB subpoenaed the so-called Philips documents, as well as sourcing affidavits from three eyewitnesses to the Philips licensing program with more than 1,500 exhibits. Appellant asserts that the FTB’s Attachment A (Revised), which the FTB offers to support its calendar, contains more than 2,000 false statements that are identified, explained, and corrected with eyewitness and documentary evidence. (App. 1991 CS, pp. 8-9.)

Appellant argues that the presumption of California residency under R&TC section 17016 does not apply to him, that the FTB bears the burden of proof on its new “presumption of residency” argument, and that the presumption has been thoroughly rebutted. Appellant argues that the direct eyewitness testimony is so compelling that it should be taken as dispositive of his move to Las Vegas. Appellant asserts that Ms. Ruth, his former Jennifer Circle neighbor, testified that near the

end of September 1991, appellant said goodbye and pulled a trailer load of possessions with his “old brown car” to Las Vegas. Appellant argues that, even more compelling is that this was testimony from one of the FTB’s depositions of appellant’s witnesses. (App. 1991 CS, p. 9.)

Appellant argues that his closest connections were with Nevada after September 26, 1991. Appellant contends that: (1) he stayed at a hotel for a few weeks; (2) he leased an apartment for six months; (3) he looked for and purchased a Las Vegas house; (4) he opened bank and situs investment accounts in Las Vegas; (5) he joined a Las Vegas synagogue; (6) he surrendered his California driver’s license and obtained a Nevada driver’s license; (7) he registered to vote and did vote; (8) he insured his two cars, his apartment, and his house through a Las Vegas insurance agent whom he has used for over 25 years; (9) he hired Nevada professionals; (10) most of his checking account and credit card transactions were in Las Vegas; (11) he terminated his California homeowner’s property tax exemption; (12) he registered his automobiles in Nevada and registered his 1977 Toyota in Las Vegas after it passed a smog check; (13) he bought a new Toyota in Las Vegas, which was located in Las Vegas during the disputed period and thereafter; (14) he hired Nevada professionals; (15) he moved his computer, fax machine, active files, and telephone to Las Vegas; (16) he filed his tax returns from Las Vegas; and (17) he worked with the Governor of Nevada to bring international businesses to Nevada. Appellant contends that he did hundreds of other things that established his permanent residence in Las Vegas. (App. 1991 CS, pp. 3, 7, 10, 16, & 18.)

Appellant states that he provided many written changes of address to persons, entities, and the United States Postal Service (USPS), informed more than 100 persons of his move to Las Vegas, and provided his Las Vegas contact information to his family, friends, neighbors, licensing associates, and service providers. Appellant asserts that he continues to reside in Las Vegas today. 20

Appellant contends that, before September 26, 1991, he personally walked through many Las Vegas houses and made many purchase offers. Appellant contends that, on October 1, 1991, he signed and delivered a grant deed for his Jennifer Circle house to the purchaser (Ms. Jeng). Appellant contends that, on June 10, 1993, he notarized the grant deed with an acknowledgement of his prior

Appellant argues that the sale was valid and contends that former Orange County elected assessors Bradley Jacobs and Webster Guillory confirmed the validity of the sale. Appellant asserts that Ms. Jeng gave him a note, a $15,000 down payment, monthly payments for six years, and a balloon payment to pay off the loan in full in six years. Appellant contends that he had no California abode after October 1, 1991. Appellant asserts that, during the disputed period, he shopped for a Nevada house in person and made purchase offers on ten Las Vegas houses. Appellant argues that the FTB in bad faith disregarded the eyewitness testimony of Mr. McGuire, Mr. Shoemaker, and appellant with regard to house hunting in Las Vegas and fabricated a story about shopping for houses by telephone. Appellant asserts that escrow opened on his Las Vegas Tara home on March 16, 1992, and escrow closed on this home and he moved in on April 3, 1992. 21

Appellant asserts that he lived alone, did not have a spouse, had long been divorced, and his children were adults who did not live with him. Therefore, appellant argues that he was free to move to Las Vegas without any family commitments. Appellant contends that he was not employed, did not have business interests, and did not use professional licenses during the disputed period. Appellant contends that he had no investment real property during the disputed period. Appellant contends that his only telephone was located in his Las Vegas apartment and his account was with the Centel telephone company in Las Vegas. Appellant asserts that eyewitnesses testified about the telephone in his Las Vegas apartment and telephone calls with him. Therefore, appellant argues that all of his calls originated from Las Vegas. (App. 1991 CS, p. 11.)

Appellant contends that he spent all of his time during the disputed period in Nevada except for short temporary and transitory trips to other states. Appellant contends that he always intended to and did return to Nevada after each trip. Appellant contends that he was only present in California for temporary and transitory purposes, such as a stay in a hospital for cancer surgery, which does not count as residency days in California. Appellant contends that, when he visited California after October 1, 1991, he stayed at California motels, not the La Palma house. Appellant contends that he had 166 full and part days in Las Vegas as a resident out of the 190 days in the disputed period (i.e., between September 26, 1991 and April 3, 1992). Appellant argues that his limited presence in California during

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the disputed period was only for temporary or transitory purposes. Appellant contends that he had only 9 full days in California between September 26, 1991 and April 3, 1992 and that during these 9 days he was in a California hospital recovering from cancer surgery.\(^{22}\)

Appellant contends that the origination point of his checking and credit card transactions was Las Vegas. Appellant notes that he opened new Las Vegas checking accounts and entered changes of address to his Las Vegas address with his national credit account companies. Appellant states that, during the disputed period, he signed more than 80 checks in Las Vegas with his Las Vegas address printed thereon and with his banks’ Las Vegas addresses printed thereon. Appellant contends that virtually all of these transactions took place in Las Vegas.\(^{23}\)

Appellant asserts that his social, religious, and professional memberships and activities during the disputed period and after were in Las Vegas. Appellant asserts that he joined and regularly attended worship services at a Las Vegas synagogue. Appellant asserts that he joined the Las Vegas Personal Computer Users Group and was associated with the Office of the Nevada Governor, Nevada Development Authority, and Clark County School District. Appellant asserts that he used more than 100 non-California professionals. Appellant argues that the FTB disregards his documentary evidence that he used more than 100 non-California professionals and falsely alleges that Philips’ California professionals are his professionals. (App. 1991 CS, pp. 14-15.)

Appellant contends that the U.S. Postal Service forwarded Philips and Mahr Leonard misaddressed correspondence and other correspondence to his Las Vegas address because of his change of address. Appellant contends that on October 21, 1991, he submitted a change of address from his La Palma house and Cypress P.O. Box to his Las Vegas address. Appellant contends that he received virtually all of his mail in Las Vegas during the disputed period and thereafter. Appellant asserts that he received his Las Vegas bank statements and statements for his new investment accounts in Las Vegas. Appellant asserts that he gave Philips and Mahr Leonard a change of address to Las Vegas in October 1991. Appellant argues that the correspondence sent by Philips to his former California addresses and


fax numbers is undisputed misaddressed correspondence. Appellant asserts that he gave Philips further notice by marking up a November 5, 1991 draft supplemental agreement with Philips by inserting his Las Vegas apartment address. Appellant notes that the preambles of the Sony Corporation (Sony) and NEC Corporation (NEC) agreements stated that he was a resident of Las Vegas. Appellant observes that Mr. Tamoshunas testified that he was given a change of address and that the subsequent sending of correspondence to appellant’s former California addresses was inadvertent error by Philips personnel.24

Appellant states that his eyewitness and documentary evidence rebutting the FTB’s bad faith calendar, Attachment A-R and Attachment E, are summarized in tabular form in his 1991 second additional brief (ASAB) dated September 28, 2016. Appellant asserts that ASAB exhibits 1 and 2 provide links to overwhelming testimonial and documentary evidence which illustrates the true facts. Appellant explains that ASAB exhibit 1 is a copy of the FTB’s calendar and ASAB exhibit 2 is a table summarizing appellant’s presence for each day during the disputed period and is linked day-by-day to his Rebuttal to the FTB’s Attachment A/F. Appellant argues that the FTB’s attempt to establish his presence based on false inferences and speculation is in bad faith. Appellant argues that a document containing an incorrect address does not establish his location on a given day and is not evidence of residency. Appellant argues that the FTB’s calendar is based on false illogical inferences and speculation and is not credible. Appellant argues that, instead of evidence of actual presence, the FTB bases its calendars on incorrect inferences drawn from misaddressed correspondence, as summarized in exhibits CDE-ST002 and CDE-ST003 of his 1992 ASAB. Appellant asserts that the FTB’s “inferred” days are contradicted by testimonial and documentary evidence, citing to exhibit 2 of ASAB. (App. 1991 CS, p. 17.)

Appellant argues that the FTB incorrectly infers California presence based on the alleged absence of documentation, pointing to exhibit 3 of ASAB. Appellant argues that the FTB uses “double incorrect inferences” and incorrectly infers his presence in California based on an address on misaddressed correspondence and then further infers his presence on a different day based on the first incorrect inference. Appellant argues that there was no attraction to Jennifer Circle and no reason for

him to live or work there after he moved to Las Vegas. Appellant argues that it is absurd to suggest that
he would establish a Nevada residency but operate a home business 270 miles away in California.
Appellant asserts that the FTB’s bad faith acts are further illustrated with the six false statement tables
and with the seven Testimonial Response tables. Appellant asserts that these tables excerpt or cite to
thousands of eyewitness statements made under oath which rebut the false statements of the FTB.25

Appellant argues that his name typed in the “Signed” location of a FedEx Summary does
not establish that he signed it. Appellant argues that the name of a Philips secretary working in
New York was also typed in the “Signed” location on a FedEx Summary for a package delivered to
appellant’s former La Palma house. Appellant argues that the FTB has not produced any copies of
delivery receipts that were signed by him because there are none. Appellant argues that eyewitness
testimony confirms that FedEx drivers left packages at the Jennifer Circle house after appellant had
moved away. Appellant contends that he inadvertently neglected to cancel his years old authorization
for FedEx drivers to leave packages without a signature. (App. 1991 CS, p. 20.)

Appellant contends that he sent and received faxes at his Las Vegas apartment where his
only fax machine was located during the disputed period. Appellant contends that the “overwhelming
eyewitness testimony” confirms that his fax machine was located at his Las Vegas apartment during the
disputed period and, thus, a fax sent by appellant is evidence of his presence at his Las Vegas apartment.
Appellant asserts that he did not send faxes from the La Palma House after October 1, 1991.26

Appellant contends that he did not have a “home/business” (as referred to by the FTB) or
a licensing business. Appellant argues that, in its attempt to create a Hyatt California licensing business
that did not exist, the FTB goes so far as to mischaracterize the deposition testimony of Helene
Schlindwein as referring to appellant’s “home/business”, when she made no such statement. Appellant
argues that the Philips documents containing a legacy P.O. Box return address do not establish that the
documents were faxed from the Jennifer Circle house or that appellant was present at the Jennifer Circle
house. Appellant argues that the FTB has not rebutted Mr. Tamoshunas’ testimony regarding the

misaddressed correspondence and, thus, contends that the testimony is undisputed.\textsuperscript{27}

**FTB’s Contentions – Issue (1) - Residency**

The FTB asserts that its auditor reviewed appellant’s 1991 Part Year Tax Return wherein appellant stated under the penalty of perjury that he had moved to Nevada on October 1, 1991. The FTB notes that appellant claimed no moving expense deductions on his 1991 federal income tax return. The FTB states that its auditor concluded that the fraud penalty was warranted in part because of appellant’s failure to disclose his location during the three weeks following his alleged departure from California. The FTB asserts that no explanation of appellant’s 1991 whereabouts was provided until May 24, 2000.\textsuperscript{28} (FTB 1991 CS, pp. 1-2, 7.)

The FTB contends that appellant was a long-time California domiciliary and resident through April 2, 1992. The FTB argues that evidence of appellant’s “failure to sever any meaningful ties to California is found in contemporaneous statements which he made; the failure to provide evidence such as telephone records and cancelled checks, which would clearly demonstrate the cessation of day-to-day living activity in one locale in favor of another; the conduct of a multi-million dollar patent licensing business in California; and an abject refusal to cooperate with respondent’s attempts to determine where he was, and what he was doing, during the disputed period.” (FTB 1991 CS, p. 7.)

The FTB contends that, early in its audit, appellant’s tax representative advised appellant to locate and preserve documents. The FTB argues that, for almost five years, appellant failed to explain where he lived from September 26, 1991, through late October 1991. The FTB contends that no justification for the five-year delay has been provided and no documentary evidence has been produced to corroborate appellant’s purported stay at the Continental Hotel. The FTB argues that neither appellant nor his representatives ever alleged that appellant stayed at the Continental Hotel until the hotel had closed, went into bankruptcy, and all of its records were destroyed. (FTB 1991 CS, pp. 7, 10-11.)

The FTB contends that, despite approximately four years of New York litigation by appellant to prevent the FTB from using documents, the FTB was able to obtain business activity

\textsuperscript{27} App. 1991 CS, pp. 20-21; see also App. 1991 Reply to FTB CS, pp. 15-16.

\textsuperscript{28} Respondent states that a more detailed discussion of the relevant audit history and related factual and legal issues has been previously set forth at pages 84 through 91 of its 1991 Opening Brief.
records that had been concealed by appellant and that the records show appellant’s presence in California. The FTB contends that appellant obtained the ‘516 patent’ while a California domiciliary and, with California advisors, devised a business plan to obtain hundreds of millions of dollars from Japanese companies which used the technology. The FTB contends that “[t]he plan, among other things, was designed to extract compensation from the Japanese companies for their past use of the technology falling under the ‘516 patent and other patents he owned.” (FTB 1991 CS, pp. 7-8.)

The FTB contends that “[t]he concealed business records reveal that by April 1991, MLMC [Mahr Leonard Management Company], and perhaps Mr. Hyatt, had met with representatives of Matsushita in Japan.” The FTB contends that MLMC had monthly meetings with prospective licensees and that, by September 25, 1991, appellant’s team expected the receipt of licensing contracts totaling $80.5 million. The FTB asserts that by September 30, 1991, MLMC sent final draft agreements to appellant at his Jennifer Circle address. The FTB asserts that this baseline agreement uses appellant’s Cerritos P.O. Box as his mailing address, an address that would be used in five 1991 agreements executed after his alleged departure from California. The FTB asserts that “[f]inancial expectations quickly became reality as contracts were executed, and millions of dollars were sent to appellant in California by the Japanese companies.” The FTB contends that, “[u]pon receipt of those monies, Mr. Hyatt . . . distributed millions of dollars to Philips and MLMC from California through a mutual fund account he opened and maintained in California.” (FTB 1991 CS, pp. 8-9.)

The FTB argues that “[t]he concealed business records further reveal that countless letters and other writings were authored, delivered to, and exchanged between appellant, Philips, MLMC, and the Japanese companies . . . .” The FTB argues that “[v]olumes of correspondence ultimately procured from Philips reveal that virtually every written communication directed to appellant by Philips during 1991 was sent to appellant at his Jennifer Circle residence, either by use of the Jennifer Circle street address, appellant’s Cerritos P.O. Box, or via the fax machine within his Jennifer Circle home.” The FTB argues that the same is true with respect to written communications addressed to appellant by the

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29 The FTB is referring here to appellant’s microprocessor patent. The FTB argues that “knowledgeable observers” would concur that this was appellant’s “only valuable patent.” (FTB 1991 Op. Br., p. 6, fn. 18.) Appellant argues in part that this was only one of 23 or 24 patents that were licensed. (App. 1991 Reply to FTB CS, p. 2.)
Japanese companies and with respect to documents sent by appellant to Philips. The FTB argues that invoices from appellant’s California patent lawyer and other service providers were sent to him at the Cerritos P.O. Box, press releases uniformly stated he was in or of La Palma, and his limited Las Vegas house-hunting activity was conducted via the Jennifer Circle fax machine. (FTB 1991 CS, p. 9.)

The FTB asserts that appellant executed seven licensing contracts with the Japanese companies and that every one of the contracts was executed by appellant after his alleged departure from California on September 26, 1991. The FTB contends that, in the first five of those agreements, signed by appellant between October 14, 1991, and November 29, 1991, he states that his mailing address is Cerritos, California. The FTB contends that the latter two contracts, “executed on December 10, 1991, state that his mailing address is his Las Vegas low-income apartment, but the business correspondence surrounding the execution of those contracts reveals that Mr. Hyatt was in Orange County.” The FTB asserts that appellant signed multiple court documents confirming his presence in Orange County, performed personal banking and made several visits to safe deposit boxes in a La Palma bank, served as the Grand Marshal of the La Palma Day Parade, attended medical appointments with California doctors, engaged in round-trip air travel which began and ended at LAX, and either sent or was the addressee on patent-related correspondence with the United States Post Office (USPTO). (FTB 1991 CS, pp. 9-10.)

The FTB disputes the credibility of appellant’s explanation that he left California on September 26, 1991, sold his house on October 1 to a friend and colleague, and moved into a “low-rent ($540 each month) one-bedroom apartment,” and further disputes appellant’s “grossly-belated revelation of an alleged long-term stay in a long-defunct Nevada hotel.” The FTB argues that “appellant’s original explanation as to how he severed his ties to California rested heavily upon the assertion that he sold his long-standing Jennifer Circle home/office to Ms. Jeng on October 1, 1991, in favor of a one-bedroom unit in a low-income apartment complex in Las Vegas.” The FTB argues that the lease agreement pertaining to that unit “revealed, however, that appellant could not have taken possession of that unit any time prior to October 20, 1991.” (FTB 1991 CS, p. 10.)

The FTB argues that, once these facts were revealed, the FTB repeatedly asked for appellant to account for his whereabouts between September 24, 1991, and October 20, 1991, but that it received no answer for almost five years. The FTB contends that the explanation that appellant stayed at...
the Continental Hotel did not come until records actually maintained and retained by the hotel were
destroyed and states that the claimed stay is not substantiated by receipts, credit card statements, or any
other objective documents. (FTB 1991 CS, pp. 10-11.)

The FTB argues that appellant’s affidavits are “an attempt to deflect attention from the
absence of contemporaneous documentation[,]” that the identities of the individuals making these
affidavits should have been disclosed years earlier, and that they “purport to speak about events which
during 1991 and/or 1992” and “cannot be independently verified.” The FTB argues that the “belated
nature of the disclosure of the identities of these individuals, coupled with the lack of contemporaneous,
objective verification of the accounts they have presented, renders the declarations . . . without merit or
credibility.” (FTB 1991 CS, p. 11.)

The FTB states that appellant contends that he sold the Jennifer Circle residence to his
friend and colleague, Grace Jeng, on October 1, 1991, and that, to substantiate the sale, appellant
produced a non-recorded copy of a grant deed he contends effectuated that transaction. The FTB
contends that the grant deed contains a fraudulent notary acknowledgement which is backdated by
almost two years. The FTB contends that the official notary journal and notary Darlene Beer’s
testimony reveal that appellant appeared before the notary on June 10, 1993, not October 1, 1991. The
FTB asserts that, on February 10, 1992, when provided with an opportunity to disclose the alleged
unrecorded sale to Ms. Jeng, appellant did not do so. The FTB further asserts that as late as April 8,
1993, appellant continued to claim record ownership of the Jennifer Circle home. The FTB asserts that
appellant’s tax counsel also misrepresented that a questioned $15,000 down payment from Ms. Jeng was
deposited by appellant on December 14, 1991. The FTB asserts that the front of the Franklin Federal
Money Fund draft shows that appellant wrote himself a $15,000 draft from his own account. The FTB
contends that other abnormalities with this alleged transaction include the fact that the deed was not
recorded in 1991 or 1992, that no contract exists to memorialize the sale, that no “change of ownership
statement” was filed between 1990 and 1996, that a Ticor “Property Profile” report indicates that
Ms. Jeng acquired the La Palma house on August 12, 1993, not October 1, 1991, and that appellant
maintained homeowner’s insurance on the property long after the alleged sale. (FTB 1991 CS, p. 12.)

The FTB contends that Ms. Jeng was heavily involved with the procurement of the
Wagon Trails lease. The FTB asserts that, according to a former apartment leasing agent who both lived and worked at the facility, Ms. Jeng sought to lease an apartment for appellant on October 8, 1991. The FTB asserts that, on October 9, 1991, a Wagon Trails employee faxed a partially completed rental agreement to appellant’s Jennifer Circle home/business fax number. The FTB asserts that appellant signed, dated, and faxed the rental agreement to Wagon Trails Apartments four days later, on October 13, 1991. The FTB asserts that the regular monthly rent was initially $570, but eventually was reduced $30 per month. The FTB asserts that the lease began on November 1, 1991, but also provided for a prorated rental period from October 20, 1991, through October 31, 1991. The FTB asserts that the first cancelled check for rent is dated October 28, 1991. (FTB 1991 CS, p. 13.)

The FTB contends that Ms. Clara Kopp, who worked as a leasing agent and lived in Wagon Trails, had no memory of seeing appellant at the complex even though she lived there and would come and go from her apartment to the nearby rental office. The FTB asserts that Ms. Kopp knew Ms. Jeng but she could not definitively recognize appellant. The FTB asserts that appellant concedes, through his representative, that he did not visit the Wagon Trails rental office or speak with any manager when allegedly living there. (FTB 1991 CS, p. 13.)

The FTB contends that, with respect to appellant’s physical presence between September 24, 1991, and April 3, 1992, appellant is physically present in California for 169 days, in Nevada for 19 days, and in other states for 23 days. The FTB further contends that, during the disputed period from September 26, 1991, to December 31, 1991, appellant spent 80 days in California, 5.5 days in Nevada, and 10.5 days in other states. The FTB argues that, during the disputed period in 1991, appellant was physically present in California at his La Palma home or at his patent attorney’s Los Angeles office participating in licensing activities, involved with the Hyatt v. Boone patent interference litigation, doing marketing work, dining at restaurants, and handling matters related to his mother’s estate. The FTB contends that, despite claims that appellant had no access to the Jennifer Circle home after October 1, 1991, appellant was present inside the home for a composite portrait shoot with Mr. Cameron a mere five days later. The FTB asserts that appellant also visited his California ophthalmologist in September and October. The FTB contends that appellant’s California physical presence continued into November when he was the Grand Marshal in the La Palma Day Parade. The
FTB argues that, “considering his admission that he lived in California for 273 days through September 30, 1991, the overwhelming documentary evidence and relevant testimony places appellant in California for nearly all of the 1991 calendar year and less than 6 days in Nevada.” (FTB 1991CS, pp. 14-15.)

The FTB asserts that, despite its early audit requests for phone records, no phone records have been provided, and the FTB questions appellant’s assertion that he did not have and could not obtained such records. The FTB argues that, as a self-employed patent pursuer, appellant relied very heavily upon the use of a telephone and fax machine, the expenses for which were tax deductible. In addition, the FTB argues that appellant’s conduct contradicts his explanation for the lack of records as appellant in 1990 offered a partial phone bill statement as proof that he spoke with an individual during 1977. The FTB asserts that appellant also produced select phone bills he submitted as reimbursable expenses in her California estate proceeding. The FTB argues that appellant’s phone bills “were not produced because they would have confirmed appellant’s continuous and heavy use of the Jennifer Circle telephone and fax machine lines during the disputed time period on accounts in appellant’s name.” Quoting the Appeals of Appeal of James C. Coleman Psychological Corporation, et al., 85-SBE-028, decided April 9, 1985, the FTB argues that “the failure to provide evidence which is within appellant’s control gives rise to the presumption that, if provided, the evidence would be unfavorable.” (FTB 1991 CS, p. 15.)

The FTB asserts that appellant fails to establish that he obtained telephone service in his Wagon Trails apartment at any time before November 1991. The FTB disputes appellant’s contention that he moved his fax machine from his former La Palma house on October 1, 1991, and that he set it up at his Las Vegas apartment after he obtained telephone service in late October. The FTB asserts that appellant received a confirmed fax from Philips to his California fax number on October 24, 1991, four days after his rental began at Wagon Trails, and numerous business faxes were sent to and from that same number in the following months. The FTB argues that appellant’s “continued use of his California telephone and fax numbers for licensing and business communications long after his alleged move to Nevada simply cannot be disputed.” (FTB 1991 CS, pp. 15-16.)

The FTB asserts that appellant had multiple accounts with financial institutions in California, that appellant frustrated the FTB’s attempts to obtain information about the accounts, and
that appellant continued his California banking activities after his alleged move. The FTB asserts that
respondent determined that as many as 340 checks written by appellant throughout 1991 were not
provided as requested. The FTB asserts that through court records it recovered checks from an account
used by appellant for personal expenses in years prior to 1991. The FTB contends that, during October
and December 1991, appellant engaged in personal banking at the California Federal Bank branches,
and further contends that, in December, appellant also made visits to his two safe deposit boxes in
La Palma, California. The FTB asserts that appellant renewed his rental of the boxes and then waited
until July 21, 1992, to change his address on his account for these La Palma bank services. The FTB
argues that many of the California accounts that appellant closed were “largely inactive.” The FTB
asserts that appellant opened a Franklin Federal Money Fund on August 6, 1991 (retaining his Jennifer
Circle home address for the mutual fund account), with $400,000 he received from Philips in late July
1991, and later caused $40 million to be transferred into the account, and further asserts that appellant
paid MLMC and Philips with checks drawn on that account which state that he was residing at Jennifer
Circle in La Palma, California. (FTB 1991 CS, pp. 16-17.)

The FTB asserts that about a month after he allegedly moved, appellant opened his first
Nevada bank account on October 25, 1991, at the Maryland Parkway branch. The FTB argues that
appellant later opened a second Nevada bank account on or about December 12, 1991, with a $200
deposit. However, the FTB argues, appellant’s “California banking activity continued with him
receiving bank statements from California Federal Bank, Lakewood and Cerritos branches, at his
Cerritos P.O. Box for nearly all of the disputed period.” (FTB 1991 CS, pp. 17-18.)

The FTB asserts that, while new Nevada residents are required to register any vehicles
they own within 45 days of moving to Nevada, appellant did not register his 1977 Toyota Celica in
Nevada until May 6, 1992. The FTB contends that, while appellant asserted that he had registered to
vote in Nevada in 1991 but did not register in California between 1986 and 1992, appellant was a
registered voter in California from September 12, 1990, to September 18, 1992. The FTB contends that
in Nevada, you are qualified to vote if you have resided continuously in the state and county for 30 days
and in the precinct for 10 days. The FTB contends that on November 26, 1991, appellant purchased two
airline tickets and that on the next day appellant obtained a Nevada driver’s license and registered to
vote in Nevada using the Wagon Trails address. However, the FTB asserts that, by November 29, 1991, appellant had returned to California and signed an agreement using his Cerritos, California address, and signed for two FedEx parcels “at his Jennifer Circle home/business location.” (FTB 1991 CS, p. 18.)

The FTB contends that appellant used various professional services, including medical services, in California during the relevant period. The FTB contends that, in 1991 and 1992, appellant consulted five California doctors, was hospitalized for ten days in California in February 1992, and visited one California medical clinic. The FTB contends that appellant did not consult any medical or dental providers in Nevada during the disputed period. The FTB contends that appellant obtained professional and/or support services from numerous individuals in California with respect to the *Hyatt v. Boone* interference who were paid by Philips on behalf of appellant. The FTB contends that California professionals used by appellant for these matters in 1991 and 1992 include, among others, Barry Lee, Gregory L. Roth, and Caroline Cosgrove. The FTB contends that other California attorneys and professionals consulted by appellant in 1991 and 1992 include Roger McCaffrey, Dale Fiola, the law firm of Goldberg & Andrus, and four other California professionals. (FTB 1991 CS, p. 19.)

The FTB argues that appellant did not have a business license to work from either his Wagon Trails apartment or his Tara home and that he did not apply for a business license from the City of Las Vegas until December 10, 1992. The FTB argues that appellant’s conduct of business and associations with Nevada professionals was limited to his search for, and eventual purchase of, the Tara home which did not begin until mid-December 1991. The FTB contends that appellant did not meet or consult with his Nevada accountant until mid-March 1992 and did not lease or rent any commercial office space in Nevada during the disputed period. The FTB asserts that the Wagon Trails lease prohibits the use of the apartment for business. The FTB contends that appellant concedes that he did not operate a business in his Wagon Trails apartment but maintained a “small home office” for his “own personal work.” (FTB 1991 CS, p. 20.)

The FTB asserts that appellant received degrees in California and was a licensed professional engineer in the State of California from 1979 to 1995. The FTB asserts that appellant’s last address filed with the Board for Professional Engineers and Land Surveyors was a P.O. Box in Cerritos, California, 90703. The FTB argues that appellant has not offered any evidence of a professional
engineering registration from Nevada or elsewhere. (FTB 1991 CS, p. 20.)

The FTB asserts that, in 1991, appellant was honored with a plaque in La Palma. The FTB states that, in accepting the honor, appellant was quoted as saying “[i]t is this city gives me the sense of freedom and flexibility to work, think and live[.]” The FTB asserts that appellant subsequently appeared as the Grand Marshal in the November 9, 1991 annual La Palma Day Parade. (FTB 1991 CS, p. 21.)

The FTB contends that, despite its efforts, it was not able to verify that appellant’s claimed Nevada civic and social affiliations started before April 1992. The FTB asserts that its letters inquiring with a Las Vegas computer group and temple were returned or met with no response. The FTB asserts that appellant’s attorney later informed the FTB that appellant provided an incorrect temple in the initial response, and gave the name of another temple, but the second temple also did not respond to respondent’s inquiry. (FTB 1991 CS, p. 21.)

The FTB contends that appellant “subsequently provided information including an out-of-sequence, cancelled check not cashed until December 17, 1991, purporting to establish new membership with the Congregation Ner Tamid.” The FTB contends that appellant’s son testified that he had not attended any temple services with his father from 1991 to 2005. The FTB also contends that Mr. Cowan subsequently represented that appellant joined the Las Vegas PC User’s Group in May 1992. The FTB argues that there are contradicting assertions of civic involvement made by or on behalf of appellant, that the Nevada Development Authority had no record of his membership, that the Nevada Governor’s office had no record of any contact with appellant, and that the Nevada tutoring program that appellant claimed to have assisted beginning in April 1992 could not verify his alleged volunteer activity. (FTB 1991 CS, p. 21.)

The FTB contends that appellant did not terminate his California homeowner’s exemption in 1991. The FTB contends that appellant’s termination notice was sent to the Orange County Assessor on or about February 10, 1992. (FTB 1991 CS, p. 21.)

The FTB contends that appellant continued to maintain at least two P.O. boxes in California. The FTB asserts that the P.O. Box application shows that Gilbert P. Hyatt and Grace Jeng were listed as the users of the P.O. Box in Cerritos, CA, which was renewed by appellant on April 16, 1992. The FTB asserts that, on February 2, 1992, appellant sent a letter to the Postmaster to add Grace
Jeng and Barry Lee as authorized users of the P.O. Box. The FTB notes that appellant’s Jennifer Circle home is only 1.3 miles from the Cerritos Post Office. (FTB 1991 CS, p. 22.)

Applicable Law – Issue (1) – Residency

Burden of Proof

It is well established that a presumption of correctness attends respondent’s determinations of fact, including determinations of residency, and that an appellant has the burden of proving such determinations erroneous. 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.)

In Todd v. McColgan (1949) 89 Cal.App.2d 509, 514, Todd challenged the determination of the Franchise Tax Commissioner (the predecessor of the FTB) of how to determine the rate of return attributable to separate property of a husband that was invested as capital. The court stated that when the FTB’s allocation of income “is found to be reasonable and rational the burden of showing error in [the taxing agency’s] computation or application is on the taxpayer.”

In Wesley, supra, 2005-SBE-002, Wesley filed a return with zeros for income and all other financial information, and the FTB estimated his income based on reporting by third parties. Citing Todd v. McColgan, supra, 89 Cal.App.2d 509, and other cases, the Board stated that the FTB’s initial burden was to show that its assessment was “reasonable and rational.” However, the Board stated, once the FTB introduced some evidence linking the taxpayer with unreported income, the FTB’s assessment is presumed correct and appellants have the burden of proving it to be wrong.

Residency

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, if an individual is domiciled in California, he or she remains a resident until he or she leaves for
other than temporary or transitory purposes. (Cal. Code Regs., tit. 18, § 17014; see also Rev. & Tax.
Code, § 17014.)

Under R&TC section 17016, taxpayers who spend an aggregate of more than nine
months in California during a taxable year are presumed to be a California resident for the year.

However, the statute provides that the presumption “may be overcome by satisfactory evidence that the
individual is in the State for a temporary or transitory purpose.”

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, 76-SBE-002, Jan. 6,
1976 (Zupanovich) (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. (Bragg, supra, 2003-SBE-002; Cal. Code Regs., tit. 18, § 17014, subd.
(c).) 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 presentation of the facts and circumstances, the domicile must be found to have not
changed. (Bragg, supra, 2003-SBE-002.)

Regulation 17014, subdivision (b), states that “[w]hether or not the purpose for which an
individual is in this State will be considered temporary or transitory in character will depend to a large
extent upon the facts and circumstances of each particular case.” The regulation further states:

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, or has retired from business and moved to California with no
definite intention of leaving shortly thereafter, he is in the State for other than temporary
or transitory purposes, and accordingly, is a resident taxable upon his entire net income . . .
Regulation 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. (*Zupanovich, supra, 76-SBE-002.*) 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 the taxpayer maintains in other places. (*Id.*)

In *Bragg*, the Board listed nonexclusive factors to aid it in determining with which state an individual has the closest connection. The Board in *Bragg* cautioned 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, as provided below. As will be seen below, many factors overlap one another.

*Registrations and Filings*

This group of factors includes items which the taxpayer has filed with the state or other agency. The factors in this category include:

- The state wherein the taxpayer claims the homeowner’s property tax exemption on a residence;
- The address the taxpayer uses on his tax returns, both federal and state, and the state of residence claimed by the taxpayer on such returns;
- The state wherein the taxpayer registers his automobiles;
- The state wherein the taxpayer maintains a driver’s license; and
- The state wherein the taxpayer maintains voter registration and the taxpayer’s voting participation history.

*Personal and Professional Associations*

The factors in this group help show where the taxpayer had his day-to-day contacts in both his occupational life as well as in his personal life. These factors include:

- The state wherein the taxpayer’s children attend school;
- The location of the taxpayer’s bank and savings accounts;
- The state wherein the taxpayer maintains memberships in social, religious, and professional organizations;
• The state wherein the taxpayer obtains professional services, such as doctors, dentists, accountants, and attorneys;
• The state wherein the taxpayer is employed;
• The state wherein the taxpayer maintains or owns business interests;
• The state wherein the taxpayer holds a professional license or licenses;
• The state wherein the taxpayer owns investment real property; and
• Affidavits from third parties attesting to the taxpayer’s presence and community involvement.

Physical Presence and Property

This group includes the factors showing where the taxpayer was physically located during the time in question, and where his tangible and real property were located. 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;
• The state wherein the taxpayer’s spouse and children reside;
• The taxpayer’s telephone records (i.e., the 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
• The origination point of the taxpayer’s checking account transactions and credit card transactions.

In the case of individuals who claim to be nonresidents by virtue of being outside 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. (Cal. Code Regs., tit. 18, § 17014, subd. (d)(1).) Residency determinations depend on the facts and circumstances of each case, however, affidavits and declarations from an individual’s friends, family, and business associates stating that the individual was in California for temporary or transitory purposes ordinarily are sufficient to overcome a presumption of residency. (Ibid.) In the Appeal of William G. and Susan G. Crozier, 92-SBE-005, decided April 23, 1992, the Board found, on the record before it, that contemporaneous records from the years at issue held more weight than statements Mr. Crozier made several years after the tax year at issue. In the Appeal of Raymond H. and Margaret R. Berner, 2001-SBE-006-A, decided August 1, 2002, the Board found, on the record before it, that the Berners had established through affidavits and
declarations from friends, family, and professionals that they were domiciled in and resided in Nevada.

Staff Comments – Issue (1) - Residency

Residency determinations require a weighing of the particular facts and circumstances of each case. (Bragg, supra, 2003-SBE-002 [citing additional authorities].) Here, the record includes an extraordinary amount of both testimonial and documentary evidence, and very little agreement between the parties about the relevant facts.

In order to assess the evidence, the Board may find it helpful to compare the FTB’s Attachment A (Revised) (daily analysis) and Attachment F (business activity analysis) with appellant’s rebuttal to these documents, which are available in appellant’s folder “02_FTB_Briefs_and_Hyatt_Rebuttals” in PDF files beginning with “06B” and “06C.” Staff also notes that appellant has provided chronological statements of appellant’s view of the facts in the folder “04_ChronologicalStmts_of_Facts” and affidavits and tables with contemporaneous documentary evidence in “HYATT_LINKED_BRIEFS/10_Hyatt_Contemporaneous_Doc_Evid.” The FTB has provided a PDF with respect to documents from each day in the disputed period in FTB_LINKED_BRIEFS/07_ftb Calendar Support Documents.

It appears to staff that, for many days, the FTB has provided some evidence which, on its face, appears to suggest a California presence at a particular time, such as a meal charge, FedEx record, or attorney billing record. However, appellant has argued, among other things, that the evidence does not in fact demonstrate a California presence, that any California presence was temporary, that the evidence is contradicted by affidavits, that the evidence is unreliable, and/or that the evidence is contradicted by documents listing a California address. For example, appellant has argued that he did not make credit card charges for meals in California, that bank safe deposit records are not reliable, and that Ms. Jeng used his credit card and made deposit and check-cashing transactions on his behalf.31 It will be up to the judgment of the Board, as the finder of fact, to weigh the totality of the evidence.

31 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_Att_A_F.pdf, p. 179 [re credit card charges] & 06B3_Dec_91_Rebut_Att_A_F.pdf, p. 50 [referring to safe deposit records shown in FTB Ex. L, Tab 1] & 06B3_Oct_91_Rebut_Att_A_F.pdf, p. 36 [example of asserted deposit by Ms. Jeng]; May 18, 2001 Affid. of G. Jeng, p. 3 [stating that she used Mr. Hyatt’s credit cards, cashed checks he wrote and gave the cash to him, and deposited checks for him].

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board’s decision or opinion.
A key factual determination for the Board will be whether or to what extent the Board finds the affidavits submitted by appellant to be reliable. In making this determination, the Board may wish to consider, among any other factors it deems relevant, the passage of time between events described in the affidavit and the making of the affidavit, any business or social relationships of the affiant with appellant, and whether or to that extent the affidavit is corroborated, or contradicted, by other evidence. “The weight of the evidence does not necessarily depend on the number of witnesses called by a party, and the credibility to be given a witness is a matter for the Tax Court [i.e., the finder of fact].” (Merchants Nat. Bank of Topeka v. Comm’r (9th Cir. 1977) 554 F.2d 412, 416.)

Staff notes that, with regard to several dates at issue, appellant initially contended that he was in Las Vegas and was not in California. However, after the FTB provided evidence indicating a California presence on the date, appellant revised his explanation to state that on these dates he made a round trip from Las Vegas to the Los Angeles area (or San Francisco), attended a meeting or took other actions in California, and then on the same day traveled back to Las Vegas. In many cases, appellant provides affidavits from himself and others to support his explanations. At the hearing, the parties should be prepared to discuss whether the evidence corroborates the testimony offered by appellant or whether the evidence and travel time required for such a round trip calls into question the reliability of the testimony. Staff summarizes below various dates on which, after the submission of evidence in support of a California presence, appellant states a round trip occurred in which he traveled from Las Vegas to the Los Angeles or San Francisco area, and back, on the same day.

Saturday, October 26, 1991. Before the Philips documents were introduced into the appeal record, appellant argued that, on October 26, 1991, he was in Nevada and that it is “established //

32 Appellant provides a comprehensive list of affidavits which can be found, among other locations, in HYATT_LINKED_BRIEFS/08_Affidavits_re_Supp_Briefs/000_Updated_Index_of_Affidavits.pdf. In addition, appellant provides linked tables showing affidavits and declarations regarding various topics in HYATT_LINKED_BRIEFS/05_Testimonial_Topics. The FTB has provided attachments with analysis and objections to affidavits in FTB_LINKED_BRIEFS/02_FTB_Attachments (attachments B, D & E).

33 Staff estimates it would take approximately 8 to 9 hours to drive from Las Vegas to the Los Angeles area and back, depending on traffic and whether any stops are made during the trip (e.g., for gas). Appellant has not provided airline tickets or other such documents to show that he flew from Las Vegas to California and back on the dates discussed here.
that Mr. Hyatt was not present in California on this day.”34 He stated that he had breakfast with
Mr. Howard at the Hacienda Hotel and Mr. Howard showed appellant around the hotel and his nearby
house, providing a July 12, 2010 affidavit of Mr. Howard in support. The FTB then obtained and
provided a billing record from Philips that indicates that Mr. Roth (a Los Angeles attorney), Mr. Lee,
and appellant met for an hour.35 Appellant now contends that he made a round trip to California where
he met with Mr. Roth and Mr. Lee for an hour before returning to Las Vegas.36

Saturday, November 9, 1991. Previously, appellant contended that he was in Nevada on
November 9, 1991, that “it is established that [he] was not present in California on this day[,]” and that
he “was certainly physically present” in Las Vegas during this weekend.37 Later, the FTB provided a
newspaper article stating that appellant had been named Grand Marshal of a “La Palma Days” parade to
be held on November 9, 1991.38 In a 2016 affidavit, appellant now states that, on this date, he traveled
from Las Vegas to La Palma to attend “an annual event,” and then traveled back to Las Vegas where he
spent the night. (Sept. 8, 2016 Supp. Aff. of G. P. Hyatt, par. 49.)39

Wednesday, November 13, 1991: Previously, appellant stated that he was in Nevada on
November 13, 1991, and that “it is established that [he] was not present in California on this day.”40
Appellant submitted a 2008 affidavit from his attorney Roger McCaffrey that Mr. McCaffrey telephoned

34 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991_Stmts.pdf, pp. 140-
143.

35 FTB_Linked_Briefs/07_FTB Calendar Support Documents/19911026_October 26, 1991.pdf (FTB_Philips 0006614). The
record also includes a charge on appellant’s credit card on this date for the King Dragon Restaurant in Cerritos, California.


37 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991_Stmts.pdf, pp. 192 –
194.

38 FTB 1992 Reply Br., p. 39, fn. 175 (providing a link to a newspaper article and evidence to show that appellant purchased
videos of the parade).

39 On the day prior to this date (i.e., on Friday, November 8, 1991), a meal at a restaurant in Cerritos, California, was charged
to appellant’s credit card, and on the day after this date (i.e., Sunday, November 10, 1991), a meal at a restaurant in Fullerton,
California, was charged to appellant’s credit card. (FTB Ex. K, Tab 15 [Visa statement].) Appellant’s September 8, 2016
affidavit states that he spent the night of Friday, November 8, 1991 in Las Vegas and spent Sunday, November 10, 1991 in
Las Vegas.

40 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991_Stmts, pp. 200-201.
appellant at his Las Vegas apartment on November 13, 1991.\(^{41}\) Appellant also submitted a 2012 affidavit from his friend Will Connell stating that he telephoned appellant in his Las Vegas apartment each day from about November 1 to November 13, 1991, in order to discuss investment programs.\(^{42}\)

After obtaining documents from Philips, the FTB submitted a fax that appears to have been sent from appellant on November 13, 1991 and which lists a Cerritos P.O. Box and Jennifer Circle telephone and fax numbers as appellant’s return address.\(^{43}\) The FTB also submitted a billing statement from Los Angeles attorney Gregory Roth that lists a one-hour meeting with appellant on November 13, 1991 regarding licensing.\(^{44}\)

Appellant now states that he traveled from Las Vegas to California, met with Mr. Roth for an hour in California, and then returned that same day to Las Vegas.\(^{45}\) Appellant states that, after returning to Los Vegas, he sent the fax referenced by the FTB (which lists a Cerritos return address, phone and fax), and received telephone calls from Mr. McCaffrey and Mr. Connell. In support, appellant provides affidavits of Mr. McCaffrey and Mr. Connell who state that they called appellant in Las Vegas on this day. He argues that the return address and contact information on the fax was a “legacy address from a template on [his] computer that he moved to Las Vegas.”\(^{46}\)

**Thursday, November 21, 1991:** Previously, appellant argued that he was in Nevada on November 21, 1991, and that “it is established that [he] was not present in California on this day.”\(^{47}\) Appellant stated that he visited the Strattons at their Las Vegas home and had lunch in Las Vegas with

\(^{41}\) Aug. 7, 2010 Supp. Aff. of R. McCaffrey, p. 21, par. 48. Mr. McCaffrey also stated that he called appellant in Las Vegas on November 4, 5, 11, and 25 and December 12, 13, 16, 17, 18, 19 and 20. Appellant cites Mr. McCaffrey’s statement that these phone calls occurred in support of his argument that he was in Nevada on those dates. (See, e.g., App. 1991 Disputed Period Chon. Statement of Facts re Supp. Br., pp. 90, 93, 98, 114, 116, 119, 120-123.)

\(^{42}\) July 10, 2012 Aff. of W. Connell, p. 17, par. 37. Mr. Connell also stated, among other things, that he helped appellant pack for his move to Las Vegas and that he called appellant at the Continental Hotel. (Id., p. 31.)

\(^{43}\) FTB_Linked_Briefs/07_FTB Calendar Support Documents/19911113_November 13, 1991.pdf (FTB_Philips 0005439). The fax memo is dated November 12, however the fax spray appears to indicate it was sent on November 13, 1991.


\(^{45}\) HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B4_Nov._91_Rebut_Att_A_F.pdf, p. 212.

\(^{46}\) Id., p. 197 (see also p. 209).

\(^{47}\) HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991_Stmts, pp. 216-217.
Mr. Howard. In support, appellant submitted: Mr. Howard’s July 12, 2010 affidavit stating he had lunch with appellant; an affidavit from Mrs. Mary Stratton, dated June 21, 2010, in which she states, at paragraph 14, that she remembers Mr. Hyatt visiting her and her husband at their Las Vegas home on that day and further states she remembered appellant telling them about the grand opening of a swap meet; and a December 4, 2008 affidavit from Mr. Roth in which, at paragraph 12, Mr. Roth states that Mr. Hyatt said that he was driving back to Las Vegas after Mr. Hyatt and Mr. Roth flew into Los Angeles.

Later, the FTB provided billing documents from Mr. Roth showing seven hours in a meeting on November 21, 1991. The billing statement does not show who attended the meeting with Mr. Roth. In light of the billing documents and evidence indicating that appellant flew into Los Angeles with Mr. Roth on the evening before, the FTB argues that appellant’s presence in California on November 21, 1991 should be inferred.48

Appellant now states that, after flying into LAX on November 20, 1991, he returned to his Las Vegas apartment, and, on the next day (November 21, 1991), he “flew round trip from Las Vegas to San Francisco for a meeting with Sony, met with the Strattons at their Las Vegas Tara Avenue home and spent the night in his Las Vegas apartment.”49

Tuesday, November 26, 1991: Previously, appellant contended that he was in Nevada on November 26, 1991, and that “it is established that Mr. Hyatt was not present in California on this day.”50 Appellant noted that, in his 2010 affidavit he stated under oath that he was in Las Vegas preparing for a visit with his son and visiting with his son. He argued that a charge on his credit card for a meal at a California restaurant, King Dragon Restaurant, was not made by him and argued that Ms. Jeng was permitted to use his credit card. The FTB had provided a credit card statement showing a November 26, 1991 charge for plane tickets in Artesia, California (which is near La Palma), and


49 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B4_Nov_91_Rebut_Att_A_F.pdf, p. 297.

50 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991Stmts, pp. 228-232.
appellant stated that this charge was also made by Grace Jeng. He stated in his 2010 affidavit that “I was in Las Vegas this entire week taking care of personal matters, visiting with my son, recreating, and taking care of DMV matters[,]” and that he “did not fly into or out of Las Vegas, neither on November 26, 1991 nor on November 27, 1991 as alleged nor at any other time during this week.”

Appellant provided affidavits from his son Daniel dated November 11, 2008, and July 18, 2012, stating, at paragraphs 7 and 138, respectively, that he visited with his father from November 26, 1991 to December 1, 1991.51

The FTB then provided, among other things, billing records from Los Angeles attorney Gregory Roth showing that appellant met with him for 1.5 hours on November 26, 1991, and a FedEx document stating that Philips sent documents to appellant in California on November 26, 1991.52 On its face, the FedEx document states that the package was delivered to Jennifer Circle on November 29, 1991 and “SIGNED: G. HYATT.” The FTB also provided a fax sent by appellant to Philips at approximately 10 p.m. and a fax sent at 22:30 (i.e., 10:30 pm) which the FTB (and appellant) states was sent by appellant to Mr. Roth.53 The FTB contends that appellant sent the faxes from La Palma, while appellant contends that he sent the faxes from Las Vegas.

Appellant now contends that he traveled from Las Vegas to California, had a meeting with Mr. Roth, traveled back to Las Vegas on the same day, and then “sent faxes to Philips and Mr. Roth after returning to his Las Vegas apartment, had [a] visit from his son . . . and spent the night in his

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51 In a May 1, 2001 affidavit, Daniel Hyatt stated that he regularly spoke by telephone with his father in Las Vegas after his father’s move in 1991, but he does not mention visiting his father in person in Las Vegas during 1991. In a November 18, 2005 deposition, Daniel Hyatt indicated he did not visit his father at the Wagon Trails apartment. (FTB EX. H, Tab 44, p. 46 [p. 179 of the deposition].) In a 2016 declaration, Daniel Hyatt states, at paragraph 27, that he did visit his father for five days over the Thanksgiving holiday in November 1991, however “I stayed at a motel during that trip and we did things together in Las Vegas and did not have a need to visit my father at his Las Vegas apartment.” (The 2012 declaration is listed in appellant’s updated index of affidavits as being dated July 16, 2016, however the date is not completed in the declaration.)

52 FTB_Linked_Briefs/07_FTB Calendar Support Documents/199111126_November 26, 1991.pdf (FTB_Philips 0005439). The FTB argues that the evidence shows that the document was sent in response to conversations with appellant on November 26, 1991, suggesting that the sender knew appellant was in California.

53 The first fax document (FTB_Philips 0000929) appears to have been sent at 10:03 pm (California time) to Philips in New York. The second fax (document GLR 02886) is addressed to appellant at Jennifer Circle from Pioneer. It appears to have a “19:43” (i.e., 7:30 pm) fax spray from Japan, and also has a 10:30 pm fax spray.
Las Vegas apartment.”54 He references in support affidavits and declarations from his son Daniel Hyatt and Mr. Neuner. Mr. Neuner states, at paragraph four of his May 28, 2015 declaration, that he remembers FedEx dropping off packages at Jennifer Circle about six months after September 1991. Staff notes that Mr. Neuner thus states his recollection of packages delivered to a neighbor on a date more than 23 years prior to the date of the declaration. Appellant argues that he did not sign for the package and offers in support a February 17, 2015 affidavit from Steve Foster, a FedEx paralegal, who testified, at paragraph 10 of his affidavit that, based on his knowledge of FedEx practices, the typed name in a “signed” block does not mean that the person actually provided a signature.

Friday, November 29, 1991. Previously, appellant contended that he was in Nevada on November 29, 1991, and that “it is established that [he] was not present in California on this day.”55 Appellant argued that he attended temple services with his son Dan. He also argued that, “on or about” this date, he had a meal at Kokomo’s in Las Vegas with his son Daniel Hyatt and Trent Eyler, and visited Robert Huddleston, an insurance agent, in Las Vegas. In support, appellant cited various affidavits made in 2008 or 2010 by his son Daniel Hyatt, Rabbi Mel Hecht, Mrs. Hecht, Mr. Huddleston, Neil Howard, and Trent Eyler.56

The FTB then provided billing records that Mr. Roth submitted to Philips, which list a 1.5 hour meeting with appellant regarding license rates.57 The FTB also provided a FedEx record, noted above with respect to November 26, 1991, which states a document was delivered on November 29, 1991 to Jennifer Circle and “SIGNED: G. HYATT.”

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54 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B4_Nov_91_Rebut_Att_A_F.pdf, pp. 399 – 443.
55 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06_Rebuttals_to_FTB_Attach_A_1991Stmts, pp. 243-247.
56 In his 2008 and 2010 affidavits, Mr. Eyler indicates that he remembers specific details of the 1991 lunch. For example, in his 2010 affidavit, Mr. Eyler states that he remembers Daniel Hyatt saying that his father’s car would not pass a smog test.
Appellant now states as follows:

On this day [November 26, 1991] Mr. Hyatt made a round trip visit to California and met for 1.50 hours with Mr. Roth, returned to Las Vegas, visited insurance agent Robert Huddleston with his son Dan, had a meal with Trent Eyler at Kokomo’s, attended Friday evening services at Temple Beth Am with his son Dan, received a telephone call at his Las Vegas apartment from Mr. Kazmaier and spent the night in his Las Vegas apartment.58

Staff notes that, on November 27, 1991, appellant went to the DMV in Nevada and applied for and received a Nevada driver’s license, listing a Nevada P.O. Box as his mailing address and the address for the Wagon Trails Apartments as his residence.59 Appellant also completed a Nevada voter registration form on that day, again listing the Nevada P.O. Box as his mailing address and the address for the Wagon Trails Apartments as his residence.60 On December 12, 1991, appellant visited State Farm insurance in Las Vegas, Nevada, and obtained auto insurance.61

There are no contemporaneous documents to support appellant’s contention that he stayed at the Continental Hotel. The FTB argues that appellant did not tell the FTB where he stayed between September 26, 1991 and late October 1991 for almost five years, and only provided the Continental Hotel explanation after it had been revealed that the lease agreement for appellant’s Wagon Trails apartment did not commence until October 20, 1991, and after the Continental Hotel’s records had been destroyed. (FTB 1991 CS, pp. 7, 10-11.) Appellant argues that he did not suppress evidence of his stay at the hotel, that when FTB asked for evidence of where he was he provided all the evidence he had, and that because he was part of a van tour the hotel did not record his stay.62 He points to affidavits of hotel employees that van tours were not registered and affidavits of many others who stated

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58 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B4_Nov_91_Rebut_Att_A_F.pdf, pp. 509-547.

59 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06B4_Nov_91_Rebut_Att_A_F.pdf, p. 449 [link to driver’s license]; FTB_Linked_Briefs/07_FTB Calendar Support Documents/199111127_November 27, 1991.pdf, p. 48 [DMV application].

60 HYATT_LINKED_BRIEFS/02_Briefs_and_Hyatt_Rebuttals/06B4_Nov_91_Rebut_Att_A_F.pdf, p. 449 [providing a link to the voter registration form].

61 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B5_Dec_91_Rebut_Att_A_F.pdf, pp. 182 – 183.

they called or visited him at the hotel.63

There is a grant deed dated October 1, 1991, indicating the sale of appellant’s La Palma house to Ms. Jeng, and a note dated October 1, 1991, from Ms. Jeng payable to appellant for $160,000 of the $175,000 purchase price.64 The deed was not originally notarized or recorded. Appellant argues that it was not originally notarized or recorded in order to protect Ms. Jeng’s privacy. (App. 1991 Op. Br., p. 3.) On June 10, 1993, appellant obtained a notary acknowledgement for the deed, however, the notary acknowledgment incorrectly states that appellant and Ms. Jeng appeared before the notary on October 1, 1991.65 In fact, appellant and Ms. Jeng did not appear before the notary, and the deed was not notarized, until June 10, 1993.66 The deed was not recorded until June 16, 1993. The FTB contends appellant suborned the false notarization of the grant deed. (FTB 1991 Op. Br., p. 16.) Citing the affidavit of the notary, Ms. Beer, appellant argues that the notary made a mistake and that he did not ask her to backdate the document. (App. 1991 Reply Br., p. 78.) On October 14, 1991, appellant wrote a check for $1,859.74 to the Orange County assessor for 1991/1992 property taxes at the Jennifer Circle house. (FTB Ex. J, Tab 42; FTB Attach. A (Revised), p. 41.) The FTB argues that the check to the assessor was dropped off personally in Orange County, based on the processing date. Appellant argues that the check was mailed from Las Vegas and that he paid the property taxes as part of his agreement to sell his home to Ms. Jeng.67 On December 12, 1991, appellant wrote a $15,000 check or draft68 from his Franklin Federal Money Fund to himself.69 Two days later, on December 14, 1991, a $15,000 check was deposited at a Los Cerritos location into appellant’s account at California Federal Bank. Appellant

63 See HYATT_LINKED_BRIEFS/05_Testimonial_Topics/000A_Updated_Table_of_Testimonial_Topics_in_Subject_Matter_Order.pdf, p. 3.


65 FTB 1991 Op. Br., p. 51, fn. 139 [providing link notary log at Ex. D, Tab 2, FTB 13949], 3 [examination of D. Beer; see FTB 13667 at p. 24 of the PDF].

66 FTB Ex. D, Tab 2, p. 24 of the PDF, marked FTB 13667 (Examination of Darlene Beer).

67 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_A_F.pdf, pp. 377-378.

68 Appellant argues that “check” is a misnomer and it should be referred to as a draft as the account is not a checking account.

69 FTB Ex. L, Tab 19 [December 12, 1991 Franklin Federal Money Fund $15,000 draft written from Mr. Hyatt to Mr. Hyatt]; FTB_LINKED_BRIEFS/02_FTB_Attachments/04_Attachment A (Revised) (with Philips Documents).pdf., p. 72.
argues that he wrote the check in Las Vegas and that Ms. Jeng took the check to California and
deposited it for him. Appellant further contends that he received a $15,000 down payment from Grace
Jeng, citing her testimony, and that “[w]hether or not the check in question was for the down payment is
not the issue.” The FTB contends that appellant moved his own funds
from one account to another. As evidence for the sale and payment of the purchase price, appellant
points to, among other things: Ms. Jeng’s testimony; property tax payments by Ms. Jeng that began on
October 23, 1992; bank records showing a $2,200 deposit in his account on December 31, 1991, which
appellant contends was Ms. Jeng’s first two $1,100 monthly payments; checks written by Ms. Jeng
starting in February of 1992; a September 1996 final payoff by Ms. Jeng; and the fact he reported the
sale and interest on the note on his 1991 tax return.

Appellant provides affidavits from county assessors that the deed was legally sufficient to
show a sale on October 1, 1991. However, in staff’s opinion, whether or not appellant actually signed
the deed on October 1, 1991 and transferred the property to Ms. Jeng on that date is a factual matter for
the Board to determine.

With regard to appellant’s Wagon Trails apartment, there is a Wagon Trails agreement
dated October 8, 1991, which appellant signed on October 13, 1991 and a security release form dated

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70 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B5_Dec_91_Rebut_Att_A_F.pdf, p. 207.

71 During the audit and/or protest, appellant contended that a $15,000 down payment of Ms. Jeng was deposited into his
determination letter setting forth Mr. Hyatt’s responses to questions regarding the sale].) It is not clear to staff why a down
payment would be deposited in December of 1991 when the sale is stated to have occurred on October 1, 1991.

72 App. 1991 Op. Br., pp. 44-46 (fn’s 238-240), 58; HYATT_LINKED_BRIEFS/03_Hyatt_Exhibits/01_Annex_V_Ex:\n01_H_Bates_from_H00241.pdf, p. 89 [appellant’s bank records], p. 113 [promissory note];
HYATT_LINKED_BRIEFS/03_Hyatt_Exhibits/01_Annex_V_Ex:\02_H_Bates_from_H02603.pdf, p. 52 [Ms. Jeng’s
checks] [The photocopies are difficult to read but the response to IDR lists four checks paid to Mr. Hyatt in the amount of
$1,100 each, dated February 27, 1992, March 26, 1992, June 30, 1992, and July 1, 1992.];
HYATT_LINKED_BRIEFS/03_Hyatt_Exhibits/02_Annex_VI_Ex\CCC_00751_01000.pdf, p. 231 [FTB narrative report
discussing interest: “The taxpayer reported Schedule B interest and dividend income on his 1991 tax return for a Note from
Sale of Residence in the amount of $2,233”].

73 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_Att_A_F.pdf, pp. 8-30.

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Based on a fax spray on the bottom of the agreement, it appears that, on October 9, 1991, the rental agreement was faxed from Wagon Trails to the Jennifer Circle fax number. Appellant contends that he forgot to sign the agreement and that Wagon Trails Apartments apparently faxed the agreement to Ms. Jeng because he had put her fax number on the rental application as he did not know the fax number of the Continental Hotel. Appellant contends that Ms. Jeng brought the agreement to him in Las Vegas on October 13, 1991, and then he brought it to Wagon Trails. The apartment manager, Ms. Kopp, stated in 1999 that she only dealt with Ms. Jeng, and then later stated in 2015 that she had met appellant. Appellant provides affidavits from Wagon Trails employees to show that the application would have to be completed in person. Appellant also provides affidavits from many individuals stating that they visited him or called him at Wagon Trails Apartments. The FTB notes that the apartment manager, Ms. Kopp, wrote a $30 discount on the lease but appellant wrote a check for the rental amount without the discount. The FTB contends that this is because appellant was not present when Ms. Kopp signed the agreement and wrote the discount on the lease. Appellant contends that he wrote the wrong amount by mistake.

ISSUE (2): Whether appellant’s income is taxable as California source income.

Background

On August 21, 1995, FTB employee Monica Embry sent an internal FTB memorandum

74 FTB_Linked_Briefs/07_FTB Calendar Support Documents/19911013_October 13, 1991.pdf [agreement; see A00245, A00247]; FTB Attachment A (Revised) (with Philips Documents), p. 45, fn. 145 [providing link to Apartment Security Acknowledgement and Release attached as Exhibit K, Tab 7].

75 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_Att_A_F.pdf, p. 307. It is not clear to staff why Ms. Jeng would not have faxed the agreement to appellant if, as he contends, he was in Las Vegas and had a fax machine in Las Vegas.

76 HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_Att_A_F.pdf, p. 307. It is not clear to staff why Ms. Jeng would not have faxed the agreement to appellant if, as he contends, he was in Las Vegas and had a fax machine in Las Vegas.

77 HYATT_LINKED_BRIEFS/05_Testimonial_Topics/000A_Updated_Table of_Testimonial_Topics_in_Subject_Matter_Order.pdf, pp. 3-4.

78 FTB_LINKED_BRIEFS/02_FTB_Attachments/04_Attachment A (Revised) (with Philips Documents).pdf, p. 37, fn. 99 [linking to FTB_Linked_Briefs/07_FTB Calendar Support Documents/19911008_October 8, 1991.pdf [Kopp 1999 testimony]]. HYATT_LINKED_BRIEFS/02_FTB_Briefs_and_Hyatt_Rebuttals/06B3_Oct_91_Rebut_Att_A_F.pdf, pp. 242-302; 2015 Dec. of C. Kopp, par. 22 [stating that Mr. Hyatt had to make the rental arrangements as he was the resident and her prior testimony had been influenced by an FTB private investigator who told her a false statement].

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NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board’s decision or opinion.
summarizing a discussion on June 6, 1995 regarding sourcing theories and concluding that, as they had found few facts to support appellant’s involvement in a patent business, there was “little evidence” to support a trade or business of developing patents or that the patents had a California business situs.  

As noted in “Background” under Issue (1), on April 23, 1996, the FTB issued its NPA for the 1991 tax year. The NPA notes the statutory definition of resident, provides citations to Board decisions on residency, and states the fraud penalty is imposed pursuant to R&TC section 19164, subdivision (b). On June 20, 1996, appellant protested the NPA. Appellant’s protest stated that the issue to be decided was whether appellant was a California resident during the disputed period. Protest hearings were held on September 27, 2000 and October 4, 2000. Also on October 4, 2000, and following a protest hearing, the FTB sent a letter indicating that one of the four issues at protest was “[w]hether the patent license and royalty income received by Hyatt during 1991 and 1992 is California source income.” On May 31, 2001, appellant filed a 190-page protest supplement letter. 

On November 1, 2007, the FTB issued a Determination Letter for both the 1991 and 1992 tax years in which the FTB stated that it would affirm the NPAs for both years. The Determination Letter also advanced “an additional and alternative basis for the assessments that the patent licensing income received by the taxpayer is, in whole or in large part, California source income taxable by California.” The letter states “[i]f the income is California source income, all of the payments received by Hyatt from the licensing agreements during 1991 and 1992 are taxable by California.” The letter argues that the patents have a business situs in California such that the income is California source income.

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79 See App. 1991 Op. Br., p. 83 & Ex. 69; App. 1991 Sept. 28, 2016 Br., p. 15 & Ex. 69. The FTB argues that the Embry memorandum reflected an incorrect assumption that appellant was not engaged in a licensing activity. The FTB argues that the assumption was proved incorrect by evidence largely acquired after the audit. (See FTB 1992 Op. Br., pp. 28-29.)

80 As noted previously, the FTB argues that both hearings covered both years while appellant contends that the 1991 protest hearing was held on October 4 and the 1992 protest hearing was held on September 27, 2000. (See FTB 1992 Reply Br., p. 81; App. 1991 Op. Br., p. 88.)


On December 26, 2007, respondent issued its NOA for the 1991 tax year, affirming the NPA. The NOA references the November 1, 2007 determination letter. It finds appellant to be a resident of California through April 2, 1992 and, as such, taxable on his income from all sources through that date. The assessment was alternatively sustained on the basis that appellant’s income was generated from intellectual property that had a business situs in California for the entire taxable year and was derived from sources within California. (FTB Op. Br., p. 1, Ex. A, Tab 4 (FTB28804 [NOA]).)

**Contentions – Issue (2) – Source of Income**

**Appellant’s Contentions**

Appellant contends that he had no California source income. Appellant contends that the 1991 disputed licensing payments that appellant received came from Philips licensing his Nevada situs patents through the Philips licensing program. Appellant argues that the FTB’s sourcing claims must be rejected because the eyewitness testimony proves that he moved away in 1991 and was not present at the Jennifer Circle house before late 1992, and, therefore, appellant did not work and operate a California licensing business at the Jennifer Circle house.83

Appellant argues that the FTB has failed to carry its initial burden of establishing a reasonable and rational assessment. Appellant argues that the FTB failed to audit the sourcing issue and therefore has no record on which to base a sourcing assessment. Appellant contends that it is unlawful for the FTB to make major assessments at the end of the FTB administrative process without an audit or protest record to rely on. Appellant further contends that the FTB’s sourcing assessments are new assessments which were not included in the NPAs and did not set forth reasons in the NPAs as required by California law. Appellant argues that the FTB cannot raise new assessments without formally complying with the statutory requirements for issuing a proposed assessment notice. Appellant asserts that the FTB cannot meet its burden of proof with regard to the disputed period or thereafter due to the “overwhelming eyewitness and documentary evidence” which establishes that he had no California sources. Appellant further asserts that, in order to carry its burden, the FTB must establish that appellant was not a resident, when the FTB has tried to prove that he was a resident. (App. 1991 CS, p. 4.)

Appellant argues that the FTB asserts new theories in its 2013 additional briefing that were not included in its NPAs or NOAs. Appellant notes that, in its NOAs, the FTB cited the 2007 Protest Determination Letter where the alternative sourcing basis was discussed. However, appellant contends, the NOAs fail to provide any reasons for the sourcing based deficiency assessments as required by California law. Appellant further contends that the NOAs merely recite an ultimate conclusion and only allege that his intellectual property was derived from sources within California. Appellant argues that there is no assertion that his income was derived from sources in California as would be the case with a California licensing business. On this basis, appellant argues that the FTB did not give proper notice in the NOAs that it alleges there was a California licensing business.84

Appellant argues that the intellectual property has a situs that follows the residence of the owner, which the FTB admits for the sourcing issue is Nevada, citing R&TC code section 17952. Appellant contends that, to establish business situs in California, the FTB must show that possession and control of the patents has been localized in a California business so that the substantial use and value attach to and become an asset of the business, citing California Code of Regulations, title 18, section (Regulation) 17952, subdivision (c). Appellant argues that the FTB has provided neither the required notice of such allegations in the NPAs and NOAs nor the required proof. (App. 1991 CS, p. 6)

Appellant contends that the FTB attempts to misrepresent to the Board that he had a California licensing business by quoting statements that he made in a radio interview with Mike Malone in May 1991. Appellant states that he indicated in the interview that his people had been approached by a group of companies and were negotiating with them. Appellant argues that, at this point, Mahr Leonard had exclusive rights with four companies and was doing the negotiating. Appellant further argues that, under the July 1991 Philips Agreement, Philips had the responsibility to sublicense his patents. Appellant contends that he did not personally negotiate sublicenses that were signed under the Philips licensing program.” (App. 1991 CS, p. 12.)

Appellant contends that the license payments received by him were not California source income. Appellant asserts that the FTB’s Embry audit task force in 1995 determined that the FTB did

not have a sourcing case against appellant. Appellant asserts that Philips created and managed the Philips licensing program and appellant did not have a California licensing business and none of the license payments from Philips sublicensing his patents went to a California business. Appellant argues that the FTB’s “The La Palma, California home was Mr. Hyatt’s business office” theory and “Commercial Exploitation”\(^8\) business situs theory fail as a matter of law and for the lack of evidence. Appellant asserts that the FTB’s sourcing arguments were rejected by the FTB at audit in 1995 (the Embry audit task force). Appellant contends that the FTB’s Embry audit task force in 1995 determined that there was explicit doubt about the FTB’s 1991 residency case against appellant and that the FTB did not have a 1992 residency case against appellant. (App. 1991 CS, pp. 21-22.)

Appellant argues that all of the disputed 1991 and 1992 payments came from licensing his Nevada situs patents and are thus not taxable by California. Appellant contends that the disputed income came from the ordinary course of licensing appellant’s Nevada situs patents and is, therefore, not taxable by California. Appellant contends that he did not have California source income under Regulation section 17951-4 because he did not engage in a patent licensing business in California or anyplace else. Appellant contends that, under R&TC section 17952, the mere licensing of appellant’s own patents does not create California source income. Appellant argues that he did not have California source income under R&TC section 17952 because his patents did not have a California business situs. Appellant argues that the patents were not “employed as capital in this State” and the “possession and control” of his patents has never been localized with a California business so that their substantial use and value attach to and become an asset of the business. Appellant contends that, after the July 1991 agreement, he no longer possessed the substantial use and value of his own patents, and Philips was the only entity that had the substantial use and value of his patents. (App. 1991 CS, p. 22.)

Appellant argues that tracing license payments to appellant confirms that he did not have California source income. Appellant asserts that the license payments were transferred to his Nevada situs investment accounts, not to a California business. Appellant asserts that he did not receive

compensation for his assistance to the Philips licensing program and no California business received income from the licensing of his patents. Appellant contends that he did not have an ownership interest in the Philips licensing program as the FTB incorrectly implies. Appellant asserts that Mr. Tamoshunas testified that “Philips by itself and through its attorneys created and managed the Licensing Program.” Appellant contends that Philips had the exclusive licensing authority to license appellant’s patents. Appellant argues that there could not be and there was no appellant licensing business because if he ran a licensing business it would have been in breach of the July 1991 Philips agreement and in violation of appellant’s representations and warranties to Philips.86

Appellant argues that the FTB’s sourcing and residency cases both rely on the false premise that appellant lived and worked at the Jennifer Circle house. Appellant argues that the FTB’s bad faith attempt to continue to tax appellant for the FTB’s $24 million error must fail.87 Appellant asserts that the license payments were received after the disputed period and the licenses had no involvement with California. Appellant argues that he would not and did not breach the July 1991 Philips agreement by negotiating with prospective licensees or by operating a licensing business. Appellant contends that Philips had exclusive licensing authority and Mahr Leonard had exclusive negotiating rights. Appellant contends that he did not have any licensing rights or negotiating rights and he did not have the rights to license his own patents. (App. 1991 CS, p. 23.)

Appellant argues that Philips wanted him to sign several patent agreements because of Philips’ cross licensing relationships. Appellant contends that he wanted to be cooperative with Philips so he agreed to sign patent agreements for Philips. Appellant further contends that Philips and Mahr Leonard promised to correct appellant’s address in the preamble of the patent agreements and, after several of his complaints, they did correct it. Appellant states that, in December 1991, Philips and Mahr Leonard put his Las Vegas apartment address on the Sony and NEC patent agreements. Appellant

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87 Appellant argues, with respect to the 1992 tax year, that the FTB overstated by approximately $24 million the amount of income he received between January 1, 1992 and April 3, 1992. This issue is discussed in the appeal for 1992 under Issue (2), regarding sourcing.
asserts that he had very limited involvement in the Philips licensing program.88

Appellant argues that his former consulting business and Digital Nutronics Corp. (DNC) are irrelevant to the FTB’s California business argument. Appellant argues that the FTB’s claim that he used “California independent contractors” does not establish a California business. Appellant asserts that he did not play a role in any California business, nor did he control the business income at issue. Appellant argues that his relevant tax information does not establish a California business. Appellant argues that the FTB’s patent portfolio argument is without merit. Appellant argues that what remains of the FTB’s commercial exploitation argument is without merit. Appellant asserts that the FTB’s new Philips sourcing argument is without merit and was rejected at audit, only to be resurrected by the FTB in its Determination Letter in November 2007 at the conclusion of the protests. Appellant argues that, prior to the 2007 Determination Letter, the FTB never advanced any sourcing arguments as the basis for any proposed deficiency assessments. Appellant argues that sourcing is a new argument, upon which the FTB bears the burden and the FTB has not and cannot meet that burden. (App. 1991 CS, p. 24.)

Appellant contends that the FTB in bad faith never audited or protested the sourcing cases, thereby unlawfully depriving appellant of his statutory rights to audits and protests and to proper notice on the NPAs and NOAs. Appellant argues that the FTB’s sourcing assessments must be reversed for the additional reason that the assessments were not properly raised in the NPAs or NOAs. Appellant argues that the FTB is significantly changing its theory for the sourcing assessments and severely prejudicing appellant. Appellant asserts that, during the audit, the FTB secretly examined the sourcing issue with a special task force, which held that the FTB did not have a sourcing case. Appellant asserts that the FTB removed the final task force report from the audit file. (App. 1991 CS, pp. 24-25.)

Appellant asserts that the FTB is barred from raising the sourcing issues because these issues were not raised in the NPA. Appellant asserts that current California law and the Rules for Tax Appeals do not permit the FTB to introduce new issues during an appeal before the Board. Appellant asserts that the FTB did not comply with California law by setting forth sourcing as a reason for its assessments in its 1991 and 1992 NPAs. Appellant argues that the FTB is thus barred from asserting its

sourcing assessments. (App. 1991 CS, p. 25.)

Appellant argues that placing the sourcing assessments for the first time in the NOAs does not satisfy the statutory procedure for issuing an assessment. Appellant argues that the FTB’s 10-year plus delay has significantly prejudiced appellant. Furthermore, appellant argues that the FTB’s 1991 and 1992 NOAs assert sourcing based only on a California business situs for appellant’s patents, not on the different theory of income from a California business. Appellant argues that the FTB’s sourcing assessments are unlawful, unfair, and unjust. Appellant argues that the NPAs and NOAs do not give him the required notice of the FTB’s sourcing assessments. Appellant argues that neither the NPAs nor the NOAs give him notice of the reasons and factual basis for asserting the sourcing assessments.

Appellant argues that the FTB’s determinations that he is a Nevada resident for sourcing and a California resident for residency are inconsistent allegations, not alternative determinations and do not comply with California law. (App. 1991 CS, pp. 25-26.)

Appellant argues that the FTB cannot raise a new California-based license business theory at this time because the issue was not raised in the NPAs or NOAs. Appellant argues that the FTB’s new sourcing theories are highly prejudicial to him. Appellant argues that the FTB has not met its burden of proving that he had California source income and that the FTB is prohibited from raising the issue because it did not raise the issue in its 1991 and 1992 NPAs. (App. 1991 CS, p. 26.)

FTB’s Contentions – Issue (2) – Source of Income

Respondent asserts that, at the time of the audit, the auditors considered examining the extent to which the licensing income was sourced to California but chose not to pursue that particular examination at that time because they had been led to believe by appellant’s representative that all of the payments from his Japanese licenses were for the future use of his patents. Respondent asserts that, in reality, the payments were for both the future use of the patents and for the settlement of claims of prior infringement, including infringement which may have occurred prior to appellant’s alleged termination of his California residency. (FTB 1991 CS, p. 2.)

89 The FTB states that a more detailed discussion of the relevant sourcing factual and legal issues is set forth in prior briefing, including pages 23 to 45 and 92 to 95 of its 1991 Opening Brief, pages 1 to 30 of its 1992 Opening Brief, pages 1 to 37 of its 1992 Reply Brief, pages 1 to 13 of its February 19, 2013 brief, and pages 15 to 30 of its 1992 July 15, 2015 Brief. (FTB 1991 CS, p. 23.)
The FTB argues that California may tax appellant on his 1991 California source income pursuant to R&TC section 17041. The FTB asserts that “[i]ncome from intangibles such as patents is California source income and taxable in California if the intangibles acquired a business situs in this state[,]” citing R&TC section 17952 and Regulation 17952, subdivision (a). The FTB argues that “[t]he patents that formed the basis for the licensing agreements and income at issue were all researched, developed, applied for, and issued while appellant admits he was a California resident.” (FTB 1991 CS, pp. 22-23.)

The FTB contends that the 1991 income at issue is from the Fujitsu and Matsushita license agreements effective as of October 24, 1991, and November 14, 1991, respectively. The FTB contends that “[d]uring the period that Hyatt admits he was a California resident, negotiations with Fujitsu and Matsushita were virtually completed, as 94 percent of the aggregate value of those contracts, paid on October 31, 1991, and November 15, 1991, respectively, had already been offered.” The FTB contends that, in addition, the objective contemporaneous evidence acquired by it “reveals that appellant continuously conducted his patent-related business affairs from his Jennifer Circle residence throughout the contested time period.” Therefore, the FTB argues that the patents that generated the income at issue in this appeal acquired a business situs in California. (FTB 1991 CS, p. 23.)

**Applicable Law – Issue (2) - Sourcing**

**Adequacy of a NPA**

R&TC section 19033 provides that “[i]f the [FTB] determines that the tax disclosed . . . on an original or amended return . . . is less than the tax disclosed by its examination, it shall mail notice to the taxpayer of the deficiency proposed to be assessed.” R&TC section 19033 further provides that “[i]n no case shall the determination of the deficiency be arbitrary or without foundation.” R&TC section 19034 requires that the FTB send a notice to taxpayers which “shall set forth the reasons for the proposed deficiency assessment and the computation thereof.”\(^{90}\) This notice is referred to as a NPA. The taxpayer then has an opportunity to protest the proposed deficiency assessment with the FTB, pursuant to R&TC sections 19041 and 19044. At the conclusion of the protest process, the FTB

\(^{90}\) During 1991 and 1992, this language was set forth in R&TC section 18584.

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issues an action on the protest, known as a NOA, which the taxpayer may appeal to the Board.

In *Scar v. Commissioner* (9th Cir. 1987) 814 F.2d 1363 (*Scar*), the Scars successfully challenged a notice of deficiency sent by the IRS that stated on its face that the Scars’ tax return had not been examined. The Ninth Circuit ruled that “because the Commissioner’s purported notice of deficiency revealed on its face that no determination of tax deficiency had been made in respect to the Scars for the 1978 tax year, it did not meet the requirements of [IRC] section 6212(a).” (*Scar, supra*, 814 F.2d 1363, 1370.)

In *Clapp v. Comm’r of Internal Revenue* (9th Cir. 1989) 875 F.2d 1396, the Ninth Circuit stated that *Scar* does not require “any affirmative showing . . . that a determination . . . was made on the basis of the taxpayers’ return.” Instead, the Ninth Circuit stated, “[o]nly where the notice of deficiency reveals on its face that the Commissioner failed to make a determination is the Commissioner required to prove that he did in fact make a determination.” Applying this standard, the Ninth Circuit found that the notices of deficiency at issue were valid as, on their face, the notices made clear that the IRS examined the returns, considered the deduction at issue and attributed income based on trusts related to the taxpayer rather than, as in *Scar*, on the basis of unrelated entities. Quoting *Scar*, the Ninth Circuit further stated that, in assessing the validity of the notice, it would not consider internal IRS memoranda and would not “depart from the rule that we should not ‘look behind a deficiency notice to question the Commissioner’s motives and procedures leading to a determination.’” (*Clapp, supra*, 875 F.2d 1396, 1401 [quoting *Scar, supra*, 814 F.2d at 1368].)

In the *Appeal of Sierra Pacific Industries*, 94-SBE-002, decided January 5, 1994 (*Sierra Pacific*), the Board considered an appeal in which a subsidiary, Humboldt, transferred property to the

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91 In *Wertin v. FTB* (1998) 68 Cal.App.4th 961, the appeals court applied *Scar* to a NPA issued by the FTB. The appeals court found that *Scar* was applicable as California tax law used language that was very similar to the language used in the Internal Revenue Code. Therefore, the court held that the FTB was required to review the Wertins’ return prior to issuing its proposed assessment, and ruled in favor of the Wertins.
taxpayer which the taxpayer then used in a sale-leaseback transaction.92 The Board found that the FTB “may modify an NPA in order to reflect issues and conclusions developed during the protest.” The Board stated that “[o]ne of the purposes of the NPA is to inform taxpayers so that they can intelligently lodge a protest.” The Board found that the taxpayer was on notice that the FTB was reviewing the Humboldt transaction, which included the sale-leaseback.

Burden of Proof

In Sierra Pacific, supra, 94-SBE-002, the Board also discussed whether the burden of proof should be shifted to the FTB. The Board stated as follows:

If respondent’s position on appeal results in a larger deficiency (had respondent adopted it initially), or requires the presentation of different evidence, then a new matter has been introduced and the burden of proving that new position shifts to respondent. However, if the assertion of a new theory merely clarifies or develops the original determination without being inconsistent with it or increasing the amount of the deficiency, it is not a new matter requiring the shifting of the burden of proof to respondent. (Appeal of David G. and Helen Mendelsohn [85-SBE-141], Nov. 6, 1985; see also Zarin v. Commissioner, 92 T.C. 1084 (1989) and Achiro v. Commissioner, 77 T.C. 881 (1981) (interpreting Tax Court Rule 142(a)).)

Applying the above rules, the Board noted that the NOA decreased the amount of tax set forth in the NPA. The Board stated that “. . . it is logical for the respondent to modify its original determination so as to account for any new facts or information developed during the federal audit.” The Board further stated that the property transaction, which it referred to as the Humboldt transaction, “was the subject of respondent’s NPA, and continues to be so on this appeal.” Accordingly, the Board found that the FTB had not raised a new matter that would shift the burden of proof.

Source of Income

California residents are taxable on their income from all sources during periods in which they are a resident of California. For purposes of computing the taxable income of a nonresident or part-year resident, R&TC section 17951, subdivision (a), provides that “in the case of nonresident

92 The taxpayer argued that the transfer of property was a partial liquidation, but an IRS audit report found that the transfer was a dividend. The FTB then issued a NPA, dated July 19, 1976, which was apparently based on the IRS report. During the protest, the taxpayer reached a settlement with the IRS. On June 8, 1987, following the protest, the FTB issued a NOA that accepted the IRS determination of a dividend, but changed the computation of the dividend and imposed additional tax on the sale-leaseback transaction. The taxpayer argued that the NOA was invalid because it raised new issues not covered by the NPA.
taxpayers the gross income includes only the gross income from sources within this state.” R&TC section 17954 states that for purposes of computing taxable income of a nonresident or part-year resident, “gross income from sources within and without this state shall be allocated and apportioned under rules and regulations prescribed by the [FTB].”

Regulation 17951-4, subdivision (a), provides, in part, that if “the nonresident’s business, trade or profession is conducted wholly within the state, the entire net income therefrom is derived from sources within this state.” Regulation 17951-4, subdivision (b), provides that if a nonresident has a separate and distinct business in California that is unconnected with business outside the state then income from the California business is sourced to California. Regulation 17951-4, subdivision (c), provides rules for determining how to determine the income derived from California sources by a nonresident’s sole proprietorship. It further provides that business income is apportioned pursuant to R&TC section 25120, et seq., while income that is not business income is determined by reference to R&TC sections 17951 through 17955.

R&TC section 17952 provides that “income of nonresidents from stocks, bonds, notes, or other intangible personal property is not income from sources within this state unless the property has acquired a business situs in this state . . . .” With respect to business situs, subdivision (c) of Regulation 17952 provides that:

[i]ntangible personal property has a business situs in this State if it is employed as capital in this State or the possession and control of the property has been localized in connection with a business, trade or profession in this State so that its substantial use and value attach to and become an asset of the business, trade or profession in this State. For example, if a nonresident pledges stocks, bonds or other intangible personal property in California as security for the payment of indebtedness, taxes, etc., incurred in connection with a business in this State, the property has a business situs here.

. . .

If intangible personal property of a nonresident has acquired a business situs here, the entire income from the property including gains from the sale thereof, regardless of where the sale is consummated, is income from sources within this State, taxable to the nonresident.

STAFF COMMENTS – Issue (2) – Source of Income

If the Board sustains respondent’s determination that appellant remained a California resident throughout 1991, the source of appellant’s income is not at issue for the 1991 tax year. Thus,
for 1991, sourcing is only at issue if the Board determines that appellant established residency in Nevada during 1991.

In its Concluding Summaries, the FTB emphasizes that the licensing income at issue should be sourced to California on the ground that appellant’s patents had a business situs in California under R&TC section 17952. The general rule is that income from an intangible, such as a patent, follows the domicile of its owner. Thus, in the absence of an exception to this general rule, if a nonresident receives income from stock, or from intellectual property licensed under a licensing agreement, that income is not taxable by California.

However, there is an exception to the foregoing general rule where an intangible has a “business situs” in California. Under Regulation 17952, intangible property has a business situs in California “if it is employed as capital in this State or the possession and control of the property has been localized in connection with a business . . . in this State so that its substantial use and value attach to and become an asset of the business . . . .” The regulation provides two examples of intangible property acquiring a business situs: (1) the pledge of an intangible by a nonresident as security for debt of a California business and (2) a bank account at a California branch office that is used to pay expenses in California. In *Holly Sugar Corp. v. McColgan* (1941) 18 Cal.2d 218, 224, the California Supreme Court explained that business situs arises from the owner of the intangible employing the intangible “as an integral portion of the business activity of the regular place, so that it becomes identified with the economic structure of that place and loses its identity with the domicile of the owner.”

With the foregoing in mind, the question with regard to R&TC section 17952 is whether the patents and applications for patents licensed by appellant were employed by appellant as an integral part of a California business so that the “substantial use and value” of the property constituted an asset of the California business. As noted above, the question only arises during time periods when appellant was not a resident of California. Therefore, in order for the business situs exception to apply, appellant

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93 See FTB 1991 CS, p. 22, FTB 1992 CS, p. 11. Also, the FTB’s 1992 NOA states that that the assessment is “alternatively sustained” on the basis that appellant’s intellectual property had a business situs in California.

must have used the intellectual property as an integral part of a California business while he was residing in Nevada. At the hearing, the parties should be prepared to discuss whether the evidence indicates that, during any periods when appellant was a Nevada resident, he employed the patents as an integral part of a California business.

The FTB has also argued that appellant’s income had a California source under R&TC section 17951 and Regulation 17951-4 on the basis of the FTB’s contention that appellant operated a California licensing business. At the hearing, the parties should be prepared to address whether a preponderance of the evidence indicates that, during any periods in which appellant was a Nevada resident, he operated a California business, and whether the licensing payments received were earned in the operation of any such business.

The FTB has contended that appellant realized income on July 15, 1991, when the Philips licensing agreement became effective, at which time he was a California resident, and that the source of the licensing income should be determined as of that time, even though the income was received and recognized later. (See FTB 1992 Op. Br., pp. 23-26.) In support, the FTB has argued that the agreement provided guaranteed payments and therefore should be analogized to an installment sale of property. However, it is not clear to staff that the grant of the nonexclusive, nontransferable license of intellectual property is analogous to an installment sale of property. With regard to whether the license was a sale of property, staff notes that, in the license at issue, not all rights were transferred (e.g., through Article 10, appellant retained the right to use the licensable patents, to license to affiliates, and to license to IBM). Even if the license could be viewed as a sale of property, it does not appear to staff that the payments in Section 4.6 of the licensing agreement were guaranteed because the amounts were paid “in order [for Philips] to retain the sublicensing rights . . .” and it appears to staff that the amounts would not be owed if Philips decided to give up future sublicensing rights.

At the hearing, the parties should be prepared to discuss whether the burden of proof should shift to the FTB for some or all of the sourcing issues. However, both parties have provided

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96 The licensing agreement can be found, among other locations, at FTB’s Exhibit G, Tab 10, and Exhibit 55 of appellant’s 1991 Opening Brief.
substantial evidence and if the Board determines that either party to this appeal has established by a
preponderance of the evidence that the party should prevail, then the burden of proof would be
irrelevant. (See Steiner v. Comm’r, T.C. Memo. 1995-122 [stating that the burden of proof is “merely a
‘tie-breaker’”).)

ISSUE (3): Whether the FTB has shown that it properly imposed a fraud penalty.

Background

On April 23, 1996, the FTB issued its 1991 NPA, which stated that a fraud penalty was
being assessed. On November 1, 2007, respondent issued a Determination Letter for both the 1991 and
1992 tax years in which respondent stated it would affirm the NPA for 1992 as well as the NPA for
1991. The Determination Letter reflected that a fraud penalty would be imposed.97

On December 26, 2007, respondent issued its 1991 NOA. The NOA affirmed the NPA,
including the fraud penalty. The NOA referenced the November 1, 2007 Determination Letter for

Applicable Law

R&TC section 19164, subdivision (c), states that “[a] fraud penalty shall be imposed . . .
and shall be determined in accordance with Section 6663 of the Internal Revenue Code . . . .” IRC
section 6663 provides for a penalty equal to 75 percent of the portion of the underpayment which is
attributable to fraud. The burden is upon respondent to prove, by clear and convincing evidence, that
appellant committed civil fraud. (See, e.g., Appeal of Robert F. and Helen R. Adickes, 90-SBE-012,
Nov. 27, 1990; Appeal of Barbara P. Hutchinson, 82-SBE-121, June 29, 1982.)

Fraud implies bad faith, intentional wrongdoing, and a sinister motive; the taxpayer must
have the specific intent to evade a tax believed to be owed. (Jones v. Comm’r (5th Cir. 1958) 259 F.2d
300 (Jones); Powell v. Granquist (9th Cir. 1958) 252 F.2d 56.) Fraud may be proved by circumstantial
evidence, and the taxpayer’s entire course of conduct may establish the requisite fraudulent intent.
(George v. Comm’r, T.C. Memo. 2015-158.) “Because fraudulent intent is rarely established by direct

97 The NPA is attached as Exhibit EE, Tab 2, of the FTB’s February 19, 2013 additional brief. The determination letter can
be found at Exhibit A, Tab 4, of respondent’s 1991 opening brief. (The determination letter is located after the NOAs, and
the fraud penalty is discussed at pages 26–29.)
evidence, [the Ninth Circuit] has inferred intent from various kinds of circumstantial evidence.”

(Bradford v. Comm’r (9th Cir. 1986) 796 F.2d 303, 309.) These badges of fraud include:

1. understating income;
2. inadequate records;
3. failure to file tax returns;
4. implausible or inconsistent explanations of behavior;
5. concealing assets; and
6. failure to cooperate with tax authorities. (Id.) Although fraud may be established by circumstantial evidence, it is never presumed or imputed, and it will not be sustained upon circumstances that at most create only a suspicion of fraud.

(Jones, supra, 259 F.2d at p. 303.)

Contentions – Issue (3) – Fraud Penalty

Appellant’s Contentions

Appellant argues that the FTB imposed fraud penalties “in bad faith” in order to “coerce settlements.” Appellant further argues that “[t]he fraud penalties are based on 10 trumped up factors that are based on false inferences, speculation and false statements that ignore Mr. Hyatt’s eyewitness testimony and documentary evidence.” Appellant contends that the FTB has failed to meet its burden of proving fraud by “clear and convincing evidence.” Appellant asserts that the FTB “maintains its fraud penalty on its $24 million error[,]” even after admitting the error. (App. 1992 CS, pp. 5-6; see also App. 1992 Reply to FTB CS, p. 12.)

Appellant contends that the “FTB must not be allowed to violate the established law and regulations for conducting audits, assessing taxes, and appealing tax assessments as it is attempting to do here.” Appellant further contends that the FTB’s audits “have lasted over 20 years into 2016, and [that] FTB has intentionally delayed the administrative process into 2016.” Appellant argues that “[m]ost of the current assessments are not in the NPAs or NOAs, have not been audited or protested, [and] are in large part based on an admitted $24 million error that FTB has admitted to but has still not conceded.” Appellant argues that the fraud assessments are “tainted” by FTB’s “abusive policy of using the fraud penalty to coerce . . . settlements even though [the] FTB audit reviewers were not convinced of fraud.” (App. 1992 CS, p. 6; see also App. 1992 Reply to FTB CS, p. 13.)

Appellant contends that “[o]verwhelming documentary and testimonial evidence

98 Appellant incorporates his discussion of the fraud penalty from his 1992 concluding summary, section 1.9. (CS, p. 27.)
establishes that Mr. Hyatt moved to Las Vegas and that he believed that he was a Nevada resident and
he was a Nevada resident.” Appellant asserts that he had a reasonable cause and good faith belief that
he satisfied the legal requirements for Nevada residency for the 1991 disputed period. (App. 1992 CS,
pp. 6-7; see also App. 1992 Reply to FTB CS, p. 13.)

Appellant asserts that the FTB initially set forth its fraud penalties with “false fraud
factors” that have subsequently been “dropped.” Appellant also asserts that the FTB failed to follow
statutory requirements for assessing the penalty in the NPAs because the 1991 NPA recites only the
statute without citing reasons as required by R&TC section 19034. (App. 1992 CS, p. 8.)

Appellant argues that the FTB “provides only generalized argument instead of clear and
convincing evidence.” Appellant further argues that Adickes, supra, 90-SBE-012, is “not relevant”
because “Mr. Hyatt actually moved to Nevada[,]” “[t]here is no issue of fabricated documents and
Mr. Hyatt’s three CDE [Contemporaneous Documentary Evidence] authenticate and explain thousands
of documents.” Appellant further argues that the testimony of 150 eyewitnesses “cannot be overcome
by FTB’s false inferences and speculation.” (App. 1992 CS, p. 9.)

Appellant discusses each of 10 factors cited by the FTB in favor of its fraud penalty and
argues that the factors do not establish fraud.

First Factor. Appellant argues that his alleged “physical presence” in California does not
support a fraud penalty because his “overwhelming presence was in Las Vegas . . . [,]” pointing to
testimony from 72 witnesses that he moved away. Appellant argues that, out of 190 days in the disputed
period, he had “125 full days in Nevada, 37 days partly in Nevada and partly in California (each time for
a temporary or transitory purpose) and 9 full days in a California hospital as he recovered from a cancer
surgery.” (App. 1992 CS, pp. 9-10.)

Second factor. Appellant argues that the sale of his former California home “on
October 1, 1991 was a bona fide sale, not a sham as falsely alleged by FTB . . . .” Appellant further
argues that “two former elected Orange County assessors, Bradley Jacobs and Webster Guillory, have
confirmed that the sale of Mr. Hyatt’s former La Palma house on October 1, 1991, was a bona fide sale.”
Appellant contends that scores of witnesses, including 16 witnesses who testified about the sale of his
home in October of 1991 and many other witnesses testified about his move from La Palma. (App. 1992
Third factor. Appellant asserts that he “did not suppress evidence of his stay at the Continental Hotel as falsely alleged by FTB.” Appellant further asserts that “[b]ecause he was part of a van tour the Continental Hotel did not register van tour guests and made no record of [his] stay . . . .” Appellant states that hotel employees “all testified that tour guests did not register . . . and thus the hotel did not maintain records of tour guests[,]” and thus argues that there were no records of his stay to suppress. (App. 1992 CS, pp. 10-11.)

Fourth factor. Appellant argues that he did not conceal or destroy DNC corporate records. He further argues that DNC “was known to all three auditors . . . and [it] was secretly audited by FTB.” (CS 1992, p. 11.)

Fifth factor. Appellant argues that, contrary to the FTB’s assertion, he and his representatives “cooperated during audit and protest” and further contends that “[a]ll three auditors as well as three protest hearing officers all concurred that Mr. Hyatt cooperated at audit.” (App. 1992 CS, p. 11.)

Sixth factor. Appellant contends that he “produced extensive records to support his 1991 tax return and did not produce inadequate records as falsely alleged by FTB.” Appellant further contends that the FTB disregarded much of the records “and then assessed a fraud penalty in large part because it claimed that records that were in the audit file were not produced.” Appellant also asserts that he “kept adequate records of his moving expenses because he moved himself by pulling a trailer to Las Vegas and thus had no records of moving expenses.” (App. 1992 CS, p. 11.)

Seventh factor. Appellant disputes the FTB’s contention that he abused the corporate form and argues that neither he nor DNC “deducted personal expenses as business expenses . . . .” (App. 1992 CS, p. 11.)

Eighth factor. Appellant argues that he properly reported his 1991 income on his 1991 part-year tax return and he did not fail to report income. He further argues that he “properly reported the $200,000 and $400,000 payments he received from Pioneer and Philips during 1991 on his 1991 part year tax return.” (App. 1992 CS, p. 11.)

Ninth factor. Appellant contends that he “provided truthful and accurate statements to
Appellant further contends that he properly registered to vote in Nevada and that Mr. Zuzak “has refuted Mr. Dameron’s false hearsay statement that Mr. Zuzak told him Mr. Hyatt was on Jennifer Circle in October 1991.” (App. 1992 CS, p. 11.)

Tenth factor. Appellant disputes the FTB’s allegation that he solicited false testimony, arguing that his witnesses did not offer false testimony and that the FTB offered “no evidence that Mr. Hyatt was even present at any witness interviews.” (App. 1992 CS, p. 11.)

FTB’s Contentions – Issue (3) – Fraud Penalty

The FTB argues that the evidence establishes that appellant’s assertion that he terminated his California domicile and residency and established residency in Nevada not later than October 1, 1991, is “devoid of merit and objective substantiation.” The FTB asserts that appellant has changed his alleged departure from California to four different dates: October 1, 1991; September 25, 1991; September 24, 1991; and September 26, 1991. The FTB asserts that appellant has not provided any objective documentation of expenses incurred with his alleged 273-mile (one direction) relocation or of where he stayed once he allegedly arrived in Las Vegas. (FTB 1991 CS, pp. 23-24.)

The FTB argues that appellant presents no objective, contemporaneous documentary proof which substantiates the contention that he moved to Las Vegas on or about September 26, 1991. The FTB contends that there are no receipts for gasoline, food, or other amenities typically associated with multiple 546-mile round trips. The FTB contends that there are no receipts documenting a stay at the Continental Hotel, that the Continental Hotel explanation was concealed for “more than five years,” and that the particulars of the Continental Hotel stay contradict hotel practices and laws. (FTB 1991 CS, p. 24.)

The FTB asserts that, on appellant’s part-year tax return for 1991, he stated, under the penalty of perjury, that he left California on October 1, 1991. The FTB argues that appellant later contradicts the accuracy of the statement contained in his tax return. The FTB asserts that, as evidence

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99 The FTB states that the relevant factual and legal analysis has been previously discussed in, among other briefs, its 1991 Opening Brief at pages 13-16, 46-48, 50-52, 55-56, and 77-91, and its 1992 Reply Brief at pages 59 through 71, and incorporates its prior briefing by reference.
of his departure from California, appellant points to two documents dated October 1, 1991, the deed, and
a deed of trust, which appellant contends memorialize his sale of a house located on Jennifer Circle in
La Palma, California. The FTB argues that the transaction “is, at best, highly suspect.” The FTB
contends that, among other things, the transaction is between appellant and a long-time friend and
associate, Grace Jeng, and is devoid of supporting contractual documents or proof that a required
$15,000 initial payment was made, and evidenced by a deed not recorded until June 16, 1993, and which
contains a fraudulent, back-dated notary acknowledgement. (FTB 1991 CS, p. 24.)

The FTB contends that objective contemporaneous evidence acquired by it reveals that
appellant “continuously conducted his personal and patent-related business affairs from the Jennifer
Circle residence throughout the contested time period.” The FTB contends that the evidence includes
appellant signing contracts with Japanese companies representing that his mailing address is Cerritos,
California, sending and receiving correspondence “with Philips, MLMC, his patent lawyer, the Japanese
companies, the Japanese government, the USPTO, and other service providers, with directional or return
addresses of Jennifer Circle, the Cerritos P.O. Box, and/or the fax machine installed and operating at
Mr. Hyatt’s Jennifer Circle home.” The FTB argues that the use of California address information is
“systemic, beginning long before September 26, 1991, and extending well beyond April 2, 1992.” (FTB
1991 CS, pp. 24-25.)

The FTB argues that “[a]ll of Mr. Hyatt’s 1991 licensing fee income was sent to him in
California, typically by wire-transfer to his Los Angeles patent lawyer’s trust account.” The FTB
contends that, pursuant to contracts executed while appellant was in California, appellant divided
monies received between him, Philips, and MLMC, and wrote “multi-million dollar checks on a
California financial account which represented that he was residing at Jennifer Circle.” (FTB 1991 CS,
p. 25.)

The FTB further contends that many business promotional activities were conducted in
California, such as appellant appearing for a photo shoot at his La Palma home, appearing as the Grand
Marshal at the La Palma Day parade, releasing press releases from La Palma which reported on the
success of appellant’s pursuit of patent licensing fees with the Japanese companies, attending meetings
with representatives of the Japanese companies in California, and conducting round-trip business travel

Appeal of Gilbert P. Hyatt

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via flights which began and ended at LAX. (FTB 1991 CS, p. 25.)

The FTB argues that objective contemporaneous evidence also reveals that appellant continued to conduct his personal affairs in California long after his alleged departure to Nevada. The FTB contends that appellant maintained and used personal safe deposit boxes in La Palma during 1991 and 1992 and never changed his address with respect to those accounts until July 1992. The FTB contends that appellant continued to engage in personal banking at California Federal Bank and other California financial institutions during 1991 and 1992, institutions which continued to send statements to appellant at Jennifer Circle and/or the Cerritos P.O. Box. (FTB 1991 CS, p. 25.)

The FTB contends that the evidence shows that appellant “wrote personal checks to pay taxes on the Jennifer Circle residence after it was purportedly sold, that [appellant], as executor, was heavily involved in the Orange County probate of his mother’s estate, a proceeding in which several documents were filed representing appellant’s presence in California, that [appellant] incurred charges at California restaurants, attended medical appointments in California, and sought legal advice from California lawyers.” (FTB 1991 CS, p. 26.)

The FTB further contends that appellant used a checking account in the name of DNC for personal expenses and failed to provide related records. The FTB argues that, based on information that was produced, “some 340 checks were not produced for review and inspection.” The FTB contends that “the objective and contemporaneous evidence reveals that appellant’s procurement of the low-income apartment unit lease, Nevada house search, and ultimate procurement of the Tara residence, shows numerous communications regarding those endeavors were effectuated through the use of appellant’s Jennifer Circle fax machine.” (FTB 1991 CS, p. 26.)

STAFF COMMENTS – Issue (3) – Fraud Penalty

In order to prevail on this issue, the FTB will need to show, by clear and convincing evidence, that appellant knew that he continued to be a California resident but, acting in bad faith and with an intent to deceive and evade tax believed to be owing, falsely reported that he had moved to Nevada. (See Jones, supra, 259 F.2d 300, 303; Adickes, supra, 90-SBE-012.) As noted above, “clear and convincing” has been defined as “explicit and unequivocal,” leaving “no substantial doubt,” and “sufficiently strong to command the unhesitating assent of every reasonable mind.” (Adickes, supra.)
STATE BOARD OF EQUALIZATION
FRANCHISE AND INCOME TAX APPEAL

ISSUE (4): Whether appellant has shown a legal basis for the abatement of interest under R&TC section 19104.

Background

The following timeline and background information primarily notes events that are directly or indirectly referenced by the parties in connection with interest abatement arguments. It does not constitute an exhaustive chronology and by listing an event staff does not express an opinion as to whether the event is legally relevant to the interest abatement analysis. In some cases, documents are not clear as to which tax year is being discussed, or discuss both years.100


On April 4, 1997, Ms. Ford emailed Ms. Bauche stating in part that Sheila Cox just found out that the 1991 protest “sat on Terry’s desk for over 6 months before being assigned to her.” Ms. Ford stated that Ms. Cox had wondered if it had anything to do with “sitting on” cases to close them after the end of the fiscal year, and that Ms. Ford stated she replied that she had “nothing to do with the decision. . . .”101

On May 1, 1997, FTB hearing officer Anna Jovanovich logged that she had called Mr. Cowan to confirm that he wished to consolidate the protests, which is what Mr. Cowan apparently told an auditor. She stated that she could halt the review of 1991 until she received the 1992 file. She stated that he requested she complete her review of 1991 as soon as possible as he argued she would then accept appellant’s position and there would be no need to consider 1992. She states that she

100 According to a timeline provided by the FTB, between 1996 and 2008, the FTB issued sixteen Information Document Requests (IDRs). (FTB 1992 Op. Br., Ex. H, Tab 36.) However, as the exact dates of the IDRs are not clear from the timeline, the IDRs are not listed below unless staff located a separate document or reference to the date of the IDR.

101 App. 1992 Op Br., Ex. 73 [April 4, 1997 email referencing the reviews noted above]. The FTB states that, “[a]ccording to the testimony of audit supervisors, administrators and managers who would have intimate knowledge of the processing of Mr. Hyatt’s audit, it was not delayed for purposes of meeting any perceived fiscal goals.” (FTB 1992 Op. Br., pp. 33-34, Ex. H, Tab 11 [testimony of Ms. Bauche] & Tab 12 [testimony of Ms. Ford].)
anticipated completing her review by mid-May, barring interruptions. She further states that he had
indicated a dispute regarding the audit computations and she suggested that he include that dispute in his

On May 28, 1997, Ms. Jovanovich logged that she had left a voicemail for appellant’s
representative that she had been interrupted by another case but was back reviewing his client’s case and

On June 12, 1997, FTB hearing officer Anna Jovanovich logged that she spoke at length
with appellant’s representative, Mr. Cowan. She states that she described the protest process and
settlement possibilities. She states that she explained the need for extensive letters and investigation and
that she would be sending a lengthy letter asking for documentation. She notes that he reiterated that his
client wished for the 1991 year to be finished first rather than waiting to consider it with 1992. (FTB

On August 6, 1997, Ms. Jovanovich logged that appellant’s representative had called
inquiring regarding status and she advised that “several interruptions and a week’s vacation” had
delayed her review but that she is now returning to her review. She stated that he could call her

On September 4, 1997, Ms. Jovanovich logged that she spoke at length with the
representative and suggested that he quickly file a protest and then request disclosure. She stated that
she told the representative that she would be sending a lengthy letter that would probably cover parts of

On December 3, 1997, appellant’s representative, Mr. Cowan, wrote a memo to the file
stating that Ms. Jovanovich had told him that she was delayed in reviewing appellant’s 1991 file because
she had been assigned other cases. (App. 1991 Op. Br., p. 92, fn. 506, Ex. 93.)

On November 21, 1997, Ms. Jovanovich logged that she spoke at length with appellant’s
representative regarding the time plan for the protest. She wrote that they both agreed it would be “more
efficient” to handle the 1991 and 1992 years together and for requests and answers to go out at one time

102 There are two entries for May 1, 1997, one referencing a voicemail and another referencing a telephone conversation.
for both years. She states that his protest letter had been sent to the Legal Department where it “sits” in
her supervisor’s office and should be assigned shortly. She further states that “now” would be a good
time for him to request disclosure, while she is reviewing 1991, as it will take time to finish that review,
which is going “MUCH slower than I originally anticipated – both due to its complexity & unexpected
interruptions.”

On January 6, 1998, appellant sued the FTB in Nevada.

On January 8, 1998, Ms. Jovanovich logged that she called appellant’s representative to
confirm the receipt of the file. He stated that he had requested the disclosure of documents for the 1992
tax year on December 11, 1997. She states that she told him that, if the Disclosure Department does not
borrow the file, she will finish the review of the 1991 file in a few days and begin the review of 1992
and then the Disclosure Department could have the file when she finishes. She stated that he seemed
“agreeable” to the plan and emphasized that he wanted to do whatever was quickest in terms of

On March 17, 1998, appellant’s attorney Eugene Cowan sent a memo to appellant and his
team that, “[w]hile there are no ‘pure’ tax reasons to quash [an FTB subpoena for banking information],
there may be tactical reasons to do so (such as making the FTB work for its requests [from] now on or
taking this opportunity to file the motion in the Nevada courts or otherwise) . . . .” (FTB 1992 Op. Br.,
pp. 49 – 50 & Ex. E, Tab 38.)

On March 18, 1998, FTB attorney Terry Collins submitted an affidavit in the Nevada
court stating that the FTB “intends to continue processing, and continues to process, Mr. Hyatt’s protests

In March or April of 1999, FTB employee Carol Ford erased files related to appellant,
according to her testimony. (App. 1991 Op. Br., p. 8, fn. 31 [citing testimony of Ms. Ford].)

According to the FTB, in December 1999, the FTB issued an IDR to appellant, and

103 FTB 1992 Op. Br., p. 45, fn. 131 & Ex. H, Tab 22 (see Nov. 19 and Nov. 21 entries on page 71 of the PDF, following
other entries).

declaratory relief confirming his status as a Nevada resident from September 26, 1991 to the present.
appellant requested six months to reply.105

On December 27, 1999, the Nevada court adopted a protective order allowing appellant
to designate information as confidential information which could not be shared outside of the FTB’s
litigation team except in certain circumstances.106

On March 7, 2000, FTB employee Charlene Woodward sent FTB supervisor George
McLaughlin a memo attaching a copy of a memorandum she wrote to Terry Collins analyzing a
protective order that had been issued in the Nevada litigation. The memo states in part that
Ms. Woodward “made a preliminary attempt to organize the materials” but that they could not take
further action until they received complete audit files. The memo further states that “[w]e will
effectively be creating a parallel universe of information . . . [,]” and cautions that “[w]e will not be
discussing the case with the litigation attorneys . . . .” The memo also states that “[i]n all other respects,
we need to proceed with the protest as if there were no litigation – our actions on protest must not be
held hostage to the litigation, to the extent we can avoid it.” The letter attached to the memo is
addressed to Terry Collins from George McLaughlin (but evidently drafted by Ms. Woodward) and
describes procedures to be followed to comply with the protective order, including the identification by
litigation attorneys of confidential information, who would then request that Mr. Hyatt voluntarily
consent to the disclosure of such information and, if such consent is not provided, could issue an
administrative subpoena. Also on March 7, 2000, Mr. McLaughlin provided Charlene Woodward with a
copy of his memo to Mr. Collins and stated that “. . . we can take no further action, until we get the
complete audit files.”107

On April 3, 2000, FTB supervisor George McLaughlin entered into the log a “Request for
Audit Support.” The entry states that this is a “high profile” residency case that is “the companion to the
‘high profile’ federal litigation case in Nevada.” It further states that “[t]he protest has been on hold for

106 FTB 1992 Op. Br., p. 50 & Ex. H, Tab 27. The order had been prepared on December 3, 1999 by a Discovery
Commissioner.
Mr. McLaughlin to Ms. Woodward) & 68 (memo from Mr. McLaughlin to Mr. Collins).
awhile, but is now active – and we intend to close it by March 3, 2001. It adds that there is an IDR outstanding with an extended due date of June 30, with protest hearings set for September 27 and October 4. It requests the assignment of an auditor to work with FTB employee Charlene Woodward.108

On April 11, 2000, the FTB filed a motion to vacate the protective order. (App. 1992 Reply Br., Ex. 24 [hearing transcript referencing the motion to vacate].)

On May 24, 2000, appellant’s CPA Mike Kern was deposed in the Nevada litigation and stated that appellant initially moved into the Continental Hotel.109 According to the FTB, this was the first time appellant had informed the FTB of his assertion as to where he initially moved to in Nevada. Appellant apparently placed that deposition under the Nevada protective order.110

On May 30, 2000, Ms. Cinnamon logged that she did not have the original protest record, including the protest letter. She states that, when she is done with the audit record, she will “pursue reconstructing a facsimile of the historical protest record” if needed. (App. 1991 Op. Br., p. 91, Ex. 90; App. 1992 Op. Br., Ex. 70.)

On June 7, 2000, the Nevada Supreme Court issued a temporary stay with regard to the protective order.111

On September 11, 2000, Ms. Cinnamon requested to Mr. Miller that any missing audit files be sent to her. (App. 1992 Op. Br., Ex. 67.)

On September 13, 2000, the Nevada Supreme Court issued an order clarifying the temporary stay it issued on June 7, 2000, stating that the order was intended to stay all proceedings in the district court.112 (FTB 1992 Op. Br., Ex. H, Tab 30.)


111 FTB 1992 Op. Br., Ex. H, Tab 30. This document is a Nevada Supreme Court order dated September 13, 2000, which references the earlier order. Appellant argues that the stay only stayed the production of documents claimed to be privileged by the FTB and that the Nevada protective order (NPO) did not restrict the ability of the FTB to obtain documents under California law. (App. 1992 Reply Br., p. 85, fn. 550.)

112 Appellant argues that the stay only stayed the production of documents claimed to be privileged by the FTB and that the NPO did not restrict the ability of the FTB to obtain documents under California law. (App. 1992 Reply Br., p. 85, fn. 550.)
On September 27 and October 4, 2000, protest hearings were held.\textsuperscript{113}

On October 10, 2000, Mr. McLaughlin sent a memo stating in part that the audit files have been “a significant problem” and that “[w]ith the Herculean effort by Cody Cinnamon, we were able to determine that we have some semblance of the complete audit file – recognizing that there are still gaps that can’t fully be accounted for and redactions/omissions that are related to the confidential/privilege issue.” Mr. McLaughlin requested that a complete file by sent to Mr. Hyatt’s counsel, who had requested it. (App. 1992 Op. Br., Ex. 66.)


On April 26, 2001, Terry Collins sends a letter to Mr. Cinnamon stating that, while the Nevada Supreme Court is deliberating, they will not take action which might cause Mr. Hyatt to file additional requests with the court and will not request permission to disclose materials covered by the protective order. Mr. Collins states that there are “many documents relevant to the protest that we are unable to furnish at this time . . .” and “strongly suggest[s] . . . that you need to review these additional documents prior to making your decision. [emphasis in original]” The letter states that the Nevada Supreme Court held oral argument on February 5, 2001 and that it takes, on average, about four months for a decision to be rendered. (FTB 1992 Op. Br., Ex. H, Tab 31.)

On June 13, 2001, the Nevada Supreme Court ordered summary judgment in favor of the FTB. Later, on April 4, 2002, the Nevada Supreme Court vacated its prior ruling. (\textit{FTB v. Hyatt} (2003) 538 U.S. 488, 492 [referencing the June 13, 2001 ruling].)

On June 15, 2001, appellant apparently sent a letter to Ms. Cinnamon stating that there

\textsuperscript{113} The FTB argues that both hearings covered both years while appellant contends that the 1991 protest hearing was held on October 4 and the 1992 protest hearing was held on September 27, 2000. (See FTB 1992 Reply Br., p. 81; App. 1991 Op. Br., p. 88; App. 1992 Op. Br., p. 68.)
On January 17, 2002, there was a hearing in the Nevada District Court regarding an FTB motion to vacate the protective order, and the court stated it did not think that the Nevada Supreme Court intended for its stay to have the broad application that was being sought. (App. 1992 Reply Br., p. 85, fn. 550 & Ex. 23.)


On March 7, 2002, appellant’s representative at that time, Eric Coffill, sent a letter to the FTB stating that FTB supervisor George McLaughlin had informed the representative that the protests were not being worked on because of the pending Nevada litigation. Mr. Coffill stated that he had telephoned the FTB because “we had not heard from FTB for over seven months” and also stated that there were no pending document requests. Appellant’s counsel further stated that FTB attorney Cody Cinnamon had told him that she had not charged time on the protests since June 2001 and that Mr. McLaughlin had told the representative that the protests are “written up” and that determination letters could be issued quickly once the case was activated.

On April 4, 2002, the Nevada Supreme Court vacated its prior ruling which had dismissed Mr. Hyatt’s lawsuit. (FTB v. Hyatt (2003) 538 U.S. 488, 492 [referencing the April 4, 2002 ruling].)

On April 5, 2002, FTB attorney Ben Miller sent an email stating that the Nevada Supreme Court had allowed Mr. Hyatt to proceed with his intentional tort case. Mr. Miller then states:

114 This letter is referenced in a later March 7, 2002 letter from appellant’s counsel which is attached as Exhibit 61 to appellant’s 1992 Opening Brief.

115 The FTB states that appellant incorrectly describes this as an email when it was a log entry. (FTB 1992 Op. Br., p. 38.) However, appellant provides a copy of the email. It may be that the communication was made by email and noted in the log.

I think this means we should put things on hold with administrative matters, in particular the recent draft letter. This puts a new light on things and we well want to proceed under the protective order to try and get documents[.]. It is clear that the protective order is [not] going away anytime in the near future.


On May 20, 2002, FTB supervisor George McLaughlin wrote to appellant’s former representative Eric Coffill that Mr. Coffill’s outline of events was “substantially correct.” The letter also states, among other things, that the Nevada litigation had impacted protest proceedings and that the FTB had been complying with the Nevada protective order. (FTB 1992 Op. Br., Ex. H, Tab 17.)

On June 3, 2002, the California Department of Justice requested appellant’s consent, under the protective order and pursuant to R&TC section 19504, to the release of all documents and testimony marked as confidential under the protective order. (FTB 1992 Op. Br., Ex. H, Tab 32.)

On July 7, 2002, the FTB issued a subpoena requesting six categories of documents produced in the Nevada litigation. (App. 1992 Reply Br., Ex. 26.)


According to appellant, on December 2002, the FTB destroyed backup tape data. (App. 1991 Op. Br., p. 10, fn. 36 [citing testimony].)

On February 28, 2003, the Sacramento County Superior Court issued a ruling compelling appellant to comply with the FTB subpoena as to five categories of documents, but not enforcing compliance with a sixth “catch-all” category. (FTB 1992 Op. Br., Ex. A, Tab 10 [Dec. 31, 2003 California Court of Appeal decision].)

On March 20, 2003, appellant appealed the judgment of the Superior Court. (Id.)

On December 31, 2003, the Court of Appeal of California, Third Appellate District, affirmed the Superior Court. The FTB states that, after the Court of Appeal decision became final, it began the process of copying and transferring the information released pursuant to the ruling.\textsuperscript{117}

\textsuperscript{117} Id. (decision). FTB 1992 Op. Br., p. 53 (regarding the copy and transfer of files).
In or about May 2004, according to the FTB, the documents obtained through the subpoena were received by the protest hearing officer. (FTB 1992 Op. Br., p. 53.)

On August 5, 2005, an FTB attorney stated to the Nevada court that there was no evidence that the protest had been put on hold. (App. 1991 Op. Br., p. 89, fn. 492.)

On October 28, 2005, FTB attorney Bob Dunn requested appellant’s consent to release documents covered by the protective order.118

On December 6, 2005, the FTB responded to a November 9, 2005 letter from appellant’s counsel. The letter states that the FTB had not received a response to its document request, which it had expected to be provided by November 30, 2005, and that the FTB did not intend to alter its document request. (FTB 1992 Op. Br., Ex. H, Tab 34.)


On January 19, 2007, the FTB requested, pursuant to the Protective Order, that appellant consent to the FTB’s production of litigation documents. The documents for which consent to disclosure was requested include transcripts of depositions of appellant, Grace Jeng, and many others, appellant’s 1991 and 1992 amended federal income tax returns, and documents related to an IRS audit. (FTB 1992 Op. Br., Ex. H, Tab 28.)

On November 1, 2007, the FTB sent a 50-page protest Determination Letter for 1991 and 1992 indicating that the hearing officer intended to affirm the NPAs.120


In January of 2008, appellant filed notices of appeal for 1991 and 1992. Both appellant and the FTB filed lengthy briefs, with many attachments, and both parties requested and received

118 This letter is referenced in Ex. H, Tabs 34 & 35, of the FTB’s 1992 Opening Brief.

119 According to the FTB, it did not receive the last of the documents requested until June 2007. (FTB 1992 Op. Br., p. 53.)

120 FTB 1991 Op. Br., p. 1, Ex. A, Tab 4 [Determination letter is located after the NOAs and marked FTB 28751].
numerous extensions of time for briefing. The regular briefing process, prior to additional briefing requested pursuant to Rule 5435, subdivision (a), concluded in August of 2012 with the filing of appellant’s supplemental briefs.121

Appellant’s supplemental briefs included 93 new affidavits or declarations. On August 29, 2012, the FTB submitted over 7,000 pages of evidence it obtained from Philips. On October 5, 2012, the FTB requested that its submission be withdrawn in order to comply with a New York Supreme Court order obtained by appellant.

On January 17, 2013, and February 25, 2013, the Appeals Division requested additional briefing from the parties regarding the alleged $24 million error and the litigation in New York regarding the Philips documents. During the additional briefing process, the parties had numerous disputes regarding which Philips documents could be submitted or referenced in the briefing. In addition, during the additional briefing process, both parties requested and received numerous extensions of time for briefing.

On April 23, 2014, it appeared that the New York litigation had resolved, and the Appeals Division requested additional briefing regarding the Philips documents and affidavits submitted by appellant, and requested that each party provide a concluding summary for each appeal. From 2014 to 2016, numerous additional disputes arose regarding the briefing and the Philips documents. In March of 2015, in response to filings made by the FTB, appellant renewed litigation in New York, which was not resolved until September of 2015. Following the resolution of the litigation, the parties engaged in a process designed to reach agreement, or narrow areas of disagreement, regarding which documents could be submitted under a New York court order relating to Philips documents. After various extensions were provided, the additional briefing process concluded late in 2016.122 An oral hearing was originally planned for March 2017 but, at appellant’s request, the oral hearing was

121 Appellant filed supplemental briefs in July and August of 2012. Appellant filed corrected supplemental briefs on August 15, 2012 and provided DVDs with linked briefing on November 14, 2012.

122 Pursuant to Rule 5435, the Appeals Division (now known as the Appeals Bureau), individual Board Members, or the Board, can request additional briefing at any time. Therefore, while staff does not presently anticipate any further additional briefing, it cannot foreclose that possibility. Prior to the hearing, the parties may receive inquiries sent by the Appeals Bureau in response to Board Member requests.
rescheduled to May 2017.

As noted previously, the FTB then requested a two-month continuance due to a family medical emergency. Appellant did not object but requested that the hearings be held on the calendar commencing on August 29, 2017. In light of the foregoing, the appeals were rescheduled for the August 29, 2017 calendar.

Contentions – Issue (4) – Interest Abatement

Appellant’s Contentions

Appellant argues that he is entitled to interest abatement for the FTB’s delays, referring to Section 1.8 (pages 57 – 59) of his 1992 Second Additional Brief dated September 28, 2016. There, appellant argues, pointing to the Nevada Supreme Court decision, that “[b]ecause of FTB’s fraudulent delaying tactics all interest should be abated as arbitrary.” Appellant also points to the FTB’s “extraordinary 11-year delay in processing the two protests[,]” stating that “the Nevada Supreme Court expressly highlighted FTB’s extreme delay in processing [his] two protests.” Appellant further argues that the FTB continues to delay “into 2016.” As examples, appellant points to FTB continuing to take discovery (noting a deposition taken by FTB on April 7, 2016), the FTB’s issuing the Philips subpoenas “in 2011 which were not resolved until April of 2016 when your Board had to burden itself to redact prohibited information from FTB’s RSABs.” (App. 1992 Second Add’l Br. Sept. 28, 2016, p. 57.)

Appellant further argues that the FTB placed a hold on his protest “for over seven years,” “lost, destroyed, or withheld numerous [audit] documents[,]” delayed assigning his protests “for over six months[,]” overburdened the protest officer with other cases and unreasonably delayed in re-assigning the case, refused to correct the $24 million error, and committed torts against him. Appellant contends that the FTB subpoenaed Philips in 2006, but then cancelled the subpoenas and “delayed five years, until the formal briefing . . . was near completion, to issue new, overbroad supboenas . . .” Appellant asserts the FTB violated court orders with respect to its briefing, requiring appellant “to go back to the New York court to request enforcement of its orders.” (App. 1992 Second Add’l Br. Sept. 28, 2016, p. 58.)

Appellant argues that the delays occurred after he was first contacted (on June 17, 1993) and were “in no way attributable” to him. Appellant disputes the FTB’s contentions that the managerial acts provision of R&TC section 19104 does not apply to tax years before 1998, arguing that the FTB’s

In his 1991 Concluding Summary, appellant reiterates that the Nevada Supreme Court found that the FTB committed fraud and the intentional infliction of emotional distress in part because of its delays. Appellant contends that there have been many unreasonable delays attributable to ministerial and managerial acts performed by the FTB during the protest. Appellant asserts that the FTB’s unreasonable delays occurred after the FTB contacted him in writing, are numerous and successive, and are not significantly attributable to him. (App. 1991 CS, p. 26.)

Appellant asserts that the FTB intentionally placed a hold on his protest, constituting an unreasonable delay based on ministerial and managerial acts. Appellant asserts that the FTB has lost, destroyed, or withheld numerous documents from audit files, constituting unreasonable error or delay based on a managerial act. Appellant asserts that the FTB delayed the protest by assigning the protest officer to other cases and by failing to reassign his case to another protest officer, constituting an unreasonable delay due to a managerial or ministerial act. In his 1991 Concluding Summary, appellant also asserts that the FTB failed to expeditiously issue the 1992 NPA, constituting an unreasonable delay due to a ministerial act. (App. 1991 CS, pp. 26-27.)

FTB’s Contentions – Issue (4) – Interest Abatement

The FTB argues that appellant is responsible for delays in the appeal. The FTB contends that appellant’s delaying tactics began early in the protest. The FTB asserts that, in 1999, the Nevada District Court issued a protective order that allowed appellant to unilaterally designate as confidential discovery in the Nevada litigation that could not be shared with respondent’s protest hearing officer without appellant’s consent. (FTB 1991 CS, pp. 26-27.)

The FTB asserts that appellant subsequently designated as confidential discovery under the protective order that included the answer to the earlier asked question of where appellant initially moved to. The FTB contends that appellant similarly designated as confidential other information such as information concerning the timing and the amount of his income. The FTB asserts that, in late 1999,

123 The FTB states that its contentions regarding unreasonable delays of appellant have been discussed in its 1992 Opening Brief at pages 30 through 57 and in its 1992 Concluding Summary and incorporates those arguments.
respondent’s protest hearing officer issued a comprehensive IDR that repeated many of the questions appellant never answered at audit and requested additional documentation, including his whereabouts from September 26, 1991, to October 14, 1991. The FTB asserts that appellant did not respond until mid-2000, at which time discovery was ongoing in the Nevada litigation. The FTB asserts that, in mid-2002, the Nevada Supreme Court failed to modify or limit the protective order and that the FTB immediately followed the protective order by asking appellant to release the designated information to the hearing officer. The FTB asserts that appellant refused to release the information so that the FTB had to issue an administrative subpoena. (FTB 1991 CS, p. 27.)

The FTB notes that, in February 2003, the Sacramento County Superior Court issued an Order compelling appellant to comply with respondent’s administrative subpoena as to all but one of the requests. The FTB states that, following appellant’s appeal of that order, the Third District Court of Appeal held that “there was no reason why respondent’s personnel working on the protest should not have access to evidence produced by [appellant] in his Nevada litigation.” The FTB asserts that appellant’s “actions in opposing respondent’s subpoenas impeded the progress of the administrative tax proceedings and contradict [his] statements that, despite the Nevada litigation, the California tax proceeding continued without interruption.” (FTB 1991 CS, pp. 27-28.)

The FTB asserts that, despite the 2003 California appellate court holding, appellant continued to use the protective order to designate as confidential evidence that was relevant to his California tax protest. The FTB asserts that, in late 2005, it issued a second administrative subpoena for this information. The FTB asserts that appellant at first refused to produce this information, relenting only upon the threat of litigation. The FTB also asserts that, subsequently, its protest hearing officer issued five additional IDRs. The FTB argues that appellant continued to object to its requests and cause delays in the FTB’s ability to obtain relevant documents. (FTB 1991 CS, p. 28.)

The FTB contends that, shortly after this appeal was filed, appellant sought and obtained an extension of one year to file his opening brief. The FTB contends that after submitting numerous and voluminous declarations from individuals purporting to have knowledge of his whereabouts and activities during 1991 and 1992, many of whom had not been previously identified, appellant fought the FTB’s efforts to investigate the accuracy of the information provided. As an example, the FTB points to
its attempt to obtain the Philips business records, which the FTB states it previously requested during the
audit. The FTB asserts that its efforts resulted in an approximately “four-year legal battle in New York”
during which appellant sought to prevent the FTB from using documents which are “clearly relevant” to
the appeal. The FTB asserts that the New York courts upheld of its “resort to legal process so as to
[inquire] into documentary evidence which should have been produced almost twenty years ago.” Most
recently, the FTB asserts, “this matter has seen a multi-month delay in the submission of its concluding
summary due to appellant’s change of lawyers.” (FTB 1991 CS, p. 28.)

The FTB argues that there have been numerous other delays caused by appellant and his
representatives, many of which are described in the June 19, 2014 Declaration of Robert Dunn filed in
opposition to a lawsuit commenced by appellant against the Board and the FTB in the United States
District Court for the Eastern District of California. (FTB 1991 CS, p. 29.)

Applicable Law – Issue (4) – Interest Abatement

Interest is not a penalty but is merely compensation for a taxpayer’s use of the money.
(Rev. & Tax. Code, § 19101, subd. (a); Appeal of Amy M. Yamachi, 77-SBE-095, June 28, 1977;
Appeal of Audrey C. Jaegle, 76-SBE-070, June 22, 1976.) There is no reasonable cause exception to
the imposition of interest. (Appeal of Audrey C. Jaegle, supra.)

As in effect for the year at issue, R&TC section 19104, subdivision (a)(1), provides, in
part, that the FTB may abate all or a part of any interest on a deficiency to the extent that interest is
attributable in whole or in part to any unreasonable error or delay committed by respondent in the
performance of a ministerial act.

For deficiencies with respect to tax years beginning on or after January 1, 1998, R&TC
section 19104, subdivision (a), also allows interest abatement related to errors and delays in the
performance of a “managerial” act. (Rev. & Tax. Code, § 19104, subd. (e); Appeal of Ernest J.
Teichert, 99-SBE-006, Sep. 29, 1999 (Teichert).) Specifically, R&TC section 19104, subdivision (e),
provides in relevant part that, except as provided in subparagraph (C) of paragraph (2) of subdivision
(b) (which provides that the Board can review requests to abate interest that are made on or after
January 1, 1998), the amendments made by Chapter 600 of the Statutes of 1997 are operative “with
respect to taxable years beginning on or after January 1, 1998. [emphasis added]” The term “taxable
year” means the year “upon the basis of which the taxable income is computed.” (Rev. & Tax. Code §§
17010, 18402, subd. (c)(1).) The referenced amendments made by Chapter 600 state that abatement
may be provided for managerial acts, in addition to ministerial acts. Here, as the year “upon the basis
of which the taxable income is computed” is 1991, rather than a taxable year beginning on or after
January 1, 1998, interest abatement may only be obtained for unreasonable errors or delays in the
performance of a ministerial act.

An error or delay can only be considered when no significant aspect of the error or delay
is attributable to the appellant and after respondent has contacted the appellant in writing with respect
to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).)

In the Appeal of Michael and Sonia Kishner, 99-SBE-007, decided September 29, 1999
(Kishner), the Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining
a “ministerial act” as:

[A] procedural or mechanical act that does not involve the exercise of judgment or
discretion, and that occurs during the processing of a taxpayer’s case after all
prerequisites to the act, such as conferences and review by supervisors, have taken place.
A decision concerning the proper application of federal tax law (or other federal or state
law) is not a ministerial act.

Treasury regulation 301.6404-2(b) provides the following examples:

Example 1. A taxpayer moves from one state to another before the IRS selects the
taxpayer's income tax return for examination. A letter explaining that the return has been
selected for examination is sent to the taxpayer's old address and then forwarded to the
new address. The taxpayer timely responds, asking that the audit be transferred to the
IRS's district office that is nearest the new address. The group manager timely approves
the request. After the request for transfer has been approved, the transfer of the case is a
ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest
attributable to any unreasonable delay in transferring the case.

Example 2. An examination of a taxpayer's income tax return reveals a deficiency with
respect to which a notice of deficiency will be issued. The taxpayer and the IRS identify
all agreed and unagreed issues, the notice is prepared and reviewed (including review by
District Counsel, if necessary), and any other relevant prerequisites are completed. The
issuance of the notice of deficiency is a ministerial act. The Commissioner may (in the
Commissioner's discretion) abate interest attributable to any unreasonable delay in
issuing the notice.

Example 3. A revenue agent is sent to a training course for an extended period of time,
and the agent's supervisor decides not to reassign the agent's cases. During the training
course, no work is done on the cases assigned to the agent. The decision to send the
revenue agent to the training course and the decision not to reassign the agent's cases are not ministerial acts; however, both decisions are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 4. A taxpayer appears for an office audit and submits all necessary documentation and information. The auditor tells the taxpayer that the taxpayer will receive a copy of the audit report. However, before the report is prepared, the auditor is permanently reassigned to another group. An extended period of time passes before the auditor's cases are reassigned. The decision to reassign the auditor and the decision not to reassign the auditor's cases are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 5. A taxpayer is notified that the IRS intends to audit the taxpayer's income tax return. The agent assigned to the case is granted sick leave for an extended period of time, and the taxpayer's case is not reassigned. The decision to grant sick leave and the decision not to reassign the taxpayer's case to another agent are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

Example 6. A revenue agent has completed an examination of the income tax return of a taxpayer. There are issues that are not agreed upon between the taxpayer and the IRS. Before the notice of deficiency is prepared and reviewed, a clerical employee misplaces the taxpayer's case file. The act of misplacing the case file is a managerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from the file being misplaced.

Example 7. A taxpayer invests in a tax shelter and reports a loss from the tax shelter on the taxpayer's income tax return. IRS personnel conduct an extensive examination of the tax shelter, and the processing of the taxpayer's case is delayed because of that examination. The decision to delay the processing of the taxpayer's case until the completion of the examination of the tax shelter is a decision on how to organize the processing of tax returns. This is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

Example 8. A taxpayer claims a loss on the taxpayer's income tax return and is notified that the IRS intends to examine the return. However, a decision is made not to commence the examination of the taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. The decision on how to prioritize the processing of returns based on the expiration of the statute of limitations is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.
Example 9. During the examination of an income tax return, there is disagreement
between the taxpayer and the revenue agent regarding certain itemized deductions
claimed by the taxpayer on the return. To resolve the issue, advice is requested in a
timely manner from the Office of Chief Counsel on a substantive issue of federal tax law. The decision to request advice is a decision concerning the proper application of federal
tax law; it is neither a ministerial nor a managerial act. Consequently, interest
attributable to a delay resulting from the decision to request advice cannot be abated
under paragraph (a) of this section.

Example 10. The facts are the same as in Example 9 except the attorney who is assigned
to respond to the request for advice is granted leave for an extended period of time. The
case is not reassigned during the attorney's absence. The decision to grant leave and the
decision not to reassign the taxpayer's case to another attorney are not ministerial acts;
however, they are managerial acts. The Commissioner may (in the Commissioner's
discretion) abate interest attributable to any unreasonable delay caused by these
decisions.

Example 11. A taxpayer contacts an IRS employee and requests information with respect
to the amount due to satisfy the taxpayer's income tax liability for a particular taxable
year. Because the employee fails to access the most recent data, the employee gives the
taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount
required to satisfy the tax liability. Accessing the most recent data is a ministerial act.
The Commissioner may (in the Commissioner's discretion) abate interest attributable to
any unreasonable error or delay arising from giving the taxpayer an incorrect amount due
to satisfy the taxpayer's income tax liability.

Example 12. A taxpayer contacts an IRS employee and requests information with respect
to the amount due to satisfy the taxpayer's income tax liability for a particular taxable
year. To determine the current amount due, the employee must interpret complex
provisions of federal tax law involving net operating loss carrybacks and foreign tax
credits. Because the employee incorrectly interprets these provisions, the employee gives
the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount
required to satisfy the tax liability. Interpreting complex provisions of federal tax law is
neither a ministerial nor a managerial act. Consequently, interest attributable to an error
or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's
income tax liability in this situation cannot be abated under paragraph (a) of this section.

Example 13. A taxpayer moves from one state to another after the IRS has undertaken an
examination of the taxpayer's income tax return. The taxpayer asks that the audit be
transferred to the IRS's district office that is nearest the new address. The group manager
approves the request, and the case is transferred. Thereafter, the taxpayer moves to yet
another state, and once again asks that the audit be transferred to the IRS's district office
that is nearest that new address. The group manager approves the request, and the case is
again transferred. The agent then assigned to the case is granted sick leave for an
extended period of time, and the taxpayer's case is not reassigned. The taxpayer's
repeated moves result in a delay in the completion of the examination. Under paragraph (a)(2) of this section, interest attributable to this delay cannot be abated because a significant aspect of this delay is attributable to the taxpayer. However, as in Example 5, the Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by the managerial decisions to grant sick leave and not to reassign the taxpayer's case to another agent. [emphasis added by staff]

Respondent’s determination not to abate interest is presumed correct, and the burden is on the appellant to prove error. (Appeal of Michael E. Myers, 2001-SBE-001, May 31, 2001.) By statute, the Legislature has limited the Board’s jurisdiction in an interest abatement case to a review of the FTB’s determination for an “abuse of discretion.” (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).) To show an abuse of discretion, an appellant must establish that, in refusing to abate interest, the FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (Woodral v. Comm’r (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus an abatement should be ordered only “where failure to abate interest would be widely perceived as grossly unfair.” (Lee v. Comm’r (1999) 113 T.C. 145, 149.) In Lee, the Tax Court found that the mere passage of time in the litigation of a tax dispute does not establish an error or delay in the performance of a ministerial act. (Id. at p. 150.)

STAFF COMMENTS – Issue (4) – Interest Abatement

As noted above, there is no reasonable cause exception to the imposition of interest. (Appeal of Audrey C. Jaegle, supra.) Especially for the tax year at issue in this appeal, it is difficult to establish grounds for the abatement of interest. In order to establish legal grounds for interest abatement, R&TC section 19104 requires, for the year at issue, that appellant show all of the elements outlined below.

First, appellant must show an “unreasonable error or delay.”

Second, the “unreasonable error or delay” must have been committed by the FTB in the performance of a “ministerial act.” A “ministerial act” refers to a “procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer’s case after all prerequisites to the act . . . have taken place.” (Treas. Reg. § 301.6404-2(b)(2).) Appellant incorrectly argues that a “managerial act” may suffice. While that is true for interest
appealing on deficiencies for tax years after 1997, it is not true for the tax year at issue. For the tax year
at issue, an unreasonable error or delay in the performance of a managerial act is not sufficient to
establish interest abatement.124

According to the regulations set forth above, examples of ministerial acts may include, if
all prerequisites to the act have been completed, the transfer of a case, a mechanical failure to look up
the most recent data regarding the amount due, and an issuance of a notice of deficiency. (Treas. Reg. §
301.6404-2(b), Examples 1, 2 & 11.) Thus, an unreasonable error or delay in such acts could constitute
grounds for interest abatement, if other requirements are also met. On the other hand, the loss of a file
and assignment decisions are managerial acts, rather than ministerial acts. (Id., Examples 6 & 10.)

Delaying action on a taxpayer’s claimed deduction while the IRS examines the tax shelter at issue is a
general administrative decision for which an abatement is not available (Id., Example 7.) It appears to
staff that an FTB determination to defer actions during the protest period due to litigation-related issues
would be an act requiring judgment and discretion, and also a general administrative decision, and
therefore would not constitute a ministerial act. Under R&TC section 19104, the legal issue is whether
FTB committed an unreasonable error or delay in performing a ministerial act. For this reason, unless
appellant can tie his allegations of bad faith to an unreasonable error or delay in performing a ministerial
act, those allegations do not appear relevant to the legal analysis under R&TC section 19104.

Third, appellant must show that the interest is “attributable in whole or in part” to the
unreasonable error or delay in the performance of a ministerial act. Thus, the interest accrual must have
been caused, in whole or part, by the unreasonable error or delay in the performance of a ministerial act.
The taxpayer must show that, but for the unreasonable error or delay, the tax liability would have been
paid sooner.125 The Tax Court has held that, by seeking an abatement of all interest, rather than interest

124 See discussion in “Applicable Law” above. See also Braun v. Comm’r, T.C. Memo. 2005-221, p. 4. Braun notes that, at
the federal level, the provision allowing for an abatement based on managerial acts is only effective for interest accruing with
respect to deficiencies for tax years beginning after July 30, 1996. For California purposes, the provision for managerial acts
is only effective with respect to interest accruing on taxable years beginning on or after January 1, 1998.

125 See Prakash v. Comm’r, T.C. Memo. 2016-176, p. 3 [stating that the taxpayer must “establish a correlation between the
error or delay and a specific period for which interest should be abated” and that, but for the error or delay, the taxpayer
would have paid the tax liability sooner]. But see the Appeal of Alan F. And Rita K. Shugart, 2005-SBE-001, July 1, 2005
[abating interest based on the cumulative effect of delays when discrete periods could not be identified].
with respect to a specific period attributed to a ministerial act, the taxpayer “is not so much seeking an
abatement of interest as he is an exemption from it[,”] and that this defect, in combination with others,
placed the taxpayer’s request beyond the intent of the interest abatement statute. (Donovan v. Comm‘r,
T.C. Memo. 2000-220, p. 2.)

Fourth, appellant must show that “no significant aspect” of the error or delay can be
attributed to him. (Rev. & Tax. Code, § 19104, subd. (b)(1).) This provision may apply even if a
taxpayer’s actions were not intended to cause the error or delay. For example, if the Board determined
that interest abatement was unavailable because appellant’s actions significantly contributed to any
asserted errors or delays, such a determination would not require a finding that appellant acted with the
intent to delay the proceedings or otherwise acted in bad faith.

Fifth, any error or delay in the performance of a ministerial act can only be taken into
account after the FTB has contacted the taxpayer in writing with respect to the deficiency. At the
hearing, the parties should be prepared to discuss when the first written contact with respect to the
deficiency occurred. 126 On the one hand, staff notes that the language in R&TC section 19104,
subdivision (b)(1), limiting an abatement to periods after the FTB has contacted the taxpayer in writing
with regard to “that deficiency” could be read as referring to the proposed deficiency set forth in the
NPA, rather than correspondence issued prior to the FTB’s determination that a deficiency existed.
Also, in Teichert, supra, 99-SBE-006, the Board found that the NPA constituted the first written
contact, although it may have been that the NPA in that appeal was issued before any other
 correspondence. On the other hand, California’s abatement provision is very similar to the federal
 provision (see Kishner, supra, applying the federal interest abatement regulations), and federal
 regulations and cases appear to indicate that interest abatement may be obtained for periods prior to the
 issuance of the notice of deficiency. 127

126 In appellant’s 1991 Opening Brief, at page 93, he argued that the first written contact was the June 17, 1993 letter.
 However, appellant only requested interest abatement for the period after the issuance of the NPAs. (App. 1991 Op. Br.,
 p. 87.)

127 See e.g., Treasury Regulation section 301.6404-2(c)(2), Example 1, allowing interest abatement during audit, and
 Example 2, allowing interest abatement for a delay in issuing a notice of deficiency. See also Allcorn v. Comm’r (2012) 139
 T.C. 53, pp. 56-57, stating that an abatement under IRC section 6404(e)(1), which is the federal equivalent of R&TC section
 19104, subdivision (b)(1), may apply when the IRS commences an audit.

Appeal of Gilbert P. Hyatt

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Sixth, by statute, the Legislature has limited the Board’s jurisdiction in an interest abatement case to a review of the FTB’s determination for an “abuse of discretion.” (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).) To show an abuse of discretion, an appellant must establish that, in refusing to abate interest, the FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (Woodral v. Comm’r, supra, 112 T.C. 19, 23.)

Section 40

As noted above, this matter is subject to Revenue and Taxation Code 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 to determine the appeal, except when a petition for rehearing is filed within that period.128 (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 which type of written 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).) The proposed written opinion 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 written opinion.

Any party may request that the Board delay voting to decide the appeal until it votes to adopt its written opinion for the appeal. Any such request should be made in writing to the Board Proceedings Division prior to the hearing or as part of the party’s oral argument at the hearing, and the request would then be considered by the Board during its deliberations on the appeal. If the Board grants the request, the proposed written opinion will be confidential until it is adopted by the Board. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(5).)

128 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.