

CRITERIA FOR DETERMINING CALIFORNIA RESIDENCY¹

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One of the more perplexing questions an individual faces when they move into or out of the State of California is the question of when they are subject to California income tax. This question may arise in the simple context of a job relocation, or may be integral to a tax plan to minimize or eliminate state income taxes for which the individual is liable. The California Franchise Tax Board [FTB] aggressively scrutinizes returns of those moving into or out of the state because they have found their efforts fruitful in recovering substantial tax. As one will see the question of whether one owes tax to California is based on the facts and circumstances of each case. This results in FTB audits questioning residency status to be very expensive in terms of the taxpayer gathering the information requested by the FTB. FTB information requests are lengthy, and intrusive into the personal lives of the taxpayers. The purpose of this paper is to set forth the criteria applied by California to determine if an individual is a resident or domicile of the state.

California has jurisdiction to collect its individual income tax from all residents and domiciles of the state on their worldwide income. California also has the right to impose an income tax on nonresident individuals who are not domiciles of California arising from the rental or sale of California real property, earnings based on the physical presence of a nonresident individual working in California, and income from businesses operating in California. We are not attempting to discuss when income is subject to California tax or how that tax is calculated. Rather for our purposes here we are limiting our discussion to the criteria California applies in determining when one is a resident or domicile.

A California resident includes “(1) every individual who is in California for other than a temporary or transitory purpose, and (2) every individual who is domiciled in California who is outside California for a temporary or transitory purpose.”² There is a presumption that if one is present in California for more than nine months in a tax year, they are California residents. Although this presumption is not conclusive and rebuttable, in practice it is seldom overruled. On the other

¹ This memorandum is intended as a generalized discussion of California's treatment of residents and domiciles for tax purposes. It is not intended as a substitute for the examination of the particular facts and circumstances that would be appropriate for a specific Taxpayer; prior to reliance on this advice a formal Engagement Agreement must be entered into with the author.

² §17014(a); Reg. §170914(a). All section references herein are to the California Revenue and Tax Code; all Reg. Section references are to 18 California Administrative Code.

hand there is no presumption of non-residency if the individual is in California for less than nine months during the year. Taxpayers may be absent from California for an entire year, or for more than a year, and because they are domiciles of California they are treated as California residents.

The Concept of Domicile and Temporary And Transitory

The definition of a California resident as set forth above includes two concepts that must be further explained.

The California regulations and case law define “domicile” as a taxpayer’s true, fixed, and permanent home or principal establishment. It is the place to which the taxpayer intends to return whenever absent, and with which the taxpayer is considered to have the most settled and permanent connections.³ Further it is where the taxpayer *intends* to make a permanent home or establish a martial abode until some unexpected event occurs to induce the taxpayer to adopt some other permanent home. [italics for emphasis] Intent is an important element in looking at the criteria for determining domicile. Domicile may also be defined as the place where an individual has fixed a habitation and permanent residence, with no present *intention* to permanently leave. There are numerous decisions of both the California courts and the SBE illustrating the definition of domicile. One would be wise to read as many decisions citing facts and circumstances as possible in framing their own interpretation of both domicile and residency.

One can only have one domicile. The Board has previously ruled that when an individual has two dwelling places which each are equivalent, then the one that was first established remains as the domicile of the taxpayer.

The concept of domicile requires both physical presence in a particular place and the intention to make that place one’s home.

The other concept is “temporary or transitory”. There is no specific definition of the meaning of temporary or transitory, but the regulations define the terms by example⁴ looking at all of the circumstances on a case-by-case basis. The regulatory guidance looks at presence in or absence from California for an identifiable reason or purpose that may be fulfilled in a short period of time as indicative of a temporary or transitory purpose. The longer or more indefinite the

³ Reg. §17014(c)

⁴ Reg. §17014(b)

purpose, the more likely that the purpose is not temporary or transitory. Frequently the FTB weighs the taxpayer's connections with California as compared with the connections at other locations in determining whether an absence was temporary or transitory. The expectations at the time the taxpayers departed from California are important in showing intent and a change in circumstances resulting in a return to California after, say two years, may not be fatal in arguing that the taxpayer intended to abandon California as their domicile.

Residence and Domicile Distinguished

While the definition of residence and domicile may seem the same, they are two different concepts. One can have only one domicile. One may have many places of residence at the same time. So the FTB looks to the permanency of one's contacts with a location and demonstrated intent to determine domicile. In deciding a case, the issue of domicile is usually determined first since the manner in which the temporary or transitory purpose test is applied in a residency determination depends on whether the taxpayer is or is not a California domiciliary. If it is determined that the taxpayer is domiciled in California, then the question is merely whether the taxpayer was outside the state for a temporary or transitory purpose. If so the taxpayer is a California resident. On the other hand if it is determined that the taxpayer is not domiciled in California, and then the question is whether the taxpayer is in California for a temporary or transitory purpose.

Contacts for Determining Domicile and Residence

While different cases cite different factors as important in the circumstances of that particular case, the contacts being evaluated in determining domicile or residency are generally the same. Contacts with, or acts at a particular location are important in determining documented intent.

While it must be emphasized that no one factor is conclusive, contacts, which are important factors in both the evaluation of domicile and residence, include:

1. **Physical Presence** – The most important evidence in determining residence is physical presence. Physical presence coupled with the intent to remain at the location is the most important criteria for domicile. The longer one is at a location, and the more acts showing the intent to remain, the more likely the finding of residence and/or domicile. Even a long period of time away from California, and the cases have considered periods where the husband was away for as long as ten years, may not overcome domicile if there was not the requisite

intent to abandon a California domicile as demonstrated by the acts of the taxpayer.

2. **Employment** – Employment in California is a strong indicator of California residency unless the taxpayer’s presence in the state is for a “short period” and is only necessary to complete a particular transaction, contract, or engagement. If the employment on the other hand is outside California, then if it is indefinite it indicates the fact that the taxpayer is a nonresident. The key to finding of non-residency during an absence from the state is that the out-of-state employment is expected to be permanent or at least indefinite at the time of leaving California. Absences from California for employment reasons even for extended periods are not usually regarded as establishing a change in domicile. Something more is needed to demonstrate intent to abandon California as one’s domicile.

3. **Business Interests** – California business interests are sometimes mentioned as indicative that California residency is intended. However this factor standing alone will not result in residency for one who otherwise resides outside California. For one who has been a domicile of California and subsequently moves out of state, continuing California businesses may be indicative of intent to return to California for purposes of the FTB arguing there was intent to return.

4. **Financial Accounts** - The maintenance of bank accounts, stocks, and similar investments in California is frequently mentioned as an indicator of California residency. It is a less significant factor than more formal business ties, however, and absent other contacts with California; it alone would ordinarily not result in a finding of California residency.

5. **Ownership of Family Home** - Ownership of a family home while absent from the state is an important factor in the finding of California residency both for domicile and residence purposes. It demonstrates intent to return after a period that would be temporary or transitory. This is true even if a home is purchased outside California. If there are homes both within and without California the FTB argues that the value of the respective homes is important. This is a biased approach because of the high California land values and construction costs. An alternative may be to argue size of home. Retaining a home in California can be fatal in trying to abandon California as the state of residence and domicile even though the home was sold in a subsequent year.

6. **Ownership of Investment Property** – Owning investment property in California is not conclusive of California residency, and it is given less weight than ownership of a family home.

7. **Family** – It is difficult to overcome being classified as a resident or domicile of California if the taxpayer's spouse remains in California, particularly living in a family home. Being able to prove martial discord may be helpful, but dissolving a marriage in a year subsequent to the period being audited will not necessarily establish that there was martial discord for the year of audit. The FTB, in over reaching, has also been known to argue that when adult married children remained in California, even though the parents moved out-of-state, that domicile was not abandoned. There is no case on record supporting such a decision by the appellate bodies that hear California tax disputes.

8. **Children** – Taxpayer's minor children attending schools in California is frequently mentioned as a significant contact. This was even true where both mother and father moved out-of-state and left children attending school in California. Having minor children in school is frequently considered when a family home has been retained in California, or there are other significant factors.

9. **Voting Registration** – Voting registration seems to be a minor factor entitled to some, but not much weight in determining residence. It may be more of a factor in determining domicile. Being registered to vote in California is given even less weight when one does not in fact vote.

10. **Federal and Other Taxes** – The filing of federal income taxes and payment of property taxes elsewhere is a factor to be considered. However the regulations state that the filing of returns as a resident of another state or country is of little value in determining one's residence. The absence of filing returns in another state in which residence or domicile is intended is a strong indication that the requisite intent to move permanently from California was lacking. The filing of a return as a California resident may however be persuasive evidence of California residence even though it is subsequently argued that the filing as a resident was in error.

11. **Claiming California's Homeowner's Property Tax Exemption** – Claiming the California homeowner's property tax exemption for a California home indicated that the home is the taxpayer's principal residence. This, in turn, is a significant contact that usually results in a finding of California residency. In contract, failing to claim the homeowner's exemption on a house located in California is not conclusive that the home is not the taxpayer's principal residence or that the taxpayer is a nonresident. Canceling the homeowner's exemption on a retained home on leaving the state is, however, treated as evidence of non-residency.

12. **Other Statements** – Statements on applications for memberships in local clubs, and death and marriage certificates can be used as evidence of residence or intent. So can statements made in applications for admission to California colleges in which residency status is claimed for purposes of eligibility for in-state tuition.

13. **Professionals** – Hiring of professionals may be indicative of there being close connections with a particular state. While it is not conclusive, but is only one factor considered, a taxpayer who uses only California licensed professionals is more likely to be found a California resident; one who uses primarily only out-of-state professionals may be a nonresident – depending of course on the overall factors being considered. There is also no definition of professional – it clearly includes attorneys, accountants, financial advisers, doctors and dentists, and veterinarians. In one case, the SBE seemed to include barbers, drycleaners, gas stations, and automobile repair services in the term.

14. **Miscellaneous Contacts** - Miscellaneous contact with a state, including memberships in social clubs, driver's licenses, automobile registrations, and business associations are indicative of establishing permanent contacts at a new location.

15. **Wills** – While not mentioned in connection with residency, the place of making one's will is evidence of domicile.

August 15, 2006