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PERSONAL INCOME TAXES

Revisiting California Tax Residency After the TCJA

With careful due diligence and proper planning, a taxpayer can successfully navigate California residency law and move beyond the reach of California's personal income tax.

By ERIC J. COFFILL and MIKE LE

ERIC J. COFFILL is Senior Counsel in the Sacramento office of Pillsbury Winthrop Shaw Pittman LLP. He can be contacted at eric.coffill@pillsburylaw.com or 916.329.4722. MIKE LE is an Associate in the same office and can be contacted at mike.le@pillsburylaw.com or 916.329.4725.

The question of whether or not an individual is a resident of a particular state has always been an important issue in the area of state personal income taxation. California, because of its top marginal personal income tax rate of 13.3%,[1] and the large number of high-wealth individuals living in the state, always has been one of the most significant jurisdictions for this issue. Indeed, California, at 13.3%, currently has the highest personal income tax rate of any state.[2] The significance of the high California rate, and the residency issue in general, recently has taken on added significance as a result of two federal tax law changes.

First, under the federal Tax Cuts and Jobs Act (TCJA), generally effective January 1, 2018, the highest federal personal income tax rate has dropped from 39.6% to 37%,[3] thus increasing the relative importance of the California top tax rate of 13.3%. Second, under the TCJA, the itemized federal deduction claimed by an individual for state and local taxes paid is limited to $10,000.[4] This limitation will hit individuals in high-tax states, such as California, especially hard. For example, in 2015, 34% of California filers claimed such a deduction, with the average deduction being $18,437.[5]

The California Legislature responded to this federal $10,000 SALT cap, as have several other state legislatures, with a proposed "workaround" in an attempt to increase the deduction. Specifically, Senate

Bill (SB) 539 would modify an existing College Access Tax Credit program to allow taxpayers a 75% California state tax credit of the amount contributed.[6] SB 539 passed both houses of the California Legislature on August 31, 2018, and was sent to the Governor. However, on August 23, 2018, the IRS issued proposed regulations to address attempts by states, such as California under SB 539, to circumvent the new federal $10,000 SALT deduction limit.[7] In effect, the proposed IRS regulations would eliminate the strategy of allowing taxpayers to donate to charitable funds or trusts, while in return receiving state tax credits and a federal charitable contribution deduction.[8] On September 29, 2018, Governor Brown vetoed SB 539, stating in part in his veto message that the bill "could invite intervention by the Internal Revenue Service."[9]

As a consequence of the convergence of all these factors, California residency or, more pointedly, a change of residency and domicile from California to a state with a more favorable tax climate, recently has become a subject of heightened interest. This article discusses how residency—and nonresidency—is determined under California law.

The Personal Income Tax in Perspective

As a preliminary matter, "motive" to change residency from California to another state is only relevant in the sense that there must be an intent to permanently change one's legal domicile from California. While it may make an interesting part of the change-of-residence "story," legally changing residency and domicile solely to save money on California state taxes is entirely permissible. As the U.S. Supreme Court famously remarked in 1935, "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."[10] As Justice Learned Hand so eloquently wrote: "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."[11]

The California Franchise Tax Board (FTB), which administers the personal income tax law, states it does not evaluate employees on the revenue they produce through additional tax assessments.[12] On the other hand, the FTB has the duty in administering the law to properly protect revenue.[13] What all this means in a practical sense is that the more potential assessment that is in issue, the more likely that the FTB will take an interest in reviewing and perhaps auditing a taxpayer's claimed change of residency to outside California.

In the authors' experience, the FTB's interest is also piqued in two situations. The first situation is where a taxpayer moves to a state with no personal income tax,[14] such as Nevada, as opposed to a state with high personal income tax, such as New York. Currently, 43 states levy individual income taxes, and seven states levy no income tax.[15] Of those states with individual income taxes, the top marginal tax rates range from North Dakota's 2.9% to California's 13.3%.[16] The second situation likely to pique the FTB's interest is where a California resident moves out of California shortly preceding a large income realization event, such as the sale of a business, which would be taxable if the individual was a California resident.[17]

To the extent it is relevant, California is not currently undergoing an economic crisis and its finances are stable. Indeed, California is sitting on an $8.98 billion surplus as of May 2018.[18] This is in contrast to times of fiscal crisis, which arguably could exacerbate the FTB's already aggressive enforcement and interpretation of California residency law. California's economy is the sixth largest in the world.[19] The top incomes are higher in California than in the United States, both as to the median and to the top five percent.[20]

Personal income tax is the dominant California state revenue source and represents nearly 70 percent of total California general fund revenue sources.[21] The personal income tax has now replaced the sales tax as the predominant source of California general revenue.[22] This increase in the role of the personal income tax in the overall state fisc is "due to rapid growth in incomes (including capital gains) of high-income people who are taxed most heavily under the state's progressive tax structure."[23] Indeed, the top *one percent* of income earners pay *up to half* of California's total personal income taxes.[24] Compare this to the federal level, where the top 1% paid 37.3% and the top 50% of all taxpayers paid 97% of total individual income taxes.[25]

Of course, the impact of personal income taxes on the California General Fund, as compared to other tax revenues, is always subject to change.[26] For example, California's sales/use tax collections are expected to increase going forward as a result of the 2018 U.S. Supreme Court decision in *Wayfair*,[27] which expanded the states' power to require out-of-state sellers to collect and remit sales tax, even without a physical presence in the taxing state.[28] As another example, California has considered legislation expanding its sales/use tax base beyond the sales of tangible personal property to services.[29] However, at the moment, the personal income tax is the major source of California revenue, with its tax effect falling disproportionately on high-wealth individuals.[30] Indeed, Mike Genest, former Budget Director for Governor Schwarzenegger, is quoted as saying, "We are very dependent on millionaires. If the millionaires get a cold, we all die of the flu."[31]

The Legal Framework and Standards

The law for determining California residency is simultaneously simple and complex. The "simplicity" comes from the fact the relevant legal standard for residency is defined in a single section of the California Revenue and Taxation Code[32] in only 32 words. The "complexity" comes from the fact that beyond these 32 words, bright-line standards and formal guidelines are next to nonexistent. Lacking further statutory rules, the residency analysis instead involves the consideration of a multitude of factors, all of which are potentially relevant, but none of which are controlling on the ultimate legal residency determination.

The legal analysis of residency always must begin with Section 17014(a), which defines "resident" to include (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 the state for a temporary or transitory purpose." Conversely, any individual who is not a California resident is a "nonresident."[33] Regulations promulgated by the FTB echo the language of Section 17014 to define residency: "[t]he term 'resident,' as defined in the law, includes (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose."[34] Again, and as mentioned above, note the absence here in the controlling statute or in the FTB's own regulation of any bright-line rules for determining residency.

The closest metric to a bright-line rule in the entire body of California residency law, in statute, regulation or decisional law, is a *rebuttable* presumption of California residency when an individual is present within California for more than nine months of a taxable year.[35] However, the converse is not true, and there is no presumption of *non*residency when a taxpayer spends *less* than nine months of the year in California.[36] Indeed, the FTB's regulation states, "It does not follow, however, that a person is not a resident simply because he does not spend nine months of a particular taxable year in this State. On the contrary, a person may be a resident *even though not in the State during any portion* of the year."[37]

To further complicate matters, California has very few court decisions addressing California residency or interpreting either Section 17014 or the corresponding regulation. In 2004, for the first time in decades, a California Court of Appeal issued a published decision interpreting Section 17014 in *Noble v. Franchise Tax Board.*[38] Prior to *Noble*, the most significant and most cited judicial residency case was the 1964 Court of Appeal decision in *Whittell v. Franchise Tax Board.*[39] There have been no published Courts of

Appeal residency decisions subsequent to *Noble* in 2004. As such, both cases are important landmarks in interpreting California residency law.

Looking first at *Whittell*, it is important to understand that the definition of "residency" under Section 17014 is closely linked to the concept of "domicile." The California Court of Appeal in *Whittell* defined "domicile" as the "one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning."[40] Similarly, FTB Regulation 17014(c) defines domicile as "the place where an individual has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning," as well as "the place where an individual has fixed his habitation and has permanent residence without any present intention of permanently removing therefrom."

"Residence" and "domicile" are nonetheless separate and distinct concepts for California tax purposes.[41] "Domicile" denotes the one location with which a person has the most settled and permanent connections and where the person intends to remain.[42] "Residence" denotes any factual place of abode of some permanency, that is, "more than a mere temporary sojourn."[43] A taxpayer may have *several* residences simultaneously, but a taxpayer will have only *one* domicile at any given time.[44] Once acquired, a domicile is presumed to continue until it is shown to have changed.[45]

Thus, an individual seeking to move out of California for personal income tax purposes must overcome this presumption in showing that move. In order to change one's domicile, the California State Board of Equalization ("SBE")[46] has required a showing that a taxpayer: (1) left the state without any intention of returning; and (2) was located elsewhere with the intention of remaining there indefinitely.[47] In determining the taxpayer's intent, "the acts and declarations of the party must be taken into consideration."[48]

Regarding the meaning of "intent," the court in *Noble* confirmed the significance of the taxpayer's physical acts in determining intent, holding: "To the extent residence and domicile depend upon intent, 'that intention is to be gathered from one's acts.'"[49] The court in *Noble* further clarified the two indispensable elements to accomplish a change of domicile: (1) actual residence in the new locality; and (2) the intent to remain there for an indefinite period of time.[50] Consistent with *Noble*, the SBE has cautioned that the residency determination "cannot be based solely on the individual's subjective intent, but must instead be based on objective facts."[51] Put differently, simply "intending" to move from California, no matter how sincere that intent, is not sufficient by itself to establish that one has changed his or her residence/domicile.

When domicile is an issue in a residency case—which is the typical scenario when moving out of California—domicile is always decided first.[52] For California domiciliaries, the focus of the inquiry is upon whether the taxpayer is absent from California for "a temporary or transitory purpose."[53] If that is the case, the individual is a California residen[54] For non-California domiciliaries, the inquiry is whether the taxpayer is in California for only "a temporary or transitory purpose."[55] If that is the case, the individual is not a California resident.[56] Whether a purpose is temporary or transitory in character "will depend to a large extent upon the facts and circumstances of each particular case."[57] The analysis under California tax law should be the same regardless of the taxpayer's state of domicile, i.e., the temporary/transitory analysis should be the same in both situations above.

Because of this scarcity of statutory and court guidance, much of the law regarding the determination of California residency is found at the administrative level. The first analysis, and the most widely known and used, is commonly referred to as the "Closest Connections" analysis.[58] This approach compares the taxpayer's contacts with his or her new place of abode to the contacts with his or her former place of abode. A number of factors traditionally have been included in this "closest connections" analysis, which makes the residency determination an intensely factual one.

While certainly helpful, neither the FTB's publications nor its regulations attempt or purport to provide a complete list of such factors.[59] However, a 2003 decision of the SBE has done a decent job of identifying the major factors to be considered. *Appeals of Stephen D. Bragg*, ("*Bragg*") recognized the complexity of the residency question in light of the diverse factual contexts in which the issue could arise.[60] Confronted with the near impossibility of creating a universal test or analysis, the SBE set forth a list of 19 items, now commonly referred to as the *Bragg* factors, to help determine a taxpayer's closest connections:

1. The location of all of the taxpayer's residential real property and the approximate sizes and values of each of the residences;
2. The state wherein the taxpayer's spouse and children reside;
3. The state wherein the taxpayer's children attend school;
4. The state wherein the taxpayer claims the homeowner's property tax exemption on a residence;
5. The taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls);
6. 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.);
7. The location where the taxpayer files his tax returns, both federal and state, and the state of residence claimed by the taxpayer on such returns;
8. The location of the taxpayer's bank and savings accounts;
9. The origination point of the taxpayer's checking account transactions and credit card transactions;

10. The state wherein the taxpayer maintains memberships in social, religious, and professional organizations;
11. The state wherein the taxpayer registers his automobiles;
12. The state wherein the taxpayer maintains a driver's license;
13. The state wherein the taxpayer maintains voter registration, and the taxpayer's voting participation history;
14. The state wherein the taxpayer obtains professional services, such as doctors, dentists, accountants, and attorneys;
15. The state wherein the taxpayer is employed;
16. The state wherein the taxpayer maintains or owns business interests;
17. The state wherein the taxpayer holds a professional license or licenses;
18. The state wherein the taxpayer owns investment real property; and
19. The indications in affidavits from various individuals discussing the taxpayer's residency.[61]

While not codified in the statutory scheme of residency or set forth in any judicial case law, the *Bragg* factors were commonly utilized by the SBE, and are still utilized by the FTB, as a benchmark for determining residency.[62] However, *Bragg* makes clear this 19-factor list is not by any means "exhaustive" or exclusive, and that these listed factors "serve merely as a guide" in determining residency.[63] The overall focus of the *Bragg* examination is "to determine where an individual is present for other than a temporary or transitory purpose," and satisfaction of a majority or a significant number of the factors is not necessarily dispositive.[64] According to *Bragg*, the weight given to any particular factor also depends on the totality of the circumstances.[65]

The second approach to residency is referred to as the "Identifiable Purpose" analysis. Under this approach, the SBE examines if the taxpayer is in a location for an identifiable purpose and the length of time necessary to fulfill that purpose, i.e., to determine whether a taxpayer is in or out of California for other than a temporary or transitory purpose. "[W]here an individual expects to be out of California for an indefinite period which is expected to last more than two years, such individual will be considered to be out of the state for an indefinite period of substantial duration" and, therefore, is no longer considered a resident of California.[66] Section 17014 does not make any distinction with respect to employment, but the SBE has suggested that when a Californian is employed outside California, his absence will be considered to be for other than a temporary or transitory purpose if the position is expected to last a long, permanent or indefinite time.[67]

The attempts to clarify California residency standards with the "Identifiable Purpose" and "Closest Connections" analyses and, specifically, with *Bragg*'s 19 factors, are all helpful approaches for analyzing the residency issue. However, the fact remains there is a dearth of judicial guidance, or even formal guidance from the FTB. As discussed above, the California Courts of Appeal have only published two California residency decisions since 1964.[68]

Even with the *Bragg* factors, a taxpayer's ability to grasp the details of California residency is further limited because of insufficient written precedential SBE decisions interpreting California residency law. The *Bragg* factors are nonexclusive and they are too easily and often conditioned on subjective interpretations. Plus, some factors now seem to be anachronisms.

For example, one *Bragg* factor looks to the "location" of the taxpayer's bank and savings accounts. In today's modern society of interstate banking, where ATMs and bank branches are available on nearly every street corner and accessible from almost everywhere, is it logical to assume that a person's presence can be meaningfully connected with the location of a brick-and-mortar bank branch? When moving, an individual with a relationship with an interstate bank simply changes the address on the bank's records.

Some factors also seem overly subjective. For example, one *Bragg* factor addresses the number of days the taxpayer "spends" in California versus the number of days the taxpayer "spends" in other states. On many occasions, individuals may spend time in several locations in a given day.

Plus, all 19 factors present issues involving comparative value. For example, should a taxpayer's state of employment carry the same weight in the *Bragg* analysis as the state in which a vehicle is registered? Should the location of a taxpayer's residence carry the same weight as where his doctors, dentists, accountants and attorneys are located? Thus, while at first glance appearing somewhat objective, *Bragg*'s application involves a high level of subjectivity.

If the vagaries of the substantive analysis were not enough, there are multiple procedural issues which come into play in a typical FTB residency audit to further complicate the matter. The law provides that tax cases are to be decided, year by year, on their own merits and their own facts, without regard to other years.[69] The implication of this principle is that a determination of residency (or nonresidency) for any given year does not necessarily preclude a similar FTB inquiry for the succeeding (or preceding) year.

Further, satisfying an auditor's thirst for information often can and will present difficulties and burdens. Formal rules of evidence do not govern FTB residency audits, leading to audit requests for broad ranges of material an auditor has concluded might be "relevant" to the residency issue, some of which frequently strike taxpayers as being overly intrusive. The FTB's own regulation encourages these type of sweeping audit requests for information by providing that the type and amount of evidence necessary to rebut or overcome a presumption of California residency and to establish nonresidency "cannot be specified by a general regulation, but will depend largely on the circumstances of each particular case."[70] In addition, the FTB has statutory authority to impose a penalty, as specified, when a taxpayer fails or refuses to furnish information requested by the FTB in writing.[71] The penalty is 25 percent of the portion of the deficiency relating to the information requested.[72]

Declarations, affidavits or testimony of a taxpayer, his or her friends, employers or business associates are highly relevant and may overcome the presumption to establish nonresidency and should be a part of any well-developed residency case.[73] Indeed, in many instances, such statements have proven dispositive, even taking into account the typical audit preference of the FTB for contemporaneous written documentation over sworn statements from individuals with personal knowledge of the matter.

Another complexity to be aware of in a change of residency analysis is the interaction between residency and California's community property rules. In some situations, a husband and wife move outside of California, but the FTB concludes on audit that one spouse has changed residency/domicile while the other spouse has remained a California resident/domiciliary. California is a community property state, and the domicile of the spouse earning the income determines the division of income between spouses.[74] That means the spouse who is no longer a resident and domiciliary of California must report to California as taxable one-half of the community property income of the California resident/domicile spouse.[75] Accordingly, what constitutes "community property" under California law or other state law is significant in this situation.

For example, because California and Nevada are both community property states, if one spouse is a resident and domiciliary of California and the other is a resident and domiciliary of Nevada, each spouse's community property income must be divided equally between them. Accordingly, one-half of the Nevada spouse's community property income is attributable to the California spouse as his or her portion of the community property interest (and the other one-half is attributable to the Nevada spouse).[76] Similarly, one-half of the California spouse's California community property income is attributable to the Nevada spouse as his or her portion of the community property interest (and the other one-half is attributable to the California spouse).[77]

Other Approaches

Finally, it is interesting to compare the vagaries of California law to those of alternative approaches. For example, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State or City. A "resident individual" means an individual:

> (A) who is domiciled in this city, unless (i) [he] maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and *spends in the aggregatenot more than thirty days of the taxable year in this city*, or . . .
>
> (B) who maintains a permanent place of abode in this city and *spends in the aggregate more than one hundred eighty-three days of the taxable year in this city,* whether or not domiciled in this city for any portion of the taxable year, unless such individual is in active service in the armed forces of the United States.[78]

Note the "hard" metric included here in both statutory situations, one related to 30 days and one related to 183 days. These are not akin to the *rebuttable* presumption found in California law based on spending more than nine months of the year in California. Thus, individuals who are considered to have "a permanent place of abode" based on a residential interest in New York must challenge their taxability by demonstrating they are physically present in New York less than 184 days. For this exercise, part days count as much as full days, so any day when the individual is physically present in New York for any period of time counts as a full day for the 183-day test.[79]

An objective standard based on the number of days also has been proposed in California. Over 25 years ago, the Taxation Section of the California Lawyers Association (formally known as the Section of Taxation of the California State Bar)[80] proposed in a preliminary report that California should provide an objective standard based on the taxpayer's presence in California for a minimum number of days.[81] One can debate the merits of adopting for California a stringent objective test for residency along the lines of the New York standards set forth above.

Concluding Thoughts

The complexity and nuances of California residency law discussed above have significant consequences for a taxpayer facing a residency audit or for a taxpayer who may simply have questions regarding his or her residency status for tax purposes. With the FTB actively pursuing residency audits in hope of reaping substantial revenue for the state, a taxpayer may face an uphill battle. Vague and ambiguous administrative and judicial tests are available for guidance; yet, as discussed here, these tests are without a bright-line rule and are subject to factual debates and interpretation. But with careful due diligence and proper planning, a taxpayer can successfully navigate this body of California residency law and move beyond the reach of California's personal income tax.

[1] *See* FTB 2017 California Tax Rates and Exemptions (Oct. 19, 2017), stating the maximum rate for individuals is 12.3% and the Mental Health Services Tax Rate is 1% for taxable income in excess of $1,000,000.

[2] Other high rates are, *e.g.*, Or. Rev. Stat. § 316.037(1)(a) imposing Oregon's top personal income tax rate of 9.9%, and N.Y. Tax Law § 601(a)(1)(A) imposing New York's top personal income tax rate of 8.82%.

[3] I.R.C. Section 1(j)(1)(B).

[4] I.R.C. Section 164(b)(6).

[5] Government Finance Officers Association, "The Impact of Eliminating the State and Local Tax Deduction," p. 9 (Sept. 20, 2017).

[6] Sen. Bill No. 539 (2017-2018 Reg. Sess.) as enrolled on Sept. 7, 2018.

[7] Contributions in Exchange for State or Local Tax Credits, 83 Fed. Reg. 43571 (proposed Aug. 23, 2018) (to be codified at 26 C.F.R. pt. 1).

[8] *Id*.

[9] "This measure started as a bold idea but because of adverse changes in the federal tax law, it now confuses an already complicated scheme and could invite intervention by the Internal Revenue Service." Governor Brown's September 29, 2019 Veto Message to the California State Legislature returning SB 539 without his signature; https://www.gov.ca.gov/wp-content/uploads/2018/09/SB-539-Veto.pdf.

[10] *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

[11] *Comm'r v. Newman,* 159 F.2d 848, 850-851 (2d Cir. 1947) (dissenting opinion).

[12] Cal. Rev. & Tax. Code § 21008; FTB Pub. 4058C, p. 5 (rev. 12/2017).

[13] FTB Pub. 4058C, p. 1 (rev. 12/2017).

[14] The following states have no personal income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.

[15] Tax Foundation, "State Individual Income Tax Rates and Brackets for 2018," p. 2 (Mar. 2018).

[16] *Id*.

[17] California residents pay tax on their entire taxable income. Cal. Rev. & Tax. Code § 17041(a)(1).

[18] *California Today: Fiscal Restraint Is Jerry Brown's Thing. Will It Follow Him Into Retirement?,* N.Y. Times, May 18, 2018; https://www.nytimes.com/2018/05/18/us/california-today-jerry-brown-budget-surplus.html.

[19] Legislative Analyst's Office, Cal Facts: 2016, p. 1 (Dec. 5, 2016).

[20] *Id*. at 7.

[21] *Id*. at 14.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 16.

[25] *Top 3% of U.S. Taxpayers Paid Majority of Income Tax in 2016,* Bloomberg, Oct. 14, 2018; https://www.bloomberg.com/news/articles/2018-10-14/top-3-of-u-s-taxpayers-paid-majority-of-income-taxes-in-2016.

[26] Indeed, the personal income tax is more volatile than the economy, in part because California taxes higher-income taxpayers at higher rates. *Id*. at 15.

[27] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

[28] *Id*. at 2093.

[29] *See* Sen. Bill No. 993 (2017-2018 Reg. Sess.).

[30] Legislative Analyst's Office, Cal Facts: 2016, p. 16 (Dec. 5, 2016).

[31] *Can California's Next Governor Fix the State's Problems? It Depends on Palo Alto,* Los Angeles Times, Sept. 23, 2018; http://www.latimes.com/projects/la-pol-ca-next-california-economy/.

[32] Cal. Rev. & Tax. Code § 17014(a). All further statutory references are to the California Revenue and Taxation Code unless otherwise indicated.

[33] Cal. Rev. & Tax. Code § 17015; *see also* Cal. Code of Regs. tit. 18, § 17014(a).

[34] Cal. Code of Regs. tit. 18, § 17014(a).

[35] Cal. Rev. & Tax. Code § 17016; Cal. Code Regs. tit. 18, § 17016.

[36] *Appeal of Walter W. and Ida J. Jaffee*, Cal. St. Bd. of Equal., July 6, 1971.

[37] Cal. Code Regs. tit. 18, § 17016 (emphasis added).

[38] *Noble v. Franchise Tax Bd.,*118 Cal. App. 4th 560 (2004).

[39] *Whittell v. Franchise Tax Bd.,* 231 Cal. App. 2d 278 (1964).

[40] *Id*. at 284.

[41] *Id.*

[42] *Whittell*, 231 Cal. App. 2d at 284.

[43] *Whittell*, 231 Cal. App. 2d at 284; *Smith v. Smith*, 45 Cal. 2d 235, 239-240 (1955).

[44] *Whittell,* 231 Cal. App. 2d at 284.

[45] Cal. Code Regs. tit. 18, § 17014(c); *Murphy v. Travelers Ins. Co*., 92 Cal. App. 2d 582, 587 (1949).

[46] There are references throughout this article to decisions by the SBE. Prior to January 1, 2018, the SBE had functioned in California as a quasi-tax court for appeals from actions of the FTB, including in FTB residency matters. However, as of January 1, 2018, that function is now performed by the newly created Office of Tax Appeals (OTA). The OTA generally intends to continue to respect prior decisions of the SBE. *See* Cal. Code Regs. tit. 18, §30501(d)(3), which is the OTA's Emergency Rules for Tax Appeals set to expire on December 31, 2018; *see also* Cal. Code Regs. tit. 18, §30504 under the OTA's Proposed Permanent Rules for Tax Appeals. To date, the OTA has not issued any residency decisions.

[47] *See Appeal of Terance and Brenda Harrison*, Cal. St. Bd. of Equal., June 25, 1985; *see also Estate of Peters*124 Cal. App. 75, 77 (1932).

[48] *Appeal of Joe and Gloria Morgan*, Cal. St. Bd. of Equal., July 30, 1985; *see also Appeal of Terance and Brenda Harrison*, Cal. St. Bd. of Equal., June 25, 1985 (stating "[i]t is the 'intent' of the person that determines domicile"); *Estate of Phillips*, 269 Cal. App. 2d 656, 659 (1969); *Chapman v. Superior Court*, 162 Cal. App. 2d 421, 426 (1958).

[49] *Noble*, 118 Cal. App. 4th at 567-568 (quoting *Chapman*, 162 Cal. App. at 426).

[50] *Noble*, 118 Cal. App. 4th at 568 (quoting *DeMiglio v. Mashore*, 4 Cal. App. 4th 1260, 1268 (1992) and *Estate of Weed*, 120 Cal. 634, 639 (1898)).

[51] *Appeals of Stephen D. Bragg*, Cal. St. Bd. of Equal., May 28, 2003 (emphasis added).

[52] *Estate of Phillips*, 269 Cal. App. 2d 656, 659 (1969); *Aldabe v. Aldabe*, 209 Cal. App. 2d 453, 466 (1962).

[53] Cal. Code Regs. tit. 18, § 17014(a).

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] Cal. Code Regs. tit. 18, § 17014(b).

[58] Cal. Code Regs. tit. 18, § 17014(b). The Closest Connections analysis relies on the underlying theory of Sections 17014 through 17016 that the state with which the person has the closet connection during the taxable year is the state of his residence.

[59] *See, e.g.*, California Franchise Tax Board, FTB Publication 1031: Guidelines for Determining Resident Status (2017); 2017 California 540NR Tax Booklet; Instructions for Form 540-540A; Instructions for Long Form 540NR.

[60] *Bragg*, Cal. St. Bd. of Equal., May 28, 2003.

[61] *Id*.

[62] Since *Bragg*, the SBE has issued numerous Letter Decisions and Summary Decisions (both nonprecedential) in which it referenced the *Bragg* factors as applicable law. *See, e.g.*, *Appeal of Robert A. Poll and Gail D. Poll*, Case No. 523625, Feb. 28, 2012; *Appeal of Constance L. Maples*, Case No. 382846, Jan. 21, 2009; *Appeal of Jeremiah S. Ryder*, Case No. 399886, June 9, 2009; *Appeal of David W. Sanders, et al*., Case No. 400374, Aug. 19, 2008; *Appeal of James F. and Diane Montgomery*, Case No. 309423, Aug. 19, 2008; *Appeal of Robert and Maureen Fouts*, Case No. 383284, May 19, 2008; *Appeal of Kenneth Banks*, Case No. 327922, Apr. 9, 2008; *Appeal of Gregory B. Duro*, Case No. 354992, Feb. 28, 2008; *Appeal of Larry and Rhoda Geisel*, Case No. 358724, June 25, 2007; *Appeal of William F. and Susan J. Grun*, Case No. 337066, June 25, 2007; *Appeal of Brian K. Shaw*, Case No. 341954, Mar. 1, 2007; *Appeal of James and Jean A. Bagley*, Case No. 217274, Feb. 1, 2006; *Appeal of Michael J. and Mary E. Bills*, Case Nos. 610028 & 782397, Aug. 26, 2016.

[63] *Bragg,* Cal. St. Bd. of Equal., May 28, 2003.

[64] *Id*.

[65] *Id*.

[66] *Appeal of Crozier*, Cal. St. Bd. of Equal., Apr. 23, 1992.

[67] *Appeal of David A. Abbott*, Cal. St. Bd. of Equal., June 10, 1986; *Bragg*, Cal. St. Bd. of Equal., May 28, 2003.

[68] *Noble*, 118 Cal. App. 4th 560 (2004); *Whittell*, 231 Cal. App. 2d 278 (1964).

[69] *See Appeal of Duane H. Laude*, Cal. St. Bd. of Equal., Oct. 6, 1976; *Appeal of Swift & Co.,* Cal. St. Bd. of Equal., Apr. 7, 1970; *Appeal of Allied Properties*, Cal. St. Bd. of Equal., Mar. 17, 1964.

[70] Cal. Code Regs. tit. 18, § 17014(d)(1).

[71] Cal. Rev. & Tax. Code § 19133.

[72] *Id*.

[73] Cal. Code of Regs. tit. 18, § 17014(d)(1); *Bragg,* Cal. St. Bd. of Equal., May 28, 2003; *Appeal of Raymond H. and Margaret R. Berner*, Cal. St. Bd. of Equal., Aug. 1, 2002. We observe that the FTB has been chided for improperly refusing such affidavits and declarations, which are permitted under SBE and OTA rules and FTB regulations. *See id*.

[74] FTB Pub. 1031 (2017), p. 10.

[75] *Id*.

[76] *Appeal of Roy L. and Patricia A. Misskelley*, Cal. St. Bd. of Equal., May 8, 1984.

[77] *See id*.

[78] N. Y. Tax Law § 605(b)(1)(A) and (B); NYC Administrative Code § 11-1705(b)(1)(A) and (B) (emphasis added).

[79] N.Y. Comp. Codes R. & Regs tit. 20, § 105.20(c).

[80] Effective January 1, 2018, the former Sections of the State Bar of California were transferred to a new independent organization called the California Lawyers Association.

[81] David S. Boyce, *California Residency: Should the 'Temporary or Transitory Purpose' Test Be Replaced?*, 1 J. Cal. Tax'n 4, pp. 30, 35 (1990).