The Six-Month Presumption in California Residency Law: Not All It's Cracked Up To Be

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The Six-Month Mythos

You don't have to be a tax lawyer to know that the way to avoid becoming a resident of California is to spend less than six months in the state during any calendar year. Right? Well, not exactly. The "six-month presumption," as it's called, which is mentioned in one form or another in almost every Google search result of California residency rules, isn't all that it's cracked up to be. That's not to say the amount of time spent in California doesn't play an

important role in determining legal residency. Just the opposite. It's critical. But the real rule is more complex and has to be understood in the context of how California determines residency. It isn't by counting days. In fact, relying on the six-month figure as a magical way to avoid California residency can get a taxpayer in tax trouble.

What Is The Six-Month Presumption?

The six-month presumption is established by regulation. You would think it would say something simple like: if you spend no more than six months in California during any calendar year, you're not a resident. That's the popular online version. And frankly it's the version many auditors for the Franchise Tax Board (California's tax enforcement agency) seem to have in mind. But that's not the legal rule.

Rather, the rule has various qualifiers: if a taxpayer spends an *aggregate* of six months or less in California during the year, and is *domiciled* in another state, and has a *permanent abode* in the domicile state, and does nothing while in California other than what a *tourist, visitor, or guest* would do, then there is a *rebuttable* presumption of nonresidency. What would a tourist, visitor or guest do? According to the regulations, nothing much more than owning a vacation home, having a local bank account for local personal expenses, and belonging to a "social club" (read "a country club").

These qualifiers call for some parsing.

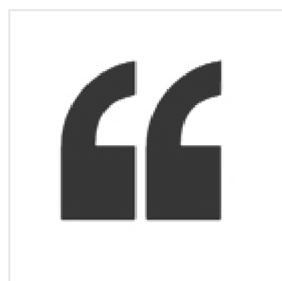
Parsing The Presumption

First, the six months of the presumption is an aggregate figure. It's not six months in a row. If you spend a total of more than 183 days in California during any calendar year in any order whatsoever, you don't get the presumption. The six-month presumption is really a 183-day presumption.

Second, you have to be a domiciliary of another state and have a permanent home there (owned or rented). Domicile differs from residency as a legal concept. For residency law purposes, domicile is defined by case law and the regulations as "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." A significant body of case law has grown up around determining domicile. But for simplistic practical purposes, it's where you are registered to vote, perform jury duty and have a driver's license. If you aren't a domiciliary of another state (that is, you don't treat it as your permanent home even while away from it) and if you don't have an abode there, you don't get the six-month presumption. Period. It doesn't matter if you only spend six days, rather than six months, in California.

Third, to get the presumption you must have only the kinds of limited contacts a tourist or visitor might have. The regulations envision this as restricted to owning a vacation home, having a local bank account, and joining a country club. Needless to say, the regulations are somewhat passé. Nobody needs a local bank account anymore due to interstate banking. And a country club is not something most out-of-state millennials with software companies seem keen on joining. But the point is, if a taxpayer has any other contacts (investment property, a foreign LLC registered with the Secretary of State, temporary employment, even a car registered here), the presumption evaporates.

Finally, the presumption is rebuttable. This means even if you meet all the requirements, the FTB retains the right to offer evidence proving you are a California resident. The evidence may consist in showing any facts or circumstances that indicate your stay in California is not temporary or transitory. Essentially, anything goes.



The purpose of the time spent in California is determinative, not the amount of time

Battling Presumptions

As the above suggests, it isn't easy getting the presumption. And even if you do, the FTB can attempt to rebut it. And beyond that, the benefit of the presumption is further eroded by a special rule the FTB almost always invokes: namely, the determinations of taxing authorities are presumptively correct. In short, if an FTB auditor concludes a taxpayer is a resident, the taxpayer bears the burden of proving otherwise on appeal, even if he qualified for the six-month presumption. This conflict between presumptions has never been reconciled by case law. As a practical matter, however, the FTB not surprisingly usually insists on the presumption of correctness. "The FTB's tax assessments are presumptively correct" is usually the first sentence in the argument of the FTB's brief in response to a taxpayer's residency appeal.

Purpose, Not Time

With this in mind, a nonresident might wonder whether the six-month presumption is worth anything. The answer: yes and no.

On the "no" side, the real rule is not whether you spend more or less than six months in California, but rather the purpose for spending time here. If you are a domiciliary of another state, and if you come to California for a temporary or transitory purpose, it doesn't matter how much time you spend here – you are not a California resident as a matter of law.

The example I like to give: a rock star from Seattle who rents a beach house in Malibu for the sole purpose of partying for a whole year straight is not a legal resident of California (obviously I wouldn't recommend this, for reasons discussed below). In contrast, if that rock star moves to Malibu permanently to be part of the LA music scene and immediately goes on a world tour, he's a California resident even if he spent only one day at the mansion. The purpose of the time spent in California is ultimately determinative, not the amount of time (though again, see the caveats below).

But to use a more realistic example than rockers on vacation to demonstrate the importance of purpose: if a software engineer comes to California under a contract to perform independent contractor services, which terminates in seven months (the time contemplated necessary to complete the project), the engineer would not be deemed a California resident as long as the taxpayer's other conduct is consistent with nonresidency, such as staying in short-term living accommodations, retaining a dwelling in his home state, avoiding representations of residency (like registering to vote), and so forth. The purpose for spending the seven months in California is temporary (and relatively short-term), even if it is a majority of the tax year.

But: Quantity Has A Quality All Its Own

Now, of course, quantity has a quality all its own. If you spend a great deal of time in California (say, more than half a year), the FTB might legitimately argue that your stay here isn't temporary, any claims about intent notwithstanding. For residency purposes, it's not what a taxpayer says he intends, but rather what his actions show he intends, that determine whether the purpose of a stay in California is temporary or not. Most of us aren't singers in a rock 'n' roll band. Where we spend most of the year is usually a pretty good indicator of our state of residence. Spending the majority of the year in California, year-in, year-out, suggests something other than a temporary purpose. It looks more like where you choose to live. Even for the software engineer, if the pattern of time in California involves spending more than six months in the state, over the span of several years, the argument that the purpose is temporary wears thin.

As for the rocker, he has another problem. He runs into the nine-month presumption, which states that taxpayers who spend more than that amount time here are presumed residents. The presumption is rebuttable, but case law suggests it is almost impossible to do so (there is only one old case that sides with the taxpayer).

I won't get into that nine-month presumption here – like the six-month presumption, it rarely plays a determinative role in legal residency cases. Taxpayers who spend more than nine months in California tend to accumulate so many contacts with California that claiming the intent of the visit was temporary is difficult to sustain. But for clarity's sake, the six-month presumption ostensibly applies to taxpayers who spend six months or less in California during the tax year. The nine-month presumption applies to those who spend more than nine months in the state. And between the six and nine months is a no-man's-land where no presumption applies.

All this is on the "yes" side of the six-month figure. It can matter whether you spend more than half a year in California (even if spending less may not).

The Type Of Taxpayer Matters

In addition, the type of taxpayer matters when it comes to intent. A nonresident living and employed or owning a business outside of California might occasionally, under certain circumstances, wind up spending more than six months in California due to the requirements of their job. That won't necessarily result in the time spent here being seen as having a permanent intent. That's the software engineer example. In contrast, retired persons who spend most of the year in California are making a choice about where the center of their lives are situated. The concept, from the FTB's perspective, is that retired persons aren't anchored to any particular state by a job, and where they spend most of the time likely represents the place they want to live. If they have a pattern of spending more time in California as a choice, they face a difficult time convincing an auditor that the stays were temporary or transitory. They look less like a vacation and more like living in California.

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The Real Rule: Not California Against The World, But California Against Your Home State

As the above shows, the purpose for spending time in California matters in residency determinations. But the FTB often determines the purpose by the amount of time itself (not what taxpayers say about it). And it gets even more complex than that. Which brings us to the "real" rule involving time in California.

California uses a "ledger" analysis to adjudicate residency. In an audit or subsequent appeal, the FTB lists all the contacts a person has with California, and all the contacts a person has with their claimed home state. And then it weighs them. In totality. Not all contacts weigh the same. The important categories subject to comparison are dwellings, physical presence (time spent), location of work, location of assets, where your immediate family lives, and representations of residency. This ledger test is discussed in more detail **here**.

The point is, time spent in California is always evaluated against time spent in a taxpayer's home state. It isn't viewed in isolation. The applicable rule used by an auditor will not be whether you spend less than the six months in California, but whether you spend more time in your home state than in California, however long that time is.

To put it more bluntly, when it comes to time, it's not California vs. the world, but California vs. your home state. It's a plurality rule, not a majority rule. The difference is crucial, and it is a common mistake in bad residency tax planning. Time spent in states or jurisdictions other than California and your home state doesn't help you. Thus, if a nonresident's time profile is five months in California, four months in his home state, and the balance of the year traveling elsewhere, the FTB will use this as an argument for residency, even though the taxpayer spent less than six months in California. The concept is, the place where you spend *most* of your time (not necessarily the majority of the year) is more likely to be your home than not. You prevail in the time category by spending more time in your home state than in California, not by being in California for less than half the year.

In a residency audit, the FTB will literally make a ledger with three columns: one column will itemize the days in California; another the days in your home state; and a third labeled "Other," the time spent elsewhere. The auditor will compare the California column with your home state column. The Other column isn't usually relevant. If you spend more time in your home state than in California, you prevail in the time category. If you spend less time, you lose in this category.

Like almost all California residency rules, this plurality rule isn't dispositive. As I indicated, a time-limited contract would be an exception, and I've often successfully argued in residency audits that special circumstances, such as a job that involves a great deal of travel, may override the impact of the rule. But nonresidents (and their tax advisers) ignore the plurality rule in making residency plans at their peril. The best way to prevail in the category comparing time spent in California and your home state is always to spend more time in your home state than in California. In other words, forget about the six-month presumption.

But even this is the minimum amount of planning. You not only want to spend more time in your home state than in California, for audit purposes, you want to spend *significantly* more time. This helps avoid having your residency determined by disputes over your location involving a few days or week. Where the difference in time is small, it gives an auditor an incentive to argue the matter. In contrast, if the time spent in your home state exceeds time in California by a significant margin, the auditor has less incentive to waste resources trying to challenge a large swath of time. What is "signficant" in this context? Usually at least two months. One month is marginal. Anything less is problematic and risky.

Conclusion: Plurality, Not Six Months

There is nothing magical about six calendar months in residency law. In fact, very few taxpayers ever qualify for the six-month presumption due to its many legal requirements, and the contending presumption that the FTB's rulings are correct and have to be rebutted. Worse, the six-month figure can lead taxpayers into a false sense of security (and an audit), since the purpose of a stay in California has more weight in determining legal residency than any particular number of months spent here. The goal should be to spend more time in your home state than in California, not less than six months in California. That said, regardless of the legalities of the presumption, it makes sense for seasonal visitors, vacationers, temporary workers, and other nonresidents who visit California, to limit their time here as much as possible. Especially at the audit level (where there are no lawyers on the FTB side), the six-month figure looms large. And it makes sense to spend more than half the year in your home state to avoid arguments about you intent to reside there . But don't let the six-month tail wag the residency dog. The real issue nonresidents face is to make sure a stay in California not only looks like it's for temporary purposes, but in fact is for temporary purposes because you spent more time in your home state.

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