

BEFORE THE STATE BOARD OF EQUALIZATION



OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JACOB B. ROSE, Administrator of the)
Estate of)
MICHAEL STEIN, Deceased)

Appearances:

For Appellant : Saul S. Klein, Attorney at Law
For Respondent : W. M. Walsh, Assistant Franchise Tax
Commissioner; Mark Scholtz and
Hebard Smith, Associate Tax Counsels

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code (formerly Section 20 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in denying the claims of Jacob B. Rose, Administrator of the Estate of Michael Stein, Deceased, for refunds of tax in the amounts of \$10.80, \$122.09, \$80.64, **\$23.67**, \$132.43, **\$58.67**, \$112.49, \$69.71 for the years ended October **31, 1937, 1938**, 1939, 1940, **1941, 1942**, 1943, and **1944**, respectively, and in the amount of \$77.00 for the period November 1, 1944, to September 19, 1945.

Prior to 1935 the decedent was a resident of Baltimore, Maryland, where he had been in business for a number of years. In that year he came to California on account of his health, and from 1935 to 1945, the year of his death in Los Angeles, he spent nine or ten months of each year in this State, the weather here being much more satisfactory for him.

The decedent lived in a hotel room during the time spent in California, that time having been spent chiefly in the City of Los Angeles. His bank signature cards, for the most part, during the ten-year period gave California addresses at three hotels and one apartment house in Los Angeles and one hotel in Palm Springs, California. When he did give a Baltimore address for that purpose it was the address of the corporation of which he was president and not his daughter's home, which, Appellant argues, was his place of residence. The decedent left California at various times to go to Arizona, Florida, or Baltimore, checking out of his hotel room each time he left the State, but he often obtained the same room when he returned,

During the period in question the decedent kept nine different term and special savings accounts, full paid investment certificates, savings share accounts, and pass book accounts in Los Angeles banks. The largest balance in any of these accounts

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at one time was over \$30,000, but the balances in later years were kept at \$5,000 and under, due to the Federal deposit insurance limitation of \$5,000.

The decedent was president of a realty corporation in Baltimore which was actively managed by his son, the latter sending monthly reports to the decedent. He kept most of his belongings and keepsakes in Baltimore in a room maintained for him at the home of his daughter. He was a registered voter in Baltimore and filed his Federal and Maryland tax returns in that city. The decedent's will, life insurance policies, and securities gave Baltimore as his place of residence. He was a member of religious and fraternal organizations there, and practically all his charitable contributions were made to Baltimore organizations.

The position of the Commissioner that the decedent was a resident of California, rather than a resident of Maryland, during the period involved herein must, in our opinion, be sustained. Under Section 2(k) of the Personal Income Tax Act, as amended in 1937, an individual actually present in this State who is not here for a temporary or transitory purpose is a resident of California. An individual who spends in the aggregate more than nine months of the taxable year within the State or maintains a permanent place of abode here is presumed to be a resident. This presumption may be overcome by satisfactory evidence that the person is in the State for a temporary or transitory purpose.

Under Articles 2(k)-1 and 2 of the Commissioner's Regulations Relating to the Personal Income Tax Act, as amended in 1937, an individual may be a resident within the meaning of Section 2(k) of the Act although not domiciled in this State and, conversely, may be domiciled here without being a resident. The purpose of this definition is to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State and enjoying the benefit and protection of its laws and government, except persons who are here temporarily. The Regulations provide that one who comes to California for a definite purpose which in its nature may be promptly accomplished is properly to be regarded as here for a temporary or transitory purpose, but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, he becomes a resident, though it may be his intention at all times to return to his domicile when his purpose has been consummated.

The argument and authorities presented in the Appellant's brief indicate that his contention that the decedent was not a resident of California is based primarily on the assumption that domicile is the test for residence under Section 2(k) or that the terms "domicile" and "residence" are synonymous. The facts herein may very well establish that decedent was domiciled in Maryland during the period in question. As stated in the Commissioner's Regulations, however, domicile is not the test to be applied under that Section.

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We are of the opinion that these facts clearly indicate that the decedent was here for other than a temporary or transitory purpose within the meaning of Section 2(k) of the Act. Finding that extended stays in California were conducive to his health, the decedent spent nine or ten months here each year during approximately the last ten years of his lifetime. In addition to the time spent in California the decedent made trips to Arizona and Florida, and, therefore, spent comparatively little time in Baltimore, the city he claims as his residence.

The decedent is undoubtedly to be regarded as a resident of this State under Article 2(k)-2 of the Commissioner's Regulations. The appellant, although citing authorities relating to domicile, has not directly attacked that ruling as an unwarranted construction of the Act. It may be observed that the ruling is similar in many respects to Article 311 of Regulation 62, issued under the Federal Revenue Act of 1921, relating to the meaning of non-resident alien, and that the Federal ruling was judicially approved in Bowring v. Bowers, 24 Fed. 2d 918, certiorari denied 277 U. S. 608. The facts cited by the Appellant in support of his position that the decedent was a resident of Baltimore are, for the most part, far more pertinent to the determination of domicile than of residence and do not, we believe, warrant the rejection of the Commissioner's determination that the decedent was a resident of this State within the meaning of the Personal Income Tax Act.

It having been pointed out at the hearing of this matter that the decedent had paid an income tax to the State of Maryland for the years here in question, an opportunity was afforded the Appellant subsequently to submit to us evidence respecting the Maryland payments to the end that credit might be allowed for those payments against the California tax in the event we determined that the decedent was a resident of this State. The only evidence submitted to us in this connection is a letter from the Income Tax Division of the Comptroller of the Treasury of the State of Maryland setting forth the amount of income tax paid to that State by the decedent for each of the years 1937 to 1944, inclusive. A copy of the Maryland income tax return filed by the decedent for the year ended October 31, 1944, had previously been submitted in evidence, but copies of his California returns for the years 1937 to 1945 have not been filed with us and we are without any information concerning the amount of income, the amount of tax or any other data appearing thereon,

It is obvious, in view of this state of the record before us, that a credit cannot be allowed under Section 25 of the California Personal Income Tax Act for the Maryland payments. That Section does not authorize merely the crediting by a resident against his California tax of whatever amount of income tax was paid to another state, but rather sets up certain conditions for the allowance of the credit and provides a formula for computing it. No showing having been made as respects those conditions and

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there being no evidence before us for the application of the formula, i.e., evidence as to the amount of income taxable in Maryland and California and the amount of tax paid to this State for each of the years in question, we have no alternative other than to disallow any credit for the Maryland tax payments.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in denying the claims of Jacob B. Rose, Administrator of the Estate of Michael Stein, Deceased, for refunds of tax in the amounts of \$10.80, \$122.09, \$80.64, \$23.67, \$132.43, \$58.67, \$112.49, \$69.71 for the years ended October 31, 1937, 1938, 1939, 1940, 1941, 1942, 1943, and 1944, respectively, be and the same is hereby sustained.

-Done at Sacramento, California, this 17th day of November, 1948, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J. H. Quinn, Member
Geo. R. Reilly, Member
J. L. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary