

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the **Matter** of the Appeal)
of)
MAURICE **AMADO** and ROSE **AMADO**)

Appearances:

For Appellant: Emanuel **Rothman**, Attorney at Law
For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Assistant Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Maurice **Amado** and Rose **Amado** to proposed assessments of additional personal income tax in the amounts of \$1,878.97, \$3,792.00, \$4,391.18 and \$6,878.62 for the years 1948, 1949, 1950 and 1951, respectively. The appeal from the action of the Franchise Tax Board on Appellants' protest to a proposed assessment of additional tax in the amount of \$6,878.62 for the year 1951 was not filed within thirty days of the date on which notice of the Franchise Tax Board's action was mailed to Appellants as provided in Section 18593, and the action of the Franchise Tax Board, accordingly, as to that year, is final,

The sole question to be considered in this appeal is whether Appellants ~~were~~ residents of California during the period from May 1, 1948, to December 31, 1950, inclusive, within the meaning of Section 17013 of the Revenue and Taxation Code.

Prior to May 1, 1948, the Appellants, husband and wife, resided in New York, New York. During the ten years immediately preceding 1948 they lived in an apartment which they leased unfurnished on a year to year basis. They owned no real property in New York. Appellants had no club, lodge, or other social or fraternal affiliations there. Although there were no children of their marriage, Mrs. **Amado** had a son by a previous marriage who lived with his family in New Rochelle, New York. A sister of Mrs. **Amado** lived in Los Angeles and two nephews and two nieces of Mr. **Amado** also resided in California,

After 1939 Mr. Amado's business activities were confined to speculating in the stock market, He did not have his own office, but carried on his transactions at the office of his stock broker. Mr. Amado maintained a commercial bank account and a safe deposit box for securities and other financial papers in New York City.

Because of a nervous condition from which Mrs. Amado was suffering, it became necessary "to cast about for some climate that would be more agreeable to her." The Appellants gave consideration to California, Florida and other localities. One of Mr. Amado's nephews, an attorney in Los Angeles, on occasions of Appellants' prior visits to California had suggested the advisability of their coming to this State to live, and they decided to "test" California first. They allowed the lease on their New York apartment to expire and in May of 1948 they came to California, after storing their furniture and other personal belongings in a New York warehouse.

Upon Appellants' arrival in California they rented a furnished apartment in Beverly Hills which had been obtained for them in advance by the nephew, The rental was on a weekly basis. Mr. Amado opened a checking account for himself and another for his wife at a Beverly Hills bank, In October, 1948, they moved to another furnished apartment. Because of the possibility of returning to New York Appellants desired to rent the second apartment on a monthly basis but the owner required a year's lease. At Mr. Amado's request, however, they were given the right to sublet to a tenant acceptable to the lessor in the event of their leaving before the expiration of the lease, In August, 1949, Appellants notified the lessor that they expected to return to New York early in 1950 and that they could not take a lease for another year. With the owner's agreement the Amados continued to stay in the apartment under a month-to-month tenancy beginning October 1, 1949.

In January of 1949 Mr. Amado and his nephew went to New York, where arrangements were made for the forwarding of all correspondence relative to the business interests of Mr. Amado to the Los Angeles office of the nephew, who in turn was to refer it to Mr. Amado. On this trip a considerable amount of additional clothing was removed from storage and brought to California,

Mrs. Amado became restless in the spring of 1949 and went to New York where she visited her son, She then spent approximately one month at a rest home in Brookline, Massachusetts. Not finding relief there, she went to a rest home in San Francisco, After about two months there she returned to the apartment in Beverly Hills .

Because Mrs. Amado continued to be restless and became lonesome for her son and grandchildren, Mr. Amado concluded in the early part of 1950 that California was not "the place for" his

wife, He decided that they would return to New York in the spring of 1950 and spend the winter of that year in Florida, which would be more accessible to New York City. He told his advisors, friends and relatives about these intentions and gave notice to the family maid, However, the plan to return to New York was never carried out. As a last resort and in order to give California a final test as a place to which Mrs. Amado might-become adjusted, they purchased a house in Beverly Hills in July of 1950. All of their household furniture was shipped from New York for the purpose of furnishing the "trial abode" in a manner familiar to Mrs. Amado and helpful to her peace of mind,

Sometime between autumn of 1949 and the purchase of the home Mr. Amado arranged to have his stock transactions handled with the Los Angeles branch of a New York stock brokerage firm. The New York office of this firm submitted copies of the transactions to his accountant in New York and his nephew in Los Angeles. Checks received from the sale of securities were deposited in Appellants' Los Angeles checking account.

During the early part of 1951 Mr. Amado spent considerable time in New York in connection with his business affairs. Mrs. Amado's health had been improving markedly and in June, 1951, shortly after the husband's return from New York, both of the Appellants became satisfied that Mrs. Amado would do as well in California as elsewhere. Mr. Amado then gave notice to his New York connections of his decision to become a California resident, The Income Tax Division of the New York Department of Taxation was notified of the change of residence as of the end of June, 1951, and Mr. Amado's New York accountant was given instructions to prepare the income tax return of that state for the first six months of 1951. Subsequently Appellants filed a timely resident return under the California Personal Income Tax Law for the last six months of the year,

From May 1, 1948, to December, 1951, Appellants spent the following periods in California and in New York:

<u>Year</u>	<u>Mr. Amado</u>		<u>Mrs. Amado</u>	
	<u>Months in California</u>	<u>Months in New York</u>	<u>Months in California</u>	<u>Months-in New York</u>
1948				
1949	11	1	11	Less than 11
1950	12	0	12	0
1951	9½	2½	12	0

During the years with which we are here concerned Mr. Amado's entire income was from intangibles. The Appellants were registered to vote in New York, Mr. Amado's legal counsel was a New York

attorney and his records and accounts were kept by an accountant in that state. He maintained his safe deposit box in New York City and most of his securities were kept there.

This appeal presents the situation of a husband and wife who had remained in California for three years before making a declared decision to become California residents, who meanwhile had retained no living quarters of any kind in their state of domicile! and who, while here, had an intention to return at some future time to the domiciliary state. During the latter part of 1949 and early 1950 they had in mind a return to New York in the spring of 1950. This plan was never carried out, and for the greater part of the three-year period the time for return remained indefinite. Although their bona fides are not at all in question, it appears that at all times the length of their stay in California was contingent upon the state of Mrs. Amado's health.

Section 17013 of the Revenue and Taxation Code provides in part:

"17013. 'Resident' includes:

- (a) Every individual who is in this State for other than a temporary or transitory purpose ..."

The "purpose", whether transitory or not, within the meaning of the statute, is not to be determined alone by the specific, conscious intention to return to the state of domicile in the face of the objective fact of remaining in California. The facts of this case show that other reasons may add up to a more compelling, over-all purpose for continuing on at the new habitation. This is recognized in those regulations of the Respondent which are devoted to explaining the meaning of "temporary or transitory purpose," since they provide that consideration is to be given to the facts and circumstances of the particular case. Under the regulations (Sections 17013-17015(b), Title 18, California Administrative Code) a person in this State for "a brief rest or vacation" is here for a temporary purpose and is not to be regarded as a resident. The fact that Appellants gave up their apartment in New York and had their furniture stored definitely indicates that they did not arrive in this State for a brief rest or vacation,

On the other hand, the regulation goes on to provide that if an individual is in California "to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate ... he is in the State for other than temporary or transitory purposes ..." The factual situation falls squarely within the language of the rule. Mrs. Amado was here to improve her health. The Appellants came to California to give this State a thorough test to determine the effect of its climate. The indefiniteness of their stay was caused by the character of her illness and is shown by the fact that after

being here two years, in 1950 they cancelled earlier plans to leave in order to further that purpose, When **Mrs. Amado's** physical and nervous condition ultimately became greatly improved, the Appellants did not return to New York; rather the **benefits afforded** to Mrs. **Amado** by living in California led to the final decision to remain permanently here.

The Appellants have submitted affidavits of several friends, relatives and business acquaintances which show that during a part of 1949 and a part of 1950 the Appellants had an intention to return to New York in the spring of 1950. Although such an intention may be an important factor in determining domicile, it is not controlling in establishing the place of residence for income tax purposes. This is particularly true in a case of this sort where no abode was maintained outside of California,

In the Appeal of Leslie Charteris (Opinion on rehearing) dated March 28 1949, we ruled that if the purpose for which a person is in this **State** is of such a nature that an extended stay may be necessary, he becomes a resident even though he may have the intention at all times to return to his domicile when his purpose has been consummated. In several other prior appeals we have noted **the effect** of the decision in Bowring v. Bowers, 24 Fed. 2d 918, cert. den, 277 U.S. 608, that a floating intention to return to the place of domicile is not enough to overcome the fact of actual residence in some other place, The Appellants have not questioned the validity of the Respondent's regulations which deal with residence and which are similar in many respects to Article 311 of Regulation 62, promulgated under the Federal Revenue Act of 1921, relative to the meaning of nonresident alien, which received judicial approval in the Bowring decision.

The Appellants contend that the fact that they continued to be registered for voting in New York State and to pay income taxes to that state show, among other things, that they were not residents of California. Under Regulation 17013-17015(f) of Title 18, California Administrative Code, the fact that an individual votes in, or files income tax returns as a resident of, some other state is relevant in determining his domicile, but is otherwise of little value in determining residence. (See also Appeal of I. C. Copley, and Appeal of Jacob B. Rose, Administrator, both decided November 17, 1948.)

Appellants have cited the Appeal of W. S. Charnley decided by this Board December 2, 1942, in support of their position that they were not residents of California. That appeal involved an application of Section 2(k) of the 1935 Personal Income Tax Act and the result reached clearly turned on the question of domicile. Section 2(k) then defined a resident as "every natural person domiciled in the State of California and every other natural person who maintains a permanent **place** of abode within this State or spends in the **aggregate** more than six months of the taxable year within this State ***" Since that time the definition of a resident has been amended to the form as set forth in Section 17013, supra, based on presence in this State for other than a

temporary or transitory purpose, and inasmuch as domicile is not the same as residence under Section 17013, the cited opinion is not applicable in the determination of this appeal.

Section 17015 of the Revenue and Taxation Code as applicable to the years 1948, 1949 and 1950 provided as follows:

"Every individual who spends in the aggregate more than nine months of the taxable year within this State or maintains a permanent place of abode within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose."

The presumption under this statutory provision is clearly applicable to the years 1949 and 1950. The substance of the affidavits and other evidence submitted by Appellants to overcome the presumption is not sufficient to establish that the Appellants were here for a temporary or transitory purpose. Such little time as was spent outside of this State by Mr. Amado was in connection with his financial investments in New York and in visiting old acquaintances. After Mrs. Amado first arrived in California in 1948 she spent only a short one-month period in 1949 visiting her son in New Rochelle and staying at a rest home in Massachusetts. It is our opinion that Appellants have failed to overcome the effect of the presumption for the years 1949 and 1950 and that the evidence clearly establishes without the operation of the presumption, that the Appellants became residents of California during 1948.

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Maurice Amado and Rose Amado to the proposed assessments of additional personal income tax in the amounts of \$1,878.97, \$3,792.00 and \$4,391.18 for the years 1948, 1949 and 1950, respectively, be and the same

is hereby sustained; and that the appeal of said Maurice Amado and Rose Amado from the action of the Franchise Tax Board on their protest to the proposed assessment of additional personal income tax in the amount of \$6,878.62 for the year 1951 be and the same is hereby dismissed,

Done at Sacramento, California, this 20th day of April, 1955, by the State Board of Equalization.

<u>J. H. Quinn</u>	Chairman
<u>Paul R. Leake</u>	Member
<u>Robert E. McDavid</u>	Member
<u>George R. Reilly</u>	Member
<u>Robert C. Kirkwood</u>	Member

ATTEST: Dizwell L. Pierce, Secretary