59-SBE-014

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
TYRUS R. COBB)

Appearances:

For Appellant: George H. Koster, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel; Crawford H, Thomas, Associate Tax Counsel

OPINION

This appeal is made pursuant to Section 18646 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the petition of Tyrus R. Cobb for reassessment of jeopardy assessments of additional personal income tax and penalties in the following amounts for the years indicated:

Year	Tax	Penalty
1949	$ 3,457.15	$ 864.29
1950	4,206.34	1,051.59
1951	3,608.64	902.16
1952	4,886.29	1,221.57
1953	3,925.67	981.42
1954	3,438.65	859.66
1955	4,443.80	1,110.95
1956	3,996.83	399.68
1957	1,700.04	----
	$33,663.41	$7,391.32

There are two issues involved herein: (1) whether Appellant was a resident of California during the period involved, and (2) whether the penalties were properly assessed,

Appellant was born in Georgia, resided in Michigan during his baseball career, and became a resident of Atherton, Menlo Park, California, after his retirement from baseball. In 1935 he purchased a home in Atherton. He admits that he was a resident of this State through 1939. In that year he purchased residential property in Glenbrook, Nevada, transferred his bank account and safe deposit box from San Francisco to Reno, registered his automobile in Nevada and obtained a Nevada driver's license. He changed his resident memberships in San

Francisco clubs to nonresident memberships. He commenced filing Federal income tax returns in Nevada although the returns were prepared by a Palo Alto accountant. He registered to vote in Nevada in 1950 but actually voted there in person only in 1954 and by absentee ballot in 1947 and 1956. Although mail was addressed to him at Glenbrook as well as at Atherton, he had no mail box or postoffice box in Nevada. He did have a postoffice box in Atherton.

Appellant stated that he changed his residence to Nevada because he felt that the climate would help provide relief for a sinus infection and because he felt that living in a thinly populated area would provide an atmosphere in which he could best work out his personal problems. (Appellant and his first wife, Cecilia, separated prior to 1939 and were divorced in 1947.) Appellant stated that while the California income tax was not a predominant reason for the change, it was considered.

Throughout the period in question Appellant maintained the Atherton property he had purchased in 1935. It consisted of a main house, with seventeen rooms, and a guest house. A fire insurance policy insured the house for $59,750. Personal property located at the Atherton house, including Appellant's most prized possessions, such as his library and baseball trophies, was valued at $70,346 under the personal property insurance policy. Medical facilities required for a heart condition suffered by Appellant were conveniently located in and around Atherton. A property settlement agreement entered into by Appellant and his first wife provided:

> "The title to the dwelling house and contents of the property located at Atherton, California, shall remain in joint tenancy, with the right, however, of the Husband to occupy said premises at any and all times."

Appellant did not have the right to dispose of this property until 1957 when Cecilia agreed to release her joint tenancy interest.

The Nevada property was also maintained throughout the period involved herein. It consisted of a house containing four bedrooms, three baths, a living room and a kitchen. A fire insurance policy insured the house for $15,000. Personal property located at the house was insured for $7,275. There were no medical facilities nearby and the altitude at Glenbrook was such that Appellant could not stay there for extended periods. At times during the winter months the highway used to reach the Nevada property was closed by snow. When the highway was open the road on the property, between the

gate and the house, sometimes remained blocked,

Although Appellant was retired during the period involved, he spent some time in Idaho in connection with a business there which he and his son owned, He also made a number of trips to Georgia and other states during each of the years involved herein. In 1951 he was employed by Metro-Goldwyn-Mayer Pictures at Culver City, California in connection with a picture it was making, He completed a personnel record form for that company on which he gave his address as "Menlo Park, California," and to the question "Are you a resident of California?" he replied "yes."

Appellant did not file California personal income tax returns after 1939. The Franchise Tax Board assessed Appellant as a resident for the years 1940-1948 but the proceedings were terminated in 1950. The Franchise Tax Board states that the proposed assessments were withdrawn in reliance upon certain information furnished by Appellant. It quotes from a brief filed at that time by Appellant which stated "On the average he has spent approximately three to four months in California each year, and on several occasions has not been in the state for more than thirty days during any one year." At a subsequent date the Franchise Tax Board conducted an investigation and secured information which led it to believe Appellant was a resident of California. The present assessments were issued in 1957.

The Franchise Tax Board has presented voluminous charts based on the information gathered in the course of its investigations. These charts set forth the following amounts of time as spent in California and Nevada:

Year	California	Nevada
1949	115 days	3 days
1950	216	3
1951	194	7
1952	199	11
1953	182	49
1954	112	9
1955	166	51
1956	219	32

The balance of the time is listed as "other" or "unknown". In the construction of its time charts the Franchise Tax Board relied on such things as dairy deliveries, electricity and gas charges, newspaper deliveries, long distance telephone calls placed from Appellant's houses (there was a phone at Atherton throughout the years; one was installed at Glenbrook in 1953) and statements made by Appellant.

In addition to the above-mentioned sources of information, the Franchise Tax Board calls attention to numerous newspaper and magazine articles which referred to Appellant as living in California or as having his home here. Letters from writers of some of the articles quoted by the Franchise Tax Board have been submitted by Appellant and state that the articles referred to Appellant as the "Atherton squire" only to add local color to their stories. In 1957 Appellant began making plans to move back to Georgia and he was quoted in the March 3, 1957, San Francisco Examiner as saying "'I'll hate to leave.. No one could live in California, even for a few months, and not love it.'" Again, in an article in the June 14, 1958, issue of the "Saturday Evening Post", he is quoted as saying "'I didn't want to leave California even now ...'"

The Franchise Tax Board also points out that Appellant was twice, in 1950 and 1951, found hunting with a California resident hunting license. Appellant stated that on one of these occasions there was a written finding by a State agency that he was a nonresident, He has not, however, submitted a copy of any such finding. It does appear that he posted bail on one occasion and later forfeited it, The difficulty apparently arose because he was using an automobile with Nevada license plates on the hunting trips,

The Franchise Tax Board contends that Appellant has at all times been domiciled in California and was not out of the State for other than temporary or transitory purposes during the years involved herein. Alternatively, it argues that even if he was domiciled in Nevada, he was nevertheless present in California for other than temporary or transitory purposes during these years.

Appellant alleges that the Franchise Tax Board compilations of time spent are erroneous in several respects and argues that the factors relied on by the Franchise Tax Board, such as milk and newspaper deliveries at the Atherton residence do not constitute a valid basis for computing time spent in California. He made no attempt to estimate the amounts of time spent in California and Nevada. To refute the evidence relied on by the Franchise Tax Board, Appellant submitted an affidavit in which he stated that he consciously "avoided spending as much as one-half year in any one year in California3 He also submitted affidavits and letters which stated that the affiants and writers thought or knew Appellant was a resident of Nevada. Appellant did not testify at the hearing. Appellant's basic theory seems to be that if he was not in the State for at least half of the year he was not a resident.

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The law and regulations applicable to this issue are as follows:

"'Resident' includes:

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

(b) Every individual domiciled in this State who is outside the State for a temporary or transitory purpose.

Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State." (Section 17014 of the Revenue and Taxation Code, formerly Section 17013.)

"... 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 enjoying the benefit and protection of its laws and government, except individuals who are here temporarily ..." (Regulation 17013-17015(a), Title 18, California Administrative Code.)

"***

The underlying theory . . . is that the state with which a person has the closest connection during the taxable year is the state of his residence ..." (Regulation 17013-17015(b), Title 18, California Administrative Code."

It is obvious from a reading of the above provisions that there is no simple measurement of time such as six months, which can be used to determine whether an individual is a resident. Nor will a formalism such as a change in registration, or a mere statement such as that made by Appellant, that he intended to be a resident of another state, settle the issue. The crucial question is always whether the individual was in the State for other than a temporary or transitory purpose. And whether a person is here for other than a temporary or transitory purpose must be determined by examining

all of the facts.

Having carefully studied all of the material presented in this appeal, we conclude that Appellant was a resident during the entire period involved herein. It appears that Appellant spent substantially more time in California, "enjoying the benefit and protection of its law and government", than in Nevada or any other state, We feel that if, as Appellant alleged in his affidavit, he consciously attempted to spend less than six months in California he should have been able to produce evidence of the time spent in California and Nevada - something more than the general statement in his affidavit, Mr. Cobb has never attempted to make such a computation. Moreover, the following facts indicate that California was the State with which he had the closest connection during the period: Appellant's Atherton house was far more substantial then the Glenbrook house; he kept most of his personal property at Atherton, including his most prized possessions; he at all times had, and extensively used, his telephone service at Atherton, while he did not even have a telephone at Glenbrook until 1953; he at all times had a postoffice box in Atherton and none in Glenbrook; he could not spend extended periods in Glenbrook due to the effect of the altitude on his heart; medical facilities required by him were conveniently located near Atherton but not in the vicinity of Glenbrook; he used California resident hunting licenses; and he in fact stated on an employment form that he was a resident of California

Appellant in his brief argued that the Franchise Tax Board should be estopped to collect the tax because of its prior determination that he was not a resident during the period 1940-1948. It is obvious, however, that the situation during the years herein involved was substantially different from the situation, as represented by Appellant, in the earlier years.

The final issue involves the propriety of the penalties levied by the Franchise Tax Board under Section 18681 of the Revenue and Taxation Code. That Section provided:

> "If any taxpayer fails to make and file a return required by this part on or before the due date of the return or the due date as extended by the Franchise Tax Board, then, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, 5 percent of the tax shall be added to the tax for each 30 days or fraction thereof elapsing between the due date of the return and the date on which filed, but the total penalty

> shall not exceed 25 percent of the tax. The penalty so added to the tax shall be due and payable upon notice and demand from the Franchise Tax Board."

Reasonable cause, such as to excuse a taxpayer's failure to file on time, has been construed under a similar Federal statute to mean such cause as would "prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances" (Charles E. Pearsall & Son, 29 B.T.A. 747. See, also, Sanders v. Commissioner, 225 Fed. 2d 629, cert. den. 350 U.S. 967; and Girard Investment Co. v. Commissioner, 122 Fed, 2d 843).

Although Appellant has devoted little time to this point, his contention seems to be that he had reasonable cause for not filing returns because of the Franchise Tax Board's prior determination and because his then counsel informed him that "The result should apply in all future years unless, of course, your circumstances radically change." As we have already noted, Appellant's situation did change substantially from that described by him as a basis for the prior determination. Once he started spending far more time in this State than in Nevada he should have realized that he could no longer rely on the advice previously given to him. We note also, that Regulation 17013-17015(f), Title 18 California Administrative Code, provides that as respects any taxable year, "if any question as to his resident status exists, he should file a return, in order to avoid the possibility of the imposition of penalties, for that year even though he believes he was a nonresident and even though he received no income from sources within this State." We conclude that the penalties were properly imposed.

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 petition of Tyrus R. Cobb for reassessment of jeopardy assessments of personal

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Income tax and penalties in the following amounts for the years indicated, be and the same is hereby, sustained:

Year	Tax	Penalty
1949	$ 3,457.15	$ '864.29
1950	4,206.34	1,051.59
1951	3,608.64	902.16
1952	4,886.29	1,221.57
1953	3,925.67	981.42
1954	3,438.65	859.66
1955	4,443.80	1,110.95
1956	3,996.83	399.68
1957	1,700.04	----
Total	$33,663.41	$7,391.32

Done at Sacramento, California, this 26th day of March, 1959, by the State Board of Equalization.

Paul R. Leake, Chairman

John W. Lynch, Member

Richard Mevins, Member

George R. Reilly, Member

____________________, Member

ATTEST: Dixwell L. Pierce, Secretary