BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LOUIS AND BETZI AKERSTROM)

Appearances:

For Appellants: J. Donald Pettus, Attorney at Law

For Respondent: Crawford H. Thomas, Associate Tax Counsel

OPINION

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Louis and Betzi Akerstrom to proposed assessments of additional personal income tax against Louis Akerstrom in the amounts of $4,080.00 and $4,165.33 for the years 1948 and 1949, respectively, and against Appellants jointly in the amounts of $1,533.34, $1,410.53, $959.80, $1,163.40, $1,179.64 and $1,464.76 for the years 1950 through 1955, respectively. The foregoing amounts include penalties of 25 percent for failure to file timely returns and 25 percent for failure to file returns after notice and demand.

The Franchise Tax Board has conceded that Appellant Louis Akerstrom was a nonresident of California for the period from January 1, 1948, through June 30, 1949, and that the 25 percent penalties for failure to file returns after notice and demand by the Franchise Tax Board were not properly imposed. The primary issue presented is whether the Appellants were California residents from July 1, 1949, through 1955.

Louis Akerstrom, hereinafter referred to as Appellant, was born in New York City, New York, in 1896. He became a resident of Chicago, Illinois, in 1928. In 1932, Appellant and an associate purchased the controlling interest in Turner Resilient Floors, Inc. (hereinafter called Turner), a floor covering contracting company, and moved its principal office to Chicago where it has since remained. Turner has had a branch office in San Francisco, California, since 1937. Appellant married his present wife, Appellant Betzi Akerstrom, in March, 1947. She had been living in San Francisco, and working for Trans World Airlines. Appellant's associate died in August, 1947, and Appellant

acquired all of the stock of Turner, becoming President and Treasurer of that firm,

Turner is engaged in business as a flooring contractor and its major activity is the installation and maintenance of floors for Sears, Roebuck and Co. and other large chain store operators, For the years 1948 through 1955, the Sears business accounted for 90 percent of the gross profit of Turner. Appellant personally handles the Sears' account, which is considered the life-line of his company. Basic agreements between Sears and Turner originate in Chicago with the details being handled by the five territorial offices of Sears located at Chicago., Philadelphia, Atlanta, Dallas and Los Angeles, The Sears' account requires the constant attention of Appellant, and necessitates business trips to every part of the United States. The growth of Sears has been especially marked in California and Appellant spends much of his time in this State working on the Sears' account.

The San Francisco office of Turner has nothing to do with the Sears or other chain store accounts, Its operation has been unprofitable and Appellant has contemplated liquidating it. Appellant's salary was divided equally between the Chicago and the San Francisco offices for Turner's accounting purposes. A certified public accountant for Turner stated that the distribution of salary bears no relationship to the amount of time spent by Appellant in San Francisco, but is an attempt on the part of the auditors to distribute salaries based upon the amount of work required by the Appellant for the organization in each city.

In the fall of 1947, Appellants leased a partly furnished four room apartment at 2000 Lincoln Park West, Chicago, Illinois, at a rental of $230 per month. Subsequently, Appellants have continuously leased one apartment or another in the same building. The Chicago apartments were never sublet. At the time of their marriage, Mrs. Akerstrom had an apartment in San Francisco and the Appellants retained this apartment until October, 1949. After this apartment was given up, Appellants kept rented quarters at the Stanford Court Apartments in San Francisco until some time in 1953. Appellants purchased a lot and an unfinished home in Del Monte Forest, Monterey County, California, late in 1947. This Del Monte house was completed in 1950, and has never been sublet. Appellants state that they purchased the Del Monte house as a business investment and that they contemplated winter vacations and possibly retirement there.

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Since 1951, Appellants have leased premises at Oconomowoc, Wisconsin, for three or four month vacations during the summer. Appellant's wife and daughter occupied the Wisconsin premises in the summer months, He spent his weekends there but was in Chicago for most of these summer periods. In 1954, Appellant acquired unimproved real property in Glenview, Illinois, and made plans to build a home there, He subsequently sold that property, however, and acquired other land in Lake Forest, Illinois. Construction of a home there commenced in 1959.

Appellant does not contend that he is an active clubman. He is a member of three clubs in Illinois, and holds a nonresident membership in a club in Los Angeles, California. Appellants are registered voters in Illinois, having utilized absentee ballots, and they file their Federal income tax returns in Chicago. Appellants maintain banking connections in Chicago and have an account in a San. Francisco bank. Chargeaccounts have been maintained with several San-Francisco and Los Angeles stores. Statements of all charge accounts have always been billed to Appellants in Chicago and paid through their Chicago account. Company cars are used by Appellants in both California and Illinois. Appellants' daughter was born in Monterey in 1950 and she was enrolled in Kindergarten in a public school there in 1955.

During the period from July 1, 1949, through 1955, with the exception of 1950, Appellant spent some six to seven months each year in California, Of the time spent each year in California, roughly three months were spent at the Del Monte home; two months were spent in San Francisco or its vicinity; and one month was spent in the Los Angeles area, The time spent in California centers around the winter months. During the same period, Appellant spent approximately three months each year in Illinois. In 1950, the year in which Appellants' daughter was born, he spent over nine months in California, His wife's confinement in California was chosen to avoid the extreme summer heat in Chicago. Betzi Akerstrom traveled with her husband on many of his trips but she spent more time in California than Appellant and spent her summers at the cottage in Wisconsin.

It is on the basis of these facts that we are required to determine whether Appellants were residents of California for the period from July 1, 1949, through 1955. Section 17014 (formerly Section 17013) of the Revenue and Taxation Code provides that "resident" includes every individual who i's in this State for other than a temporary or transitory purpose.

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Regulation 17013-17015(b), Title 18, California Administrative Code, provides:

> "Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case, It can be stated generally, however, that if an individual is simply passing through this State on his way to another state or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here.
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> "If, however, an individual . . . is here for business purposes which will require a long or indefinite period to accomplish ..., he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident ...
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> "The underlying theory of Sections 17013-17015 is that the state with which a person has the closest connection during the taxable year is the state of his residence . . . ."

Considering the evidence in its entirety, it does not appear that Appellants were in this State solely for temporary or transitory purposes. Appellant spent from six to seven months each year in California, with the exception of 1950 when he spent over nine months here, while spending approximately three months each year in Illinois. The evidence shows that Betzi Akerstrom spent more time in California than Appellant, As she spent her summers in Wisconsin, it is apparent that she could have spent but little time in Illinois, It is true that the amount of time spent in California is not the sole test for determining the matter of residence. However, the fact that

Appellant spent twice as much time in this State as he did in Illinois during the period from July 1, 1949, through 1955 assumes added significance in view of the fact that he maintained a substantial home in California while having merely an apartment in Illinois, and that he had business interests in, and personally engaged in business in California as well as in Illinois during those years. We conclude that Appellants' closest connections were with this State, and consequently, that the Franchise Tax Board was justified in determining that they were residents during the period from July 1, 1949, through 1955.

The only question remaining is what portion of the salary from Turner during the period from January 1, 1948, through June 30, 1949, was income derived from California sources, and thus taxable even though the Appellants were nonresidents,

Section 17954 (formerly Section 17214) of the Revenue and Taxation Code provides in regard to a nonresident that "Gross income from sources within and without this State shall be allocated and apportioned under rules and regulations prescribed by the Franchise Tax Board." Paragraph (4) of Regulation 17211-17214(e), Title 18, California Administrative Code, provides:

> "If nonresident employees (including officers of corporations, but excluding employees, mentioned in (1) above) are employed continuously in this State for a definite portion of any taxable year, the gross income of the employees from sources within this State includes the total compensation for the period employed in this State.
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> "If nonresident employees are employed in this State at intervals throughout the year, as would be the case if employed in operating trains, boats, planes, motor buses, trucks, etc., between this State and other States and foreign countries, and are paid on a daily, weekly or monthly basis, the gross income from sources within this State includes that portion of the total compensation for personal services which the total number of working days employed within the State bears to the total number of

> working days both within and without the State. If the employees are paid on a mileage basis, the gross income from sources within this State includes that portion of the total compensation for personal services which the number of miles traversed in California bears to the total number of miles traversed within and without the State. If the employees are paid on some other basis, the total compensation for personal services must be apportioned between this State and other states and foreign countries in such a manner as to allocate to California that portion of the total compensation which is reasonably attributable to personal services performed in this State."

Appellant proposes that "income derived from California sources" be determined by apportioning to this State that percentage of the salary from Turner which "time spent by Mr. Akerstrom in California on Turner business bears to total number of days in a year." Since the latter part of the formula includes days not spent in business pursuits it fails to make the reasonable allocation required by the regulation. We cannot determine with any degree of certainty the number of days spent by Appellant on Turner business within and without California during the year 1948 and the first half of 1949. We find, however, that Appellant was in California for a total of 94 days in 1948 and a total of 66 days in the first half of 1949. Appellant has testified that he spent substantially all of his time working for Turner, with very little vacation. We therefore believe that in this case a fair approximation may be obtained on the basis of total time. Upon this basis the salary should be assigned to California for 1948 according to the proportion that 94 bears to 365 and, for the first half of 1949, according to the proportion that 66 bears to 183.

Appellants have not specifically contested the imposition of penalties for failure to file timely returns. In any event, since they derived a substantial portion of their income from sources in California through the activities here of Mr. Akerstrom they should have known that returns were due. We conclude, accordingly, that these penalties were properly imposed.

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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 Louis and Betzi Akerstrom to proposed assessments of additional personal income tax against Louis Akerstrom in the amounts of $4,080.00 and $4,165.33 for the years 1948 and 1949, respectively, and against Louis and Betzi Akerstrom in the amounts of $1,533.34, $1,410.53, $959.80, $1,163.40, $1,179.64 and $1,464.76 for the years 1950 through 1955, respectively, be and the same is hereby modified as follows: (1) The 25 percent penalties for failure to file returns after notice and demand by the Franchise Tax Board are to be withdrawn and (2) for the period from January 1, 1948, through June 30, 1949, Appellants are to be taxed only on that portion of the salary from Turner Resilient Floors, Inc., which constitutes income derived from California sources based on the formula set forth in the Opinion of the Board, with a corresponding reduction in the penalties imposed for failure to file timely returns. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 17th day of May, 1960, by the State Board of Equalization.

John W. Lynch, Chairman

George R. Reilly, Member

Richard Nevins, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary