

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of
C. I. SCHERMER

Appearances:

For Appellant: C. I. Schermer, in pro. per.

For Respondent: Wilbur F. Lavelle, Assistant Counsel

O P I N I O N

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 C. I. Schermer to proposed assessments of additional personal income tax in the amounts of \$738.30, \$1,262.87 and \$695.71 for the years 1952, 1953 and 1954, respectively.

Appellant was originally a resident of Ohio and is now a resident of California. Respondent contends that he became a resident of California in February of 1952. Appellant contends that he did not become a California resident until December 1, 1954.

Appellant engaged-in the practice of law in Youngstown, Ohio, for 30 years. He and his law partner also developed two separate additional businesses in Ohio, a finance company and a collection service,

Appellant first visited California in 1941. In 1946 he made an investment with other persons in some commercial realty in California. He later made other investments in California realty and businesses. For the years 1946 through November of 1954, Appellant filed nonresident returns in California, reporting his income from California sources.

Appellant is not married and is the sole support of an unmarried sister. Until February, 1952, they resided together in a rented apartment in-Youngstown, Ohio. In that month Appellant brought his sister to California to improve her health. He rented an apartment in this State and remained with his sister for a time before returning to Ohio. He opened a California bank account for himself while he was here. On June 18, 1952, Appellant filed a credit application with a men's retail clothing store in California, giving the address of the California apartment as his residence and stating that he had been

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living in California for five months. At some time after his sister moved to California, Appellant rented an apartment in Ohio smaller than the one he had previously lived in there.

Appellant claimed preferential tax status as a "head of a household" in his California and federal income tax returns. In connection therewith, on his federal returns for 1952 and 1953 he answered "yes" to the question whether for the entire year he had occupied a home as the principal residence of himself and a person for whom he was entitled to an exemption.

During the years in question, Appellant was a member of B'nai Brith, the Zionist organization and Rodef Sholem Temple, all of Youngstown, Ohio. He paid to Ohio approximately \$140 a year in intangible property taxes of a type which were payable only by Ohio residents. He filed his federal income tax returns in Ohio. He was registered to vote in Ohio and voted there in person in November, 1953. In March, 1944, he renewed his Ohio automobile operator's license.

Appellant and his partner sold their Ohio law practice in June, 1954, for \$25,000. Prior thereto they sold some of the branch offices of their Ohio finance company until they had only two left, at Akron and Youngstown. They sold the Akron office in 1954 and the Youngstown office in 1955. They sold the collection service in 1954. In 1955, Appellant also sold a lot which he had previously bought in Youngstown with the thought of constructing a residence. On December 1, 1954, Appellant vacated his apartment in Ohio.

In the course of Respondent's investigation concerning Appellant's place of residence, Appellant supplied a schedule of his time in California which he based upon cancelled checks cashed on his Ohio bank account. In his computation, he omitted May and June of 1954 and the time from April 15, 1953, to June 1, 1953. Respondent made adjustments for these omissions, resulting in a schedule showing that Appellant was in California approximately 5 months in each of the years involved.

Respondent asked Appellant for cancelled checks drawn on his California account, but Appellant stated that these had been destroyed. Respondent then secured the bank ledgers and computed Appellant's time on the basis of whether more checks were drawn on his Ohio account or his California account in a given month. This approach showed that Appellant was in California for 7 months in 1952 and 8 months in 1953. No computation was made for 1954 since the bank records on the California account were not available for the last 4 months of that year.

At the hearing of this matter, Appellant stated that at all times he carried check books for banks in both California and

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Ohio and that the bank against which he wrote a particular check was determined by the balance in each account rather than by where he happened to be. He stated that he was very active in his Ohio law practice, that he visited his sister in California twice a year during the period involved and was in California only two or three months of each year. With respect to his credit application at the California clothing store, Appellant explained that the credit manager preferred that he give a California address. Appellant also stated that he claimed a "head of a household" status in his returns and answered the questions on his federal returns accordingly because his accountant advised him that it was not essential that he reside in the same building with his dependent in order to justify the claim,

Section 17013 (now 17014) of the Revenue and Taxation Code defines **resident** as including "every individual who is in this State for other than a temporary or transitory purpose.** The amount of time spent in California, obviously, is an important consideration in determining whether a person is here for a temporary purpose.

Appellant's testimony as to the time he spent in California was inconsistent with the original estimate that he gave to Respondent and also with the statement that he gave in his credit application at a California store. He has given an explanation indicating that a computation of time based on the location of the most active bank account is unreliable, but has offered nothing of substance upon which an appropriate estimate can be made. It is reasonable to expect that Appellant, as an attorney, would maintain records of his time as a basis for charging clients, yet no such records were presented. He could have also introduced testimony or affidavits of his business associates and of his sister concerning the time that he spent in each state, but he did not do so.

The undisputed facts in this matter are readily susceptible to a conclusion that Appellant became a California resident in 1952 and returned to Ohio only periodically to wind up his affairs there. Appellant, who is in a position to know and to establish the facts, must carry the burden of proving his case. Upon the record before us we must uphold the finding of Respondent that Appellant was a resident.

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,

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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 C. I. **Schermer** to proposed assessments of additional personal income tax in the amounts of \$738.30, \$~~1,262.87~~ and \$~~695.71~~ for the years 1952, 1953 and 1954, respectively, be and the same is hereby sustained.

Done at Sacramento, California this 6th day of November, 1961, by the State Board of Equalization.

John W. Lynch, Chairman

Paul R. Leake, Member

Geo. R. Reilly, Member

 , Member

 , Member

ATTEST: Dixwell L. Pierce , Secretary