



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOSEPH AND REBECCA PESKIN)

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OPINION ON PETITION FOR REHEARING

Appellants: On July 18, 1961, we reversed the action of the Franchise Tax Board in denying the Appellants' protests to proposed assessments of additional personal income tax and penalties in the amounts of \$4,260.64, \$9,994.95, \$15,755.52, \$15,645.00, \$28,507.50 and \$7,507.50 for the years 1948 to 1953, inclusive. A timely petition for rehearing has been submitted by the Franchise Tax Board pursuant to section 18596 of the Revenue and Taxation Code.

The primary issue involved in the appeal was whether Appellants were residents of California within the meaning of section 17013 (now 17014) of the Revenue and Taxation Code. We found that Appellants were not residents of this State during any of the years under review.

Petitioner argues that we should have found that Mr. Peskin spent more time in California than Petitioner's evidence demonstrated. For purposes of our decision, we accepted Petitioner's estimates of the time which Peskin spent in California. These estimates were based upon public records, gasoline credit card charges, doctor's records, health club records, restaurant charges, credit applications, bank records and airline records. Petitioner states that these estimates represented only the number of days upon which it found documentary evidence that Peskin was in California and that he must have been here on a great number of other days when he left no such evidence or Petitioner was unsuccessful in uncovering it.

The estimates were not so conservative as Petitioner implies. Short periods when no evidence was found were treated by Petitioner as California time and in a number of instances the estimates were based upon evidence which Petitioner itself stated did not positively place Peskin in this State. Our impression was and is, however, that the investigation was thorough and the fact that much evidence was found in certain periods and none at all for other periods of many days is a strong indication that Peskin was not here in those latter periods. We are not persuaded that he was here any longer than we have already found to be the case.

Appeal of Joseph and Rebecca Peskin

It is alleged that our opinion was erroneous as a matter of law because it held that constant presence for long or indefinite periods is required to make a person a resident of **California**. This is an unjustified construction of our opinion. The question of an **individual's** purpose in coming to California is to be decided upon all of the evidence in the record, The pattern of frequent short stays in this case was merely one of the many factors that influenced us in reaching our decision that Peskin was here for only a temporary or transitory purpose.

A further claim is made that we ignored the rule that the burden of proof is on the taxpayer. The burden of proof question, however, only becomes important when there is a lack of reliable evidence. No such deficiency existed here. The fact that much of the evidence was supplied by Petitioner rather than by Appellants is not controlling. As a whole, the evidence showed that during the period in question Appellants retained their closest connections with Illinois and that their presence in California was for temporary or transitory purposes.

We have carefully reviewed all of Petitioner's arguments and are of the opinion that no material error has been committed. Petitioner has not offered any evidence which has not already been examined by us. Since the determination of residence is almost entirely a question of fact, our view of the evidence will inevitably differ from the view of the party whose position is not sustained. Such differences are to be expected and do not constitute grounds for a rehearing,

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 **there-**for,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section **18596** of the Revenue and Taxation Code, that the Petition for Rehearing filed by the Franchise **Tax** Board in the Appeal of Joseph and Rebecca Peskin from the action of the Franchise Tax Board in denying their protests to proposed assessments of

