BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HAROLD L. AND MIRIAM JANE NAYLOR)

For Appellants: Herbert C. Naylor,
Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
Israel Rogers, Assistant 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 Harold L. and Miriam Jane Naylor against proposed assessments of personal income tax in the amounts of $5.19, $3.08, $4.02, $23.76, $19.06, $28.46 and $34.10 for the years 1950, 1953, 1954, 1955, 1956, 1957 and 1958, respectively.

The primary issue involved in this appeal is whether Harold L. Naylor, hereafter referred to as "appellant", was a resident of the State of California during the years on appeal.

In 1942, appellant, then residing with his parents in California, entered the armed forces of the United States. He was, eighteen years of age, In 1943 he departed from this state under military orders and, while undergoing pilot training during 1944, married a Georgia resident. In August of 1945 appellant completed his military obligation and returned to California: He chose, however, to make the Air Force his career and was offered assignments in either California or Texas. Choosing the latter, he journeyed to that state in 1946 and reenlisted. He remained in Texas until 1949, when he was transferred to Japan.

Appellant completed his tour of duty in Japan in 1952 and was given his choice of assignments in California, Texas or Pennsylvania. He selected Pennsylvania and was sent to Lehigh University, in Bethlehem, Pennsylvania, where he carried out his military duties as an instructor. In 1956, appellant was assigned to the Little Rock Air Force Base, Little Rock, Arkansas. Appellant remained there during the balance of the period under review.

Appellant and his wife have two children, Nancy and Steven. Appellant has kept his family with him, moving them from station to station, including Japan where the second child was born. Appellant owns his own furnishings and household goods and it was his practice to rent a suitable, dwelling in a

community near his place of assignment. Wherever the Naylors made their home in this country, they integrated into the local community. The-children"' attended local schools and engaged in other children's activities',-such as the Y.M.C.A. and the Girl Scouts. Appellant's wife was active. in community affairs, such'as the Parent-Teachers Association. The family attended local churches and was served by civilian doctors and dentists.

Appellants'visits to see Mr. Naylor's parents in California were each less than fourteen days in duration and occurred less often than once a year. They have no close friends in California, The Naylors' federal income tax returns were prepared by appell ant 's father , who is an attorney, and filed with the District Director of Internal Revenue in Los Angeles,. In recent 'years, appel 1 ant's father has handled certain stock accounts for his son and daughter-in-law.

For the purposes of Cal ifornia's personal income tax law, section 17014 (formerly 17013) of the Revenue and Taxat ion Code provides that the term *'resident" includes "every individual domiciled in this State who is outside the State for a temporary or transitory purpose." The Franchise Tax Board's regulations provide that whether a purpose is temporary or transitory will depend largely on the facts of each particular case. In general , if a person is simply passing through this. state, or is here for a brief rest or vacation, or to complete a particular transaction, contract or engagement, which will require his presence here for but a short period, such person is deemed to be in California for a temporary or transitory purpose., On the other hand, if an individual is in this state for health or business reasons which will require a long or indefinite stay, or is employed in a posit ion i-hat may last permanentl'y or indefinitely, or has moved to this s-tat-e with no definite intention of leaving shortly there-.. after, he is in this state for other than a temporary or transitory purpose. (Cal. Admin. Code, tit. 18, reg. 17014-17016,(b) (formerly 17013-17015(b)).)

Assuming, without deciding, that appellant remained domiciled in this state throughout the, period on appeal , we are of the opinion that appellant. was not.' a "resident" of this state,'as that term is defined in section 17014 (formerly' 17013). The purpose for which appellant was absent from this skate for a period of thirteen years, from 1945 to 1958, cannot be 'tkrmed "temporary or transitory." 'His, purpose was to make the Air, Force his, career, 'staying where-ever that career should take him, The permanence of his decision is demonstrated by the fact that, so far as we know, appellant is still following that career, some eighteen years later; outside of California.

Respondent argues that in any case, appell ant must be considered a resident in the year 1950, when, prior to its amendment in 1951, section 17013 defined "resident" so as to include every person domiciled in Cal ifornia "who is in some 'other state, terr i tory, or country for a temporary or transitory purpose."

In 1950, appellant was in Japan., He had been there since 1949 and did not leave until 1952, a period of three years. Apparently this was the usual tour of duty in Japan for servicemen who were accompanied by their families. Of course, in time of emergency, this period could have been extended indefinitely. We are also aware that in 1950 an armed conflict erupted in Korea in which the

United States was involved. This event made the future of any serviceman 'in the Far' East uncertain. Under these circumstances, appellant's presence in Japan was required for a long or indefinite period and he was in' that country for other than a temporary or transitory purpose. Thus, under the express terms of California's statutes, appellant may not be considered a resident of this state for the purposes of taxation.

The Franchise Tax Board's contention that appellant was taxable as a resident of this state during all of the years involved rests largely upon its interpretation of section 514 of the Soldiers" and Sailors' 'Civil Relief Act, 54 Stat. 1186, as added, 56 Stat. 777; and amended, 58 Stat. 722, 50 U.S.C. App. section 574. Section 514 of the act provides in part that:

> For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, ... such person shall not be deemed to have lost a residence or domicile in any State ... solely by reason of being absent there-. from in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State ... while, and solely by reason of being, so absent.

The Franchise Tax Board takes the position that by virture of this section appellant remained a "resident" of California, as that term is defined in section 17014 (formerly 17013) of the Revenue and Taxation Code. This conclusion rests upon the assumption that Congress intended thereby to expand the tax reach of "home" states to the fullest extent permitted under the law. Since appellant cannot otherwise be classified as a ""resident" under California's tax laws, respondent's position necessarily implies thatthose laws have been automatically extended by the federal act. We must reject this contention.

We need not decide whether Congress might constitutionally require a state to tax a particular individual or' class of individuals for it is clear that the statute in question does not present such an issue. The language is permissive in character and it has been so interpreted by the United States Supreme Court. Speaking of section 514 of the Soldiers' and Sailors' Civil Relief Act, the Court said: "It (Congress) saved the sole right of taxation to the state of original' residence whether or not that state exercised the right." (Dameron v. Brodhead, 345 U.S. 322, 326 (97 L.Ed. 1041.).) Thus, while a state may be authorized under the federal provision to lay a tax on individuals who originally resided, or were domiciled in that state, prior to their leaving such state under military orders, it need not so tax them. California has adopted a def'inition of the term "resident" which does not include persons such as appellant, who are absent for other than a temporary or transitory purpose. The federal statute invoked by respondent does not enlarge that definition in any way.

Respondent also places reliance upon its own regulation dealing with the status of military- personnel, which states:

> Any individual, a resident of this State prior to his departure herefrom under military or naval orders, will

> be deemed to remain a California resident .... (Cal. Admin. Code, tit. 18, reg. 17014-17016(h) (formerly 17013-17015(h)).)

The Franchise Tax Board argues that this provision, which was first published in 1944, has been a continuous administrative interpretation for some nineteen years, and that as such it is entitled to great weight.

While it is a settled rule that the contemporaneous administrative construction of an enactment by those charged with its enforcement and interpretation is entitled to great weight, it is equally well settled that such a construction is not controlling where it is clearly erroneous or repugnant to the provisions of the statute. (Coca-Cola Co. v. State Board of Equalization, 25 Cal. 2d 918, 921 (156 P.2d 1).) As applied here, we believe that respondent's regulation is clearly erroneous and, therefore, cannot be considered as controlling.

In view of our holding that he was not a resident, we need not discuss the remaining issues raised by appellant.

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 Harold L. and Miriam Jane Naylor against the proposed assessments of personal income tax in the amounts of $5.19, $3.08, $4.02, $23.76, $19.06, $28.46 and $34.10 for the years 1950, 1953, 1954, 1955, 1956, 1957, and 1958, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 11th day of December, 1963, by the State Board of Equalization.

John W. Lynch, Chairman

Geo. R. Reilly, Member

Paul R. Leake, Member

_____, Member

_____, Member

ATTEST: H. F. Freeman, Secretary