

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of        }  
HERBERT H. AND DARLENE B, HOOPER )

Appearances:

For Appellants: Thomas J. McIntosh  
                  Attorney at Law

For Respondent: Jack Gordon  
                  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 protest of Herbert H. and Darlene B. Hooper against a proposed assessment of additional personal income tax in the amount of \$428.70 for the year 1964.

Prior to 1955 appellants Herbert H. and Darlene B. Hooper and their children lived in Eureka, California, where they owned a home and where Mr. Hooper operated a service station business. In 1955 they moved to Seattle, Washington, so that Mr. Hooper could attend the University of Washington for undergraduate and graduate studies leading to a degree in dentistry. Mr. Hooper disposed of his California service station business and became a partner in a similar business in Seattle. The university classified him as a resident student, and he registered and voted in Washington. In 1960 or 1961 appellants sold their California home. During their years in Washington appellants occasionally returned to California on vacation trips. Mr. Hooper received his degree in dentistry in 1962, and subsequently appellants and their children moved back to this state.

While they were living in Washington appellants did not file California personal income tax returns. Appellants'

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1962 federal income tax return indicated that during that year they earned sufficient income to require the filing of a California return if they were residents of this state. In answer to question (C) on their 1963 California return, appellants stated **that the** reason they did not file a 1962 return was nonresidency. At the hearing of this matter appellants **explained** that they had used the term nonresidency only in the layman's sense. Appellants also stated that they had written to the Franchise Tax Board asking whether they should file a 1962 return but received no response, and they stated that if a 1962 California return had been filed it would not have indicated any tax liability.

In their return for 1964, the year in question, appellants used the income averaging method to compute their tax liability. Respondent disallowed the use of this method on the ground that appellants were not residents of California during the first three years of the four-year (1960 through 1963) base period. Whether this disallowance was correct is the sole issue of this case.

Sections 18241 through 18246 of the Revenue and **Taxation Code** allow eligible individuals, under certain specified circumstances, to use the income averaging method. Section 18243 states in part:

(a) Except as otherwise provided in this section, for purposes of this article the term "eligible individual" means any individual who is a resident of this State throughout the computation year.

(b) For purposes of this article, an individual shall not be an eligible individual for the computation year if, *at* any time during such year or the base period, such individual was a nonresident.

The "computation year" is the taxable year for which the taxpayer chooses to average income, and the "base period" means the four taxable years immediately preceding the computation year. (Rev. & Tax. Code, § 18242, subd. (e).) Section 17015 of the above code states that "Nonresident" means every individual other than a resident. Section 17014 of the same code provides that "Resident" includes:

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(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.

Regulation 17014-17016(b), title 18, California Administrative Code, states in part:

Meaning of Temporary or Transitory Purpose. 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....

\* \* \*

**If**, however, an individual is in this State to improve his health and his illness, is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to California with no-definite intention of leaving shortly thereafter, he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.

Example (1): X is domiciled in Quebec, where he had lived for 50 years and had accumulated a large fortune. However, X's doctor ordered him to California where he

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now spends his entire time, except for yearly summer trips of about three or four months duration to Quebec. X maintains an abode in California and still maintains, and occupies on his visits there, his old abode in Quebec. Notwithstanding his domicile in Quebec, because his yearly sojourn in California is not temporary or transitory he is a resident of California, and is taxable on his entire net income....

\* \* \*

The underlying theory of Sections 17014-17016 is that the state with which a person has the closest connection during the taxable year is the state of his residence.

At the hearing of this matter appellants emphasized that during their stay in Washington they always intended to return to California and therefore they remained domiciliaries of this state. Appellants seemed to argue that regulation 17014-17016 equated domiciliary status with resident status. Such an argument is incorrect. Regulation 17014-17016(a), after restating the substance of section 17014, states:

Under this definition, an individual may be a resident although not domiciled in this State, and, conversely, may be domiciled in this State without being a resident.

Example (1) in regulation 17014-17016(b) quoted above, illustrates a situation where a taxpayer's residence and domicile are located in different jurisdictions. The court in Whittell v. Franchise Tax Board, 231 Cal. App. 2d 278 [41 Cal. Rptr. 673], upheld the distinction made between residence and domicile in the predecessor of the above quoted regulation. Consequently, even though appellants may well have retained their California domiciliary status during the years in question, this does not mean that they retained their residency status. We must decide, under subdivision (b) of section 17014, whether appellants were outside California for a temporary or transitory purpose.

The facts discussed above show that from 1955 through the base period years 1960, 1961, and most of 1962, appellants

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and their children lived in Washington. Mr. Hooper's business and educational ties were also in that state. His goal of receiving a degree in dentistry was one that required a relatively long period of time to accomplish. During 1960 or 1961 appellants disposed of their California home. Their only remaining ties to this state appear to have been occasional vacation trips. Appellants have the burden of establishing the facts necessary to support their position. (Appeal of Universal Services, Inc., of Texas, Cal. St. Bd. of Equal., Feb. 3, 1966; Cal. Admin. Code, tit. 18, § 5036.) Under these circumstances we must hold that during the above base period years appellants' closest connection was with Washington, and that they were outside California for other than a temporary or transitory purpose. Therefore appellants were nonresidents of this state during those years and they can not use the income averaging method to compute their-tax liability for 1964. (Appeal of Leo Horowitz, Cal. St. Bd, of Equal., Aug. 7, 1967.)

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 protest of Herbert H. and Darlene B, Hooper against a proposed assessment of additional personal income tax in the amount of \$428.70 for the year 1964, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of February, 1969, by the State Board of Equalization.

John W. Lynch, Chairman  
Paul R. Leake, Member  
Michael H. Harris, Member  
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Attest: W. Freeman, Secretary