BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HAROLD AND LOIS LIVINGSTON)

For Appellants: Harold Livingston, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Richard A. Watson
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 Harold and Lois Livingston against a proposed assessment of additional personal income tax in the amount of $1,716.00 and a penalty in the amount of $429.00 for the year 1967.

The questions presented are whether appellants were residents of California during 1963 and thus entitled to use the income averaging provisions of sections 18241-18246 of the Revenue and Taxation Code, and whether a 25 percent penalty for failure to furnish information was properly imposed. It is not disputed that appellants resided in California during the years 1964 through 1967.

Appellant Harold Livingston is a free-lance writer. Mrs. Lois Livingston is a housewife. During 1960 and 1961, appellants and their children lived in Santa Monica, California. In late 1961 or early 1962, the family moved to Massachusetts to live with Mr. Livingston's parents. In December of 1962 they moved back to California "with no intention of becoming permanent residents." The return to California was occasioned by Mr. Livingston's work in connection with

a particular film script. Here they occupied rent-free a house owned by one James L. Henderson. Sometime during 1963 Mrs. Livingston became ill and returned with the children to Massachusetts where she was admitted to Boston University Medical Center.' Mr. Livingston remained in California but made frequent out-of-state trips of unspecified length to do research for the film script and to visit his wife and family in Massachusetts. Mrs. Livingston remained in the East for about six months, whereupon whe returned with the children to California.

Appellants'filed a federal income tax return for 1963 reporting gross income of $7,500.00 and taxable earnings of $2,721.32. All medical and interest expenses reported in that return were incurred in Massachusetts. No California return was filed for 1963, allegedly because appellants ' New York accountant concluded that they were not required to file a California return.

For the year 1967, appellants computed their California income tax under the income averaging provisions of the Revenue and Taxation Code. On July 1, 1969, respondent sent a standard form to appellants requesting information from which their income averaging eligibility could be determined; When the requested information was not' furnished, respondent concluded that appellants were not residents of California during 1963 and, therefore, they were not eligible to use income averaging in 1967. Respondent computed the tax without using income averaging and issued a proposed assessment of additional tax. Because of appellants' failure to furnish the information requested, respondent also asserted a 25 percent penalty pursuant to section 18683 of the 'Revenue and Taxation Code. Appellants protested and respondent's denial of the protest gave rise to this appeal.

The relevant statutory provisions, which are set out in sections 1.8241 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 17014 provides that "resident" includes:

> (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:

> 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 here.. .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.
>
> If, however, an individual is in this State ...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,...he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income....

The findings of the Franchise Tax Board in assessing taxes are prima facie correct. (Todd v. McColgan (1959) 89 Cal. App'. '2d 509 [201 P .2d 414].) Appellants, therefore, have the burden of producing sufficient evidence to overcome the resulting presumption of correctness. (Appeal of Joseph J. and Julia A. Battle, Cal. St. Bd. of Equal.', April 5, 1971; Appeal of Herbert H. and Darlene B. Hooper, Cal. St. Bd. of Equal., Feb.. 26, 1969.) The presumption is not overcome by the unsupported statements of the taxpayer. (Appeal of Robert C., Deceased, and Irene Sherwood, Cal. St. Bd. of Equal., Nov. 30, 1965.)

Appellants have not established that they were in California in 1963 for other than a temporary or transitory purpose. They came to this state late in 1962 in connection with Mr. Livingston's work on a particular film script. There is no evidence in the record which would indicate that this task would require an extended period of time., To the contrary, appellants' statement that they had no "intention of becoming permanent residents" of California suggests that the script could be completed in a relatively short time. The fact that they were given rent-free accommodations is further indication that their stay would be limited.

The underlying theory of sections 17014-17016 and the corresponding regulation is that the state with which a person has the closest connection during the taxable year is the state of his residence. (Cal. Admin. Code, tit. 18, reg. 17014-17016(b).) The record does not reveal how much time appellants spent in California during 1963. We do know that Mr. Livingston made numerous trips out of state during the year. We also know that Mrs. Livingston and the children were in Massachusetts for a substantial part of 1963. Under the circumstances, we conclude that appellants have not established that their. closest connection was with California in 1963 and have therefore not substantiated their claim of California residency in that year. Consequently, they were not entitled to the be-nefits of income averaging for the year 1967.

With respect to the penalty for failure to furnish information, section 18683 of the Revenue and Taxation Code provides:

> If any taxpayer fails or refuses to furnish any information requested in writing by the Franchise Tax Board, the Franchise Tax Board

> may add a penalty of 25 percent of the amount of any deficiency tax assessed by the Franchise Tax Board concerning the assessment of which the information was required.

Appellants have not denied that they failed to reply to respondent's July 1, 1969, request for information nor have they given any reason for this failure. Therefore, we have no reason to disturb the imposition of this penalty.

ORDER

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 Harold and Lois Livingston against a proposed assessment of additional personal income tax in the amount of $1,716.00 and a penalty in the amount of $629 .00 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 13th day of December, 1971, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____ Member

ATTEST: _____, Acting Secretary