

Appeal of Harold L. and Wanda G. Benedict

The issues raised by appellants' appeal are:
(1) whether **respondent's** proposed assessments were barred by the statute of limitations, (2) whether appellant Harold L. Benedict was a resident of California while employed in Australia during parts of 1976 and 1977, and (3) if so, whether respondent should have allowed away-from-home living expenses.

In the years immediately **preceeding** the two years now on appeal, appellants owned and maintained their home in Millbrae, California, and considered themselves residents of California. Harold L. Benedict (hereinafter appellant) was a flight engineer employed by Pan American World Airways, Inc. Appellant was registered to vote in California, held a valid California driver's **license**, maintained checking and savings accounts **here**, owned a California registered automobile, and also owned and operated an aircraft rental business located in San Jose, California.

Early in 1976, Pan American assigned appellant to its Sydney, Australia, base station to be employed as a flight engineer on various Pan American flights between points in the South Pacific. The labor relations agreement between Pan American and its flight engineers did not permit Pan American to make a foreign assignment, such as appellant's Sydney **assignment**, for longer than three years unless there was a mutual agreement for a longer assignment between the assigned engineer and Pan American. Appellant states that at the time he left for Sydney, he expected to be required to stay there for the full three year period. Appellant further states that he also expected to exercise an option to remain based at Pan American's Sydney station until 1983, when he intended to then retire, sell all his property in **California**, and reside thereafter on his property at Incline Village, Nevada.

Appellant left California for Australia on April 26, 1976. He left all his personal property in California except his clothing. Wanda G. Benedict, his wife, remained in California. She had a terminal illness, **Huntington's Chorea**, which prevented her from being admitted into Australia as a resident alien. Appellant continued to maintain California checking and 'savings accounts, and returned to California each month to take care of his wife's bills: his wife's illness caused her speaking and writing disabilities. Although appellant did not hold a valid California driver's license during 1976, he continued the California

Appeal of Harold L. and Wanda G. Benedict

registration of his car. Appellant did not move the car to Australia, which he explained requires right hand drive vehicles,

Pan American decided to discontinue base station operations in Sydney in 1977 and reassigned appellant back to California. Pursuant to that reassignment, appellant returned to California on March 1, 1977.

Appellants timely filed joint part-year personal income tax returns for calendar years 1976 and 1977. The return for 1976 was filed on April 14, 1977. The return for 1977 was filed on April 7, 1978.

Based upon information requested by respondent and supplied by appellant, respondent determined that appellant had been a full time California resident during 1976 and 1977. Respondent recomputed appellants' tax liabilities for those years using total yearly income and total itemized deductions, and on February 9, 1979, issued notices of proposed assessment for those years. Appellant filed a protest. After a hearing on the protest, respondent reaffirmed its proposed assessments. Appellant paid the full amount of the proposed assessments, This appeal followed in due course.

Section 18586 of the Revenue and Taxation Code, the statute of limitations for proposed assessments, provides in pertinent part:

. . . every notice of a proposed deficiency **assessment** shall be mailed to the taxpayer within **four** years after the return was filed. **No** deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise fixed.

Since the proposed deficiency assessments for both years in question were issued on February 9, 1979, they were well within the applicable limitation periods.

Section 17041 of the Revenue and Taxation Code imposes a personal income tax on the entire taxable income of every resident of this state, Section 17014, subdivision (a), of the Revenue and Taxation Code defines "resident" to include:

Appeal of Harold L. and Wanda G. Benedict

(1) Every individual who is in this state for other than a temporary or transitory purpose.

(2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

Section 17014, subdivision (c), states also that:

Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state.

Respondent's regulations explain that whether a taxpayer's purpose in entering or leaving California is temporary or transitory in character is essentially a question of fact to be determined by examining all the circumstances of each particular case. (Cal. Admin. Code, tit. 18, reg. **17014-17016(b)**; Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6 1976.) The regulations further explain that the underlying theory of California's definition of "resident" is that the state with which a person has the closest connections is the state of his residence. (Cal. Admin. Code, tit. 18, reg. **17014-17016(b)**.)

In accordance with these regulations, we have held that the connections which a taxpayer maintains with this and other states are an important indication of whether his presence in or absence from California is temporary or transitory in character. (Appeal of Richards L. and Kathleen K. Hardman, Cal. St. Bd. of Equal., Aug. 19, 1975.) Some of the contacts we have considered relevant are the maintenance of a family home, bank accounts, business relationships, voting registration, possession of a local driver's license, and ownership of real property. (See, e.g., Appeal of Bernard and Helen Fernandez, Cal. St. Bd. of Equal., June 2, 1971; Appeal of Arthur and Frances E. Horrigan, Cal. St. Bd. of Equal., July 6, 1971; Appeal of Walter W. and Ida J. Jaffee, etc., Cal. St. Bd. of Equal., July 6, 1971.) We have held that so long as an individual had the necessary contacts with California, employment related absences from California were temporary and transitory in nature. (Appeal of Duane H. Laude, Cal. St. Bd. of Equal., Oct. 6, 1976; Appeal of John Haring, Cal. St. Bd. of Equal., Aug. 19, 1975.)

Appeal of Harold L. and Wanda G. Benedict

Clearly, **appellant's** absences from California were required by his employment. So we must compare appellant's other connections with Australia with his connections with California to determine whether or not appellant's California residence was retained. **Appellant** has not provided any evidence of having established any connections of a permanent nature in Australia. There appellant rented a furnished apartment and maintained bank accounts and a tennis club membership. In California, appellant owned a house and car, maintained bank accounts, supported an ill and disabled wife who remained a California resident, and returned monthly to pay his wife's bills and otherwise assist her. Appellant's connections with California appear to be significantly greater and more permanent in nature than those with Australia. So we must conclude that he remained a California resident whose absence from the state was temporary and transitory.

Appellant alleges that the Internal Revenue Service has ruled that he was a bona fide resident of Australia, but he has not provided any evidence to support this statement. In any event, such a determination by the Service would not be very relevant on the issue of appellant's California residency now before us because the state and federal laws are not the same.

Finally, appellant contends that respondent should have allowed a deduction for away from home living expenses. Section 17202, subdivision (a) **(2)**, of the Revenue and Taxation Code allows deductions for ordinary and necessary traveling expenses, including amounts expended for meals and lodging incurred while the taxpayer is "away from **home in the pursuit of a trade or business.**" In order to qualify as a deduction, the traveling expenses must be: **(1)** reasonable and necessary; **(2)** incurred while the taxpayer is "away from home;" and **(3)** directly **connected** with carrying on the trade or **business of** the taxpayer or his employer. (Commissioner v. Flowers, 326 U.S. 465 [90 L.Ed. 203] (1946); Appeal of Francis L. and Mary J. Stein, Cal. St. Bd. of Equal., Aug. 16, 1977; Appeal of Roy Chadwick, Cal. St. Bd. of Equal., Oct. 7, 1974.)

Because the **deduction** authorized by section 17202(a)(2) is limited to away from home business travel expenses, the "home" for the purposes of the deduction is generally considered to be the place of an individual's employment rather than the place of his domicile. (Lloyd G. Jones, 54 T.C. 734 (1970); cf. **Annot.** Federal

Appeal of Harold L. and Wanda G. Benedict

Income Tax: Deductibility of Traveling Expenses (1959) 3 **L.Ed.2d** 1570.) For approximately ten months, appellant's place of employment was Pan American's Sydney base.

When an individual simply maintains two separate living places, one near and one far from the place of regular employment, the additional lodging and the travel expenses between the living places and the place of employment are not deductible away from home business travel expenses. (O'Toole v. Commissioner, 243 **F.2d** 302 (2d Cir. 1957).)

Under the circumstances, we must sustain respondent's action.

Appeal of Harold L. and Wanda G. Benedict

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Harold L. and Wanda G. Benedict for refund of personal income tax in the amounts of \$2,240.17 and \$942.32 for the years 1976 and 1977, respectively, be and the same is hereby sustained.

Done at **Sacramento**, California, this 5th day Of January , 1982, by the State Board of Equalization, with Board Members Mr. Reilly, Mr. Dronenburg, and Mr. Nevins present.

_____, Chairman
George R. Reilly _____, Member
Ernest J. Dronenburg, Jr. _____, Member
Richard Nevins _____, Member
_____, Member