



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JAMES E. DUNCAN)

Appearances:

For Appellant: James E. Duncan,
in pro, per,

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of James E. Duncan against a proposed assessment of additional personal income tax in the amount of \$1,040.93 for the year 1977.

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The issue presented by this appeal is whether appellant was a resident of California for income tax purposes while employed in Texas during a portion of 1977.

Appellant filed a form 540NR return as a part-year resident of California for 1977; his return was filed as a separate return of a married person and indicated that only **\$7,421.48** of his total reported salary of **\$25,578.27** constituted California income. Appellant's 1977 Wage and Tax Statement Form W-2, **however**, reported total earnings of **\$27,076.79** from Southern Pacific Transportation Company; \$8,920 of the latter amount was shown as California wages. The **\$1,498.52** discrepancy between the income reported by appellant and the California income shown on his Form W-2 was included in the 1977 reported income of appellant's spouse.

After examination of his return, respondent requested additional information from appellant regarding his residency status in 1977. The information provided by appellant indicated, among other things, that: (i) he left his home in Redlands, California, in-May to assume an executive position with Southern Pacific in **Texas**, and that he returned to this state in December to accept a position of lesser **responsibility**; (ii) he and his wife jointly owned a home in this state throughout 1977; (iii) he had no significant social contacts in California; (iv) he held a valid California driver's license throughout 1977; and (v) while he maintained checking and savings accounts in this state, the majority of his banking was transacted in Texas. Based upon the data provided by appellant, respondent issued him a notice of proposed assessment reflecting its determination that he was a California resident throughout 1977. Appellant's tax liability was computed on his total income, less that portion reported by his wife on her separate return. In response to information later furnished by appellant, respondent allowed him deductions for moving expenses and certain employee business expenses. Respondent, however, affirmed its determination that appellant was a California resident throughout 1977, thereby resulting in this appeal.

In support of his position that he was not a California resident while employed in Texas, appellant has argued that he left this state with the intent of remaining indefinitely in Texas. That intent is evidenced, he asserts, by the fact that he received a

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permanent executive position with Southern Pacific in Beaumont, Texas. Appellant also contends that he and his wife separated in May of 1977, that he had no intention of returning to her or their California home, and that they lived apart for some time after he returned to this state. Finally, appellant has **noted that** he purchased an automobile in Texas, rented a home there, and performed all "other functions of ... living" in that state while employed outside California in 1977.

Revenue and Taxation Code section 17014, subdivision (a), defines the term "resident" to include:

(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. (Emphasis added.)

Section 17014, subdivision (c), provides that:

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

The term "domicile" has been defined as follows:

. . . the one location with which for legal purposes a person is considered to **have** the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning. . . . (Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284 [**41 Cal. Rptr. 673**] (1964).)

A person may have only one domicile at a time (Whittell v. Franchise Tax Board, supra), and he retains that domicile until he **acquires another** elsewhere. (In re Marriage of Leff, 25 Cal.App.3d 630, 642 [**102 Cal. Rptr. 195**] (1972).) The establishment of a new domicile requires actual residence in a new place and the intention to remain there permanently or indefinitely. (Estate of Phillips, 269 Cal.App.2d 656, 659 [**75 Cal. Rptr. 301**] (1969).) One's acts must give clear proof of a concurrent intention to abandon the old domicile and

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establish a new one. (Chapman v. Superior Court, 162 Cal.App.2d 421, 426-427 [328 P.2d 23] (1958).)

On the basis of the foregoing principles as applied to the record of this appeal, we are convinced that appellant did acquire a new domicile in Texas during the period of his employment there.

The record of this appeal, including appellant's testimony at the oral hearing on this matter, reveals that when appellant accepted his executive position with Southern Pacific in **Beaumont**, Texas, he did so with the intent of remaining there indefinitely and that he had no intention of returning to California. Documentation supplied by appellant indicates that his appointment as trainmaster in Beaumont was viewed as a permanent one, both by his employer as well as by himself. Furthermore, appellant's oral testimony established to our satisfaction that: (i) he had no intention of returning to his wife or California when he and his wife parted in May 1977; and (ii) he left his position in Texas only when the working conditions there proved to be unsatisfactory. In this regard, it should be noted that when appellant left Texas, he did not return to his wife or home in Redlands, but rather accepted a position of lesser responsibility in Bakersfield, California. It was not until mid-1973, after he and his wife reconciled their differences, that appellant returned to Redlands.

Respondent's regulations provide that whether a taxpayer's purposes in entering or leaving California are 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 David J. and Amanda Broadhurst, Cal. St. Bd. of Equal., April 5, 1976.) We believe, based upon the relevant facts as outlined above, that appellant, even **though** absent from this state for a relatively short period of time, was not domiciled in this state while employed in Texas and, therefore, was not a "resident" of California, as that term is defined in Revenue and Taxation Code section 17014.

For the reasons set forth above, respondent's action in this matter will be reversed.

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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 James E. Duncan against a proposed assessment of additional personal income tax in the amount of **\$1,040.93** for the year 1977, be and the same is hereby reversed,

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