BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
NELSON AND DORIS DeAMICIS)

For Appellants: Nelson DeAmicis,
in pro. per.

For Respondent: John A. Stilwell, Jr.
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 Nelson and Doris DeAmicis against a proposed assessment of additional personal income tax and a penalty in the total amount of $351.27 for the year 1976, and against a proposed assessment of additional personal income tax in the amount of $394.50 for the year 1977. Since Doris DeAmicis is included in this appeal solely because appellants filed joint returns for the years in issue, "appellant" herein shall refer to Nelson DeAmicis.

The issues for determination are: (a) whether appellant Nelson DeAmicis was a California resident for income tax purposes during the period of his employment at Ascension Island; (b) whether his overseas employer is liable for the proposed assessment upon appellant's overseas wages, where the employer failed to withhold state income tax from the wages; and (c) whether respondent properly computed the assessed tax.

Appellant Nelson DeAmicis has lived in California for the past fifteen years, with the exception of a period from October 1976 to October 1977. During this period, he worked on Ascension Island for Bendix Field Engineering Corporation (Bendix). On his joint state personal income tax returns for the years 1976 and 1977, he excluded from gross income his Bendix wages, which were entirely out-of-state wages. This reduced his taxable income so that his withholdings from other employment resulted in his entitlement to a tax refund.

Appellant attached Bendix W-2 forms to the appropriate returns. The W-2 forms indicated that Bendix had paid appellant $7,529.17 in 1976 and $18,825.14 in 1977, and had withheld no state income tax from these wages. On the forms, in the box labeled "state or locality," Bendix had entered "FOREIGN" and "OSEA," apparently an abbreviation for "overseas."

Respondent determined that appellant remained a California resident for income tax purposes throughout the years in question, and that he therefore was taxable on his entire taxable income from foreign as well as domestic sources. Accordingly, respondent added his Bendix wages to his reported taxable income for 1976 and 1977, adjusted his claimed medical expense deductions and contribution deduction to reflect his increased adjusted gross income, and issued proposed assessments. For 1976, respondent also issued a penalty because appellant had filed his 1976 return three months late. Respondent's denial of appellant's timely protest is the subject of this appeal.

Appellant argues, first, that he "established residence" on Ascension Island during the years in question after he and his wife had agreed to a trial separation, and that as an out-of-state employee, he should not be required to pay state income tax on his overseas earnings. Second, he contends that he repeatedly requested Bendix to withhold state income

tax from his wages, but the company refused, telling appellant that he did not owe state tax on these wages. He argues that Bendix should be liable for the proposed assessment on the theory that Bendix had acted unlawfully. Third, he claims that respondent's mathematical computation of his tax liability is in error.

The first issue, then, is whether appellant is liable for state income tax upon wages earned overseas. California requires every resident of this state to pay tax upon all taxable income from whatever source derived. (Rev. & Tax. Code, § 17041, subd. (a).) Thus, appellant's overseas earnings are taxable if he was a California resident while working overseas. Revenue and Taxation Code section 17014, subdivision (a) (2), defines "resident" to include "[e]very individual domiciled in this state who is outside the state for a temporary or transitory purpose." For the reasons expressed below, we believe that appellant was a California resident while abroad because he was domiciled in this state and because his absence was for a temporary or transitory purpose.

"Domicile" has been defined as:

> 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).)

An individual may claim only one domicile at a time (Cal. Admin. Code, tit. 18, reg. 17014-17016(c)); to change one's domicile, one must actually move to a new residence and expect to remain there permanently or indefinitely. (In re Marriage of Leff, 25 Cal.App.3d 630, 642 [102 Cal.Rptr. 195] (1912); Estate of Phillips, 269 Cal.App.2d 65.6, 659 [75 Cal. Rptr. 301] (1969).)

Appellant was domiciled in California for nine years prior to leaving for Ascension Island in 1976. While abroad, he kept his interest in his home in Lancaster, California; upon leaving the Island he returned to the Lancaster abode, where he lived for at least four years thereafter. Appellant has not provided this board with the slightest indication that he intended to remain on the Island permanently or indefinitely. He asserts that. his move abroad coincided with

a trial marital separation. This does not, however, prove an intent to change residence, especially where the separation apparently ended as soon as he returned to the United States in late 197'7. We must conclude that appellant did not establish a new domicile on Ascension Island, but remained a California domiciliary throughout his absence.

Since he was domiciled here, he will be considered a California resident under section 1701 4, subdivision (a) (2), if his absence was for a temporary or transitory purpose. We have generally held that. a key indication of the temporary or transitory nature of a taxpayer's absence from California is found in the contacts which the taxpayer maintains both in Califiornia and at his or her out-of-state abode. (Appeal of David J. and Amanda Broadhurst, Cal. St.., Bd. of Equal., April 5, 1976.) In the Appeal of David A. and Frances W. Stevenson, decided by this board on March 2, 1977, we stated:

> [i] n cases . . . where a Cal ifornia domiciliary leaves the state for business or employment purposes, we have considered it particularly relevant to determine whether the taxpayer substantially severed h is California connections upon his departure and took steps to establish significant connections with his new place of abode, or whether he maintained his California connect ions in readiness for h is return.

In the instant case, it seems that appellant retained most of his California contacts while employed on Ascension Island. During this period, he and his wife kept their home in Lancaster, where his wife and children remained. While he was away, his children attended California schools, he transacted the greater part of his banking activities in this state, and he maintained his California voter r-eqistration, driver's license, automobile registration and bank accounts, Furthermore, he has not presented a shred of evidence to indicate that he established any connections at all with Ascension Island.

Respondent's determinations of residence status, and proposed assessments based thereon, are presumed to be correct; the taxpayer bears the burden of proving respondent's actions erroneous. (Appeal of Patricia A. Green, Cal.. St. Bd. of Equal., June 22,

1,976.) Given the above circumstances, we must conclude that appellant's closest connections were with California, that his stay at Ascension Island was for a temporary or transitory purpose, and that he was therefore a California resident throughout the years at issue. He has not sustained his burden of proving otherwise.

Appellant's second and alternative argument is that Bendix is liable to respondent for the tax in question because Bendix was under a duty to withhold the tax from the wages it paid him.

Under California law, certain employers paying wages under specified conditions must deduct and withhold stated amounts of income tax from the employees' wages, and must transmit the withheld sums to the Franchise Tax Board. (Rev. & Tax. Code, §§ 18805, subd. (a), and 18806.) Section 18815 of the Revenue and Taxation Code provides that the person (here, the employer) who is required to deduct and withhold this tax is liable for the payment of the tax.

However, even if Bendix were found obliged to withhold the tax, this would not relieve appellant from responsibility for its payment. Section 18551.1, subdivision (a), provides generally that withheld income tax is treated as a credit against the taxpayer's income tax liability for the year for which the tax was withheld. (Appeal of Frank R. and C. A. Moothart, Cal. St. Bd. of Equal., Feb. 8, 1978.) It stands to reason that appellant may not avail himself of this credit where no tax was withheld.

Section 18815, subdivision (a), which holds employers liable for wage withholding, and the credit provision of section 18551.1, subdivision (a), are derived from and are substantially identical to their federal counterparts (Internal Revenue Code of 1954, §§ 3403 & 31(a), respectively.) It is well settled that prior decisions of federal courts construing a federal statute are highly persuasive in interpreting a state statute which is based on the federal statute. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955); Meanley v. McColgan, 49 Cal.App.2d 313, 317 [121 P.2d 772] (1942).) In Edwards v. Commissioner, 39 T.C. 78 (1962) (affirmed in part, reversed and remanded in part, on separate grounds, 323 F.2d 751 (9th Cir. 1963)), the tax court considered an argument similar to that raised by appellant, and held as follows:

> We agree with petitioner that an employer is liable to the taxing authorities for any amount which it was required to withhold, regardless of whether or not it was actually withheld. Therefore, had the respondent chosen to do so, he could have attempted to collect from the company the amount which it was required to withhold .... Respondent, however, need not do so, but may assess the tax against the employee upon whom, in the final analysis, the tax burden must fall. The employee of an employer failing to properly withhold amounts for tax is not entitled to a credit for amounts which were never withheld from him. (39 T.C. at 83-84.)

(See also United States v. Kuntz, 259 F.2d 871 (2d Cir. 1958).) Bendix's correct or incorrect failure to withhold state income tax from appellant's earnings does not expunge appellant's liability for the tax.

Appellant's final argument is that respondent improperly computed his deficiency assessment. In his appeal to this board, appellant added his Bendix wages to his reported income for 1576 and 1977, and produced tax deficiencies which are substantially less than those issued by respondent..

Appellant has made three errors in his computations. First, he neglected to add to his recomputed deficiency the tax refund that he had received from reported withholdings on his 1976 return.

Second, he failed to reduce the medical expense deductions he had taken on his 1976 and 1977 returns. Revenue and Taxation Code sections 17253 and '17254 permit a taxpayer to deduct, among other costs, expenses for medicine and drugs which exceed one percent of his adjusted gross income, and the portion of his other medical expenses which exceeds three percent of his adjusted gross income. In this case, increasing appellant's adjusted gross income by the amount of his Bendix wages for the years at issue diminishes his permissible medical expense deduction.

Appellant's third error concerns an extra $106 in charitable contributions that he had reported, but not deducted, on his 1977 return. Revenue and Taxation Code section 17215 permits a deduction for charitable contributions up to twenty percent of the taxpayer's adjusted gross income. Adding the Bendix wages to his

adjusted gross income for 1977 increases the sum of reported contributions that he is entitled to deduct.

If appellant adds on the 1976 refund that respondent sent him, and makes the above adjustments in his medical and contribution deductions for 1976 and 1977, he will arrive at the amounts represented in respondent's proposed assessments. For the reasons stated above, we must hold appellant liable for those assessments.

Appeal of Nelson and Doris DeAmicis

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 Nelson and Doris DeAmicis against a proposed assessment of additional personal income tax and a penalty in the total amount of $351.27 for the year 1976, and against a proposed assessment of additional personal income tax in the amount of $394.50 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of June, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member

_____, Member