

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RHODA LAKS)

For Appellant: Norman H. McNeil
Attorney at Law

For Respondent: Robert L. Koehler
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 Rhoda Laks against a proposed assessment of additional personal in-come tax in the amount of **\$13,720.80** for the year 1972.

Appeal of Rhoda Laks

The issue presented in this appeal is whether the income earned by appellant's husband in Colorado constituted community property, one-half of which was taxable to her.

Prior to mid-1971 appellant, her husband, Sid, and their two children lived in Burlingame, California. Sid, with his two partners, Jack Halpern and Neal **McKnight**, was operating a sound recording business in Garden Grove, California. This business was started in 1970 and was at that time referred to as a "tape pirate" business. Allegedly, in early 1971 an artists' group commenced civil proceedings against a business similar to **Sid's**, and his partnership was warned that legal action could ensue if they stayed in California. Consequently, the business was moved in mid-1971 to Denver, Colorado, where state laws allow such activities.

When Sid left California, he took only his car and his personal possessions. Appellant refused to move to Colorado and remained in California with their children. Sid agreed to provide for appellant's support as she was not employed at that time.

Once in Denver, Sid and his partners formed Analog Industries and continued their sound recording business. The business would purchase eight-track tapes and duplicate songs on these tapes. The business was immediately successful, grossing almost \$175,000 in 1972, because Sid could produce a cartridge for under one dollar and at the same time sell the cartridge for a much higher price at retail. However, he had to buy his inventory on a cash-on-delivery basis. As his suppliers were in California, Sid made several trips to **the** state in 1972. While in California on business, he visited his children and stayed for a few days at the home in Burlingame.

During **the summer of 1972, appellant and her** children went to Denver. The children, then aged eighteen and fifteen, stayed the entire summer and worked at their father's business. Due to marital difficulties, appellant stayed only about two weeks before returning to California. They have remained physically separated since Sid left California in **1971**; however, they are still legally married.

Sid's business continued until mid-1973 when he quit the partnership and started a similar business in Denver on his own. Sid has remained in Colorado.

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Appellant and her husband filed a joint federal income tax return for 1972, and joint returns were filed in California through 1974. Upon their attorney's advice, appellant and Sid, in 1975, began filing their returns in Colorado. Appellant's accountant allegedly initially recommended filing in California because he assumed that Sid's business in Colorado might be temporary. Returns **were**, subsequently, routinely filed in California.

After a federal audit was made of the **Laks'** 1972 return, respondent conducted an audit. Respondent in December of 1976 issued a proposed assessment jointly against the Laks. In March of 1979 respondent withdrew this assessment, based on its finding that Sid was not a California resident. On March 14, 1979, a proposed assessment in the amount of **\$13,720.80** was issued against appellant only. Respondent concluded that Sid had not abandoned his California domicile. in 1972 and **that appel-**lant's one-half community interest in the income earned by Sid in Colorado during that year is subject to tax. This decision was based on the finding that appellant's husband (1) did not divorce appellant but rather continued to provide for her total support; (2) kept his interest in their Burlingame home; (3) left all the furniture in the California home; (4) kept an account in Burlingame with the Chartered Bank of London; (5) did not buy any real property in Colorado but merely rented a three-room, furnished apartment; (6) might have returned to California if the business had proved unsuccessful; and (7) returned to California in 1972 and stayed at his California home while in this state.

In order to resolve the issue presented in this appeal, we must determine whether Sid's earnings were community property. If these earnings are found to be community property, appellant is liable for income tax on her one-half community interest in those earnings, even though the parties were not living together. (Appeal of Neil D. and Carole C. Elzey, Cal. St. Bd. of Equal., Aug. 1, 1974.) It is well established that marital property interests in personal property are determined under the laws of the acquiring spouse's domicile. (Schecter v. Superior Court, 49 Cal.2d 3, 10 [314 P.2d 10] (1957); Rozan v. Rozan, 49 Cal.2d 322, 326 [317 P.2d 11] (1957).) Thus, we must determine whether appellant's husband was a California domiciliary or whether he was domiciled in Colorado.

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It is first necessary to distinguish the term "domicile" from the term "residence." In the case of Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284 [41 Cal.Rptr. 673] (1964), the court stated:

" [D]omicile" properly denotes 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 but which the law may also assign to him constructively.

Appellant appears to concede that her husband was domiciled in California until he left for Colorado in 1971. A domicile, once acquired, is presumed to continue until it is shown to have been changed. (Murphy v. Travelers Ins. Co., 92 Cal.App.2d 582, 587 [207 P.2d 595] (1949).) "To constitute a new domicile, it must be shown that there is (1) an actual change of residence, and (2) the intention to remain there. (In re Marriage of Leff, 25 Cal.App.3d 630, 641 [102 Cal.Rptr. 195] (1972).) The term "residence" denotes any factual place of abode of some permanency. (Whittell v. Franchise Tax Board, supra, 231 Cal.App.2d at 284.) As to the question of Sid's residence in Colorado, it is very clear that Sid took an apartment in Denver and has remained there since 1971. When Sid returned to California, it was with the sole purpose of purchasing supplies for his business. Respondent concedes that Sid was a resident of Colorado.

The second requirement of establishing a new domicile is an intent to remain there. When determining whether Sid "intended" to return to California, both his acts and declarations must be taken into consideration. (Appeal of Robert M. and Mildred Scott, Cal. St., Bd. of Equal., March 2, 1981.) Respondent asserts that Sid maintained a "marital abode" in California and that this is a significant factor to consider when determining whether Sid intended to return to California. (Aldabe v. Aldabe, 209 Cal.App.2d 453 [26 Cal.Rptr. 208] (1962).) In this board's ruling in the Appeal of Annette Bailey, decided on March 8, 1976, we held that Mr. Bailey did consider his marital abode to be in California because he visited here whenever possible and did, in fact, return to California when his health failed. In the present case, Sid did not return to California whenever possible, and he has not moved back to California. The Laks were, unlike the Baileys, married in name only. The present case is clearly distinguishable from Bailey. Subsequent events have shown that Sid has not had a marital abode in California since 1971.

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Respondent also relies on the case of Makeig v. United Security Bk. & T. Co., 112 Cal.App. 138 [296 P. 673] (1931), as support for its position that the mere fact that Sid and appellant lived apart for thirteen years is not in itself determinative of whether they were permanently separated. In Makeig, however, the only reason the couple lived apart was because they couldn't get enough money to establish a home together. Appellant and Sid, unlike the Makeigs, were not friendly and were not maintaining marital relations. Their marital discord is documented. They spent only two weeks together in Denver in 1972 before the relationship broke down and appellant returned home. The facts in Makeig are distinguishable from the facts in the present situation.

Finally, respondent contends that because Sid kept an interest in the real property in Burlingame, did not divorce appellant, did not take any furniture to Colorado, and did not buy any real property in Colorado, that these **acts** evidence an intent to return to California. Again, we cannot agree. Unlike our opinion in Appeal of Robert M. and Mildred Scott, supra, it is clear that **Sid's** business was immediately successful and that his stay in Colorado was not temporary. He knew that his business was very profitable and secure and that there would be no reason to return to California. The fact that he rented an apartment in Denver rather than buy a house is not particularly significant. There is no evidence that Sid needed a house as his children did not live with him. Furthermore, he may not have had, due to his business, the time to keep up a house or yard.

In view of the above, we find that Sid did establish a new domicile in Colorado in 1972 and that California's community property law cannot be used to attribute one-half of **Sid's** income to appellant. Respondent's action in this matter will therefore 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 Rhoda Laks against a proposed assessment of additional personal income tax in the amount of **\$13,720.80** for the year **1972**, be and the same is hereby reversed.

Done at Sacramento, California, this 8th day of May **1984**, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. **Collis**, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9