BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROY L. AND PATRICIA A. MISSKELLEY)

For Appellants: Roy L. Misskelley, in pro. per.

For Respondent: Bruce R. Langston
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Roy L. and Patricia A. Misskelley for refund of personal income tax in the amount of $3,147.19 for the year 1978.

The issue in this matter is whether appellant-husband (hereinafter "appellant") was a resident and domiciliary of California from June 16, 1978, through December 31, 1978.

Appellants filed a joint California personal income tax return for 1978, On that return they listed their address as "24 Piper Court, Novato, CA." On October 22, 1981, appellants filed an amended return claiming a refund of $3,147.19. The primary adjustment on this return was a $42,871.07 reduction in total income reported. By way of explanation, appellants wrote that the "[o]riginal return included income made in Nevada as a permanent resident of Nevada."

Respondent requested further information from appellants about their residency status for taxable years 1977 through 1980. The information provided showed that appellants had lived in California from 1950 through 197'7, that appellant left California and moved to Nevada on July 16, 1978, and that appellant's wife left California and moved, to Nevada on October 4, 1979. Appellants also indicated that during all of 1978 Mrs. Misskelley held a California driver's license, had an automobile registered in California, and transacted the majority of her banking activities in California. Although appellant held a California driver's license, registered his car in California, and maintained savings and checking accounts in California during 1978, he apparently also acquired a Nevada driver's license, registered his car in Nevada, and opened bank accounts in Nevada during the latter part of that year. Appellants' children apparently attended school in California during all of 1978. Based on the information supplied by appellants, respondent determined that both Mr. and Mrs. Misskelley were California residents for all of 1978 and disallowed the claimed refund. This appeal followed.

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.

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

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

Respondent's determination of residency status and the proposed assessments based thereon are presumed to be correct and the taxpayer bears the burden of proving respondent's actions erroneous. (Appeal of Robert J. Addington Jr., Cal. St. Bd. of Equal., Jan. 5, 1982; Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June 22, 1976.)

> However, the presumption is a rebuttable one and will only support a finding in the absence of sufficient evidence to the contrary. [Citations.] Respondent's determination is not evidence to be weighed against evidence produced by the taxpayer. The presumption of correctness, disappears once evidence which would support a contrary finding has been submitted. [Citations.]

(Appeal of Janice Rule, Cal. St. Bd. of Equal., Oct. 6, 1976.)

There is no question that appellant's wife was a resident of California during all of 1978 as she did not leave the state until late 1979. There also is no question that appellant was a resident of California until June 15, 1978. The only status in question is that of appellant for the period June 16, 1978, through December 31, 1978. Since appellant was outside the state for that period, his status must be determined under section 17014, subdivision (a)(2), supra. Therefore, we must first decide whether or not he was still domiciled in California. If not, then he was not a resident of California.

In support of his claim that he was not a California resident during the period in question, appellant argues that he left the state with the intent of remaining indefinitely in Nevada. Appellant has stated that he wanted to move to Nevada for better job opportunities, but that his wife, for a variety of reasons, refused to accompany him. This disagreement resulted in a spousal separation when appellant moved to Nevada and his wife remained in California. He further stated that upon arriving in Nevada, he established a business, acquired a residence, and opened two bank accounts there. About fourteen months after he first moved to Nevada, he and his wife reconciled. their differences. Mrs. Misskelley moved to Nevada in October 1979, and the whole family has resided there ever since.

In regard to determining an individual's domicile for income tax purposes, we had occasion to summarize the applicable California law in the Appeal of Robert J. and Kyung Y. Olsen, decided on October 28, 1980:

> "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).) A person may have only one domicile at a time (Whittell, supra), and he retains that domicile until he acquires another elsewhere. (In re Marriage of Leff, 25 Cal.App.2d 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 establish a new one. (Chapman v. Superior Court, 162 Cal.App.2d 421, 426-427 [328 P.2d 23] (1958).)

As noted above, to prove that a new domicile has been established, appellant must show: (1) actual residence in a new place, and (2) the intention to remain there permanently or indefinitely. Respondent does not dispute that appellant actually resided in Nevada. It does appear to dispute appellant's intention to remain in Nevada permanently or indefinitely, based on two generalized propositions which it inaccurately applies to appellant's situation.

First, respondent cites prior decisions of this board which state that absences for reasons of employment, even for extended periods, are usually not regarded as establishing a change of domicile. (See Appeal of Robert J. and Kyung Y. Olsen, supra; Appeal of Bernard and Helen Fernandez, Cal. St. Bd. of Equal., June 2, 1971.) However, the cases cited by respondent involved employees who were sent out of California to perform their jobs for their employers. Appellant, on the other hand, was apparently a self-employed construction contractor in California, and he established a construction contracting business in Nevada immediately upon his arrival there.

Respondent's citations have no relevance to appellant's situation. We view appellant's establishment of a business, and its apparent immediate success as tending to indicate that appellant did intend to remain in Nevada permanently or indefinitely.

Respondent's second proposition was that appellants maintained their marital abode in California during this time, and that this is "a significant factor in resolving the question of domicile." (Resp. Br. at 5.) However, appellants have explained that a marital disagreement was at the root of the decision to split the family during the period on appeal. There is no evidence that appellant ever returned to the home in California after leaving it or that he, or his wife, continued to consider it as his home. Given appellant's uncontradicted statements that there was a marital separation, we do not feel justified in attributing to appellant the intention of returning to California simply because his estranged spouse lived there. Consequently, contrary to the view held by respondent, Mrs. Misskelley's decision to remain in California when her husband chose to go to Nevada does not support the conclusion that appellant retained his California domicile.

In our view, the information provided by appellants is sufficient to overcome the presumption of correctness attaching to respondent's determination. Respondent has presented conjectures, but no evidence whatsoever, to contradict appellant's statements, We find, therefore, that appellant was not domiciled in California during the period at issue and was not a "resident" of California, as that term is defined in Revenue and Taxation Code section 17014.

As respondent points out in its brief, our finding that appellant was not a domiciliary of California does not end this matter. 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).) Income earned during a marriage constitutes community property in Nevada. (Nev. Rev. Stats. § 123.220 (1979).) Therefore, appellant's income earned as a Nevada domiciliary was community property, and Mrs. Misskelley is liable for California income tax on her one-half community interest in those earnings. (Appeal of Robert M. and Mildred Scott, Cal. St. Bd. of Equal., March 2, 1981; Appeal of Neil D. and Carole C. Elzey, Cal. St. Bd. of Equal., Aug. 1, 1974.) Additionally, her tax liability must be

computed using the rates for a married person filing separately, since a joint return may not be filed where one spouse was a nonresident for part of the year. (Rev. & Tax. Code, § 18402, subd. (b)(1).) These adjustments will reduce somewhat the amount of refund to which appellants are entitled. (Resp. Ex. G.)

Appeal of Roy L. and Patricia A. Misskelley

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 claim of Roy L. and Patricia A. Misskelley for refund of personal income tax in the amount of $3,147.19 for the year 1978, be and the same is hereby modified to reflect adjustments resulting from appellant's status as a Nevada domiciliary, as set out in the foregoing opinion.

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.

Richard Nevins., Chairman

Ernest Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9