

Appeal of Peter M. and Anita B. Berk

Appellants filed a **1978 part** year resident return which included in income \$24,068 of moving expense reimbursement, deducted \$8,664 as moving expenses, and claimed \$507 as a capital loss. Respondent requested appellants to substantiate the claimed moving expense and capital loss deductions. Mr. Berk (hereinafter "appellant") stated in the information submitted that moving expense reimbursement was erroneously included on appellants' California tax return and should have been excluded, as well as his moving expense deduction of \$8,664 because both had accrued before he left Wisconsin. After considering all the information, respondent increased appellant's income by \$221 for an unauthorized moving expense deduction, increased appellants' capital gain income by \$9,224, and issued a proposed assessment reflecting those changes.

Appellants protested, contending that neither of them became California residents until May 12, 1978, that certain of the moving expense reimbursements were accrued and certain of the capital gains were realized prior to that time, and concluded that those amounts should not be included in California income. After considering further information submitted by appellants, respondent affirmed its proposed assessments, and appellants filed this appeal.

Respondent contends that the moving **expense** reimbursements were paid by appellant's employer because appellant was moving to its California office. Therefore, those payments were compensation to the employee for his expected California services and, as contemplated by statute, are to be considered as California source income taxable to appellant without regard to the time at which he became a California resident. Respondent further contends that, in any event, all of the employer's moving expense payments or reimbursements were actually made after appellant became a California resident and, therefore, were taxable to him on the basis of his residency without regard to the possible source of that income.

Appellant contends that section 17596 of the Revenue and Taxation Code places the taxpayer on the accrual method of accounting and that if an item of income accrues prior to the time-appellant became a California resident, that item is not subject to tax even if it is received after he became a California resident. Appellant further contends that the bulk of the expenses were fixed and determined and therefore were accrued before he became a California resident.

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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, in pertinent part, states: "(a) 'Resident' includes: (1) Every individual who is in this state for other than a temporary or transitory **purpose.**" California Administrative Code, title 18, section 17014, subdivision (b), in pertinent part, reads:

Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. ... If, however, an individual is in this State to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, **or** is employed in a position that may last permanently or indefinitely, ... he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.

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 the case. If an individual is in California to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement which will require his presence here for but a short period, that person is in this state for a temporary or transitory purpose and will not be a resident by virtue of his presence here. But if the individual is here for business purposes which will require a relatively long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, he is here for other than temporary or transitory purposes and is a resident taxable upon his entire net income. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (b).)

From the evidence, it appears that in the first part of 1978, appellant was employed by **Phillip** Morris at its industrial division in Wisconsin. He was then informed by his employer that he would be transferred to its real estate development division in Mission **Viejo**,

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California. On March 28, 1978, appellant signed a contract to sell his Wisconsin residence. The **only contingency** to the **sale** was that water from a well on the property had to be **tested** and found potable. The sale was to close on May **12, 1978**. Also on March 28, 1978, appellant signed an agreement with a van line to **pick** up the family household goods on May 12, 1978, and move them to California.

Appellant arrived in California on **April 9** and commenced work at **Phillip Morris'** Mission **Viejo** division on **April 10, 1978**. On April 13, 1978, Mrs. Berk arrived in California. On April 18, 1978, appellants signed escrow instructions to purchase a California residence. **The** only contingency to the purchase was appellants' receipt of a new loan from a savings and loan association. Apparently, both appellants returned to Wisconsin on April 21, a Friday. Mrs. Berk remained in Wisconsin, but Mr. Berk returned to work in California on April 24, the following Monday, where he remained **until** May 5, 1978, when he returned to Wisconsin for the weekend. The following week, from May 7 through 9, he attended a finance conference in Richmond, Virginia. Appellant then returned to Wisconsin on May 10. On May 12, 1978, appellants' household goods were picked up in Wisconsin for shipment to California. Appellants and their family immediately left for their California hotel, where they remained until May 20, when their household goods were delivered in California.

We conclude that Mr. Berk became a resident when he arrived here on April 9 to commence an indefinite term of employment here and that his cited absences from the state thereafter were for specific, temporary purposes: to visit his family in Wisconsin, to attend a business conference, and to manage the shipment of **household** goods to California. Respondent concedes that Mrs. Berk did not become a California resident until May 12, **1978**.

Section 17122.5 of the Revenue and Taxation Code states:

There shall be included in gross income (as compensation for services) any amount received or accrued, directly or indirectly, by an individual as payment for or reimbursement of expenses of moving from one residence to another residence which is attributed to employment or self-employment.

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Appellant contends, however, that for the purposes of determining whether items of income and deductions are reportable in California, section 17596 of the Revenue and Taxation Code places him on the accrual method of accounting for the year his residency status changes. Section 17596 of the Revenue and Taxation Code states:

When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise **includible** in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

Appellants had entered into a conditional contract of sale of their Wisconsin house and a contract to move their household goods by April 9, but the house sale had not taken place nor the household goods moved by that date, so the expenses had not become fixed and definite. (Cf. Appeal of James H. and Heloise A. Frame, Cal. St. Bd. of Equal., Nov. 14, 1979.) Since none of the moving expenses were fixed and definite at the time appellant became a California resident on April 9, 1978, the application of section 17596 urged by appellant would not remove any items from California income. **But**, whenever fixed or paid, the income is California source income since it was paid by **Phillip** Morris because appellant was moving to its California division and is therefore attributable to his California employment and is California source income. We have repeatedly held that section 17596 is not applicable to situations involving California source income. - (See generally, Appeal of Virgil M. and Jeanne P. Money, Cal. St. Bd. of Equal., Dec. 13, 1983; Appeal of Bertram D. and Glorian B. Thomas, Cal. St. Bd. of Equal., Nov. 1b, 1981)

The capital gains on the sale of stock included in appellants' income reflected by the proposed assessment assumed that appellant became a California resident on April 9, 1978, and that the stock in question was owned separately by him so that all gains on sales of the stock after that date were taxable by California, the state of his residency after that date. Respondent has stated that if Mrs. Berk did not become a California resident

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until May 12, 1978, and if the stock was jointly owned by both appellants, then gains on her portion of stock sold between April 9 and May 12, 1978, should not be included in California income. Appellants were provided with the opportunity -after our hearing of their appeal to submit proof of joint ownership of the stock in question. After the hearing, appellants' representative submitted a letter which stated that an argument could be made that the stock was jointly owned by appellants on the basis that both appellants brought equal amounts of assets to their marriage, they both worked until the birth of their first child, and investment monies came from both parties equally. This appears to be an argument that the stock should have been jointly owned, rather than a demonstration that the stock had been jointly owned and that respondent had been in error in attributing the gains to Mr. Berk in its proposed assessment. The **determination** of a **deficiency** by the taxing authority is presumed correct, and the burden is on the taxpayers to prove that the correct income was an amount less than that on which the deficiency assessment was based. (374 **ley** v. Commissioner, 111 F.2d (5th Cir. 1940); Appeal of John and Cordelle Perez, St. Bd. of Equal., Feb. 16, 1971.) Appellants have not sustained their burden, and we have no alternative but to sustain respondent's determination on this issue also.

