

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
BARRY H. KEELING) No. 82A-1640
)

For Appellant: William P. Shannahan
Attorney at Law

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Barry H. Keeling against proposed assessments of additional personal income tax in the amounts of \$10,042.36 and \$2,057.53 for the years 1977 and 1978, respectively, and against proposed assessments of additional personal income tax and penalties in the total amounts of \$5,539.72 and \$6,033.00 for the years 1979 and 1980, respectively.

^{1/} Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

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The major issue presented in this appeal is whether appellant was a resident of California for income tax purposes during the period 1977 through 1980.

Appellant is a pilot who has been employed with Trans World Airlines (TWA) since April of 1965. After completing his flight training in Illinois, appellant and his wife moved to Los Angeles where appellant took up his duties as a flight officer. In December of 1969, the Keelings purchased a home in La Jolla, California.

Appellant and his wife separated in April of 1976. Appellant, as a result of the property settlement, received the La Jolla residence as well as two California limited partnerships. In September of 1976, appellant was, at his request, assigned by TWA to Saudi Arabia where he was to serve as a flight instructor. After two months of training in Colorado, appellant left for Jeddah, Saudi Arabia. Appellant's contract provided that he would remain in Saudi Arabia for a minimum of 18 months. He also was provided with rent-free housing.

Before leaving California, appellant gave his friend, Joseph E. Aiken, his power of attorney. Mr. Aiken has stated that appellant indicated to him that because he was recently divorced he was not likely to return to California after the Saudi Arabia assignment. As Mr. Aiken had previously acted as appellant's financial advisor, he was instructed to handle appellant's affairs as he saw appropriate. A joint bank account was set up so that Mr. Aiken could pay the bills. Mr. Aiken had a real estate license so he was to determine the timing of the sale of the La Jolla residence. According to Mr. Aiken, he did not sell the property because at that time property values were soaring with annual appreciation of 25 to 40 percent. During appellant's absence from California, a friend of Mr. Aiken's occupied appellant's La Jolla house. He paid no rent but he did pay his own utilities and acted as caretaker of the property.

In January of 1978, appellant was assigned to New York to fly the international routes. He resided in London until May of 1979, when he rented an apartment in New York. In 1980, appellant moved to Las Vegas, Nevada, where he commuted to New York until March of 1981, when he was reassigned to Los Angeles. Upon returning to California, appellant again resided at the home in La Jolla.

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Appellant filed California nonresident returns in 1977 and 1978, but filed no California returns in 1979 and 1980. Respondent determined that appellant was a California resident during all four years in issue and proposed assessments were issued in February of 1982. Respondent's determination was based on the following:

- (1) the real property at La Jolla was neither sold nor rented;
- (2) a new 1977 Porsche 911 was garaged at appellant's La Jolla house;
- (3) appellant periodically returned to California to stay in the La Jolla house which was occupied by a friend of Joseph Aiken's;
- (4) appellant continued to conduct his personal business in California, such as taking out a \$5,000 loan from California First Bank in July of 1979, and a \$50,000 loan from Crocker Bank in November of 1980;
- (5) appellant employed a San Diego accounting firm to prepare his tax returns;
- (6) appellant retained his California driver's license through 1979;
- (7) appellant maintained a telephone listing in his name at his La Jolla home;
- (8) appellant returned to California numerous times for medical examinations, surgery, and other business; and
- (9) appellant claimed the residence at La Jolla as his principal residence for purposes of obtaining a California homeowner's property tax exemption through 1979.

Appellant contends that when he left California for Saudi Arabia he never intended to return to California. In support of this position appellant points out that once he left his assignment in Saudi Arabia he went to London, then New York, and finally Nevada. Appellant further contends that he had no family in California to which he could return and he kept his real property only as a business investment. Finally, appellant contends that he built a house in Illinois, in which his parents are living, and that he had bank accounts in Illinois,

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England, and Nevada. As to the issue concerning the homeowner's exemption, appellant has stated that he did not receive the notice of homeowner exemption sent out by the county assessor and, therefore, did not realize his error until July 1, 1979, when he had the exemption removed.

Section 17041 imposes a tax on the entire taxable income of every resident of this state. Therefore, the wages earned by appellant while absent from California are taxable to appellant if he remained a California resident during that absence. Section 17014, subdivision (a), defines the term "resident" as including: "(2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose."

Under the terms of this statute, appellant was a resident of California for tax purposes if (1) he continued to be a domiciliary during his absence, and (2) this absence was for a temporary or transitory purpose. Since appellant does not contend that he did not remain a California domiciliary during his absence, we need only determine whether or not his absence from California was for a temporary or transitory purpose. Respondent's regulation explains 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 each particular case. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (b); Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6, 1976.) The regulation further explains that the underlying theory of California's definition of "resident" is that the state with which a person has the closest connections is the state of his residence. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (b), supra.) In accordance with this regulation, we have held that the connections which a taxpayer maintains with this and other states are an important indication of whether his presence in or absence from California is temporary or transitory in character. (Appeal of Richards L. and Kathleen K. Hardman, Cal. St. Bd. of Equal., Aug. 19, 1975.) Some of the contacts we have considered relevant are the maintenance of a family home, bank accounts, business relationships, possession of a local driver's license, and ownership of real property. These contacts are important both as a measure of the benefits and protection which the taxpayer has received from the laws and government of California, and also as an objective indication of whether the taxpayer entered or left the state for temporary or transitory purposes.

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(Appeal of Jeffrey L. and Donna S. Egeberg, Cal. St. Bd. of Equal., July 30, 1985.)

Using the above-referenced guidelines, we find no reason to conclude that appellant was outside of California for other than a temporary or transitory purpose. While appellant did have housing provided for him in Saudi Arabia and did work in Saudi Arabia from September of 1976 to January of 1978, the only substantial connections he kept were with California. Quite clearly the burden of proof is on appellant to show that respondent's determination of tax, which is presumed to be correct, is, in fact, erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949).) Appellant has not shown that his connections with any other location were greater than his connections with this state. Rather, appellant kept a telephone listing and a car in La Jolla; he returned to California many times for his medical and business needs; he claimed the California homeowner's exemption on his La Jolla property^{2/}; and he did not lease or sell his La Jolla home. When appellant was in New York and Las Vegas, he shared apartments and does not appear to have established many connections with either area. Given the nature of appellant's employment and the ease with which he could travel great distances, we must conclude that even though his job was not based in California, he kept his most substantial contacts with this state. Consequently, appellant's purpose for being outside of California was temporary or transitory and he continued to be a resident during the years in issue. The action of respondent must be sustained.

We note that the amounts assessed for the years 1979 and 1980 include penalties for failure to file a return and for failure to furnish requested information.

Section 18681 imposes a penalty when a taxpayer fails to file a return by the due date unless it can be shown that the failure was due to reasonable cause and was not due to willful neglect. Appellant contends that

^{2/} California's Constitution in subdivision (k) of section 3 of article XIII provides that a homeowner's exemption may be taken only when the property is occupied by an owner as his principal residence. Revenue and Taxation Code section 218 further provides that the exemption does not extend to property which is the owner's secondary home.

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he is not subject to any filing requirements because he was not a resident. On May 14, 1981, appellant corresponded with respondent and stated that his accountant noted that his income was so minor that no tax was owed; consequently, the accountant did not bother to file a return.

Federal courts construing the phrase "reasonable cause," as it appears in comparable penalty provisions of the Internal Revenue Code, have uniformly held that the mere uninformed and unsupported belief of a taxpayer, no matter how sincere that belief may be, that he is not required to file a tax return is insufficient to constitute reasonable cause for his failure to file. (Henningsen v. Commissioner, 26 T.C. 528 (1956).) Therefore, even though appellant honestly believed that he did not need to file a return, this does not constitute "reasonable cause." Likewise, appellant does not contend, or present evidence to support such a contention, that he sought the advice of counsel and relied on such advice in failing to file a return. Quite clearly the burden of proving that the failure to file was due to reasonable cause is on appellant. (Russell v. Commissioner, ¶ 81,082 T.C.M. (P-H) (1981).) As appellant has not met this burden of proof, the action of respondent as to the failure to file penalty was proper.

Section 18683 provides that if any taxpayer fails or refuses to furnish any information requested in writing by the Franchise Tax Board, a penalty of 25 percent may be added to the deficiency. On June 11, 1981, respondent sent a letter to appellant requesting copies of receipts, utility and telephone bills, and the like to verify when he was in the state. On September 15, 1981, a follow-up letter was sent by respondent stating that appellant must respond by September 30, 1981, if he wished to avoid the 25-percent penalty. Appellant responded on September 27, 1981, but he did not provide the information requested by respondent. Once again as appellant has not shown reasonable cause for failing to send the requested information, we must conclude that respondent's action in imposing the penalty was proper.

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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 Barry H. Keeling against proposed assessments of additional personal income tax in the amounts of \$10,042.36 and \$2,057.53 for the years 1977 and 1978, respectively, and against proposed assessments of additional personal income tax and penalties in the total amounts of \$5,539.72 and \$6,033.00 for the years 1979 and 1980, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of October, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

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

*For Kenneth Cory, per Government Code section 7.9