

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ANTHONY J. AND)
ANN S. D'EUSTACHIO)

Appearances:

For Appellant: Anthony J. D'Eustachio,
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 Anthony J. D'Eustachio against proposed assessments of additional personal income tax in the amounts of \$61.88, \$116.08, and \$203.31 for the years 1977, 1978, and 1979, respectively, and on the protest of Ann S. **D'Eustachio** against proposed assessments of additional personal income tax in the amounts of **\$1,605.07, \$3,233.17, and \$1,464.79** for the **years** 1977, 1978, and 1979, respectively.

Appeal of Anthony J. and Ann S. D'Eustachio

The issue presented in this appeal is whether appellants are required to file separate returns in which one-half of each spouse's income is properly apportioned to the other.

Appellant Anthony **D'Eustachio** (hereinafter referred to as "appellant") first entered California in 1969 and worked here for nine months. He then left the state until 1972 when he returned and began a business in the Irvine area. In 1973, appellant left California and moved to Indiana leaving his wife and family in their Irvine residence. During the years 1977, 1978, and 1979, he resided at 5331 **Whisperwood**, Indianapolis, Indiana. Appellant's wife, Ann, and their daughters continued to reside at the family's home at 16 Aspen Tree, Irvine, California.

Appellant stated that he left California in 1973 because of the job opportunities with Boehringer-Mannheim Corporation. Appellant and his wife agreed that she would stay in California with the children because of her job, professional standing, their home, California's desirable climate, and their daughters' schools. Appellant purchased a house in Indiana and also did some of his banking there, Appellant kept his California driver's license- as he made weekend trips' **to California** to visit his family **approx-**imately once a month.. Appellant states that his wife and children also visited him in Indiana.

In 1981, appellant moved **to** Houston, Texas, to run a larger division for the company. By the end of 1982 appellant resigned from Boehringer-Mannheim, rejecting the opportunity to move to the home office in Europe, and returned to California to be with his wife who was terminally ill. Mrs. **D'Eustachio** died in March of 1984.

In each of the appeal years appellants, filed joint California tax returns reporting all of Mrs. **D'Eustachio's** earnings and one-half of appellant's earnings,. **Each** return included the following statement:

Taxpayer is employed as president of **Boehr/** Ingermanheim Inc. [sic] in Indianapolis Ind * His wife and family reside in Irvine, CA where the family owns their home * Taxpayers spouse **is** employed in **Calif** * It was the opinion of the Assistant Chief Counsel - Technical Services of the FTB that taxpayer was a resident of Indiana but domiciled in California and that the community property rules would

Appeal of Anthony J. and Ann S. D'Eustachio

attribute one-half of taxpayers salary to the spouse and. subject it to California tax * The return has been prepared on this basis **

(Resp. Br. at 2.)

The returns were completed by the accounting firm of Main Hurdman and it was this firm which allegedly contacted the Franchise Tax Board and inquired as to the proper manner of reporting.

Respondent disallowed appellants' jointly filed returns, stating that Mrs. **D'Eustachio** must file a resident return and that appellant must file a nonresident return. Respondent concluded that in accordance with California community property laws, Mrs. **D'Eustachio's** returns should **include** as income **subject** to tax both her one-half share of her own earnings, and her one-half share of her husband's earnings, as California residents are taxed on their entire incomes. Respondent concluded that appellant's returns should include only his one-half share of his **wife's** earnings, as nonresidents are taxable **only on California-**source income.

Completion of these revisions for the years in question produced the tax liability at issue. Respondent notes that pursuant to subdivision (b) of section 18402 of the Revenue and Taxation Code, taxpayers may not file joint personal income tax returns where one spouse was not a resident of California for the entire taxable year for which the return was filed.

Appellant contends that they should not be disallowed the joint filing privileges because during the years at issue both were residents of Indiana. Appellant further contends that respondent agreed to the joint filing and that respondent should now be held to this agreement.

Revenue and Taxation Code **section 18402**, subdivision (b), provides that no joint return may be filed if one spouse was a resident for the entire year but the other spouse was a nonresident for all or any portion of the taxable year. It is therefore necessary to determine where each appellant was a resident during the years in question.

For income tax purposes, "resident" includes every individual who is in this state for other than temporary or transitory purposes, as well as every domiciliary who is outside the 'state for a temporary or

Appeal of Anthony J. and Ann S. D'Eustachio

transitory purpose. (Rev. & Tax. Code, § 17014.) As to Mrs. **D'Eustachio**, it is quite clear that her residency was in California. Prior, during and subsequent to the years at issue, she lived in Irvine with her children. It was in California where she **worked** and where she resided until her death in 1984. As to appellant's residence, both parties agree that he was a resident of Indiana. Based on these facts, we must conclude that appellants were not entitled to file joint returns.

Appellant further contends that he was not domiciled in California and that California's community property laws should not apply to make Mrs. **D'Eustachio** taxable on one-half of his earnings.

It is well settled that marital property interests in personal property are determined **under the** laws of the acquiring spouse's domicile. (Schechter 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 was a California domiciliary.

The word "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).)

Both Mr. and Mrs. **D'Eustachio** were domiciled in California prior to the years at issue. As to Mrs. **D'Eustachio**, the evidence indicates that she remained domiciled in California as she continued to live in Irvine until her death. As to the issue of appellant's domicile, it is well established that 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).) Consequently, appellant has the burden of proving that he changed his domicile from California to Indiana.

A person's domicile is generally described as the place where he lives or has his home, to **which**, when absent, he intends to return, and from which he has no present purpose to **depart**. (Ibid.) In other words, the

Appeal of Anthony J. and Ann S. D'Eustachio

concept of domicile involves not only a physical presence in a particular place, but also the intention to make that place one's home.

The facts in this case show that appellant resided in Indiana, was employed there, filed Indiana income tax returns, had club memberships there, and had bank loans there. As to California, appellant kept his family and real property here; he kept his California driver's license; and he returned once a month to visit his family. A review of these facts shows that both of appellant's dwelling places have some of the aspects of a home. In situations such as this, where it cannot clearly be determined which of the dwelling places is appellant's domicile, appellant's domicile remains at that one of the two dwelling places which was first established. (**Rest. 2d Conf. of Laws, § 20, comment b, illustration 3 (1969).**) As appellant's first dwelling place was in California, California will continue to be appellant's domicile until appellant can show that it clearly has changed.

Finally, appellant contends that sometime in 1975 his accountant reached an "agreement" with respondent concerning the propriety of filing a joint return. A review of the statement appellant placed on his returns, on which he presumably relied, shows that the opinion given by respondent's Assistant Chief Counsel - Technical Service Bureau is consistent with our finding. The statement relates only to appellant's **California** domicile and does not address the propriety of the filing of joint returns. The fact that respondent failed to discover that appellant's 1973 and 1974 joint returns were improper is not evidence of such an agreement.

For the above reasons, respondent's action in this matter will be sustained.

