



Appeal of **Terance** and Brenda Harrison

The issues **presented** here are: whether appellant Mr. Harrison was a resident of California in 1976, thereby rendering his entire income taxable; if not, whether Mr. Harrison was, nevertheless, a domiciliary of California in 1976, there**by** rendering one-half of his community income taxable. **2/**

Appellants, husband and wife, filed a joint personal income tax return as residents of California for 1976. Later appellants filed an amended 1976 return reducing their taxable income by the amount of appellant-husband's (hereinafter sometimes denoted as "appellant") 1976 salary, contending that he had been a domiciliary and a resident of Canada during that period. Upon review, respondent concluded that appellant had been both a domiciliary and a resident of California during the year at issue. Respondent treated appellants amended return as a claim for refund pursuant to section 19053.1. After reviewing information submitted by appellants, respondent denied appellants' claim for refund, and this appeal followed.

The record indicates that appellants entered California in 1958 and that their son was born here in 1960. Appellants purchased a home in Redlands, California, and admittedly both became domiciliaries and residents of California. By letter dated February 19, 1973, appellant-husband was offered a sales job by **deHavilland** Aircraft of Ontario, Canada. That letter indicated that in order to qualify for reimbursement for moving expenses the company expected appellant to *work* for at least two years. In fact, appellant-husband worked for the Canadian company from April 1973 until March 1977, **almost** four years. During that period, appellant-husband spent the bulk of his time in Canada or in other foreign countries selling airplanes. He returned to California only for vacations of two to three weeks per year. During his absence, appellant-wife and their son remained in California living in the home that appellants jointly owned. Their child attended school in California. During his employment in

**2/In** addition to the proposed assessment upon which **this** appeal is **based**, respondent made a subsequent assessment of \$609.15 for 1976 on October 17, 1980, reflecting adjustments made by a federal determination. As appellants did not file a protest within the **60-day** statutory period (Rev. & Tax. Code, **§ 18590**), the second assessment is final and this board has no jurisdiction, at this time, to hear the issues surrounding it.

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Canada appellant apparently rented a house in **Canada**, purchased a car, obtained a driver's **license**, participated in social and civic activities, and maintained a banking relationship there.

Appellants concede that appellant-wife was both a domiciliary and resident of California during **1976**. However, appellants contend that appellant-husband was neither a domiciliary nor a resident of California during that period. Respondent contends that he was both a domiciliary and a resident of California.

At the outset it is necessary to distinguish between "residence" and "domicile." For our **purposes**, this distinction was enunciated in Whittell v. Franchise Tax Board, 231 **Cal.App.2d** 278 [**41 Cal.Rptr.** 673] (**1964**).) In Whittell, 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. Residence, on the other hand, denotes any **factual** place of abode of some permanency, that is, more than a mere temporary sojourn,

(231 **Cal.App.2d** at 284,)

Prior to April of 1973 **appellant-husband** was clearly a California domiciliary. In order for **appellant-husband** to lose his California domicile, it is necessary to find **that** he: (1) left the state without **any** intention of returning, and (2) was located elsewhere with the intention of remaining there indefinitely. (Estate of Peters, 124 **Cal.App.** 75 (12 **P.2d** 118) (1932); Chapman v. Superior Court, 162 **Cal.App.2d** 421 (328 **P.2d** 23) (1958).) Like the taxpayer in the Appeal of Robert M. and Mildred Scott, decided by this board March 2 1981 appellant maintains that he was not a California domiciliary during his absence because he intended to stay in Canada indefinitely. As **indicated above**, it is the **"intent"** of the person that determines domicile. However, it is well settled that this **intention** is not to be determined merely from unsubstantiated **statements**, but rather the **"acts** and declarations of the **party** must be taken into **consideration**." (Estate of Phillips, 269 **Cal.App.2d** 656, 659 [75

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Cal.Rptr. 301] (1969); Appeal of Robert M. and Mildred Scott, supra.)

It is well settled that the burden of proof is on the one asserting a change of domicile to prove the acquisition of a domicile in another place. (Sheehan v. Scott, 145 Cal. 684 [79 P. 350] (1905).) Accordingly, appellant must show that he (1) left California without any intention of returning and (2) was located in Canada with the intention of remaining there indefinitely. Similar to the situation in the Appeal of Robert M. and Mildred Scott, supra, the record is wanting of acts by appellant-husband which would tend to establish perennial connections in Canada. The contacts emphasized by appellants (e.g., maintaining a house, car and bank accounts in Canada) are no more significant than those raised by the taxpayer in Appeal of Annette Bailey, decided by this board March 8, 1976, where we found the taxpayer-husband to be a domiciliary of this state. To the contrary, appellant continued to own a home in California in which his wife and child resided, and from time to time he returned to that home. His child attended school in California during his absence. We have held before that the maintenance of a marital abode is a significant factor in resolving the question of domicile. (Appeal of Annette Bailey, supra.) Accordingly, we find that appellant has not carried his burden of proving that he acquired a new domicile in Canada and, consequently, he remained a California domiciliary during the period at issue.

Notwithstanding this conclusion, we find that the factors noted above are sufficient to establish that appellant-husband was a resident of Canada during the critical period.

Subdivision (a)(2) of section 17014 defines the term "resident" to include "[e]very individual domiciled in this state who is outside the state for a temporary or transitory purpose." The precise question presented with respect to residency, therefore, is whether **appellant-husband's** absence from this state was for a temporary or transitory purpose.

Respondent's regulations indicate that whether a taxpayer's presence **in or** absence from California is for a temporary or transitory purpose is essentially a question of fact, to be determined by examining all the circumstances of each particular case. (Cal. Admin.

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Code, tit. 18, reg. 17014, **subd. (b).**) The regulations go on to provide that, as a general **rule:**

**[I]f an individual is simply passing through this State on his way to another state or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here.**

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, or has retired from business and moved to California with no definite intention of leaving shortly thereafter, he is in the State for other than temporary or transitory purposes, . . .

(Cal. Admin. Code, tit, 18, reg. 17014, **subd. (b).**)

**The examples listed in this regulation are equally relevant in assessing the purposes of a California domiciliary's absence from the state. (Appeal of George J. Sevesik, Cal. St. Bd. of Equal., Mar. 25, 1968.)**

The regulations also reveal that the underlying theory of California's definition of "resident" is that the state where a person has his closest connections is the state of his residence. (Cal. Admin. Code, tit, 18, reg. 17014, **subd. (b).**) Consistent with this regulation, we have held that the contacts which a taxpayer maintains in this and other states are important, objective indications of whether the taxpayer's presence in or absence from California was for a temporary or transitory purpose. (Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6, 1976.) In cases such as the present one, where a California domiciliary leaves the state for business or employment purposes, we have considered it particularly relevant to determine whether the taxpayer substantially severed his California connections upon his departure and took steps to establish significant

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connections with his new place of abode, or whether he maintained his California connections in readiness for his return. (Compare Appeal of Richards **L.** and Kathleen **K. Hardman**, Cal. St. Bd. of Equal., Aug. 19, 1975, and Appeal of Christopher T. and **Hoda A. Rand**, Cal. St. Bd. of Equal., Apr. 5, 1976, with Appeals of Nathan A. and Julia M. Juran, Cal. St. Bd. of Equal., Jan. 8, 1968, and Appeal of William and Mary Louise **Oberholtzer**, Cal. St. Bd. of Equal., Apr. 5, 1976.)

The February 19, 1973, letter offering appellant a job in Canada indicated that the job was of a permanent **or** indefinite nature. In fact, appellant remained on that job for approximately four years. During that time he apparently rented a **house**, purchased a car, obtained a driver's license, maintained a **banking relationship**, and participated in social and civic activities in Canada. Appellant-husband returned to California only for vacations of two or three weeks each year during the years 1973 through 1977, including the year at issue. Clearly, during the years at issue, his closest connections were in Canada, not in California, and, as indicated above, we must conclude that appellant-husband was not a resident of California during the period at issue.

Since we have found Mr. Harrison was a domiciliary, but not a resident, of California during the year at issue, and the parties agree that his wife remained both a domiciliary and resident of California, we must conclude that appellant's earnings constituted community property, only one-half of which is taxable in this state. (Appeal of Annette Bailey, supra.) We note, however, that pursuant to section 18402, subdivision (b), appellants are precluded from filing a joint return and their tax liability for the year at issue must be computed on the basis of separate returns. Accordingly, respondent's determination must be modified in accordance with the views presented herein.

