



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
 ROBERT D. AND SUSAN OWCHINKO)

For Appellants: Robert L. Fenton
Attorney at Law

For Respondent: Esther Low
Counsel

O P I N I O N

This appeal is made pursuant to section **19061.1** of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Robert D. and Susan Owchinko for refund of personal income tax and penalty in the total amount of **\$4,970.70** for the year 1980.

17 Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The central issue is **whether** appellants were residents of California during 1980.

In 1977, Robert Owchinko, a professional baseball pitcher, moved to California in order to work for the San Diego Padres. When the baseball season was **over**, Robert returned to **Michigan** to live with his parents. In 1978, Robert returned **to** San Diego to **work and**, at that time, purchased a condominium there which he rented out. Thereafter, in 1979, Robert married Susan, and they began to occupy the San Diego condominium. During 1979, appellants spent ten and one-half months in San Diego, spending the remainder of the year in training camp in Arizona. Appellants held California driver's licenses and registered their automobiles in California. During this time, the majority of their banking activities were centered in California. While Robert did not register to vote **in any** state, Susan registered to vote in California in 1979 and 1980. Moreover, appellants applied for and were granted a homeowner's exemption for property taxes for the condominium contending that it was their principal residence. in 1979 and 1980.

In early 1980, Robert was traded to the Cleveland Indians baseball club. Appellants remained in California for the first six weeks of 1980 and then moved to Ohio for the 1980 baseball season. In Ohio, appellants rented a furnished apartment, the lease of which expired in October coinciding with the end of baseball season. Appellants opened checking and savings accounts in Ohio' and contend that they shopped for permanent housing intending to make Ohio their domicile. While in Ohio, appellants rented out their San Diego condominium with its furnishings until October (the end of ~~the~~ ^{2/} baseball season) to a member of the San Diego team. Thereafter, the condominium remained vacant until appellants returned in January of 1981. While in Ohio, appellants retained their California driver's licenses, automobile registrations, bank accounts, and Susan's California voting registration. At the end of the 1980 baseball season, Robert was traded to the Pittsburgh Pirates baseball

2/ Respondent notes that appellants have not included rental income or expenses from the rental of this condominium which, arising from a California source, would be chargeable to appellants regardless of the outcome of this appeal. Appellants have offered to make any adjustments required pending the outcome of this case.

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club, During the fall of 1980, **Robert** played winter baseball in Puerto Rico and appellants accordingly resided there during the remainder of 1980. Before the 1981 baseball season, Robert was traded to the Oakland Athletics baseball club, located in California. Appellants returned to their San Diego condominium for the first six weeks of 1981.

For 1980, appellants submitted a **part-year** resident income tax return for California, in which they claimed they were California residents from January 15, 1980, to March 15, 1980. Upon audit, respondent determined that appellants were California residents for the entire 1980 tax year. In addition, respondent assessed a penalty for late filing pursuant to Revenue and Taxation Code section 18432 since the appellants' 1980 return was received **3/** May 1, 1981, rather than April 15, 1981, as required. **3/** Appellants' protest and respondent's denial thereof led to this appeal.

Section 17041 requires a tax to be paid upon all the taxable income of each California resident. (Appeal of William Harold Shope, Cal, St. Bd. of Equal., May 21, 1980.) Section 17014, subdivision (a)(2), defines "resident" to include "[e]very individual domiciled in this state who is outside the state for a temporary or transitory purpose.*"

Respondent argues that **appellants** were California residents during the year at issue because they were domiciled in this state and because their absence was for a temporary or transitory purpose. On the other hand, appellants argue that they were Ohio domiciliaries and were not domiciliaries of this state during the year at issue. Even if they were, appellants maintain, they **were** outside this state for other than a temporary or transitory purpose.

At the outset it is necessary to distinguish between "residence" and "domicile." For our purposes this distinction was enunciated in Whittell v. Franchise

3/ Regardless of the outcome of this case, appellants **are** required to file a California personal income tax return for 1980 due to their admitted part-year residency and rental income. Accordingly, appellants have made no argument with respect to the propriety of the penalty and apparently concede its accuracy pending the determination of the amount of tax due.

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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.)

Regulation 17014, subdivision (c), of title 18 of the California Administrative Code adds, in relevant part:

An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he retains that domicile until he acquires another elsewhere. . . . [A]n individual, who is domiciled in California and who leaves the State retains his California domicile as long as he has the definite intention of returning here regardless of the length of time or the reasons why he is absent from the State.

The record indicates that appellants were domiciled in California for 1979, the year prior to the one at issue. Appellants allege that they intended to establish a new domicile in Ohio in early 1980 when Robert was traded from the San Diego Padres baseball club to the Cleveland Indians baseball club. As noted, **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 Cal.Rptr. 301] (1969); Appeal of Robert M. and Mildred Scott, Cal. St. Bd. of Equal., Mar. 2, 1981.) The only acts that appellants can point to in order to establish their intent to become Ohio domiciliaries in 1980 are the facts that they established Ohio checking and savings accounts and the fact that they shopped for houses in Ohio. However, during 1980 appellants continued to hold only California driver's licenses and California automobile registrations. Neither

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appellant registered to vote in Ohio, and Susan retained her California voting registration during this time. Appellants retained their ownership in the San Diego condominium and continued to maintain California checking and savings accounts. These circumstances convince us that appellants did not establish a new domicile in Ohio but remained **domiciled** in California throughout their absence in 1980.

Since appellants were domiciled here, they will be considered California residents if their absence was for a temporary or transitory purpose. In the Appeal of David J. and Amanda Broadhurst, decided by this board on April 5, 1976, ~~we~~ summarized the regulations and case law **interpreting the** phrase "temporary or transitory purpose" and noted that:

Respondent's regulations indicate that whether a taxpayer's purposes in entering or leaving California are temporary or transitory in character is essentially a question of fact, to be determined by examining all the **circum-**stances of each particular case. [Citations.]

Appellants' argue that given the particular circumstances of Robert's **business**, professional baseball, his absence from California in 1980 was other than for temporary or transitory purposes. Respondent answers that in the Appeal of Richard and Carolyn Selma, decided by this board on September 28, 1977, we held a professional baseball player to the same standard as others when interpreting the phrase "temporary or transitory **purpose.**"

Section 17014, subdivision (a), makes ~~no~~^{4/} distinction with respect to this type of employment. ~~Out-~~side of the limited exception noted in footnote four above, when a domiciliary of California leaves the state, what matters is not what type of employment he has, but whether his absence from California is for a temporary or transitory purpose, (Appeals of Ronald L. and Joyce E. Surette, Cal, St. Bd. of Equal., Dec. 13, 1983; Appeal of Cecil L. and Bonai G. Sanders, Cal, St. Bd. of Equal., June 2, 1971.)

4/ Revenue and Taxation Code section 17014, subdivision (b), ~~does~~ make certain distinctions for appointed and **elected** officials and their staffs which **are** not relevant to this appeal.

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Respondent's determinations of residency status, and proposed assessments based thereon, are presumed to be correct; the taxpayer bears the burden of proving respondent's actions erroneous. (Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June **22**, 1976.) In the instant case, the facts before us show that appellants had more ties with California than with Ohio. Appellants retained ownership of their condominium in San Diego. While the condominium was rented, appellants chose to rent it to a member of the San Diego Padres who vacated the unit after the end of baseball season in mid-October. In addition, appellants left their furniture in the condominium. The condominium remained vacant and available for appellants' return in January of 1981.

Appellants had California driver's licenses, California automobile registrations, and California bank accounts. In addition, Susan registered to vote in California. There is no evidence that appellants severed any connections with California or established any significant-connections in Ohio. Therefore, we must conclude that appellants' closest connections were with California, and that their stay in Ohio was for a temporary or transitory purpose. Appellants have not sustained their burden of proving otherwise. Accordingly, we hold that appellants were California residents in 1980 and that respondent's action must be upheld.

ORDER

appearing therefor,

of personal income tax and penalty in the total amount of **\$4,970.70** for the year 1980, be and the same is hereby sustained.

of June , 1985, by the State Board of Equalization,
with Board **Members** Mr. Dronenburg, Mr. Collis, Mr. Bennett
and Mr. Nevins present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Richard Nevins, Member

, Member