

Appeal of Dennie Housteen

Appellant, a full-blooded Navajo Indian, lived with his family on the Navajo Indian reservation in Arizona until 1970. Since 1970 appellant has been employed by The Atchison, Topeka and Santa Fe Railway Company in California while maintaining a home on the Arizona reservation for his family. While employed in California appellant lived in various locations, often in "outfit cars" furnished by the railway company. From 1969 until November 1975, appellant was separated from his wife although proceedings for a divorce or legal separation were never instituted. During the course of the separation appellant's wife resided with their children on the reservation. In November 1975, appellant and his wife were reconciled.

Appellant filed a nonresident personal income tax return for 1974 claiming head of household status. Thereafter, respondent requested information from appellant to substantiate his head of household status. When appellant failed to reply, respondent issued its notice of proposed assessment denying appellant's claimed head of household status and assessing a penalty for failure to furnish the requested information. The propriety of respondent's determination is the sole issue for determination.

Appellant first contends that he is not subject to California's income tax laws since he is an American Indian maintaining his permanent home on an Indian reservation in Arizona. Recent United States Supreme Court decisions have held that states were prohibited from imposing taxes on reservation Indians or their property where the Indians earned their income or maintained the property exclusively on Indian reservations. (Bryan v. Itasca County, 426 U.S. 373 [48 L. Ed. 2d 710] (1976); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 [36 L. Ed. 2d 129] (1973).) However, in the absence of express federal law to the contrary, Indians going beyond reservation boundaries are generally subject to nondiscriminatory state laws applicable to other citizens, including state tax laws. (Mescalero Apache Tribe v. Jones, 411 U.S. 145 [36 L. Ed. 2d 114] (1973))

In this appeal appellant had been employed in California for a period of almost five years when he filed his 1974 personal income tax return. Although appellant's family remained on the reservation in Arizona, appellant was an Indian "going beyond" his reservation while employed in California. Therefore, he was subject to California's income tax laws.

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Appellant also suggests that he may be entitled to income tax relief because of his status as a veteran. We find appellant's contention unfounded. The California personal income tax is imposed on the taxable income of any resident of this state and on the taxable income of any nonresident derived from sources within this state. (Rev. & Tax. Code, § 17041.) Here, appellant, a nonresident, generated California source income by virtue of his employment within the state. His California source income is, therefore, taxable notwithstanding his status as a veteran. We are unaware of any statute, regulation or case law to the contrary.

Next, we consider whether respondent correctly denied appellant's claimed head of household status. Section 17042 of the Revenue and Taxation Code provides that in order to claim head of household status, an individual must be unmarried and maintain as his home a household that is the principal place of abode of an individual who is within certain specified classes of relationship. In general, although a taxpayer is separated from his spouse, he is still considered as being married for purposes of claiming head of household status, unless, at the close of the taxable year, he was legally separated from his spouse under a final decree of divorce or separate maintenance. (Appeal of Robert J. Evans, Cal. St. Bd. of Equal., Jan. 6, 1977.; Appeal of Glen A. Horspool, Cal. St. Bd. of Equal., March 27, 1973; Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (a) (D).)

For years beginning on or after January 1, 1974, Revenue and Taxation Code section 17173 extended the benefits of head of household status to certain married individuals. This was accomplished by considering a married person as unmarried for purposes of classification as a head of household where he lives separate and apart from his spouse during the entire year and maintains a home for dependent children under certain conditions. In order to comply with section 17173, the taxpayer must maintain as his home a household which constitutes the principal place of abode of a qualifying dependent and, during the entire taxable year, the taxpayer's spouse may not be a member of such household. Since appellant's spouse lived with the children in Arizona during the entire year in issue, appellant cannot qualify as a head of household.

Finally, we note that appellant has not challenged the propriety of the penalty for failure to furnish information which respondent included in the proposed

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assessment. The burden of showing that the penalty was improper is upon the taxpayer. (Appeal of Dare and Patricia Miller, Cal. St. Bd. of Equal., March 18, 1975.) Appellant's **failure** to offer any evidence to show that the penalty was improperly imposed requires us to conclude that respondent's action was appropriate.

For the reasons set out above, we are compelled to conclude that respondent's determination is correct and that its action in this matter must be sustained.

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 Dennie Housteen against a proposed assessment of additional personal income tax and penalty in the amounts of \$151.60 and \$37.90, respectively, for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of January, 1979, by the State Board of Equalization.

William H. Bennett, Chairman
John J. [unclear], Member
George [unclear], Member
_____, Member
_____, Member