

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MICHAEL T. AND) No. **84A-903-SW**
PATRICIA C. GABRIK)

For Appellants: Michael T. and Patricia C. Gabrik,
in. pro. per.

For Respondent: Alison M. Clark
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 Michael T. and Patricia C. Gabrik against a proposed assessment of additional personal income tax and penalties in the total amount of \$323.77 for the year 1981, and against a proposed assessment of additional personal income tax in the amount of **\$8,057.00** for the year 1982. Subsequent to the filing of this appeal, appellants conceded the correctness of the 1981 proposed assessment. Accordingly, only the proposed assessment for 1982 remains in issue.

1/ 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 issue presented in this appeal is whether appellants were residents of California for the year 1982.

Prior to and during the taxable year 1981, appellants resided in Clayton, California, where Mr. Gabrik was employed as an engineer for Bechtel Petroleum, Inc. Appellants owned their home in Clayton and were owners of two rental properties, also located in California. In September of 1981, Mr. Gabrik was assigned to a project in Okpo, Korea. He left for Korea on November 11, 1981, and Mrs. Gabrik followed on January 6, 1982. All four of appellants' children remained in California. At least two of their adult children lived in and maintained the family home during appellants' absence and three of their children were attending California schools during their absence. Appellants claimed the California homeowner's exemption on their home for 1982.

Mrs. Gabrik returned to California for a one-month vacation in August of 1982, and appellants both returned to California on December 5, 1982, when the Korean assignment ended.

For the taxable year 1982, appellants filed a nonresident California joint personal income tax return, but they did not include the income earned by Mr. Gabrik while in Korea as California income.

Based on the following facts, respondent determined that appellants were residents of California for 1982:

- (1) Appellants did not sell or rent out their family home;
- (2) At least three of their children remained in California and attended school in this state;
- (3) Appellants claimed the homeowner's exemption on their house in Clayton; and
- (4) They maintained bank accounts, voting registration, driver's licenses, and ownership of several rental properties.

Appellants contend, however, that during 1982 they were not domiciliaries or residents of California and that no tax is owed on the income earned while in Korea. In support of their position, appellants state that Mr.

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Gabrik's assignment was not a temporary assignment; that they held valid international driver's licenses; that they did some banking locally; and that they were involved in local church events in Korea.

For income tax purposes, the term "resident" includes every domiciliary who is outside the state for a temporary or transitory purpose. (Rev. & Tax. Code, § 17014.) It must be decided, therefore, first whether appellants were domiciliaries of California in 1982 and, secondly, **if they were**, whether they were outside the state for temporary or transitory purposes.

Both appellants were domiciled, in California prior to 1982. These years are not disputed. It, therefore, becomes appellants' burden of proving that their domicile changed from California to Korea as **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 5951 (1949).])

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." (Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284 [41 Cal.Rptr. 6731 (1964).]) In other words, the concept of domicile involves not only a physical presence in a particular place, but also the intention to make that place one's home. (Appeal of Anthony J. and Ann S. D'Eustachio, Cal. St. Bd. of Equal., May 8, 1985.)

The facts in this case show that appellants resided in Korea, belonged to a church group there, Mr. Gabrik was employed there, and they did some banking there. As to California, appellants' children remained here, their real property was here, they kept their California driver's licenses, they did their banking here, and they claimed the California homeowner's exemption. (See Appeal of Joe and Gloria Morgan, Cal. St. Bd. of Equal., **July 30**, 1985.) A review of the facts shows that both of appellants' 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 appellants' domicile, appellants' domicile remains at the one of the two dwelling places which was first established. (Rest.2d Conf. of Laws, § 20, comment b, illustration 3 (1969).) As appellants' first dwelling place was in California, California will continue to be their

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domicile until appellants can show that it clearly has changed.

As we have concluded that appellants are domiciliaries of California, it must now be decided whether their absence 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. (Appeal of Jeffrey L. and Donna S. Egeberg, Cal. St. Bd. of Equal., July 20, 1985.)

In this case, Mr. Gabrik was employed under a contract which had no stated minimum duration. The assignment was defined simply as for an indefinite period. When they left California, they did not sell or rent out their home. Several of their children remained in the home and three of their children received the benefit of attending school in the state. No evidence has been presented that during this period appellants paid out-of-state tuition for any of their children, even though two of their adult children were presumably attending California colleges or universities. The Gabriks claimed the homeowner's exemption on their California house and, in essence, kept their home in readiness for their return. They continued to conduct their banking in this state and retained their California driver's licenses for the 12

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months they were in Korea. Quite clearly, the burden of proof is on appellants to show that respondent's determination of tax is erroneous. (Todd v. McColgan, 89 **Cal.App.2d** 509 [201 P.2d 414] (1949).) Given the above facts, we must conclude that appellants have not met this burden of proof. The Gabriks did not **substantially** sever their ties with California and they were not gone long enough so as to cause us to conclude that their absence from California was anything more than a temporary or transitory absence. Consequently, we must conclude that appellants continued to be California residents during the year 1982.

Appellants have questioned why, for federal income tax purposes, they are not considered to be residents-of the United States during 1982 and yet are considered to be residents of California during that same period. While California has chosen to pattern many of its laws on federal laws, it is not required to do so. Appellants would like us to apply federal tax law to a set of facts with respect to which the California Legislature has chosen not to follow. **the** federal statutes. We cannot do so. Federal revenue provisions which have no counterpart in California law may not be applied in determining California income tax liability. (Appeal of John A. and Barbara J. Vertullo, Cal. St. Bd. of Equal., July 26, 1916.)

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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 Michael T. and Patricia C. Gabrik against a proposed assessment of additional personal income tax and penalties in the total amount of \$323.77 for the year 1981, and against a proposed assessment of additional personal income tax in the amount of **\$8,057.00** for the year 1982, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day Of February , 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

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

*For Kenneth Cory, per Government Code section 7.9