BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 84R-1271-VN
JOHN J. AND ROSEMARY LEVINE)

Appearances:

For Appellants: John J. Levine, in pro. per.

For Respondent: Karen D. Smith Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), 1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of John J. and Rosemary Levine for refund of personal income tax in the amount of $2,581.71 for the year 1978.

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

The major issue presented for our decision is whether John J. and Rosemary Levine, husband and wife, were residents of California for income tax purposes in 1978. Whereas Mrs. Levine is a party to this appeal only because she filed a joint tax return with her husband, John J. Levine will hereinafter be referred to as "appellant."

Early in 1978, appellant was retired and living with his spouse in their home in the Lake Arrowhead area, San Bernardino County. Both of them had been long-time residents of this state. Appellant decided, however, to come out of retirement to work for Lockheed Aircraft Service Company. On June 2, 1978, appellant entered into an employment agreement with the company to work as a senior industrial engineer in Tehran, Iran. The term of the contract, according to appellant's statements, was two years. His wife was authorized to join him in his overseas assisgnment.

After securing visas from the Iranian government, appellant and his spouse left their home unoccupied and moved to Tehran in the summer of 1978. Once there, appellant rented a three-bedroom apartment pursuant to a written one-year lease agreement that he signed on July 7, 1978. Six months later, appellant's contract was terminated due to the unstable political climate caused by the Iranian revolution. Consequently, appellant and his wife had no choice but to return to their California abode in January 1979.

For the year 1978, appellant filed a joint non-resident or part-year resident return in which he did not report any of his earnings made while in Iran as part of his 1978 California taxable income. In October 1983, after receiving a waiver extending the statute of limitations, the Franchise Tax Board determined that appellant was a resident of the state for all of 1978 and liable for income tax based on his entire income for that year. Respondent then issued a deficiency assessment which reflected inclusion of the income that appellant had. failed to report on the return. Appellant filed a protest against the assessment, but the Franchise Tax Board denied the protest. Subsequently, appellant paid the assessment and filed a claim for refund which was also denied, resulting in this appeal.

Section-17041 imposes a personal income tax upon the entire taxable income of every resident of this

state. Section 17014 defines the term "resident" as follows:

> (a) "Resident" includes:
>
> (1) Every individual who is in this state for other than a temporary or transitory purpose.
>
> (2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

The purpose of this definition is to define that class of individuals who should contribute to the support of the state because they receive substantial benefits and protections from its laws and government and to exclude those persons who, aithough domiciled in this state, are outside for other than temporary or transitory purposes and thus do not enjoy the benefits and protection of the state. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (a); Whittell v. Franchise Tax Board, 232 Cal.App.2d 278, 285 [41 Cal.Rptr. 673] (1964).) In this appeal, the Franchise Tax Board determined that appellant and his spouse were California domiciliaries who remained residents of this state while in Iran in 1978 because their purpose there was only temporary or transitory in nature. Since appellant does not argue that he and his wife were not domiciled in this state, the determinative question is whether or not appellant's absence was temporary or transitory in purpose.

Respondent's regulations provide that whether a taxpayer's presence in or absence from California was 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. Code, tit. 18, reg. 17014, subd. (b); see Klemp v. Franchise Tax Board, 45 Cal.App.3d 870 [119 Cal.Rptr. 821] (1975).) The regulations explain the meaning of the term "temporary or transitory" in the following manner:

> It can be stated generally, however, that if 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 the

> 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 ... 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, . . . he is in the State for other 'than temporary or transitory purposes, and, accordingly, is a resident taxable on his entire net income. . . .

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

Although this regulation is framed in terms of whether or not an individual's presence in California is for a "temporary or transitory purpose," it is also relevant in assessing the purpose of a domiciliary's absence from the state. (Appeal of George J. Sevcsik, Cal. St. Bd. of Equal., Mar. 25, 1968; Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6, 1976.) As the regulation suggests, where a Californian is employed outside this state, his absence will be considered for other than temporary or transitory purposes if the job position is expected to last a long, permanent, or indefinite period of time. (Appeal of Anthony V. and Beverly Zupanovich, supra.) On prior occasions, this board has held that absences from California for employment or business purposes are not temporary or transitory if they require a long or indefinite time to complete. (See, e.g., Appeal of David A. and Frances W. Stevenson, Cal. St. Bd. of Equal., Mar. 2, 1977; Appeal of Christopher T. and Hoda A. Rand, Cal. St. Bd. of Equal., Apr. 5, 1976; Appeal of Richards L. and Kathleen K. Hardman, Cal. St. Bd. of Equal., Aug. 19, 1975.) More recently, we have pronounced that employment abroad in a position expected to last an indefinite period of substantial duration indicates an absence for other than temporary or transitory purposes. (Appeal of Jeffrey L. and Donna S. Egeberg, Cal. St. Bd. of Equal., July 30, 1985; see also Appeal of Basil K. and Floy C. Fox, Cal. St. Bd. of Equal., Apr. 9, 1986.)

It is well settled that respondent's determination of residency is presumptively correct, and the taxpayer bears the burden of showing error in that determination. (Appeal of Joe and Gloria Morgan, Cal. St. Bd. of Equal., July 30, 1985; Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June 22, 1976.) In the

present matter, appellant has argued that his absence from California was not merely temporary, for he and his wife left the state with the intention of remaining abroad for an extended and indefinite period of time. However, the sparse record in this appeal indicates that appellant went to Iran as a contract employee of Lockheed Aircraft Service Company. Appellant has stated that he was obligated by the terms of his contract to work there for a definite two-year term. Where a taxpayer goes abroad for a foreign assignment or job position that is expected to last two years, his employment-related absence from this state will not be considered sufficiently long so as to indicate other than temporary or transitory purposes. (Appeal of Bernell R. and Lon L. Bowen, Cal. St. Bd. of Equal., June 10, 1986.) Moreover, the facts here show that appellant kept his home unoccupied in a state of readiness for his return and continued using his California bank accounts even while abroad, thus indicating an absence for a temporary purpose. (Appeal of Egon and Sonya Loebner, Cal. St. Bd. of Equal., Feb. 28, 1984; Appeal of Nathan H. and Julia M. Juran, Cal. St. Bd. of Equal., Jan. 8, 1968.) Inasmuch as appellant has not proven his contention that he was employed in a position that was expected to last an indefinite period of substantial duration (Appeal of Jeffrey L. and Donna S. Egeberg, supra), we have no choice but to conclude that his and Mrs. Levine's absence from this state in 1978 was temporary or transitory in purpose. (Appeal of Richards L. and Kathleen K. Hardman, supra.) Accordingly, we must conclude that appellant and his spouse were California residents for all of 1978.

Appellant has seemingly argued that he could not have been a resident of this state in 1978 because he established residence in Iran when he moved there and rented the apartment. Appellant may have had a "residence" or place of abode in Tehran, Iran, during his foreign assignment, but that alone would not preclude respondent from properly classifying him as a resident for tax purposes under California law. (Appeal of Richards L. and Kathleen K. Hardman, supra.) Finally, appellant contends that if he is found to have been a resident then he should be entitled to deduct his "living expenses" incurred while working in Iran. (Appeal Ltr. at 3.1 Personal living expenses, however, are not

deductible. (Rev. & Tax. Code, § 17282;[2/] Appeal of William and Mary Louise Oberholtzer, Cal. St. Bd. of Equal., Apr. 5, 1976.)

Based on the foregoing, we must conclude that appellant has failed to prove that respondent's finding of residency was erroneous. Respondent's action will be sustained.

2/ Former section 17282 entitled "Personal, living and family expenses," was repealed by Statute 1983, chapter 488, Section 31.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of John J. and Rosemary Levine for refund of personal income tax in the amount of $2,581.71 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of July, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

Richard Nevins, Chairman

William M. Bennett, Member

Ernest J. Dronenburg, Jr., Member

Walter Harvey*, Member

, Member

*For Kenneth Cory, per Government Code section 7.9