BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 84A-820-VN
JULIAN T., JR. AND	)	
MARGERY L. MOSS	)	

For Appellants: Julien T. Moss, in pro. per.

For Respondent: John A. Stilwell, Jr. Counsel

OPINION

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 Julian T., Jr. and Margery L. Moss against proposed assessments of additional personal income tax in the amounts of $954.57, $513.65, $2,159.86, and $3,113.64 for the years 1979, 1980, 1981, and 1982, respectively.

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

Appeal of Julian T., Jr. and Margery L. Moss

The issue presented for our decision is whether appellants were California residents for income tax purposes during the years 1979 through 1982, inclusive.

Appellant Julian T. Moss, Jr. is a retired individual and his wife, appellant Margery L. Moss, is a housewife. Prior to 1971, the Mosses were clearly California residents. They were born in this state and had lived in Fremont, California, since 1958. In 1964, according to the records of the El Dorado County assessor's office, appellants purchased a cottage at 2608 Elwood Avenue in the City of South Lake Tahoe, California. The records of the assessor's office in Douglas County, Nevada, reveal that in September 1969 appellants acquired a residence in Zephyr Cove, Nevada, another Lake Tahoe community which is approximately four miles across the stateline from South Lake Tahoe. Appellants state that they paid $47,000 for the Nevada house.. In June 1971, appellants allegedly moved to their Zephyr Cove residence after entering into a purchase-lease agreement for the sale of their Fremont house. Appellants sold the Fremont house in September 1972 for $45,000. In 1977, they acquired another cottage on Elwood Avenue in South Lake Tahoe. Appellants have lived in the Lake Tahoe area for the past 15 years.

For the taxable years 1979, 1980, 1981, and 1982, the Mosses filed California part-year resident tax returns (form 540 NR). On their returns, appellants included only California-source income in calculating their adjusted gross income for state tax purposes. In addition, appellants claimed substantial amounts of medical expenses among their itemized deductions which they deducted in full from their state adjusted gross income to compute their California taxable income.

Upon auditing appellants' 1979 and 1980 returns, the Franchise Tax Board disallowed the deductions for medical expenses since appellants had indicated by filing the part-year resident returns that they were not full-year residents and the medical expenses did not appear to be related to California income or property-or to have been incurred while appellants were California residents. In its notices of proposed assessment, respondent informed appellants that:

> Non-resident and part-year residents may claim itemized deductions. in lieu of the standard deduction. However, itemized deductions are limited to those directly related to income

or property in California or those allowable deductions incurred while a California resident.

(Resp. Br., Ex. I & J.)

Accordingly, respondent allowed appellants only the standard deduction for 1979 and 1980, resulting in tax deficiencies for both years.

Appellants immediately filed protests against the two proposed assessments, arguing that the medical expenses were incurred in 1979 and 1980 while they were California residents. During the protest stage, appellants wrote several letters to the Franchise Tax Board. Appellants first explained that they lived in their South Lake Tahoe cottage during the winter months. They stated that; it is difficult to live in their Zephyr Cove residence when it snows due to poor street maintenance and power outages. Apparently, their Nevada home is located on a steep hill and the roads become very icy. Subsequently, the Mosses declared that they were full-time California residents until 1969 when they "purchased a home in Nevada for the purpose of occupying it in the Summer." (App. Ltr., Ex. A.) Appellants stated that they maintained residences in both California and Nevada and did not consider themselves to be in this state for temporary or transitory purposes. In response to inquiries by respondent, appellants further indicated that they lived in California for six.months each winter which was when they incurred all the disputed medical expenses and that they lived in Nevada for the other six months of the year "to enjoy [their] retirement in the summer only." (Resp. Br., Ex. H.)

Based on the information received from appellants during the protest proceedings, the Franchise Tax Board withdrew its original deficiency assessments for 1979 and 1980. Concurrently, respondent issued revised assessments for 1979 and 1980 as well as proposed assessments for 1981 and 1982. Under these four assessments, respondent determined that the Mosses were California residents for the years 1979 through 1982. As a result, appellants were allowed the disputed medical expense deductions but became taxable on their entire income from all sources. In this appeal, appellants express a willingness to concede the nondeductibility of their medical expenses in 1979 and 1980 but contest the finding that they were residents of this state during the four years in question.

During the appeal period, appellants contend that they continued the pattern of alternating their 'residences between California and Nevada. While the Zephyr Cove house was allegedly used only by appellants and remained vacant in the winter, their South Lake Tahoe cottage was rented out when not occupied by them. In addition, the Mosses used the second cottage in South Lake Tahoe exclusively as a rental unit. Appellants did not claim a homeowner's property tax exemption for either California cottage. They maintained accounts at both California and Nevada banks, but'the majority of their personal banking activities was conducted in this state. Appellants possessed driver's licenses issued by Nevada and their automobile was registered in that state. Appellants received medical care from physicians in California. Their tax returns were prepared in Nevada. They used a Nevada mailing address. Finally, appellants contend that they are registered to vote in Nevada but it does not appear that they were registered voters during the years at issue.

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 ensure that all individuals who are physically present in California for other than a temporary or transitory purpose and enjoying the benefits and protections of its law and government. should contribute to its support. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (a); Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 285 [41 Cal.Rptr. 673] (1964).)

In these proceedings, respondent contends that appellants were at all times California domiciliaries who remained residents when they went to Nevada each year. Appellants have seemingly argued that they become Nevada domiciliaries when they moved to their Zephyr Cove house and sold their Fremont home. It is appellants' position

that Nevada is their state of residence. Thus, the initial inquiry is whether appellants were domiciled in this state during the four years under review.

"Domicile" has been defined as "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 . . . ." (Whittell v. Franchise Tax Board, supra, 231 Cal.App.2d at 284.) An individual may claim only one domicile at a time. (Cal. Admin. Code, tit. 18, reg. 17014, subd. (c).) In order to change one's domicile, a person must actually move to a new residence and intend to remain there permanently or indefinitely. (In re Marriage of Leff, 25 Cal.App.3d 630, 642 [102 Cal.Rptr. 195] (1972); Estate of Phillips, 269 Cal.App.2d 656, 659 [75 Cal.Rptr. 301] (1969).) One's acts must give clear proof of a concurrent intention to abandon the old domicile and establish a new one. (Superior Court, 162 Cal.App.2d 421, 426-427 [328] (1958).) In any case, the burden of proving the acquisition of a new domicile lies with the taxpayer. (Appeal of Frank J. Milos, Cal. St. Bd. of Equal., Feb. 28, 1984.)

In the present appeal, appellants have stated that they moved to their Zephyr Cove residence in June 1971. The record, however, does not support a finding that they intended to remain in Nevada permanently or indefinitely. When appellants moved to Zephyr Cove in the summer of 1971, they owned the South Lake Tahoe cottage as well as the Fremont house albeit subject to a lease-purchase agreement. Appellants stated during the protest stage that they purchased the Zephyr Cove property for use as a summer home. They also declared that they actually lived in the Zephyr Cove house only in the summer time and stayed in South Lake Tahoe during the other half of each year. Finally, appellants have asserted that their principal residence in 1979 and 1980 was in South Lake Tahoe. Thus, even though appellants state that they moved to Nevada in the summer of 1971, the evidence supports the inference that they did not abandon their California domicile but simply changed their place of abode to South Lake Tahoe. Where a taxpayer's original permanent home is in California, we will presume that California continues to be his place of domicile until he can show that it clearly changed. (Appeal of Anthony J. and Ann S. D'Eustachio, Cal. St. Bd. of Equal., May 8, 1985.) Under the circumstances of

this appeal, we must conclude that appellants remained domiciliaries of this state during the years at issue.

Since appellants were domiciled here, they will be considered California residents if their absences from this state were for a temporary or transitory 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).) The regulations explain 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).) Consistently with these regulations, this board has held that tire contacts which a taxpayer maintains in this and other states are important objective indications of whether his presence in or absence from California was for a temporary or transitory purpose. (Appeal of Richards L. and Kathleen K. Hardman, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6, 1976.) Some of the contacts that we have considered relevant are the maintenance of a family home, bank accounts, or business interests; voting registration and the possession of a driver's license; and ownership of real property. (Appeal of David J. and Amanda Broadhurst, Cal. St. Bd. of Equal., Apr. 5, 1976.) Such connections are important both as a measure of the benefits and protection which a taxpayer has received from the laws and government of California and also as objective indicia whether a taxpayer entered or left this state for temporary or transitory purposes. (Appeal of Anthony V. and Beverly Zupanovich, supra.)

We note that respondent's determination of residency and the proposed deficiency assessments based therein are presumptively correct, and the taxpayer bears the burden of proving respondent's action to be erroneous. (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.) Here, appellants have not met this burden. In these proceedings, they assert that they were nonresidents whose principal residence was actually located in Nevada and whose winter home was in California. However, the record shows that appellants earlier stated that South Lake Tahoe was their place of principal residence for six months and Zephyr Cove was their summer retreat. Moreover, when we examine the

various connections that they maintained in this state, we find that these contacts are not consistent with a presence for a mere temporary or transitory purpose. The existence of such California connections as home ownership, rental property, banking, and medical care have a tendency in reason to show that appellants were more than mere seasonal visitors. On the other hand, we find that appellants' retention of a Nevada summer home, driver's licenses, automobile registration, and tax preparer are not sufficient by themselves to show that they were residents of that state when balanced against these California connections. Based on this record, we must conclude that appellants have not demonstrated their summer stays in Nevada were for other than temporary or transitory purposes. Accordingly, we have no choice but to sustain respondent's determination that appellants were residents of California during the four appeal years.

Appeal of Julian T., Jr. and Margery L. Moss

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 Julian T., Jr. and Margery L. Moss against proposed assessments of additional personal income tax in the amounts of $954.57, $513.65, $2,159.86, and $3,113.64 for the years 1979, 1980, 1981, and 1982, respectively, 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