89-SBE-032

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 87A-0246-SS
CHARLES AND PENNY DREILING)

Appearances:

For Appellant: Jennifer Miller Moss
Attorney at Law

For Respondent: John A. Stillwell, Jr.
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 protests of Charles and Penny Dreiling against proposed assessments of additional personal income tax and penalties against each of them, individually, in the total amounts of $383.75, $170.00, $245.00, and $462.50 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.

The issue presented by this appeal is whether the appellants were California residents during the appeal years by virtue of living in a house they had built on the California side of the California-Nevada border. A second issue is, if they are California residents, should they be assessed delinquent filing penalties for failing to file California returns during the appeal years.

Appellants moved from Oregon to Nevada in 1971 and purchased five acres of unimproved forest land located in Sierra County, California, at the base of the mountains near Verdi, Nevada. Appellants' land was situated on a strip of border territory which was the subject of a quiet title action instituted by the State of California against the State of Nevada in April of 1977. In 1980, the U.S. Supreme Court resolved the case in California's favor, consistent with the statutory and de facto border which the two states had been observing for many years before the litigation commenced. (California v. Nevada, 447 U.S. 125 [65 L.Ed.2d 1](1980).)

In April of 1971, shortly after moving to Reno to take a teaching position at the University of Nevada, appellant-husband wrote a letter to respondent announcing his intention 'to buy a parcel of land in Verdi (Sierra County), California and [we] will be building a new home there in the near future." (Emphasis added.) He requested information regarding his obligations to the State of California with respect to state income tax, sales tax exemption, voting, vehicle licenses, and driver's licenses.

While completing the purchase of the Sierra County land and construction of the house, appellants first rented and then purchased a home in Reno. They remained at that residence until September of 1978, at which time they moved into the newly constructed Sierra County home and rented out the home in Reno which they had purchased 15 months before.

After the U.S. Supreme Court's decision in California v. Nevada, supra, respondent reviewed its records and determined that appellants, as well as others similarly situated on the California-Nevada border, had failed to file personal income tax returns in California. Appellants were contacted and told to file returns for the appeal years. Appellants attended a meeting in 1983 scheduled by respondent to explain their failure to file returns. They argued they were neither California residents nor domiciliaries. Respondent issued notices of proposed assessment against each appellant separately for the years 1979, 1980, 1981 and 1982, computing their California income from the income they reported

on their federal returns. Appellants filed timely protests, and respondent affirmed its proposed assessments, resulting in this timely appeal.

Appellants' home is located on the California side of the Sunrise Basin area of the small residential community of Verdi, Nevada, eight miles west of Reno. Like all other residents of the area, appellants' sole route of ingress/egress is through Verdi, where they received their mail at a post office box. They conduct essentially all of their social, civic, professional and commercial activities in Nevada, where they spend most of their working hours. They have obtained Nevada drivers' licenses and are registered to vote in Washoe County, Nevada, even though they are not eligible for either under Nevada law. (See Nevada Revised Stats., §§ 293.524 and 482.103.) During the appeal years, fire protection for their house was provided by the Verdi Volunteer Fire Department (VVFD) and the Nevada Division of Forestry, with the WFD apparently receiving no reimbursement from either the State of California or Sierra County. According to affidavits submitted by appellants, the only service provided appellants by California or Sierra County is the assignment of a Sierra County deputy sheriff, based in the California town of Downieville, to serve appellants' area. Appellants' children attend Nevada schools, and although California will reimburse Nevada for schooling provided for California residents of Verdi, appellants' designation of Nevada as their residence on the school residency questionnaire prevented Nevada from receiving California reimbursement for their children. Snow removal and maintenance for appellants' private access road is provided by the property owners, and all other roads most frequently used by appellants are located in and maintained by Nevada.

Appellants contend that the fact that they concededly maintain their principal place of abode one mile to the west of the California-Nevada border is not determinative of their domicile or residency here because of the substantial connections they have maintained in Nevada. They claim in fact to be "in California only for transitory purposes" - namely resting in their home at night and on weekends. That purpose, argue appellants, cannot reasonably be distinguished from those of a seasonal visitor, tourist or guest, who, despite ownership and maintenance of an abode in California, acquire neither domicile nor residence here. (See Cal. Code Regs., tit. 18, reg. 17014; Klemp v. Franchise Tax Board, 45 Cal.App.3d 870 [119 Cal.Rptr. 821] (1975); Appeal of James C. and Susanne Sherman, Cal. St. Bd. of Equal., Aug. 6, 1962.) According to appellants, moving to their Sierra County home in 1978 did not constitute a change of domicile from Nevada because they continued to maintain an

abode, albeit leased to others, in Reno, and they built the Sierra County house essentially as an investment which they would ultimately sell to return to the house in Reno. As further evidence of this intent not to change domicile to California, appellants cite to the fact that they never filed for the Homeowners Property .Tax Exemption on their California home.

Section 17041 imposes a personal income tax upon the... entire taxable income of every resident of this state. In pertinent part, 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.

As we-stated in the Appeal of Richard H. and Doris J. May, 87-SBE-031, decided by this board on April 7, 1987:

> 'Domicile' has been defined as:
>
> [T]he one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he [or she] intends to remain and to which, whenever he [or she] is absent, he [or she] has the intention of returning .... (Whittell v. Franchise Tax Board, 231 Cal .App.2d 278, 284 [41 Cal.Rptr. 673](1964).)

In the marital dissolution case of Aldabe v. Aldabe, 209 Cal.App.2d 453 [26 Cal.Rptr. 2081 (1962), the court of appeal determined that the location of a taxpayer's marital abode is a significant factor in resolving the question of domicile. 'Stated the court:

> It is stated by Professor Beale (1 Beale, Conflict of Laws, pp. 149,150): "It is not enough that a man desires to acquire or to keep a 'legal residence' or 'legal domicile' ; the intention necessary for the acquisition of a domicile is an intention as

> to the fact, not as to the legal consequences of the fact. 'A man's home is where he makes it, not where he would like to have it' . . . .
>
> "One cannot have his only home in one place and a domicile in another, as he may have a mere residence in one place and a domicile elsewhere. A place which is a man's home must be his domicile (except where he has in fact more than one home). The intention requisite to acquire a domicile is the intention to have a home, and that is the only legally relevant intention; the domicile follows as a legal consequence, without regard to whether the consequence is desired or not. 'When you intend the fact to which the law attaches a consequence, you must abide the consequence whether you intend it or not'" [Citation omitted.]
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> * * *
>
> The evidence which was introduced, both in the Nevada and California actions, with reference to the parties' declarations of intent, their banking, shopping, voting and car registration were, therefore, merely evidence of a desire to enjoy some of the benefits of Nevada residence, evidence which, because it collided with the fact that they made their only home in California and intended to do so, became legally irrelevant. (Emphasis added.)

(Aldabe v. Aldabe, supra, 209 Cal.App.2d at 466-467.)

Although we recognize that the concept of domicile for purposes of marital dissolution may sometimes differ from domicile for purposes of taxation, where a taxpayer's principal-indeed only - abode is within California's borders and no evidence is presented to indicate a present intent to

move out of the state.[2/] The taxpayer is a California domiciliary, regardless of the extent of his or her contacts with Nevada or any other state.

As California domiciliaries, appellants were residents if their absences from this state were for a temporary or transitory purpose. (Rev. & Tax. Code, § 17014, subd. (a)(2).) Appellants contend that their daily commute to employment and commercial activity in Nevada does not constitute a temporary or transitory purpose. They urge us to use the "closest connections" or "benefits and protections" tests, citing to Appeal of David J. and Amanda Broadhurst, decided by this board on April 5, 1976.

Respondent's regulations provide that whether taxpayers' 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 circumstances of each particular case. (Cal. Code Regs., tit. 18, reg. 17014, subd. (b); Appeal of Anthony V. and Beverly Zupanovich, Cal. St. Bd. of Equal., Jan. 6, 1976.) The tests cited by appellants have generally been used in a particular factual setting where the taxpayers maintain two separate abodes-one within the state and one in another country or other location far removed from the California home. In such cases, a test of balancing significant contacts in the two locations is necessary and appropriate. (See, e.g., Appeal of David J. and Amanda Broadhurst, supra; Appeal of Richard L. and Kathleen K. Hardman, Cal. St. Bd. of Equal., Aug. 19, 1975 (London); Appeal of Pierre E. and Nicole Salinger, Cal. St. Bd. of Equal., June 30, 1980 (London and France); Appeal of Robert J. and Kyung Y. Olsen, Cal. St. Bd. of Equal., Oct. 28, 1980 (Iran); Appeal of Robert and Nancy D. Hanley, Cal. St. Bd. of Equal., July 29, 1981 (Florida); Appeal of Jorge R. and Eva E. Paoli, Cal. St. Bd. of Equal., July 29, 1981 (Mexico); Appeal of Rinzi and Lily Y. Manaka, Cal. St. Bd. of Equal., Oct. 26, 1983 (Alaska); Appeal of John J. and Rosemary Levine, Cal. St. Bd. of Equal., July 29, 1986 (Iran).)

2/ Appellants' failure to take out the California homeowner's exemption is not controlling. See Appeal of Julian T., Jr. and Margery L. Moss, Cal. St. Bd. of Equal., July 29, 1986. Neither does it evidence an intention to return to the Reno house sometime in the future as such an intention would also be entirely consistent with a claim of exemption. The impression created is that appellants' failure to take advantage of the exemption was part of a calculated effort, dating back to 1971, to avoid California income tax.

The only case cited by appellants which does not fit the above pattern is Klemp v. Franchise Tax Board, supra, 45 Cal.App.3d 870, a case concededly involving domiciliaries of Illinois. The Klemps spent the winter in a home they built in Rancho Mirage, California. The rest of the year they travelled between Hawaii, Europe, Idaho, and an apartment in an "apartment hotel" in Chicago, where they previously had owned a home and continued to maintain business offices and banking, insurance, and professional contacts. The court stated:

> The lack of an empty house or apartment in Illinois is a factor to be considered in determining whether a family is in California as seasonal visitors or otherwise, but under the statute the decision must turn upon what they were doing in California. . . . The Klemps' only connection with California . . . was their purpose to spend the colder half of the year as visitors in the California desert, together with their ownership of a home and a club affiliation suitable for that purpose.

(Klemp v. Franchise Tax Board, supra, 45 Cal.App.3d at 877.)

In determining that the Klemps were seasonal visitors, the court was looking to the regulations interpreting the residency statute which provide that out-of-state domiciliaries who are seasonal visitors will not be fpund to be here for other than temporary or transitory purposes, even if they own an abode here. (Cal. Code Regs., tit. 18, reg. 17014, subd. (b).) Aside from the speciousness of appellants' analogy of nights and weekends to vacations, the case is entirely inapplicable to California domiciliaries unless they are trying to claim out-of-state residency by virtue of seasonal visits to another state. (See, e.g., Appeal of Julien T., Jr. and Margery L. Moss, supra.)

Appellants argue that they do not share in such benefits or protections of California law as public schools and police and firefighting services. In fact, however, police services were provided by California, and it was only due to appellants' own misrepresentations that no reimbursement was made by California for the Nevada public schooling provided to their children. In the light of those facts, appellants' argument appears disingenuous.

Appellants fail in their attempt to diminish the significance of the fact that their single abode is within the borders of this state and that they returned to that abode

every evening and most weekends throughout the appeal years. It is no more conceivable that they should not be residents of California than that homeowners in Connecticut and New Jersey who commute to work in New York City should not be deemed residents of Connecticut and New Jersey.

With respect to the imposition of penalties, section 18681 provides for a maximum penalty of 25 percent of the unpaid tax liability when a taxpayer fails to file a return on or before the due date unless reasonable cause and no willful neglect is shown. Respondent cites to and appellants distinguish Appeal of George Whittell, Jr., and Elia Whittell, decided by this board on August 6, 1962, another residency case involving a taxpayer with extensive ties to Nevada. Penalties were assessed in that case because the taxpayer spent eight or nine months a year in California. As we stated in that case, we did not think the appellants could reasonably have believed that their purpose for remaining in California eight to nine months of each year was temporary or transitory. We find even more unreasonable the appellants' argument in this case that they should be treated like seasonal visitors or tourists because they only used their California home to rest and sleep. Furthermore, we note that the regulations provide that if any question as to an individual's resident status exists, she should file a return in order to avoid penalties, even though she believes she was, a nonresident. (Cal. Code Regs., tit. 18, reg. 17014, subd. (d)(2).)

Accordingly, respondent's action in this appeal will be sustained.

Appeal of Charles and Penny Dreiling

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 protests of Charles and Penny Dreiling against proposed assessments of additional personal income tax and penalties against each of them, individually, in the total amounts of $338.75, $170.00, $245.00, and $462.50 for the years 1979, 1980, 1981, and 1982, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of November, 1989, by the State Board of Equalization, with Board Members Mr. Carpenter, Mr. Bennett, Mr. Dronenburg, and Mr. Davies present.

Paul Carpenter, Chairman

William M. Bennett, Member

Ernest J. Dronenburg, Jr., Member

John Davies*, Member

_____, Member

*For Gray Davis, per Government Code section 7.9

89-SBE-032-A

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	87A-0246-SS
CHARLES AND PENNY DREILING	)	

ORDER CORRECTING CLERICAL ERROR

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the figure $338.75 appearing in the second paragraph, line seven, of the November 29, 1989, Order be changed to read $383.75.

Done at Sacramento, California, this 10th day of January, 1990, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter, and Mr. Davies present.

Conway H. Collis, Chairman

Ernest J. Dronenburg, Jr., Member

William M. Bennett, Member

Paul Carpenter, Member

John Davies*, Member

*For Gray Davis, per Government Code section 7.9