BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
W. S. CHARNLEY)

Appearances:

For Appellant: E. H. Conley, Attorney at Law.

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner; Harrison Harkins, Associate Tax Counsel.

O P I N I O N

This appeal is made pursuant to Section 19 of the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of W. S. Charnley to a proposed assessment of additional tax *in* the amount of $828.20 for the year ended December 31, 1935.

The proposed assessment resulted from the determination by the Commissioner that the Appellant was a resident of California during the entire year ended December 31, 1935, The Appellant contends that he did not become a.resident of California Until October 1, 1935.

Prior to 1928, Appellant and his wife resided and maintained a home for many years in the Commonwealth of Pennsylvania. In that year Appellants health became impaired, and upon his physician's advice, he and his wife removed to California. Appellant opened a temporary office here for Dillon, Read and Co., in which firm he was a partner. Although he and his wife still owned and maintained a residence in Pennsylvania, the Appellant in 1932 built a home in California. In 1934, Dillon, Read & Co. closed the California office, requesting the Appellant to return to Pennsylvnia and continue his partnership there. At the same time he received and offer to enter a new brokerage partnership in. Pennsylvania, the firm to be known as Riter & Co. Although his health had improved, the Appellant resigned his partnership in Dillon, Read & Co. He and his wife testified, however, that not until October, 1935, was it finally decided to refuse the offer of Riter and Co. and to remain permanently in California.

Prior to October 1935, the Appellant continued to register and vote in Pennsylvania and to pay personal property taxes based on residence there. In November, 1935, he registered as a voter in California, doing so upon the advice of counsel to establish

residence in California. He still maintains the home in Pennsylvania, his mother-in-law residing there,. and makes occasional trips to that home, although not as frequently as prior to October, 1935.

Section 2(k) of the Personal Income Tax Act as enacted in 1935 defined the term "resident" as follows:

> "The word 'resident' includes *every* natural person domiciled in the State of California and every other natural person who maintains a permanent place of abode within this State or spends in the aggregate more than six months of the taxable year within this State ..."

The Commissioner, in Articles 2(k)-3 and 4 of the Regulations Relating to the Personal Income Tax Act of 1935, has interpreted this provision, except insofar as it relates to persons domiciled in the State, as creating merely a presumption of residence, which may be overcome by evidence of a domicile'outside the State.' It is essential, therefore, to determine the meaning of "domicile". The Commissioner has provided as follows in Article 2(k)-2 of the Regulations:

> "Domicile has been defined as the place where an individual has his true, fixed, permanent home and principal establishment, and to which place has has, whenever he is absent, the intention of returning. It is the place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home ..."

The foregoing definition has been widely accepted. See 28 Corpus Juris Secundum, 3; District of Columbia v. Murphy, 314 u. s. 441, 451.

In order to acquire a domicile of choice there must be both physical presence in the place where domicile is alleged to have been acquired and the intention to make that new place a home. Texas v. Florida, 306 U. S. 398, 424; In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350; Chambers v. Hathaway, 187 Cal. 104, 200 Pac. 931. Thus, actual physical presence in a place, even though of long duration, does not establish domicile if the motivating influence is the person's ill health and there is no intent to make that place a permanent home. In re Davis, 217 Fed. 113; Hiatt v. Lee, 48 Ariz. 320, 61 P. (2d) 401; Pickering v. Winch, 48 Ore.5500, 87 Pac. 763; Restatement of Conflicts of Laws, Section 22. A determination to acquire a new domicile may, however, coexist with an indefinite.

or "floating" intention to return at some future time to the abandoned domicile. District of Columbia v. Murphy, supra at 456. Estate of Weed, 120 Cal. 634, 53 Pac. 20; Bullis v. Staniford, 178 Cal. 40, 171 Pac. 1064.

It is not sufficient merely to desire the retention of a "legal residence" or "legal domicile", for 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. 1 Beale, Conflict of Laws, Section 19.2. "When you intend the facts to which the law attaches a consequence, you must abide the consequence whether you intend it or not." Holmes, C. J., in Dickinson v. Brookline 181 Mass. 195, 196, 63 N.E. 331. See also Texas v. Florida, 306 U. S. 398, 425. An individual cannot merely by desiring to do so retain an old domicile, apart from his home.

Thus the question of domicile is to a large extent a question of fact and it is necessary to consider the effect of the facts and circumstances in the instant matter. The Commissioner, although stating that the type and amount of proof required to rebut a presumption of residence cannot be specified by a general regulation and that finding of domicile depends largely upon the circumstances of each individual case, does suggest certain types of evidence that are persuasive. Article 2(k)-5, Regulations Relating to the Personal Income Tax Act of 1935. These include testimony concerning the purpose which brough the individual to California and evidence that he has maintained a home, registered and voted in another state, or paid taxes based on domicile in another state. The relevancy of such evidence is well recognized. See District of Columbia v. Murphy, Chambers v. Hathaway, both supra, 1 Beale, Conflict of Laws, pp. 171 et seq., 261, et seq.

While there is unquestionably some evidence indicating an intent on the part of the Appellant to establish a residence in this State prior to 1935, we are of the opinion that the evidence, considered in its entirety, compels a conclusion to the contrary, particularly in view of the testimony of Mr. and Mrs. Charnley that it was not until October of 1935 that they decided to remain permanently in California. Nothing in the record is inconsistent with this testimony, but on the contrary the evidence concerning voting and payment of personal property taxes in Pennsylvania affirmatively supports it. The action of the Commissioner, based on the determination that the Appellant was a resident of California during the entire year 1935, is, therefore, reversed.

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, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling

the protest of W. S. Charnley to his proposed assessment of an additional tax in the amount of $828.20 for the year ended December 31, 1935, be and the same is hereby reversed. Said ruling is hereby set aside and the Commissioner is hereby directed to proceed in conformity with this order.

Done at Sacramento, California, this 2nd day of December, 1942, by the State Board of Equalization.

R. E. Collins, Chairman
George R. Reilly, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Pierce, Secretary