

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of     }  
LLOYD T. JONES                         }

Appearances:

For Appellant:     William D. McKee, Attorney at Law

For Respondent:    Burl D. Lack, Chief Counsel;  
Crawford H. Thomas, Associate Tax  
Counsel

O P I N I O N

This appeal was made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Lloyd T. Jones to proposed assessments of additional personal income tax in the amounts of \$5,375.76, \$8,476.53, \$1,825.52 and \$1,627.13 for the years 1942, 1943, 1944 and 1945, respectively. All of these sums are exclusive of interest.

The proposed assessments were based upon the determination by the Franchise Tax Board that Appellant was a resident of California for the years in question and that income received by him under an agreement relating to certain patents constituted ordinary income. After this appeal was filed the Franchise Tax Board determined that the income received under the agreement was capital gain derived from the sale of patent rights. Appellant thereafter paid the tax as recomputed, together with interest thereon, in the aggregate amounts of \$5,746.17, \$9,659.29, \$2,261.41 and \$1,066.82 for the respective years involved. Under the provisions of Section 19061.1 of the Revenue and Taxation Code, this appeal will be treated as an appeal from the denial of claims for refund of those amounts,

The sole remaining issue is whether Appellant was a resident of California for the years 1942 through September, 1945. For many years prior to 1942, i.e., since about 1915, he was domiciled in California. He was divorced in 1932 and thereafter made his home with a sister in Berkeley. For several years prior to 1942 Appellant had suffered from arthritic and neuritic attacks and was advised by his physicians to leave the San Francisco Bay area and go to a hot, dry climate,, In July, 1940, he was called to active duty to

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serve in the Air Force of the United States Army as Assistant Air Officer for the Ninth Corps Area, with headquarters at the Presidio in San Francisco. His duties required visits throughout the area. During such trips he frequently stayed at Las Vegas, Nevada, and found that the climate there afforded relief from his illness. This led to a desire to acquire a ranch near Las Vegas.

In January, 1942, the headquarters of the Ninth Corps Area were moved to Utah and the Appellant was ordered to report there. He drove his personal automobile to Utah via Las Vegas, although a shorter route would have been through Reno. He stayed in a Las Vegas motel overnight and states that he discussed real estate conditions with informed Las Vegas residents.

When Appellant left California he had his personal furniture moved to Utah. He allowed his bank account in Berkeley to become exhausted and his last check on that account was written in August, 1942. He subsequently maintained bank accounts in other states in which he was stationed. He remained in Utah until June, 1943. While stationed there he made trips through Nevada every two or three months. He was then stationed in Pennsylvania until November, 1943, and from that month until August, 1945, he was assigned to Fort Dix, New Jersey. He was granted terminal leave from the army and was married in New Jersey in August, 1945. At his request, his discharge was issued at Fort Dix. In September, 1945, he settled in Nevada and has since lived there. It is his contention that he became domiciled there when he stayed overnight in Las Vegas in 1942.

On March 12, 1943, Appellant sent his Federal income tax return to the San Francisco office of the Collector of Internal Revenue, stating in a letter attached that "It is realized that this year's return might justly have been forwarded to Baltimore, in as much as I am no longer a resident of California." Several letters were sent by him to the then Franchise Tax Commissioner of this State in the period 1944 through 1947. In such a letter of December 17, 1944, he stated that "You see, as I previously stated, I moved away from California about January 5, 1942 and have not been back in the state since that time, While it is true that orders from military sources have directed my movements they have, nevertheless, made it impossible for me to reside in the state of California during the time that has passed since." In a letter of December 28, 1945, he stated that "During the several years I have been in military service I was endeavoring to arrange the set-up which would apply on my return to civil life. I believe that I may have indicated my intention

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to engage in ranch activities in the Las Vegas region, I have just now been released by the Army and am being able to carry out my plan for the ranching activity in Las Vegas."

In an affidavit of July, 1949, Appellant stated "...during the year 1941, affiant concluded that he would settle in the Las Vegas - Lake Mead Area in Nevada upon the completion of his active duty, ... His purpose in making this detour [to Las Vegas] was to investigate the possibility of purchasing a future home or home site in the Las Vegas - Lake Mead Area, to which he could return upon his release from active duty. ... Due to such high prices and the fact that he could not occupy the home until his release from active duty, affiant decided not to purchase a home or home site at that time. However, affiant has since regarded Southern Nevada as his home." At the hearing in this matter Appellant stated that during the period in question he regarded his home as "probably" in Las Vegas.

For the years 1942 to 1944, inclusive, Section 2(k) of the Personal Income Tax Act provided:

"Every natural person who is in the State of California for other than a temporary or transitory purpose is a resident and every natural person domiciled within this State is a resident unless he is a resident within the meaning of that term as herein defined of some other State, Territory or country. ... Any natural person who is or shall become a resident of this State shall continue to be a resident even though temporarily absent from the State."

For the year 1945, Section 17013 of the Revenue and Taxation Code provided:

"17013. 'Resident' includes:

(a) Every individual who is in this State for other than a temporary or transitory purpose.

(b) Every individual domiciled within this State who is in some other State, Territory or country for a temporary or transitory purpose.

Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State,"

A domicile once established continues until it is superseded by a new domicile (Sampsell v. Superior Court, 32 Cal. 2d 763; Estate of Glassford, 114 Cal. App. 2d 181; Kopasa v.

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Kopasz, 108 Cal. App. 2d 308; Murphy v. Traveler's Insurance Co., 92 Cal. App. 2d 582). In order to acquire a new domicile there must be an intention to make a home at the moment of physical presence there, not an intention to make a home in the future (Restatement; Conflict of Laws, § 20; Sheehan v. Scott, 145 Cal. 684; Sivalls v. U. S., 205 Fed. 2d 444, cert. den. 346 U. S. 898; In re Hoff's Estate, 35 N. Y. Supp. 2d 60.

Appellant relies particularly upon Murphy v. Travelers Ins. Co., 92 Cal. App. 2d 582, to establish that he became domiciled in Nevada in 1942. That decision, however, concerned a deceased serviceman who prior to his death had been stationed in California for a period of years, while here had married a resident of the State, had become a registered voter and had claimed a veteran's exemption from taxes as a resident. Thus, although the court there considered the decedent's act of seeking property to purchase for use as a turkey ranch upon retirement as evidence of intent to make California his domicile, this evidence was but one of many factors indicating such an intent. Moreover, the court stated that to accomplish a change of domicile "...two things are indispensable: First, residence in the new locality; and second, the intention to remain there."

When Appellant stopped overnight in Nevada in 1942 he was traveling under military orders enroute to a new post of duty in Utah. No matter what his wishes, the opportunity to establish residence or to remain in Nevada was completely lacking. While there he took *no* affirmative steps toward acquiring a present home or place of abode. Viewed in the light most favorable to Appellant, these facts do not meet the basic requirements for a change of domicile. Consistent with this conclusion, although not by itself of persuasive weight, is the fact that Appellant in letters written before his discharge in 1945 did not indicate that he considered himself a resident of Nevada,

There is nothing ambiguous in the language of Section 2(k) of the Act, *supra*, or of Section 17013 of the Code, *supra*, which successively defined the term "resident" for the years in question. Under either section, a person domiciled in this state continued to be subject to the personal income tax as a resident while absent from the State, unless he was in some other State, territory or country for other than a temporary or transitory purpose, *i. e.*, unless he became a resident of another State, Territory, or country (see Keesling, The Problem of Residence in State Taxation of Income, 29 Calif. L. Rev. 706, 728, 729).

The facts would not support the conclusion, and Appellant does not contend, that he became a resident of Utah, Pennsylvania or New Jersey, or that he was in any one of those

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states for other than a temporary or transitory purpose. Since there is no constitutional objection to domicile as a basis for the imposition of a state income tax (Lawrence v. State Tax Commission, 286 U. S. 276; New York ex rel. Cohn v. Graves, 300 U. S. 308), the absence of Appellant from California during the years in question did not suspend his tax liability under the taxing statutes, supra, then in effect.

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 claims of Lloyd T. Jones for refund of personal income tax and interest in the amounts of \$5,746.17, \$9,659.29, \$2,261.41 and \$1,061.82 for the years 1942, 1943, 1944 and 1945, respectively, be and the same is hereby sustained,

Done at Sacramento, California, this 2nd day of October, 1957, by the State Board of Equalization.

Robert E. McDavid, Chairman

Paul R. Leake, Member

J. H. Quinn, Member

George R. Reilly, Member

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ATTEST: Dixwell L. Pierce, Secretary