75-SBE-041

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
PAUL PERINGER)

For Appellant: Paul Peringer, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

David M. Hinman
Counsel

OPINION

This appeal is made'pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Paul Peringer against a proposed assessment of additional personal income tax in the amount of $132.62 for the year 1970. However, for reasons which will become apparent below, appellant's appeal is treated as an appeal from the denial of a claim for refund in the amount of $153.79 for the year 1970, pursuant to section 19058 of the Revenue and Taxation Code.

The primary issue for determination is whether appellant was a California resident for 1970. However, since the procedural posture of this matter is unusual, it is necessary to consider it at some length before reaching the substantive question of residency.

Appellant filed a California nonresident personal income tax return for 1970. On that return appellant computed the tax liability in two ways. He first determined that, if he were a nonresident, the total tax liability would be $1,177.00. Next, he correctly computed the amount of the tax liability as if he were a California resident as $1,330.79. Since appellant had previously made estimated tax payments of $701.00, he determined that the remaining amount of tax due would be $629.79 ($1,330.79 - $701.00) if he were a California resident, while the actual amount due if he were a nonresident would be $476.00 ($1,177.00 - $701.00). With his return, appellant remitted the amount of $629.79, thuspaying the entire amount of his 1970 tax liability as if he were a California resident. The difference between the amount appellant determined was due as a resident and the amount due as a nonresident was $153.79 ($1,330.79 - $1,177.00). Typed on the face of appellant's 1970 return was the following statement: "Sum of $153.79, herewith included, is paid under protest and is to be refunded as soon as nonresident status has been reviewed and confirmed."

Thereafter, respondent examined appellant's 1970 return, and, on April 18, 1973, issued a notice of proposed assessment erroneously showing that additional tax in the amount of $147.62 was due. Respondent's apparent theory in issuing the notice of proposed assessment was that appellant was a California resident and had paid only the amount of tax due as a nonresident. Of course, as we have noted above, appellant actually paid the correct amount of tax due if he was a California resident. However, in determining the amount of tax due as a resident, respondent erroneously computed the amount as $1,324.62, rather than $1,330.79.

Appellant protested the proposed assessment. On July 7, 1973, respondent, after once again recomputing the amount of tax due, issued a notice of action affirming the proposed assessment in the amount.of $132.62. In issuing the notice of action, respondent's

theory remained the same; appellant was a California resident and had paid only the amount of tax due as a nonresident. However, respondent once again erroneously computed the amount of appellant's 1970 total tax liability as a resident. This time the amount was computed as $1,309.62.

On August 22, 1973, appellant appealed from the denial of his protest. On August 29, 1973, this board acknowledged the filing of the appeal but indicated that, under the circumstances, further proceedings would be deferred pending respondent's review of the matter. Respondent reviewed the matter and determined that appellant's return was correct as filed. Respondent also maintains that it first realized appellant intended his return to be treated as a claim for refund as a result of this review. Thereafter, on September 12, 1973, respondent notified appellant that it was withdrawing its proposed assessment. On September 21 it issued a notice of action denying appellant's claim for refund on the basis that this board had previously determined that appellant was a California resident for the years 1965 through 1968, and that there had been no change in appellant's resident status. (See Appeal of Paul Peringer, Cal. St. Bd. of Equal., Dec. 12, 1972.)

Initially, appellant argues that respondent's efforts to withdraw its original notice of action and issue another notice of action were void. It is appellant's position that respondent is bound by the erroneous computation of tax due which appeared in its original notice of action ($1,309.62), and cannot now accept as correct the amount of tax that appeared on the return filed by appellant ($1,330.79.)[1] We have examined the authorities cited by appellant in support of his position and do not find them persuasive under the facts in this case. In view of the fact that action by this board on the instant appeal was deferred pending further review by respondent, coupled with the fact that respondent's action has been reviewed by this board, we are unable to agree with appellant's position that the withdrawal of the erroneous notice of

1/ We have reviewed appellant's 1970 personal income tax return and found it correct as filed.

action was void under the unique facts of this matter. Accordingly, we find that the erroneous notice of action dated July 7, 1973, has been properly withdrawn and that appellant's return was correct as filed. 2/

We need not determine whether respondent's notice of action denying appellant's $153.79 claim for refund was properly issued. Since appellant's original return was sufficient to constitute an informal claim for refund 3/ and no action was taken thereon by- respondent within six months it could be deemed denied pursuant to section 19058 of the Revenue and Taxation Code.

The, basis for appellant's claim for refund was that he was not a California resident for 1970. As we have noted above, this board has previously determined that appellant was a California resident for the years 1965 through 1968. (Appeal of Paul Peringer, supra.) The facts upon which that determination was based may be summarized briefly. Appellant is an engineer who, for all practical purposes, has been continuously employed by the federal government since 1942, when he commenced his career in Seattle. In 1946, appellant was transferred to Alaska

2/ Appellant has advanced other arguments intending to show that respondent's actions were void. We have examined these arguments and find them without merit.

3/ The basic underlying principle determining the validity of an informal claim for refund is the necessity to put the taxing authority on notice of what the taxpayer was claiming and that he was in fact making a claim for refund. (American Radiator and Standard Sanitary Corp v. United States, 318 F. 2d 915; see also Union Pacific R. R. Co. v. United States, 389 F. 2d 437.) An informal claim for refund may be found in statements made in the taxpayer's income tax return. (American Radiator and Standard Sanitary Corp. v. United States, supra.)

and, thereafter, to California. Since 1964, appellant has been employed at the Naval Ship Missile Systems Engineering Station at Port Hueneme, California. All of appellant's job transfers were initiated by the federal government. At all times since 1946 he has sought a transfer back to the Seattle area. Appellant votes in the State of Washington, maintains his church membership there, holds his professional engineering license from that state, and has taken education courses there.

The term "resident" includes "[e]very individual who is, in this state for other than a temporary or transitory purpose." (Rev. & Tax Code, § 17014, subd. (a).) Section 17016 of the Revenue and Taxation Code contains a presumption of residence where an individual is in California for an aggregate of nine months during the taxsble year. This presumption may be overcome by satisfactory evidence that the individual is in this state for a temporary or transitory purpose.

Based upon this presumption, we determined in our prior opinion that the facts conclusively established "that appellant lived in this state for at least seven years prior to the years here under review, that he lived in this state throughout the years on appeal, and that he continues to live in this state." In the absence of any satisfactory evidence offered by appellant to rebut the presumption of residency we concluded that appellant was a California resident during the years under appeal.

In the present matter, respondent has argued, and appellant agrees, that the facts surrounding the question of appellant's residency have not changed significantly since the years involved in the prior appeal. In view of the parties' agreement on the factual issues and since appellant has offered no argument that was not previously considered, we find our previous decision controlling and hold that appellant was a resident of California during 1970.

Appeal of Paul Peringer

ORDER

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 Paul Peringer for refund of personal income tax in the amount of $153.79 for the year 1970, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of June, 1975, by the State Board of Equalization.

John W. Lynch, Chairman

William M. Bennett, Member

George R. Reilly, Member

Paul R. Gibson, Member

_____, Member

ATTEST: W. W. Dunlop, Executive Secretary