

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT J. AND BETTY J. ELLINGSEN)

For Appellant: Betty J. Ellingsen,
in pro. per.

For Respondent; Bruce R. Langston
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert J. and Betty J. Ellin sen against a proposed assessment of additional persona4 income tax in the amount of \$1,395 for the year 1979.

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The issue presented for decision is whether appellant Robert Ellingsen was a domiciliary of California in 1979, thereby making his income earned in Alaska community property.

Mr. Ellingsen is an electrician by profession; The record indicates that from 1975 through 1980, he spent various periods of time in Alaska working on the Alaska pipeline. During 1975 Mr. Ellingsen spent one month in California and eleven months in Alaska. During 1976 he spent twelve months in Alaska. During 1977 he spent one month in California and eleven months in Alaska. During 1978 he spent eleven months in California and one month in Arizona. During 1979, the appeal year, he spent eight months in California and four months in Alaska. During 1980 he spent one month in California and eleven months in Alaska. Mrs. Ellingsen continued to reside for this entire period with their children in California in the family home appellants purchased in 1964.

Appellants claim that Mr. Ellingsen is a resident and domiciliary of Alaska, and, therefore, his income earned in Alaska is not subject to the California income tax. As support for their claim, appellants point out that Mr. Ellingsen was registered to vote in Alaska, held an Alaska driver's license, and registered his automobile there. Appellants claim that Mr. Ellingsen intended to move permanently to Alaska and that he intended to move his family there when he could obtain suitable housing for them.

Initially, respondent contended that Mr. Ellingsen was both a resident and domiciliary of California during the appeal year. Respondent subsequently conceded that Mr. Ellingsen's contacts with Alaska made him a resident of that state, but respondent continues to assert that Mr. Ellingsen was a domiciliary of California during the appeal year. Respondent also determined that Mrs. Ellingsen continued to be both a resident and a domiciliary during the period in question. Therefore, respondent attributed one-half of Mr. Ellingsen's out-of-state income to Mrs. Ellingsen as her portion of the community income. On that theory, the income became subject to California personal income tax because Mrs. Ellingsen is a California resident. (Rev. & Tax. Code, § 17041, subd. (a).) Additionally, respondent determined that pursuant to subdivision (b) of section 18402 of the Revenue and Taxation Code, appellants could not file joint personal income tax returns because one spouse was not a resident of California for the entire taxable year. These adjustments and respondent's concession reduced the proposed assessment from \$1,395 to \$1,009.

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In support of its determination, respondent points out that appellants maintained their family home in California, that, their children attended California schools, and that Mr. Ellingsen returned to California periodically. Appellants do not contest **respondent's** determination of the status of Mrs. Ellingsen.

We will first discuss-the question of domicile. Domicile is defined as a person's permanent home, to which place he has, whenever absent, the intention of returning. (Whittell v. Franchise Tax Board, 231 Cal. App.2d 278, 284 [41 Cal.Rptr. 673] (1964).) In order to lose a California domicile, it is necessary for an individual to (1) leave the state without any intention of returning, and (2) locate elsewhere with the intention of remaining there indefinitely. (Appeal of Earl F. and Heien W. Brucker, Cal. St. Bd. of Equal., July 18, 1961.)

Appellants contend that because Mr. Ellingsen never intended to return to this state, he is not a domiciliary of California. While it is correct, as previously stated,- that the intention of the parties determines domicile, this intention is not determined merely from unsubstantiated statements, but rather by the acts and declarations of the parties. (Estate of Phillips, 269 Cal.App.2d 656, 659 [75 Cal.Rptr. 301] (1969); Appeal of Robert M. and Mildred Scott, Cal. St. Bd. of Equal., March 2, 1981.) -Appellants claim that Mr. Ellingsen intended to move his family to Alaska; however, this record is devoid of any facts which show that any attempt was ever made to move the family. The record does not specify what type of housing Mr. Ellingsen obtained for himself while working in Alaska, but it does indicate that his work required him to travel frequently to remote areas. After appellant first left for Alaska in 1975, he periodically returned to California. In 1979, the appeal year, he spent eight months in this state, and during the previous year, he was here for eleven months. During the entire period Mr. Ellingsen was in Alaska, appellants maintained their family home in California and their children attended California schools. The maintenance of a marital abode in California is a significant factor in resolving the question of domicile. (Appeal of Annette Bailey, Cal. St. Bd. of Equal., March 8, 1976.) Based on these facts, we find that Mr. Ellingsen was a resident of Alaska during the appeal year, but that he remained a domiciliary of California.

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It is well settled that marital property interests in personal property are determined under the laws of the acquiring spouse's domicile. (Schechter v. Superior Court, 49 Cal.2d 3, 10 [314 P.2d 10] (1957); Appeal of Robert M. and Mildred Scott, supra.) Since we have determined that Mr. Ellingsen was a California domiciliary during the appeal year, his earnings constituted community property, one-half of which was taxable to Mrs. Ellingsen, a California resident.

