

Appeal of David C. and Livia P. Wensley

The issue presented is whether appellants, David C. and Livia P. Wensley, were residents of California for income tax purposes during 1974.

Appellants filed a California joint resident personal income tax return for 1974 on which they reported that appellant-husband (hereinafter appellant) was an engineer and that his wife was a housewife. Appellants reported income from wages in the amount of \$10,080, but also stated "federal included foreign income of \$16,465." They indicated that this latter amount had been earned from McDonnell Douglas Corporation in Germany.

Pursuant to the provisions of Internal Revenue Code section 6103(d), respondent received a report from the Internal Revenue Service dated January 12, 1978, which disclosed several changes to the taxable income as reported on appellants' 1974 federal return. One of the federal audit adjustments reported was the disallowance of an employee business expense deduction because of the determination that appellant's tax home was in Germany.

In connection with the examination of appellants' 1974 return for the application of the federal adjustments, respondent also requested that Appellants explain **their** exclusion of the \$16,465 earned in Germany. Appellants claimed that the \$16,465 earned in Germany was not taxable by California since appellant was not a resident of California for the full year of 1974. This claim was based on appellants' having been in Germany during that time, where appellant was employed from February 1973 to August 31, 1974.

On February 21, 1979, respondent issued a notice of proposed assessment against appellants applying the federal adjustments applicable for state purposes, and adding **the** \$16,465 income which appellants had excluded from their California return. In their protest appellants reaffirmed their claim of nonresidency for the period in question, and further stated that they had been audited by the federal government for the tax year **1974 and** the audit report declared Germany as their tax home.

On July 3, 1979, appellants filed an amended return for taxable year 1974 as part-year residents. The report was identical to their original return except for a change in computation of their medical expense deduction. Appellants also completed a questionnaire

Appeal of David C. and Livia P. Wensley

sent by respondent which contained questions relevant to determination of their residency during the period in question. Based upon factors such as appellants' retained ownership of their home in California during their absence and their reoccupation of the house upon their eventual return to the state, along with their maintenance of two investment properties in California, respondent affirmed its proposed assessment, resulting in this timely appeal.

In their appeal letter, appellants provided the following additional information pertaining to their residency: (1) they joined the German Auto Club, (2) appellant's wife had major surgery in Germany and members of his family received medical and dental treatment, (3) appellants were forced to terminate an income property partnership in California due to his move, and (4) appellants were allowed a federal income exclusion. Appellants also contested respondent's reopening of the audit more than three years after acceptance of appellants' return and, furthermore, contested respondent's imposition of interest on the proposed-assessment.

Revenue and Taxation Code section 17014(a) defines the term "resident" to include:

(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.

Further, section 17014(c) provides that:

Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state.

"Domicile" has been defined as "the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning (Whittell v. Franchise--Tax Board, 231 Cal.App.2d 278, 284 [41 Cal.Rptr. 673] (1964).) A person may have only one domicile at a time (Whittell, supra), and he retains that domicile until he acquires another elsewhere. (In re Marriage of Leff, 25 Cal.App.

Appeal of David.C. and Livia P. Wensley

3d 630, 642 [102 Cal.Rptr. 195] (1972).) The establishment of a new domicile requires actual residence in a new place and the intention to remain there permanently or indefinitely. (Estate of Phillips, 269 Cal.App.2d 656, 659 [75 Cal.Rptr. 3011 (1969)].) One's acts must give clear proof of a concurrent intention to abandon the old domicile and establish a new one. (Chapman v. Superior Court, 162 Cal.App.2d 421, 426-427 [328 P.2d 23] (1958).)

On the basis of the foregoing principles as applied to the facts in the record, we are convinced that appellants did not acquire a new domicile in Germany during the period at issue, but rather were and remained California domiciliaries during that time.

Appellants returned to California after approximately 18-1/2 months employment in Bremen, Germany, and have lived in this state since that time. Appellants retained ownership of their home in California during their absence and reoccupied it upon their return to the state. During their absence, they maintained and rented their home and two investment properties also located in California. Although appellants did establish certain connections in Germany, such as those aforementioned, these connections were not of a permanent nature, such as the purchase of a home.

Appellants were, therefore, domiciled in this state, and will be considered California residents if their absence therefrom is for a temporary or transitory purpose. In the Appeal of David J. and Amanda Broadhurst, decided April 5, 1976, we summarized the case law and regulations interpreting the term "temporary or transitory purpose" as follows:

Respondent's regulations indicate that whether a taxpayer's 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. [Citations.] The regulations also provide that the underlying theory of California's definition of "resident" is that the state where a person has his closest connections is the state of his residence. [Citation.] The purpose of this definition is to define the class of individuals who should contribute to the support of the state because they receive

Appeal of David C. and Livia P. Wensley

substantial benefits and protection from its laws and government. [Citation.] Consistently with these regulations, we have held that the connections which a taxpayer maintains in this and other states are an important indication of whether his presence in or absence from California is **temporary** or transitory in character. [Citation.] Some of the contacts we have considered relevant are the maintenance of a family home, bank accounts, or business interests; voting registration and the possession of a local driver's license; and ownership of real property. Such connections are important both as a measure of the benefits and protection which the taxpayer has received from the laws and government of California, and also as an objective indication of whether the taxpayer entered or left this state for 'temporary or transitory purposes. [Citation.]

It has been indicated that appellant's relocation to Germany was the result of a McDonnell Douglas... transfer. Appellant claims that his assignment in Germany was for an indefinite period, not for a **temporary** or transitory one, and that this was described in a company internal memorandum. However, he has not provided the company memorandum or any other substantiation of this claim. Under these circumstances, appellant's unsupported statement is insufficient to overcome the presumption of correctness that attaches to respondent's assessment. (Appeal of Clyde L. and Josephine Chadwick, Cal. St. Bd. of Equal., Feb. 15, 1972; Appeal of David A. and Barbara Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.)

In addition, appellant's statement about the transfer arrangement is unconvincing in light of other statements he has made. For example, he has indicated that he was transferred to Germany in order to participate in a study of the European **Spacelab** for use with the U.S. Space Shuttle. Moreover, though he terms his assignment there as "indefinite," he indicates that the above-mentioned memorandum described his initial assignment in Germany as being for a minimum of 11 months. Under these circumstances, keeping in mind that appellant was employed with McDonnell Douglas Corporation in California both before and after the assignment to Germany, **we are** of the view that **a finite**, rather than indefinite, stay in Germany was envisioned by appellant's employer as well as by appellant himself. In

Appeal of David C. and Livia P. Wensley

any event, he has not substantiated his claim that the duration of his stay there was indefinite.

On the whole, this case is similar to the Appeal of Pierre E. G. and Nicole Salinger, decided by this board June 30, 1980, wherein appellants' absence from the state was found to be temporary or transitory in nature, despite the fact that the husband's family accompanied him to his out-of-state employment location and together they established numerous connections there. In making our decision, we took into account, along with other factors, appellants' continued maintenance of a home in California, their eventual return to this home, and their failure to purchase a home at the out-of-state location. All these factors are present here, and collectively they lead us to the conclusion that appellants' contacts in this state are significantly more substantial than the contacts made by them in Germany.

In support of their position of nonresidency, appellants have offered the finding of the Internal Revenue Service, made in its disallowance of appellants' claimed "away from home" employer business expenses, that appellants' tax home was in Germany. Appellants' reliance on this finding is misplaced in that different criteria are required for establishing a taxpayer's "tax home" in connection with employee business expenses than are required for establishing a taxpayer's residence. The term "tax home" is defined generally as the taxpayer's principal place of business or post of employment (see Lee E. Daly, 72 T.C. 190 (1979)), and the term does not relate to the determination of residency. In this same light, appellants' reliance on their qualification for the foreign income exclusion provided by section 911 of the Internal Revenue Code as supportive of their position is again misplaced, as section 911 specifies the requirements for the exclusion from federal income of certain foreign income, and does not deal with the issue of California residency.

In regard to the contention that the termination of a certain income property partnership was forced upon appellants because of the move out of state, they have not presented sufficient facts about the alleged partnership to allow us to draw a meaningful conclusion. Unsupported statements made by appellants are insufficient to carry their burden of proof that respondent's proposed assessment is incorrect. (See Appeal of David A. and Barbara L. Beadling, supra.)

Appeal of David C. and Livia P. Wensley

In regard to the charges that respondent acted improperly in reopening their audit three years after acceptance of their tax return, and in thereafter imposing interest on the proposed assessment, we find that respondent's actions were proper. According to section 18581 of the Revenue and Taxation Code, the normal statute of limitations requires that a proposed assessment be issued within four years from the date the taxpayer's return was filed. As appellants' 1974 return was filed on **April 15, 1975**, respondent's issuance of its proposed assessment against appellants on February 21, 1979, was timely. In addition, respondent was correct in **imposing** interest on the proposed assessment. This board has consistently held that the **imposition** of interest is not a penalty: rather, it is compensation for the use of money. (See Appeal of Audrey C. Jaegle, Cal.- St. Bd. of Equal., June 22, 1976.)

For the reasons stated, **we sustain respondent's action.**

