



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ANNETTE BAILEY)

For Appellant: T. Thomas Mott
Certified Public Accountant

For Respondent: Bruce W. Walker
Chief Counsel

Paul J. Petrozzi
Counsel

O P I N I O N

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 Annette Bailey against proposed assessments of additional personal income tax in the amounts of \$397.55, \$732.60, and \$400.96 for the years 1969, 1970, and 1971, respectively.

Appeal of Annette Bailey

The sole issue for determination is whether the earnings of appellant's spouse constituted community property, one-half of which was taxable to her.

During the years in issue, appellant, a California resident, was married to Mr. John B. Bailey. She lived in Fresno where she owned a home which had been purchased with her separate funds. Sometime in 1965, Mr. Bailey, a business executive, moved to British Columbia where he established his residence. Mr. Bailey operated his own business enterprise in British Columbia from 1965 until 1973. Due to reasons of ill health, he was forced to return to appellant's Fresno home in 1973. During the period Mr. Bailey lived in Canada, appellant and their child remained in Fresno where appellant was a practicing attorney. Mr. Bailey visited his family in Fresno periodically as business conditions permitted.

Appellant and her husband filed joint nonresident California personal income tax returns for the years in issue. On their returns the entire amount of appellant's income from her law practice was reported. However, Mr. Bailey's total earnings were excluded on the basis that they were out-of-state income. In March 1973, respondent issued notices of proposed assessment to both appellant and Mr. Bailey. Respondent first noted that, pursuant to subdivision (b) of section 18402 of the Revenue and Taxation Code, taxpayers may not file joint personal income tax returns where one spouse was not a resident of California for the entire taxable year for which the return was filed. Additionally, respondent attributed one-half of Mr. Bailey's out-of-state income to appellant as her portion of the community income on the theory that Mr. Bailey was a California domiciliary. Respondent also attributed one-half of appellant's income to Mr. Bailey on the same theory. Separate notices of proposed assessment were sent to each spouse for each of the years in issue. Mr. Bailey did not protest the additional assessments and they became final in due course. Appellant did protest the assessments but conceded that she was not entitled to file jointly with her spouse for the years in issue. However, appellant does contend that there was no basis to attribute one-half of Mr. Bailey's income to her.

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In order to resolve the issue presented in this appeal we must determine whether Mr. Bailey's earnings were community property. If they were, appellant is liable for income tax on her one-half community interest in those earnings even though the parties were not living together and even though appellant did not receive any part of them. (United States v. Malcolm, 282 U.S. 792 [75 L. Ed. 714]; Appeal of Neil D. and Carole C. Elzey, Cal. St. Bd. of Equal., Aug. 1, 1974; Appeal of Ann Schifano, Cal. St. Bd. of Equal., Oct. 27, 1971.) 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]; Rozan v. Rozan, 49 Cal. 2d 322, 326 [317 P. 2d 11]; Appeal of Estate of Eleanor M. Gann, Cal. St. Bd. of Equal., Dec. 13, 1971.) Thus, we must determine whether Mr. Bailey was a California domiciliary or whether he was domiciled in British Columbia.

At the outset it is necessary to distinguish between "residence" and "domicile". For our purposes this distinction was enunciated in Whittell v. Franchise T-ax Board, 231 Cal. App. 2d 278, 141 Cal. Rptr. 673[.].) In Whittell the court stated:

"[D]omicile" properly denotes 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 but which the law may also assign to him constructively. Residence, on the other hand, denotes any factual place of abode of some permanency, that is, more than a mere temporary sojourn. (231 Cal. App. 2d at 284.)

Appellant has conceded that Mr. Bailey was a California domiciliary until 1965 but maintains that he was domiciled in British Columbia during the years in issue. A domicile once acquired is presumed to continue until it is shown to have been changed. (Murphy v. Travelers Ins. Co., 92 Cal. App. 2d 582, 587 [207 P. 2d 595].) In order to terminate a California domicile, it is necessary for an individual to leave the state without any intention of returning, and to locate elsewhere with the intention of remaining there indefinitely. (In re Marriage of Leff, 25 Cal. App. 3d 630, 641-42 [102 Cal. Rptr. 195]; Estate of Phillips, 269 Cal. App. 2d 656, 659 [75 Cal. Rptr. 301]; Appeal of Earl F. and Helen W. Brucker, Cal. St. Bd. of Equal., July 18, 1961.)

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In support of her position appellant has emphasized the many contacts Mr. Bailey had with British Columbia during his stay there. For example, Mr. Bailey purchased furniture and leased an apartment in British Columbia. He qualified for Canadian medical care and social security; He banked in Canada and maintained a membership in an athletic club there. These factors are sufficient to establish that he was a resident of British Columbia during the years in issue, a point which respondent readily concedes. However, they do not establish that he was domiciled in British Columbia. Rather, the facts establish that Mr. Bailey, concededly a California domiciliary prior to 1965, remained a California domiciliary during the critical period.

The maintenance of a marital abode in California is a significant factor in resolving the question of domicile. (Aldabe v. Aldabe, 209 Cal. App. 2d 453, [26 Cal. Rptr. 208]; Murphy v. Travelers Ins. Co., supra; cf. Appeal of Olav Valderhaug, Cal. St. Bd. of Equal., Feb. 18, 1954.) It is clear that Mr. Bailey considered the parties' California abode as the marital abode. His wife and child remained here and he visited here whenever business circumstances allowed. The record also indicates that he intended to return to California whenever his business association in Canada should terminate; and, in fact, he did return when ill health forced him to terminate his Canadian enterprise. The record is devoid of any facts which would establish that Mr. Bailey was a domiciliary, as opposed to a resident, of British Columbia during the appeal years.

Since we have determined that Mr. Bailey was a California domiciliary during the years in issue we must conclude that his earnings constituted community property, one-half of which was taxable to appellant. Therefore, respondent's action in this matter must be sustained.

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,

