JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-26-018 / NOT PRECEDENTIAL**
ID: **P9900226**
DATE: **09-26-00**
DISPOSITION: **SUSTAINED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That Protestants filed joint Oklahoma income tax returns, Form 511-NR (Nonresident, Part-Year Resident) for the years 1996 and 1997. That the "State of Residence" was not marked on the 1996 return, but was marked "OUT OF STATE" for Husband and "Oklahoma" for Wife on the 1997 return. That the address listed on both returns was CITY-ONE, OUT OF STATE.

2. That on April 16, 1999, the Division issued a proposed assessment of additional income tax, interest and penalty against Protestants for the 1996 tax year, as follows:

	Tax	Interest (To 04-16-99)	Penalty	TOTAL
1996	$4634.00	$1392.10	$463.40	$6489.50

3. That on June 30, 1999, the Division issued a proposed assessment of additional income tax, interest and penalty against Protestants for the 1997 tax year, as follows:

	Tax	Interest (To 06-30-99)	Penalty	TOTAL
1997	$4423.00	$801.89	$442.30	$5667.19

4. That the total aggregate amount in controversy is $12,156.69, plus accruing interest.

5. That the proposed assessments are based on the Division's position that both Protestants were domiciled in and residents of the State of Oklahoma and that DOCTOR PROTESTANT'S income earned OUT OF STATE should not have been excluded from Oklahoma taxable income.

6. DOCTOR PROTESTANT timely protested the assessments, contending that he has been a resident OUT OF STATE since 1995 and has not worked in Oklahoma since that time.

7. That a Prehearing Conference was held in this matter on September 27, 1999. DOCTOR PROTESTANT was in attendance, as was the Division. At that Prehearing Conference, Protestant advised that he has not been a resident of Oklahoma nor worked in Oklahoma since 1995, even though his wife and children live in Oklahoma. He further advised that he has had no intent to return to Oklahoma since 1995.

8. That subsequent to the Prehearing Conference, a hearing was set in this matter and was held on May 4, 2000.

9. DOCTOR PROTESTANT is an emergency medicines physician. He is licensed in Oklahoma and OUT OF STATE.

10. During 1990 through 1994, DOCTOR PROTESTANT was employed by PHYSICIAN SERVICE, INC. as a part-time independent contractor at its various client hospitals in Oklahoma.

11. In 1995, DOCTOR PROTESTANT moved OUT OF STATE after THE PHYSICIAN SERVICE, INC. accepted his application, as an independent contractor, for a full-time position with its various client hospitals OUT OF STATE. According to DOCTOR PROTESTANT, he sought the move OUT OF STATE because of the opportunity for full-time employment, the greater employment opportunities, the higher wages, family and friends and the larger Indian community.

12. THE PHYSICIAN SERVICE, INC. employment contracts are for one (1) year, but are generally renewed on an annual basis. DOCTOR PROTESTANT has worked at the same hospital OUT OF STATE since 1996.

13. Upon arriving OUT OF STATE, DOCTOR PROTESTANT leased a one bedroom apartment in the CITY-THREE area. In 1998, DOCTOR PROTESTANT leased a larger apartment in the same complex due to his daughter moving in with him. Each of these apartments have been leased on a yearly basis. The utilities for the apartment are paid by the apartment complex and are included in DOCTOR PROTESTANT'S rent.

14. In February, 1996, DOCTOR PROTESTANT registered his vehicle OUT OF STATE and received AN OUT OF STATE tag and Certificate of Title.

15. DOCTOR PROTESTANT testified regarding his inability to obtain AN OUT OF STATE driver's license and voter's registration card until August, 1998 and October, 1998, respectively. He stated that although he attempted he was prevented from obtaining the license because he had misplaced his social security card and his work schedule did not allow for time. DOCTOR PROTESTANT generally worked from 6:00 a.m. to 6:00 p.m. and had to drive approximately 150 miles one way to work. He stated that he applied for the voter's registration card when he applied for his license.

16. DOCTOR PROTESTANT'S wife and children lived at their residence in ANYTOWN, Oklahoma during the relevant time period. DOCTOR PROTESTANT AND MS. PROTESTANT testified that this decision was made to allow each of their children to graduate high school in ANYTOWN, OKLAHOMA. MS. PROTESTANT also testified that she remained in Oklahoma to manage their rental properties. DOCTOR PROTESTANT testified that during this time period, he was in Oklahoma approximately 6 or 7 times per year for approximately a total of 20 to 25 days. He also testified that his family visited him OUT OF STATE approximately every two to three weeks. He further testified that when he abandoned his residence in Oklahoma, he took all of his personal possessions with him.

17. DOCTOR PROTESTANT'S two oldest daughters have since moved OUT OF STATE. One is in college in CITY-TWO, OUT OF STATE and the other daughter lives with him. MS. PROTESTANT testified that she intends to move OUT OF STATE upon the graduation from high school in May, 2000 of their youngest child. She also testified that she is attempting sell their rental property.

18. DOCTOR PROTESTANT testified that he is involved in the Indian community in CITY-THREE, OUT OF STATE. He stated that he attends meetings approximately weekly, is a member of the Islamic Association OUT OF STATE and contributes to the organization and the CITY-THREE Central Mosque.

19. Regarding the abandonment of the protest to the 1995 income tax assessment and payment of the taxes, DOCTOR PROTESTANT testified that the decision was based on the information he received from the Division concerning the legal ramifications of his claim to a homestead exemption on the ANYTOWN OKLAHOMA residence in 1995. He stated that after withdrawing the protest he called the ANYTOWN County Assessor and was advised that since the residence was jointly owned either owner could claim the homestead exemption. He further stated that his wife claimed the homestead exemption on the residence in 1996 and 1997.

20. Regarding the evidence concerning CORPORATION ONE, DOCTOR PROTESTANT testified that CORPORATION ONE was never active, never functioned as an entity, never owned any assets, never incurred any liability and never had a bank account. CORPORATION ONE was incorporated in Oklahoma in March, 1987. The Articles of Incorporation list DOCTOR PROTESTANT as the registered agent. The 1996 and 1997 franchise tax returns for CORPORATION ONE list DOCTOR PROTESTANT as an officer of the Corporation and report his address as that of the ANYTOWN, OKLAHOMA residence. The check in payment of the 1997 franchise taxes is a personal check which is signed by DOCTOR PROTESTANT and is drawn on the PROTESTANT'S account with ANONYMOUS Bank in ANYTOWN, Oklahoma.

21. DOCTOR PROTESTANT testified that the federal identification number ("FEI") appearing on the tax documents for CORPORATION ONE was obtained by him in 1982, that the FEI was never assigned to CORPORATION ONE and that his accountant merely used the number as a convenience.

22. DOCTOR PROTESTANT testified that although the W-2s attached to his daughters' 1996 and 1997 Oklahoma income tax returns report he is the employer and list the FEI number, the wages represent work performed in his wife's real estate business (rental properties), his wife was actually the employer and his wife actually paid the wages.

23. Concerning the Applications for Renewal of Oklahoma Medical License for the periods of 1995 through 1996 and 1996 through 1997, DOCTOR PROTESTANT testified that he maintained his Oklahoma license because his health insurance company required an Oklahoma license to maintain the insurance, that he has had the same health insurance for 17 years and that it would be difficult to obtain health insurance OUT OF STATE because of his health. He stated that the ANYTOWN, OKLAHOMA address of the residence appears on the applications as his mailing and practice addresses because in 1990 when he started working emergency medicine and had no practice address he called the Board of Medical Examiners and was advised that he could list his home address.

24. DOCTOR PROTESTANT testified that due to his work schedule and drive time, he not only receives mail at his apartment, but opened a P.O. Box in CITY-ONE, OUT OF STATE, has mail forwarded to the hospital where he works and still receives mail at the ANYTOWN, OKLAHOMA residence. He stated that he and his wife still maintain a joint checking account, but that he makes deposits to the account OUT OF STATE.

25. DOCTOR PROTESTANT testified that upon moving OUT OF STATE in 1995, he abandoned Oklahoma as his domicile and intended to make OUT OF STATE his permanent residence. He stated that he intends to retire OUT OF STATE.

26. The auditor testified that the audit began as a result of the filing of the 1995 amended return by Protestants. She stated that upon reviewing the return she reviewed the 1996 and 1997 returns which were filed in the same manner as the 1995 amended return.

27. The auditor also testified that as of December, 1998, DOCTOR PROTESTANT was registered to vote in Oklahoma, that the homestead exemption was still being claimed on the ANYTOWN, OKLAHOMA residence and that as of March, 1999, DOCTOR PROTESTANT'S Oklahoma driver's license was still valid.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the evidence presented shows proof of a "change of domicile" by DOCTOR PROTESTANT, for the years in question.

Protestants contend that the assessments are erroneous for the reason that DOCTOR PROTESTANT made OUT OF STATE his state of residence as of 1996 and that the facts and evidence presented prove he effected a change of domicile.

The Division contends that the assessments should be sustained for the reason that DOCTOR PROTESTANT never abandoned his Oklahoma domicile and is, therefore, still an Oklahoma resident and subject to the income tax laws of the State of Oklahoma.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. The Oklahoma Income Tax Act at 68 O.S. 1991, § 2353(4) defines "resident individual" and "nonresident individual" as follows:

> "Resident individual" means a natural person who is domiciled in this state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state shall be presumed to be a resident for purposes of this act in the absence of proof to the contrary. A "nonresident individual" means an individual other than a resident individual.

3. Domicile is a proper basis for the assessment of state income taxes on an individual.[1] ***New York ex rel. Cohn v. Graves***, 300 U.S. 308, 313 (1937); ***Lawrence v. State Tax Commission of Mississippi***, 286 U.S. 276, 279 (1932).

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[1]A person domiciled in this state is an Oklahoma resident. Rule 23.003.01(A) of the Oklahoma Tax Commission Permanent Rules. Rule 23.003.01 provides:

> A. An Oklahoma resident is a person domiciled in this state. "Domicile" is the place established as a person's true, fixed, and permanent home. A domicile, once established, remains until a new one is established. The state for which withholdings are referred on the Form W-2 shall be deemed evidence of State of Residence.
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> B. One is presumed to retain his Oklahoma residency if he has:
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> 1. An Oklahoma Homestead Exemption;
> 2. His family remains in Oklahoma;
> 3. He retains an Oklahoma drivers license;
> 4. He intends to return to Oklahoma; or
> 5. He has not abandoned his Oklahoma residence.

4. A person's domicile is the place where he has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. ***Suglove v. Oklahoma Tax Commission***, 605 P.2d 1315, 1317 (Okl. 1979), citing ***Jones v. Reser***, 61 Okl. 46, 160 p. 58, 59 (1916). Domicile forms the basis for imposition of state income tax on the income of an individual, whether said income is earned without the state. ***Suglove***, supra at 1317. See, ***Davis v. Oklahoma Tax Commission***, 488 P.2d 1261 (Okl. 1971) and ***Colchensky v. Oklahoma Tax Commission***, 184 Okl. 207, 86 P.2d 329 (1939).

5. In ***Suglove***, the Court set forth the general principles which have evolved in connection with the determination of domicile, to-wit:

> First, a person may have only one domicile at a time. Second, domicile, once fixed is presumed to continue until a new one is established. Third, to effect a change of domicile, there must be (a) actual abandonment of the first domicile, coupled with (b) the intention not to return to it and (c) actual residence in another place with intention of making it a permanent home. Indicia of a changed domicile are to be found in the habits of the person, his business and domestic relations, declarations, exercise of political rights, community activities and other pertinent objective facts ordinarily manifesting the existence of requisite intent. As a general principle, Oklahoma domicile is presumed to continue unless an individual can show that a change has occurred.

The Court in ***Suglove*** also recognized that there is a reasonable basis for distinguishing between moves abroad and moves to another state. *Id*., at 1320. The Court held that "[I]n absence of countervailing factors, it is not unreasonable to infer that such a move [from one state to another] is permanent and constitutes a change of domicile." *Id*.

6. Whether a change of domicile has occurred is a question of fact to be determined in accordance with the facts and circumstances of each individual case. ***Graham v. Graham***, 330 P.2d 1046 (Okl. 1958). The burden of proving a change of domicile is on the person attempting to show the same. ***McKiddy v. State***, 366 P.2d 933 (Okl. 1961); ***Jones v. Burkett***, 346 P.2d 338 (Okl. 1959).

7. Here, the evidence supports a finding that DOCTOR PROTESTANT, abandoned Oklahoma as his domicile during the years in question and made OUT OF STATE his true, fixed and permanent home and principal establishment. Accordingly, the Division's proposed assessments of additional income tax for the years in question are erroneous.

8. Protestants' protest should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestants, DOCTOR PROTESTANT AND MS. PROTESTANT, be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.