

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2010-07-20-19 / NON-PRECEDENTIAL
ID: P-10-020-H
DATE: JULY 20, 2010
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (“Protestant”) appears pro se.¹ The Case Management Section of the Account Maintenance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On January 27, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*² and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.³

On February 3, 2010, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-020-H. The letter also advised the parties a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.⁴ On February 9, 2010, a letter received from the Protestant to the Division was filed with the Court Clerk,⁵ with documents attached thereto. On February 11, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On February 12, 2010, the Notice of Prehearing Conference was mailed to the parties, setting the prehearing conference for March 18, 2010, at 9:30 a.m.

On March 18, 2010, at 9:30 a.m., the prehearing conference was held as scheduled. The Protestant appeared in person and OTC ATTORNEY appeared by telephone. On March 23, 2010, a letter was mailed to the parties advising that pursuant to the prehearing conference, a status report was to be filed on or before April 19, 2010, advising how the parties wished to

¹ “[P]ro se” (proh **say or see**), *adv. & adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK’S LAW DICTIONARY (8th ed. 2004), available at <http://westlaw.com>.

² OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ *Id.*

⁵ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

proceed. On March 29, 2010, the Protestant filed a Status Report advising that the parties had been unable to resolve this matter.

On April 19, 2010, OTC ATTORNEY filed the Division's Status Report advising the parties had conferred and requested that this matter be set for hearing. On April 20, 2010, the parties were advised by letter this matter had been set for hearing on May 10, 2010, at 1:30 p.m. with position letters or memorandum briefs due on or before May 3, 2010.

On May 3, 2010, the Division's Memorandum Brief ("Brief") was filed with Exhibits A through E attached thereto. On May 10, 2010, at 1:30 p.m. a closed hearing⁶ was held as scheduled. The Protestant testified on her own behalf concerning her work history and her intent concerning domicile during the 2008 Tax Year. The Protestant did not identify or offer any exhibits for admission into evidence. The Division called SUPERVISOR, Case Management Section of the Account Maintenance Division, Oklahoma Tax Commission, concerning the audit of the return for the 2008 Tax Year and as custodian of the Division's records.⁷ The Division's Exhibits A through E, were identified, offered, and admitted into evidence without objection. At the conclusion of the hearing, the record in this matter was closed and the case was submitted for decision on May 10, 2010.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Brief, the undersigned finds:

1. On October 16, 2009, the Division received the Protestant's Oklahoma Nonresident Income Tax Return (Form 511NR) ("2008 Return") for the 2008 Tax Year. The 2008 Return lists STATE as the Protestant's state of residence claiming a refund of \$4,760.00. The address on the 2008 Return is OKLAHOMA ADDRESS. The address on the W-2 is RURAL ADDRESS and reflects that the Protestant had \$119,697.47 in Oklahoma wages and \$4,782.00 in Oklahoma withholding. The 2008 Return reported Federal Adjusted Gross Income of \$120,961.00, but on Line Twenty-three (23) reported only \$1,176.00 in Oklahoma unemployment compensation.⁸

2. The Protestant attached a letter to the 2008 Return⁹ which states in pertinent part as follows, to-wit:

I've attached the letter of notification from my employer, EMPLOYER, of my becoming a STATE resident on January 4, 2007.

⁶ The Protestant was not sure what to do, but for purposes of the record, confidentiality was invoked as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

⁷ SUPERVISOR testified that he has been the Supervisor of the Case Management Section since 2004.

⁸ Division's Exhibit A.

⁹ *Id.*

I established residency at STATE ADDRESS. I resided there all of 2007 and 2008, and moved back to Oklahoma in Spring, 2009.

My employer failed to change my address and discontinue the Oklahoma income tax withholding, but that does not negate the fact that I was a STATE resident.

3. The Protestant also attached a letter to the 2008 Return dated December 15, 2006, from her employer, EMPLOYER, COMPTROLLER, Payroll Department,¹⁰ which states in pertinent part as follows, to-wit:

According to the IRS, a temporary assignment is one that is realistically expected to last and does last less than one year. An indefinite assignment is one that is expected to last more than one year. If you realistically expect an assignment to last for one year and then you become aware that it will last longer than one year at that point the assignment becomes an indefinite assignment.

If an assignment is indefinite per diem is not deductible for tax purposes by the employee, and any allowance must be included in their income. Your current assignment in CITY is currently expected to last more than one year. Effective January 4, 2007 supplemental per diem must be included in you taxable income.

4. On November 19, 2009, the Division mailed a letter¹¹ to the last-known address of the Protestant making adjustments to the 2008 Return as follows, to-wit:

		REPORTED	ADJUSTED
LINE 23	OKLA AGI - OKLA SOURCES	1,176.00	120,873.00
LINE 36	NON-RESIDENT OKLAHOMA TAX	58.00	6,023.00
LINE 40	BALANCE	58.00	6,023.00
LINE 48	OVERPAYMENT OF INCOME TAX	4,760.00	0.00
LINE 52	REFUND	4,760.00	0.00
LINE 53	INCOME TAX DUE	0.00	1,205.00
LINE 56	TOTAL BALANCE DUE	0.00	1,205.00

5. On December 1, 2009, the Division received via e-mail a timely filed protest to the proposed adjustments to the 2008 Return.¹²

¹⁰ *Id.*

¹¹ Division's Exhibit B.

¹² Division's Exhibit C. The Protestant states her STATE address was ADDRESS.

6. In a letter filed February 9, 2010, with the Court Clerk, the Protestant explained her work history in STATE, attaching copies of the letter dated December 15, 2006, from her employer; a Certificate of Title for an RV issued by State of STATE to the Protestant dated September 11, 2007; a receipt for personal property taxes (\$32.10) assessed by COUNTY, STATE, for the Protestant's RV located at STATE ADDRESS; and rental records from RENTAL PARK covering December 29, 2005, through March 28, 2009.¹³

7. The Protestant has resided with her spouse at OKLAHOMA ADDRESS f/k/a RURAL ADDRESS for approximately eleven (11) years. The Protestant purchased the residence in 1999 and has claimed a homestead exemption on the residence beginning in the Tax Year 2000 and continuing through Tax Year 2008.¹⁴

8. During the 2008 Tax Year, the Protestant maintained an Oklahoma Driver's License, the Protestant always intended to return to Oklahoma, and the Protestant never intended to abandon her Oklahoma residence. The letter¹⁵ received by the Division from the Protestant and the Protestant's Spouse dated February 5, 2010, states in pertinent part:

Called by SUPERVISOR and was referred to Oklahoma tax law about if we abandoned our property in Oklahoma,,,NEVER,,,if we intended to come home,,,,,YES, eventually,,,,,and if we changed our Driver's license, I thought my wife had because I thought it was going to expire. It seems the Oklahoma law allows you to obtain a license without a photo until you get home as long as you keep it attached to your original. She did.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁶

2. For the purposes of the Oklahoma Income Tax Act,¹⁷ "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 in absence of proof to the contrary.¹⁸

¹³ Division's Exhibit D.

¹⁴ *Id.* See Division's Exhibit E.

¹⁵ Testimony of Protestant. See Note 13, *supra*.

¹⁶ OKLA. STAT. tit. 68, § 221(D) (West Supp. 2002).

¹⁷ OKLA. STAT. ANN. tit. 68, § 2351 et seq. (West 2001).

¹⁸ OKLA. STAT. tit. 68, § 2353(4) (West Supp. 2004).

3. In cases where a return has been filed, the Tax Commission shall determine that the tax disclosed by such return is less than the tax disclosed by its examination, it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at the taxpayer's last-known address.¹⁹

4. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement and collection of taxes and other levies enacted by the Oklahoma Legislature with respect to income.²⁰

5. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.²¹

6. 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.²²

7. One is presumed to retain his Oklahoma residency²³ if he has:

- (1) An Oklahoma Homestead Exemption;
- (2) His family remains in Oklahoma;
- (3) He retains an Oklahoma driver's license;
- (4) He intends to return to Oklahoma; or
- (5) He has not abandoned his Oklahoma residence.

8. One's intent with respect to domicile presents a question of fact.²⁴

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.²⁵

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.²⁶

¹⁹ OKLA. STAT. tit. 68, § 221(A) (West 2002).

²⁰ OKLA. ADMIN. CODE § 710:50-1-1.

²¹ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

²² OKLA. ADMIN. CODE § 710:50-3-36(a) (June 26, 1997).

²³ OKLA. ADMIN. CODE § 710:50-3-36(b) (June 26, 1997).

²⁴ *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315.

²⁵ OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). *See* OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

²⁶ *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d

DISCUSSION

The Division cites the leading Oklahoma case on “Domicile” for Oklahoma income tax purposes, *Suglove*,²⁷ decided by the Supreme Court of Oklahoma in 1979. In *Suglove*, the Court set forth the tests for determining Oklahoma Domicile and therefore an individual’s residency for Oklahoma income tax purposes, which in pertinent part states as follows, to-wit:

...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. Domicile has been held to form a constitutional basis for the imposition of state income tax on an individual... 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, once established, is presumed to continue unless an individual can show that a change has occurred. One’s intent with respect to domicile presents a question of fact.... (Citations omitted.)

The Protestant’s intent must be determined by weighing the evidence contained in the record. The most expeditious way to evaluate the evidence is to address the factors contained in the Rule one at a time.

First, did the Protestant claim an Oklahoma homestead exemption during the 2008 Tax Year? Yes. Since the 2000 Tax Year, the Protestant has claimed an Oklahoma homestead exemption on the residence located at OKLAHOMA ADDRESS f/k/a RURAL ADDRESS.²⁸

Second, did the Protestant’s family remain in Oklahoma during the 2008 Tax Year? For Oklahoma Income Tax purposes the Spouse’s Oklahoma residency is not in dispute. The Protestant’s Spouse was also working in STATE on assignment as an insurance adjuster with the same employer as the Protestant, but the death of the Spouse’s uncle necessitated that he return to Oklahoma to sell off horses. Protestant’s Spouse took a part-time job delivering autos for a dealership in CITY 2, checked on the property, and eventually went back to STATE to join the Protestant.²⁹

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²⁷ See Note 25, *supra*.

²⁸ See Note 15, *supra*.

²⁹ See Note 13, *supra*.

Third, did the Protestant retain an Oklahoma driver's license? Yes. The Protestant maintained an Oklahoma Driver's License.³⁰

Fourth, did the Protestant intend to return to Oklahoma? Yes. The Protestant does not dispute that it was always her intention to return to Oklahoma. The Protestant, being an "independent" insurance adjuster, was accustomed to working job assignments out of the State of Oklahoma, but usually the job assignments lasted two (2) to six (6) months. In this instance, while working claims in STATE 2 and STATE 3 the Protestant's employer assigned her to work in STATE in the fall of October 2005, which the Protestant thought would be a normal job assignment (two (2) to six (6) months). However, that area of the United States was hit by six (6) consecutive hurricanes, which caused the job assignment to last until the Protestant returned to Oklahoma in April 2009. This was the first time the Protestant's job assignment lasted for twelve (12) months or longer.

Fifth, did the Protestant abandon her Oklahoma residence? No. The Protestant does not dispute that she did not abandon her Oklahoma residence.³¹

The Protestant's position is that because she remained in STATE for over twelve (12) months she became a resident of STATE because "The IRS sent me a letter stating that we were residents of STATE because we had been there longer than 12 months."³² They were taxing my Per Diem, while I will always come home to Oklahoma on a permanent basis, sometimes my job takes me elsewhere in the united states [sic]."³³ The Protestant supports her position with the letter from her employer, the Certificate of Title for the purchase of the RV, the receipt for the payment of personal property taxes on the RV to COUNTY, STATE, and rental records from RENTAL PARK. The Protestant also states, "WE HAVE NEVER WORKED IN THE STATE OF OKLAHOMA FOR EMPLOYER [sic]. All of our income from them was and has been earned from work in other states. They would not let us work in our own state...."³⁴

At the hearing, Protestant was questioned about her statement, "The IRS sent me a letter stating that we were residents of STATE because we had been there longer than 12 months. They were taxing my Per Diem, while I will always come home to Oklahoma on a permanent

³⁰ See Note 16, *supra*.

³¹ *Id.*

³² The Protestant testified that the letter stated once she spent over twelve (12) months in STATE she automatically became a resident of STATE.

³³ See Note 12, *supra*.

³⁴ See Note 13, *supra*. It appears that this argument was thrown in as an after thought. The Protestant was not challenging her Oklahoma Residency when her job assignments were "temporary" or twelve (12) months or less. The fact that the Protestant always worked out-of-state would only come into play in this matter if the Protestant was required to file an income return and pay income tax in the state(s) in which she was working in order to claim the credit for taxes paid to another state. However, since STATE does not have an individual income tax it is not relevant in this matter.

basis, sometimes my job takes me elsewhere in the united states [sic].”³⁵ The Protestant testified that she had never received any letter or notification from the IRS. The only letter the Protestant received was from her employer, dated December 15, 2006, which informed her in pertinent part, “Your current assignment in CITY 2 is currently expected to last more than one year, effective January 4, 2007 supplemental per diem must be included in your taxable income.”³⁶

Unfortunately, the Protestant and her Tax Preparer³⁷ interpreted the letter from her employer to mean that she was now a resident of STATE, but no where in the letter is the term “residency” ever mentioned. What the letter refers to is the employer’s notification under the Internal Revenue Code that when the Protestant’s job assignment changed from “temporary” to “permanent” the Protestant’s per diem (travel expense) was no longer deductible, but was taxable as income.³⁸ The letter does not advise the Protestant that she was a resident of STATE as of January 4, 2007.

The record in this matter establishes by a “preponderance of the evidence” that it was not the Protestant’s intention to abandon Oklahoma as her state of domicile, and therefore Protestant’s status for Oklahoma income tax purposes for the 2008 Tax Year is that of a “resident”.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the Division’s proposed assessment of income taxes for the 2008 Tax Year should be denied.³⁹

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.

³⁵ See Note 12, *supra*.

³⁶ See Note 13, *supra*.

³⁷ Testimony of Protestant. The Protestant testified that she had used the same Tax Preparer for a number of years and “assumed” the Tax Preparer knew what they were doing.

³⁸ See IRS Publication 463 (2009), Travel, Entertainment, Gift, and Car Expenses at <http://www.irs.gov/publications/p463/ch01.html>. (Last visited May 12, 2010).

³⁹ The Protestant does not specifically request a waiver of penalty and interest, but once the tax is paid such a request can be made by the Protestant. This office does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West 2001).