

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2013-03-12-02 / NON-PRECEDENTIAL  
**ID:** P-12-149-K  
**DATE:** MARCH 12, 2013  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND and WIFE appear pro se. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

### STATEMENT OF THE CASE

On August 26, 2011, Protestants filed a married filing joint Oklahoma Nonresident/Part-year Income Tax Return (Form 511NR) for the 2010 tax year reporting Oklahoma taxable income of \$48,337.00, Oklahoma income tax of \$2,228.00, Oklahoma withholding of \$7,330.00, and a refund of \$5,102.00 which was disbursed to them. On February 6, 2012, Protestants filed an amended Oklahoma income tax return for the 2010 tax year claiming a refund in the amount of \$2,238.00. The Division audited the amended return, and by letter dated May 11, 2012, notified Protestants that the "claimed refund is disallowed" and wrote as an explanation that "[n]o documentation was submitted to substantiate the claim that all your previously taxed income was non-taxable to Oklahoma." By letter dated July 6, 2012, Protestants timely protested the disallowance of the refund and submitted additional information in support of their claim. Protestants did not request an oral hearing in the letter of protest.

On August 8, 2012, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure before the Office of Administrative Law Judges<sup>2</sup>. The protest was docketed as Case No. P-12-149-K and assigned to ALJ, Administrative Law Judge.<sup>3</sup>

A pre-hearing conference was scheduled for September 11, 2012, by *Prehearing Teleconference Notice* ("Notice") issued August 21, 2012.<sup>4</sup> Protestants did not respond to the Notice. By *Prehearing Teleconference Order* ("Order") issued September 11, 2012, the Division was directed to file a verified response to protest and Protestants were notified that a reply to the

---

<sup>1</sup> 68 O.S. 2011, § 201 et seq., as amended.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("OAC").

<sup>3</sup> OAC, 710:1-5-22(b).

<sup>4</sup> OAC, 710:1-5-28(a).

response could be filed. The *Order* further directed that unless an oral hearing was requested, the record would be closed and the protest submitted for decision upon completion of the procedural schedule<sup>5</sup>. Protestants did not file a response to the *Order*.

The *Compliance Division's Verified Response* (“*Verified Response*”) and Exhibits 1 through 6 were filed October 12, 2012. Exhibit 6 appears to be the Division’s file with respect to Protestants’ 2011 Oklahoma income tax filing, inclusive of a letter issued by the Division on May 3, 2012, requesting additional information in order to process Protestants’ 2011 Oklahoma return and basically the same information Protestants submitted in support of their protest to the disallowance of their 2010 income tax refund, inclusive of a letter in response to the Division’s request dated the same date as the protest letter (July 6, 2012).<sup>6</sup> Protestants did not file a reply to the *Verified Response*. On November 26, 2012, the record was closed and the protest to the disallowance of Protestants’ income tax refund claim for tax year 2010 was submitted for decision.<sup>7</sup>

### FINDINGS OF FACT

Upon review of the file and records, including the *Verified Response* and exhibits, the undersigned finds:

1. On August 26, 2011, Protestants filed a married filing joint Oklahoma Nonresident/Part-year Income Tax Return (Form 511NR) for the 2010 tax year with copies of Protestants’ 2010 Federal income tax return and two (2) W-2s issued to Protestant, HUSBAND by COMPANY 1 of CITY, STATE (“COMPANY 1”). Exhibit 1.
2. Both the Oklahoma and Federal returns, and the two (2) W-2s issued to HUSBAND report Protestants’ home address as OKLAHOMA ADDRESS. Exhibit 1.
3. The total number of exemptions claimed on both returns is two (2). Exhibit 1
4. On the Oklahoma return, Protestants reported as their residency status – Nonresident – “lived overseas”. Exhibit 1.
5. On Form 2555 “Foreign Earned Income” to the Federal return, Protestants reported a “tax home” of COUNTRY established on January 26, 2010, under the “physical

---

<sup>5</sup> OAC, 710:1-5-28(b).

<sup>6</sup> To the extent that the information submitted as Exhibit 6 pertains only to the 2011 tax year, the information is not relevant to this proceeding and is not considered. It cannot be determined from this information whether the Division took any action in regard thereto and/or whether such action resulted in a timely filed protest by Protestants.

<sup>7</sup> OAC, 710:1-5-39.

- presence test”. Form 2555 reports that HUSBAND was physically present in COUNTRY for 337 days in 2010. Exhibit 1.
6. On the Federal return, Protestants reported “foreign earned income” of \$155,339.00 comprised of “wages, salaries, bonuses, commissions, etc.” and a “foreign earned income exclusion” of \$85,278.00. Exhibit 1.
  7. On the original Oklahoma return, Protestants reported Oklahoma taxable income of \$48,337.00 after the subtraction of the foreign earned income exclusion, itemized deductions and personal exemptions, resulting in Oklahoma income tax due of \$2,228.00. An income tax refund of \$5,102.00 was claimed on the return (income tax due of \$2,228.00 less Oklahoma income tax withholding of \$7,330.00) which was disbursed to Protestants. Exhibits 1 and 2.
  8. On February 6, 2012, Protestants filed an amended married filing joint Oklahoma Nonresident/Part-year Income Tax Return for the 2010 tax year reporting no Oklahoma taxable income, a withholding tax credit of \$2,238.00 and a refund of the same amount. Exhibit 3.
  9. On the amended return, Protestants reported their mailing address as “USAEDFE Unit ###TJDJI, APO, AP and indicated their residency status as “Foreign”. Protestants also checked off the box indicating they did not have an Oklahoma filing requirement and were filing for a refund of their Oklahoma withholding. Exhibit 3.
  10. The Division audited the amended return, and by letter dated May 11, 2012, notified Protestants that the “claimed refund is disallowed” and wrote as an explanation that “[n]o documentation was submitted to substantiate the claim that all your previously taxed income was non-taxable to Oklahoma.” Exhibit 4.
  11. By letter dated July 6, 2012, Protestants timely protested the disallowance of the refund and submitted additional information in support of their refund claim. Exhibit 5.
  12. In support of their contention that the income earned by HUSBAND in COUNTRY is non-taxable by Oklahoma, Protestants submitted: (1) Expatriate Assignment, Pro Forma Letter of Agreement – CITY, COUNTRY between HUSBAND and his employer, COMPANY 1; (2) HOTEL Accommodation Agreement; (3) Lease Agreement for APARTMENT; (4) copy of Passport of HUSBAND; and (5) copy of Passport of WIFE. Exhibit 5.
  13. The Expatriate Assignment indicates employment in CITY, COUNTRY on the Department of the MILITARY, District, Corps of Engineers Project with an

effective date of February 1, 2010. The Expatriate Assignment provides: “[y]our point of origin and Taxation State has been designated as CITY, OK” and “[y]our assignment is expected to last 11 months with the option for a 2 year renewal based on approval by he [sic] client”. The Addendum to the Expatriate Assignment indicates that the assignment to CITY, COUNTRY is temporary. In the Expatriate Assignment, the Reassignment clause provides:

In most all cases the employee will return to his/her home office. However, depending on the employee’s position or previous agreement with the Company, he/she may be subject to reassignment to any of the Company’s foreign or domestic locations. On reassignments, the Company attempts to take into account a number of factors, including personal goals and desires, experience, performance, needs of the Company, etc. While a sincere effort is made to accommodate the needs and requirements of the individual, the individual is subject to the final decision of the Company. If a reassignment is refused, his/her action may be considered as a voluntary termination, unless the Company determines otherwise. Exhibit 5.

14. The HOTEL Accommodation Agreement reflects an offer to lease a unit of one bedroom to HUSBAND commencing February 28, 2010. HUSBAND indicates that he stayed in a hotel prior to this date and commencing on January 26, 2010. Exhibit 5.
15. The lease agreement for APARTMENT reflects the lease of Unit ### for a term of 6 and ½ months, unless extended by mutual agreement, commencing June 13, 2010. Exhibit 5.
16. HUSBAND’S Passport reflects a “Status of Sojourn” to the COUNTRY issued February 26, 2010 and a period of sojourn “during mission” with re-entry permit good until January 28, 2011. Exhibit 5.
17. WIFE’S Passport indicates that she entered the COUNTRY on April 4, 2010, departed May 18, 2010 and re-entered May 26, 2010<sup>8</sup>. Exhibit 5.
18. Protestants’ 2010 Federal return reports a charitable contribution to a church in CITY, Oklahoma on August 17, 2010. Exhibit 1.
28. The amount in controversy, exclusive of interest is \$2,228.00.<sup>9</sup>

---

<sup>8</sup> Protestants and the Division both identify the date of re-entry as August 24, 2010; however, this appears to be the date her visa expired.

<sup>9</sup> Protestants miscalculated the remaining Oklahoma withholding tax credit available for the 2010 tax year.

### ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving that the income sought to be excluded by Protestants is not taxable by the State of Oklahoma.

Protestants contend that the disallowance of the refund claimed on their amended 2010 Oklahoma income tax return is erroneous. In support of this contention, Protestants argue that they did not substantially live or earn the income at issue in Oklahoma during 2010. Protestants further argue that the documentation they submitted shows they established residency in the COUNTRY in 2010.

The Division contends that Protestants have not sustained their burden of proving that they abandon Oklahoma as their domicile in 2010. In support of this contention, the Division argues that the following indicia of Protestants' intent to not abandon Oklahoma as their domicile overcomes any evidence to the contrary, to-wit: (1) the Expatriate Assignment executed by HUSBAND designates CITY, Oklahoma as Protestants point of origin and "Taxation State"; (2) WIFE'S presence in CITY, Oklahoma for more than 180 days in 2010; (3) reporting their CITY, Oklahoma address as their home address on their 2010 Oklahoma and Federal income tax returns; and (4) the charitable contribution to the church in CITY, Oklahoma.

### CONCLUSIONS OF LAW

Wherefore, premises considered the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and subject matter of the protest is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 207.
2. "Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute." *State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.*, 2005 OK 52, ¶ 7, 131 P.3d 705, 707. Accordingly, the basis for this action must be found in the Oklahoma Income Tax Act ("Act").<sup>10</sup>
3. Oklahoma income tax is "imposed on the Oklahoma taxable income of every resident or nonresident individual". 68 O.S. 2001, § 2355(A). "Every resident individual having a gross income, or gross receipts, for the taxable year in an amount sufficient to require the filing of a federal income tax return, \* \* \* if married and living with husband or wife", 68 O.S. Supp. 2007, § 2368(A)(2); and "[e]very nonresident individual having Oklahoma gross income for the taxable year of One Thousand Dollars (\$1,000.00), or more", 68 O.S. Supp. § 2368(A)(3); are required to "make a return stating specifically the taxable income and, where necessary, the

---

<sup>10</sup> 68 O.S. 2001, § 2351 et seq.

adjusted gross income and the adjustments provided in the [Act] to arrive at Oklahoma taxable income and, where necessary, Oklahoma adjusted gross income”, 68 O.S. 2001, § 2368(A).

4. A "resident individual" and a "nonresident individual" are defined for purposes of the Act as follows, to-wit:

‘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 the absence of proof to the contrary. A natural person who resides less than seven (7) months of the taxable year within this state is presumed to be a ‘part-year resident individual’ \* \* \* in absence of proof to the contrary. A ‘nonresident individual’ means an individual other than a resident individual or a part-year resident individual.

For all tax years beginning after December 31, 1981, a nonresident individual, with respect to foreign earned income and deductions, shall include an individual who:

- a. during any period of twenty-four (24) consecutive months is out of the United States at least five hundred fifty (550) days,
  - b. during such period referred to in subparagraph a of this paragraph is not present in this state for more than ninety (90) days during any taxable year,
  - c. during any period of less than an entire taxable year, which period is contained within the period referred to in subparagraph a of this paragraph, is not present in this state for a number of days in excess of an amount which bears the same ratio to ninety (90) days as the number of days contained in the period of less than an entire taxable year bears to three hundred sixty-five (365) days, and
  - d. during such period referred to in subparagraph a of this paragraph does not maintain a permanent place of abode in this state at which the spouse of the individual, unless such spouse is legally separated, or minor children of the individual are present for more than one hundred eighty (180) days[.]68 O.S. 2011, § 2353(4).
5. Domicile is a proper basis for the assessment of state income taxes on an individual.<sup>11</sup> *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).

---

<sup>11</sup> See OAC, 710:50-3-36 which provides:

6. 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*, 1979 OK 168, 605 P.2d 1315, citing *Jones v. Reser*, 1916 OK 809, 61 Okla. 46, 160 p. 58. 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*, 1971 OK 109, 488 P.2d 1261 and *Colchensky v. Oklahoma Tax Commission*, 1938 OK 612, 184 Okla. 207, 86 P.2d 329.

7. 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 also recognized that there is a reasonable basis for distinguishing between moves abroad and moves to another state and 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.*

8. 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*, 1958 OK 184, 330 P.2d 1046. The burden of proving a change of domicile is on the person attempting to show the same. *McKiddy v. State*, 1961 OK 282, 366 P.2d 933; *Jones v. Burkett*, 1959 OK 221, 346 P.2d 338.

---

(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.

(b) One is presumed to retain his Oklahoma residency if he has:

- (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.

9. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC*, 710:1-5-47. *In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.
10. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not \* \* \* evidence which is more credible and convincing to the mind \* \* \* that which best accords with reason and probability.” BLACK’S LAW DICTIONARY 1064 (5<sup>th</sup> ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.
11. Protestants failed to sustain their burden of proving they abandon Oklahoma as their domicile. In particular, the evidence shows the assignment to COUNTRY is temporary and they maintained their residence in Oklahoma.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest to the denial of the tax year 2010 income tax claim for refund of Protestants, HUSBAND and WIFE, be denied.

### 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.

NOTE: The distinction between a Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just “Precedential” Orders. See OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West

2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is “clear and unambiguous.”