

THOMAS C. ROBERTSON, JR. §
2600 Vaughn Lakes Boulevard, #1514
Montgomery, Alabama 36177, §
DIVISION

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW

Taxpayer, §
458

DOCKET NO. INC. 95-

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER
DENYING APPLICATION FOR REHEARING

A Final Order was entered in this case on April 26, 1996 dismissing the final assessments in question. The Department timely applied for a rehearing. The Department's application is denied for the reasons stated below.

This case involves the following issue - should the Taxpayer be required to adjust his basis in property pursuant to Code of Ala. 1975, §40-18-6(b)(2) for depreciation for the years before he moved to Alabama.

Section 40-18-6(b)(2) provides that a taxpayer's basis in property must be adjusted for depreciation "to the extent allowed (but not less than the amount allowable) under this chapter of (sic) prior income tax laws."

The Department repeats its argument that an individual's basis in property must be reduced for depreciation for all prior years that the individual owned the property, even if the individual was not subject to Alabama tax in some of those years.

However, the language of §40-18-6(b)(2) requires that an

individual's basis in property should be adjusted only if depreciation is allowed or allowable "under this chapter." "This chapter" is Chapter 18 of Title 40, Code of Ala. 1975, which contains Alabama's income tax statutes. As stated in the Final Order, at page two, if an individual is not subject to Alabama income tax in a given year, depreciation is not allowed or allowable under Alabama law in that year. Consequently, the individual would not be required by §40-18-6(b)(2) to adjust his basis for depreciation concerning that year.

The Department correctly argues that it is not necessary that the individual receive a tax benefit from the depreciation in the prior year. But §40-18-6(b)(2) does require that depreciation must have been allowed or allowable under Alabama law in the prior year. Equity arguments can be made by both sides. The Department is correct that an individual can depreciate property while living in another state, move to Alabama, sell the property, and not be required to adjust his basis for the previously claimed depreciation. It is not known if or to what extent the Taxpayer depreciated the subject property for state purposes prior to moving to Alabama. He lived at least part of the time in Texas, which has no income tax.

On the other hand, an individual might live and own property in a state that has no income tax. If the individual moves to Alabama and sells the property, the Department would require the individual to reduce his basis for depreciation for the years he

owned the property before moving to Alabama. The individual would thus be required to pay Alabama income tax on the phantom gain resulting from his reduced basis, even though he could not have claimed depreciation either (1) in his prior state of residence, because it had no tax, or (2) in Alabama, because he was not subject to Alabama tax at the time.

But fairness is not determinative. Rather, the language of the statute must control, and §40-18-6(b)(2) clearly provides that basis must be adjusted only for depreciation allowed or allowable under Alabama law. If an individual is not subject to Alabama tax in a given year, depreciation is not allowed or allowable under Alabama law in that year. Consequently, the Taxpayer in this case is not required to adjust his basis for depreciation under §40-18-6(b)(2) for the years before he moved to Alabama in 1991.

The above considered, the Department's application for rehearing is denied. The Final Order previously entered is affirmed.

This Final Order Denying Application For Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §§40-2A-9(f) and (g).

Entered June 28, 1996.

BILL THOMPSON
Chief Administrative Law Judge

