

A. MITCHELL & SALLY G. COBB § STATE OF ALABAMA
428 Pine Court DEPARTMENT OF REVENUE
Mobile, Alabama 36608, § ADMINISTRATIVE LAW DIVISION
Taxpayers, § DOCKET NO. INC. 96-272
v. §
STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed income tax against A. Mitchell and Sally G. Cobb (together "Taxpayers") for 1992 and 1993. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on December 4, 1996 in Mobile, Alabama. Gil Dukes represented the Taxpayers. Assistant Counsel Duncan Crow represented the Department.

The issue in this case is whether Mitchell Cobb (individually "Taxpayer") was domiciled in Alabama in 1992 and 1993, and thus liable for Alabama income tax in those years pursuant to Code of Ala. 1975, §40-18-2(7).

The Taxpayers lived in Alabama from the mid-1970s until 1991. Cooper/T. Smith Company hired the Taxpayer in August 1991 to represent it in South America. The employment was open-ended, and required the Taxpayer to reside full time in Buenos Aires, Argentina.

The Taxpayer became interested in Latin America when he was stationed in Puerto Rico with the Marines. After leaving the Marines, he traveled extensively on business in Honduras, Brazil,

and Mexico. The Taxpayer speaks fluent Portuguese and Spanish.

Before accepting the South American job, the Taxpayer and Mrs. Cobb discussed at length their long-term retirement plans. They both liked Argentina because of its beauty and safe living conditions, and finally decided to accept the job because they both wanted to retire in Buenos Aires.

The decision was difficult because Mrs. Cobb had to quit her job as the Director of Student Affairs at the University of South Alabama ("USA"). She had worked at USA for seven and one-half years, and would have become vested for retirement purposes after ten years. The Vice President of Student Affairs, after hearing that Mrs. Cobb intended to quit, suggested that she take a leave of absence rather than resign because years accrued during a leave of absence would count towards retirement in case she decided to return. Mrs. Cobb still resigned, however, because she did not intend to return to Mobile to live. She also gave up 41 hours of course work she had earned towards the 48 needed to earn a master's degree.

The Taxpayer moved to Buenos Aires and started working in August 1991. The couple intended to buy a house, but could not find a suitable location. Consequently, the Taxpayer rented a small apartment during 1991. Mrs. Cobb traveled to Buenos Aires in December 1991 to help her husband find a house. They were unsuccessful, and the couple returned to Mobile for Christmas while

a local real estate agent continued looking for a house in Buenos Aires.

The Taxpayer returned to work in Buenos Aires in January 1992. In early February, the real estate agent found a suitable furnished condominium in Buenos Aires that was large enough for both Taxpayers to live. They had wanted an unfurnished place so they could move their furniture from Mobile. They took the furnished condominium, however, because of its ideal location.

Mrs. Cobb and the couple's daughter, Kathleen, joined the Taxpayer in Buenos Aires in March 1992. They returned to Mobile in the Summer of 1992 because Kathleen intended to enter law school in the Fall. However, Kathleen decided to work another year before going to law school. Mrs. Cobb returned to Buenos Aires in September 1992, and thereafter joined various clubs in Buenos Aires that accepted only permanent residents of South America as members.

The couple returned to Alabama to spend Christmas 1992 with their children. They both returned to Buenos Aires in early 1993.

The Taxpayers' adult son lived in their Mobile house during part of 1992 and 1993. The Taxpayers kept their furniture at the Mobile house because they could not find an unfurnished house or condominium in Buenos Aires.

In mid-1993, the Taxpayers decided to sell the Mobile house and store the furniture because neither of their two children wanted to live there. Mrs. Cobb discussed the expected sale of the

house in a letter to the children. They contacted a real estate agent in Mobile, who unsuccessfully showed the house on several occasions in mid-1993.

Without warning, Cooper/T. Smith fired the Taxpayer in early July 1993. The Taxpayer immediately contacted an attorney to look into the prospect of moving to neighboring Uruguay. The Taxpayer was hoping to continue working in the area as a consultant for Cooper/T. Smith and other companies, and Uruguay is much cheaper to live in than Buenos Aires. However, because of a threatened lawsuit by Cooper/T. Smith, the Taxpayer was unable to continue working in South America. He returned to Alabama in August 1993.

The Taxpayer returned to Buenos Aires briefly in late 1993 to finalize his personal affairs, pay bills, etc. He earned no income in 1993 after leaving South America in August of that year.

The Taxpayers filed nonresident Alabama returns in 1992 and 1993. They paid Alabama tax on only the income earned by Mrs. Cobb at USA before she resigned in March 1992. The Department reviewed the returns, determined that the Taxpayer remained domiciled in Alabama during 1992 and 1993, and accordingly taxed his income earned in Argentina in those years. The Taxpayers appealed to the Administrative Law Division.

Alabama income tax is levied on all individuals domiciled in Alabama. Code of Ala. 1975, §40-18-2(7). A person's domicile is his true, fixed home to which he intends to return when absent. The burden is on a person claiming a change of domicile to prove that a change has in fact occurred. There is a presumption in

favor of the former domicile, and a change occurs only if the person (1) abandons Alabama with the intent not to return, and (2) establishes a new residence outside of Alabama with the intent to remain at the new location permanently, or at least indefinitely. See generally, Whetstone v. State, 434 So.2d 796 (Ala. 1983).

"The intent to return is usually of controlling importance." Whetstone, 434 So.2d at 797, citing Jacobs v. Ryals, 401 So.2d 776 (Ala. 1981). A person's intent must be discerned primarily from the person's actions.

However, the underlying motive for a person's actions are as important, if not more important, than the acts themselves. As pointed out in the Taxpayers' insightful analysis of Rabren v. Mudd, 234 So.2d 549 (1970) (Taxpayers' Brief at 8, 9), a person's motive for taking certain actions indicating a change of domicile may in fact be tax avoidance.

In Mudd, the taxpayer, an Alabama lawyer, anticipated a large profit from a pending sale of stock. Knowing the tax law on domicile, the taxpayer meticulously created a paper trail indicating his prima facie intent to move to Florida. (Florida has no income tax). He declared himself a Florida resident, transferred his church membership to Florida, moved his bank accounts to Florida, etc. Looking at those factors, Alabama's courts were apparently hoodwinked into believing that the taxpayer had actually abandoned Alabama and intended to reside in Florida permanently. In fact, however, the taxpayer and his wife lived in

a rented apartment in Florida for only four or five months, and then effectively moved back to Alabama.¹

¹For a different result under similar facts, see Docket No. Inc. 89-141 (Admin. Law Div. 5/15/91). In that case, an Alabama

resident anticipated a multi-million dollar profit from the sale of a family business in Alabama. He consulted with several tax lawyers and then took various actions intended to establish that he was moving permanently to Florida. He registered as a citizen of Florida, changed his mailing address, voter registration, driver's license, and banking to Florida, etc.

The Administrative Law Division held, however, that those specific acts were taken solely for the purpose of avoiding Alabama income tax on the pending gain. "Another view is that the actions were self-serving attempts to create evidence of a change of domicile so as to avoid Alabama tax on the proceeds from the pending sale The similarity of the circumstantial evidence in this case and Mudd only indicates that the Taxpayer knew about and tried to copy the taxpayer's successful actions in Mudd." Docket Inc. 89-141 at 5, 6. The Administrative Law Division concluded that the taxpayer remained domiciled in Alabama, and was thus liable for Alabama tax on his large gain. The taxpayer elected not to appeal.

The same tax avoidance motive is not present in this case. The Taxpayers' undisputed and believable testimony, when viewed with the circumstances surrounding their actions, clearly establishes that they moved to Buenos Aires with the intent to remain permanently.

Of particular importance is that Mrs. Cobb quit her job at USA instead of taking a leave of absence, as suggested by her employer.

She needed only two and one-half more years to vest in USA's pension system. Terminating her employment instead of taking a leave of absence shows her intent at the time never to return to Alabama. The couple also tried to sell their home in Mobile, which anyone interested in returning to Mobile probably would not have done.

The Taxpayers did retain some ties to Alabama during the subject years, but most are easily explained and do not show an intent to return to Alabama. For example, the Taxpayers maintained their Mobile home only because they needed a place to store their furniture while they looked for a suitable, unfurnished house in Buenos Aires. Their son also lived in the house. Instead of selling their cars in Alabama, they let their children use them.

They also needed a car when they returned to Alabama for visits. The Taxpayers reasonably kept their Alabama driver's licenses because an American license is recognized in all South American countries. They presumably also saw no need to cancel their Alabama voter registration. They should have cancelled their

homestead exemption on their Mobile house, but it is understandable that they failed to do so.

This case can also be distinguished from Whetstone. In Whetstone, the taxpayers admitted that after retiring they intended to leave Nigeria and move to Florida. The Court thus correctly found that they did not intend to remain in Nigeria permanently. Whetstone, 434 So.2d at 797. In this case, however, the Taxpayers intended to remain in Buenos Aires permanently.

Because the Taxpayers changed domiciles to Argentina, the income earned by the Taxpayer in Argentina in 1992 and 1993 was not subject to Alabama income tax. The final assessments are accordingly dismissed.

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

Entered January 21, 1997.

BILL THOMPSON
Chief Administrative Law Judge