

MICHAEL E. JANES  
66 DUNN DRIVE  
FORT RUCKER, AL 36362,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
ALABAMA TAX TRIBUNAL

DOCKET NO. INC. 16-863

### FINAL ORDER

This appeal involves a final assessment of 2015 Alabama income tax entered by the Revenue Department against Michael E. Janes ("Taxpayer"). The Taxpayer appealed to the Tax Tribunal pursuant to *Code of Ala. 1975*, §40-2A-7(b)(5)(a). A hearing was conducted on October 20, 2016. The Taxpayer attended the hearing. Assistant Counsel Margaret McNeill represented the Revenue Department.

The Taxpayer filed a 2015 Alabama non-resident return in which he claimed a refund due in the amount of \$1,342 in Alabama tax withheld by the U.S. Army from his 2015 wages. The Revenue Department reviewed the return and the Taxpayer's W-2 and determined that the Taxpayer's Army income was taxable in Alabama, and assessed him for \$95 in additional tax due. The Taxpayer responded to the Revenue Department that he was an Ohio resident and a member of the Army on active duty in Alabama. The Taxpayer provided the Revenue Department with the following records to show he was a resident of Ohio and stationed in Alabama: a copy of his US Army ID card, a copy of his Ohio driver's license issued June 18, 2015, a copy of his vehicle registration in Ohio, a copy of his Ohio voter registration card, and a letter from the Army mailed to his Ohio address ordering the Taxpayer to active duty at Fort Rucker in Dale County, Alabama.

The Revenue Department determined that the above records were insufficient to prove that the Taxpayer was a resident of Ohio. It then indicated that the final assessment would only be voided if the Taxpayer provided a corrected W-2, an explanation from the Army pay office (DFAS) as to why the W-2 reported an Alabama residence, and a year ending Leave and Earnings Statement (LES) verifying active duty status. The Taxpayer was unable to provide a corrected W-2, and this appeal followed.

The Taxpayer has continuously lived in Ohio for 24 years until he was ordered to active duty in Alabama in December 2014. The Taxpayer testified that when he completed his in-processing paperwork at Fort Rucker he was wrongly advised by a DFAS officer that his state of residence for W-2 purposes and other “pay office” purposes was Alabama. He testified that he has attempted numerous times through telephone calls, meetings and various paperwork to have his W-2 corrected. He further testified that DFAS indicated to him that correcting the W-2 or issuing the explanation letter would be an admission that the DFAS officer provided incorrect information, and that DFAS was not authorized to make the correction.

Alabama income tax is levied on individuals residing in Alabama, *Code of Ala. 1975*, § 40-18-2(1), and also on individuals residing and earning income outside of Alabama that are domiciled in Alabama. *Code of Ala. 1975*, § 40-18-2(7). A persons’ domicile is his true fixed home to which he intends to return when absent. *Whetstone v. State*, 434 So. 2d 796 (Ala. 1983). In order to change domicile from Alabama, a taxpayer must abandon Alabama and also establish a new domicile elsewhere with the intent to remain there permanently, or at least indefinitely. *Id.* The burden is on the Taxpayer asserting a change in domicile to prove that a change of domicile has occurred.

The Servicemembers' Civil Relief Act (the "Act"), PL 1089-189, formerly the Soldiers' and Sailors' Relief Act, 50 USCA §501, et seq., provides in substance that the original domicile of a person in the military does not change solely because the person is assigned to duty in another state. The Oregon Tax Court explained the protections in *Carr v. Dept. of Revenue* as follows:

The Soldiers' and Sailors' Civil Relief Act was enacted to protect servicemembers from the unfortunate financial consequences of being posted to duty away from their homes. See 50 USCA A[[ Sections 501 et seq. The Soldiers' and Sailors' Civil Relief Act was renamed and revised in 2003 to the Servicemembers' Civil Relief Act, PL 108 – 189. The issue in this appeal is whether those laws, in either their original or revised forms, shield Plaintiffs from the responsibility of paying income taxes to the state of Oregon for the 2001, 2002, and 2003 tax years.

The portion of the statutes at issue here differs in its original and revised versions, but not dramatically. The Soldiers' and Sailors' Civil Relief Act at section 574 states "(f)or the purpose of taxation of any person, or of his personal property, income, or gross income, by any state \* \* \* such person shall not be deemed to have lost a residence or domicile in any state \* \* \* solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other state \* \* \* while, and solely by reason of being, so absent." Section 511 of the Servicemembers' Civil Relief Act reads that a servicemember "shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the \* \* \* income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders." It has not been lost on the courts, when construing those statutes, that each version uses the word "solely," and that solely means "exclusively." See *U.S. v. Minnesota*, 97 F. Supp 2d 973 (D. Minn. 2000). No serviceperson shall be deemed to have acquired a new domicile in the state of his or her posting "solely" because they are there under orders. However, a state may tax a serviceperson as long as other factors exist, in addition to physical presence in the state, which leads to the conclusion that a serviceperson has affirmatively chosen the state of posting as home.

*Carr*, 2005 Ore. Tax Lexis 223.

The evidence shows that the Taxpayer was domiciled and resided in Ohio when he reported for active duty at Fort Rucker. The Taxpayer has been an active duty servicemember since 2014, and as such, is afforded protection under the Act. There is no evidence that the Taxpayer has affirmatively chosen Alabama as his new domicile. Pursuant to the Act, The Taxpayer's domicile has not changed from Ohio to Alabama just because the Taxpayer resided in Alabama in 2015 under active duty orders from the Army.

The 2015 Final Assessment is voided. The Department is directed to issue a refund to the Taxpayer in the amount of \$1,342, plus applicable interest. Judgment is entered accordingly.

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

Entered November 7, 2016.

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CHRISTY O. EDWARDS  
Associate Tax Tribunal Judge

cc: Margaret Johnson McNeill, Esq.  
Michael E. Janes