

BARRY R. & LISA K. COOK
1403 Burbank Street
Dothan, AL 36303-1922,

Taxpayers,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 00-330

FINAL ORDER

The Revenue Department denied refunds of 1996, 1997, and 1998 income tax requested by Barry R. and Lisa K. Cook (ATaxpayers@). The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(c)(5)a. A hearing was conducted on August 31, 2000. The Taxpayers were notified of the hearing by certified mail, but failed to appear. Assistant Counsel David Avery represented the Department.

The issues in this case are:

- (1) Were the refunds properly denied by the Department; and,
- (2) Should the Taxpayers be assessed the frivolous appeal penalty levied at Code of Ala. 1975, ' 40-2A-11(f).

The Taxpayers live in Dothan, Alabama. Alabama income tax was withheld from their wages in the amounts of \$2,917 in 1996, \$2,428 in 1997, and \$2,921 in 1998. The Taxpayers timely filed returns for those years, and received refunds of \$367 in 1996, \$590 in 1997, and \$1,008 in 1998.

The Taxpayers subsequently petitioned for a refund of all of the tax paid in the three years. The Department denied the refunds. The Taxpayers, through their authorized

representative, Gene Bridges, appealed to the Administrative Law Division. The

Taxpayers= appeal reads as follows:

STATEMENT OF FACTS:

A Revocation of Election and Claim for Refund from Original Alabama Individual Income Tax Return Form 40 was filed on behalf of the above referenced clients on 12-08-99, certified mail #P 528 071 414.

The refund claim was filed pursuant to the Code of Alabama in order to notify your agency of our clients= Revocation of 26 USC ' 871(b) and ' 6013(g) Election, namely the election of a nonresident alien to be treated as a United States citizen for tax purposes, and the resulting change in their federal tax liability. The amounts requested are amounts withheld from and/or paid by our clients for taxes in the referenced tax years.

STATEMENT OF LAW and ARGUMENT:

The Alabama Department of Revenue has been advised extensively through numerous correspondences of the following state and federal statutes upon which the Revocation of Election is based:

Title 26 of the United States Code at ' 871(b)(2) and 8 provide in pertinent part: *A nonresident alien individual engaged in a trade or business with the United States shall be taxable without regard to subsection (a) . . . the term Aengaged in a trade or business within the United States@ includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation not engaged in trade or business within the United States. (That is, the entity described as the AUnited States@ and defined in 26 IRC ' 7701(a)(9) AUnited States@ and ' 7701(a)(10) AState@, and further, in ' 3121(e) State, United States, and Citizen, (1) AState@ and (2) AUnited States@).*

The determination that this individual has the A*tax status@* of a *Anonresident alien individual,@* that is nonresident to the residence and alien to the citizenship of the United States established directly and immediately by the United States through the Fourteenth Amendment and as further defined in 26 CFR ' 1.1-1(a)(b), has been established by filing with the Internal Revenue Service a revocation of the election of Title 26 USC ' 871(b). **At no time during the above stated tax period were these individuals engaged in, nor did he/she receive gross income that was effectively connected**

with the conduct of a trade or business within the United States.

The Code of Alabama, ' 40-2A-7 Uniform revenue procedures, states in pertinent part: *(g)(2) When a federal income tax return or federal estate tax return is changed in any manner after it has been filed with the Internal Revenue Service, other than by amended return, and the change results in an overpayment of taxes imposed by this title, a petition for refund of the overpayment may be filed within the later of one year after the federal changes become final, or within the time allowed for the filing of a petition for refund as provided by this chapter. The refund shall be limited to those items changed on the federal income tax return or federal estate tax return that affect the income tax liability or estate tax liability imposed by this title.* Further, **The Code of Alabama, ' 40-18-79 Overpayment of tax; credit or refund available,** states: *Where there has been an overpayment of any tax imposed under Section 40-18-71 or 40-18-82, the amount of such overpayment may, if a petition for refund is timely filed or the department otherwise allows an automatic refund within that period, be credited against any income tax or installment thereof then due from (sic) the taxpayer, and any balance shall be refunded to the taxpayer.*

The Alabama Department of Revenue's denial of claim for refund completely fails to address the issue at hand, namely our clients' Revocation of 26 USC ' 871(b) and ' 6013(g) Election and the nexus between the Internal Revenue Code and Alabama's Department of Revenue. The Department's denial fails to address the issue of revocation of 26 USC ' 871(b) and ' 6013(g) election or to address the fact that Alabama is a participating and reciprocating entity of the Federal Income Tax Program and the Revenue and Taxation Code.

The U.S. Tax Court has rejected the Taxpayers' argument as frivolous and groundless. Anders v. C.I.R., 1999 WL 682050 (1999). In Anders, the taxpayer was represented by Gene Bridges, the same individual representing the Taxpayers in this case. As in this case, Bridges argued that Anders was exempt from U.S. income tax as a nonresident alien. The Tax Court rejected that argument, as follows:

Furthermore, Petitioner's position, based on stale and meritless contentions, is manifestly frivolous and groundless. Claiming status as a nonresident alien in order to avoid Federal income tax is a hackneyed argument that has been universally rejected by this and other courts. See, e.g., Kerr v. Commissioner, T.C. Memo. 1994-582, affd. without published opinion 73 F.3d 369 (9th Cir.1995); see also Haskins v. Commissioner, T.C. Memo.

1999-106; Harkless v. Commissioner, T.C. Memo. 1999-58; McQuatters v. Commissioner, T.C. Memo. 1998-88; Peterson v. Commissioner, T.C. Memo. 1997-463; Heun v. Commissioner, T.C. Memo. 1997-265; Mancebo v. Commissioner, T.C. Memo. 1997-46; Swaim v. Commissioner, T.C. Memo. 1996-545; Schmidt v. Commissioner, T.C. Memo. 1996-309; Wesselman v. Commissioner, T.C. Memo. 1996-85; Fox v. Commissioner, T.C. Memo. 1996-79; Nagy v. Commissioner, T.C. Memo. 1996-24; Friesen v. Commissioner, T.C. Memo. 1996-2; Erwin v. Commissioner, T.C. Memo. 1995-498; Reese v. Commissioner, T.C. Memo. 1995-244; McGanty v. Commissioner, T.C. Memo. 1995-178; Hacker v. Commissioner, T.C. Memo. 1994-488.

The Tax Court assessed Anders the maximum \$25,000 frivolous appeal penalty levied at 26 U.S.C. ' 6673(a)(1). Likewise, the Taxpayers in this case should be assessed the frivolous appeal penalty levied at ' 40-2A-11(f). That statute levies a penalty of \$250 or 25 percent of the tax in question, whichever is greater. The tax in question in this case is the refund of \$6,301 claimed by the Taxpayers for the three years in issue. Judgment is entered against the Taxpayers for 25 percent of that amount, or \$1,575.25.

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

Entered September 11, 2000.

BILL THOMPSON
Chief Administrative Law Judge