

TERRY K. SOUTHERN
330 SHALER DRIVE
KILLEN, AL 35645,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 09-523

FINAL ORDER

The Revenue Department denied a 2005 income tax refund requested by Terry K. Southern ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. The appeal was submitted on the record.

The Taxpayer filed a 2005 Alabama income tax return and paid the reported tax due of \$4,408. The return showed Killen, Alabama as the Taxpayer's home address.

The Taxpayer subsequently filed an amended 2005 return and claimed a refund of the amount previously paid. The Taxpayer argued that a refund was due because he had resided and earned the 2005 income in issue in Iraq.

The Department denied the refund because the amended return also showed Killen, Alabama as the Taxpayer's home address. The Department's denial letter reads in part – "If you were legally a resident of Alabama; it doesn't matter where income was earned (outside of Alabama or even Iraq), the amount is still taxable to the State of Alabama." See, Dept. Ex. C. This appeal follows.

The Taxpayer claimed in his notice of appeal that he moved from Alabama to Iraq in January 2005, and that he has lived and worked in Iraq as a fire fighter since that time. He also explained that the address on his 2005 Alabama returns is his mother's address that he has used for mailing purposes only.

The Taxpayer submitted additional information with an August 3, 2009 letter further explaining his situation. He reiterated that he began working in Iraq in 2005, and that “I placed my mother in charge of receiving my paycheck, paying my bills and tending to other financial affairs.” He returned to Alabama only once in 2005 to visit his ill father. He claimed that he is “still currently employed overseas and will remain here for an unforeseen time. This past year I have placed an offer on a house in California. At the end of (my) current contract, I anticipate returning to California.”

Alabama income tax is levied on every person domiciled in Alabama. Code of Ala. 1975, §40-18-2(7). A person’s domicile is their true, fixed home to which they intend to return when absent. Consequently, individuals can still be domiciled in Alabama, even if they reside outside of Alabama in a given year.

Alabama’s courts have also held that once Alabama is established as a person’s domicile, that domicile is presumed to exist until a new one is acquired. And to change an existing domicile, the person must abandon the former domicile, and also establish a new domicile elsewhere. “In order to displace the former, original domicile by acquisition of a new domicile, actual residence and intent to remain at the new domicile must both occur.” *Whetstone v. State, Dept. of Revenue*, 434 So.2d 796 (Ala. Civ. App. 1983).

In *Whetstone, supra*, the taxpayers moved from Alabama to Nigeria in 1975. The taxpayers’ children remained in Alabama, and the taxpayers also maintained other ties to the State. The taxpayers purchased a condominium in Florida and acquired Florida driver’s licenses in 1978, although they continued to reside and work in Nigeria through a least 1982.

The Revenue Department audited the taxpayers and determined that they were still domiciled in Alabama in 1976 and 1977, and thus liable for Alabama income tax in those years. It assessed the taxpayers accordingly.

The circuit court affirmed the assessments on appeal. The taxpayers appealed to the Court of Civil Appeals, which also affirmed the assessments. That Court held that the taxpayers had failed to overcome the presumption that Alabama had remained as their domicile in the subject years. And importantly, the Court also held that the taxpayers had failed to prove that they intended to remain permanently in Nigeria.

The taxpayers have failed to meet their burden in establishing Nigeria as their domicile in another critical way; that is, they have not shown an intent to remain in Nigeria. In order to establish Nigeria as their domicile, they need to show their intent to remain permanently, or at least for an unlimited time from which the intent to remain may be inferred. *State ex rel. Rabren v. Baxter, supra; Holmes v. Holmes*, 212 Ala. 597, 103 So. 884 (1925). By their actions, the taxpayers have indicated an intent to remain at the most only until the husband retires. Although no specific date is involved, a specific event – retirement – will cause the taxpayers to leave Nigeria. Put another way, they will not be there for an “unlimited time,” because they will leave upon the husband’s retirement. The fact that the taxpayers have established a home in Florida further supports the trial court’s finding that the taxpayers are not domiciled in Nigeria because they have no intent to remain.

Whetstone, 434 So.2d at 797.

The *Whetstone* rationale applies in this case because although there is no evidence that the Taxpayer maintained any substantial ties in Alabama after moving to Iraq in January 2005, there is also no evidence that he established a new domicile in Iraq with the intent to remain permanently, or at least indefinitely. To the contrary, while the Taxpayer states in his August 3, 2009 letter that he “will remain (in Iraq) for an unforeseen time,” he also states that “[a]t the end of current contract, I anticipate returning to California.” Consequently, just as the taxpayers in *Whetstone* failed to establish Nigeria as a new

domicile because they intended at some future time to move to Florida, the Taxpayer in this case failed to establish Iraq as his new domicile because he intends to eventually move to and settle in California when his current employment contract expires. The Taxpayer thus remained domiciled in Alabama in 2005, and is liable for Alabama income tax in that year.

The Department's denial of the Taxpayer's 2005 income tax refund is affirmed. Judgment is entered accordingly.

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, 2009.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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