

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 86-106

F. LAWSON & ROSE B. ACTON  
2707 Altadena Lake Drive  
Birmingham, AL 35243,

§

§

Taxpayers.

§

ORDER

This case involves disputed preliminary of income tax entered by the Revenue Department against F. Lawson Acton (Taxpayer) for the year 1983 and against F. Lawson and Rose B. Acton (Taxpayers) for the year 1984.

A hearing was conducted in the matter by the Administrative Law Division on May 20, 1987. The Taxpayers were represented at said hearing by the Hon. Walter R. Byars. Assistant counsel Mark Griffin was present and represented the Department. Based on the evidence submitted at said hearing, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

This is a domicile case, the issue being whether the Taxpayer, F. Lawson Acton, was domiciled in Alabama during 1983 and 1984 so as to be subject to Alabama income tax pursuant to Code of Ala. 1975, §40-18-2. The relevant facts, largely undisputed, are as follows:

Prior to the years in dispute, both Taxpayer were domiciled in Alabama and resided at 2707 Altadena Lake Drive, Birmingham.

In 1971, the Taxpayer, F. Lawson Acton, went into business as Waste Disposal Service, Inc., based in Birmingham. The Taxpayer disposed of his interest in the company in 1981 or 1982, but remained as manager and president until October, 1982. Thereafter, the Taxpayer entered into an employment contract with the company's successor, Browning-Ferris Industries, Inc., under which he worked in Alabama for approximately six to eight weeks in both 1983 and 1984.

In September, 1982, the Taxpayer purchased a condominium in Pensacola, Florida. The Taxpayer moved into the Pensacola residence in early 1983, and has continuously resided at that location since that time. On the advice of his accountant, upon moving to Pensacola the Taxpayer notified the Revenue Department by letter that he was moving to Florida and would no longer be a resident of Alabama.

The Taxpayer's wife remained at the couple's Altadena Lake Drive residence during most of 1983, but eventually joined her husband in Pensacola in October or November, 1983. The wife has resided in Pensacola since that time. The Birmingham house has been for sale since 1984.

For 1983, the Taxpayer filed a married filing separate, non-resident return. The Taxpayers filed a joint non-resident return for 1984. Both returns included all income earned by the Taxpayer and his wife from Alabama sources, but excluded all intangible

investment income. Income from "intangible personal property" does not constitute gross income to a non-resident unless such non-resident is deemed to be domiciled in the State, see Code of Ala. 1975, §40-18-14 and Reg. 810-3-14-.05.

The Department reviewed the returns for both years and determined that the Taxpayers had been domiciled in Alabama for the subject years. Accordingly, liability was assessed based on the Taxpayers' unreported investment income in those years.

The facts relied on by the Department are as follows:

The Taxpayers made contributions to Alabama charities in both years. The Taxpayers also used medical facilities and paid utilities in both states. The Taxpayers made a 1983 political contribution to an Alabama candidate for Congress. The Taxpayers purchased and registered two automobiles in Alabama during 1983 and 1984. The Taxpayers continued to use an Alabama insurance company, an Alabama accountant, an Alabama attorney and maintained investment accounts in Alabama during 1983 and 1984. The Taxpayers also continued to claim a homestead exemption on their Altadena Lake Drive residence in both years. Finally, the Taxpayer worked and earned income in Alabama during both years.

The Taxpayer counters that upon his move to Florida in early 1983, he intended to abandon Alabama as his permanent residence and remain permanently in Florida, as evidenced by his contemporaneous letter to that effect addressed to the Revenue Department. The

Taxpayer further explains that the continued use of Alabama banks, an Alabama accountant (a relative), Alabama attorneys and Alabama investment accounts after the move to Florida was because of his long-term and satisfactory relationship with those parties, and not because he intended to return to the State to reside.

The evidence further shows that the Taxpayers had attempted to change their homestead exemption from the Altadena Lake Drive residence to their Pensacola condominium in both 1983 and 1984, but were unable to effectuate such a change until 1985. There is no dispute that medical treatment was obtained in both states, that utilities were paid in both states or that the Taxpayers had purchased and registered two automobiles in Alabama during the years in dispute. Finally, evidence was presented indicating charitable contributions of at least \$7,400.00 in Florida during the disputed years.

#### CONCLUSIONS OF LAW

Subsection (1) of Code of Alabama 1975, §40-18-2 levies an income tax on every individual residing in Alabama. Subsection (7) provides that every person domiciled in Alabama shall be presumed to be residing in the State for purposes of determining liability for income tax.

The controlling Alabama law on the subject of domicile was set out by the Court of Civil Appeals in Whetstone v. State, Dept. of

Revenue, 434 So.2d 796 (1983), as follows:

Our Alabama Supreme Court concisely stated the relevant Alabama law in the question of domicile in Jacobs v. Ryals, 401 So.2d 776 (Ala. 1981). Domicile once acquired is presumed to exist until a new one has been acquired.

Jacobs v. Ryals, supra; State ex rel. Rabren v. Baxter, 46 Ala.App. 134, 239 So.2d 206 (1970). 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 concur. Jacobs v. Ryals, supra; 8 Ala. Digest, Domicile, Key No. 4(2). A change of domicile cannot be inferred from absence, temporary or due to employment, where there is an intent to return.

Jacobs v. Ryals, supra; Wilkerson v. Lee, 236 Ala. 104, 181 So. 296 (1983). The intent to return is usually of controlling importance. Jacobs v. Ryals, supra; Hilley v. Hilley, 275 Ala. 517, 157 So.2d 215 (1963).

One who asserts a change of domicile has the burden of establishing it, and where the facts are conflicting, the presumption is strongly in favor of an original, or former domicile, as against a newly acquired one. Jacobs v. Ryals, supra; State ex rel. Rabren v. Baxter, supra.

Actual physical residence on a day to day basis is not required. See Jacobs v. Ryals, supra, holding a couple who resided only two weeks a year in Alabama were domiciled in Alabama. See also Hogue v. Auburtin, 291 F.Supp. 1003 (S.D.Ala. 1969), stating that domicile and physical presence are not necessarily synonymous.

In Rabren v. Mudd, 234 So. 549 (1970), quoting from Merrill's Heirs v. Morrissett, 76 Ala. 433, the Alabama Supreme Court defined domicile as follows:

The word domicile may be defined to be a residence at a particular place, accompanied by an intention either positive or presumptive, to remain there permanently, or for an indefinite time.

In Ex Parte Weissinger, 22 So.2d 510 (1945), the Supreme Court stated:

. . . [D]omicile of choice [is] the place which a person has voluntarily chose for himself to displace his

previous one . . .

Domicile of choice is entirely a question of residence and intention . . .

To summarize: A person's domicile is that place in which his habitation is fixed, without any present intention of removing, and it embraces (1) the fact of residence and (2) the intention to remain . . .

The question of domicile must be decided on a case by case basis through application of the above general principles, with the taxpayer's intention being of chief importance.

In the present case, a reasonable interpretation of the evidence establishes that the Taxpayer intended to abandon Alabama and establish Florida as his permanent residence upon his move to Pensacola in early 1983. The Taxpayer has resided continuously in Florida since his move, as has his wife since late 1983.

While the Taxpayers have maintained certain ties with Alabama banks, professionals, etc., their dealings in the State do not indicate an intention to return, but rather, are due to the long-term and satisfactory nature of those relationships. Finally, the fact that the Taxpayer informed the Revenue Department in writing of his intention to reside in Florida beginning in January, 1983 clearly shows a present intention to abandon Alabama as his domicile. That fact, coupled with the Taxpayer's actual residence in Florida during 1983 and 1984, must lead to the conclusion that the Taxpayer properly effectuated a change of domicile from Alabama to Florida in early 1983, as did his wife later that year.

The above considered, the Revenue Department is hereby directed to reduce and make final the assessments in issue showing no tax due.

Done this 26th day of May, 1987.

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BILL THOMPSON  
Chief Administrative Law Judge