

RUSSELL S. WHITAKER  
1130 MONTVUE ROAD  
ANNISTON, AL 36207-6223,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 09-452

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **FINAL ORDER**

The Revenue Department assessed Russell S. Whitaker (“Taxpayer”) for 2005 income tax. The Taxpayer 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, 2009. The Taxpayer and his representative, Robert Walthall, attended the hearing. Assistant Counsel David Avery represented the Department.

The issue in this case is whether the Taxpayer was domiciled in Alabama in 2005, and thus subject to Alabama income tax in that year pursuant to Code of Ala. 1975, §40-18-2.

The Taxpayer was a practicing cardiologist in Anniston, Alabama until 2001 or 2002, when his practice group dissolved. The Taxpayer thereafter taught part-time at medical schools in Mobile, Alabama and Augusta, Georgia.

In 2004, the Taxpayer again wanted to become a practicing cardiologist. He consequently began looking for an existing practice where he could work. He explained at the December 4 hearing that he wanted to locate in an area where he could live and practice for the remainder of his working life. He looked at several areas, and finally decided on Austin, Texas because (1) he found a good position with a cardiology group at a heart hospital in Austin, and (2) his wife is from Austin and he wanted to be somewhere

that his wife would be happy and close to family.

The Taxpayer began negotiating with the Austin cardiology group, Austin Heart, in the Spring of 2004. He signed a contract and began working with the group in the Fall of 2004.

The Taxpayer looked for a house to purchase before he moved to Austin. He was unable to find one he wanted to buy, so he moved into an apartment in Austin. He and his wife's family continued looking for a house to buy after he moved to Austin, but never found one.

The Taxpayer's wife, who is a non-practicing physician, remained at the couple's home after the Taxpayer moved to Austin. She intended to eventually move to Austin, but did not want to do so until the Taxpayer became a partner in the group, which was expected to take two years.

The Taxpayer was on provisional status at the hospital for about one year. The hospital notified him in November 2005 that he was no longer provisional, and that his "reappointment will be in October 2006." See, Taxpayer's Exhibit 3. The Taxpayer testified that he expected to become a partner in the group upon his reappointment, and that his wife would then join him in Austin.

The Taxpayer regularly returned to Alabama on most of the weekends in 2005 that he was not on call. He generally stayed in Alabama only a day or two before returning to work in Austin.

In early 2006, the Taxpayer's cardiology group merged with another group. As a result, the hospital unexpectedly notified the Taxpayer that he was no longer needed at the hospital. He received three months severance pay at that time. He subsequently moved

back to Alabama in the Spring of 2006.

The Taxpayer re-registered his motor vehicle in Alabama in 2005, and also renewed his Alabama drivers license in that year. He explained that he was informed by airport personnel on one of his trips back to Alabama in 2005 that his license had expired. His wife insisted that he immediately get it renewed, and he did so before returning to Texas. He also explained that his wife routinely re-registered his vehicle in Alabama in the appropriate month, and that he did not realize that he should perhaps have registered it in Texas.

All individuals domiciled in Alabama are subject to Alabama income tax, even if they reside outside of Alabama during the year. Code of Ala. 1975, §40-18-2(7). A person's residence is where the person currently resides. A person's domicile, however, is the person's true, fixed home to which he intends to eventually return when absent. *State ex rel Rabran v. Baxter*, 239 So.2d 206 (1970).

The burden is on a person claiming a change of domicile to prove that a change has occurred. A person changes domiciles from Alabama only if the person (1) abandons Alabama with the intent not to return, and (2) establishes a new domicile 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).

The Department argues that the Taxpayer remained domiciled in Alabama in 2005 because he renewed his Alabama drivers license and re-registered his vehicle in Alabama in that year. Those actions are factors to be considered. But the Taxpayer explained,

adequately I believe, that he renewed his Alabama license on an emergency basis because his old one had expired. His wife also tended to the family business, and she re-registered his vehicle in Alabama in 2005 because she was in Alabama and it was convenient for her to do so. The Taxpayer also explained that he worked long hours in Austin, and that it never crossed his mind that he should perhaps get a Texas drivers license or register his vehicle in Texas.

The Department also suggested at the December 4 hearing that the Taxpayer took a job in Texas in part because Texas does not have an income tax. It is unreasonable to believe, however, that a successful physician would take a temporary job almost 1,000 miles from his home and wife because he wanted to avoid the five percent Alabama income tax. If that was his motivation, he could have found a position in Chattanooga or elsewhere in South Tennessee, which is less than 100 miles from Anniston. Tennessee also does not have an income tax

The facts show that after a two year hiatus from work in the early 2000's, the Taxpayer wanted to find a location where he could live and practice cardiology until retirement. He considered several areas, but decided on Austin because he found a position at Austin Heart hospital in Austin that fit his skills, and also because his wife was from Austin and still had immediate family in the area.

When the Taxpayer moved to Austin and began working in the Fall of 2004, he effectively abandoned Alabama as his home with the intent of making Austin his new permanent home and job location. He expected to become a partner in the cardiology group in Austin in approximately two years, at which time his wife would join him in Texas.

The Taxpayer obviously maintained some ties to Alabama after he moved to Texas in the Fall of 2004, but his overall intent and purpose was to establish Austin as his new permanent home. He thus abandoned Alabama with the intent not to return to live permanently. Temporary weekend visits to Alabama in 2005 did not negate the Taxpayer's intent to live in Austin permanently, nor does the fact that the Taxpayer unexpectedly lost his job and returned to Alabama after the year in issue.

Because the Taxpayer both abandoned Alabama and established a new domicile in Texas with the contemporaneous intent to make Texas his permanent home, the Taxpayer effectively changed his domicile to Texas in the Fall of 2004. He continued his domicile in Texas through 2005, and until he was unexpectedly dismissed by the hospital in early 2006 and moved back to Alabama.

The final assessment is voided.

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

Entered December 10, 2009.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Lionel C. Williams, Esq.  
Robert C. Walthall, Esq.  
Barry Estes