

Cases and Rulings in the News States A-M, Arkansas Department of Finance and Administration Office of Hearings & Appeals, Administrative Decision Nos. 17-077, 17-078, Arkansas, (Dec. 12, 2016)

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF HEARINGS & APPEALS
ADMINISTRATIVE DECISION**

IN THE MATTER OF *****

(ACCT. NO.: ***)**

DOCKET NOS.: 17-077

17-078

INDIVIDUAL INCOME TAX ASSESSMENTS

TAX YEAR 2012

(\$***)**

TAX YEAR 2013

(\$***)**

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest filed on April 26, 2016, by ***** on behalf of himself and ***** the Taxpayers. The Taxpayers protested assessments of Individual Income Tax issued by the Department of Finance and Administration ("Department"). Ben Johns, Tax Auditor – Individual Income Tax Section, made adjustments to the returns filed by the Taxpayers for Tax Years 2012 and 2013. The Letter ID Numbers are ***** and *****.

A telephone hearing was held in Little Rock, Arkansas, on September 28, 2016, at 10:00 a.m. The Department was represented by Michelle Baker, Attorney at Law, Office of Revenue Legal Counsel. The Tax Auditor appeared for the Department. The Taxpayers appeared at the hearing, via telephone, and represented themselves.

The record remained open until November 28, 2016, for the submission of additional arguments and evidence.

ISSUES

Whether the Taxpayers abandoned their domiciles in the State of Arkansas in October of 2012? Yes. Whether the Taxpayers were residents of the State of Arkansas for income tax purposes beginning in November of 2013? Yes.

FINDINGS OF FACT/ CONTENTIONS OF THE PARTIES

The protest submitted by ***** summarized the legal position of the Taxpayers and provided, in pertinent part, as follows:

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I moved to **** Texas in October of 2012 to start a new career as a ****. This was intended to be a permanent move, I was not on any sort of short term assignment or short term contract. I moved away from my job as a pharmacy manager for ****, AR and sold my house to start a new life in Texas. I changed my Church Parishonership from **** in **** to **** in ****, TX (where my son went through his first communion). I entered a House lease in ****, because I wasn't in a financial position to buy a house at that time. My family moved with me where my oldest son was in enrolled in school. I changed the address on my Bank account to my **** address and opened an account with a local bank. I registered vehicles in Texas. I was issued a Texas **** License and obtained resident hunting and fishing licenses. I had every intention of staying in Texas.

My wife became unexpectedly pregnant in the fall of 2013; she started having complications exacerbated by a chronic health condition. We were down in **** hundreds of miles from any family support system and scared of what might happen. So, we made the decision to move back home closer to family. We moved back to ****, AR, my home town to receive help from my family. Keep in mind we moved away from **** and returned to the **** where we are both from. I found a job with ****, working in both **** and ****. I had to COBRA my insurance from my job in ****, at great personal expense to cover the pregnancy until my third son, ****. was born **** and until I had met the time requirement at **** for health insurance. There was nothing planned out or preconceived about returning to Arkansas. We made the decision based on family health reasons to return to my home town to be close to family during a difficult time and regroup until we could eventually move back to Texas.

I have had many communications with the department of finance and administration since January of 2016 in response to their letter of proposed assessment for 2013..... They finally sent me a non-filer response (letter ID ****) dated 3/2/16 stating that I would have to file a return for 2013 for a part year or full year resident. At the advice of my accountant, ****, who had originally filed my 2013 taxes I submitted a part year return showing \$0 earned in Arkansas for 2013, which is true and accurate..... On Friday 4/15/16 I received a letter from the Auditor, Ben Johns, stating that he considered me to be an Arkansas resident in 2013 because I never switched over my Arkansas driver's license and did not register to vote in Texas. I called the office back on Monday morning 4/18/16 and spoke to Mr. Johns to try to explain the circumstances surrounding my return to Arkansas and was told there is nothing that I could tell him that would convince him to reverse his decision.

It is correct that I never switched over my Drivers license and that I should have. I procrastinated going to the DMV in **** and getting a new license for a while. Then I lost my wallet with my Arkansas license in it, I left it on a gas pump while filling up my car and when I returned to the station, it of course it was gone. The state of Texas requires you to surrender your out of state license when switching over to a Texas license. So when I was visiting family in Arkansas in July of 2013, I had a replacement copy made for \$10. Not a renewal, just a copy to turn in to Texas to switch over my license, but I never got around to it. My wife went to the DMV to switch her license over, but since she didn't have any bills with her in her name they wouldn't let her switch hers over without my signature, and I wasn't with her. I never registered to vote in Texas because there wasn't anything worth voting on when I was down here the first time; and that is something I usually do when renewing a driver's license. I regret not switching over my Drivers license, and I am sorry for not being more responsible and taking care of that in a timely manner. But the Drivers license alone does not prove where you live or where you call home. I live in **** Texas, now and I have a Texas drivers license. [P. 1-2].

The Department's Answers to Information Request addressed the contention of the Taxpayers regarding domicile and provided, in part:

In this case, the evidence that has been submitted demonstrates that the taxpayers claimed real property located in ****, Arkansas as their homestead for tax purposes in 2012 and part of 2013; both taxpayers were registered to vote in Arkansas, and did vote in Arkansas elections, through November 2014; the taxpayers assessed personal property in Arkansas in 2012 and in 2014; the taxpayers registered vehicles

in Arkansas in 2014 and paid for those registrations with checks drawn on accounts located in *****, Arkansas; the taxpayers each held an Arkansas driver's license until 2016 (more than 90 days after the legal requirement to apply for a Texas license as a new resident if they had become residents of Texas in 2012); the taxpayers held resident hunting and fishing licenses through the years at issue in this matter, and ***** received a W-2 identifying an Arkansas address for tax year 2013. Based upon these facts, it would appear that the taxpayers may have lived in Texas for part of 2012 and part of 2013; however the evidence does not clearly suggest that the taxpayers abandoned their Arkansas domicile in 2012. [P. 7-8].

The Tax Auditor testified that: (1) he reviews tax returns for questionable expenses and deals with the issue of residence; (2) he became aware of the Taxpayers' account because of a non-filer issue for Tax Year 2013 when an Arkansas address was used and the Taxpayers filed a nonresident return reflecting zero income; (3) the Taxpayers filed an Arkansas Return for 2012 and claimed to be part-year residents from 01/01/12 through 10/29/12;¹ (4) the W-2's attached to the Arkansas Return for 2012 reflected employers of ***** from Arkansas and Tennessee;² (5) as of August of 2015, the Taxpayers had not filed an Arkansas Return for 2013; (6) the Department sent a non-filer letter to the Taxpayers for 2013 which was prompted by notification from the IRS that the Taxpayers filed a federal return with an Arkansas address;³ (7) the Department did not receive a response to the non-filer letter so a notice of proposed assessment was issued for 2013;⁴ (8) after the notice of proposed assessment was issued, the Taxpayers filed a nonresident/part year return for 2013 (with an address in *****, Texas) which indicated the Taxpayers were residents of Texas with zero income taxable in Arkansas even though the Taxpayers were present in Arkansas for a week at the end of the year;⁵ (9) the W-2 form attached to the Arkansas return for 2013 reflects an address for ***** in *****, Arkansas;⁶ and (10) his determination that the Taxpayers were residents of Arkansas in 2012 and 2013 was based on findings that:

- (a) the Taxpayers maintained Arkansas driver's licenses during both years;⁷
- (b) ***** obtained a duplicate Arkansas driver's license in July of 2013;
- (c) the Taxpayers were registered to vote in Arkansas both years;⁸
- (d) the Taxpayers owned a home in the ***** area that they sold early in 2013 and they maintained a homestead credit on the property until it was sold;⁹
- (e) Department Exhibit 9 – P. 2 is a receipt from ***** for 2012 real estate taxes reflecting the homestead credit was claimed by the Taxpayers;¹⁰
- (f) the Taxpayers assessed vehicles in ***** in 2012 and in ***** in 2014;¹¹
- (g) ***** had a 2002 ***** registered in Arkansas through 2014 with a ***** address on the vehicle and an ***** address on the account;¹²
- (h) ***** registered a 2011 ***** in Arkansas in 2014 and the title issue date was October 7, 2014, with a ***** address;¹³
- (i) ***** also registered a 2009 ***** in Arkansas and the title work was created in September of 2014;¹⁴
- (j) when the Taxpayers registered certain vehicles, payments were made through ***** in *****, Arkansas;¹⁵
- (k) records from the Arkansas Game and Fish Commission reflect that ***** purchased a resident fishing/hunting license from 2006 – 2015 and ***** purchased a resident fishing/hunting license for 2010, 2011, 2014, and 2015;¹⁶
- (l) the Taxpayers filed a nonresident return the first time for 2012 and after reviewing all of the relevant information, he determined that the Taxpayers were residents of Arkansas for tax purposes and determined that tax was due for 2012 and 2013; and

(m) Department Exhibit 8 contains an Explanation of Tax Adjustment for 2012 and 2013 and, even if the Taxpayers were living in Texas, the documents stated that it did not appear the Taxpayers abandoned their domicile in Arkansas since the Taxpayers maintained driver's licenses and voter registration during 2012 and 2013 (and voted before and after 2012 and 2013).

During cross-examination by the Taxpayers, the Tax Auditor stated that: (1) the voting records in the file do not reflect that the Taxpayers voted in Arkansas in 2012 and there was no election in 2013; and (2) ***** purchased an Arkansas resident fishing/hunting license on December 6, 2013.

The Taxpayers testified that: (1) ***** did not vote in Arkansas in 2012 because he was living in Texas at the time of that election; (2) ***** did not change his voter registration to Texas during the period of time that he lived in Texas; (3) ***** obtained a duplicate Arkansas driver's license in July of 2013 while visiting family in Arkansas with the intention of getting it switched over to a Texas license but he did not obtain a Texas driver's license in 2012 or 2013; (4) the Taxpayers claimed the homestead tax credit for 2012 since the home in ***** was not listed on the market until November 1, 2012;¹⁷ (5) the Taxpayers sold their 2002 ***** in 2013 and they purchased the 2009 ***** which was initially registered in Texas then registered in Arkansas on September 10, 2014;¹⁸ (6) the Taxpayers' ***** was registered in Texas in July of 2013;¹⁹ (7) ***** purchased an Arkansas resident fishing/hunting license on December 6, 2013, after the Taxpayers moved back to Arkansas;²⁰ (8) the Taxpayers purchased a Texas hunting license for their oldest son on January 18, 2013;²¹ (9) ***** purchased an Arkansas resident fishing license in May of 2012 before he moved to *****; (10) ***** continuously retained his ***** even after he obtained a ***** because it can be used to reciprocate with other states;²² (11) the address [*****] used on the Relocation Expense Payback Agreement signed by ***** on October 11, 2012, is his parents' address which he used since he was moving away from the home in *****;²³ (12) after the Taxpayers moved back to Arkansas, they moved into a house at ***** in early 2014 and re-established residency in Arkansas; (13) at the end of 2013, the Taxpayers were staying with ***** parents until the Taxpayers could find a home; (14) the Taxpayers intended to move permanently to Texas in 2012; (15) the Taxpayers moved back to Arkansas because of an unexpected pregnancy and ***** wanted help from family members; (16) the Taxpayers signed a lease agreement for a house in ***** Texas, for a term from October 26, 2012, and October 31, 2013;²⁴ (17) the Taxpayers transferred church membership to ***** in September of 2013 and intended to remain in Texas permanently at that time;²⁵ (18) prior difficulties and the circumstances around the pregnancy of ***** caused the Taxpayers to move back to Arkansas; (19) ***** doctor in Texas gave her a hormone injection to help prevent early labor;²⁶ (20) the Taxpayers maintained an ***** account at an Arkansas bank because there were a number of automatic bills paid from that account and the Taxpayers opened a checking account at a bank in Texas right after they moved there;²⁷ (21) when the Taxpayers decided to move back to Arkansas it was a spur-of-the-moment decision which caused the Taxpayers to need to COBRA coverage for medical expenses;²⁸ (22) the Taxpayers' youngest child was born on ***** 2014;²⁹ and (23) the Taxpayers have now moved back to Texas.

Based on the Department's determination that the Taxpayers did not abandon their domicile in Arkansas prior to or during Tax Years 2012 and 2013, the Department issued assessments for individual income tax against the Taxpayers.

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. §26-18-313 (Supp. 2015) provides, in pertinent part, as follows:

- (a) When the state seeks to impose a tax under the terms of a state tax law, then the statute imposing the tax shall be strictly construed in limitation of the imposition of the tax.

(b) When a taxpayer claims to be entitled to a tax exemption, deduction, or credit under the terms of a state tax law, then the statute providing the tax exemption, deduction, or credit shall be strictly construed in limitation of the exemption, deduction, or credit.

(c) The burden of proof applied to matters of fact and evidence, whether placed on the taxpayer or the state, in controversies regarding the application of a state tax law shall be by **preponderance of the evidence**.

(d) When the meaning of a state tax law is in controversy, the burden of establishing the proper construction of the statute shall be on the party claiming application of the tax or benefit of the tax exemption, deduction, or credit.

(e) Words used in statutes imposing a tax and in statutes providing for a tax exemption, deduction, or credit shall be given their plain and ordinary meaning, not their narrowest possible meaning.

(f)(1) Statutes imposing a tax and statutes providing a tax exemption, deduction, or credit shall be fairly and reasonably construed, taking into consideration the purpose and spirit of the tax, exemption, deduction, or credit and the public policy at the time the statute was passed.

(2) If after taking this section and other applicable rules of statutory construction into account, a well-founded doubt exists with respect to the meaning of a statute imposing a tax or providing a tax exemption, deduction, or credit, the rule of strict construction shall require that the doubt be resolved against the tax, exemption, deduction, or credit. [Emphasis added].

A preponderance of the evidence means the greater weight of the evidence. See *Chandler v. Baker*, 16 Ark. App. 253, 700 S.W.2d 378 (1985). In *Edmisten v. Bull Shoals Landing*, 2014 Ark. 89, at 12-13, 432 S.W.3d 25, 33, the Arkansas Supreme Court explained that:

[a] preponderance of the evidence is not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Income Tax Assessments

For the purpose of tax imposition, the term “Resident” is defined at Ark. Code Ann. §26-51-102 (Repl. 2012) as follows:

(14) “Resident” means natural persons and includes, for the purpose of determining liability for the tax imposed by the Income Tax Act of 1929 upon or with reference to the income of any taxable year, any person domiciled in the State of Arkansas and any other person who maintains a permanent place of abode within this state and spends in the aggregate more than six (6) months of the taxable year within this state[.]

Arkansas Comprehensive Individual Income Tax Regulation 2.26-51-102(9) (“Regulation 2.26-51-102(9)”) provides, in pertinent part, as follows:

A three pronged test, as set forth below, is used to determine whether or not a person is a resident of Arkansas. Satisfaction of any one prong is sufficient to establish residency.

a) any person domiciled in the state of Arkansas. Domicile is comprised of an act coupled with an intent. A domicile is acquired by (1) physical presence at a place coinciding with (2) the state of mind (that is, intent) of regarding the place as a permanent home. A domicile arises instantaneously when these two facts occur. Every person must have one domicile but can have no more than one domicile, regardless of how many residences a person may have at any given time. A domicile, once established, continues until a new domicile of choice is legally established. An established domicile does not end by lack of physical presence alone nor by mental intent alone. The old domicile must be abandoned with the intention not to

return to it. If one moves to a new location but intends to stay there only for a limited period of time (no matter how long), the domicile does not become the new location but rather remains unchanged.

...

c) In situations where it is not clear if the requirements of either domicile (a) or place of abode (b) have been met, a residency determination can only be made after thoroughly reviewing the facts on a case by case basis. When reviewing the facts, the Supreme Court of Arkansas has held that we are not bound to accept a taxpayer's claims of intent when the circumstances point to a contrary conclusion. Furthermore, when acts are inconsistent with a taxpayer's declarations, the acts will control, and our conclusions regarding residency should be based on the facts and circumstances proved. The following factors should be reviewed in making a residency determination:

- Address used on federal income tax returns;
- Address used on telephone, utility and commercial documents;
- Address used on voter registration;
- Address used on drivers license, hunting and fishing license;
- Address used on motor vehicle, boat and trailer registration;
- Address used on real and personal property tax documents;
- Address used on county and other tax assessments;
- Address on governmental documents, such as military records. With respect to military records, the Leave and Earning Statement is a very important document;
- If the Taxpayer has a spouse, the spouse's address on such things as drivers license, voter registration, vehicle registration, etc. should be checked out;
- Employer and withholding information, nature of Taxpayer's employment (traveling salesperson, etc.);
- Location of Taxpayer. How often and for how long does Taxpayer reside at the location;
- Location of immediate family, such as spouse and children;
- Length of time in Arkansas of Taxpayer and immediate family;
- Community affiliations, such as club memberships, church, bank accounts, etc.;
- Absence of factors in other states.

With respect to the Taxpayers' domicile during Tax Years 2012 and 2013, the controlling issue is whether they legally established a new domicile of choice. The burden of proving a change of domicile is on the Taxpayers. See *National Wire Fabric Corporation v. Nelson*, 563 F. Supp. 303 (D.C. Ark., 1983) and *Steward v. Steward*, 16 Ark. App. 164, 698 S.W.2d 516 (1985). In order to prove a change of domicile prior to or during Tax Years 2012 and 2013, under the provisions of Regulation 2.26-51-102(9)(a), the Taxpayers must establish that they abandoned their domiciles in Arkansas "with the intention not to return to it."

While the Taxpayers inappropriately retained Arkansas driver's licenses during 2012 and 2013, did not change voter registration in 2012 or 2013,³⁰ and failed to timely register and license their vehicles in Texas,³¹ a majority of the factors for making residency determinations in Regulation 2.26-51-102(9)(c) favor the Taxpayers' position in this case. The Taxpayers provided persuasive testimony that the address of the residence of the ***** father was used on the Relocation Expense Payback Agreement as a matter of convenience for the Taxpayers³² and the evidence also established that ***** purchased an Arkansas resident hunting/fishing license for 2012 before the Taxpayers moved to Texas and for 2013 after the Taxpayers moved back to Arkansas. Under the facts and circumstances of this case, the factors of "Employer and withholding information, nature of Taxpayer's employment" and "Location of Taxpayer" are entitled to greater weight for making the residency determination concerning the Taxpayers. The following evidence preponderates ***** in favor of the Taxpayers:

(1) the Taxpayers sold their real property in *****, Arkansas; (2) the Taxpayers entered into a long-term lease agreement for a house in *****, Texas; (3) ***** began working for an employer in *****, Texas; (4) the Taxpayers withdrew their oldest son from ***** Primary School in October of 2012 and he attended school in Texas until the Taxpayers withdrew him from school to return to Arkansas in November of 2013;³³ and (5) the Taxpayers established community affiliations in Texas.³⁴ With respect to 2012, a preponderance of the evidence supports a finding that the Taxpayers abandoned their domiciles in Arkansas on October 29, 2012, and they intended to reside permanently in Texas after that date. Consequently, the Department incorrectly assessed income tax against the Taxpayers for the final months of 2012 and the Taxpayers' 2012 AR1000NR³⁵ was improperly adjusted.

With respect to 2013, a preponderance of the evidence supports a finding that the Taxpayers re-established their domicile in Arkansas on November 29, 2013. The Department incorrectly determined that the Taxpayers were full-time residents of the State of Arkansas for 2013. Consequently, the assessment for 2013 should be adjusted to reflect that the Taxpayers were part-year residents of the State for Arkansas from November 29, 2013, through December 31, 2013. Interest was properly assessed upon the sustained portion of the tax deficiency for use of the State's tax dollars. See Ark. Code Ann. §26-18-508 (Repl. 2012). The record does not contain sufficient evidence to support the assessment of a penalty under Ark. Code Ann. §26-18-208(6) (2012).

DECISION AND ORDER

The proposed assessment for 2012 is set aside. After the adjustments to tax and interest discussed above and the abatement of penalty, the proposed assessment for 2013 is sustained. The file is to be returned to the appropriate section of the Department for further proceedings in accordance with this Administrative Decision and applicable law. Pursuant to Ark. Code Ann. §26-18-405 (Supp. 2015), unless the Taxpayers request in writing within twenty (20) days of the mailing of this decision that the Commissioner of Revenues revise the decision of the Administrative Law Judge, this Administrative Decision shall be effective and become the action of the agency. The revision request may be mailed to the Assistant Commissioner of Revenues, P.O. Box 1272, Rm. 2440, Little Rock, Arkansas 72203. The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision, may revise the decision regardless of whether the Taxpayers have requested a revision. The Taxpayers may seek relief from the final decision of the Administrative Law Judge or the Commissioner of Revenues on a final assessment of a tax deficiency, and a final notice of a denial of a claim for refund, by following the procedure set forth in Ark. Code Ann. §26-18-406 (Supp. 2015).

OFFICE OF HEARINGS & APPEALS

RAY HOWARD

ADMINISTRATIVE LAW JUDGE

DATED: December 12, 2016

Footnotes

- 1 See Department Exhibit 1 – P. 1.
- 2 See Department Exhibit 1 – P. 18 and 19. The address for ***** on the W-2's was *****, TX *****.
- 3 See Department Exhibit 2.
- 4 See Department Exhibit 3.
- 5 See Department Exhibit 5.
- 6 See Department Exhibit 5 – P. 4.
- 7 See Department Exhibit 6. Both of the Taxpayers transferred their driver's licenses to Texas in 2016.

- 8 See Department Exhibit 7. ***** voted in 2006, ***** voted in 2010, and both of the Taxpayers voted in Arkansas in 2014.
- 9 See Department Exhibit 9. The warranty deed conveying ownership from the Taxpayers was filed on ***** , 2013.
- 10 The receipt indicates the real property taxes were paid on March 6, 2013, by ***** .
- 11 See Department Exhibit 10. A handwritten note reflects "No 2013 just 2014."
- 12 See Department Exhibit 11 – P. 1.
- 13 See Department Exhibit 11 – P. 3-4.
- 14 See Department Exhibit 11 – P. 8.
- 15 See Department Exhibit 11 – P. 9.
- 16 See Department Exhibits 12 and 13.
- 17 Taxpayers' Answers to Information Request, P. 10-15, is a copy of the real estate contract dated November 1, 2012. As reflected in Department Exhibit 9, the 2012 real estate taxes for the home in ***** were paid on ***** , 2013, by ***** and the Taxpayers' interest in the home in ***** was conveyed to a buyer on ***** , 2013.
- 18 See Taxpayers' Post-Hearing Brief – P. 4 and Taxpayers' Answers to Information Request – P. 37.
- 19 See Taxpayers' Post-Hearing Brief – P. 6-11. ***** stated that this vehicle was traded-in for the 2011 ***** which was registered in Arkansas in 2014. A copy of the ***** registration certificate is reflected in the Taxpayers' Answers to Information Request – P. 37.
- 20 See Department Exhibit 12 – P. 7.
- 21 See Taxpayers' Answers to Information Request - P. – 28.
- 22 See Taxpayers' Answers to Information Request - P. – 17-20.
- 23 See Taxpayers' Answers to Information Request - P. – 9.
- 24 See Taxpayers' Answers to Information Request - P. – 16.
- 25 See Taxpayers' Answers to Information Request - P. – 27.
- 26 See Taxpayers' Answers to Information Request - P. – 30.
- 27 See Taxpayers' Answers to Information Request - P. – 20-21.
- 28 See Taxpayers' Answers to Information Request - P. – 31.
- 29 See Taxpayers' Answers to Information Request - P. – 36.
- 30 The Taxpayers did not vote in Arkansas in 2012.
- 31 The Taxpayers ultimately registered and licensed vehicles in Texas.
- 32 The Taxpayers did not have a forwarding address on October 11, 2012.
- 33 See Taxpayers' Post-Hearing Brief – P. 3 and Taxpayers' Answers to Information Request - P. – 32.
- 34 See Taxpayers' Answers to Information Request - P. – 26-27.
- 35 See Department Exhibit 1.