

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessments of Individual)
Income Tax for the Taxable Years 2001)
and 2002 by the Secretary of Revenue of)
North Carolina)
vs.)
[Taxpayers])

FINAL DECISION
Docket No. 2003-318

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, on August 21, 2003, upon an application for a hearing by [Taxpayers, Husband and Wife], wherein they protested the proposed assessments of individual income tax, penalties, and interest for the taxable years 2001 and 2002. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by Taxpayers; W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division; and Gail H. Beamon, Administrative Officer in the Personal Taxes Division.

During the taxable year 2001 and until March 8, 2002, Husband was employed by [a company], which is hereinafter referred to as "Employer."

ISSUES

The issues to be decided in this matter are as follows:

1. Were Taxpayers residents of North Carolina for income tax purposes during the entire 2001 and 2002 taxable years?
2. Are the assessments for additional tax, penalties and interest proposed against Taxpayers for the taxable years 2001 and 2002 lawful and proper?

EVIDENCE

The evidence presented by W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division, consisted of the following:

1. Memorandum from E. Norris Tolson, Secretary of Revenue, to Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, dated May 16, 2001, a copy of which is designated as Exhibit PT-1.
2. Taxpayers' North Carolina individual income tax return for the taxable year 2001, a copy of which is designated as Exhibit PT-2.
3. Taxpayers' North Carolina individual income tax return for the taxable year 2002, a copy of which is designated as Exhibit PT-3.
4. Taxpayers' amended North Carolina individual income tax return for the taxable year 2001, a copy of which is designated as Exhibit PT-4.
5. Taxpayers' amended North Carolina individual income tax return for the taxable year 2002, a copy of which is designated as Exhibit PT-5.
6. Notice of Individual Income Tax Assessment for the taxable year 2001 dated January 3, 2003, a copy of which is designated as Exhibit PT-6.
7. Notice of Individual Income Tax Assessment for the taxable year 2001 dated February 4, 2003, a copy of which is designated as Exhibit PT-7.
8. Notice of Individual Income Tax Assessment for the taxable year 2002 dated August 12, 2003, a copy of which is designated as Exhibit PT-8.
9. Section .3901, subchapter 6B, Title 17 of the North Carolina Administrative Code, a copy of which is designated as Exhibit PT-9.
10. Letter with related attachments from Husband to the Secretary of Revenue dated February 28, 2003, copies of which are collectively designated as Exhibit PT-10.
11. Letter from Gail H. Beamon, Administrative Officer in the Personal Taxes Division, to Taxpayers dated April 9, 2003, a copy of which is designated as Exhibit PT-11.
12. Letter from Husband to Gail H. Beamon dated April 18, 2003, a copy of which is designated as Exhibit PT-12.
13. Letter from Nancy R. Pomeranz, Director of the Personal Taxes Division, to Husband dated May 1, 2003, a copy of which is designated as Exhibit PT-13.
14. Letter with related attachments from Husband to Nancy R. Pomeranz dated May 26, 2003, copies of which are collectively designated as Exhibit PT-14.
15. Letter from Eugene J. Cella to Taxpayers dated July 9, 2003, a copy of which is designated as Exhibit PT-15.

16. Taxpayers' [out-of-state] individual income tax return for the taxable year 2001, a copy of which is designated as Exhibit PT-16.
17. Taxpayers' [out-of-state] individual income tax return for the taxable year 2002, a copy of which is designated as Exhibit PT-17.
18. Taxpayers' [county] property tax records, a copy of which is designated as Exhibit PT-18.
19. Statement from [a business] a copy of which is designated as Exhibit PT-19.
20. Memorandum from [Director of Elections] with [a County Board of Elections] to Gail Beamon, a copy of which is designated as Exhibit PT-20.
21. [A North Carolina County Board of Elections] form completed and signed by Husband and dated October 29, 2002, a copy of which is designated as Exhibit PT-21.
22. [A North Carolina County Board of Elections] form completed and signed by Wife and dated October 28, 2002, a copy of which is designated as Exhibit PT-22.
23. Husband's [North Carolina County Board of Elections] record of voting history, a copy of which is designated as Exhibit PT-23.
24. Wife's [North Carolina County Board of Elections] record of voting history, a copy of which is designated as Exhibit PT-24.
25. Husband's North Carolina withholding tax returns for his accounting business and cancelled checks for payment of the tax shown due for the filing periods ending March 31, June 30, and September 30, 2001. Husband's North Carolina withholding tax return for the period ending December 31, 2001, and the annual withholding reconciliation for the taxable year 2001, copies of which are collectively designated as Exhibit PT-25.

At the hearing, Husband presented the following evidence:

1. Complaint filed April 26, 1999, in the United States District Court for the Middle District of North Carolina by Husband against Employer, a copy of which is designated as Exhibit TP-1.
2. Motion to file a supplemental complaint filed March 17, 2000, by Husband against Employer, a copy of which is designated as Exhibit TP-2.
3. Letters between Husband and Employer with various dates between June 10 and September 18, 2000, copies of which are collectively designated as Exhibit TP-3.
4. Complaint filed November 29, 2000, in the United States District Court for the Middle District of North Carolina by Husband against Employer, a copy of which is designated as Exhibit TP-4.
5. Letters between Husband and Employer and personal documents of Husband, copies of which are collectively designated as Exhibit TP-5.

6. A letter from Employer to Husband dated January 19, 2001; a letter from an unrelated corporation to Husband dated March 26, 2001; and a letter from Husband to Employer dated April 1, 2001, copies of which are collectively designated as Exhibit TP-6.
7. Motion to amend Husband's complaint against Employer in the United States District Court for the Middle District of North Carolina dated December 31, 2001, a copy of which is designated as Exhibit TP-7.
8. Employer's payroll records for Husband for the taxable year 2001, copies of which are designated as Exhibit TP-8.
9. An Offer To Purchase And Contract signed and dated by buyers only on July 24, 2003, for offer to purchase Taxpayers' real property located [in North Carolina], a copy of which is designated as Exhibit TP-9.
10. Letter from the servicer of Taxpayers' home mortgage to Taxpayers dated August 8, 2003, a copy of which is designated as Exhibit TP-10.

Husband stated at the hearing that Taxpayers currently hold a North Carolina driver's license and held such during the taxable years at issue. Husband further stated that he is a licensed Certified Public Accountant in the State of North Carolina and was so certified during the years at issue.

FINDINGS OF FACT

Based on the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

1. During the periods at issue, Husband worked outside North Carolina. Wife worked both inside and outside North Carolina during the taxable year 2002.
2. Taxpayers timely filed their North Carolina individual income tax returns for the taxable years 2001 and 2002. The residency status indicated on the 2001 return is part-year resident for Husband and full year resident for Wife. Taxpayers indicated on the return for the taxable year 2002 that they were both North Carolina residents for the entire taxable year.
3. Upon examination, Taxpayers' 2001 individual income tax return was adjusted to disallow a credit claimed for tax paid to another state. The auditor disallowed the credit because Husband's income while a North Carolina resident had not been taxed by another state. A ten percent negligence penalty was also assessed. A Notice of Individual Income Tax Assessment was mailed to Taxpayers on January 3, 2003.
4. Husband later submitted a copy of the income tax return filed with [another state] for the taxable year 2001 indicating he was a nonresident of [another state] for the entire year. The auditor adjusted the North Carolina return to compute Husband's State income tax as a full year North Carolina resident and to allow credit for tax paid to [another state]. A Notice of Individual Income Tax Assessment reflecting the corrected tax, penalty, and interest for the tax year 2001 was mailed to Taxpayers on February 4, 2003. Husband

objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue.

5. Subsequent to Husband's request for hearing, Taxpayers filed amended North Carolina individual income tax returns for the taxable years 2001 and 2002 on May 26, 2003. The amended return for the taxable year 2001 reflected a change of Husband's residency status from part-year resident to nonresident of North Carolina. The amended return for the taxable year 2002 reflected a change of residency status from full-year resident to nonresident for Husband, and from resident to part-year resident for Wife. While both the 2001 and 2002 amended returns indicated an overpayment of North Carolina income tax, only the overpayment shown on the 2002 amended return was refunded to Taxpayers.
6. The Department concluded that Taxpayers were both full-year residents of North Carolina and were not entitled to the amended refund that had been issued. A further review also indicated errors on Taxpayers original 2002 North Carolina return. Taxpayers are entitled to a retirement deduction of \$2,000 each for private retirement income included in their 2002 federal taxable income. Taxpayers made an error in computing the additions to federal taxable income for the difference in State and federal law on their original and amended returns. Because of the limitation on their itemized deductions, the addition to federal taxable income of \$8,919 shown on Taxpayers' return was corrected to \$8,726. Taxpayers were allowed a federal personal exemption of \$3,000 each for the tax year 2002. Taxpayers filing a joint State return with adjusted gross income of \$100,000 or more are allowed a personal exemption of \$2,000 each for a total of \$4,000. Taxpayers were required to add the difference of \$2,000 to their federal taxable income; however, in error, they entered \$1,800 on their North Carolina return. Additionally, a credit was allowed for tax paid to the State of California on income that was also taxed by North Carolina in 2002. The Department asserted the twenty-five percent negligence penalty. A Notice of Individual Income Tax Assessment reflecting the additional tax, penalty, and interest due for the taxable year 2002 was mailed to Taxpayers on August 12, 2003.
7. In June 2000, Husband accepted an assignment from Employer requiring him to work three days in [another state] and two days in North Carolina while maintaining his office in North Carolina.
8. In December 2000, Husband accepted a full time assignment in [another state] from Employer and began commuting to [another state] from North Carolina on a five day per week basis. This assignment ended in July 2001.
9. Effective July 2001, Husband accepted a temporary three-year assignment in [another country] from Employer. This assignment ended prematurely in September 2001 and Husband was reassigned to [another state]. During this time Husband traveled extensively on business from North Carolina to [another state] and to [another country] and would most often return to his wife and home in North Carolina. While temporarily assigned to [another country] Employer continued to maintain Husband on the [North Carolina] payroll. Husband's employment with Employer ended on March 8, 2002.
10. Husband was employed by [an out-of-state business] from March 18 through December 17, 2002.

11. Husband rented an apartment in [another state] on April 18, 2002. Upon wife's ceasing employment with [North Carolina County] Schools in June 2002, she joined Husband in [another state].
12. Taxpayers placed their house in North Carolina for sale on June 17, 2002, and moved some of their personal belongings to [another state] on June 25, 2002. The North Carolina house was not sold and Taxpayers moved their personal belongings back to the North Carolina house on January 10, 2003, after Husband's employment in [another state] had ended on December 17, 2002.
13. Taxpayers timely filed their [out-of-state] individual income tax return for the taxable year 2001 on which "nonresident" is indicated as the Taxpayers' residency status. This return was signed by Husband on February 10, 2002.
14. Taxpayers timely filed [an out-of-state nonresident] individual income tax return for the taxable year 2002 and indicated they were nonresidents of [another state] the entire year. The return also lists [a North Carolina County] as the county and State of Taxpayers' residence. This return was signed by Taxpayers on March 14, 2003.
15. Since at least 1986 and throughout the entire period at issue, Taxpayers have owned a residence located [in North Carolina]. Taxpayers' federal income tax return for the tax year 2001 and their North Carolina income tax returns for the tax years 2001 and 2002 reflect that North Carolina address. Taxpayers' [out-of-state nonresident] income tax return for the tax year 2001 and Taxpayers' [out-of-state nonresident] income tax return for the tax year 2002 reflect that North Carolina address.
16. Husband reported self-employment income on Schedule C of Taxpayers' federal income tax return for the tax year 2001 for work performed as an accountant. The address reported on the federal Schedule C reflects the North Carolina address.
17. Withholding reports for Husband's self-employment accounting business were filed by Husband for all four quarters of tax year 2001 showing a [North Carolina] business address. The reports were filed on April 25, July 15, and October 15, 2001, and January 15, 2002. The reports are signed by Husband as "owner" and list Taxpayers' [North Carolina] home telephone number. The North Carolina annual withholding reconciliation report was filed by Husband on January 15, 2002, reflecting the North Carolina business address.
18. Payments submitted with the April 25, July 15, and October 15, 2001, withholding tax reports were paid from Husband's business checking account that reflects a [North Carolina] business address.
19. Husband and Wife have been registered to vote in North Carolina since at least October 6, 1978, and January 15, 1980, respectively. Taxpayers appeared in person at [a County] Courthouse in [North Carolina] on October 28, 2002. At that time, Taxpayers reaffirmed their residence address as [North Carolina] and signed the required Board of Elections form on which Taxpayers noted "never moved." Taxpayers exercised their voting rights by casting ballots early in the 2002 general election on October 28, 2002, in [a North Carolina County].

20. Husband and Wife have North Carolina driver's licenses that were issued by the North Carolina Department of Motor Vehicles on May 27 and May 26, 1998, with expiration dates of July 26, 2004, and May 31, 2006, respectively.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. The term "resident" means an individual who is domiciled in North Carolina at any time during the taxable year or who resides in this State during the taxable year for other than a temporary or transitory purpose. An individual who lives in North Carolina for more than 183 days of a tax year is presumed to be a resident for income tax purposes in the absence of factual proof to the contrary; but the absence of an individual from the State for more than 183 days raises no presumption that the individual is not a resident. A resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State.
2. The North Carolina Supreme Court in Reynolds v. Cotton Mills, 177 N.C. 412 (1919), defined domicile as "... the residence of a person at a particular place, with the intention to remain there permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave the same." The Court further held that to effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with the taxpayer's intention not to return to it. Actual residence must be established in a new locality with the intention of making the last acquired residence the taxpayer's home. The presumption of law is that an individual's domicile or origin exists until a change of domicile is proved.
3. Domicile is a question of fact and intention. The rule is well stated in 25 Am. Jur. 2d Domicil §91 (1966): "The weight to be given to the many facts and circumstances indicative or presumptive as to domicil depends upon the circumstances of each case. The determination of domicil depends upon no one fact or combination of circumstances, but upon the whole, taken together, showing a preponderance of evidence in favor of some particular place as the domicil." Declarations as to domicil may be contradicted by evidence of acts and conduct inconsistent with such declarations. Declarations as to an intention to acquire a domicil are of slight weight when they conflict with the facts. Where there is evidence which shows that the performance of acts ordinarily sufficient to show a change of domicil were done without intent to change one's home, but with the intent to gain the legal advantage of having a domicil elsewhere, the inferences established by such acts are insufficient to establish a change. 25 Am. Jur. 2d Domicil §93 (1966).
4. Taxpayers were residents of North Carolina within the meaning of the law for the entire 2001 and 2002 taxable years.
5. For residents of this State, the term "North Carolina taxable income" means the taxpayer's taxable income as determined under the Code, adjusted as provided under the law.

6. An addition to federal taxable income is required on the North Carolina return for the amount of state income tax deducted on the federal return since North Carolina does not allow a deduction for state income tax. Federal law requires certain itemized deductions to be phased out or limited when federal adjusted gross income exceeds \$137,300 for married taxpayers filing jointly in the taxable year 2002. When Taxpayers do not receive the benefit of the entire State tax deduction because of the limitation on their itemized deductions, they are not required to add the entire State tax deduction on the North Carolina return.
7. Federal law provides that the basic exemption amount is increased each year for inflation. For the taxable year 2002, taxpayers filing a joint federal return with no dependents are entitled to two exemptions of \$3,000 each. North Carolina law allows only a personal exemption of \$2,000 each for married taxpayers filing jointly with adjusted gross income of \$100,000 or more. Since Taxpayers claimed two exemptions, they are required to add \$2,000 $[(\$3,000 - \$2,000) \times 2]$ to federal taxable income for the difference in federal and State personal exemptions for the taxable year 2002.
8. The ten percent penalty is required for negligent failure to comply with the income tax laws without intent to defraud. The twenty-five percent negligence penalty is imposed for a large individual income tax deficiency. A large income tax deficiency exists when a taxpayer understates taxable income by an amount equal to twenty-five percent or more of gross income. The ten percent negligence penalty of \$233.10 and the twenty-five percent negligence penalty of \$1,412.25 were properly asserted for the taxable years 2001 and 2002, respectively.
9. The corrected proposed assessment for the taxable year 2001 and the proposed assessment for the taxable year 2002 are lawful and proper.

DECISION

Husband contends that because he was employed outside North Carolina during the taxable years 2001 and 2002 with temporary job assignments in [two other states and another country] and was physically present with temporary living quarters established in each of these various locations, he should not be considered a resident of North Carolina during those tax years. Taxpayers further contend that because Wife joined Husband at his apartment in California and was employed there for a portion of the taxable year 2002, she was a part-year resident of North Carolina for that tax year.

Pursuant to section .3901, subchapter 6B, Title 17 of the North Carolina Administrative Code, "Domicile means the place where an individual has a true, fixed, permanent home and principal establishment, and to which place, whenever absent, the individual has the intention of

returning. In many cases, a determination must be made as to when or whether a domicile has been abandoned. A long-standing principle in tax administration, repeatedly upheld by the courts, is that an individual can have but one domicile; and, once established, it is not legally abandoned until a new one is established. A taxpayer may have several places of abode in a year, but at no time can an individual have more than one domicile.”

To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with a taxpayer’s intention not to return to it. The question of residency is dependent upon an analysis of all the various facts and circumstances in each case. Although Taxpayers established temporary places of abode outside of North Carolina, the facts demonstrate that their continued ties to this State indicates a lack of abandonment of their domicile in North Carolina. Accordingly, the Assistant Secretary finds that Taxpayers have not carried their burden of proving abandonment of North Carolina as their State of domicile for the taxable years 2001 and 2002.

Based on the foregoing findings of fact and conclusions of law, the proposed assessment as corrected for taxable year 2001 and the proposed assessment for the taxable year 2002 are found to be lawful and proper in every respect and are hereby sustained in their entireties, and are declared to be final and immediately due and collectible, together with interest as allowed by law.

Made and entered this 15th day of November, 2003.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue