

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE NORTH CAROLINA
DEPARTMENT OF REVENUE
OAH NO: 10 REV 3634

[Petitioner],

v.

N. C. DEPARTMENT OF REVENUE,

Respondent.

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FINAL AGENCY DECISION

THIS MATTER came before the North Carolina Department of Revenue (“Department”) from the Decision of the Honorable Beecher R. Gray, Administrative Law Judge, filed in the Office of Administrative Hearings (“OAH”) on August 11, 2010. The official administrative record was transmitted by OAH to the Department on September 10, 2010. By letter dated September 14, 2010, each party was notified of the opportunity to file exceptions to the Administrative Law Judge’s Decision as well as file a supporting brief and proposed final order. Neither party submitted exceptions or a brief. The Respondent submitted a proposed order and updated statement of Petitioner’s account. After a full review of the entire record of this matter, including the official record as defined in N.C. Gen. Stat. § 150B-37(a), and upon consideration of the proposed order and updated statement of Petitioner’s account, the Department makes the following Final Agency Decision:

FINDINGS OF FACT

The Department hereby adopts all Findings of Fact set forth in the Decision of the Administrative Law Judge, as follows:

1. Petitioner filed a timely appeal to the Office of Administrative Hearings (“OAH”) from the Notice of Final Determination (“NOFD”) issued June 30, 2010 by the Department upholding its \$12,727.40 assessment for unpaid 2006, 2007, and 2008 individual income tax, and penalties and interest thereon.
2. Petitioner is on active duty as a [Position] in the United States Marine Corps, and was stationed at Camp Lejeune, North Carolina and living in [Town], North Carolina at the time of the assessment.
3. Petitioner alleged, in his defense, that he legally changed his state of residence to Florida in 2001 and was therefore not liable for North Carolina income taxes thereafter.

4. Petitioner was born and raised in North Carolina and was living in this state when he entered service in the United States Marine Corps in 1986.
5. Prior to 2001, Petitioner had continuously maintained his status as a North Carolina resident and had paid North Carolina income taxes.
6. In 2001, while Petitioner was stationed in [City], Louisiana, the Marine Corps sent him on temporary additional duty orders to the United States Naval Station in [Town], Florida, for a military school for approximately thirty (30) days, after which he returned to his regular duty station in [City], Louisiana.
7. On February 15, 2001, prior to his temporary additional duty in Florida, Petitioner was aboard a Navy ship in the Atlantic Ocean and filled out a DD Form 2058, "State of Legal Residence Certificate," Form ("Form 2058"), in which he purported to change his legal residence from North Carolina to Florida. Petitioner was not living in Florida at that time.
8. That Form 2058, bearing Petitioner's signature, plainly advised Petitioner as follows:

[P]hysical presence in the new State [is required] with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence. In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly indicated. Your intent to make the new State your home may be indicated by certain actions such as:

 - (1) *registering to vote;*
 - (2) *purchasing residential property or an unimproved lot;*
 - (3) *titling and registering your automobile(s);*
 - (4) *notifying the State of your previous residence/domicile of the change in your State of legal residence/domicile; and*
 - (5) *preparing a new last will and testament which indicates your new State of legal residence/domicile.*
9. The Form 2058 then stated, "Generally, unless these steps have been taken, it is doubtful that your State of legal residence/domicile has changed."
10. Of the five factors listed by the Form 2058, Petitioner testified that he had not done any of them except to register to vote in Florida, and that he did not do that until 2009, which was after he had been served the Department's assessment in this case.
11. Petitioner testified that he had never resided in Florida at any time other than the 30 days he spent at the military school in [Town] in 2001, and that he resided in transient personnel housing on base during that time.

12. The Florida address Petitioner used for his voter registration in 2009 was the address of the voter registration office, and Petitioner did not reside in Florida at the time of that registration.
13. Petitioner testified that he had never owned or leased a residence or undeveloped real estate in Florida.
14. Petitioner testified that he did not obtain a Florida driver's license or register his automobiles in Florida.
15. Petitioner knew the actions required to evince his purported intent to change his legal residency, as they were listed on the face of the Form 2058, yet Petitioner did not take any of those actions until after the assessment in this case, and even then, he only registered to vote.
16. Petitioner testified that he was trying to change his residency to Florida because he thought he might want to retire there someday.
17. Petitioner admitted that he was aware that Florida did not have a state income tax, and that he had taken that into consideration in attempting to change his residency to Florida.

The Department hereby adopts all Conclusions of Law set forth in the Decision of the Administrative Law Judge, as follows:

1. The parties properly are before the undersigned Administrative Law Judge and jurisdiction and venue are proper.
2. Petitioner was a legal resident of North Carolina at all times prior to his execution of the Form 2058.
3. Petitioner's mere execution of the Form 2058, without more, was insufficient indication of an intention to abandon his North Carolina legal residency and to adopt Florida legal residency, instead. *See Reynolds v. Cotton Mills*, 177 N.C. 412, 415-16, 99 S.E. 240, 242 (1919) (requiring that the old domicile must first be abandoned with no intention of returning to it, and *actual residence* established in the new domicile, coupled with the intent of making the latter the taxpayer's permanent home).
4. Based on the failure of Petitioner to establish an actual residence in Florida, and his failure to take but one of the actions specified in the Form 2058, and then only belatedly, the Court concludes that the Petitioner did not have a *present* intent to make Florida his permanent home in 2001, and that Petitioner did not effectively demonstrate an intent to abandon his North Carolina legal residency at that time.
5. There being no other evidence of Petitioner having established a different residency than North Carolina, the Court concludes that Petitioner was a legal resident of North

Carolina during tax years 2006, 2007, and 2008, and through the date of the contested case hearing.

6. Under to *[sic]* N.C. Gen. Stat. § 105-134, Petitioner was therefore subject to North Carolina income tax for 2006, 2007, and 2008.
7. The purported claims for refunds set out in the Petition were first raised in that document, were not asserted as required under N.C. Gen. Stat. § 105-241.11, were not included in the final determination under N.C. Gen. Stat. § 105-241.14, and therefore are not properly before the Office of Administrative Hearings, and may not be considered. N.C. Gen. Stat. § 105-241.15.
8. Petitioner has failed to establish by a preponderance of the evidence that the Department acted erroneously or failed to act as required by law or rule, as Petitioner had alleged in his Petition.

DECISION

The Department determines that the Findings of Fact and Conclusions of Law of the Administrative Law Judge, as adopted by the Department, support the Administrative Law Judge's Decision in favor of the Respondent. The Department hereby adopts the Decision of the Administrative Law Judge in the above captioned case, upholding the tax assessment issued to Petitioner by Respondent. The Notice of Final Determination dated June 30, 2010 issued to Petitioner by Respondent is sustained as to the tax, penalties, and interest shown due, plus interest accruing until the tax is paid in full.

APPEAL

Pursuant to N.C. Gen. Stat. § 150B-45, a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 105-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Agency Decision. Before filing a petition for judicial review, a taxpayer must pay the amount of tax, penalties, and interest that this Final Agency Decision states is due. N.C. Gen. Stat. § 105-241.16.

Under N.C. Gen. Stat. § 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department, as well as the Department's Final Agency Decision, with the reviewing court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, 1429 Rock Quarry Road, Suite 105, Raleigh, North Carolina 27610, at the time the appeal is initiated to ensure timely filing of the record.

This the 19th day of October, 2010.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

Janice W. Davidson, Esq.
Agency Legal Specialist, II.
North Carolina Department of Revenue