

IN THE MAGISTRATE DIVISION
OF THE OREGON TAX COURT

Income Tax

DAVID A. ROBERTS, JR.,)	
)	
Plaintiff,)	No. 000199B
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION

A trial was held on August 3, 2000. David Roberts, Jr. appeared on his own behalf. Belinda Deglow, tax auditor, represented defendant.

At issue are 1998 Oregon income taxes assessed to David Roberts, Jr. for income earned while stationed in Oregon as a military recruiter for the Department of the Navy. Defendant denied plaintiff's claimed tax refund and instead assessed a tax deficiency of \$1,230 for that year.

Mr. Roberts maintains he was not an Oregon resident during 1998.

STATEMENT OF FACTS

David Roberts, Jr. is employed by the United States Navy and has served on active duty for the past 16 years. Mr. Roberts enlisted in the Navy in Virginia, where he was a resident at that earlier time. Both parties agree that "military personnel generally keep their residency in the state in which they enlisted." (Def's Answer.)

Since enlisting, the Navy has assigned Mr. Roberts to some four states, none of which considered him a resident of the state, other than Oregon. (See Def's Ex B at 4.)

Mr. Roberts' spouse is Sonia Silva; he was married to her during the tax year

at issue. Each time Mr. Roberts was re-assigned, his wife moved with him. When Mr. Roberts was assigned to the state of Washington in 1996, he spent most of his time on ship. At that same time, his wife and their children moved to Oregon. They have not left. He joined them whenever he was able.

The Roberts' purchased their first home (ever) in Oregon during 1996 and registered at least three vehicles in Oregon between 1996 and 1998. Each person obtained Oregon driver licenses, Ms. Silva in 1996 and Mr. Roberts in 1997.¹ Ms. Silva is a resident of Oregon.² She grew up in Oregon, where her parents still reside. She works in Oregon and pays Oregon resident income taxes.

In April 1998, Mr. Roberts was assigned to Oregon as a recruiting officer. His next transfer is scheduled for April, 2001. (Ptf's Ex 1.) Although he originally filed an Oregon Form 40 resident return, Mr. Roberts amended his Oregon return, filing as a military nonresident and requesting a refund.³

Defendant believes that Mr. Roberts changed his residency in 1996, abandoning his Virginia residency and re-establishing residency in Oregon. Defendant attributes Mr. Roberts' intent to do so to the above facts. Defendant's witness testified (with the aid of her taxpayer contact records) that Mr. Roberts stated to her that he plans to retire

¹While military personnel are not required to do so, Mr. Roberts testified that he obtained a state operator's license each time he was re-assigned, for the purpose of convenience. Defendant's taxpayer contact records indicate that plaintiff told defendant he obtained an Oregon driver's license because he had lost his Virginia driver's license. (See Def's Ex B at 4.)

²Mr. Roberts and Ms. Silva are now separated. Oregon recognizes that each spouse may establish and maintain domicile in different states. ORS 108.015 (1999).

³Mr. Roberts states that the original return was filed by a Volunteer Income Tax Assistant who mistakenly combined his income with his wife's income on the first return, which caused him to file amended returns. (See Ptf's Complaint.)

in Oregon. (See Def's Ex B at 4.)

Mr. Roberts testified that he has never intended to be a resident of Oregon, wanting only to retain residency in Virginia, where he did file resident individual income tax returns for 1998. No other facts were presented to establish Mr. Roberts' continued and ongoing connection to Virginia.

COURT'S ANALYSIS

Oregon imposes a state income tax on the taxable income of every resident of this state. ORS 316.027⁴. Active duty military personnel, who are often transferred multiple times during their time of service, are considered residents of the state within which they enlisted, unless they later obtain domicile elsewhere.

See 50 USC § 574 (1994). However, that does not preclude military personnel from acquiring a new domicile. See *Volmer v. Volmer*, 231 Or 57, 61, 371 P2d 70 (1962).

Many years of cases demonstrate that domicile has come to be understood as that place to which a person intends to return whenever absent therefrom. See, e.g., *de la Rosa v. Dept. of Rev.*, 313 Or 284, 291, 832 P2d 1228 (1992). A person can have only one domicile at a time. *Zimmerman v. Zimmerman*, 175 Or, 585, 591, 155 P2d 293 (1945).

Mr. Roberts enlisted in the Navy while domiciled in Virginia. The key issue herein is whether he intended to change his domicile from Virginia to Oregon in 1996.

It is well settled that three elements are essential to change domicile: 1) residence in another place; 2) an intention to abandon the old domicile; and 3) an intention to acquire a new domicile. *In re Noyes' Estate*, 182 Or 1, 4-5, 185 P2d 555 (1947).

The law discerns real intent from objective conduct, relying heavily on the

⁴All references to Oregon Revised Statutes are to 1997.

individual's overt acts as the "true indicators of his state of mind." *Hudspeth v. Dept. of Rev.*, 4 OTR 296, 298 (1971). No one fact is determinative. See *id.* at 299. Similarly, the fact that taxes are voluntarily paid to another state does not conclusively determine the outcome.

Solely present by virtue of compliance with naval orders, Mr. Roberts did not establish Oregon residency, by that act alone. See 50 USC § 574; *Volmer*, 231 Or at 61 (noting that mere presence is not enough to show intent due to the fact that a soldier's orders are not voluntary). Here there is more connection with this state at that time.

Defendant's testimony that Mr. Roberts told her he intended to retire in Oregon if he were able to remain assigned here is also not enough alone to sustain the intent element. "As a general rule an intention to make a new location a permanent home at some future time or upon the happening of some contingent event does not change domicile." *Oberhettinger v. Dept. of Rev.*, 4 OTR 62, 64 (1970).

The critical, unique facts linking Mr. Roberts to Oregon include that he and his entire family purchased a home for the first time (ever), registered their vehicles in Oregon, and that his spouse's family lives in this state. This is clearly a marked change from his prior, established pattern. It demonstrates a true connection and very real elements of permanence.

Plaintiff did not leave an owned home behind in Virginia. No evidence was introduced as to motor vehicle registration prior to 1996. Considered together, these facts indicate plaintiff's intent was to establish roots and permanency with future thinking beyond merely three years (the period covered by the transfer to Oregon). These are tangible factors that require a former person in-transit to consciously evaluate and choose as to residential intent.

Based on the evidence, the court finds that Mr. Roberts intended to abandon his Virginia domicile and acquire domicile in Oregon in 1996. Given current family considerations, he may have since decided otherwise. However, that does not change his earlier, original intent formed in 1996, which is objectively apparent in this record.

CONCLUSION

IT IS THE DECISION OF THIS COURT that Mr. Roberts was a resident of Oregon during tax year 1998; plaintiff is subject to state income taxation for that year.

Dated this _____ day of September, 2000.

JEFF MATTSON
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97310. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE JEFF MATTSON ON SEPTEMBER 11, 2000. THE COURT FILED THIS DOCUMENT ON SEPTEMBER 11, 2000.