

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

JOHN S. POWELL and JACQUELINE G. POWELL,	)	
	)	
Plaintiffs,	)	TC-MD 030875B
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE, STATE OF OREGON,	)	
	)	
Defendant.	)	<b>DECISION</b>

Plaintiffs appealed Defendant's assessment of personal income tax for the 2001 tax year. They were represented by Russell Filice, of Filice Accountancy Corporation. Defendant appeared through Kimberly Amos, of its staff.

The issue presented by this appeal is whether Plaintiffs were domiciled in Oregon during the 2001 tax year. That point merits some explanation. Residency and domicile are not synonymous. *Reed's Will*, 48 Or 500, 504, 87 P 763 (1906). However, in the context of income tax, a resident is defined as one domiciled in this state. ORS 316.027(1)(a).<sup>1</sup> That statutory framework dictates the analysis of this appeal.

**I. STATEMENT OF FACTS**

The facts which control this dispute are best set out in their chronological order.

***The indefinite past:*** Plaintiffs live in Palo Alto, California. Their home has been in Jacqueline Powell's family since the 1920's. John (John) Powell works as an electrical contractor.

**1998:** Plaintiffs purchase a condominium in Washington. They put the

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<sup>1</sup> All references to the Oregon Revised Statutes (ORS) are to 2001.

condominium to occasional use during visits to their daughter. The Palo Alto house continues to be their home. John works in California as an electrical contractor.

**March 2001:** The market for residences in Palo Alto reaches the point that Plaintiffs conclude that they must take advantage of their home's escalated value. They list the home for \$2,800,000. As is typical with homes marketed at such a price, Plaintiffs move out of the house. Their belongings are put into storage as Plaintiffs take up residence in an apartment. Repairs are made to the home, and rental furniture is placed in the dwelling as a professional decorator stages it for sale.

**May 2001 through October 2001:** While their family home is marketed, Plaintiffs travel. John places his business in the hands of his foreman. Plaintiffs spend time in their condominium in Washington and sites in Oregon. In July and August Plaintiffs visit Canada, Europe, and Russia.

**June 2001:** Plaintiffs purchase a home in Wilsonville, Oregon, for \$330,000. The transaction is financed through a bridge loan. Plaintiffs testified that two factors led to their purchase. The first is that Plaintiffs were attracted to the home and thought they would like to retire to Oregon. The second is that Plaintiffs perceived that the home could be purchased for less than its real value. Plaintiffs reasoned that it would be a good idea to buy the home, for if their retirement plans did not work out, they could turn around and resell the home for a short-term gain. Plaintiffs moved their belongings out of storage in California and shipped them to Oregon. They testified that this choice was dictated by their storage costs. If the Palo Alto house did not sell, and Plaintiffs had to resume their lives in California, Plaintiffs reasoned it would be cheaper to ship the goods to Oregon and later return them to California than it would be to continue to warehouse their belongings in California.

**August 24, 2001:** The Palo Alto house sells for \$1,875,000. Plaintiffs' proceeds come to \$1,472,000, which are used to pay the bridge loan on the Wilsonville property and fund a brokerage account. Plaintiffs testify that they settled on that price, approximately a third less than their original listing, due to the softening of the market for Silicon Valley housing.

**October 2001:** Plaintiffs receive Oregon drivers' licenses, register to vote in Oregon, open Oregon bank accounts, register their vehicles in Oregon, and establish an Oregon social circle. The California business accounts are closed. John terminates his involvement with what had been his electrical contracting business.

**September 2002:** Plaintiffs file an Oregon part-year resident return describing themselves as making Oregon their domicile as of May 1, 2001. Following Defendant's denial of a credit for taxes paid to another state, Plaintiffs amended their return. Plaintiffs' amended return asserts they did not move their domicile to Oregon until after the sale of the Palo Alto house.

In addition to that chronology, some additional facts are important. John's business as an electrical contractor was operated with no hard assets other than trucks and small tools. There were three employees. The goodwill of the business was limited to John's personal reputation. He could not, given the degree of care and control he was required to exercise, manage his California business on a sustained basis from Oregon. John ended his career as an electrical contractor by turning over the business to his foreman and walking away.

A last point is that the Palo Alto home was the asset that made retirement possible. John was 62 when he retired, at which point Plaintiffs had some \$70,000 in retirement accounts.

## II. ANALYSIS

Defendant's reasoning in denying the amended return and assessing additional tax based on the gain from the sale of the Palo Alto residence is easy to understand. Plaintiffs purchased a house in Wilsonville in June of 2001, and in that same month moved all their belongings to Oregon. Plaintiffs filed an original return showing that they were domiciled in Oregon as of May of that year. The court finds that Plaintiffs wished to make Oregon their home as of June 2001, approximately two months before the sale of the Palo Alto house that generated the gains at issue here.

Intention is the key element in determining questions of domicile. *In re Noyes' Estate*, 182 Or 1, 4-5, 185 P2d 555 (1947). However, the wish to move one's domicile to Oregon does not automatically generate residency status. "Domicile" has been defined by rule and precedent to be an individual's true, fixed, and permanent home and principal establishment. OAR 150-316.027; *de la Rosa v. Dept. of Rev.*, 11 OTR 201, 203 (1989), *aff'd* 313 Or 284, 832 P2d 1228 (1992). However intensely Plaintiffs may have wanted to make Oregon their home, the ability to effectuate that desire did not exist in June 2001. Plaintiffs simply lacked the means to make Oregon their true, fixed, and permanent home until after the Palo Alto house sold.

Plaintiffs, with only \$70,000 in their retirement accounts and John at 62 years of age, did not otherwise have sufficient funds to retire in the manner they wished. The California electrical contracting business could neither be sold at a price high enough to permit retirement, nor could it continue to operate without the sustained local control of John. If the family home had not sold, John would be in California working as an electrical contractor. Although Plaintiffs did buy a home in Oregon and move their possessions to

this state in June 2001, without the sale of the Palo Alto home there would be no proceeds with which to pay off the bridge loan on the Wilsonville residence. Plaintiffs would have been forced to resell the Wilsonville home and move their goods back to California. Plaintiffs' attachments to Oregon could not attain the degree of permanency inherent in the concept of domicile until after the Palo Alto house sold. OAR 150-316.027; *de la Rosa*, 11 OTR 201.

Plaintiffs certainly wished, probably at some point prior to June 2001, to move their domicile to Oregon. However, an intention to make a new location a permanent home at some future time or upon the happening of some contingent event does not establish domicile. *Oberhettinger v. Dept. of Rev.*, 4 OTR 62, 64 (1970). The event which made it possible for Plaintiffs to make Oregon their domicile was the sale of the Palo Alto home, which, when it occurred in August 2001 paid the bridge loan financing the Wilsonville transaction in full, and transferred \$1,000,000 to Plaintiffs' brokerage account. The conclusion of the court is that Plaintiffs did not become Oregon residents until after the sale of their California property. The gain from that transaction was therefore not subject to Oregon tax.

This decision is consistent with other precedent of this court, which found that an intention to change domicile that was dependent upon selling a home did not result in a change of domicile. *Harlan v. Dept. of Rev.*, 10 OTR 497 (1987). The court is aware that this conclusion is inconsistent with Plaintiffs' original return, which first described them as becoming Oregon residents in May 2001. However, a reason the law permits amended returns is to allow taxpayers to recant positions earlier taken in good-faith error. Here the nature of the good-faith error is that the original return focused more on the intention of

Plaintiffs then the means to effectuate that desire. The declarations on the original return, although important, do not preclude revision, especially where, as in this case, the subjective views of the individuals at issue are so readily tempered by the unequivocal nature of contemporary events. *See Hudspeth v. Dept. of Rev.*, 4 OTR 296 (1971).

A final point is that if during the period in question the Palo Alto residential market had been static instead of declining, the court may have reached a different result. If Plaintiffs were confident that they would receive their asking price at the time they purchased the Wilsonville home, the court might conclude that their means to become Oregon residents was so assured that they moved their domicile to Oregon at that point. However, that was not the case. The listing of the Palo Alto property had fallen by about a third in some five months. The fact that values were falling gives credence to the conclusion that Plaintiffs could not know, until they had an offer in hand, whether or not their wish to retire to Oregon would become a reality. Although it is a close question, the conclusion of the court is that this appeal is granted.

### III. CONCLUSION

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is granted.

Dated this \_\_\_\_\_ day of December, 2003.

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SCOT A. SIDERAS  
MAGISTRATE

**IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. 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 SCOT A. SIDERAS ON  
DECEMBER 19, 2003. THE COURT FILED THIS DOCUMENT ON DECEMBER 19,  
2003.**