

BEFORE THE MONTANA TAX APPEAL BOARD

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| DAVID DeWALD, |) | |
| |) | |
| Appellant, |) | DOCKET NO.: IT-2013-4 |
| |) | |
| -v- |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| |) | ORDER AND OPPORTUNITY |
| DEPARTMENT OF REVENUE) |) | <u>FOR JUDICIAL REVIEW</u> |
| OF THE STATE OF MONTANA,)) |) | |
| |) | |
| Respondent. |) | |

This is an income tax case that comes to us as a direct appeal from a decision of the Montana Department of Revenue Office of Dispute Resolution upholding the taxes imposed on Mr. David DeWald by the Department of Revenue (DOR). The issue is whether Mr. DeWald was a Montana resident during the years at issue and therefore was subject to the taxing jurisdiction of Montana on the income he earned outside of Montana.

At Mr. DeWald's request, hearings scheduled before this Board were continued on two different occasions because Mr. DeWald wanted to find an attorney to represent him. He did not do so. This Board proposed to Mr. DeWald the option of having the appeal heard on the written record in lieu of a telephonic hearing, unless he objected. Mr. DeWald did not object and then submitted a supplementary written statement of his case to be added to the existing record, which consists of the record from the hearing before the Office of Dispute Resolution as well as the appeal applications. A summary of the evidence presented in the ODR hearing and in subsequent filings follows.

Evidence Presented

1. Mr. DeWald is the owner of a home at 2027 Terry Avenue in Billings, Montana. In the five years from 2007 through 2012, Mr. DeWald filed for tax relief through the Montana Property Tax Assistance Program for low income homeowners. Uncontroverted testimony established that Mr. DeWald's mother resides at the property and has at all times here at issue.

2. The Property Tax Assistance Program (PTAP) in Montana provides property tax relief for homeowners who live in the home and meet the income qualifications set out in statute. The relief is based on the Montana resident owner's income in the preceding calendar year and the statute requires that the home be the owner's primary residence. The application form states, on its face:

A **qualified applicant** is someone who is an owner of the property and who occupied the property as their primary residence for at least seven months during the preceding calendar year.

This property was owned and occupied by: one qualified owner (check box) or more than one qualified owner (check box). (emphasis in original) Section 15-6-134(2)(b)(i), MCA.

Mr. DeWald checked the one-qualified-owner box on his 2012 PTAP application and signed the form, adding "I am working part time in Wyoming." ODR Exh. 25. He listed his mother as a dependent and submitted a U.S. income tax return showing \$15,420 for his 2011 income and 2707 Terry Avenue, Billings, as his address. A similar PTAP application, supported by a similar federal income tax return, was filed by Mr. DeWald in Montana to the DOR in each of the five years he received property tax assistance. ODR Exhs. 25, 26, 27, 28.

3. In 2007, Mr. DeWald applied for the Montana resident homeowner tax rebate of \$400 and received it. ODR Exh. 29.

4. To verify his eligibility for the property tax assistance, the DOR looked for his state income tax returns but found he had not filed in Montana during the

years at issue. His federal income tax returns were obtained, showing a Wyoming Post Office Box as his address and higher income earnings than the federal tax forms he submitted to the Montana DOR in support of his PTAP applications. ODR Exhs. 31, 32, 33, 34.

5. In response, the Montana DOR asked the Taxpayer to complete a residency declaration form which he completed, signed and submitted on April 26, 2012. ODR Exh. 2. In it, he declared the Terry Street address in Billings, Montana as his permanent residence, attested that he owned the home, and had resided there for 42 years. To back up his declaration, he stated that he had a Montana driver's license, various local bank accounts, and stated that he considered himself a permanent resident of Montana.

6. DOR Field Auditor Tina Standish wrote to the Taxpayer on June 8, 2012, thanking him for the residency declaration and pointing out that as a resident he was required to file state income tax returns, regardless of where he earned his income. She requested State of Montana returns for the years 2006 through 2010. She further stated that his income would be estimated by the DOR if he did not file returns. ODR Exh. 3.

7. On July 18, 2012, Ms. Standish wrote again, stating that as Mr. DeWald had not responded, therefore his income had been estimated by the DOR from his federal returns. A Statement of Account was included listing the taxes sought for the years 2007, 2008, 2009 and 2010, and requesting immediate payment. ODR Exh. 4.

8. On July 20, 2012, Mr. DeWald registered to vote in Wyoming and obtained a Wyoming driver's license. ODR Decision, Finding #10, p. 9.

9. On August 15, 2012, Mr. DeWald submitted a Request for Review in which he claimed "I am not a resident of Montana and therefore do not have a tax liability to

the State.” ODR Exh. 10. The review was performed by the Montana DOR but no changes in tax liability were found. ODR Exh. 11

10. On August 20, 2012, Mr. DeWald signed and notarized a second Montana residency questionnaire, stating his address was PO Box 8062, Jackson, Wyoming and that he had lived there for 18 years. He included several identification cards from Wyoming organizations, such as the Red Cross and the National Safety Council with issue dates of 2009 and 2010 as well as his newly obtained Wyoming driver’s license and Wyoming voter registration. He listed his employer as MetWest Terra in Jackson Hole, Wyoming. ODR Exh. 10.

11. Douglas Peterson, Montana DOR Field Audit Unit Manager, responded to Mr. DeWald’s review request on August 21, 2012, citing the statutory definitions of residency or domicile and listing the factors considered in determining Montana residency. Peterson quoted §1-1-215, MCA, which states “Every person has, in law, a residence. . . . (1) It is the place where a person remains when not called elsewhere for labor or special or temporary purpose and to which the person returns in seasons of repose. (2) There may be only one residence. . . . (3) A residence cannot be lost until another is gained. (7) A residence can be changed only by the union of act and intent.” Further, §15-30-2101(28), MCA, defines a resident as one who maintains a permanent place of abode in the state even though temporarily absent from Montana and who has not established a residence elsewhere. Finally, “Montana source income” means wages, salaries or any other compensation for services performed in Montana or while a resident of Montana regardless of where the services were performed. Section 15-30-2101(18) (a) (i), MCA. Peterson emphasized that the tax liability was estimated by relying on Mr. DeWald’s April, 2012, affirmation of his Montana residency.

12. Mr. Peterson wrote again on August 31, 2012 responding to the claim of residency change and pointed out that most of the documentation was dated after the audit period and does not prove he was a Wyoming resident during the years at issue.

13. Mr. DeWald requested a hearing with the Office of Dispute Resolution, which was held on February 27, 2013.

14. At the hearing before the Department of Revenue Office of Dispute Resolution, Auditor Standish noted that the years at issue were written on some evidentiary forms as 2007 through 2009 but she wanted to clarify that 2010 is included in the case as it was part of the original Statement of Account sent to the Taxpayer. Mr. DeWald objected, claiming that 2010 was not part of the original claim against him.

15. Ms. Standish testified that, in addition to the various tax forms on which Mr. DeWald had declared himself a Montana resident, he also had a Montana driver's license, registered a vehicle in Montana and owned a home in Billings. He also received bank statements at the Billings address. Ms. Standish further testified to substantial discrepancies between the income Mr. DeWald reported to Montana on his PTAP applications and the income he reported to the federal government on his U.S. tax returns. She stated that he would not have qualified for the property tax assistance based on the income he reported to the IRS. ODR Transcript pp. 4, 5, 6.

16. Mr. DeWald testified that he had lived in Wyoming since 1988 and was currently employed as a Night Auditor for a Jackson Hole hotel. With respect to the PTAP applications he completed, in which he claimed Montana residence, he said he had trouble with forms and sought assistance from the DOR. He stated: "With her assistance we filled out that form and sent it in. But I never actually read the thing. . . I didn't know that I had to be a resident. I didn't know. I didn't like I said, I didn't

actually read any of the forms or anything, we just filled them out.” ODR Transcript, pp. 8, 9.

17. Mr. DeWald also testified that he also did not understand the meaning of “residing” in the first residency questionnaire he submitted. Once again, he stated he received help at the DOR office and testified he was told “everything on that has to be Montana.” He further blamed the DOR employee for not stopping him from filing the questionnaire because DeWald had told him he was working in Wyoming and living in Wyoming.

18. During the ODR hearing, Mr. DeWald called three witnesses to testify, telephonically, that he did not live at the Billings address. One was his mother, Mrs. Lile, who stated that he visited occasionally but did not live there. Two other neighbors confirmed the notion that he rarely visited Billings in their testimony.

19. Mr. DeWald also presented a letter from MetWest Terra Hospitality stating he had been employed in Wyoming since December 2008. Mr. DeWald presented other documents, such as bank statements and mail received at his Wyoming Post Office Box.

20. As for his actual residence in Wyoming, Mr. DeWald testified that he had an RV and was allowed by a friend to live on the friend’s land rent-free, but the friend was not available to testify to that. Mr. DeWald provided no written documentation of his living arrangements in Wyoming.

21. In response to questioning about the federal tax returns he submitted with his PTAP applications, Mr. DeWald said:

Yea, I think I signed it. But those . . . the . . . those . . . that . . . I never, remember I didn’t look at those until I actually saw those. Those should have had my mom’s name on them instead of mine. Tr. p. 44, lines 13-23, p. 45, lines 1-2.

His mother, Mrs. Lile, is not an owner of the home, however, and therefore could not have qualified for the tax assistance.

22. When questioned about the discrepancies in residency status and income between the federal return he actually filed and the one he included with his PTAP application, Mr. DeWald responded:

Yeah. You know the only thing I can think of she, the guy I was having do this, he does my taxes once in a while, and I, (sic) feeling he put the numbers in at the top and changed the name, that's the only thing I can think of. Because I don't remember, I remember signing stuff and sending it in, but I don't remember, like I said, lots of times I send my stuff into the IRS and let them do it. This guy I know has a program, has my name and address and stuff on it. And I don't know what's going on here. Like I say, when I first saw, when I, this time was like three pounds of stuff. I was trying to look through this stuff here and when I came across it, it didn't seem, when I saw it, it didn't say that, that's not right. I don't ever remember, I just never, in all this stuff and sending it into you guys, that's the only thing I remember doing." Tr, p. 45, lines 16-23, P. 46, lines 1-7.

23. The decision of the ODR upheld the Department's assessment and Mr. DeWald appealed to this Board on August 13, 2013. His appeal stated:

I feel that the hearing and Department took advantage of me and was all one sided from the beginning.

1. The dates (years) were not adheared (sic) to and adjusted by the judge.
2. Evidence was not well received and looked at truely (sic).
3. I was not made aware of what evidence I could present & available to me + more.

This was a kangaroo court at best.

June 17, 2014 appeal of David DeWald.

24. Mr. DeWald further submitted a four-page statement of his case to this Board when it was determined the case would be decided on the record. He challenges the years at issue, and blames the DOR for giving him bad advice on filling in forms and then taking "advantage of the

situation (and me) to extract personal income tax, when the state didn't earn it." June 17, 2014 Statement of David DeWald.

25. Mr. DeWald claims, in the June 17 statement, that he has lived in Wyoming for 26 years. He offers no explanation for his signed Montana residency questionnaire submitted April, 2012 in which he asserted himself to be a Montana resident during that entire time.

26. In his June 2014 statement to this Board, Mr. DeWald claims he never submitted the federal returns to the DOR with his PTAP applications and has no idea where they came from.

27. Mr. DeWald claims that the years in question are wrong. He claims that the correspondence between the parties only deals with 2007 through 2009 and that 2010 was added improperly at the time of the hearing.

28. Mr. DeWald further submits a case, *Pletcher v. DOR*, 280 Mont. 419 (1996) in which a dissent argues that the statute excludes from residency status those who are temporarily working elsewhere.¹

¹ The statutory exception argued for in the dissent is based on §15-30-101(16), MCA, which has since been repealed and replaced by §15-30-2103(28), MCA, which does not have a residency exception for those who are temporarily out of the state. Thus, the statutory argument made by the dissent is no longer relevant to this case.

Applicable Law

1. Section 15-30-2101(28), MCA, defines “resident” as any person domiciled in Montana and any other person who maintains a permanent place of abode in the state even though temporarily absent from Montana and who has not established a residence elsewhere.
2. Residence is defined in statute as (1) The place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose. (2) There may be only one residence. . . (3) A residence cannot be lost until another is gained. . . (7) The residence can be changed only by the union of act and intent.” Section 1-1-215, MCA.
3. Montana source income is defined to include “net income or loss derived from a trade, business, profession, or occupation carried on in the state or while a resident of the state.” Section 15-30-2101(18), MCA.
4. Permanent employment out of state does not necessarily mean permanent absence from the state. *Pletcher v. Montana Department of Revenue*, 280 Mont. 419 (1996).

Findings of Fact, Rulings of Law and Decision

First, we must consider Mr. DeWald’s jurisdictional claim that the case was improperly enlarged from three tax years to four at the beginning of the ODR hearing. The record shows the Montana Department of Revenue’s early communications to Mr. DeWald all list four years (2007 through 2010) at issue. On a later questionnaire dealing with witnesses testifying to his residency in Billings, the years were listed as 2007 through 2009, though no documents describe the change as purposeful. At the hearing, Auditor Standish corrected

the Hearing Examiner's description of the case as dealing with 2007 through 2009. Ms. Standish noted that the bill that was sent out had four years on it. Mr. DeWald disagreed, stating "the original complaint had only three years on it." In fact, the Statement of Account (SOA) sent on July 18, 2012 clearly stated at the top of the letter that the years at issue were 2007, 2008, 2009 and 2010. *See* EP 14. Having received no documentation suggesting that the DOR had reached a separate arrangement regarding tax year 2010, we will continue to regard the case as dealing with four years' tax returns.

The primary issue in the case is Mr. DeWald's residency during the years at issue. Montana statutes define a resident as one who maintains a permanent place of abode in the state and who has not established a permanent residence elsewhere. Further, a residence can only be changed by the "union of act and intent." *See* AL #2. Since Mr. DeWald does own a home in Montana, his intent with regard to that home is important. Prior to receiving the Statement of Account demanding back taxes, the evidence clearly demonstrates that Mr. DeWald repeatedly described himself as a Montana resident living at 2707 Terry Avenue, Billings, Montana. He has never attempted to sell the home that his mother lives in nor has he deeded it to her. He claimed the Montana resident homeowner tax rebate in 2007, applied for and received property tax assistance for Montana resident homeowners for all the years at issue here and completed a Montana residency questionnaire, clearly labelled as such, describing himself as a permanent Montanan. In each of these instances, he signed a form clearly attesting to his Montana residency. We find that the evidence submitted in this case demonstrates his intent to be a Montana resident.

While his profession of Montana residency is significant in determining his intent, we also note that he did so in order to receive financial benefits from the state. The fact that he availed himself of the benefits of citizenship is an important factor in deciding residency. He also maintained a Montana driver's license, car registration and bank accounts, in addition to owning the home in Billings. We must consider these actions in deciding his intent.

Mr. DeWald's professions of Wyoming residency began in August 2012 when he received an SOA for back taxes from the Department of Revenue. He immediately got a Wyoming driver's license and registered to vote in Wyoming. He now claims that as a Wyoming resident he is not subject to Montana income tax. However, while his recent actions in 2012 may indicate Wyoming residency, *as of 2012*, he presents no evidence that would change his residency status during the years at issue. DeWald claims to have continuously resided in Wyoming for 26 years but no evidence of a permanent residence before 2012 was presented. In fact, the evidence shows that his intent during those years was clearly stated on the applications for tax rebates or assistance as a Montana resident. His testimony and evidence, such as library cards, Red Cross cards, and employment show definite connections to Wyoming but we find nothing substantial enough to overcome his repeated signed statements that he was a Montana resident.

Mr. DeWald claims to have difficulty reading and completing forms due to a short attention span. He states in several places that he never read the form applying for PTAP assistance and cites others as completing forms for him or instructing him on filling in the form. As a result, he claims he did not know what he was signing, despite the clear language on the form requiring the applicant to be the homeowner and reside at least seven months of the year in

the Montana home. In fact, his filing before this Board also denies any knowledge of the falsified federal tax returns submitted with the applications even though he admitted to filing them in the ODR transcript. He offers no other explanation for the erroneous forms' inclusion with his applications.

Mr. DeWald submitted no supporting evidence of a reading disability or vision problem and we note that he has represented himself in this case, submitting a four-page single-spaced statement and attaching a Montana Supreme Court opinion he felt was helpful to his case. *See* EP 28. The statement signed by Mr. DeWald and submitted on June 17, 2014, is a coherent narrative of his view of his case and does not appear to be the work of an individual lacking the reading skills to understand a simple statement that his signature constitutes an affirmation of residency. He holds a responsible job as a night auditor for a hotel and is a certified Red Cross instructor. Furthermore, evidence shows he understood the Montana PTAP form well enough to complete the form in his own name as the owner and not his mother's name, though she was the full-time occupant. He also submitted a falsified federal income tax return each year with his application for property tax assistance, understating his income enough to qualify under the statute, and changing his mailing address to appear to be living in the house. While his testimony offers a picture of confusion and reliance on others in the process of filling out the PTAP applications, the evidence demonstrates that his actions show a clear understanding of what he had to do to qualify for the government benefit.

Mr. DeWald continuously blames others for filling out his forms incorrectly but he signed the completed forms, proving he knew it was his name, and not his mother's name, on the PTAP applications. We note also that the forms themselves are only necessary because he actively chose to apply

for a tax reduction as a low-income Montana resident. Furthermore, his alleged failure to read the documents does not excuse him from the consequences of voluntarily signing them, which he freely admits he did. We find his denial of knowledge of the content of the applications he signed not credible.

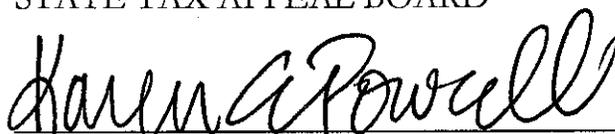
Further, the 2012 questionnaire asserting Montana residency is filled out in his handwriting and clearly states he is a resident and has not moved. His sentiments did not change until he received a tax bill from the state of Montana. This Board sees no reason, therefore, not to take his multiple assertions of Montana residency at face value. We find that the evidence clearly demonstrates that Mr. DeWald intended to be a Montana resident. We find Mr. DeWald was a Montana resident during the four tax years at issue and liable for Montana income taxes for years 2007-2010.

ORDER

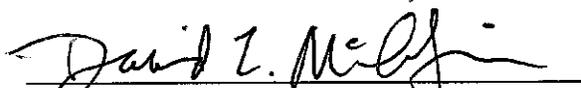
The Montana Tax Appeal Board hereby affirms the determination of the Department of Revenue that David DeWald was a Montana resident during the tax years in question, and therefore, was required to file Montana individual income tax returns for tax years 2007 through 2010.

Dated this 29th of August, 2014.

BY ORDER OF THE
STATE TAX APPEAL BOARD


KAREN E. POWELL, Chairwoman


SAMANTHA SANCHEZ, Board Member


DAVID L. McALPIN, Board Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

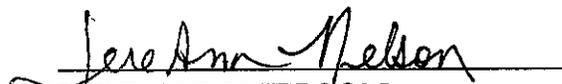
The undersigned hereby certifies that on this 29th day of August, 2014, a true and correct copy of the foregoing has been served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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