

STATE OF MINNESOTA

IN SUPREME COURT

Supreme Court File No. A08-274

Tax Court File No. 7721

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CAROL DREYLING AND ROGER A. DREYLING,

Relators,

vs.

COMMISSIONER OF REVENUE,

Respondent.

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RELATORS' REPLY BRIEF

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## INTRODUCTION

The Commissioner attempts to make much of the rule that the party objecting to the imposition of a tax has the burden of proof on all relevant issues. While it is true that the taxpayer bears the initial burden of proof, this rule needs to be applied with great caution to avoid the sort of situation which arose in the well-known case of *State of Texas v. State of Florida*, 306 U.S. 398, 59 S.Ct. 563 (1939). In that case, four states claimed that the decedent was a domiciliary of their respective jurisdiction for purposes of imposing death taxes. The states conceded, and the Supreme Court found, that the decedent could have only one domicile for tax purposes:

Here it is conceded by the pleadings and upon brief and argument that the sole legal basis asserted by the four states for the imposition of death taxes on decedent's intangibles is his domicile at death in the taxing state. There is no question presented of a situs of decedent's intangibles differing, for tax purposes, from the place of his domicile, such as was considered in *City of New Orleans v. Stempel*, 175 U.S. 309, 20 S.Ct. 110, 44 L.Ed. 174; *Safe Deposit & Trust Co. of Maryland v. Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386; *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 8, 51 S.Ct. 54, 55, 75 L.Ed. 131; *First National Bank v. Maine*, 284 U.S. 312, 331, 52 S.Ct. 174, 178, 76 L.Ed. 313, 77 A.L.R. 1401; *Wheeling Steel Corporation v. Fox*, 298 U.S. 193, 210, 56 S.Ct. 773, 777, 80 L.Ed. 1143; *First Bank Stock Corporation v. Minnesota*, 301 U.S. 234, 237, 238, 57 S.Ct. 677, 678, 81 L.Ed. 1061, 113 A.L.R. 228; *Nashville Trust Co. v. Stokes*, 173 Tenn. --, 118 S.W.2d 228, probable jurisdiction noted, *Long v. Stokes*, 59 S.Ct. 152, 83 L.Ed. --, Nov. 14, 1938; *In re Brown's Estate*, 274 N.Y. 10, 8 N.E.2d 42, certiorari granted, *Graves v. Elliott*, 305 U.S. 667, 59 S.Ct. 151, 83 L.Ed. 432, November 14, 1938. And no determination made here as to domicile can hereafter foreclose the determination of such questions by any court of

competent jurisdiction in which they may arise. By the law of each state a decedent can have only a single domicile for purposes of death taxes, and determination of the place of domicile of decedent will determine which of the four states is entitled to impose the tax on intangibles so far as they have no situs different from the place of domicile. No relief is sought to restrain collection of the tax or to interfere with the determination of its amount by appropriate state procedure.

(*Id.* at 408)

Minnesota, like Florida, rejects the idea of dual residence for most purposes. See, e.g., *Tri-State Ins. Co. v. Quinn* 1989 WL 117573 (Minn.App. 1989). And Minnesota, like Florida, places the burden of proof in a tax case on the taxpayer. See, e.g., *Overstreet v. Brickell Lum Corp.*, 262 So.2d 707 (Fla.App. 3 Dist., 1972). So there is a real danger of inconsistent tax determinations, which leads to unjust double taxation. As the United States Supreme Court explained it in *State of Texas*, *supra*:

The risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one, due both to the jurisdictional peculiarities of our dual federal and state judicial systems and to the special circumstances of this case. That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representatives of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence. *Thormann v. Frame*, 176 U.S. 350, 20 S.Ct. 446, 44 L.Ed. 500; *Overby v. Gordon*, 177 U.S. 214, 20 S.Ct. 603, 44 L.Ed. 741; *Burbank v. Ernst*, 232 U.S. 162, 34 S.Ct. 299, 58 L.Ed. 551; *Baker v.*

*Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152, 61 L.Ed. 386; *Iowa v. Slimmer*, 248 U.S. 115, 120, 121, 39 S.Ct. 33, 34, 63 L.Ed. 158; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299, 58 S.Ct. 185, 187, 82 L.Ed. 268. And a judgment thus obtained is binding on the parties to it and constitutionally entitled to full faith and credit in the courts of every other state. *Milwaukee County v. M. E.*, *supra*. The equity jurisdiction being founded on avoidance of the risk of loss resulting from the threatened prosecution of multiple claims, the risk must be appraised in the light of the circumstances as they are in good faith alleged and shown to exist at the time when the suit was brought.

(*Id.* at 569)

It is understandable that the Commissioner of Revenue wishes to maximize tax collections for the State of Minnesota. But the Supreme Court has a duty to prevent injustice by preventing "the risk of loss resulting from the threatened prosecution of multiple claims." It is noteworthy that Dr. Dreyling has already been paying the Florida substitute for income tax, viz., the Florida personal property tax.

The ultimate question in this case is straightforward: Is Dr. Dreyling a resident of the State of Minnesota, or is he a resident of the State of Florida? He cannot be both. If the Courts of Minnesota lean too heavily on the "burden of proof" rule as a means of imposing taxes on Florida residents, Florida Courts are likely to notice, and are in a position to impose Florida taxes upon Minnesota residents. Shabby treatment tends to beget shabby treatment, and Dr. Dreyling has been treated shabbily by the Minnesota taxing authorities and the Minnesota

Tax Court.

Thus, where a taxpayer such as Dr. Dreyling presents substantial evidence of Florida residence, it is important that Minnesota Courts take that evidence seriously. In this case, the Commissioner did not. The State presented virtually no evidence after Dr. Dreyling testified and simply ignored the relator's well-supported demonstration that his primary contacts were with the State of Florida. In its responsive brief, the State relies primarily on *Dreyling v. Commissioner or Revenue*, 711 N.W.2d 491 (Minn. 2006); hereafter, *Dreyling I*, ignoring the facts that (a) Dr. Dreyling's claims in *Dreyling I* were based upon his residence in Alaska; and (b) significant changes in Dr. Dreyling's circumstances had taken place between 1998-2000 and 2001 - 2002. Indeed, the Commissioner is basically making the same arguments it did in *Dreyling I*: Dr. Dreyling is a tax evader and the states which he wishes to claim as his residence are tax havens. This is not argument: it is a slur on our sister states and deserves to be ignored.

#### ARGUMENT

DR. DREYLING WAS NOT PRESENT IN MINNESOTA FOR A SUFFICIENT PERIOD OF TIME TO QUALIFY AS A DOMICILIARY UNDER MINN STAT. § 290.01 SUBD. 7(a) OR (7b). The

State argues:

In sum, Relators first failed to provide adequate documentation to Respondent during the audit, and Respondent therefore deemed Dr. Dreyling to be a Minnesota resident. Relators then failed to overcome

the prima facie correctness of Respondent's determination during this appeal to the Tax Court. Relators now ask this Court to conduct its own review of the record, without the benefit of evaluating the demeanor [of] the witnesses during live testimony, and hope that this Court will reach a different factual finding.

(Respondent's brief, p. 21)

Note that the State does not at any time claim that Dr. Dreyling was in Minnesota for 183 days or more. It knows that he was not. There is not one shred of evidence that Dr. Dreyling was in Minnesota for such a period of time. So the State's argument is not about the content of Minn. Stat. § 290.01 subd. 7(a) or 7(b). Rather, is about attempting to use procedure and presumptions to avoid dealing with fact. Dr. Dreyling testified, without contradiction, that he was in Minnesota less than 145 days in both 2000 and 2001 (T-30). The State does not dispute this, and even if it did, it produced no evidence which would place Dr. Dreyling's testimony on this issue in doubt. What the State did do in its brief was to claim that Dr. Dreyling had not produced evidence of the right kind on the issue and therefore it does not matter whether he really was in Minnesota for 183 days:

Because there is no basis in the record to overturn the Tax Court's finding, this Court should affirm the Tax Court's Order.

(Respondent's Brief, p. 21)

This is simply wrong. Of course there was a basis in the record to overturn the Tax Court's findings. Dr. Dreyling said:

Q. And in 2001 you were in Minnesota a total of 144 days; is that correct?

A. Correct.

....

Q. In 2002 you had 189 - 179 days in Florida, but those are only total days, Correct?

A. That is correct.

Q. Where you were completely there 24 hours?

A. The Commissioner's guidelines, correct.

Q. You were present in Minnesota 143 days, correct?

A. Correct.

(T-30)

The Commissioner (and even the Tax Court) does not dispute that this is competent evidence, or that it is true. How could it? Rather, the Commissioner and the Tax Court argue that, because Dr. Dreyling did not produce evidence of the type required by the Commissioner, the taxpayer's evidence should be ignored. There are two problems with this approach.

First, Dr. Dreyling **did** produce evidence of the kind the Commissioner claims to require. He produced "credit card receipts" and statements, which are "contemporaneously kept records that establish the places of physical presence of a person on a particular date." He used these records to calculate how often he was in Minnesota. That is all Minn.R.8001(0300) seems to require. So he conformed to the rule, no part of which

requires any particular quantity or quality of records to satisfy its requirements. Once Dr. Dreyling had produced records of the type labeled "adequate" by Minn.R. 8001.0300, subpart 3, it was incumbent the State to indicate why the records introduced were not probative. It is not enough to simply claim those records were inadequate. No matter how much evidence a taxpayer produced, the State could always argue that - particular where, as here, it had a grudge against that taxpayer.

Rule 8001.0300 subpart 3 was promulgated in order to get at the truth, not as a substitute for the truth. And it was promulgated to indicate the sort of documentation which would aid in demonstrating the truth, not as a means of discounting the evidence produced by a taxpayer. The State does not contend that Dr. Dreyling's evidence fails to establish that he was in Minnesota only 141 and 143 days. It simply says that "The Tax Court did not err in giving little weight to Dr. Dreyling's self serving testimony...." But absent evidence to the contrary - and there was no evidence to the contrary produced by the State - unrefuted evidence which includes the type of evidence contemplated by the rule - must stand.

The State did not even address the issue raised by Dr. Dreyling in his citation of *Cabellero v. Litchfield Woodworking Co.*, 74 N.W.2d 404 (Minn. 1956), where the Court said:

Clear, positive, direct, and undisputed testimony by an unimpeached witness, which is not in itself

contradictory or improbable, cannot be rejected or disregarded by either court or jury, unless the evidence discloses facts and circumstances which furnish a reasonable ground for so doing.

Was Dr. Dreyling's evidence as to the period of his sojourn in Minnesota clear? It certainly was. Was it direct? It certainly was. Was it undisputed. Yes, it was. So there is no basis to reject it. Let us put the matter this way - does the State (or for that matter, the Court) seriously doubt that Dr. Dreyling was in Minnesota less than 183 days? If so, there is no indication of it in the Court's Findings or the State's brief. Even if Dr. Dreyling was wrong in his calculations by a few days, he still was under the § 290.01 subd. 7(b) limit. The law is not a game of "move the goal posts." Dr. Dreyling kicked the ball through the uprights during his testimony, and there is no basis for the State to relocate the posts to the next county.

Second, nothing in 290.01 subd. 7(a) which suggests that the Tax Court is free to ignore sworn testimony and evidence if it finds that evidence of the type explicitly recited in 7(b) has not been produced. Indeed, subpart 5 explicitly indicates:

"Adequate records" means **any** contemporaneously kept records that establish the places of physical presence of the person on particular dates. Adequate records include, **but are not limited to**, calendars, diaries, canceled checks, credit card receipts, and airline tickets.

(Italics supplied)

Actually, *Cabellero v. Litchfield Woodworking Co.* and

similar cases strongly suggest that even if a taxpayer's records were not "adequate" within the meaning of subd. 7(b), the Tax Court would not be free to ignore the taxpayer's sworn testimony. Nothing in subp. 5, or Minn. Stat. § Minn. Stat. § 290.01 subd. 7(b)(2). much less subd. 7(a), suggests that for the purposes of a domicile determination, failure to keep adequate records precludes the Tax Court from crediting sworn testimony on the number of days in Minnesota and Florida.

Failure to abide by subpart 5, if there had been a failure to abide by subpart 5, would have been just one more factor for the Tax Court to take into consideration in evaluating the evidence regarding subd. 7(b). What the Tax Court Judge really needed in evaluating § 23 was to make a finding that Dr. Dreyling's testimony regarding the time spent in Florida and Minnesota respectively was not credible - and this finding, the Tax Court Judge was unwilling to make, perhaps because she could not have done so in good faith. In the absence of such a finding, the Tax Court was hiding behind a procedural rule which did not even apply to the subdivision where the Court used it. As an analysis of Minn.R. 8001.0300 subparts 3 and 5, this will never do.

This brief has been focusing on Minn. Stat. § 290.01 subd. 7(b) first, not because it is the most important issue in the case (it is not), but because the facts developed in the analysis § 290.01 subd 7(b) are central to the proper analysis of §

290.01, subd. 7(a). The State is entirely correct when it says that subd. 7(b) does not come into play unless there has been a determination that a taxpayer is not a domiciliary under § 290.01 subd. 7(a). But the length of time a taxpayer has been in Minnesota vis-a-vis the length of time he has been in Florida (the gist of a subd. 7(b) analysis) is also the most important single element of a subd. 7(a) analysis. That analysis, incorporated into Minn.R. 8001.0300 subpart 3, includes:

23. Percentage of time that the person is physically present in Minnesota and the percentage of time that the person is physically present in each jurisdiction other than Minnesota.

Now if Dr. Dreyling was present in Minnesota about 142 days, he was present in Minnesota about 38% of the time and in jurisdictions other than Minnesota about 62% of the time. Thus, the State is simply wrong when it says:

Indeed, if this Court determines that the Tax Court did not err in finding that Dr. Dreyling was a Minnesota domiciliary under the totality of the factors in Minn.R. 8001.0300, subpt. 3, it is unnecessary to separately determine whether Dr. Dreyling was present in Minnesota for 183 days.

(Respondent's Brief, p. 10)

If the tax court does not "separately determine whether Dr. Dreyling was "present in Minnesota for 183 days," how can it make a competent finding with respect to Rule 8001.0300 subp. 3 § 23?

The Tax Court was aware of this problem, and attempted to finesse it by saying:

Dr. Dreyling maintains he was physically present in Minnesota for 144 days in 2001 and 143 days in 2002. He also claims he was in Florida for 181 days in 2001 and 179 days in 2002. The remainder of his time in each year was spent traveling to Seattle, Washington, South Dakota, and western states, in addition to the time he spent en route between Minnesota and Florida. Since Dr. Dreyling did not maintain contemporaneous journals and did not provide adequate documentation to substantiate the time he was physically present in Minnesota and in Florida, this factor is not helpful in determining his domicile in 2001 and 2002. Since credit card statements submitted during the Minnesota audit did not show who was responsible for the charges made in the various locations during the time periods in question, this factor does not support Dr. Dreyling's claim that he was not domiciled in Minnesota in 2001 and 2002.

The statement is problematical, not only because it is misleading, and because it uses a requirement which is made applicable to subd. 7(b) to make a finding under subd. 7(a), but because it shows prejudice and bias on the part of the Tax Court Judge. First, the Tax Court does not actually say that what Dr. Dreyling "maintains" ("testified to" would have been more accurate) was either false or wrong. Second, nothing in even subd. 7(b) paragraph 2 makes the keeping of records a prerequisite for the receipt or evaluation of evidence presented by the taxpayer. Third, and most important, if 7(b), paragraph 2 is not an absolute bar to the crediting of a taxpayer's testimony and evidence under § 23, what possible basis does the Tax Court have for rejecting it? Was Dr. Dreyling lying? The Tax Court is unwilling to say so. Were Dr. Dreyling's credit card statements forged? Of course not. Were they inaccurate as to place of

charge? The Tax Court does not say so, and it would be very unlikely that any significant number of charges was inaccurate as to date or place. Was Dr. Dreyling's method of determining his presence in Minnesota in Florida faulty? The Tax Court did not say so, and would have no basis for saying so if it had. So the Dr. Dreyling's testimony should have been credited, and having been credited, the *Cabellero* rule applies.

Just as in summary judgment cases where the moving party presents competent evidence to substantiate its position, the other party cannot rely upon mere averments, but must produce admissible evidence showing that there is a real issue of material fact (See, e.g., *Celotex Corp. v. Cantrell*, 477, U.S. 317, 106 S.Ct. 2548 (1986)), in a trial the party opposing competent evidence may not simply rely on its position, must present competent evidence refuting the other party's submissions. The *Celotex* principle applies even more strongly in the context of a trial than in the context of a summary judgment motion, because at trial the evidence produced consisted of testimony which had been subjected to cross-examination.

The State argues that there is other evidence upon which the Tax Court could have relied in making its findings, and did so. There are several problems with this analysis. First, the "relative-time" finding under § 23 is the 500-pound gorilla in the room. After all, Dr. Dreyling was living in his house in

Florida, and visiting his house in Minnesota.<sup>1</sup> If the Tax Court's decision with respect to § 23 is reversed and decided in Dr. Dreyling's favor as it should have been, not only would the Tax Court's bean-counting analysis even out in Dr. Dreyling's favor. The great weight of the **important** factors would shift to his favor as well. So at a minimum, if § 23 and § 6 were found

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<sup>1</sup>It should be noted in this regard that the Tax Court simply misread § 6:

6. Location of **newly** acquired living quarters whether owned or rented. [Italics supplied]

Appellants acquired their Florida house in 1999, but also maintained their home in Paynesville, Minnesota, during the years at issue. Appellants continued to treat their Paynesville home as homestead property for real estate tax purposes until 2001, at which time they applied for homestead status on their lake home located in Biwabik, Minnesota. Mrs. Dreyling admits that she remained domiciled in Minnesota in 2001 and 2002 and acknowledges that she accompanied Dr. Dreyling to Florida virtually each time he went there except for occasional visits to her children's homes. In addition, Appellants owned three golf course lots in Florida, a commercial lot in Paynesville, offshore lots on Moose Lake in Minnesota, and an 80-acre farm in Kandiyohi County, Minnesota during the years in question. We find this factor supports Dr. Dreyling being a Minnesota domiciliary during 2001 and 2002.

The location of the **newly acquired** living quarters was in Florida. So this factor should have militated in favor of Florida residence. To be sure, the Tax Court could have determined that this factor was overridden by other factors, because § 7, § 8 and § 9 allow for considerations of relative occupancy (something the Tax Court never did, incidentally). But ignoring the plain language of § 6 permitted the Tax Court to "double up" its findings that Florida was not Dr. Dreyling's primary residence.

in Dr. Dreyling's favor, the case requires a remand to Tax Court for a redetermination in light of the Tax Court's errors on these salient factors.

Finally, a word about process. In their initial brief, the Dreylings complained about how the State had conducted itself at trial and in discovery. To this, the State replied:

Relators also make various assertions that Respondent failed to fully comply during the discovery phase of this litigation. not only do Relators fail to identify any specific alleged discovery violation, the opportunity to raise such issues has long passed.

(Respondent's Brief, p. 9)

The State misses the point here. First, as noted in the record and in Relators' initial brief, the State responded to discovery and other motions only as motions for summary judgment and sanctions were about to be addressed. Second, and related to this, the State has conducted this entire litigation in bad faith. It did not dismiss its spurious fraud claims until it was "on the Courthouse steps" facing Relators' summary judgment motion. And more importantly for present purposes, it presented no evidence with respect to time-in-state issues, relying on an "adequate records" provision which did not even apply to subd. 7(a) determinations and which ignored the fact that the taxpayer's evidence included records of the sort contemplated in the "adequate records" section of subd. 7(b).

The State's tactical posture in this case has been to rely

on the burden of proof, even after substantial evidence and testimony had been produced by relators. In a proceeding in which Dr. Dreyling's evidence is either true or it is not, the State must do more than say it is inadequate. It must give the Courts some basis for saying it is false. Otherwise, the State could claim in every tax case that the evidence its taxpayers have proffered is inadequate. This has never been thought to be a compelling basis for a decision in the law, and should not be found to be compelling here. The Commissioner has avoided his responsibilities to respond to the taxpayer's arguments, and should not be encouraged to employ such tactics in the future.

#### CONCLUSION

The State is no different from any other litigant in a civil case. It cannot stand idly by and rely on its claims and its status when taxpayer has produced admissible evidence supporting his position. What is sauce for the goose is sauce for the gander. The goose has laid the golden egg, and the State has not demonstrated that it is only iron pyrite. The State deserves to lose, and the Commissioner's determination should be reversed.

Dated: April 20<sup>th</sup>, 2008

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