



## Tax Reduction Letter

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### **GUINAN v. U.S.**

91 AFTR 2d 2003-2174

### **OPINION**

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,**

### **ORDER**

**Judge:** Paul G. Rosenblatt United States District Judge

Pending before the Court are the plaintiffs' Motion for Summary Judgment (doc. #20) and the United States' Cross-Motion for Summary Judgment (doc. #24). Having considered the parties' memoranda in light of the undisputed evidence and the oral argument of counsel, the Court finds that there are no genuine issues of material fact and that the United States is entitled to entry of judgment in its favor as a matter of law pursuant to Fed.R.Civ.P. 56.<sup>1</sup>

This is an action by the plaintiffs seeking a refund of \$45,009.00 for income taxes they paid in the 1998 tax year on the gain realized from the sale of their residence in Wisconsin. The plaintiffs filed an amended income tax return in January 2001 in which they excluded that gain pursuant to 26 U.S.C. § 121; the Internal Revenue Service disallowed the requested refund in December 2001. The issue before the Court is whether the plaintiffs' Wisconsin residence was their principal residence for purposes of 26 U.S.C. § 121(a), which, as amended by the Taxpayer Relief Act of 1997, provides in relevant part that "[g]ross income shall not include gain from the sale ... of property if, during the 5-year period ending on the date of sale ..., such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more."

[1] The plaintiffs purchased their Wisconsin residence in March 1993 and sold it on September 15, 1998. During the five-year period prior to the sale of the Wisconsin residence the plaintiffs, who are retired, also owned homes in Georgia and Arizona. Their Georgia residence,

which they owned when they purchased the Wisconsin residence, was sold in 1996, at which time they purchased a home in Arizona. The plaintiffs generally resided at their Wisconsin home during the warmer months and at their Georgia or Arizona homes during the rest of the year. According to the plaintiffs' affidavit, which the United States does not dispute, during the five-year period from September 15, 1993 through September 15, 1998 the plaintiffs occupied their Wisconsin residence for 847 days, their Georgia residence for 563 days, and their Arizona residence for 375 days.<sup>2</sup>

The plaintiffs, as the taxpayers claiming a refund due to an exclusion from income, bear the burden of proving that their Wisconsin residence was their principal residence during the relevant time period. *Rockwell v. C.I.R.*, 512 F.2d 882, 887 [35 AFTR 2d 75-1055] (9th Cir. 1975); *Pipitone v. United States*, 180 F.3d 859, 862 [83 AFTR 2d 99-2769] (7th Cir. 1999). The Court concludes as a matter of law that they have not met that burden.

The United States concedes that the plaintiffs owned and used their Wisconsin residence for the duration required by § 121(a) during the relevant five year period. See Treasury Regulation § 1.121-1(c). Since what remains disputed is whether the plaintiffs used the Wisconsin residence as their principal residence during that time period, the Court looks to Treasury Regulation § 1.121-1(b) (2) for guidance.<sup>3</sup> That regulation states:

- (2) Principal residence. In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the taxpayer's principal residence depends upon all of the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence. In addition to the taxpayer's use of the property, relevant factors in determining a taxpayer's principal residence include, but are not limited to ((i)) The taxpayer's place of employment;
- ((ii)) The principal place of abode of the taxpayer's family members;
- ((iii)) The address listed on the taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;

- ((iv)) The taxpayer's mailing address for bills and correspondence;
- ((v)) The location of the taxpayer's banks; and
- ((vi)) The location of religious organizations and recreational clubs with which the taxpayer is affiliated.

The Court concurs with the United States that the fact that the plaintiffs utilized the Wisconsin residence on more days in total during the relevant five year period than either the Georgia residence or the Arizona residence is not determinative for purposes of § 121(a) since the governing regulation refers to the time spent in a residence during a single tax year. See § 1.121-1(b)(2) ("[T]he property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence." (Emphasis added)). The plaintiffs' own undisputed figures fail to establish that the Wisconsin house was their principal residence inasmuch as they show that the plaintiffs spent more time in the Wisconsin house only during the first year of the five-year period (1993-1994), and that for each of the other four years they spent the majority of each year either at the Georgia house (1994-1995 and 1995-1996), or the Arizona house (1996-1997 and 1997-1998); their figures also show that for the entirety of the five-year period they spent more time in the Georgia and Arizona houses combined than they did in the Wisconsin house (52.5% versus 47.5%, respectively).

The Court also concurs with the United States that while time spent in a residence is a major factor, if not the most important factor, in determining whether it is the principal residence, other factors are also relevant, see § 1.121-1(b) (2), and in this case those other factors, taken as a whole, do not establish that the Wisconsin house was the plaintiffs' principal residence during the relevant time period.

First, a majority of the relevant factors do not actually favor any one of the residences as being the principal residence: the location of the plaintiffs' recreational and other activities do not favor Wisconsin since the evidence reflects activities in both Wisconsin and Georgia, e.g., while Mr. Guinan served on the board of their Wisconsin homeowners' association and the plaintiffs returned to Wisconsin during the winter months for major holidays and to attend Green Bay Packers games, both of the plaintiffs were actively involved in tennis activities in Georgia and Mr. Guinan lectured at local Georgia colleges; the location of the principal abodes of the

plaintiffs' children do not favor any of the residences since none of the children then lived in Wisconsin, Georgia, or Arizona; the location where the plaintiffs received their mail and did their banking does not favor Wisconsin since the plaintiffs received mail and had bank accounts at each residence; and the location where the plaintiffs registered their vehicles does not favor Wisconsin since while the plaintiffs kept one car and two boats in Wisconsin, they kept two cars at their Georgia house and then at their Arizona house.

Second, other important factors, however, definitely point to the Wisconsin residence as not being the plaintiffs' principal residence in that, during the relevant time period, neither plaintiff filed any Wisconsin state tax return but did file Georgia and/or Arizona state returns, neither plaintiff was registered to vote in Wisconsin but both were registered in Georgia and then in Arizona, neither plaintiff had a Wisconsin driver's license but both had a Georgia license and then an Arizona license, and the plaintiffs treated their Arizona house as their principal residence for the 1999 tax year for purposes of the now-repealed 26 U.S.C. § 1034(a).

Third, the one relevant factor decidedly favoring Wisconsin as the principal residence, i.e., the imposing size of the Wisconsin house, is insufficient as a matter of law to overcome the facts and circumstances establishing that Wisconsin was not the plaintiffs' principal residence for purposes of § 121(a). Therefore,

IT IS ORDERED that the plaintiffs' Motion for Summary Judgment (doc. #20) is denied.

IT IS FURTHER ORDERED that the United States' Cross-Motion for Summary Judgment (doc. #24) is granted and that the Clerk of the Court shall enter judgment accordingly.

Dated this 9<sup>th</sup> day of April, 2003.

Paul G. Rosenblatt

United States District Judge

1

The Court notes that 13 of the plaintiffs' 32 statements of fact, i.e., nos. 11, 13-18, 23-25, 27-28, and 32, are supported solely by statements made by Mr. Guinan during his deposition but the cited-to deposition pages were inadvertently not submitted as evidence by the plaintiffs and are

not part of the excerpts from Mr. Guinan's deposition submitted as evidence by the United States. However, given that the United States' counsel stated during oral argument that the United States does not contest the accuracy of those statements of fact, the Court construes the plaintiffs' otherwise unsupported statements of fact as being stipulated facts and the Court has considered them in resolving the parties' cross-motions for summary judgment.

2

According to the plaintiffs' uncontroverted affidavit, their occupancy of the three residences during the relevant time period was broken down as follows:

Year	Wisconsin	Georgia	Arizona
9/96-9/97	172	---	186
9/95-9/96	157	194	--
9/94-9/95	162	197	--
9/93-9/94	184	172	--
847	563	375	

3

The Court has utilized the final version of the regulations applicable to the amended § 121 since both sides refer to the final version and neither side argues that the Court should not apply the final version. See Treasury Regulation § 1.121-1(f) and § 1.12-14(j) (allowing regulations to be applied retroactively). The final version of § 1.121-1(b) (2) did not in any case change settled law inasmuch as it merely incorporated the "facts and circumstances" test applied to 26 U.S.C. § 1034 prior to its repeal by the Taxpayer Relief Act of 1997. The Court has given § 1.121-1 the deference that is due it. *Durando v. United States*, 70 F.3d 548, 550 [76 AFTR 2d 95-7464] (9th Cir. 1995) ("Courts given deference to IRS rulings and interpretations of the Code.")