

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF REVENUE**

In the Matter of	)	
	)	
R. E.,	)	
T. J. E., and	)	
J. N. E.	)	
	)	
<u>2003-2005 Permanent Fund Dividends</u>	)	OAH No. 06-0385-PFD Agency No. 03596912_9

**DECISION & ORDER**

**I. Introduction**

R. E. and her older minor daughter, T., received 2003, 2004, and 2005 permanent fund dividends (PFDs); her younger daughter, J., born in 2004, received a 2005 PFD. Late in 2005 the Permanent Fund Dividend Division denied and assessed the seven payments, seeking reimbursement of \$6,592.08 from Ms. E. The basis for the assessment was the fact that a car co-owned by Ms. E. had been registered in Alaska with a nonresident tax exemption in 2002. Initially, the division based its assessment in part on a belief that Ms. E. had improperly concealed this fact, but when it became clear that the registration occurred without her knowledge, the failure to report the registration was dropped as a basis for assessment. Thereafter, the basis for the assessment was the registration itself and a related contention that Ms. E. and her daughter did not meet the definition of “state resident” for the years in question.

A formal hearing took place on July 13, 2006, with Ms. E. representing herself and Thomas Coté appearing by telephone for the division. At the hearing, the division further narrowed the controversy by agreeing that assessment and collection should be abated for the three 2005 dividends. Two 2003 dividends and two 2004 dividends remained at issue.

The evidence at the formal hearing showed that the assessment of the 2004 dividends should be abated as an exercise of the enforcement discretion expressly granted to the Department of Revenue by statute and regulation. The assessment of the 2003 dividends is appropriate because Ms. E. and T. E. did not meet the definition of “state resident” for the whole of the qualifying year for that dividend.

In sum, five of the dividends covered by this appeal should be left alone, and two should be assessed. The total amount owed, exclusive of any applicable interest, is \$2,215.12.

## II. Facts

Ms. E. first moved to Alaska in 1995, accompanying her husband who was given an Army posting here.<sup>1</sup> Mr. and Mrs. E. lived in Alaska for three years, but did not apply for PFDs because they did not expect to make Alaska their permanent home. After leaving Alaska, the E.s began to consider Alaska as a potential home upon Mr. E.'s military retirement. When Mr. E. received orders for a Hawaii posting in late 2000, he asked to be stationed in Alaska instead. The family moved back to Anchorage in May of 2001.

“In the summer of 2002,” according to Ms. E., Mr. and Mrs. E. “made the decision” to extend Mr. E.'s tour in Alaska so that they could retire here.<sup>2</sup> They bought a house in Anchorage in late 2002.

After 2001, with the exception of the Ford Excursion registration to be discussed later, Ms. E. has maintained strong ties to the state, such as voter registration, voting, driver's license, and bank accounts, and has not maintained these in any other state. She has been steadily employed in Alaska. For her own use, she bought two cars here after her return, and registered both of them in Alaska without claiming any exemption.

Mr. E. made a more gradual transition to full Alaska ties. In February of 2002 (still prior to the summer 2002 decision date), he registered a Ford Excursion in Alaska using a military affidavit showing Ohio as his state of residence.<sup>3</sup> This entitled him to a nonresident tax exemption at the time of registration. He changed his state of legal residence for military purposes to Alaska on January 30, 2003.<sup>4</sup> He did not apply for a 2003 PFD.<sup>5</sup> The record does not indicate whether he applied in later years. At some point, Mr. and Mrs. E. apparently separated, with the children residing with R. E.

The Ford Excursion, though titled in the name of both Mr. and Mrs. E., was for Mr. E.'s use, and he filed the military affidavit and accepted the small tax exemption without her knowledge. Because registration is biennial, he did not have to re-register in 2003. At some point in 2003 Mr. E. was deployed to Afghanistan. The registration on the vehicle expired in February of 2004, but because the car was not being driven the registration was not renewed

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<sup>1</sup> This factual history, except where otherwise referenced, is drawn from a combination of the recorded hearing and the two written statements filed by Ms. E. The statements appear at Exhibit 4, pp. 5-6 and Exhibit 7, pp. 4-6. Much of the material in the statements was explored again at the live hearing.

<sup>2</sup> Exhibit 7, p. 4 (statement of Ms. E. with Request for Formal Hearing).

<sup>3</sup> Exhibit 7, p. 7 (Military Affidavit) and p. 8 (Application for Title & Registration).

<sup>4</sup> This fact was stipulated at the hearing.

<sup>5</sup> See Exhibit 1, p. 7 (attachment to R. E.'s 2003 Adult Application) (noting that her husband was not eligible “because he only recently changed his residency to the State of Alaska”).

until Mr. E. returned from Afghanistan in September of that year. At that time, he did not submit a military affidavit and did not apply for a nonresident tax exemption. The Division of Motor Vehicles apparently extended an exemption to him, but both parties to this appeal agree that the exemption was applied in error and in direct contravention of DMV's published procedures.<sup>6</sup>

The PFD Division paid dividends to R. and T. for 2003, 2004, and 2005, and to J. for 2005. Shortly after paying the 2005 dividends, the division learned of the Ford Excursion registration issue and issued "Denial & Assessment Letters" to Ms. E. for all of the dividends.<sup>7</sup> The election to assess the dividends remained unchanged through the informal appeal process.<sup>8</sup> This formal appeal followed.

### **III. Discussion**

#### *A. Discretion*

Assessment of a PFD that has already been paid, but paid in error, is a matter of discretion. Alaska Statute 43.23.035(b) provides that if the commissioner determines that a dividend should not have been paid, he "may" recover the payment. Likewise, 15 AAC 23.233(a) permits the department "in its discretion" to elect to take steps to recover a dividend paid to an individual who was not eligible. While in many cases it will be good policy to recover dividends that have been paid in error, the department is never compelled by law to do so.

#### *B. 2003 Dividends*

The qualifying year for the 2003 dividend was 2002.<sup>9</sup> To receive a PFD, an individual must be a state resident "during the entire qualifying year."<sup>10</sup> Alaska residency is defined in AS 01.10.055, which reads in relevant part:

(a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.

Ms. E. and her husband were "thinking about putting down ties" when they moved back to Alaska in 2001, but they did not "ma[k]e the decision" until the summer of 2002.<sup>11</sup> This means that they did not form the "intent to remain in the state indefinitely and to make a home in the state" until part-way through the qualifying year. Mr. E.'s claim of Ohio residency on his

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<sup>6</sup> See Exhibit 7, p. 16 (DMV SOP No. R-190).

<sup>7</sup> Exhibit 3.

<sup>8</sup> Exhibit 6.

<sup>9</sup> AS 43.23.095(5).

<sup>10</sup> AS 43.23.005(a)(3).

<sup>11</sup> Exhibit 7, p. 4 (statement of Ms. E. with Request for Formal Hearing).

military affidavit in February of 2002 is consistent with change in intent over the course of the year. Because R. E. did not meet the definition of Alaska resident until part of the qualifying year had already elapsed, she should not have received a 2003 dividend.

The intent of a minor such as T. E., when living with her parents, is established by her parents, and thus she likewise did not meet the definition of resident for the 2003 dividend. In any event, she needed to be “in the lawful and physical custody of a sponsor who is eligible for a dividend” (or who was ineligible solely by reason of a criminal conviction),<sup>12</sup> and her sponsor was not such a person.<sup>13</sup>

Ms. E.’s mistake in applying for the 2003 dividends is understandable and does not suggest fraud on her part. She was present in Alaska for the entire qualifying year, she maintained many ties to the state, and by the time she applied she genuinely thought of herself and her daughter as Alaskans. Moreover, the 2003 dividend was paid a long time ago, and seeking to recover it now imposes some hardship on this single mother. It would be a supportable exercise of enforcement discretion to leave R. and T. E.’s 2003 dividend payments unassessed.

On the other hand, several factors favor assessment of the 2003 payments. First, the law is clear that the two dividends paid in 2003 should not have been paid. Second, Ms. E., had she been fully informed about the law, could have determined based on the facts available to her that she and T. were ineligible. She did not need to know about the registration of the Excursion to determine that she was ineligible, because she was ineligible even without that registration. Third, the E. family received a genuine financial benefit, albeit a small one, from claiming Ohio residency early in the qualifying year. Although Ms. E. herself was unaware of the claim and of the benefit, she was a co-owner of the car and a beneficiary of the tax exemption. Finally, the PFD Division has elected to assess the 2003 dividends, and some deference to their enforcement judgments seems appropriate in close cases. On balance, I conclude by a narrow margin that it is appropriate to ask for repayment of the 2003 dividends.

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<sup>12</sup> 15 AAC 23.113(b).

<sup>13</sup> Although Ms. E. has suggested substituting another sponsor, this will not work because T. was not “in the lawful and physical custody” of anyone but her parents.

### C. 2004 Dividends

By 2004, the situation had changed. Ms. E. formed the intent to remain in Alaska well before the qualifying year for that dividend commenced. The sole potential basis to deny her and her daughter's dividends for 2004 is the status of the Ford Excursion.

15 AAC 23.143 disqualifies an individual from a dividend if the individual, at any time from January 1 of the qualifying year through the date of application—in this case, in the span from January 1, 2003 through March 22, 2004—has “claimed, maintained a claim, or accepted an Alaska motor vehicle nonresident tax exemption on a vehicle owned or co-owned by the individual.” Ms. E. was a co-owner of the Excursion, so she is potentially within the coverage of this regulation. But it is still not clear as a legal matter that the regulation is implicated for the 2004 dividend.

No claim of a nonresident tax exemption was actually made during span of dates that applies to the 2004 dividend. The theory for applying 15 AAC 23.143 would be that, through the biennial registration in early 2002, the family “maintained a claim” or “accepted” an exemption *on a continuing basis* until the time of the next biennial registration. The theory is not wholly persuasive, however. The registration tax is due only once every two years, and the applicable statutes and regulations on vehicle registration make no mention of a procedure to change the tax basis of the registration midway through the two-year cycle.<sup>14</sup> Indeed, the DMV website states that “motor vehicle registration tax cannot be prorated.”<sup>15</sup> This suggests that the tax is not an ongoing obligation paid in advance, but rather that it is a tax imposed at a discrete moment every two years and calculated at that moment based on the status of the vehicle.<sup>16</sup>

It is not necessary to resolve this legal question—which turns in part on the interpretation of regulations of departments other than the Department of Revenue—because regardless of the correct answer, the Department of Revenue should exercise its discretion not to assess R. and T. E.'s 2004 dividends. Registration of the Excursion is the sole basis on which the 2004 dividends could be denied. It is undisputed that Ms. E. had no knowledge of the status in which that car was registered in 2002. DMV evidently permits, and permitted in this case, the registration of a

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<sup>14</sup> See AS 28.05; 13 AAC 70. As a matter of convenience, DMV permits owners to re-register before their registration has expired and pro-rates their registration *fee* (not tax) if they do so.

<sup>15</sup> <http://www.state.ak.us/local/akpages/ADMIN/dmv/reg/require.htm>.

<sup>16</sup> A second weakness of the division's legal theory is that it is not clear that an individual who was unaware of a claim can accurately be said to have “maintained” the claim or “accepted” a benefit under the claim. Maintenance of a claim and acceptance of a benefit both imply a conscious choice, something more than merely the unknowing, passive receipt of a benefit.

vehicle with the signature of only one of its two co-owners.<sup>17</sup> Thus, even if Ms. E. had correctly understood the law in all respects in 2004, she could not have known that she and T. were ineligible for dividends. Moreover, she received no financial benefit during the qualifying period from this hidden circumstance. Where the only basis to assess a long-paid dividend is a legally-debatable application of a regulation to an obscure fact of which the applicant had no awareness, the department should use its discretion not to disturb the dividend.

*C. 2005 Dividends*

The division agreed at the hearing that R., T., and J. E. are all entitled to 2005 PFDs, and that the assessment for 2005 was based on a misunderstanding of the facts.<sup>18</sup>

**IV. Conclusion**

The assessments regarding the 2004 dividends of R. and T. E., and the 2005 dividends of R., T., and J. E., should be abated. The assessments of the 2003 dividends of R. and T. E. are appropriate.

**V. Order**

IT IS HEREBY ORDERED that the assessments of previously paid 2004 and 2005 permanent fund dividends to R. L. E., T. J. E., and J. N. E. be ABATED.

IT IS FURTHER ORDERED that the assessments of previously paid 2003 permanent fund dividends to R. L. E. and T. J. E. are AFFIRMED.

DATED this 14<sup>th</sup> day of September, 2006.

By: Signed \_\_\_\_\_  
Christopher Kennedy  
Administrative Law Judge

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<sup>17</sup> Exhibit 7, p. 8 (Application for Title & Registration, signed only by Mr. E.).

<sup>18</sup> The division's expansive interpretation of 15 AAC 23.143 could, in theory, have applied to the 2005 dividend, since the 2002 registration carried forward until February of 2004, part of the qualifying year for the 2005 dividend. However, the evidence showed that the Excursion was parked and inactive during early 2004, with Mr. E. deployed in Afghanistan and clearly unable to attend to its tax status. The division evidently felt that an application of 15 AAC 23.143 in this circumstance would be excessive.

### **Adoption**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of October, 2006.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Deputy Chief Administrative Law Judge  
Title

[This document has been modified to conform to technical standards for publication.]