

**IT 09-8**

**Tax Type: Income Tax**

**Issue: Income Earned In Illinois/Individual Residency**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>THE DEPARTMENT OF REVENUE</b>	)	<b>Docket No.</b>	<b>07-IT-0000</b>
<b>OF THE STATE OF ILLINOIS</b>	)	<b>Tax ID No.</b>	<b>000-00-0000</b>
<b>v.</b>	)	<b>Tax Years</b>	<b>2001-2003</b>
<b>JOHN &amp; JANE DOE,</b>	)	<b>John E. White,</b>	
<b>Taxpayers</b>	)	<b>Administrative Law Judge</b>	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Michael Wynne, Reed Smith, LLC, appeared for John & Jane Doe; Jessica Arong O'Brien and Mehpara Suliman, Special Assistant Attorneys General, appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter arose when John & Jane Doe (the Does or Taxpayers) protested the Notice of Deficiency (NOD) the Illinois Department of Revenue (Department) issued to them to propose to assess Illinois income tax regarding calendar years 2001 through 2003. During those years, John Doe (John) earned income while working outside the United States, in Hong Kong. The issue is whether the income John earned from his work in Hong Kong was taxable by Illinois because he remained a resident of Illinois during those years.

Each of the Does testified at hearing, and they also offered into evidence several documents, mostly via stipulation. I have reviewed the evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the

Director finalize the NOD as issued.

**Findings of Fact:**

**Findings Regarding the Doe's Federal and Illinois Returns as Filed**

1. Taxpayers filed Illinois individual income tax returns for 2001. Department Ex. 3. John filed as a non-resident (*id.*, pp. 2-5 (copy of John's filed 2001 Illinois return and schedule NR)), and Jane Doe (Jane) filed as a resident. *Id.*, pp. 7-8 (copies of, respectively, the Department record keeper's certification that the Department destroyed Jane's 2001-2002 individual returns, and a copy of a worksheet reflecting the Department's records of the entries contained on Jane's filed 2001 Illinois return).
2. Jane filed a 2002 Illinois return as an Illinois resident. Department Ex. 3, pp. 7, 9 (page 9 is a copy of a worksheet reflecting the Department's records of the entries contained on Jane's filed 2002 Illinois return).
3. Jane filed her 2001 and 2002 Illinois returns as married, filing separately. Department Ex. 3, pp. 7-9; *see also* 35 ILCS 5/502(c)(1), (3).
4. John did not file a 2002 Illinois return. Department Ex. 2 (copy of an audit workpaper titled, Auditor's Comments), p. 1.
5. Taxpayers filed a joint 2003 Illinois return. Department Group Ex. 3, pp. 10, 11-15 (copies of, respectively, the Department record keeper's letter certifying the authenticity of Taxpayers' 2003 Illinois return, and a copy of Taxpayers' 2003 Illinois return and schedule NR). Taxpayers filed their 2003 Illinois return as married, filing jointly. Department Ex. 3, pp. 11-15.
6. On their 2003 Illinois schedule NR, Taxpayers reported that they both lived outside

Illinois from January 1, 2003 through June 15, 2003, and that they both lived in Illinois from June 15 through December 31, 2003. Department Ex. 3, p. 13 (Step 1, lines 4a-4b).

7. As part of their joint federal return for the years at issue, Taxpayers completed and filed form 2555, Foreign Earned Income, to report information regarding the receipt of income from John's employment in Hong Kong. Stip. Ex. A, pp.17-19; Stip. Ex. B, pp. 26-28, 48-51; Stip. Ex. C, pp. 20-22.
8. On the form 2555 for 2001, Taxpayers reported: that John was a citizen of the United States; that John was employed under a 3 year contract; that John's visa limited the length of his employment in Hong Kong; and that John maintained a home in the United States while living abroad. Stip. Ex. A, p. 17 (lines 7 and 15a-e).
9. On the form 2555 for 2002, Taxpayers reported: that John was a citizen of the United States; that John entered Hong Kong on an employment visa; that John's visa was renewable periodically; and that John maintained two homes in the United States while living abroad. Stip. Ex. B, p. 26 (lines 7 and 15a-e). On the same form, Taxpayers also reported that their son, John Jr., lived with John in Hong Kong from January 1 through June 15, 2002. Stip. Ex. B, p. 26 (line 12b); *see also*, Hearing Transcript (Tr.) pp. 47-49 (John), 114-15 (Jane).
10. On the form 2555 for 2003, Taxpayers reported: that John was a citizen of the United States; that John's contract of employment expired on 6/15/03; that John's visa limited the length of his employment in Hong Kong; and that John maintained a home in the United States while living abroad. Stip. Ex. C, p. 20 (lines 7 and 15a-e).

## **Facts Regarding the Nature of John's Employment and Business Activities in Hong Kong**

11. In late 1999, the executive recruiting firm of We Recruit contacted John regarding a position in Hong Kong. Tr. p. 28 (John).
12. In January 2000, John was offered, and accepted, employment as the deputy chief operating officer of the Hong Kong ABC (ABC) and chief executive officer of the Hong Kong XYZ (XYZ). Stip. Ex. E (the first five pages of the exhibit consist of a copy of a Contract of Employment, dated March 21, 2000, between John and the ABC, and the following five pages consist of a copy of another Contract of Employment, dated June 22, 2000, between the same parties); Tr. pp. 26-28 (John).
13. John's positions with the ABC had to be approved by the Hong Kong government, since the ABC is partially owned and regulated by the Hong Kong government. Tr. p. 30 (John).
14. John had to obtain an employment visa from the Hong Kong Immigration Department for the job at the ABC. Stip. Ex. J, pp. 2-3, 5-6 (copies of Hong Kong visa pages from John's passport); Stip. Ex. K, pp. 1-2 (copy of letter from the ABC to John regarding his application for an employment visa); Stip. Ex. L, pp. 1-3 (copies of John's completed Hong Kong employment visa application form); Tr. pp. 31, 55-56, 61-66 (John).
15. On his Hong Kong visa application form, John stated that his proposed stay in Hong Kong was for three years, for employment purposes. Stip. Ex. L, p. 1.
16. John's employment visa for Hong Kong was granted through April 4, 2003, and then extended through April 4, 2005. Stip. Ex. J, pp. 2-3, 5-6.
17. When John was hired, the ABC consisted of three different organizations. Tr. p. 29

(John). John's role was to help merge the three exchanges and transition them from a floor-style of trading to computerized trading before the exchanges went public in June 2000. Tr. p. 29 (John).

18. Upon his arrival in Hong Kong, John signed a 6-month lease on a furnished two-bedroom apartment. Stip. Ex. F (copy of Tenancy Agreement of Serviced Apartment between Pacific Place Holdings Limited and John); Tr. pp. 68-69 (John). John continued to renew that lease for consecutive periods. Tr. pp. 68-69 (John).
19. About two months after he began working for the ABC, John was offered, and he accepted, another contract with the ABC to be chief executive officer of the XYZ, and to continue as chief operating officer of the ABC. Stip. Ex. E, pp. 6-10.
20. The employment contracts expressly required that John be present in Hong Kong during work hours, and as needed by the ABC. Stip. Ex. E, pp. 2, 7. Under the contracts, John's work hours were 9 a.m. through 5:30 p.m. on Mondays through Fridays, and from 9 a.m. through 1 p.m. on alternating Saturdays. *Id.*; Tr. p. 30 (John).
21. The first contract of employment John entered into with the ABC had a term of three years, from April 5, 2000 to April 4, 2003. Stip. Ex. E, p. 1; Tr. p. 57 (John).
22. John expected that his employment contract with the ABC could be renewed or extended, and it was renegotiated once, a few months after the first contract term commenced. Stip. Ex. E, pp. 6-10; Tr. pp. 56-57 (John).
23. The second contract of employment John entered into with the ABC also had a term of three years, from August 1, 2000 to July 31, 2003. Stip. Ex. E, p. 6.

24. The parties agree that the primary reason John agreed to take the executive leadership positions with the ABC was that the ABC offered to extend stock options to him regarding an anticipated initial public offering of the exchange. Taxpayer Ex. O (copy of Pre-Listing Share Option Scheme (Option Agreement), dated June 20, 2000); Tr. pp. 29, 33-34 (John); Department of Revenue's Trial Brief and Response to Taxpayers' Trial Brief (Department's Response), p. 5.
25. John was offered stock options after the first employment contract term commenced, and before the second employment contract term commenced. Taxpayer Ex. O; Tr. pp. 33-34 (John).
26. Pursuant to the Option Agreement, John was granted 1.2 million stock options at a price of approximately 1 dollar (U.S.) per option. Taxpayer Ex. O; Tr. pp. 35-36 (John).
27. Beginning in March of 2002, John vested in 25% or 300,000 of the stock options, and would be vested in 25% more of the stock options at the end of each year of employment. That is, each March, John would be vested in 300,000 stock options. Taxpayer Ex. O; Tr. pp. 36-37 (John).
28. In March of 2003, Jones Smith (Jones Smith), the Chief Executive of the ABC, announced he was resigning from the ABC Board of Directors. Tr. p. 52 (John). Jones Smith was the director who had been instrumental in hiring John to be the ABC's chief executive and operating officer. *See id.*
29. Jones Smith's successor began working in mid-June, 2003, and did not offer to renew John's employment contract. Tr. p. 52 (John).

30. Before his employment with the ABC was terminated, John had vested in 600,000 stock options. Tr. p. 37 (John); *see also* Taxpayer Ex. O.
31. From 2003 through the present time, John has also worked for a company in which he was a primary shareholder, ZZZ Financial Engineering (ZZZ), as a consultant for financial markets around the world. Tr. pp. 25-26 (John).
32. ZZZ is a Hong Kong registered corporation. Tr. p. 26 (John).
33. John discussed other options for employment in Hong Kong with We Recruit, the firm that recruited him for the position with the ABC. Tr. pp. 52-53 (John).
34. John returned to the United States, and to Illinois, soon after he was unable to find other employment in Hong Kong. Tr. p. 53 (John).

**Facts Regarding Taxpayers' Contacts with Illinois and/or with Hong Kong**

35. Currently, John is working as a United States Bankruptcy Trustee. Tr. p. 25 (John).
36. Prior to the years at issue, John obtained a Bachelors of Science in Finance from the University of Illinois, a law degree from DePaul University, and a Masters in Business Administration from the University of Chicago. Stip. Ex. L (copies of various documents), pp. 5-6 (copies of John's diplomas from, respectively, the University of Illinois, DePaul University, and the University of Chicago); Hearing Transcript (Tr.) p. 25 (John).
37. John never practiced law in Illinois. Tr. p. 25 (John).
38. In 2000, Taxpayers had been residing in Anywhere, Illinois, with their two children, for approximately 16 years. Tr. pp. 25, 54 (John), 122 (Jane).
39. Prior to the years at issue, John had worked for the Anywhere Company (ANYWHERE COMPANY) for 25 years. Tr. p. 27 (John).

40. The last job John held at the ANYWHERE COMPANY was as its Executive Vice President of Planning and Administration. Tr. p. 27 (John).
41. Taxpayers claimed and were granted the statutory residential exemption for their home in Anywhere, Illinois. Stip. Ex. O (copies of, respectively, 2001 through 2003 Anywhere County Real Estate Tax Bills bearing Taxpayers' names and the address of their Anywhere, Illinois home); Tr. p. 124 (Jane).
42. Jane has always been a resident of Illinois. Tr. pp. 134 (Jane), 149 (John).
43. Jane has had an Illinois driver's license since 1968. Tr. pp. 122, 127 (Jane).
44. Jane's mother lived in Illinois. Tr. p. 122 (Jane). She helped Jane care for Taxpayers' children, and Jane helped care for her. *Id.*
45. Taxpayers have a home in Anywhere, Wisconsin, and, at the time of hearing, Taxpayers had owned it for approximately 20 years. Tr. pp. 96-97 (John), 122 (Jane).
46. Taxpayers' family dentist, their children's orthodontist, and the family physicians were all located in Illinois. Tr. p. 123 (Jane).
47. Prior to and during the years at issue, John maintained a membership at the League Club in Illinois. Tr. p. 87 (John). When he was working in Hong Kong, John changed the status of his membership there from resident to non-resident. Tr. pp. 87-88 (John). The dues for a non-resident membership are less than those for a resident membership. *Id.*, at 87.
48. During the years at issue, John used his League Club membership mainly for business luncheons during his returns to Illinois. Tr. p. 88 (John).
49. John joined a health club in Hong Kong, which he used for business luncheons and health club benefits. Tr. p. 88 (John); *see also* Stip. Ex. E.

50. In 1997, Taxpayers obtained an interim membership at the Country Club in Anywhere, and became full members in 2000. Tr. p. 123 (Jane).
51. In 2002, Taxpayers' son, John Jr., attended school in Hong Kong during what would be, in Illinois, the second semester of his sophomore year of high school. Stip. Ex. B, p. 26 (line 12b); Tr. pp. 47-49 (John), 114-15 (Jane).
52. Taxpayers' daughter, Jane Jr., did not attend school in Hong Kong. Tr. pp. 130-31 (Jane).
53. John Jr. suffered a head injury during a family vacation in Asia in 2002, and was unable to continue to attend school in Hong Kong. Tr. pp. 47-49 (John), 114-15 (Jane); *see also* Stip. Ex. B, p. 26.
54. Upon John Jr.'s return from school in Hong Kong in 2002, Jane and Taxpayers' children abandoned any intent they might have had to move, permanently, to Hong Kong. Tr. pp. 132, 140 (Jane).
55. While in Hong Kong, John obtained a Hong Kong identity card and a Hong Kong driver's license. Stip. Ex. I (copies of John's Hong Kong driver's license and identity card); Tr. pp. 73-74 (John).
56. John also kept his Illinois driver's license during the years at issue. Tr. p. 74 (John). John could not recall if his Illinois driver's license expired during the time he was working in Hong Kong. *Id.*
57. John thought that he voted during the 2000 presidential election via an Illinois absentee ballot. Tr. p. 75 (John).

58. John's name was the name used for most of the family's various accounts, including utilities, bank accounts, leaseholds, etc. Stip. Exs. G, O; Tr. pp. 78, 141, 147 (John), 122-26 (Jane).
59. John maintained bank accounts in Illinois, which Jane had access to and used to write checks and to draw funds necessary to maintain the family's expenses. Tr. pp. 81, 86 (John), 122-26 (Jane). John regularly transferred funds from a Hong Kong bank account into which his Hong Kong salary was deposited directly, to his Illinois account, for Jane to use. Tr. p. 81 (John).
60. In November 1999, John signed a 35-month lease for a Jaguar. Stip. Ex. G (copy of lease for Jaguar); Tr. pp. 76 (John). On the lease agreement, John used the address of his home in Wisconsin (Stip. Ex. G, p. 3), and he registered that vehicle in Wisconsin. Tr. p. 147 (John).
61. John used the Jaguar to drive to and from work in Illinois, either from Anywhere or from Wisconsin. *See* Tr. pp. 142-43 (John).
62. For income tax purposes, John was never a resident of Wisconsin. Tr. p. 147 (John).
63. On May 5, 2000, John terminated the lease on the Jaguar, and paid an early termination fee of \$7,724. Stip. Ex. G; Tr. p. 77 (John).
64. In November 2002, John leased a Land Rover for use by his family. Tr. pp. 78-80, 148-49 (John).
65. During the years at issue, John returned to Illinois more than 4 or 5 times a year. Tr. pp. 102-03 (John); *see also* Stip. Ex. B, pp. 26 (line 14 of form 2555, referring to explanatory statement 18), 50 (explanatory statement 18, listing days present in the

United States on business); Stip. Ex. C, p. 20 (line 14 of form 2555, listing days present in the United States on business).

66. The auditor reports attached to the NOD set forth the following amounts due:

Period	Tax	Penalty	Interest	Total Liability
2001	\$22,039	0	\$12,720	\$34,759
2002	\$26,383	0	\$5,879	\$32,262
2003	\$26,194	0	\$3,992	\$35,058
Total proposed liability				\$102,079

Department Ex. 1, pp. 1-2.

**Conclusions of Law:**

When the Department introduced the NOD into evidence under the certificate of the Director, it presented prima facie proof that Taxpayers were residents of Illinois for the years at issue. 35 ILCS 5/904(a)-(b); Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1<sup>st</sup> Dist. 1981). The Department’s prima facie case is a rebuttable presumption. *See* Branson v. Department of Revenue, 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995). After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that the Department’s determinations are not correct. *Id.*; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217, 577 N.E.2d 1278, 1287 (1<sup>st</sup> Dist. 1991) (“To overcome the Department’s prima facie case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions.”).

**Analysis:**

**What is the Burden and Who Has It**

The parties initially dispute who has the burden of proof in this matter, and the quantum and quality of evidence necessary to overcome that burden. Taxpayers cite to

and rely on Illinois Supreme Court cases construing whether a plaintiff has presented a prima facie case for purposes of granting a defendant's motion to dismiss, pursuant to § 2-1110 of Illinois' Code of Civil Procedure. John and Jane Doe's Post Hearing Memorandum of Law (Taxpayers' Brief), p. 2 (*citing* People ex rel. Sherman, 203 Ill.2d 264, 275, 786 N.E.2d 139, 148 (2003); Kokinis v. Kotrich, 81 Ill. 2d 151, 154, 407 N.E.2d 43 (1980)); 735 **ILCS** 5/2-1110 (2002)). In response, the Department acknowledges that it, as the taxing authority, has the burden of proving that a taxpayer actually received income and that such income is properly subject to taxation. Department's Response, p. 9. It also cites Balla for the proposition that, "The Illinois legislature, in order to aid the Department in meeting its burden of proof in this respect, has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct." *Id.*; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238 (*citing* Ill.Rev.Stat.1979, ch. 120, par. 9-904(a)). The Department then concludes that, since it offered the NOD it issued to Taxpayers into evidence, it has established a prima facie case against Taxpayers, and that, thereafter, they bear the burden to overcome that prima facie case. Department's Response, p. 9.

The Department's conclusion is a concise and accurate summary of the effect of the Illinois General Assembly's grant of a statutory presumption of correctness to the Department's preliminary factual determinations. 35 **ILCS** 5/904; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238. In their Reply, however, Taxpayers dispute that the same quantum of evidence required to overcome the statutory presumption discussed in Balla applies to this dispute. Taxpayers are correct. This matter does not involve an express statutory exemption or credit, as was the case in Balla. Balla, 96 Ill. App. 3d at 296, 421

N.E.2d at 238. Rather, the issue involves whether Taxpayers were Illinois residents during certain years.

The Illinois Income Tax Act (IITA) imposes a “tax measured by net income ... on every individual, corporation, trust and estate ... on the privilege of earning or receiving income in or as a resident of [Illinois] ....” 35 **ILCS** 5/201(a). Section 201(a) makes it clear that persons who are not residents of Illinois are not exempt from Illinois income tax. They are subject to Illinois income tax, so long as their physical presence and/or activities in Illinois contribute to their “earning or receiving income in [Illinois] ....” *Id.*; *see also, e.g.*, 35 **ILCS** 5/301(c) (prescribing how persons other than residents are to allocate items of income or deduction taken into account when computing base income), 5/304(a) (prescribing how non-residents are to allocate business income realized from activities conducted wholly within Illinois, and also prescribing how non-residents are to apportion business income from activities conducted both inside and outside Illinois). Thus, to rebut the statutory presumption of correctness, Taxpayers need not present clear and convincing evidence showing that they were entitled to some particular exemption; a preponderance of competent evidence showing that they were not Illinois residents will do. 5 **ILCS** 100/10-15.

On the other hand, Taxpayers are wrong about the kind (as opposed to the amount) of competent evidence that is required to overcome the Department’s prima facie case. *See* Taxpayer’s Reply, pp. 2-3. Specifically, Taxpayers assert that, in matters where the issues do not involve statutory credits, deductions, or exemptions, mere testimony is sufficient to rebut the Department’s prima facie case. *Id.* But the almost universally applied rule in Illinois tax law is that a taxpayer must present books and

records to overcome the Department's presumptively correct determinations. Branson, 168 Ill. 2d at 260, 659 N.E.2d at 968; Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33-34, 765 N.E.2d 34, 48 (1<sup>st</sup> Dist. 2002) (“the law establishes that, ‘[t]o overcome the Department's prima facie case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions.’”) (*quoting* Mel-Park Drugs, Inc., 218 Ill. App. 3d at 217, 577 N.E.2d at 1287).

In this matter, therefore, after the Department introduced the NOD under the certificate of the Director, Taxpayers had the burden of production and persuasion to show, by a preponderance of the competent evidence, that the Department's determination that they were both full-year residents of Illinois during 2003, and its determination that John was an Illinois resident during 2001 and 2002, were not correct. Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; PPG Industries, Inc., 328 Ill. App. 3d at 33-34, 765 N.E.2d at 48. To overcome their burden, moreover, Taxpayers must present documentary evidence that is closely associated with their books and records. Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; PPG Industries, Inc., 328 Ill. App. 3d at 33-34, 765 N.E.2d at 48; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

### **The Text and Context of the Illinois Income Tax Act's Definition of a Resident Individual**

Again, the IITA imposes a “tax measured by net income ... on every individual ... on the privilege of earning or receiving income in or as a resident of [Illinois] ....” 35 **ILCS** 5/201(a). In the case of non-residents, tax is imposed upon the privilege of earning or receiving income *in* Illinois; in the case of residents, tax is imposed upon the privilege of earning or receiving income *as a resident of* Illinois. *Id.* The United States Supreme

Court has long acknowledged that residency alone provides the basis for state taxation of all of a resident's income, from whatever source. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462-63, 115 S.Ct. 2214, 2222, 132 L.Ed.2d 400 (1995); New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937); *see also* Zunamon v. Zehnder, 308 Ill. App. 3d 69, 79, 719 N.E.2d 130, 137 (1999) (“The due process clause does not prohibit a state from taxing all of its residents’ income, even income earned in another state.”).

Section 1501(a)(20) of the IITA defines the term resident, and it includes within the definition “an individual ... who is in this State for other than a temporary or transitory purpose during the taxable year; or ... who is domiciled in this State but is absent from the State for a temporary or transitory purpose during the taxable year ....” 35 ILCS 5/1501(a)(20). The text of the statutory definition of resident not only details two classes of individuals that are expressly included within the definition, it also implies the exclusion of two classes of individuals that were not intended to be included within the definition. 35 ILCS 5/1501(a)(20). First, since the legislature defined a resident to include “an individual ... who is in this State for other than a temporary or transitory purpose during the taxable year ...[,]” that implies that the legislature intended to exclude from the definition of resident an individual who is in this State for only temporary or transitory purposes during the taxable year. *Id.* This clause is not a consideration in this matter.

This matter involves the second clause of the statutory definition. This clause implies that the legislature intended to exclude from the definition of a resident an individual who is domiciled in Illinois but who is absent from Illinois for other than temporary or transitory purposes during the taxable year. *Id.*

The Illinois General Assembly granted the Department the authority to make reasonable rules and regulations relating to the administration of the IITA. 35 ILCS 5/1401. Pursuant to that authority, the Department has adopted a regulation that interprets and administers the sections of the IITA involving the taxation of residents, which is published at 86 Ill. Admin. Code § 100.3020. Illinois income tax regulation (IITR) § 100.3020(b) provides, in pertinent part:

Section 100.3020 Resident

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b) Individuals. The purpose of the general definition is to include in the category of individuals who are taxable on their entire net income, regardless of whether derived from sources within or without Illinois, all individuals who are physically present in Illinois enjoying the benefit of its government, except those individuals who are here temporarily, and to exclude from this category, all individuals, who, although domiciled in Illinois, are outside Illinois for other than temporary and transitory purposes, and, hence, do not obtain the benefit of Illinois government. If an individual acquires the status of a resident by virtue of being physically present in Illinois for other than temporary or transitory purposes, he remains a resident even though temporarily absent from Illinois. If, however, he leaves Illinois for other than temporary or transitory purposes, he thereupon ceases to be a resident. If an individual is domiciled in Illinois, he remains a resident unless he is outside Illinois for other than temporary or transitory purposes.

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86 Ill. Admin. Code § 100.3020(b).

This subsection sets forth the Department's own, authoritative interpretation of the text of the statutory definition of resident, as it applies to individuals. First, the regulation states that the purpose of the definition of individual resident was to include into a single category all individuals who are taxable on their entire net income, regardless of whether it was derived from sources within or without Illinois. 86 Ill. Admin. Code § 100.3020(b). Included into that category are "all individuals who are

physically present in Illinois enjoying the benefit of its government, except those individuals who are here temporarily ....” *Id.* Excluded from that category are “all individuals, who, although domiciled in Illinois, are outside Illinois for other than temporary and transitory purposes, and, hence, do not obtain the benefit of Illinois government.” *Id.* In sum, the Department’s own, authoritative regulation makes plain that, in addition to defining who is included within the definition of an Illinois resident, there are two classes of individuals whom the legislature intended *not* to be Illinois residents: individuals who are physically present in Illinois only for temporary or transitory purposes during a particular tax year; and Illinois domiciliaries who are absent from Illinois for other than temporary or transient purposes during a particular tax year. *Id.*

### **Was John Doe A Resident of Illinois During 2001 Through 2003**

Within their briefs, both parties focus primarily on whether the evidence shows that John changed his domicile from Illinois to Hong Kong prior to 2001. But, as the plain text of the statutory definition and the Department’s own regulation makes clear, answering that inquiry does not resolve this dispute. The Illinois General Assembly intended that some individuals domiciled in Illinois not be taxed as Illinois residents, because they were intended to be excluded from the definition of an Illinois resident. 35 **ILCS** 5/1501(a)(20); 86 Ill. Admin. Code § 100.3020(b).

Both parties presented limited arguments regarding part of the more salient issue. That is, both parties touched upon whether John’s absence from Illinois during 2001 through 2003 was for other than temporary and transitory purposes. *See* Taxpayers’ Brief, pp. 5-7; Department’s Response, pp. 13, 15. This recommendation addresses both issues,

beginning with whether John changed his domicile from Illinois to Hong Kong when he physically moved to Hong Kong for his job there.

### **Did John Change His Domicile From Illinois to Hong Kong**

IITR § 100.3020 contains a subsection interpreting the legislature's use of the term domicile within § 1501(a)(20). That regulatory subsection provides:

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d) Domicile. Domicile has been defined as the place where an individual has his true, fixed, permanent home and principal establishment, the place to which he intends to return whenever he is absent. It is the place in which an individual has voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. Another definition of "domicile" consistent with the above is the place where an individual has fixed his habitation and has a permanent residence without any present intention of permanently removing therefrom. An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he retains that domicile until he acquires another elsewhere. Thus, if an individual, who has acquired a domicile in California, for example, comes to Illinois for a rest or vacation or on business or for some other purpose, but intends either to return to California or to go elsewhere as soon as his purpose in Illinois is achieved, he retains his domicile in California and does not acquire a domicile in Illinois. Likewise, an individual who is domiciled in Illinois and who leaves the state retains his Illinois domicile as long as he has the definite intention of returning to Illinois. On the other hand, an individual, domiciled in California, who comes to Illinois with the intention of remaining indefinitely and with no fixed intention of returning to California loses his California domicile and acquires an Illinois domicile the moment he enters the state. Similarly, an individual domiciled in Illinois loses his Illinois domicile:

- 1) by locating elsewhere with the intention of establishing the new location as his domicile, and
- 2) by abandoning any intention of returning to Illinois.

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86 Ill. Admin. Code § 100.3020(d).

The test the regulation sets up for determining whether an individual taxpayer has changed his domicile from Illinois to another place is consistent with the tests Illinois

courts have long used to determine the same issue for purposes of Illinois taxation. For example, in Holt v. Hendee, 248 Ill. 288, 295-96, 93 N.E. 749 (1911), the Illinois Supreme Court reviewed a trial court's determination that an individual had not changed his domicile from Illinois, when determining whether he was subject to Illinois's personal property tax. There, the Court held:

\*\*\* [I]n order to effect a change of domicile, there must be an actual abandonment of the first domicile coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home. In order to bring about a change of residence, it is necessary that there be not only an intention to change the residence, but the change must actually be made by abandoning the old and permanently locating in the new place of residence. \*\*\*

Hendee, 248 Ill. at 295-96, 93 N.E. 749.

Taxpayers argue that “[t]he question of a person’s domicile is largely one of intent, and Mr. Doe clearly intended to reside in Hong Kong and establish it as his permanent domicile.” Taxpayers’ Brief, p. 5. The items of documentary evidence that Taxpayers cite to prove John’s intent to make Hong Kong his new domicile include, among other things: copies of his two employment contracts to work in Hong Kong (Stip. Ex. E); a copy of his lease of a condominium in Hong Kong (Stip. Ex. F); copies of his Hong Kong driver’s license and identification card (Stip. Ex. I); and copies of documents regarding his Hong Kong employment visa (Stip. Exs. K-M). Taxpayers also cite to testimony regarding John’s acquisition of membership in clubs in Hong Kong and to his termination of a lease of a vehicle that he had previously driven in Illinois. Tr. pp. 51, 76-77 (John); Stip. Ex. G; *see also* Taxpayers’ Brief, *passim*.

The Department, on the other hand, and relying on the express text of IITR §

100.3020(d), cites other evidence to show that John never abandoned any intent to return to his domicile in Illinois. Department's Response, pp. 17-21. That evidence shows, among other things, that: Taxpayers continued to own their family home in Anywhere; Taxpayers took the benefit of the homeowner's exemption from the property tax extended on that property (Stip. Ex. O); John retained memberships at Illinois clubs (Tr. pp. 88 (John), 123 (Jane)); Taxpayers' children continued to attend school in Illinois (Tr. pp. 83-84 (John), 130-32 (Jane)); and that John continued to return to his home in Illinois at different times during 2001 through 2003. Tr. pp. 102-03 (John).

Here, I agree with the Department that the evidence does not show that, when John physically removed himself from Illinois to Hong Kong, he had abandoned any intent to return to his domicile in Anywhere, Illinois. 86 Ill. Admin. Code § 100.3020(d)(2). Nor does the evidence show that he ever abandoned his actual, physical, and/or associative ties to Illinois, even though he physically removed himself from Illinois for much of the three years at issue. "Only when abandonment has been proven is residence lost." Hatcher v. Anders, 117 Ill. App. 3d 236, 239, 453 N.E.2d 74, 77 (2d Dist. 1983). The evidence that is most persuasive on this point is the evidence showing that John kept and maintained ownership of the Anywhere home, where his family continued to reside, during the years at issue. Stip. Ex. O; 86 Ill. Admin. Code § 100.3020(d). The tax bills identify both John and Jane as the owners of that house and property. Stip. Ex. O. While a tax bill is certainly not conclusive evidence of title, had John intended to abandon that home as his domicile, he could have evidenced such an intent, for example, by transferring title to that home solely to his wife. No such documentary evidence was offered. John's positive acts of keeping and maintaining the

home he owned in Illinois does not manifest John's intent to abandon that Illinois home as his domicile. Hendee, 248 Ill. at 296, 93 N.E. 749 ("The intention [to abandon] is not necessarily determined from the statements or declarations of the party but may be inferred from the surrounding circumstances, which may entirely disprove such statements or declarations. On the question of domicile less weight will be given to the party's declaration than to his acts."); Davis v. Davis, 9 Ill. App. 3d 922, 926, 293 N.E.2d 399, 403 (5<sup>th</sup> Dist. 1973) (Affirmative acts of abandonment of one's Illinois residence must be proved to sustain abandonment. Temporary absence does not equate with abandonment.).

I also find it significant that Taxpayers claimed, and were given actual benefit of, the homestead exemption from the amount of property tax extended on the Anywhere property during the years at issue. Stip. Ex. O; 35 **ILCS** 200/15-175. The Illinois General Assembly created the statutory homestead exemption for property its owners use as their "primary dwelling place." 35 **ILCS** 200/15-175. Thus, when an owner of real property situated in Illinois takes the affirmative act of claiming the benefit of Illinois' statutory homestead exemption for such property, that act is wholly inconsistent with the owner's claim that he has abandoned the same property during the same year. To be sure, the evidence shows that John leased another dwelling place in Hong Kong, which he, himself, used and lived in when he was working there. Stip. Ex. F. But his leasing of a condo in Hong Kong does not prove that he intended to abandon the Illinois home he continued to own, and in which his wife and children continued to live and to use as their domicile, any more than his ownership of a house in Wisconsin proved the same thing. Here, the evidence shows that John owned, possessed and enjoyed more than one

dwelling. Stip. Ex. O; Tr. p. 45 (John). But since John took the benefit of Illinois' statutory homestead exemption on the Anywhere property during the years at issue, that shows that his property in Illinois was and remained his domicile (Stip. Ex. O; 35 ILCS 200/15-175; 86 Ill. Admin. Code § 100.3020(d)), while the other properties were not.

Just as important on the issue of whether John abandoned any intent of returning to his domicile in Illinois, is the fact that John continued to return to his home in Illinois during the years at issue, and that he returned to, and stayed at, that home, after his employment in Hong Kong terminated, unexpectedly, prior to the end of the term of the second contract. Department Ex. 3, p. 13 (Step 1, lines 4a-4b); Stip. Ex. C, p. 20 (lines 7 and 15a-e); Tr. pp. 52-53 (John). When considering whether an individual has abandoned Illinois as his domicile, Illinois courts have found it appropriate for the fact finder to consider not only the facts that occurred during the particular time when a dispute arose, but also the facts both prior to and after such time. So, for example, in Viking Dodge Inc. v. Hoffman, 147 Ill. App. 3d 203, 407 N.E.2d 1346 (3d Dist. 1986), the appellate court overturned a trial court's ruling which allowed a plaintiff to use substituted service, which is available only for service of process to a non-resident of Illinois, to serve a civil complaint to an Illinois domiciliary who was attending college in Arizona. Viking Dodge, Inc., 147 Ill. App. 3d at 205, 407 N.E.2d at 1347-48. When determining whether the student had abandoned any intent to return to his domicile in Illinois at the time service was attempted, the appellate court took into account the fact that the Illinois domiciliary returned to Illinois after college. *Id.* The court held that substituted service was ineffectual, because the evidence showed that the individual never abandoned the intent to keep Illinois as his domicile. *Id.*

Taxpayers have not shown, by a preponderance of the evidence, that John abandoned his intent of returning to his domicile in Illinois, prior to or during the tax years at issue. Thus, I agree with the Department that Taxpayers have not established that prior to or during the years at issue, John changed his domicile from Illinois to Hong Kong. Hendee, 248 Ill. At 295-96; Viking Dodge, Inc., 147 Ill. App. 3d at 205, 407 N.E.2d at 1347-48; 86 Ill. Admin. Code § 100.3020(d)-(e).

**Notwithstanding That John Remained An Illinois Domiciliary,  
Was He A Non-Resident Because He Was Absent From Illinois For  
Other Than Temporary Or Transitory Purposes During 2001  
Through 2003**

The applicable regulation again provides much needed guidance on this question, which calls for an interpretation of the phrase “temporary or transitory purpose.” 35 ILCS 5/1501(a)(20). Subsection (c) of the regulation provides:

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c) Temporary or transitory purposes. Whether or not the purpose for which an individual is in Illinois will be considered temporary or transitory in character will depend upon the facts and circumstances of each particular case. It can be stated generally, however, that if an individual is simply passing through Illinois on his way to another state, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in Illinois for but a short period, he is in Illinois for temporary or transitory purposes, and will not be a resident by virtue of his presence here. If, however, an individual is in Illinois to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to Illinois with no definite intention of leaving shortly thereafter, he is in Illinois for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may also maintain an abode in some other state.

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86 Ill. Admin. Code § 100.3020(c).

This subsection sets forth the Department's own description of the types of purposes that it will consider to be temporary or transitory, as well as its description of the types of purposes that it will consider to be *other than* temporary or transitory. While this particular subsection describes such purposes in terms of whether an individual is inside Illinois, the regulation does not imply that the Department intends to interpret the statutory phrase to have different meanings depending on whether an individual is present in, versus absent from, Illinois. That is, the regulation does not reflect that the Department will consider a non-domiciliary of Illinois who is present in Illinois, for example, "for business purposes which will require a long or indefinite period to accomplish," to be here for other than a temporary or transitory purpose, but that it will consider an Illinois domiciliary who is absent from Illinois *for the very same reason* to be absent from Illinois only for a temporary or transitory purpose. Of course, the part of regulation § 100.3020(c) that is most relevant to this dispute is the Department's statement that, generally, if an individual is present in Illinois "for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely ... he is in Illinois for other than temporary or transitory purposes ...." 86 Ill. Admin. Code § 100.3020(c).

Here, the Department argues that John's work in Hong Kong was only temporary or transitory, since each of the employment contracts admitted into evidence has a definite ending date, and since there is no express provision of contract renewal. Department's Response, pp. 13-14. The Department also contends that John's absence from Illinois was only temporary or transitory, since he did not obtain a resident visa for

Hong Kong, and only applied for and received an employment visa. *Id.*, p. 15. Finally, the Department implies that the employment contracts, and not the Option Agreement, should be the best measure of John's expected stay in Hong Kong, since John actually realized the benefit of most of the anticipated stock options within the three year term of the contract of employment. Department's Response, pp. 14-15.

Taxpayers, on the other hand, have argued that, while each of the employment contracts identify a start and termination date, each also has an express provision allowing the employer to transfer the employee to another post. Stip. Ex. E. John testified that a reassignment by the employer to such a post would then be followed up with the creation of another, separate employment contract. Tr. pp. 56-57 (John). His testimony on this point is corroborated by his own, second, employment contract, which was executed when John was promoted to chief executive officer (CEO) from deputy CEO. Stip. Ex. E. Thus, while the employment contracts themselves each had a defined, three year term, Taxpayers also offered credible testimony that the written contracts could be renewed or renegotiated, and that clear, credible testimony was corroborated by documentary evidence. Stip. Ex. E.

Additionally, Taxpayers stress the importance of the Option Agreement as a source for John's expectation of continued employment with the ABC. Taxpayers' Brief, pp. 6-7; Taxpayers' Reply, pp. 7-8. They also contend that the period of time set forth in that Option Agreement proves that John "intended to stay in Hong Kong for an indefinite term, eventually with his entire family, to continue earning and vesting in the stock options." Taxpayers' Reply, p. 8. That Option Agreement reflects the ABC's grant to John of the option of subscribing to shares in the Company periodically, on a schedule

that terminated on May 30, 2010. Taxpayers' Ex. O. The Option Agreement was granted to John in 2000. *Id.*

Ultimately, however, John's credible testimony regarding the very real opportunities that his Option Agreement presented is overcome by the fact that those opportunities were expressly conditioned by his continued employment at the ABC on the specified anniversary dates (Taxpayer Ex. O), and by the fact that John's contract was not extended in 2003. Stip. Ex. C, p. 20 (form 2555, lines 10, 15a); Tr. pp. 52-53 (John). Thus, even if John had a good faith expectation that the contract might be renewed, or that he might be assigned a new post, the plain text of the second contract gave him an even more express expectation that his employment might well end on or before July 31, 2003. Stip. Ex. E, p. 6. And it did end prior to that date. Stip. Ex. C, p. 20 (form 2555, lines 10, 15a); Tr. pp. 52-53 (John). In other words, even though John testified credibly that he hoped that his employment in Hong Kong might last as long as the 10 year period set forth in the Option Agreement, the contracts provide better evidence that John's employment in Hong Kong would *not* last indefinitely or permanently. 86 Ill. Admin. Code § 100.3020(c).

Further, the period of time that John was absent from Illinois for business and/or employment purposes, in this case, is roughly consistent with the length of time required to obtain a college degree, or to serve a stint in the armed services. Stip. Ex. E; Stip. Ex. L, p. 1 (statement on John's visa application that his proposed stay in Hong Kong was for three years, for employment purposes). Without a doubt, actually living through such periods of time may not seem so temporary. But when addressing issues of residency and/or domicile, Illinois courts have considered an individual's absence from Illinois for

the length of time John was employed in Hong Kong to be only temporary. Viking Dodge, Inc., 147 Ill. App. 3d at 205, 407 N.E.2d at 1347-48; Anders, 117 Ill. App. 3d at 240, 453 N.E.2d at 77.

One final way to test whether, under the applicable regulation, John's absence from Illinois due to employment elsewhere for a period of years is for other than temporary or transitory purposes is to see how the Department has treated individuals who are not Illinois domiciliaries, but who are present in Illinois for a purpose that is like the purpose for John's presence in Hong Kong. One of the more recent significant examples involved an earlier case docketed within the Department's Office of Administrative Hearings, where the Department proposed to tax the compensation of a professional athlete who was not an Illinois domiciliary. A redacted copy of the agency decision in that case, subsequently overturned for reasons not pertinent here, is viewable at the Department's web site. *See* <http://tax.illinois.gov/legalinformation/hearings/it/it01-6.pdf> (copy of redacted agency decision published on Department's web site) (last viewed on May 19, 2009) (hereinafter, IT-01-6). This particular contested case was a test case, which the parties intended would bind similarly situated parties having contested cases with the Department regarding the same issue. IT-01-6, p. 2 n.1. Like John in this case, the taxpayer in IT-01-6 leased a condo in the place of his employment. Stip. Ex. F; IT-01-6, pp. 7-8.

In that case, one of the main issues was whether the Department properly taxed the full measure of the non-Illinois domiciliary's compensation that was paid in Illinois. IT-01-6, p. 2. For purposes of this case, however, the critical aspect of that case lies in noting how the Department treated the particular individual non-Illinois domiciliary

taxpayer in that case, and all of the similarly situated individual taxpayers who agreed to be bound by the decision in that test case. *See* IT-01-6, p. 2 n.1. In IT-01-6, the Department proposed to tax only the individual's compensation that was paid in Illinois. The Department did not attempt to tax all of the taxpayer's income, from all sources. IT-01-6, p. 28. In other words, the Department did not treat individuals who were not Illinois domiciliaries, and who were present in Illinois to fulfill contracts of employment for different numbers of years, as though they were present in Illinois for other than temporary or transitory purposes. *See* IT-01-6; 86 Ill. Admin. Code § 100.3020(c). Instead, it treated their presence in Illinois as being for only temporary or transitory purposes.

I note here that I do not cite to the agency's decision in what was colloquially referred to as the baseball cases as any type of precedent. I do, however, consider it as reflective of how the Department has interpreted the statutory phrase "temporary or transitory purposes" historically. As indicated earlier, the applicable regulation reflects that the Department will construe the phrase to have the same meaning regardless whether a person is present in Illinois for a particular purpose, or whether he is absent from Illinois for the same purpose. 86 Ill. Admin. Code § 100.3020(c). I conclude that John's absence from Illinois to fulfill the particular employment contracts admitted as evidence, and for the period of years covered by those contracts, was an absence from Illinois that was only for temporary or transitory purposes. Stip. Ex. E; Stip. Ex. L, p. 1; 86 Ill. Admin. Code § 100.3020(c).

Taking into account all of the evidence, I conclude that Taxpayers have not shown that John was absent from Illinois for other than temporary or transitory purposes during

2001 through 2003. The evidence shows, instead, that John's employment and business activities in Hong Kong were only temporary or transitory. Stip. Ex. E; 86 Ill. Admin. Code § 100.3020(c). Thus, Taxpayers have not rebutted the Department's prima facie correct determination that John was an Illinois resident during 2001 through 2003. 35 ILCS 5/1501(a)(20); 86 Ill. Admin. Code § 100.3020(b)-(c).

### **Taxpayers' Status as Part Year Residents for 2003**

Although the evidence reflects that John remained an Illinois domiciliary and resident during the years at issue, I also conclude that the manner in which Taxpayers filed their Illinois return for 2003 has a preclusive effect on their ability to challenge the Department's determinations regarding their joint deficiency for that year.

Within the IITA, the Illinois legislature has provided, generally, that an Illinois taxpayer must report items on his Illinois return in the same manner that such items were reported on his federal return. 35 ILCS 5/401 – 5/403. As is often the case, there are exceptions to this general rule, and the legislature has expressed certain specific exceptions within the IITA itself. One of the instances in which the legislature has made an express exception to a general rule is within IITA § 502, which sets forth, among other things, which persons must file Illinois income tax returns. Subsection (c)(1) of § 502 provides the general rule, and subsection (c)(3) provides the express exception:

#### Section § 502. Returns and Notices

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#### (c) Joint returns by husband and wife.

(1) Except as provided in paragraph (3), if a husband and wife file a joint federal income tax return for a taxable year they shall file a joint return under this Act for such taxable year and their liabilities shall be joint and several, but if the federal income tax liability of either spouse is determined on a separate federal income tax return, they shall file separate returns under this Act.

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(3) If either husband or wife is a resident and the other is a nonresident, they shall file separate returns in this State on such forms as may be required by the Department in which event their tax liabilities shall be separate; but they may elect to determine their joint net income and file a joint return as if both were residents and in such case, their liabilities shall be joint and several.

35 **ILCS** 5/502(c).

As one can see, IITA § 502(c)(3) provides an express, limited exception to the general rule requiring married individuals who file joint federal returns to file Illinois returns in the same manner. This statutory section provides the exclusive procedure the Illinois legislature has prescribed for a married person with an Illinois reporting obligation to have his or her Illinois income tax liability calculated separately from the potential liability of his or her spouse. Filing an Illinois return as married, filing separately, is also the exclusive means for a married individual to avoid joint and several liability for the other spouse's Illinois income tax liabilities. In this way, the Illinois legislature has taken into account and provided for the possibility that, in a given tax year, an individual residing in Illinois might marry another individual who is not an Illinois resident, or that one, and only one, spouse might have a different domicile, or residence, than the other spouse. *See* 35 **ILCS** 5/502. The Illinois legislature clearly intended that married individuals be allowed to file separate Illinois returns under such circumstances, and that such persons could have their individual Illinois income tax liabilities calculated separately, if they followed the procedure set forth in § 502(c)(3).

For 2001 through 2003, Taxpayers filed their federal returns as married, filing jointly. Stip. Exs. A-C (p. 1 of each federal form 1040). For 2001, Taxpayers filed their Illinois returns as married, filing separately. Department Ex. 3, pp. 2-9. For 2002, Jane

filed as she had the year before, and John did not file an Illinois return. *Id.* For 2003, however, Taxpayers filed a single Illinois return as married, filing jointly, and as part year residents of Illinois. Department Ex. 3, pp. 11-15.

Further, at hearing, both Jane and John testified clearly, and without ambiguity, that Jane has always been a resident of Illinois. Tr. pp. 134 (Jane) 149 (John). Taxpayers never offered any evidence, of any kind — indeed, they never even made the argument — that Jane lived outside Illinois during the period identified on their 2003 joint Illinois return. *Compare* Department Ex. 3, p. 13 *with* Tr. pp. 134 (Jane), 149 (John). As to that particular return entry, moreover, it is good to recall that a return, itself, is not proof of the correctness of any particular entry. Bohannon v. Commissioner, T.C. Memo. 1997-153 (March 26, 1997) (“A tax return does not establish the correctness of the facts stated in it.”) (*citing* Seaboard Commercial Corp. v. Commissioner, 28 T.C. 1034, 1051 (1957)). Instead, taxpayers must keep books and records to support the entries made on a return. 35 **ILCS** 5/913. As to 2003, the evidence is clear that Jane was a domiciliary, as well as a full-year resident, of Illinois. Stip. Ex. O; Tr. pp. 134 (Jane), 149 (John).

Since Jane was a domiciliary and full-year resident of Illinois during 2003, the Department correctly determined that Taxpayers’ report, on their 2003 Illinois return, that they were both non-residents of Illinois from January 1, through June 15 (Department Ex. 3, p. 13), was not correct. 35 **ILCS** 5/502(c)(1). Further, since Taxpayers filed their federal returns as married, filing jointly, the only way Taxpayers were able to have their Illinois income tax liabilities calculated separately was to file an Illinois return as married, filing separately. 35 **ILCS** 5/502(c)(3). They did not do so. Department Ex. 3, pp. 11-15. Nor did they file an amended return, within the required time, to change their

Illinois filing status from married, filing jointly to married, filing separately. 35 **ILCS** 5/911(a)(1); Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 267-69, 586 N.E.2d 516, 519-20 (1<sup>st</sup> Dist. 1991) (taxpayer must file amended return within statutory period to report changes made to Illinois return). Since it is undisputed that Jane was an Illinois resident throughout 2003, and since Taxpayers elected to file their 2003 Illinois return as married, filing jointly, Taxpayers have waived their right to report, and to have any of their individual incomes realized during 2003 treated, as though John were a part-year resident of Illinois. 35 **ILCS** 5/502(c)(1); Dow Chemical Co., 224 Ill. App. 3d at 267-69, 586 N.E.2d at 519-20.

**Conclusion:**

I recommend that the Director finalize the NOD as issued, with interest to accrue pursuant to statute.

August 3, 2009  
Date

John E. White, Administrative Law Judge