

IT 10-02

Tax Type: Income Tax

Issue: Nonresident Exemption

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

THE DEPARTMENT OF REVENUE)	Docket No.:	00-IT-0000
OF THE STATE OF ILLINOIS)	SSN:	XXX-XX-XXXX
)		
v.)	Tax Years:	2002 and 2003
)		
JOHN DOE,)	Julie-April Montgomery	
Taxpayer.)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Jessica Arong-O'Brien, Ronald Forman and Mehpara Suleman, Special Assistants Attorney General for the Illinois Department of Revenue; Mark N. Senak of Senak, Smith & Michaud, Ltd. on behalf of John Doe.

Synopsis:

The Illinois Department of Revenue ("Department") issued a Notice of Deficiency ("NOD") on December 21, 2007 to John Doe ("Taxpayer") in the amount of \$88,862. The basis of the NOD was the Department's determination that Taxpayer was a resident of Illinois for the 2002 and 2003 tax years. Taxpayer timely protested the NOD and requested a hearing in the matter. The Department and the Taxpayer each proffered testimonial and documentary evidence at the hearing which commenced on June 26, 2009. The parties filed post hearing briefs.¹

The sole issue to be resolved is whether Taxpayer was a resident of Illinois for the tax years 2002 and 2003. January 20, 2009 Pre-Trial Order. Following the submission of all evidence and a review of the record, it is recommended that the NOD be finalized with respect to the 2002 and 2003 tax years. In support thereof, are the following findings of fact and conclusions of law.

¹ The briefs filed by the parties are the Department Brief ("Dept. Br."), Taxpayer's Brief ("TP Br.") and Taxpayer's Reply Brief ("TP RBr.").

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements was established by admission into evidence of the NOD dated December 21, 2007 proposing a deficiency based upon Taxpayer's status as a resident of Illinois for the tax years 2002 and 2003. Dept. Ex. A ("Notice of Deficiency"); Tr. p. 22.
2. Taxpayer was a resident of Illinois for the tax year 2001. Dept. Ex. H ("Auditor's Comments"); Tr. p. 30.
3. Taxpayer owned a condominium at Anywhere Place in Anywhere, Illinois ("Anywhere address") in 2002 and 2003. Dept. Ex. S (quit claim deed); Taxpayer Exhibit Nos. 84 (mortgage commitment), 92 (10/27/03 check and Citimortgage payoff statement), 94 (correspondence and check for payment of 2003 property tax).
4. Taxpayer was employed by ABC Company in 2002. Dept. Ex. L (Taxpayer's 2002 W-2 from ABC Company).
5. ABC Company business was located in Illinois in 2002. *Id.*
6. Taxpayer was employed by XYZ Company ("XYZ") for whom he did work in their Illinois office in 2002 and 2003. Dept. Exs. L (2002 W-2), O (2003 W-2); Tr. pp. 94-101, 671, 973.
7. Taxpayer filed no Florida Intangible Tax returns in 2002 and 2003. Tr. pp. 68-69, 851, 1099, 1104.
8. Taxpayer used the services of an Illinois CPA in 2002 and 2003. Tr. pp. 1095, 1113, 1117-1118.
9. Taxpayer was a partner with a 1.39% interest in XXX, LLC, located in Anywhere, Illinois in 2002. Taxpayer Ex. No. 76 (2002 Federal K-1 Schedule: "Partner's Share of Income, Credits, Deductions, etc.").

10. Taxpayer leased a vacation condominium that he shared with three other individuals in Miami Beach, Florida (“Miami Beach address”) on June 1, 2002. Taxpayer Ex. No. 5 (contract to lease, tenant information “with signatures indicating they have read the contract to lease and agree to the noted terms” document).
11. Taxpayer’s parents have owned and lived in Cocoa Beach, Florida (“Cocoa Beach address”) since 1999. Dept. Ex. H; Tr. pp. 113-114.
12. Taxpayer obtained a Florida driver’s license, on December 26, 2002, listing his parents’ Cocoa Beach address when he surrendered his Illinois driver’s license. Dept. Ex. G (Illinois Secretary of State record regarding Taxpayer); Taxpayer Ex. No. 13 (Florida driver’s license).
13. Taxpayer obtained a Florida voter’s card on December 26, 2002 listing his parents’ Cocoa Beach address. Taxpayer Ex. No. 14 (Florida voter’s card).
14. Taxpayer has and continues to be a member of the Illinois Bar since he first passed the Illinois Bar exam in 1999. Taxpayer Ex. No. 62 (ARDC Record of Taxpayer) Tr. pp. 579, 582, 920.

Conclusions of Law:

Section 904(a)-(b) of the Illinois Income Tax Act, 35 ILCS 5/101 *et seq.* (the “*IITA*”), provides that the admission into evidence of the NOD establishes the Department’s *prima facie* case and is *prima facie* evidence that taxpayer is a resident of Illinois for the years at issue. 35 ILCS 5/904(a)-(b); Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97 (1st Dist. 1981). The Department’s *prima facie* case is a rebuttable presumption. See Branson v. Department of Revenue, 168 Ill. 2d 247, 260

(1995). Once the Department's *prima facie* case is established, the burden of proof is shifted to the taxpayer to establish that the Department determinations are incorrect. *Id.*; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st 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.") A taxpayer must present documentary evidence that is closely associated with his books and records. PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33-34 (1st Dist. 202).

The parties agree that the sole issue in this matter is whether Taxpayer was an Illinois resident for Illinois tax purposes in 2002 and 2003. To establish that one is exempt from Illinois income tax, Taxpayer must present a preponderance of competent evidence showing that he was not an Illinois resident. 5 ILCS 100/10-15.

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). Section 201(a) of the IITA makes it clear that even if a person is not a resident of Illinois, that person may still be liable for Illinois income tax if that person is "earning or receiving income in [Illinois]." *Id.* Taxpayer must present books and records to overcome the Department's presumptively correct determinations. Branson at 260; PPG at 33-34; Mel-Park Drugs, Inc. at 217.

The Department introduced the NOD under the certificate of the Director, and as such, Taxpayer bears the burden to establish, by a preponderance of competent evidence, that the Department's determination that he was a resident of Illinois for the years 2002 and 2003 was not correct. PPG at 33-34.

The parties' briefs focus on whether the evidence shows Taxpayer changed his domicile from Illinois to Florida. Section 100.3020 of the IITA regulations (the "Regulation") on residency defines a "domicile" 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." 86 Ill. Admin. Code, Sec. 100.3020(d). The parties agree that subsection (d) of the Regulation states that "if an individual has acquired a domicile at one place, he retains that domicile until he acquires another elsewhere." Dept. Br. p. 11; TP Br. p. 13. Clearly, a taxpayer remains an Illinois domiciliary, and is, therefore, an Illinois resident, until he establishes a new domicile in some other state. In addition, the parties agree the Regulation's subsection (d) also provides that an individual who is domiciled in Illinois can only give up his domicile, pursuant to this Regulation, by "locating elsewhere with the intention of establishing the new location as his domicile, and by abandoning any intention of returning to Illinois." Dept. Br. 12; TP Br. p. 13. Lastly the parties agree that subsection (g) of the Regulation enunciates factors, that, while not conclusive, are probative in weighing whether one has, in fact, overcome the presumption of Illinois residence. Dept. Br. p. 12; TP Br. p. 14.

The Regulation's tests for determining whether an individual taxpayer has changed his domicile from Illinois to another place are 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 (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. 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.

The parties agree that intent is the critical factor in a determination of residency and that this factor is evaluated by a person's acts. Dept. Br. p. 12; TP Br. p. 15. Affirmative acts are required to prove abandonment of an Illinois residence. Hughes v. Illinois Public Aid Commission, 2 Ill. 2d 374, 380-381 (1954). When an Illinois residency has been established, such residency is presumed to continue until the contrary is proven and the burden of proof rests with the party claiming the residency change. In re Estate of Jackson, 48 Ill. App. 3d 1035, 1038 (1977).

The factors of the Regulation as well as additional factors were argued by the parties as determinative of whether Taxpayer overcame the presumption of the Illinois residency he admitted he had in 2001 (tr. p. 30) and substantiated when he filed his 2001 tax return. Dept Ex. H.

Status of Taxpayer in 2002

Driver's license and voter's registration

Taxpayer established that he obtained both a Florida driver's license and Florida voter's registration card using his parents' Cocoa Beach address on December 26, 2002. Taxpayer Ex. Nos. 13, 14. But this address is contrary to Taxpayer's testimony that he moved to a Miami Beach address in June 1, 2002. Tr. p. 172. The Miami Beach address,

however, was established by the lease as a vacation rental. Taxpayer Ex. No. 5.

Club and/organizational memberships and participation

Taxpayer did not establish that he had any Florida club or organizational memberships in 2002.

Filing an income tax return as resident of another state

Taxpayer and his CPA testified (tr. pp. 851, 1102) that under Florida law, the only tax return Taxpayer could have been required to file would have been the Florida Intangible Tax return which taxes, as of January 1, a Florida resident on the intangible assets that he owns, manages or controls as of January 1. Fla. Stat. Ch. 199, sec. 199.012. Taxpayer testified that he did not intend to move to Florida until March 2002 (tr. p. 682-682) so that he would not have been subject to Florida's Intangible Tax and did not file this return. Taxpayer did, however, file a 2002 Illinois income tax return, as a non-resident, on or about October 14, 2003, wherein he left question 6 of the Schedule NR blank that asked him to list other states in which he had either "earned income or filed an income tax return." Dept. Ex. L (Taxpayer's 2002 Schedule NR). Florida was not listed. Taxpayer's failure to not list Florida on the Schedule NR stands as his acknowledgement that he did not earn income in Florida.

Home ownership or rental agreements

The only documentary evidence of a Florida domicile that Taxpayer submitted was a vacation condominium lease that he shared with three other individuals having a Miami Beach address which Taxpayer admits was not only his residence (Dept. Ex. Q, Taxpayer's August 1, 2006 letter to Department) but argues was rented in part to establish a trading business. TP RBr. pp. 14-15. No documentation, however, was

presented to substantiate the conduct of such business activities at this address. While one of Taxpayer's 2002 W-2 (Dept. Ex. L) had a Florida address, the record also reflects that Taxpayer had ownership in an Illinois address at the time and Taxpayer had another 2002 W-2 listing that Illinois address. Dept. Exs. L, S; Taxpayer Ex. Nos. 84, 92, 94. While Taxpayer presented his testimony of his intent to abandon his Illinois domicile/residence (tr. p. 917), he presented no documentation that reflected actual abandonment such as moving receipts, cancelation/conclusion of a lease for a residence or the sale of a residence in Illinois.

Telephone and/or utility usage over a duration of time

Taxpayer argues that he established telephone service at the Miami Beach address by two Sprint phone bills that were mailed to Taxpayer at the Miami Beach address. TP Br. p. 36. No phone number, however, is listed on the bills submitted so that one could discern whether or not Florida telephone service was established. Taxpayer Ex. No. 8. It is not unreasonable to conclude that these bills were for cellular/mobile phone service. In addition, the record is clear that Taxpayer did not show any other utility bills that would establish a Florida domicile.

Location of doctors, dentists, accountants and attorneys

Taxpayer acknowledges that he continued to use the services of an Illinois CPA and the Goldman Sachs office located in Illinois based upon long standing relationships. TP RBr. p. 18. While the testimony does not clearly establish how the business relationship with the CPA commenced, the Illinois CPA testified that his business relationship with Taxpayer did not commence until mid 2001, and this Illinois CPA testified that he was not the accountant who prepared Taxpayer's 2001 returns. Tr. pp.

1112-1113. In fact, the documentary evidence shows the transaction of business between Taxpayer and this CPA occurred in Illinois in 2002. Taxpayer Ex. Nos. 11A, 11B (trust documents notarized by an Illinois notary that Taxpayer admits were executed in Illinois); TP RBr. p. 23.

Bank accounts

While the Department acknowledges Taxpayer closed one of his Illinois bank accounts in 2002 (tr. p. 307) the record is absent documentary evidence that Taxpayer closed his other Illinois bank accounts in 2002. The record shows that: 1) Taxpayer had other bank accounts in Illinois (tr. p. 130), 2) he also had a Florida bank account (TP Ex. Nos. 6, 9), 3) his bank accounts were accessible on-line (tr. pp. 130, 310), and 4) his banks, be they in Illinois or Florida, had branches in Illinois, Florida and elsewhere (tr. pp. 130). Thus, Taxpayer's submission of bank accounts to reflect his domicile is inconclusive.

Mailing address

The record reflects Taxpayer did receive some mail at the Miami Beach address in 2002. Taxpayer Ex. Nos. 3 (4/1/02 401(k) statement), 6 (6/19/02 bank statement), 7 (3 bi-weekly check summary statements), 8 (2 Sprint bills), 10 (12/2/02 Department letter). The amount of correspondence seems meager not only for the tax year but when compared to Taxpayer's assertion that there is a "volume of correspondence" (TP Br. p. 37) and "large number of correspondence" that was addressed to him in Florida (TP RBr. p. 19) for 2002.

Taxpayer's 1099 income

Taxpayer testified that his 1099 income was earned as a result of work as an

independent contractor for Illinois businessman ABC Company. Tr. pp. 658-659. Taxpayer argues that he was a Florida resident (tr. p. 661) while working for this Illinois businessman, but Taxpayer submitted no documentary evidence of his alleged independent contractor relationship with ABC nor did Taxpayer present documentary evidence as to where this income was earned. In fact, the documentary evidence of Taxpayer's 2002 employment for ABC Company was a W-2 that withheld Illinois income tax. Dept. Ex. L.

Trusts/Partnership

In December 2002 Taxpayer established two trusts which identified him as being "of Miami Beach, Florida," which he argues as relevant to prove his intent to establish Florida residency (TP RBr. p. 22). Within a matter of a few weeks, Taxpayer also obtained a Florida driver's license and voter's registration card which listed his parents' Cocoa Beach address. These Florida addresses do not establish residency, so much as serve as vehicles for estate planning and tax reduction as Taxpayer and his Illinois CPA testified. Tr. pp. 66-67, 1102. While use of a Florida residence may be good for Florida tax and estate planning purposes, use of Florida law is not definitive on the legal issue of one's residency.

Business ties

Taxpayer argues his documented partnership interest in XXX, an Illinois business (Taxpayer Ex. No. 76), was as a passive investor with a 1.39% interest and should be discounted in favor of Taxpayer's undocumented involvement in the management of Doe Capital, LLP ("Doe Capital") which was created on December 16, 2002 with its registered office in Delaware. Taxpayer Ex. No. 12. The record reflects no

documentation such as credit card bills, sales contracts or any other receipts to reflect Taxpayer's involvement as an active participant in Doe Capital, which only existed for a couple of weeks in 2002.

Taxpayer's documented work for Illinois businessman ABC Company (who had a Chicago office) and the Chicago office of XYZ, both of which withheld Illinois income tax from Taxpayer in 2002 (Dept. Ex. L, 2002 W-2 from ABC Company; Taxpayer Ex. Nos. 7, XYZ paycheck summaries, 15, 2002 W-2 from XYZ), along with Taxpayer's testimony that after February 28, 2002 he made 20 to 30 trips to Illinois for work that lasted from 1 day to a week (tr. p. 94-101), tilt in favor of Taxpayer's documented business ties with Illinois and weigh in favor of the Department's position that this Taxpayer did not abandon his Illinois residency in 2002.

Florida residency

Taxpayer argues that he satisfies Florida's definition of resident. TP Br. pp.40-41. Florida law is irrelevant. But even if Florida law did apply, Taxpayer's assertion on this point is incorrect. Taxpayer lists nine factors that Florida considers in support of his argument. Fla. Stat. ch. 196, sec. 196.015.

First, is a "valid Florida driver's license...or valid Florida identification card...and evidence of relinquishment of driver's licenses from any other states." TP Br. p. 40. Taxpayer did not provide evidence of a Florida identification card for 2002 and the Florida driver's license was obtained in late December 2002 for an address Taxpayer claimed to have moved away from six months prior – his parents' Cocoa Beach address. Tr. p. 172.

Second, is "[p]roof of voter registration in Florida matching the address of the

physical location where the exemption is being sought.” *Id.* at 41. Taxpayer’s voter’s registration card, obtained on December 26, 2002, also lists his parent’s Cocoa Beach address, an address he testified he was not at during this time.

Third, is “formal declaration of domicile by the applicant recorded in the public records of the county in which exemption is being sought.” *Id.* Florida’s Homestead and Exemptions Act states a person can show intent to establish a Florida domicile by filing a sworn Declaration of Domicile with the clerk of the circuit court. Fla. Stat. ch. 222, sec. 222.17. Taxpayer is a lawyer who has passed four bar exams and been admitted to two state bars. Tr. pp. 26, 577, 580-581. Taxpayer’s Illinois CPA has testified that he has Florida clients and knowledge of Florida tax law, which includes residency aspects. Tr. p. 1090, 1092-1094. The Illinois CPA also testified that he referred Taxpayer to a very knowledgeable attorney to assist in establishment of Taxpayer becoming a Florida resident. Tr. p. 1099. Certainly, one if not all three of these individuals should have been aware of this document in 2002 when they began their work to ensure Taxpayer became a Florida resident. However, no such declaration or recordation was shown to have occurred in 2002.

Fourth, is “place of employment of applicant.” *Id.* Taxpayer, in May 2002, gives Stafford Trading, a Chicago business, and this employer’s Chicago address and telephone number on the contract for lease of the Miami Beach address. A lease that commenced months after Taxpayer testified he was no longer working for such employer because the business ceased to exist. Taxpayer Ex. No. 5; Tr. pp. 107-108, 140.

Fifth is “address as listed on federal income tax returns filed.” TP Br. p. 41. No federal income tax return for 2002 was proffered, only one 2002 Schedule C: Profit or

Loss from Business which gives Taxpayer, as a consultant, the business address of “Anywhere, IL”. Taxpayer Ex. No. 71.

Sixth, is “location where applicant’s bank statements and checking accounts are registered.” TP Br. p. 41. For 2002, two checks on a Florida bank and one Florida bank statement were submitted but documentation regarding Taxpayer’s other bank accounts (tr. p. 130) was not proffered regarding where such accounts were registered or statements sent in 2002, save one in Illinois which Taxpayer testified he closed in 2002. Tr. pp. 86-87; TP RBr. p. 17.

Seventh, is “[p]roof of payment for utilities at the property which permanent residency is being claimed.” TP Br. p. 41. Taxpayer produced no documentary evidence that he established service for or paid for utilities at the Miami Beach address or any other Florida address.

Eight, is “[i]nformal statement regarding residency.” *Id.* Both Taxpayer and his Illinois CPA testified to Taxpayer’s intent to become a resident of Florida. Tr. pp. 917, 1098.

Ninth, is “[p]reviously filed Florida intangible tax returns.” *Id.* No such return was filed for 2002.

The Department presented a *prima facie* case for the tax year 2002. In light of the above, it is clear that in 2002, Taxpayer failed to either introduce legally sufficient evidence to overcome the Department’s *prima facie* case or establish himself as a Florida resident, pursuant to Florida law, with a Florida domicile.

Status of Taxpayer in 2003

Driver's license and voter's registration

As previously discussed, in December of 2002 Taxpayer obtained a Florida driver's license and voter registration card for his parents' Cocoa Beach address while Taxpayer was still under a lease for the Miami Beach address. Taxpayer Ex. No. 5. In fact, Taxpayer testified he not only renewed the lease for a different unit he shared with others at the Miami Beach address in May, 2003 but maintained a lease at the Miami Beach address from June 1, 2002 to well beyond the audit period into 2009. *Id.*; Tr. pp. 173-175. Moreover, the record reflects that Taxpayer sent a change of address notice to the Internal Revenue Service on August 14, 2003 to change his address from the Miami Beach address to the Cocoa Beach address. Taxpayer Ex. Nos. 22-23. Taxpayer's CPA testified Taxpayer's address for tax purposes was the Cocoa Beach address. Tr. p. 1110.

The record also reflects that in September and October of 2003 Taxpayer sent out notices that asked those contacted change their records to reflect the Downtown Chicago address for Taxpayer. Taxpayer Ex. Nos. 86, 86A, 87, 92. In addition, the record reflects Taxpayer had ownership of a Chicago residence at this same time. Dept. Ex. S; Taxpayer Ex. Nos. 84, 92, 94. Taxpayer's simultaneous use/ownership of these various Florida and Illinois addresses make it questionable as to whether the obtainment of a Florida license and voter's registration card can be deemed sufficient evidence of a clear abandonment of Taxpayer's Illinois residency or even the establishment of a Florida domicile at the Cocoa Beach address.

Club and/organizational memberships and participation

Taxpayer testified he was a member of St. Patrick's church in Miami Beach. Tr.

p. 707. Taxpayer submitted three supporting documents: 1) a check, payable to “Archbishop’s Charities (ABCD)”;

2) a pledge to “Archdiocese of Miami, 9401 Biscayne Boulevard, Miami, Florida”; and 3) a thank you letter from the “National Religious Retirement Office” in Washington, D.C. for a donation to such Office. Taxpayer Ex. Nos. 25, 27. These documents do not establish a clear link between Taxpayer and Miami Beach’s St. Patrick’s church. The documents only establish financial support of a national (in one instance) and city (in another instance) Catholic endeavor.

In addition, Taxpayer submitted a “Club Portofino Renter” card. Taxpayer Ex. No. 20. This card is scant evidence of a tie to Florida when one considers Taxpayer’s association with this club is due to his lease of a vacation condominium which Taxpayer testified was offered as a benefit of such lease. Tr. pp. 690-691.

Filing an income tax return as resident of another state

Taxpayer filed an Illinois return as a nonresident which lists no other state such as Florida as where he “earned income.” Dept. Ex. M (Taxpayer’s 2003 Schedule NR). Taxpayer did not file any Florida tax documents. Taxpayer’s Illinois CPA testified that Taxpayer was not subject to Florida’s Intangible Tax because Taxpayer transferred his assets to a trust. However, Taxpayer submitted no documents as to whether the \$11 million capital contribution asserted to have been placed in the trust in 2002 was all money (not subject to Florida tax) versus stocks, bonds, notes, accounts receivables, etc. (which are subject to Florida tax) pursuant to Florida Statute, Chapter 199 *et seq.*, to substantiate Taxpayer’s claim that he was not liable for this tax in 2003. Tr. pp. 1105-1106.

Home ownership or rental agreements

Taxpayer testified that since April 2003 his domicile had been at his parents' Cocoa Beach address. Tr. p. 154. He claims to have had two residences in 2003, one at the Cocoa Beach address and another at the Miami Beach address with only scant documentary support. Tr. pp. 152-155. During the same tax year, 2003, Taxpayer also used Illinois addresses. Taxpayer proffered correspondence, dated in 2003, which not only listed Anywhere, Illinois under Taxpayer's name in the letterhead. Taxpayer Ex. Nos. 86, 86A, 87, 89-95. Furthermore, this correspondence gave a "312" Chicago telephone exchange as "home" phone number and specifically stated such phone number and address were to be used to contact Taxpayer. *Id.* In addition, Taxpayer had another Illinois address in which he had an ownership interest during this time. Dept. Ex. S. Such evidence makes it difficult to accept Taxpayer's position that he abandoned his Illinois domicile.

Telephone and/or utility usage over a duration of time

No documentary evidence of phone or other utility service was presented for this period.

Location of doctors, dentists, accountants and attorneys

Only a letter from the Illinois CPA billing for services rendered for 12/29/03 - 11/23/04 was presented. Taxpayer Ex. No. 31. Otherwise no other documentary evidence was posited for the 2003 year.

Bank accounts

Taxpayer admits that he "had active bank accounts in both Illinois and Florida during the entire audit period." TP RBr. p. 17. Thus, this evidence is inconclusive as to

Taxpayer's domicile.

Mailing address

For 2003, the record reflects ten pieces of correspondence that list a Chicago address for Taxpayer (Taxpayer Ex. Nos. 85-87, 89-93, 95-96) and three pieces of correspondence listing either the Cocoa Beach address or Miami Beach address for Taxpayer. Taxpayer Ex. Nos. 18, 26-27. A majority of the Chicago correspondence relates to communication and activities associated with the Chicago address. The Florida correspondence entails letters from the Department, the Internal Revenue Service and an acknowledgement of a charitable contribution. This evidence does not establish a Florida domicile, nor does it support abandonment of an Illinois domicile.

Trusts/Partnership

Essentially nothing new was presented with regard to the trusts and partnerships for 2003, save three Goldman Sachs statements (Taxpayer Ex. Nos. 16- 17, 28) reflecting monies earned and a shares trade to Doe Capital.

Business ties

The documentary evidence on this point is unchanged for 2003.

Florida residency

No new documentation was presented for 2003 by Taxpayer, and as such, his claim to have established himself to be a Florida resident and have abandoned Illinois is the same as stated for 2002 – inconclusive, at best.

To summarize, Taxpayer's residency claims for 2002 and 2003 are based mostly upon undocumented testimony alleging he was an independent contractor with a consulting business in Florida, closed some of his Illinois bank accounts, was not

obligated to file a Florida Intangible Tax return because assets were transferred to a trust, and he moved from Illinois to Florida. There is also conflicting documentary evidence with regard to Taxpayer's residence/domicile and the addresses that he utilized for receipt of his mail. The few documented acts, such as a Florida driver's license, Florida voter's registration card, and a vacation condominium club card, when weighed against Taxpayer's lack of documentation to support his testimony and the conflicting evidence, do not clearly establish that Taxpayer intended to create a Florida domicile/residence. Sufficient competent evidence does not exist to establish that Taxpayer intended to make Florida his domicile. More importantly, competent evidence does not exist in the record to reflect that Taxpayer abandoned his Illinois domicile.

Taxpayer's Declaration of Florida Domicile

Taxpayer argues that his 2007 Florida Declaration of Domicile ("Declaration") (Taxpayer Ex. No. 48) may not be considered because this Administrative Law Judge ruled evidence outside the audit period was inadmissible. TP RBr. P. 20. This is both incorrect and contrary to the record. Evidence relevant to Taxpayer's residency for the tax years 2002 and 2003 was found admissible whether the evidence reflected acts that occurred during or outside the tax years at issue. Tr. pp. 21-22. In fact, Taxpayer submitted evidence that was outside of the tax years at issue, including the Declaration.²

Taxpayer moved for the admission into evidence of the Declaration without restriction in its use. Tr. p. 899. The Declaration was admitted and clearly manifests Taxpayer's intention to create his domicile in Florida in 2007. Taxpayer, however, made no such declaration with respect to the tax years currently at issue.

² Examples of Taxpayer evidence outside of the tax years at issue that were admitted include the 11/23/04 letter of billing from his CPA, his 2004-2006 lease of a Chicago apartment, his 2009 ARDC record and 1998 mortgage loan commitment for the Chicago address. Taxpayer Ex. Nos. 31, 32, 62, 84.

Was Taxpayer Absent from Illinois for Other than Temporary or Transitory Purposes

The parties' briefs focused on whether the evidence shows Taxpayer changed his domicile from Illinois to Florida. Thus, the parties gave limited, and little argument was made, regarding whether Taxpayer's absence from Illinois was for other than temporary and transitory purposes.

The Regulation provides:

- a) General definition. The term "resident" is defined in IITA Section 1501(a)(20) to mean:
 - 1) An individual who is in Illinois for other than a temporary or transitory purpose during the taxable year or who is domiciled in Illinois but is absent from Illinois for a temporary or transitory purpose during the taxable year;

- b) Individuals....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 an individual is domiciled in Illinois, he remains a resident unless he is outside Illinois for other than temporary or transitory purposes.
- 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....If...an individual 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...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. 86 Ill. Admin. Code, Sec. 100.3020 (a)-(c).

Subsection (c) of the Regulation sets forth the Department's description of the types of purposes that it will consider to be temporary or transitory as well as those that

are not. While this subsection (c) describes these purposes in terms of whether an individual is inside Illinois, the Regulation does not imply that the Department intends to interpret the statutory phrase differently depending upon whether the 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. The part of the Regulation most relevant to the current matter is the statement that if an individual is present in Illinois “for 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, Sec. 100.3020(c).

Taxpayer alleges that he spent most of his time in Florida, except for business trips. TP RBr. 10. No documentation to substantiate the amount of time Taxpayer spent in Florida was posited. Taxpayer also alleges that he “maintained abodes in Miami Beach and Cocoa Beach, the state of his new domicile, and where he lived for the majority of the year.” *Id.* Taxpayer presented no documentation to support that he lived the majority of the 2002 and 2003 years in Florida. As previously discussed, Taxpayer has not established Florida as his new domicile.

Lastly, Taxpayer argues his “absence from Florida and his presence in Illinois was for temporary or transitory business purposes.” *Id.* However, Taxpayer has not

established he had a Florida domicile/residency or a business in Florida. To the contrary, Taxpayer testified that he was a resident of Illinois in 2001 (tr. p. 30) and was constantly in Illinois to work for his employer in 2002 and 2003. Dept. Exs. L, M.; Tr. pp. 94-101.

The Department argues that because Taxpayer was “employed in a position in Illinois that may have lasted permanently or indefinitely” (Dept. Br. p. 24) Taxpayer had to be in Illinois for other than temporary or transitory purposes pursuant to the Regulation. *Id.* The Department is correct.

Taxpayer testified that he was regularly in Illinois for work in 2002 and 2003 and that it was in his best interest to ensure a profitable operation. Tr. p. 976. Taxpayer testified that he was an employee of XYZ (tr. pp. 671, 973) and so long as he remained their employee he had the right to 24 million Class B units (tr. p. 669) that “would receive potential profits if the company made profits in the future” (tr. 669) because of the “back end” return on the investment seeking a 20% return. Tr. p. 671. Taxpayer further testified that “After they got their 20 percent return, over the next 51 months, over those...then the additional profit would go to the unit holders at some sort of basis of – the Class B unit holders [such as him would] get paid.” Tr. p. 671. Taxpayer admits to being in Illinois for business purposes that not only would have required a long or indefinite period to accomplish but that he was employed in a position that may have lasted permanently or indefinitely. The record reflects that Taxpayer’s time in Florida was either at his parents’ home or the shared vacation leased condominium. In addition Taxpayer testified that he was outside of Illinois to set up trading operations for ABC Company in 2002 and 2003. Tr. pp. 654-655, 658-659. Thus, it is reasonable to conclude that Taxpayer was an Illinois resident who was in Illinois for business purposes

which were other than temporary or transitory and when he was absent from Illinois it was for temporary or transitory purposes.

New Arguments

Taxpayer, in his post-trial briefs and for the first time, raised two new arguments. The first is that the NOD was barred by the statute of limitations. The second new argument is that he has been denied due process. TP Br. pp. 2, 16-17; TP Reply Br. pp. 23-24. The Department response is that Taxpayer waived these arguments when he failed to have them included in the pre-trial order. Dept. Br. pp. 25-26.

Department regulations state that “[n]o party shall have the right to file any supporting argument not contemplated by order without obtaining leave.” 86 Ill. Admin Code, Sec. 200.155(g). These arguments were not part of the parties’ January 20, 2009 pre-trial order which established the issue relevant to these proceedings. While these arguments are deemed not properly a part of these proceedings, the record clearly reflects that no violation of the statute of limitations occurred and it cannot be said that the record reflects that Taxpayer has been denied due process.

Taxpayer alleges that the NOD was barred by section 906 of the IITA because the NOD represents “a second notice of deficiency for the same tax years” that was issued subsequent to Taxpayer’s receipt of a refund. TP Br. p. 16. Such an allegation is without merit.

Section 906 of the IITA provides:

If a protest has been filed with respect to notice of deficiency issued by the Department with respect to a taxable year, and the decision of the Department on such protest has become final, the Department shall be barred from issuing a further or additional notice of deficiency for such taxable year, except in the case of fraud, mathematical

error, a return that is not considered processable. 35 ILCS 5/906.

Section 908 of the IITA also provides:

(a) Time for protest. Within 60 days ... after issuance of a notice of deficiency, the taxpayer may file with the Department a written protest

(d) Finality of decision. The action of the Department on the taxpayer's protest shall become final:
(1) 30 days after issuance of a notice. 25 ILCS 5/908 (a), (d).

Taxpayer states that “[u]pon receipt of the first correspondence from the IDOR on May 15, 2006 [Taxpayer] vehemently protested the claim that he was an Illinois resident.” TP Br. p. 16. Taxpayer acknowledges that he received a Notice of Proposed Deficiency (Taxpayer Ex. No. 44) dated June 16, 2006 which afforded him the opportunity to participate in the Informal Conference Board (“ICB”) process to resolve the matter. TP Br. pp. 8-9. Taxpayer also admits that he agreed to toll the statute of limitations for issuance of the NOD for 180 days after the ICB decision. *Id.* On November 20, 2006, Taxpayer received the Department’s “Illinois Taxpayer Notification” letter with a refund of his 2003 taxes. TP Ex. No. 46. Taxpayer was later informed that receipt of the refund check was a mistake. Tr. pp. 451, 485-486; TP Br. p. 10.

Taxpayer argues that the 2003 refund represents a final decision pursuant to section 906 of the IITA. This is incorrect. Section 906 requires a protest be filed with respect to a notice of deficiency, not a **proposed** notice of deficiency. In addition, the record does not reflect the filing of a written protest as proscribed by Department regulations to a matter other than the NOD at issue. 35 ILCS 5/908(a); *see* 86 Ill. Admin.

Code Sec. 200.120(b). Moreover, the correspondence that accompanied the refund does not state that the refund was the result of either a protested matter or a final decision. Lastly, Taxpayer admits he agreed to toll the statute of limitations for issuance of the NOD until 180 days after a decision by the ICB and the record gives no indication that the NOD was not issued within the 180 day period.

Notwithstanding that Taxpayer is prohibited by Department regulation from raising this statute of limitations argument, it is clear that no violation has occurred.

Taxpayer's next argument is his belief that the Department "violated the fundamental concepts of due process" because of the Department's changes in the "factual basis for the claims against" him. TP Br. p. 45. Taxpayer argues that the result of such changes was inadequate notice so that "he could develop evidence to respond to the new charges." *Id.*

The NOD clearly stated its basis as being a determination that Taxpayer's "correct residency status to be full year resident for all taxable years." Dept. Ex. A. Certainly this language completely encompasses the years at issue, which are stated on the NOD.

Taxpayer avers that upon receipt of a refund of his taxes for the year 2003 on November 20, 2006 he ceased his efforts to locate documents and secure witnesses that would refute the Department's position that he was an Illinois resident in 2002 and 2003. TP Br. p. 48. While Taxpayer may have believed that receipt of a refund for his 2003 taxes resolved the matter for the year 2003, no basis exists or claim has been asserted by Taxpayer that a resolution of his residency status for the year 2002 was made.

Taxpayer also admits he received a notice in February 2007 to attend an ICB Board hearing regarding his residency status for 2002 and 2003. TP Br. pp. 46-47. Such

a notice makes it very clear that the matter was not resolved and that he would still need to secure documents and witnesses in support of his position.

In addition, when Taxpayer attended the ICB hearing and was informed his 2003 refund was a mistake, more than two years before the current evidentiary hearing, Taxpayer had ample time to garner his evidence.

Due process requires only a fair hearing and an opportunity to be heard. *See Scott v. Department of Commerce & Community Affairs*, 84 Ill. 2d 42 (1981). Taxpayer has not challenged the fairness of the hearing and has availed himself of the opportunity to be heard through his presentation of his witnesses and countless documents.

The issue all along has been Taxpayer's residency for the tax years 2002 and 2003. Taxpayer, an Illinois licensed attorney, made decisions with the advice and assistance of counsel regarding his tactics, timing, theory and presentation of documents and witnesses regarding his stance on his residency status for the years at issue. To argue that the actions of the Department deterred him from garnering the documents and witnesses he would need to support his residency claims is disingenuous.

Recommendation:

For the reasons stated above, it is recommended that the NOD should be finalized for the 2002 and 2003 tax years, with interest to accrue pursuant to statute.

February 25, 2010
Date

Julie-April Montgomery
Administrative Law Judge