

A12-0499

STATE OF MINNESOTA

IN SUPREME COURT

Kenneth B. Mauer,

Relator,

v.

Commissioner of Revenue,

Respondent.

RELATOR'S REPLY BRIEF

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ARGUMENT

MAUER BECAME A FLORIDA DOMICILIARY IN JULY 2003 AND REMAINED SO THEREAFTER.

Respondent's Brief sets into relief several critical sub-issues in this case.

A. The Commissioner's Unprincipled Interpretive Practice Effectively Renders Unascertainable The Meaning Of The Residency Rule.

Not long ago, when defending the Residency Rule against a due process vagueness challenge, the Commissioner asserted "that the rule's application is governed by 'common sense.'" *State v. Enyeart*, 676 N.W.2d 311, 321 (Minn. Ct. App. 2004). Relator does *not* contend the Rule is unconstitutionally vague. Instead, he submits that the Commissioner's unprincipled interpretive practice effectively renders it so. This Court should interpret the Rule to ensure that its application truly is governed by "common sense," so it can guide citizens who consult and seek to follow it.

It is undisputed that, before moving to Fort Myers, Mauer obtained the Department's Residency publication and consulted with Accountant Michael Deegan. (T.11-12, 25-26, 141-42, 196-97); Ex. 72. After minimizing the numerous measures Mauer actually took to establish Florida as his domicile based on Deegan's advice, Resp.'s Br. at 30 n.20, the Commissioner smugly suggests several *other* measures Mauer *should have taken*. Resp.'s Br. at 40-41. This response is revealing for two reasons.

First, it recognizes that Minnesota law allows a present domiciliary to consciously arrange his affairs so as to become the domiciliary of another jurisdiction. Although domicile changes commonly involve the sale of a Minnesota residence and the purchase of one elsewhere, some people either cannot or need not sell in order to buy. A person

maintaining abodes and physical presence in two jurisdiction *must* thoughtfully arrange his affairs for state-tax purposes, particularly as to matters manifesting intent with respect to domicile, for subjective intent is critical in such cases. *E.g., Page v. Comm’r of Revenue*, 1986 WL 15695, at *6 (Minn. T.C. Mar. 12, 1986) (so noting).

Mauer’s concern to establish Florida as his domicile was legitimate, conscientious, and fully contemplated by Minnesota law. In addition, the very existence of the 183-Day Rule makes plain that Mauer’s continued ownership of a Minnesota abode did not *entail* Minnesota residency, so long as Mauer spent fewer than 183 days per year in Minnesota.

Second, the Commissioner’s response typifies his mercenary use of the Rule’s 26 factors. Prior cases verify that the Commissioner routinely minimizes the measures a taxpayer actually takes to establish domicile elsewhere, then asks courts to place particular emphasis on measures the taxpayer did *not* take. In one case, for example, “[t]he Commissioner stressed ... that [the taxpayer] did not change his Minnesota driver’s license during the period at issue.” *Syfco v. Comm’r of Revenue*, 1987 WL 5138, at *6 (Minn. T.C. Feb. 11, 1987). Here, rather than *stressing* the driver’s license factor—which favors Florida domicile—the Commissioner minimizes it. Resp.’s Br. at 30 n.20.

In *Page*, likewise, “[the Commissioner] argue[d] that the homestead status of appellants’ Minneapolis house [was] inconsistent with an intent to move to Illinois.” *Page*, 1986 WL 15695, at *7. Here again, in a case where the homestead factor favors a Florida domicile, the Commissioner minimizes that factor.

The tax court’s interpretive practice is no better. *See Relator’s Opening Br.* at 33-40. The court placed great emphasis, for example, on the fact that—in addition to

opening a Florida bank account in 2003—Mauer kept two pre-existing Minnesota accounts. Add. at 23, 28. In a previous decision, however, the Tax Court commented: “Continuing an established banking relationship and simple convenience are not conclusive of an intent to remain attached to a state as a resident.” *Syeco*, 1987 WL 5138, at *6. Here, the Tax Court neither distinguishes nor even cites *Syeco*. Why is the maintenance of existing bank accounts so important in *Mauer*, but unimportant in *Syeco*? The court does not say. Nor, in emphasizing this same fact, does the Commissioner. Resp.’s Br. at 26-27.

Relator submits that an interpretive practice which permits the Commissioner and the lower courts to arbitrarily emphasize particular facts or factors—rather than fairly evaluating the evidence as a whole—is inherently unfair. It also renders the Residency Rule incapable of guiding the prospective decisions of taxpayers, who have no choice but to consult and apply the Rule in arranging their future affairs.

B. The Court Should Clarify That Proper Application Of The Residency Rule Depends Upon The Totality of Circumstances, And That The Commissioner And The Lower Courts Must Consider All Relevant Circumstances When Determining Domicile.

Relator does *not* contend that the Commissioner may not consider or cite facts that favor a finding of Minnesota domicile. However, rather than cherry-picking such facts and ignoring all others, the Commissioner and the lower courts must fairly consider all facts relevant to domicile, including those which bear on the 26 factors.

The Rule provides that intent with respect to domicile “may be proved by acts and declarations,” and that the 26 factors “will be considered in determining whether or not a

person is domiciled in this state.” Add. at 42. It also provides, however, that “[n]o positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile” *Id.* Accordingly, *all* evidence relevant to intent must be considered.¹ Finally, the Rule specifies that “[a]ny one of the items listed above will not, by itself, determine domicile.” Add. at 43. Again, myopic focus upon the individual tree must yield to a panoramic view of the entire forest.

This Court should hold that proper application of the Residency Rule depends upon the totality of circumstances, and that the Commissioner and the lower courts must consider all relevant circumstances when determining domicile. It should further hold that domicile determinations must be based upon the evidence as a whole, and that particular facts or factors may not arbitrarily be afforded disproportionate weight.

C. Relator’s Case Has Never Been Considered In Accordance With The Foregoing Principles.

Neither the Commissioner nor the Tax Court decided Relator’s case in accordance with the foregoing principles. The audit was plainly written as an advocacy piece. Whenever a factor favored Minnesota domicile, the auditor freely enlarged upon it. *See, e.g.,* Ex. 39 at 19-20 (discussing factors F, G and M). As a representative of the Commissioner admitted at trial, however, factors clearly favoring Florida domicile received no symmetrical comment. (T.315-17). And, as Relator has already noted, the

¹ *See Page*, 1986 WL 15695, at *7 (noting that court “must look at the overall picture presented to determine the taxpayers’ intent”); *Sarek v. Comm’r of Revenue*, 1979 WL 1107, at *5 (Minn. T.C. Apr. 19, 1979) (noting with respect to intent that “all the facts of a particular case must be taken into account”) (court’s emphasis). *Cf. also Dreyling v. Comm’r of Revenue*, 711 N.W.2d 491, 496 (Minn. 2006) (addressing domicile issue by “[t]aking the factors under Rule 8001.0300, subp. 3, as a whole”).

auditor's written conclusion that Mauer remained a Minnesota domiciliary is based exclusively upon Factor W, with which she improperly trumped all other considerations. *See* Ex. 39 at 24-25. The Commissioner's Notice of Determination on Administrative Appeal essentially recapitulates this pattern. *See* Ex. 41 at 4-5.

Once litigation began in the Tax Court, the Commissioner's discovery unearthed: (a) the documentation of Mauer's residency dispute with the NBA; and (b) the numerous documents Mauer submitted to the League indicating that he now considered Florida as his domicile. *See* Relator's Opening Br. at 22-24, 37-38. Thus, the Tax Court was presented with broader and deeper evidence of Mauer's intent to reside in Florida than had been the Commissioner. The Tax Court, however, refused to acknowledge the plain import of this evidence even though it was based on stipulated exhibits, and even though the Commissioner's discovery of the evidence essentially guaranteed its reliability. *See* Relator's Opening Br. at 37-38.

D. The Court Should Not Decide Whether Mauer Was A Non-Domiciliary Resident In 2003 Because The Lower Court Did Not Reach That Issue.

Because the Tax Court resolved this residency case on the basis of domicile, it did not reach the Commissioner's alternative argument that Mauer was a non-domiciliary resident for tax-year 2003. The Commissioner nevertheless urges the Court to decide that issue. *Resp.'s Br.* at 41. The Court should decline this invitation.

Briefly, Minnesota law defines "resident" to include "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota." Minn. Stat. § 290.01, subd. 7(b). "The

term ‘abode’ means a dwelling maintained by an individual, whether or not owned by the individual and whether or not occupied by the individual.” *Id.* However,

[a] person who moves a domicile outside Minnesota is not considered to be maintaining an abode in Minnesota even though the person continues to own or rent a dwelling in Minnesota if the person has moved personal furnishings and belongings from the dwelling and is making a good faith effort to sell, lease, or sublease the dwelling.

Add. at 43.

In the Tax Court, Relator claimed that, although he spent more than one-half of tax-year 2003 in Minnesota, his effort to sell the Afton residence meant that, for purposes of the 183-day Rule, he did not maintain an “abode” in Minnesota. *See* Mauer’s Opening Post-Trial Brief at 37-41.

Although it did not reach the 183-Day Rule issue, the Tax Court considered Mauer’s efforts to sell the Afton residence in the context of Factor G, the status of former living quarters. Add. at 21. The court noted, *inter alia*, that “the Afton house was not listed for sale using the Multiple Listing Service (MLS) or any other listing service”; that “a lockbox was not used and there were no ‘for sale’ signs used outside the house”; that “the Afton house was not shown to any potential buyers”; that Realtor Richard Lesch said he produced and distributed sale flyers at 3M; that “Mr. Lesch could not produce copies of the flyers nor did he have any records of any potential buyers”; and that, after the house had been on the market for a while, Mauer rejected Lesch’s suggestion to reduce the \$3.1 million asking price. Add. at 21.

Here, as elsewhere, however, the Tax Court failed to consider additional evidence bearing on these points. Mauer and Lesch both testified that Mauer had substantial

security concerns based on: (1) the vulnerability of hundreds of valuable collectible items displayed in the Afton residence (T.59, 76, 158); and (2) Mauer's extended absences from the residence owing to his extensive travel (T.64, 104, 158).

An MLS listing would require a lockbox, which would in turn permit any realtor to enter and show the house when neither Mauer nor Lesch was present; this Mauer would not permit (T.64-65, 104, 157). Accordingly, his listing agreement with Lesch specifically provides that the home shall *not* be listed in the Multiple Listing Service. (T.64-65, 157-58); Ex. 27. Likewise, Mauer and Lesch determined that a "For Sale" sign in the yard would only attract people to the home when Mauer was not there; and, given the home's isolated location, would not assist in selling it (T.86-87, 106, 157).

Under the listing agreement, Lesch was responsible for all marketing and marketing costs. (T.69, 84); Ex. 27. Lesch determined that, in lieu of an MLS listing, he would place flyers at a 3M site (hoping to attract an executive) and at local businesses² (T.68-69, 88-89, 94-96, 104). Lesch's marketing efforts produced approximately 10-15 telephone inquiries (T.84, 94, 160-61). Lesch never actually showed the house to any of

² The Commissioner emphasizes that neither Mauer nor Lesch could produce a copy of the sale flyer, and that Mauer did not mention his sale effort during the audit. *See* Resp.'s Br. at 23 & n.15. Neither fact is remarkable. First, Mauer did not discuss with his accountant his efforts to sell the Afton house, and thus did not realize sale-related documents might constitute tax records (T.283-84). Considering the incredibly detailed records Mauer preserved and disclosed to the Commissioner during the audit, *see, e.g.*, Exs. 68 (airline ticket), 57 (hotel receipt), 30 (daily travel log), there can be little doubt that Mauer would have kept a flyer had he considered it a tax record (T.283-84). And, Lesch's failure to preserve a copy of the sale flyer cannot fairly be attributed to Mauer. Second, the Commissioner's Residency Questionnaire does not *request* information about *unsuccessful efforts* to sell a Minnesota abode. *See, e.g.*, Ex. 42 at 53. Instead, it asks only whether the abode was *actually* sold. *Id.* Consequently, Mauer did not realize his sale effort was even relevant until Tax Court litigation commenced.

these callers, however, because none could obtain pre-approval for the asking price of \$3.1 million³ (T.79, 84, 94, 160).

When Lesch suggested to Mauer that they should lower the asking price to generate more interest, Mauer refused (T.91-92, 163). Mauer recognized that Lesch's suggestion had merit as a matter of marketing, but concluded that the house was already fairly priced (T.162-65), and decided that he was unwilling to take a substantial loss on his most significant investment (T.162-63).

The Tax Court's consideration of this issue conforms to its general practice in this case: it caricatured the evidence to create an artificial simplicity that rendered decision easy. *See* Relator's Opening Br. at 34-39. Relator again acknowledges here, as he did in his Opening Brief, that the Tax Court, as factfinder, is authorized to evaluate and weigh evidence. But given the Tax Court's general failure in this case to consider the evidence as a whole, there is no reason to believe that the court's consideration of the facts bearing on Factor G was an exception. Indeed, in light of the testimony just summarized, there is no basis for the court's comment that, "[t]he only evidence *in the record* to indicate the

³ The Commissioner insinuates that Mauer was not competent to determine an asking price for his Afton residence. *See* Resp.'s Br. at 12. This is plainly incorrect. First, the \$3.1 million asking price was based on an insurance appraisal, on Mauer's valuation of the home as its general contractor, and on architect Gregory Hallback's opinion that the 10,600 square foot house was worth \$300 to \$400 per square foot (T.77-79, 93, 163-65). Second, even in litigation where value is directly in issue, an owner may testify about the value of his property. *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984). Here, Mauer was not simply a homeowner; he personally built the house. In addition, Mauer's valuation was used simply to set a real estate asking price; it was not offered to establish value where value was directly in issue.

Afton house was for sale was [Mauer's] agreement with Mr. Lesch." Add. at 21 (emphasis added).

In any event, this Court should not rely on the Tax Court's discussion of Factor G as a basis for deciding a completely separate issue the tax court never reached: whether Mauer was a non-domiciliary resident for tax-year 2003 under the 183-Day Rule. *See, e.g., State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (noting that an appellate court "will not decide issues which are not first addressed by the trial court").

E. This Court Should Reject The Commissioner's Attempt To Buttress The Tax Court's Decision By Attributing To That Court Numerous "Findings" It Never Made.

The task of defending the Tax Court's decision naturally falls to Respondent. In an attempt to supply that decision with a precision it lacks, the Commissioner attributes to the Tax Court numerous "findings" it never made. This Court should reject the Commissioner's effort.

The Commissioner claims the Tax Court divided the 26 factors into four analytical categories and made specific findings about each factor. *See, e.g., Resp.'s Br.* at 21-22, 29, 30, 31. He claims, for example, that the court "*found* that eight of the twenty-six factors weigh in favor of a Minnesota domicile," *id.* at 21 (emphasis added), and also "*found* that six factors weigh in favor of a Florida domicile" *Id.* at 30 (emphasis added). The Commissioner thus suggests that the Tax Court made explicit findings as to each factor, tallied the results, and ultimately balanced the factors in favor of a Minnesota domicile. But this is precisely what the Tax Court did not do.

The Tax Court's decision has none of the precision the Commissioner suggests. First, the court did not specify any analytical categories. Second, the court never *found* that certain factors were inapplicable; it just failed to mention them. Third, as to the factors the court did mention, it never *found* that any particular factor was neutral, or instead favored domicile in one state or the other. Add. at 20-24. By specifically refusing to make the very "findings" the Commissioner posits, the Tax Court skirted the difficulty that tallying factors would present to the (apparent) coherence of its decision, and excused itself from explaining how it balanced competing factors favoring Minnesota and Florida, respectively. *Compare, e.g., Dreyling v. Comm'r of Revenue*, 2005 WL 473893, at *7 - *10 (Minn. T.C. Feb. 25, 2005) (making an express finding on each of the 26 factors and tallying the factors based on such findings). *Cf. also Bebeau v. Mart*, 310 N.W.2d 465, 470 (Minn. 1981) ("As we have stated on numerous prior occasions, ... effective appellate review is most readily facilitated when the trial court has issued findings of fact and a legal analysis in sufficient detail to allow this court to fully comprehend the basis of the trial court's decision.").

In addition, as demonstrated in Relator's Opening Brief, the Tax Court neither discussed nor made findings about Mauer's numerous relevant acts and declarations. *Compare, e.g., Bradison v. Comm'r of Revenue*, 2012 WL 360461, at *7 - *12 (Minn. T.C. Jan. 31, 2012) (making an express finding on each of the 26 factors and separately discussing the taxpayer's relevant acts and declarations). Finally, the court acknowledged neither Mauer's reason for purchasing a home in the Heritage Palms development, nor addressed the obvious importance of his late-2003 residency dispute

with the NBA. *See* Relator's Opening Br. at 37-38. These evasions allowed the court to dispense with reasoned analysis about the evidence as a whole, and to entirely avoid confronting the force of Mauer's claim that he became a Florida domiciliary.

F. The Court Should Not Consider Evidence Of Acts Occurring After The Close Of The Tax Years In Issue.

This a residency case for tax-years 2003 and 2004. During audit, the Commissioner improperly considered actions Mauer took after the close of the audit period: namely, his passive investment in Promise Land LLC, *see* Ex. 30 at 20, a Minnesota real estate partnership that did not acquire formal existence until August 19, 2005. Ex. 73 (articles of incorporation).

Both in the parties' Stipulation of Facts and during trial, Mauer objected to this post-2004 evidence on relevancy grounds. *See, e.g.*, (T.28-29, 48 53, 69); Stip. ¶¶ 59, 71. The parties briefed for the Tax Court the relevance of this evidence⁴ (T.329-30). The Tax Court did not mention Promise Land in its written decision. Implicitly, then, the court ruled that the evidence was not relevant. Consequently, this Court should not consider it.

One additional point is worth noting. Although the Commissioner has from the start emphasized Mauer's post-audit *business* partnership, there is another post-audit partnership the Commissioner has consistently refused to consider: Mauer's 2007 marriage to his wife Danielle, a long-time Florida resident and domiciliary. Stip. ¶ 5;

⁴ *See* Mauer's Opening Post-Trial Br. at 15 n.1 (citing *Howe v. Comm'r of Revenue*, 1986 WL 9429, at *5 (Minn. T.C. June 13, 1986) ("Clearly since 1983 [the end of the audit period], appellant has taken more steps to abandon Minnesota as his domicile and to establish a domicile in North Dakota. These acts, however, cannot be considered retroactive to indicate his intention during the years in question."); Commissioner's Opening Post-Trial Br. at 15 & n.3.

(T.199-201, 280). A Department official who testified at trial could offer no principled basis for this inconsistent treatment of Mauer's post-audit activities (T.319). The Commissioner's apparent basis for selection is, again, whether the activity favors a Minnesota domicile. And though the Commissioner asserts that Mauer has not integrated his life into his Florida community, *see* Resp.'s Br. at 40, moving to a community and marrying a woman who resides there must surely be among the most universal ways of doing so.

CONCLUSION

The evidence as a whole does not reasonably support the Tax Court's domicile finding, and that court's decision is contrary law. Therefore, Relator respectfully requests that this Court reverse the Tax Court's domicile determination and remand the matter for further proceedings.

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