

No. A12-0499

STATE OF MINNESOTA

IN SUPREME COURT

Kenneth B. Mauer,

Relator,

vs.

Commissioner of Revenue,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUE

- I. Is there sufficient evidence in the record to support the decision of the Minnesota Tax Court that Relator was domiciled in Minnesota during the latter half of 2003 and all of 2004 and did not change his domicile to Florida?

The tax court found that Relator remained a Minnesota domiciliary during the tax periods at issue.

Apposite cases:

Sanchez v. Comm'r of Revenue, 770 N.W.2d 523 (Minn. 2009)

Manthey v. Comm'r of Revenue, 468 N.W.2d 548 (Minn. 1991)

Comm'r of Revenue v. Stamp, 296 N.W.2d 867 (Minn. 1980)

STATEMENT OF THE CASE

This appeal is from Findings of Fact, Conclusions of Law, and Order for Judgment of the Minnesota Tax Court. (“Order”). Add. 1-39. The tax court affirmed in all respects the Notice of Determination on Appeal of the Commissioner of Revenue, in which the commissioner assessed Relator Kenneth Mauer \$97,000 in individual income taxes, penalties, and interest for 2003 and 2004.

Kenneth Mauer filed individual income tax returns as a full-time resident of Minnesota through the year 2002. He filed his 2003 income tax return as a part-time resident of Minnesota, contending that he became a legal resident of Florida in July 2003. He did not file a Minnesota return for 2004 because he claimed that he was a legal resident of Florida for the entire year.

After an audit, the commissioner issued an audit report, in which the commissioner determined that Mauer was a full-time legal resident of Minnesota for all of 2003 and 2004. Jt. Exh. 39.¹ Mauer filed an administrative appeal of the commissioner’s audit report. In the Notice of Determination on Appeal, the commissioner once again determined that Mauer was a legal resident of Minnesota for all of 2003 and 2004. Jt. Exh. 41.

Mauer appealed to the Minnesota Tax Court. After a two-day trial, the tax court issued its opinion on January 20, 2012. The tax court affirmed the commissioner’s determination that Mauer was a legal resident of Minnesota during all of 2003 and all of

¹ “Jt. Exh.” refers to the joint exhibits of the parties, nearly all of which are described in, and attached to, either the parties’ Stipulation of Facts or the parties’ Supplemental Trial Stipulation.

2004. The basis for the tax court's decision is that the focus of Mauer's life remained in Minnesota throughout 2003 and 2004, just as it had in prior years.

STATEMENT OF FACTS

A. Background.

Mauer was born and raised in St. Paul, Minnesota, and attended high school and college in Minnesota. His parents and siblings live here still. Add. 1²; Stipulation of Facts ("Stip. Facts"), ¶ 4; Tr. 109, 111-12. During and after college, Mauer worked for Northstar Adjustment Company in St. Paul. Tr. 116. In addition, during and after college Mauer began pursuing a career as a sports referee in Minnesota. He started refereeing grade school and junior high school football games in his freshman year in college. Tr. 113. He also refereed high school and college football, baseball, and basketball games throughout Minnesota. Add. 10; Tr. 113-14. Mauer has been a registered game official for the Minnesota State High School League ("MSHSL") and a member of local officiating organizations for many years. Add. 29; Tr. 214-15; Stip. Facts, ¶72.

In 1986, Mauer was hired as a basketball referee by the National Basketball Association (the "NBA"). Add. 10; Tr. 116. He has worked for the NBA ever since. Stip. Facts, ¶ 7. He also has continued to work as a game official for the MSHSL, refereeing high school football games in Minnesota. Add. 10; Tr. 140, 215 (testifying "whenever [he is] in town [he] still referee[s] [for the MSHSL]"). He registers with the MSHSL every year using his Afton, Minnesota address. Tr. 215.

² "Add. ___ refers to the Addendum to Relator's brief to this Court.

B. Mauer's Travels For His NBA Refereeing Work.

NBA referees are assigned to work up to 82 pre-season and regular season games. Add. 2; Jt. Exh. 1, at 4; Jt. Exh. 2, at 5. Mauer typically travelled 18-25 days a month during the NBA season, which covers the months of October through May. Tr. 117-18; Stip. Facts, ¶ 11.

Game assignments were solely at the NBA's discretion. See Jt. Exh. 1, at 7. The NBA did, however, use its best efforts to avoid assigning a referee to work 3 games on 3 consecutive days. Tr. 11; see also Jt. Exh. 2, at 5, 10 (same terms, 2004-05 season). In both seasons at issue here (2003-04 & 2004-05), referees were allowed to return home between game assignments instead of traveling to the next assigned game city, based on the number of days between game assignments and the distance from the last game location, the referee's home city, and the next game assignment location. Add. 26; Stip. Facts, ¶ 16 & Jt. Exh. 1, at 11-13; Jt. Exh. 2, at 10-11. For example, when the game schedule provided the referee with three days off between game assignments, the referee could return home "without regard to the scheduled duration of any flights from or to the cities of assignment." Jt. Exh. 2, at 11; see also Jt. Exh. 1, at 13.

For the 2003-2004 NBA season Mauer named Fort Myers, Florida, as his home airport. Jt. Exh. 3; Tr. 177. Despite having the freedom under NBA rules to make his own travel arrangements for work and fly in and out of Fort Myers if he chose to do so (Add. 13; Tr. 249), Mauer's personal calendar shows that during the 2003-2004 NBA season he primarily travelled in and out of Minnesota, using this state as his home base.

Jt. Exh. 40, at 37-44.³ For example, in October 2003, Mauer arranged his travel for the month so that he flew out of and returned to Minnesota (with one exception) for all of his game assignments that month. Add. 13; Tr. 251; Jt. Exh. 40, at 37.⁴ Between the start of the NBA season in October 2003, and the end of December 2003, Mauer was physically present in Minnesota on 36 days, only one day of which was for a game assignment. Add. 13; see Jt. Exh. 40, at 37-39 (Minnesota game Oct. 23). Over those same three months he was in Florida for fifteen days, two days of which were for game assignments *Id.* (Nov. 12, Dec. 9); Add. 26-27.

During the first five months of 2004 (NBA season months) Mauer spent 70 days in Minnesota and only 29 in Florida. Add. 27; Jt. Exh. 40, at 27. He was in Florida for only two days in April, 2004, and that was for a game assignment. Tr. 288. He traveled to all of his game assignments in April 2004 by leaving from and returning to Minnesota. *Id.* at 288-89; Jt. Exh. 40, at 43 (Apr. 6; Apr. 15-18; Apr. 24-25). Similarly, in May 2004, Mauer arranged his travel between game assignments by departing from and returning to Minnesota. Add. 14; *Id.* at 44 (May 8-10; May 14-16; May 21-23). Finally, during the first three months of the next NBA season, October through December 2004, Mauer still spent more time in Minnesota in two of the three months. Add. 27; Jt. Exh. 40, at 27.

³ The page number citations in Joint Exhibits 30 and 40 refer to the handwritten numbers in the upper right corner on each page of the exhibit.

⁴ Even though he stated he changed his domicile to Florida in July 2003, Mauer's pattern of travel for his NBA work in October 2003 was substantially the same as his pattern during the previous NBA season. For example, in April 2003 Mauer left Minnesota for game assignments, completed a cycle of game assignments, and returned to Minnesota. Tr. 233; Jt. Exh. 40, at 31.

In summary, of the eleven months of the NBA season that fall within the tax period at issue, there are only two months in which Mauer spent more days in Florida than in Minnesota: March 2004, and November 2004. Add. 27; Jt. Exh. 40. In fact, if one takes into account the NBA games that Mauer was obligated to attend in either Florida or Minnesota, then in only one of the eleven months did Mauer spend more free days in Florida. In November 2004 he refereed one game in Orlando and one game in Miami, but none in Minnesota. Jt. Exh. 40, at 50. He was required to fly into the city the day before the game, Stip. Facts, ¶ 24, and therefore each of these two games necessitated Mauer being in Florida for two days. Subtracting those four days from the Florida total results in seven days being spent in Minnesota and four days being spent in Florida in November 2004 when Mauer was not required to be in Florida for work.

The NBA reimbursed referees for travel expenses, primarily airfare. For the 2003-2004 NBA season Mauer elected to receive an “air travel allowance” from the NBA for his game-related travel expenses. See Stip. Facts, ¶ 15; Jt. Exh. 3. Jt. Exh. 1, at 32; see also Stip. Facts, ¶ 14.⁵ Mauer elected the “air travel allowance” because he did not “want to be limited to what [the NBA’s] travel arrangements were for” him. Tr. 177. Instead, if he “want[ed] to go to Phoenix on [his] day off . . . [he is] allowed to do that.” *Id.* at 183.

The NBA computed the air travel allowance by first generating an itinerary of proposed travel between a referee’s “cities of [game] assignments,” or between game

⁵ For the 2004-05 NBA season, referees made all travel arrangements in the first instance. Jt. Exh. 2, at 23. The NBA then paid the referee an “assignment allowance” equal to \$900.00 per game. *Id.*, at 15.

assignment cities and the referee's home city. The NBA then paid the referee the cost represented by that proposed travel. Jt. Exh. 1, at 32-33. With that information and payment, referees electing to receive an air travel allowance would make their own flight arrangements, paying for their travel costs with the NBA's air travel allowance. See Jt. Exh. 1, at 29.

Mauer's naming of Fort Myers, Florida, as his home airport led to a dispute with the NBA over the amount of money the NBA was obligated to pay him as his air traffic allowance. Add. 13. The NBA had learned that Mauer was "actually and primarily traveling out of a home based in Minneapolis, Minnesota — not Fort Myers." Add. 14; Jt. Exh. 22. In a December 2003 letter the NBA directed Mauer to repay about \$6,000, which the NBA calculated as the cost difference between a Minneapolis-based itinerary and the Fort Myers-based allowances paid to him. Jt. Exh. 22, at 2. In January 2004, the NBA again contacted Mauer and told him that it would not pay a requested air travel allowance for a January 11 "return flight" to Fort Myers because Mauer had informed the NBA that he "would be staying at [his] home in Minnesota during that period and would not, in fact, travel to Fort Myers" and that "the NBA will not pay you for fictional flights to Fort Myers." Add. 14; Jt. Exh. 23.

C. Mauer's Florida House Purchase And His Time In Florida.

Mauer had never been to Fort Myers, Florida before July 1, 2003. Tr. 234. When he flew to Florida on July 1, 2003, he intended to return to Minnesota. Tr. 233-34.

He arrived in Fort Myers on July 1 with an appointment set up by his Minnesota realtor, friend, and business partner, Richard Lesch, to look at various properties.

Tr. 212; see also Jt. Exh. 5. He decided to purchase a 2,000 square-foot townhouse, one-half of a residential building, in the Heritage Palms community in Fort Myers on July 3 for \$235,000. Add. 3; Tr. 145, 234; see also Stip. Facts, ¶ 30.⁶ On that same day he registered to vote in Florida and obtained a Florida driver's license. Add. 4; Tr. 146; Jt. Exhs. 29, 90. He left Florida on July 4, stopped in Kentucky, and returned to Minnesota on July 7. Add. 3; see Jt. Exh. 5. Mauer was aware at the time that Florida does not impose an individual income tax. Tr. 8.

After returning to Minnesota, he signed a Florida Declaration of Domicile on July 9 before a Minnesota notary. Add. 4; Tr. 148-49; Stip. Facts, ¶ 34. Mauer stipulated, however, that he was still a Minnesota resident on that date and remained so until July 11, 2003. Stip. Facts, ¶ 52.⁷

After buying the Florida property on July 3, 2003, and returning to Minnesota, Mauer left for vacations in July and August to locations other than Florida. See Jt. Exh. 30, at 76-78, 81-82. He left from Minnesota for both vacations, intended to return to Minnesota from these vacations, and he did return to Minnesota. Tr. 237, 241. In August and September 2003, Mauer left Minnesota for short trips to Florida, intending to return to Minnesota in time to officiate at high school football games. *Id.*, at 244-45. He left from Minnesota in September 2003 for a vacation in Phoenix, intending to return to

⁶ Joint Exhibit 56 is an aerial view of this townhouse. Stip. Facts, ¶56.

⁷ Mauer took no actions on July 11, 2003, that could have resulted in a change of domicile as of that day. His personal calendar shows that he left Minnesota on a European vacation on July 10 and returned to Minnesota on July 27. Jt. Exh. 30, at 76-78.

Minnesota in time to officiate a high school football game before leaving for NBA camp. Jt. Exh. 30, at 88-89.

After he bought the Florida house, Mauer notified the NBA of his new Florida address. Add. 13; Tr. 170-71. The referee address list made available at the fall 2003 camp included both Mauer's Florida and Minnesota addresses. Add. 13; Tr. 173-75; Jt. Exh. 14. The NBA continued to use Mauer's Afton, Minnesota address through the 2004 tax year for tax purposes. Add. 13; see Jt. Exhs. 35, 38. Mauer waited until June, 2004 to notify the IRS about his Florida address. Add. 13; see Jt. Exh. 36; see also Tr. 193.

On August 27, 2003, Mauer filed in Florida for a homestead tax exemption on the Fort Myers property. Add. 22; Tr. 149-50; Jt. Exh. 10. His application was neither accepted nor approved until he obtained confirmation that the homestead exemption he claimed in Minnesota was removed. *Id.* at 150; see also Jt. Exh. 11. Washington County (Minnesota) confirmed in October 2003 that the homestead status for Mauer's Afton house would remain "on the homestead classification" for the balance of 2003, but would be removed from that classification for the 2004 assessment (payable 2005). Jt. Exh. 12.

Mauer moved some furniture and personal belongings, including a car, from Minnesota to Fort Myers in late August 2003. Tr. 153; Stip. Facts, ¶ 63 (d). He moved additional personal belongings from Minnesota to Florida in 2004 and again in 2006. Tr. 154-55.

In August 2004, Mauer bought a second property in the same Heritage Palms community. Stip. Facts, ¶ 58. Mauer maintains homeowner's insurance on both Florida

properties, obtained through a Florida agent. Jt. Exhs. 7, 32. The personal property in his Florida house was insured for \$132,500. Jt. Exh. 7.

Mauer began attending services at a Fort Myers Catholic church in 2003. See Stip. Facts, ¶ 69. Mauer attends church every week, wherever he is, unless an NBA assignment prevents him from doing so. Tr. 151. He continued to attend church services in Minnesota when he was in this state. Tr. 213; Jt. Exh. 60.

D. Mauer's Afton House And His Claimed Efforts To Sell The House.

Mauer presented evidence that he attempted to sell his home in Afton between July 2003 and July 2004. The tax court found, however, “no credible evidence” to establish that Mauer actually listed his Afton home for sale or that it was available for sale. Add. 21.

Mauer decided in the late 1980s to build a log home, and eventually bought a lot in Afton, Minnesota that provided the freedom and land he sought. Tr. 121 (“I like freedom, I want land”). He spent five to seven years planning the house before he broke ground in May 1990; he moved into the house in September 1991. Add. 2; Tr. 226, 125. Over the next 12-15 years, Mauer finished rooms and portions of the house. *Id.* He is very proud of the house, which he designed and built as the general contractor, and considers it “the greatest investment, 12 years of my life.” Tr. 163.

Mauer maintained homeowner's insurance on the 10,600 square-foot Afton house, including coverage for approximately \$1.6 million in personal property. Add. 2, 29;

Tr. 214; see also Jt. Exh. 31.⁸ He is responsible for the maintenance and upkeep at the home. Tr. 227. He has never tried to rent out the house. *Id.* Mauer kept his three most expensive vehicles at the Afton home during all or parts of 2003-2004, all of which were registered and licensed in Minnesota, as well as insured by a Minnesota agent. Add. 6-7; Stip. Facts, ¶ 63; Jt. Exh. 82, at 3-4.

In April 2003 Mauer took out a \$600,000 mortgage on the Afton house. See Jt. Exh. 81; see also Tr. 222. In September 2003, he drew on a \$160,000 line of credit secured by the Afton house. Add. 7; see Jt. Exh. 83. In 2004 he drew in excess of \$400,000 on the same line of credit, in several separate draws over several months. *Id.*

When he returned from Florida in July 2003, Mauer entered into a one-year Agreement For Sale of Real Estate with his friend, real estate agent, and business partner, Richard Lesch. Add. 12; Tr. 158; see also Jt. Exh. 27. The Agreement states it was “entered into the 15th of July, 2003,” and that is the date Mauer put next to his signature on the Agreement. Jt. Exh. 27. He agreed at trial, however, that he could not have actually signed the Agreement on July 15, 2003, because he and Lesch both signed the Agreement when they were together, and his personal calendar showed that he was in vacation in Europe from July 10 through July 27 of 2003. Tr. 239-40; Jt. Exh. 30, at 77-78. He testified that he believed he signed the Agreement a few days before he left for Europe on July 10, Tr. 240, although Lesch’s signature is dated July 14. Jt. Exh. 27.

⁸ Joint Exhibit 55 constitutes pictures of the Afton house, grounds, and front gate. Stip. Facts, ¶ 55.

Lesch is identified as the “agent” for purposes of the Agreement. Jt. Exh. 27. He is a licensed Minnesota realtor, but not a licensed broker. Tr. 55, 72. At the time, Lesch was affiliated with Coldwell Banker, which had a broker’s license. Tr. 55. Lesch acknowledged that he is “not actually the person who is listing your house. The broker that [he] work[s] for is the person that is listing your house[.]” Tr. 55-56; *see* Minn. Stat. § 82.55, subs. 19, 20 (2010) (a “real estate salesperson” works on behalf of a “real estate broker,” who is licensed to enter into agreements to list properties). Nevertheless, the Agreement was between Lesch and Mauer; nothing in the agreement stated that Lesch was working for or on behalf of his broker, Coldwell Banker, or even mentioned that Coldwell Banker was a party to the Agreement. Tr. 81; Jt. Exh. 27. The “listing agreement” expired on July 15, 2004. Jt. Exh. 27. It was not renewed. Add. 12.

Mauer “suggested” the listing price, \$3,100,000, based on an appraisal he stated he had recently obtained for the Afton house. Add. 12; Tr. 67. Neither Lesch nor Mauer produced a copy of the appraisal used to price the house. Tr. 76. Lesch confirmed that Mauer “didn’t want to hear what [Lesch] thought the house should be sold for.” Tr. 80. Thus, when Lesch told him that they were probably going to have to lower the price in order to sell the home, Mauer “got mad at him” even though Mauer “knew [Lesch] probably was right.” Tr. 163. Mauer refused to lower the price and testified that “why did I have to take a hit on my house? . . . It was [my] greatest investment, 12 years of my life. . . I didn’t think it was fair. . . I wasn’t going to do it.” Add. 12; Tr. 163.

The Afton home was not listed using the Multiple Listing Service (“MLS”) or any other listing service. Add. 12; Tr. 87-88, 104, 157-58. It was not listed in any luxury

homes sales magazine, nor was a lockbox used. Add. 12. There was no sign outside the house. Add. 12; Tr. 159. The house was not shown to any potential buyers, nor were there any open house events. Add. 12.

Lesch testified that he produced and distributed flyers for the sale of the house, but could not remember the locations where he placed flyers other than at 3M offices. Add. 12; Tr. 68. Neither Lesch nor Mauer produced copies of the flyers, nor did they have any records as to any potential buyers. Add. 12; Tr. 96, 232.

On January 4, 2004, Mauer learned that a pipe or pipes had frozen in the Afton house, requiring various repairs. Tr. 166-67; see also Tr. 230. Although the house needed repairs, there is no evidence that this event deterred any potential buyers. There were no open houses to cancel, no MLS listing to cancel, no sign to remove, and no potential buyers waiting to look at the house. Tr. 230-31. There were no activities associated with the house listing that had to be stopped or re-scheduled because of the pipe freeze. *Id.* at 231-32.

E. Mauer's Continuing Ties To Minnesota.

1. Mauer's time in Minnesota.

In July, August, and September 2003 Mauer's personal travels began and ended in Minnesota. In other words, he arranged his travel so that he left from Minnesota, and returned "home," as he wrote on his personal calendar, to Minnesota. Tr. 237; Jt. Exh. 61; Jt. Exh. 30, at 82 (Aug. 17 entry, "Returned Home"); Jt. Exh. 40, at 34-36.

Mauer spent a total of 203 days in Minnesota in 2003. Add. 24; Jt. Exh. 40, at 26. After he purchased the Florida house, Mauer spent, during the remainder of 2003, 85

days in Minnesota, 26 days in Florida, and 73 days traveling. Add. 24; Jt. Exh. 40, at 34-39. In 2004, Mauer spent 181 days in Minnesota, 64 days in Florida, and 121 days in other locations. Add. 14; Jt. Exh. 40, at 27.

In the off-season before the start of the 2004-05 regular season, Mauer's non-game related travel began and ended in Minnesota, including when he went to Florida. Add. 14; see Jt. Exh. 40, at 46-47 (July: Alaska, Europe; August: Europe, Kentucky, Florida).⁹

2. Mauer's business activities in Minnesota.

Mauer obtained a large mortgage and a line of credit in Minnesota. *Supra* 11. Most of the insurance that he carried on his homes and personal property was in Minnesota due to the vastly more expensive home, more expensive automobiles, and more valuable personal property located in Minnesota. *Supra* 10-11. His credit card statements came to his Afton home. Tr. 284. In addition, all of Mauer's NBA salary was deposited into his Minnesota bank account through November 2003, and one-half of his salary was deposited into that account thereafter. Add. 14; Tr. 220-21; Jt. Exh. 85, at 1, 4, 7, 9, 12.

3. Mauer's professional relationships in Minnesota.

Mauer maintained and used, in 2003-04, longstanding Minnesota professional relationships. He used the services of a Minnesota realtor (Lesch) for his real estate needs in Minnesota and in Florida. Add. 15; Tr. 212. He used two different Minnesota

⁹ Mauer testified that he does not want to be in Florida during much of the NBA's off-season due to the hot weather and hurricanes. Tr. 202, 292.

accountants. Add. 15; Tr. 212. He used a Minnesota accountant (Deegan) to advise him on the steps to take to establish a claim to Florida residency. See Jt. Exh. 72. He used a Minnesota dentist. Add. 23.

4. Mauer's vehicles located in Minnesota.

Mauer kept three cars in Minnesota during all or parts of 2003-2004. He moved a car, a Honda Accord, to Florida in August 2003. Add. 29; see Stip. Facts, ¶ 63. Mauer then bought another car in Minnesota, which he kept in Minnesota and financed through the dealer with billing statements sent to his Afton address. Tr. 215-16; Jt. Exh. 86. The cars kept in Minnesota were insured through his Minnesota insurance agent. Tr. 213; Jt. Exh. 82.

5. Mauer's business partnership in Minnesota.

Mauer and Lesch were partners in Promised Land of Minnesota, LLC. Tr. 96. Promised Land owns approximately seventeen vacant and developed lots in St. Paul, Minnesota. Tr. 70, 97. The Articles of Incorporation for Promised Land include a date of July 15, 2004, and were signed as of July 2004; they were filed with the Minnesota Secretary of State on August 19, 2005. Jt. Exh. 73. Mauer is the listed taxpayer for one of those properties (Winifred Street), and Ramsey County's property tax statements are sent to him at Lesch's Minnesota address. See Jt. Exh. 91. Promised Land has sold some of the developed lots. Tr. 97. After 2004 Mauer and Lesch rented out the properties on some of the Promised Land parcels. Tr. 99. Mauer and Lesch have both acted as

plaintiffs when legal action has been filed in Ramsey County, Minnesota against some tenants. Tr. 100; Jt. Exh. 92.¹⁰

6. Other Minnesota contacts.

Mauer continues to use his Afton address; no mail forwarding address is on file with the Afton post office. Add. 24; Jt. Exh. 89. Mauer was married in Minnesota in 2007, first in a civil ceremony and later in a church wedding. Tr. 201. His wife suggested that they get married in Minnesota, rather than in Pittsburgh where her family resided, because she “love[s] his family.” *Id.* He got married with a Minnesota marriage license. Stip. Facts, ¶ 5.

Mauer had speaking engagements in Minnesota. Tr. 213. He contributed to a book written by a Minnesota author. *Id.*

STANDARD OF REVIEW

This Court “review[s] a decision of the tax court to determine if it is not justified by the evidence or not in conformity with the law.” *Dreyling v. Comm’r of Revenue*, 711 N.W.2d 491, 494 (Minn. 2006). “When reviewing the tax court’s findings of fact, [the Court] determine[s] whether sufficient evidence exists to support the tax court’s decision.” *Id.* (citing *Wybierala v. Comm’r of Revenue*, 587 N.W.2d 832, 835 (Minn. 1998)).

¹⁰ Mauer objected to the evidence related to Promised Land based on relevancy. Tr. 49-51. The tax court accepted the evidence, provisionally, Tr. 52, but ultimately did not rule on Mauer’s objection, or cite to this evidence in its decision. For several reasons the evidence is pertinent and provides additional support for the tax court’s decision. *See infra* 30-31.

“As in any civil action, this Court does not substitute its judgment for that of the tax court on questions of fact, leaving the factual findings undisturbed where the evidence, as a whole, supports the decision.” *Manthey v. Comm’r of Revenue*, 468 N.W.2d 548, 550 (Minn. 1991) (citing *Busch v. County of Hennepin*, 380 N.W.2d 813, 815 (Minn. 1986) and *United States Steel Corp. v. Comm’r of Taxation*, 226 N.W.2d 870, 873 (1975)). When, as here, the relator was domiciled in Minnesota up to the tax years at issue, that domicile is presumed to continue until another domicile is actually established. *Comm’r of Revenue v. Stamp*, 296 N.W.2d 867, 870 (Minn. 1980) (holding “an existing domicile is presumed to continue until a new one is established, and a new domicile is proved by showing physical presence coupled with intent to make a home...”); Minn. R. 8001.0300, subp. 2 (2003). “Whether departure from an established domicile and residence in a new state effects a change in domicile is ‘ordinarily a question of fact, depending ... upon the purpose and intent of the change.’” *Sanchez v. Comm’r of Revenue*, 770 N.W.2d 523, 525 (2009) (quoting *Davidner v. Davidner*, 304 Minn. 491, 494, 232 N.W.2d 5, 7 (1975)). Even where “none of the facts escape equivocation entirely, and the tax court could easily have ruled the other way,” this Court has recognized that “[t]he tax court sits in a better position to judge credibility and sincerity, and its decision [will be upheld if it] is supported by the evidence as a whole.” *Manthey*, 468 N.W.2d at 550.

SUMMARY OF ARGUMENT

In its decision, the tax court properly analyzed the facts set forth in the extensive stipulation of the parties and the testimony presented at trial in light of applicable law on

the legal residency of taxpayers. Specifically, the tax court analyzed the evidence in the context of the twenty-six nonexclusive factors listed in the Minnesota Department of Revenue rule, Minn. R. 8001.0300, subp. 3 (2003).

Mauer has the burden of proving that he changed his domicile to Florida. *Sanchez v. Comm’r of Revenue*, 770 N.W.2d 523, 526 (2009). Contrary to Mauer’s claim, the tax court looked at the evidence as a whole and correctly found that Mauer failed to carry his burden of proving that he established a new domicile in Florida. The record contains ample support for the tax court’s findings.

ARGUMENT

I. MAUER BORE THE BURDEN TO ESTABLISH THAT HE CHANGED HIS DOMICILE FROM MINNESOTA TO FLORIDA.

Mauer bore a heavy burden at trial. Orders of the Commissioner are presumed correct and valid. *See* Minn. Stat. § 270C.33, subd. 6 (2002). The taxpayer bears the burden of demonstrating clearly that the challenged Order is incorrect. *Dreyling v. Comm’r of Revenue*, 753 N.W.2d 698, 701 (Minn. 2008); *see also Wybierala v. Comm’r of Revenue*, 587 N.W.2d 832, 835 (Minn. 1998). The taxpayer properly bears this burden because the taxpayer controls the records that could show the Commissioner clearly erred in his assessment. *See F-D Oil Co., Inc. v. Comm’r of Revenue*, 560 N.W.2d 701, 707 (Minn. 1997); *see also* Minn. R. 8001.0300, subp. 5 (2003) (explaining record requirement for non-domiciliary resident).

Minnesota taxes the income of a “resident individual.” Minn. Stat. § 290.014, subd. 1 (2002). A “resident” is “any individual domiciled in Minnesota.” Minn. Stat.

§ 290.01, subd. 7(a) (2002). The corresponding administrative rules define “domicile” as follows:

The term “domicile” means the bodily presence of an individual person in a place coupled with an intent to make such a place one’s home. The domicile of any person is that place in which that person’s habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return.

Minn. R. 8001.0300, subp. 2 (2003). The Court can consider “the acts and circumstances of [the taxpayer] in evaluating the sincerity” of a claimed intent to change a domicile. *Sanchez v. Comm’r of Revenue*, 770 N.W.2d 523, 526 (Minn. 2009) (quoting *Comm’r of Revenue v. Stamp*, 296 N.W.2d 867, 869 (Minn. 1980)). Thus, Minnesota employs a non-exclusive list of twenty-six factors to determine whether the taxpayer’s stated intent coincides with the taxpayer’s actions. Minn. R. 8001.0300, subp. 3 (2003).¹¹

In evaluating a claimed domicile change, Minnesota distinguishes between the legal concept of “domicile” versus the physical notion of “residency.” *See Sanchez*, 770 N.W.2d at 526 (“While individuals can be residents of more than one state, as residency only requires physical presence in a place, individuals can have only one domicile at any time.”). To “establish or change one’s ‘domicile’ requires one’s bodily presence in a place with an intent to make such place one’s home.” *Manthey v. Comm’r of Revenue*, 468 N.W.2d 548, 549 (Minn. 1991). Continued “existence of a Minnesota domicile does not require continued physical presence in Minnesota or continued maintenance of an abode in Minnesota.” *Morrissey v. Comm’r of Revenue*, No. 4275,

¹¹ The full text of the twenty-six factors in Rule 8100.0300, subp. 3, is set forth in the Addendum to Relator’s Brief at Add. 42.

1985 WL 6220, at *5 (Minn. Tax Ct., Dec. 17, 1985) (noting that “one’s domicile and one’s place of abode need not necessarily be the same”); *see also Dreyling v. Comm’r of Revenue*, 711 N.W.2d 491, 494 (Minn. 2006) (noting that presumed continuation of existing domicile means that “one may live in another state for a period of time without affecting one’s Minnesota domicile”). No “magic formula exists for determining a change in one’s domicile ... but once established, a domicile is presumed to continue until the contrary is shown.” *Manthey*, 468 N.W.2d at 550.

II. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE TAX COURT’S FINDINGS THAT THE LOCUS OF RELATOR’S LIFE DURING THE LATTER HALF OF 2003 AND THROUGHOUT 2004 REMAINED IN MINNESOTA.

The tax court found that, “considering all of the circumstances surrounding Mauer’s life during the second half of 2003 and throughout 2004, the center of his life remained in Minnesota.” Add. 30. As this Court has noted, a taxpayer claiming a change of domicile from Minnesota to another state must “demonstrate that [the taxpayer] intended to make [his] home [in the other state] and [to] integrate [his] life into the community [in the other state].” *Sanchez*, 770 N.W.2d at 527. *See also Morrissey v. Comm’r of Revenue*, No. 4275, 1985 WL 6220, at *5 (Minn. Tax Ct., Dec. 17, 1985) (holding that “intent [to establish a new domicile] must be implemented by action, which in fact integrates one’s life with a new community”).

The tax court properly analyzed the twenty-six factors set forth in Minn. R. 8001.0300, subp. 3 (2003) in finding that Mauer did not integrate his life into the Fort Myers, Florida community, and did not prove that he established a new domicile in the state of Florida, a state without an individual income tax. Most of the factors fall into one

of four categories not challenged by Mauer: (1) Factors found to be in favor of a Minnesota domicile, but not challenged by Mauer; (2) Factors found to be in favor a Florida domicile; (3) Factors not discussed by the tax court because they are not applicable; and (4) Factors found by the tax court to be neutral. Of the five factors challenged by Mauer, the tax court's findings are objectively verifiable and correct, and/or rely upon its weighing of the credibility of witnesses.¹² The challenged findings are all supported by substantial evidence in the record.

A. There Is Sufficient Evidence In The Record To Support The Tax Court's Findings On Those Factors Which The Tax Court Found To Be In Favor Of A Minnesota Domicile.

The tax court found that eight of the twenty-six factors weigh in favor of a Minnesota domicile. Mauer does not contest the findings on three of these factors. Specifically, he agrees that he was a Minnesota domiciliary prior to the tax period at issue (Factor A). Rel. Br. at 25. He agrees that his non-banking transactions with financial institutions were in Minnesota, in that he used a Visa Gold card issued by U.S. Bank in

¹² The tax court may have discredited the testimony of Mauer to a significant extent because of his tendency to put the wrong date on documents that he signed. He signed and dated the "listing agreement" with Lesch (Jt. Exh. 27) as of July 15, 2003, but admitted that he could not have signed the document on that date because he was in Europe from July 10-27, 2003. Tr. 240; Jt. Exh. 30, at 76-78. He signed and dated a consultation agreement with a Florida tax consultant (Jt. Exh. 9) as of August 12, 2003, but admitted that he was on vacation in St. Kitts from August 8-17, 2003. Tr. 243; Jt. Exh. 30, at 81-82. In addition, while he claimed to have been out of Minnesota on January 4, 2004, when a pipe burst at his Afton home, he admitted that his personal calendar indicates that he flew into Minnesota on January 2 and flew out again on January 6. Tr. 229; Jt. Exh. 30, at 108.

Minneapolis (Factor R). *Id.* at 27.¹³ He agrees that he spent a significantly higher percentage of his time in Minnesota than in Florida (Factor W). *Id.* at 28.

Mauer does contest the tax court's findings on the other five factors that the tax court found to weigh in favor of a Minnesota domicile (Factors G, M, Q, T, and U). There is substantial evidence in the record to support the tax court's findings on each of these factors.

- 1. Factor G: (Present status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available to rent to another). Mauer did not make an effort to sell his Afton home.**

The tax court found this factor weighs in favor of a Minnesota domicile because, even though Mauer contended he was trying to sell his Afton home, the court “find[s] no credible evidence to establish that his Afton house [was] listed for sale or of its market availability.” Add. 21. Mauer argues that this factor is “essentially neutral because, although Mauer continued to own the Afton residence, he listed it for sale between July 2003 and July 2004.” Rel. Br. at 28-29.¹⁴ There is ample evidence to support the tax court's finding on this factor.

The tax court made extensive findings concerning the minimal or non-existent efforts to sell the Afton house. Add. 12; *see supra* 11-13. The house was not listed for

¹³ In addition, Mauer took out a large mortgage on his Afton home from a Minnesota mortgage company in 2003. Jt. Exh. 81. The mortgage was serviced by the Minnesota company with statements being sent to Mauer's Afton home. *Id.*

¹⁴ It is undisputed that Mauer made no attempt to sell his home after July 2004 when his “listing agreement” with Lesch lapsed. Tr. 107.

sale using the multiple listing service or any other listing service, or listed in any luxury homes sales magazine. *Add.* 12; *supra* 12-13. Mauer did not use a lockbox, nor were there any for sale signs outside the house. *Id.* Mauer's real estate agent and friend, Richard Lesch, could remember only one specific location where he distributed a flyer for the house, and he could not produce any copies of the flyer. *Id.* The record contains no evidence that there were ever any potential buyers. *Id.* The asking price for the house was \$3.1 million, a price supposedly based upon an appraisal which was never produced. *Id.* When Lesch offered suggestions to list the house or lower the asking price, Mauer rejected such suggestions. *Id.* In summary, there is no evidence in the record to indicate that the house was ever seriously offered for sale.¹⁵

In addition to the total lack of objective evidence showing Mauer's intent to sell his Afton home, the tax court listened to the testimony and found it was not credible.¹⁶ Mauer does not present any arguments that address the tax court's findings on this issue.

¹⁵ There are additional reasons to doubt the genuineness of Mauer's claimed intent to offer his Afton home for sale. The "Agreement for Sale of Real Estate" entered into by Mauer and Lesch, *Jt. Exh. 27*, is clearly not a standard agreement. Lesch agreed that a listing agreement, legally, is between a homeowner and a licensed real estate *broker*. *Supra* 12. Lesch was a licensed real estate agent, affiliated with a licensed broker, Coldwell Banker. *Id.* The listing agreement did not indicate that Lesch was working for or on behalf of his broker, or even mention that Coldwell Banker was a party to the agreement. *Id.* Furthermore, neither Mauer nor his accountant even mentioned, in any of their submissions to the commissioner during the audit, that Mauer had tried to sell the Afton home. *See, e.g., Jt. Exhs. 47, 49, 51, 54.*

¹⁶ The tax court could readily have found not credible the testimony of Lesch. In his trial testimony he made numerous attempts to deviate from his deposition testimony. *Tr. 79, 80, 82, 85, 88, 92.*

2. Factor M: (Jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles). Mauer had more vehicles and newer vehicles in Minnesota.

The tax court found that this factor weighs in favor of a Minnesota domicile because, during the tax years, Mauer had three registered vehicles in Minnesota and only one in Florida. Add. 22. Mauer disputes this finding, contending that the finding is contrary to undisputed evidence. Rel. Br. at 34-35. Specifically, he contends that in 2004 he had two cars in each jurisdiction, and that “the parties’ Stipulation and ... the Court’s own findings ... both indicate that Mauer’s [1993] Lexus remained in Minnesota only until late 2003. Stip. Facts, ¶ 63 (b); Add. at 7.” *Id.*

Mauer cites the record incorrectly. The tax court’s finding on this issue is supported by substantial evidence. First, there is no dispute about the status of three of Mauer’s four vehicles. The 2004 Lexus GX-470 was purchased in late 2003 and was registered and physically maintained in Minnesota. Add. 6; Stip. Facts, ¶ 63 (a); Tr. 216. The 1989 Rolls Royce was registered and maintained in Minnesota for the period at issue. Add. 7; Stip. Facts, ¶ 63 (c). The 1988 Honda Accord was registered and maintained in Florida from August 2003 through the end of 2004. Add. 7; Stip. Facts, ¶ 63 (d).

The only dispute concerns the 1993 Lexus LS-400. The tax court found precisely what is contained in the parties’ stipulation, that this vehicle was “registered and maintained in Minnesota until late 2003.” Add. 7; Stip. Facts, ¶ 63 (b). Neither the stipulation nor Mauer’s testimony provides any basis for finding that the 1993 Lexus was transferred to Florida and registered there, as opposed to remaining in Minnesota.

In fact, there is a strong inference that the 1993 Lexus remained in Minnesota after late 2003. The parties stipulated that “Joint Exhibit 82 is a true and correct copy of American Family Insurance statements for Relator’s Afton House and Cars (2003-2004).” Supplemental Trial Stipulation (“Supp. Tr. Stip.”), ¶ 82.¹⁷ The third and fourth pages of Joint Exhibit 82 concern insurance on vehicles. Three vehicles are listed there as being insured through a Minnesota based insurance company: a 2004 Lexus, a 1993 Lexus, and a 1989 Rolls Royce. The last page shows that Mauer made a payment insuring the 1993 Lexus for the second half of 2004, a full year after Mauer contends that the car was moved to Florida. As Mauer acknowledged, he uses a Minnesota insurance agency “for the Minnesota house and the Minnesota cars” because “you have to.” Tr. 282. He specifically acknowledged that Joint Exhibit 82 “list[s] the cars [he] had insured in Minnesota in 2003 and 2004.” Tr. 215-16. In addition, the second sentence of paragraph 63(b) of the parties’ stipulation provides that “[Mauer] obtained insurance on this car [the 1993 Lexus] through a Minnesota insurance agent.”

Thus, there is ample evidence in the record to support the tax court’s finding that Mauer had three vehicles registered in Minnesota and only the 1988 Honda was registered in Florida in the tax years at issue. In addition, the car registered and maintained in Florida was the oldest and least expensive vehicle. The three newer and more expensive vehicles, including the 2004 Lexus, were registered and maintained in

¹⁷ The record does not contain a corresponding document regarding insurance on Florida vehicles.

Minnesota. It is a reasonable assumption that late model luxury vehicles are registered and kept at the primary residence. Tr. 312.

3. Factor Q: (Location of any bank accounts, especially the location of the most active checking account). Mauer's banking was centered in Minnesota.

The tax court found that Mauer had two bank accounts in Minnesota and one in Florida and that the most active bank account was in Minnesota. Add. 23, 28. The court also found that Mauer maintained an active line of credit with one of the Minnesota banks during the tax years at issue. *Id.* The tax court found that this factor weighs in favor of a Minnesota domicile.

Mauer challenges these findings. Rel. Br. at 27. He contends that Factor Q is neutral because he maintained bank accounts in both jurisdictions “in approximately equal quantities.” Rel. Br. at 29.

The parties' stipulation provides that a Florida checking account was opened in 2003 at the Bank of America; a checking account at Wells Fargo Bank in Minneapolis was opened prior to 2003 and maintained throughout the tax period at issue; and a line of credit at U.S. Bancorp in Minneapolis was opened prior to 2003 and maintained throughout the tax years. Stip. Facts, ¶ 67. The parties stipulated that Joint Exhibit 84 constitutes the Bank of America bank statements for the time from December 1, 2003, when the account was opened, through February, 2004¹⁸; Joint Exhibit 85 constitutes the Wells Fargo Bank statements for the period from June 2003 through December 2004; and

¹⁸ These are the only bank statements in the record for the Bank of American account.

Joint Exhibit 83 constitutes a summary of the U.S. Bancorp line of credit. Suppl. Tr. Stip., ¶¶ 83-85.

Mauer deposited all of his NBA salary in the Minnesota Wells Fargo account until December 2003 when he opened the Bank of America account in Florida. Tr. 220-221. After that point, he deposited half his NBA salary into the Florida account and half into the Minnesota account. Tr. 220.

The record contains statements covering two months from the Florida Bank of America account. Jt. Exh. 84. In this entire period of time only seven checks were written on this account. *Id.*

The record contains 18 months of statements from the Wells Fargo bank account in Minneapolis. Jt. Exh. 85. Checks written on this account range from a low of 11 checks in one month to a high of 42 checks in another month. The average for the 18 months is 26 checks per month. *Id.* There is no doubt that the Minnesota-based account was far more actively used by Mauer than the Florida-based account.

In addition, Mauer actively used his line of credit at the U.S. Bancorp in Minneapolis. Jt. Exh. 83. He was advanced \$160,000 in September 2003 and repaid that amount in December 2003. He borrowed about \$153,000 in the first four months of 2004 and repaid this amount by the summer of 2004. In September and December 2004 he took substantial advances against this account totaling about \$225,000. *Id.*¹⁹

¹⁹ Mauer used this line of credit to finance the purchase of properties for his real estate partnership in Minnesota. Tr. 271. *See infra* 30-31.

4. Factor T: (Location of business relationships and the place where business is transacted). Mauer transacted the bulk of his business in Minnesota.

The tax court found that Mauer used the services of five professionals in Minnesota: two accountants, a dentist, an insurance agent/broker, and a real estate agent/broker. Add. 23, 28-29. He also used the services of a Florida accountant and a Florida insurance broker. *Id.* The tax court found that more of these business associations were in Minnesota, thus indicating that this factor weighs in favor of a Minnesota domicile. Add. 29.

Mauer contests the tax court findings on this point. He contends that this factor is neutral because he maintained business relationships in “approximate equal quantities” in both states. Rel. Br. at 29.

The parties stipulated that Mauer used the services of the five professionals in Minnesota and the two professionals in Florida. Stip. Facts, ¶ 70. The commissioner also acknowledges that Mauer used the services of a Florida realtor in purchasing the townhomes in Florida. Tr. 143.

Merely counting up the number of professionals based in each state does not, however, give a full picture of “the place where business is transacted.” Mauer’s most active bank account was in Minnesota. *Supra* 27. He obtained a large mortgage and a line of credit in Minnesota. *Id.* He procured insurance for his vastly more expensive home and his more expensive automobiles in Minnesota. *Supra* 10-11. Most of his insurable personal property was located at his Afton home. *Supra* 10. His credit card

statements came to his Afton home. Tr. 284. Thus, there is substantial evidence that Factor T weighs in favor of a Minnesota domicile.

5. Factor U: (Location of social, fraternal, or athletic organizations or clubs or a lodge or county club, in which the person is a member). Mauer is an active member of referee associations in Minnesota, and he has no equivalent association in Florida.

The tax court found this factor to be in favor of a Minnesota domicile, in that Mauer was a member of the Minnesota Officials Association and/or the Capitol City Officials Association during the tax period at issue. Add. 23, 29. Mauer contends that the factor should be neutral because he maintained association and club memberships in both jurisdictions in “approximately equal quantities.” Rel. Br. at 29.

This factor weighs in favor of a Minnesota domicile. The Minnesota association was an active one. Mauer was a member of the Minnesota Officials Association of Minnesota as a condition of him refereeing high school athletic games. Stip. Facts, ¶ 72. He was also a registered official with the Minnesota State High School League and referees “whenever I am in town.” Tr. 214-15.

Mauer does have two clubhouse memberships in the Fort Myers area because they are required as a condition of him owning the two townhomes in that community. Tr. 199. He does not play golf, however, and he and his wife have been talking about moving elsewhere because everything in their community is centered around golf. Tr. 198.

B. The Tax Court Found Six Factors To Be In Favor Of A Florida Domicile.

The tax court found that six factors weigh in favor of a Florida domicile: Factor B (where the person votes or is registered to vote); Factor F (location/status of new living quarters); Factor H (homestead status of living quarters); Factor I (ownership of other real property); Factor J (state of driver's license); and Factor O (status claimed on Minnesota income tax return). Add. 20-22.²⁰ If anything, the tax court was conservative in evaluating one of these factors. Based on the record, the tax court could just have easily found that Factor I was neutral or even weighs in favor of a Minnesota domicile.

The tax court found that Factor I weighs in favor of a Florida domicile based upon the fact that in August 2004 Mauer purchased a second townhouse in Florida as an investment property. Add. 21. On the other hand, Mauer became involved with his friend Richard Lesch in a real estate partnership which owned approximately seventeen vacant and developed lots in St. Paul, Minnesota. Supra 15. In both of the Residency Questionnaires that Mauer filled out for the Department of Revenue, he stated that "I dabbled in real estate in 2003, 2004, 2005" in Minnesota. Jt. Exh. 42; Tr. 267. His accountant verified in a letter to the Department of Revenue that the "reference to

²⁰ Nearly all of these factors can be met rather easily by a taxpayer with sufficient financial resources, without the taxpayer substantially changing his life style or diminishing his activities in the state of Minnesota. Simply meeting those factors which are easy or convenient is not sufficient to establish a new domicile. See, e.g., *Manthey v. Comm'r of Revenue*, No. 5238, 1990 WL 73501, at *6 (Minn. Tax Ct., May 16, 1990) (finding that changing driver's and other licenses, obtaining housing, opening a bank account, and registering and keeping a car in Alaska "were a matter of convenience: for the time the taxpayer spent in Alaska, and did not overcome extensive ties remaining to Minnesota), *aff'd*, *Manthey v. Comm'r of Revenue*, 468 N.W.2d 548 (Minn. 1991).

dabbl[ing] in real estate refers to [Mauer's] investment in an LLC that is developing property in St. Paul.” Tr. 28. While the partnership between Mauer and Lesch known as Promised Land of Minnesota, LLC, did not file a certificate of organization with the Minnesota Secretary of State until August 2005, Jt. Exh. 73, the Articles of Organization indicate that the partnership had begun in July 2004. Jt. Exh. 73. In addition, Mauer testified that he borrowed against a line of credit in 2003 and 2004 to finance the building of one of the properties. Tr. 271.

In short, Mauer purchased a real estate investment property in Florida in August 2004, and in July 2004 he began a real estate partnership in Minnesota that involved many rental properties and vacant lots. Thus, at the very least, Factor I should be neutral.

C. The Tax Court Properly Found That Six Factors Are Not Applicable.

The tax court did not discuss six of the factors because they are not applicable: Factor C (status as a student); Factor K (professional licenses); Factor N (hunting or fishing licenses); Factor X (source of unemployment compensation); Factor Y (location of schools); and Factor Z (statements made to insurance companies). Mauer agrees that these six factors are not applicable. Rel. Br. at 25 n. 4.

D. Mauer Does Not Contest The Tax Court's Findings That Six Of The Factors Are Neutral.

The tax court explicitly or implicitly found that six of the domicile factors were neutral. First, the tax court explicitly found that the following four factors were neutral: (1) Factor D (classification of employment as temporary or permanent) — Mauer had permanent employment, but it was not centered in Minnesota or Florida; (2) Factor E

(location of employment) — Mauer’s NBA work required him to travel across the country; (3) Factor L (union membership) — Mauer was a union member, but the union is located in New York; (4) Factor V (address of mail) — Mauer received mail in both states. Add. 24.

Mauer agrees that all four of these factors are neutral. Rel. Br. at 25 n. 5. He also contends that Factor S (location of place of worship) and Factor P (fulfilling tax obligations) are also neutral. Rel. Br. at 27. The tax court implicitly found Factors S and P to be neutral or not applicable, because the court did not mention these two factors.

The tax court’s decision is again conservative. It could easily have found that Factors E and S weigh in favor of a Minnesota domicile, even if only slightly.

The tax court considered Factor E, the location of employment, to be neutral because Mauer’s NBA work was not centered in either Minnesota or in Florida. Add. 20. It is correct that Mauer’s primary full-time job, that of an NBA referee, was centered in neither state. Mauer had, however, during the one and one-half years at issue, secondary employment as a referee for the Minnesota State High School League. *Supra* 3. Because he performed this work in Minnesota and had no equivalent work in Florida, this factor weighs in favor of a Minnesota domicile, even if only slightly.

Factor S, the location of the place of worship at which the person is a member, also weighs in favor of a Minnesota domicile, at least slightly. Mauer attended a church in Florida, but also went to church every Sunday when he was in Minnesota. Tr. 213. During the latter half of 2003 and all of 2004 he attended church far more often in Minnesota than he did in Florida. His personal calendar shows that for the 78 Sundays

during this period of time, he was in Minnesota for 37 of them, in Florida for 17 of them, and elsewhere for 24 of them. Jt. Exh. 40. Therefore, Factor S weighs in favor of a Minnesota domicile.

In summary, the tax court's findings are amply supported by the evidence. If anything, the tax court was conservative in its decision because the tax court could readily have found based upon the evidence that Factors S and E weigh in favor of a Minnesota domicile rather than being neutral, and that Factor I was neutral rather than weighing in favor of a Florida domicile.

III. THE TAX COURT'S DECISION IS SUPPORTED BY THE EVIDENCE AS A WHOLE AND APPLICABLE CASE LAW.

Other than the points he raises in relation to specific factors discussed above, Mauer's challenges to the tax court decision fall into several categories. First, he contends that the tax court ignored evidence that Mauer's true intent was to move to Florida in July 2003. Rel. Br. at 35-39. Second, he contends that the tax court overemphasized Factor W, relating to the percentage of time he spent in Minnesota and in Florida, because this factor is not a reliable indicator of his intent given his "heavy employer - mandated travel." *Id.* at 39-40. Third, he faults the tax court for failing to discuss what he contends is its most germane prior case, *Page v. Comm'r of Revenue*, No. 4011, 1986 WL 15695 (Minn. Tax Ct., Mar. 12, 1986). Rel. Br. at 40-43. Finally, he contends that the tax court's decision renders Minnesota's residency standard unascertainable, and thereby void for vagueness. *Id.* at 43. None of Mauer's challenges has merit.

A. The Tax Court Properly Weighed The Evidence In Determining That Mauer Did Not Intend To Change His Domicile From Minnesota.

Mauer faults the tax court for not even “*acknowledging* that he moved to Florida generally and to Heritage Palms specifically, because his extended family would be spending significant time there for the foreseeable future (Tr. 138, 144).” Rel. Br. at 35 (emphasis in original).²¹ Mauer did provide a number of reasons why he intended to change his residency to Florida. *See* Rel. Br. at 21-25. This Court has held, however, that in determining whether a person has changed his legal residence, actions speak louder than words. *Sandberg v. Comm’r of Revenue*, 383 N.W.2d 277, 283 (Minn. 1986) (holding taxpayer remained a domiciliary of Minnesota where he continued to have close ties to Minnesota but few connections to Texas); *Comm’r of Revenue v. Stamp*, 296 N.W.2d 867, 869 (Minn. 1980) (holding trier of fact may consider acts and circumstances of taxpayer in evaluating declared intent to change domicile). *See also* *Howe v. Comm’r of Revenue*, Nos. 4471, 4375, 1986 WL 9429, at *4 (Minn. Tax Ct., June 13, 1986) (holding taxpayer’s declarations to be free of Minnesota tax laws

²¹ Mauer also argues that he intended to move to Florida because he was bitter at the state of Minnesota because of his 2001 conviction by a federal jury in Minnesota for criminal tax evasion in connection with unreported expense reimbursements from the 1990’s. Rel. Br. at 5-6, 42. Mauer did testify that his conviction left him with “a little bit of a sour taste in [his] mouth with Minnesota.” Tr. 135. He admitted, however, that the Minnesota Department of Revenue did not pursue criminal charges against him, that his federal conviction had nothing to do with his status as a Minnesota resident, and that he received a fair trial before the federal jury. *Id.* at 224-25. Furthermore, the fact that he continued to spend so much time in Minnesota during the tax period at issue demonstrates that any anger he felt towards the state of Minnesota was outweighed by other considerations.

outweighed by fact that he continued to spend seven months per year in Minnesota). In addition, the tax court was in a position to judge the credibility of witnesses, including Mauer, and did not have to accept Mauer's statements as truly indicative of his intent, particularly where those statements were contradicted by his acts. *See, e.g., Vershure v. Comm'r of Revenue*, No. 3703, 1983 WL 1974, at *4 (Minn. Tax Ct., Dec. 9, 1983) (holding that course of conduct accorded greater weight than self-serving declarations); *Sarek v. Comm'r of Revenue*, No. 2524, 1979 WL 1107, at *5 (Minn. Tax Ct., Apr. 19, 1979) (holding that taxpayer's "intent must be implemented by action, which in fact integrates one's life with the new community"). Moreover, while Mauer might have been expecting many of his family to come for visits to Florida, it is a fact that Mauer continued to have the most contact with his "close family" in Minnesota. Tr. 111. His parents, all five of his siblings, and "hundreds" of his relatives lived in Minnesota. Tr. 109, 140.

Mauer's main contention about his intent relates to what he sees as "the most significant evidence manifesting Mauer's intent with respect to domicile — his documented dispute with the NBA concerning his home airport." Rel. Br. at 37. As Mauer presents the facts, he was willing to incur the NBA's threat of sanctions up to possible termination of his employment because he claimed Fort Myers, Florida as his main airport. *Id.*

In fact, Mauer's dispute with the NBA concerning his home airport simply involved money. Mauer was free under the NBA rules to designate either Minneapolis or Fort Myers as his "home airport," and have his travel allowance based upon that airport.

Supra 7. The NBA objected, however, to the situation when it learned that Mauer was primarily flying into and out of Minneapolis, but claiming what the NBA maintained was a larger allowance associated with Fort Myers. *Id.* At some point Mauer presented the NBA with calculations to show that his choice of Fort Myers as his home airport, rather than Minneapolis, actually resulted in a net savings to the NBA. Tr. 187; Jt. Exh. 24. His documentation appears to have resolved the problem with the NBA over his travel allowance.

B. The Tax Court Properly Applied Factor W In Its Decision.

Mauer seems to argue that the tax court should not have given Factor W (percentage of time physically in Minnesota and in Florida) more than minimal weight because he could not have spent more time in Florida due to his work-related travel. Rel. Br. at 40. Indeed, Factor W is important, and the tax court weighed it correctly.

In addition to being one of the twenty-six factors, evaluation of the percentage of time spent in Minnesota and in the state in which domicile is claimed is important because it goes to whether Mauer had the requisite intent to leave Minnesota. *See, e.g., Sanchez*, 770 N.W.2d at 526 (holding taxpayer who claims a change of domicile must show that he “actually reside[s] in the new state at the time the intent is formed to make the new state one’s permanent home”) (quoting *Wolf v. Comm’r of Revenue*, No. 7068, 1999 WL 640030, at *2 (Minn. Tax Ct., Aug. 17, 1999)). Mauer’s travel pattern was to leave Minnesota with the intent to return to Minnesota. *Supra* 5, 8, 13-14. The tax court could properly interpret these facts as an indication that Mauer did not have the requisite intent to change his domicile.

Based upon stipulated calendars, Joint Exhibit 40, the tax court found that from the date on which Mauer bought the Florida townhome through the end of 2003, he spent 85 days in Minnesota and 26 days in Florida. Add. 11. In all of 2004 he was physically present in Minnesota for 181 days, for 64 days in Florida, and 121 days in other locations. *Id.* Mauer's NBA travel certainly resulted in fewer days that he could spend in Florida, but it did not affect the comparison of days in Minnesota to those in Florida. Even during the NBA season when he was free to go to either Minnesota or Florida between games (and when Florida was not so humid that he did not want to be there), he regularly spent more days in Minnesota. Of the eleven months of the NBA season that fall within the tax period at issue, there are only two months in which Mauer spent more days in Florida than in Minnesota: March and November, 2004. Add. 27; Jt. Exh. 40. In fact, if one takes into account NBA games that Mauer was obligated to attend in either Florida or Minnesota, then in only one of these eleven months did Mauer spend more free days in Florida. *Supra* 6.

C. The *Page* Case Does Not Aid Mauer.

Mauer candidly admits that *Page* is “not literally on all fours with the present case.” Rel. Br. at 42. In fact, the tax court's decision in *Page* only reinforces the tax court's decision in this case. The major factor distinguishing *Page* from this case is that the tax court in *Page* found that “clearly the focus of the Pages' lives had changed [from Minneapolis to Chicago].” *Page*, 1986 WL 15695, at *7. The Pages established their intent to change domicile by focusing their efforts on “integrating their lives in the Chicago area community.” *Id.* *Page* took his family with him to Chicago, enrolling his

children in school in Illinois. *Id.* at *2. He and Mrs. Page explored legal and other opportunities in the Chicago area in preparation for the termination of his football career. *Id.* They joined several clubs in the Chicago area and were involved in speaking engagements, charities, and other activities in the Chicago community. *Id.* Page considered running for political office in Chicago. *Id.* They took out mortgages and loans through Illinois banks and had several investments in Chicago concerns during the relevant years. *Id.* Page became a member of the Board of Directors of the Chicago Association of Retarded Citizens; he received a Jaycees' award in Chicago; and he participated on a committee of the American Bar Association in Chicago. *Id.* Meanwhile, the Pages ceased being active in community or charitable activities in Minnesota during the tax years. *Id.*

In contrast, when Mauer was in Florida in 2003 and 2004, he relaxed, enjoyed the warm weather, visited with relatives and family, went to a ball game when he could, shopped, and went to church. Tr. 197-99. By these activities Mauer did not integrate himself into the Fort Myers community. *See Morrissey v. Comm'r of Revenue*, No. 4275, 1985 WL 6220, at *6 (Minn. Tax Ct., Dec. 17, 1985) (holding that change of domicile does not take place “unless one’s intent is evidenced by actions integrating one’s life in the new community”). Mauer’s activities in Florida are no more than a “snowbird” would do when spending a few months in Florida during the winter.

Mauer retained, however, strong ties to Minnesota. He was very close to his family, hundreds of whom lived in Minnesota. Tr. 111, 140. His father was his idol, and he grew up refereeing with him and with his father, uncles, and brothers and “friends that

I still hold dear.” Tr. 112-13. He developed close friendships at the agency at which he worked after college. Tr. 116. He fell in love with Afton, and the architect of his home became his best friend. Tr. 122, 124. He engaged in speaking engagements for free in Minnesota and contributed to a book written by a Minnesota author. Tr. 140, 213. He loved to spend periods between Thanksgiving and Christmas in Minnesota because of the family he had here and because he loved snow. Tr. 291, 293. On his personal calendar, when he returned to Minnesota from a vacation on August 17, 2003, he wrote on his calendar that he “returned home.” Jt. Exh. 30, at 82.

D. The Court Should Not Entertain Any Of Relator’s Constitutional Claims.

In the tax court Mauer contended that the commissioner’s application of Factor W of the residency rule violated the Commerce Clause of the United States Constitution and the Equal Protection provisions of the United States and Minnesota Constitutions. The tax court rejected these constitutional challenges. Add. 30-39. Mauer did not raise these constitutional claims in his opening brief. Accordingly, these claims are waived. *Gassler v. State*, 787 N.W.2d 575, 582 (Minn. 2010); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Without stating explicitly that he is doing so, it appears that Mauer is now contending that the tax court’s decision renders Minnesota’s domicile standard unascertainable, and thereby void for vagueness. Rel. Br. at 43-45. This argument was not raised below and therefore should not be entertained by the Court. If an issue is not

presented below, it is not properly raised on appeal. *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn. 1997).

Even if the Court were to consider Mauer's vagueness challenge, that challenge fails. In *State v. Enyeart*, 676 N.W.2d 311, 320-21 (Minn. Ct. App. 2004), the court upheld the domicile rule against a facial and an as-applied challenge in the criminal context. The court held that "[a]lthough the domicile rule does not provide a magic formula for determining when a taxpayer has established an intention to change domiciles — relying instead on an exhaustive list of determinative factors — it specifies a standard of conduct that ordinary people of reasonable intelligence can understand." *Enyeart*, 676 N.W.2d at 321.

Mauer claims that in preparation for his move to Florida, he researched the domicile rule and attempted to comply with the rule. Rel. Br. at 43. It is, of course, impossible to predict with certainty the outcome of a tax court case when twenty-six factors are involved. If, however, Mauer had consulted a competent tax attorney or accountant at the time he professed an intent to change his domicile, the person likely would have advised him to act differently than he did in a number of ways. First, Mauer could have engaged in a true and bona fide effort to sell his Afton home rather than a sham effort that the tax court found to be not credible. Second, he could have integrated himself into the community in Florida, rather than remain integrated in his life in Minnesota. Third, he could have changed the focus of his business relationships to Florida (main banking account; line of credit; credit card; real estate partnership). Fourth, he could have spent additional time in Florida and participated in Florida

community activities. Finally, he could have brought additional belongings and automobiles to Florida.

Instead, Mauer remained invested in his Minnesota life while integrating his life into Florida no more than would a vacationer. Mauer's domicile claim failed in the tax court not because the domicile rule is too vague, but because he failed to meet many of the factors in the rule.

E. Mauer Was A Non-Domiciliary Resident In 2003.

The commissioner found, as an alternative rationale, that Mauer was a non-domiciliary resident in 2003 because he was present in the state for more than 183 days and he continued to own his Afton house. *See* Minn. Stat. § 290.01, subd. 7 (b) (2002) (stating non-domiciliary rule); *see also* Jt. Exh. 39 at 22 (noting Mauer was in Minnesota for 203 days in 2003). As the auditor stated, Mauer “has owned, lived in, and maintained his personal residence” in Afton since the early 1990s. Jt. Exh. 39 at 19. These facts were undisputed at trial.

The tax court did not need to reach this issue and did not do so. Mauer did not discuss the issue in his brief to this Court. It is clear, however, that Mauer was subject to Minnesota income taxes in 2003 as a non-domiciliary resident, even if he was not a Minnesota domiciliary during the latter half of that year.

CONCLUSION

For the reasons stated above, the Commissioner requests that this Court affirm the decision of the tax court.

Dated: May 21, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 11,917 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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AG: #2996207-v1