

STATE OF WISCONSIN
TAX APPEALS COMMISSION

GARY LIZALEK,

DOCKET NOS. 08-I-180, 08-I-181,
08-I-182, 08-I-183, 08-I-184
AND 08-I-185

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This case comes before the Commission on a Motion for Summary Judgment filed by the Respondent, the Wisconsin Department of Revenue (“the Department”), which is supported by briefs, affidavits, and exhibits. The Department is represented in this matter by Attorney Peter D. Kafkas of Madison, Wisconsin. The Petitioner in these matters, Mr. Gary C. Lizalek, appears *pro se* and has filed briefs, affidavits, exhibits, and motions in opposition to the Department’s summary judgment request. The issue in this Motion for Summary Judgment is if Mr. Lizalek had a Wisconsin domicile for income tax purposes in the years from 2001 through 2006.

Having considered the record before it in its entirety, the Commission finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS¹

A. Jurisdictional Facts

1. The Respondent issued estimated income tax assessments dated March 11, 2008, against the Petitioner in the following amounts:

2001	\$13,128.24	[\$5,672 in tax plus \$6,008.24 in interest];
2002	\$10,020.64	[\$4,692 in tax plus \$4,125.64 in interest];
2003	\$9,801.27	[\$5,014 in tax plus \$3,503.77 in interest];
2004	\$9,466.55	[\$5,335 in tax plus \$2,767.80 in interest];
2005	\$7,459.34	[\$4,679 in tax plus \$1,580.59 in interest];
2006	\$7,064.83	[\$4,997 in tax plus \$788.58 in interest].

The assessments included penalties and fees of \$1,448 for 2001, \$1,203 for 2002, \$1,283.50 for 2003, \$1,363.75 for 2004, \$1,199.75 for 2005, and \$1,279.25 for 2006. The total amount of all of the assessments against the Petitioner is \$56,940.87.

Second Affidavit of Peter D. Kafkas, Exhibits G-L.

2. The Petitioner filed Petitions for Redetermination with the Department on April 23, 2008. *Id.*, Exhibits M-R.

3. The Respondent's Resolution Unit acted on Mr. Lizalek's Petitions for Redetermination and denied Mr. Lizalek's Petitions for Redetermination by its notice dated September 24, 2008. *Id.*, Exhibits S-X.

¹ We have compiled the findings of fact from the affidavits submitted by Mr. Lizalek and the Department. We have made edits for form, clarity, and punctuation. The six years at issue correspond to the six sequential Docket Numbers assigned to these cases.

4. The Petitioner filed Petitions for Review with the Wisconsin Tax Appeals Commission which were received by the Wisconsin Tax Appeals Commission on November 21, 2008. *Id.*

B. Material Facts²

1. Mr. Lizalek was domiciled in Illinois from 1961 until 1991. August 27, 2009 Affidavit of Mr. Gary C Lizalek, ¶8.

2. Petitioner filed Wisconsin Form 1 Individual Income Tax returns for the years 1997, 1998, and 1999, listing an address for himself on Mt. Royal Road in Glendale, Wisconsin. On the returns, the Petitioner claimed exemptions for a wife (Ms. Karen Lizalek) and 2 children and used the filing status “Married filing jointly.” Mr. Lizalek listed his occupation as an electronic engineer. Affidavit of John C. Teasdale.

3. On March 5, 2001 Mr. Lizalek signed a Form W-4 Employee’s Withholding allowance certificate, claiming to be married and listing an address for himself on Mt. Royal Road “near Milwaukee, Wisconsin.” The employer listed is a communications company on Silver Spring Drive, which is in the Milwaukee area. The date of hire is listed as March 5, 2001. Affidavit of John C. Teasdale, ¶10 and Exhibit 5.

4. On February 9, 2002 the Petitioner filed a 2001 Wisconsin Fiduciary Income Tax return (for estates or trusts) for the “Gary C Lizalek” trust seeking a refund of \$903.25 for Wisconsin income tax withheld for that year. *Id.* The return had a

² The Department proposed as a finding of fact that an Internet search revealed a website on which it is stated that the Petitioner had been governor of the “Republic of Wisconsin” for the four years previous to 2006 and that he ran for reelection in 2006. As we have concerns regarding the authentication of this information, we have decided not to include this item in the statement of facts.

handwritten notation listing a “mailing location” in Oak Lawn, Illinois. Affidavit of John C. Teasdale, ¶9, Exhibit E.

5. Mr. Lizalek filed a Form W-220 Nonresident employee’s withholding reciprocity declaration with every Wisconsin employer from 2001 through 2005. The Petitioner claimed Illinois residence and sought to end Wisconsin withholding. August 27, 2009 Affidavit of Mr. Gary C Lizalek, ¶23.

6. Mr. Lizalek filed non-resident trust income tax returns with the Wisconsin Department of Revenue for the tax years 2001 and 2003. August 27, 2009 Affidavit of Mr. Gary C Lizalek, ¶49.

7. When the 2001 claim for refund was denied by the Department, Mr. Lizalek filed a Petition for Review before this Commission which was dismissed by the Commission as untimely in *Gary C. Lizalek v. Dep’t of Revenue*, Docket No. 3-I-219-SC, on November 7, 2003. The address for Mr. Lizalek listed on the Commission’s order is on Port Washington Road in Milwaukee. In that case, Mr. Lizalek sought the return of \$903.25 of income tax from the State of Wisconsin. In a footnote, the Commission stated that “[P]etitioner refers to himself as ‘Gary C Lizalek (Trust).’ Petitioner’s claim that he is a trust is frivolous and properly disregarded by [the Department].”

8. In another case before the Commission, *Gary C. Lizalek v. Dep’t of Revenue*, Docket No. 04-T-110, (May 19, 2005), the Petitioner and his wife, Ms. Karen N. Lizalek, conveyed real estate in Wisconsin on January 15, 2003, to the “Kelazil Religious Society,” but paid no real estate transfer fee. On February 6, 2004 the Department issued an assessment for the real estate transfer fee plus interest and penalties, totaling

\$732.15. The Department filed the equivalent of a summary judgment motion and in response Mr. Lizalek argued *inter alia* that Federal Reserve notes are not lawful currency. The Department's Motion for Summary Judgment was granted. The Commission imposed an additional assessment of \$300 on Mr. Lizalek pursuant to Wis. Stat. § 73.01(4) (am) for making arguments that were frivolous or groundless.

9. Mr. Lizalek was employed by four different employers during the years 2001 through 2005. August 27, 2009 Affidavit of Mr. Gary C Lizalek, ¶24.

10. Mr. Lizalek was unemployed from 2005 until 2007. August 27, 2009 Affidavit of Mr. Gary C Lizalek, ¶25.

11. Mr. Lizalek collected unemployment compensation from the Wisconsin Department of Workforce Development in 2005 and 2006, listing a Wisconsin address for himself. Affidavit of John C. Teasdale, ¶6.

12. W-2's submitted in this case show that in 2007 and in 2008 Mr. Lizalek worked at Cornell Co. in Milwaukee. In 2007, the Petitioner also worked for an employer listing a Carmel, Indiana address on the Petitioner's W-2. Respondent's Reply Brief, Attached Exhibit.

13. After reviewing the initial submissions on the Motion for Summary Judgment, the Commission ordered additional briefing from the Petitioner, requesting that he inform the Commission as to the particulars of his living situation during the years 2001 through 2006. The Commission sent Mr. Lizalek a copy of *Baker v. Wisconsin Department of Taxation*, 246 Wis. 611, 18 N.W.2d 331 (1945) and a copy of the *Rowe v.*

Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶202-280 (WTAC 1983) case.³ In response to the Commission's order, the Petitioner submitted certified copies of Illinois trust returns he filed for the years 2001 through 2006, federal trust returns he filed for the same years, and an October 23, 2003 application for a post office box in Oak Lawn, Illinois. See TAC file.

14. In one of his unsworn affidavits, the Petitioner wrote, "Petitioner reestablished residence and domicile in Illinois at least during the years 2001 through 2006 by willful and deliberate intent." Affidavit of Gary C. Lizalek.

15. In 2003, the Petitioner filed a federal civil case against his Milwaukee-based employer. In connection with that case, the Petitioner signed a "Partial Settlement Agreement and Release." Petitioner executed the document twice while listing two Wisconsin addresses for himself. (*Gary C. Lizalek v. Silver Spring Networks, Inc.*, U.S. District Court of the Eastern District of Wisconsin, Case No. 03-C-1280). Respondent's Brief, Exhibit F.

16. On February 25, 2008, the Department requested by way of a letter to the Petitioner that the Petitioner file income tax returns for the tax years 2001–2006. *Id.*, Exhibit D. In the Petitions for Redetermination filed in 2008, the Petitioner asserted that he was not a Wisconsin resident from 2001 through 2006 and, therefore, did not have to file returns or pay income taxes. Affidavit of John C. Teasdale.

³ The *Baker* case is the leading Wisconsin case on domicile and is discussed on pages 14 through 17. The significance of the *Rowe* case is that the taxpayer in *Rowe* succeeded in proving to the Commission that he was domiciled in Illinois, and not in Wisconsin.

17. In his reply to the Department's Motion for Summary Judgment filed with the Commission in August, 2009, the Petitioner submitted as exhibits a certified copy of the 2001 Illinois trust return for the "Gary C Lizalek Trust," copies of documents relating to his Illinois Driver's License, copies of various documents relating to voter registration, and a copy of a standby jury summons for Cook County, Illinois dated April, 2007. *Id.*

18. In a motion filed with the Commission on October 26, 2009, Mr. Lizalek wrote the following:

Domicile and residence can change from year to year. Previous and/or future residences and/or domiciles have no influence over the factual and legal state of a current residence and/or domicile. Petitioner was resident and domiciled in the State of Illinois until the year 1991. Yet Respondent is not arguing that Petitioner was not domiciled in the State of Wisconsin in 1997. Petitioner returned to residence and domicile in the State of Illinois in 2001. **Petitioner has been employed in the State of Illinois and the State of Wisconsin while being domiciled in the State of Illinois or the State of Wisconsin in all four possible configurations. That is; 1) domiciled in the State of Illinois and employed in the State of Illinois; and, 2) domiciled in the State of Wisconsin and employed in the State of Wisconsin; and, 3) domiciled in the State of Wisconsin and employed in the State of Illinois, an act of interstate commerce; and, 4) domiciled in the State of Illinois and employed in the State of Wisconsin . . .**

[emphasis added in bold].

October 26th, 2009 Motion of Petitioner Objecting to Respondent's Attempt to Expand Jurisdiction.

19. On December 10, 2009 Mr. Lizalek filed with the Commission an affidavit for each of his cases which stated as follows:

3. On December 4, 2009, at 10:30 a.m., GARY C LIZALEK, at an official location authorized to receive payments, appeared before the counter of the Wisconsin Department of Revenue agent [], operating under the authority of Secretary Roger M. Ervin, and tendered payment without contest in United States Gold coin as payment for a purported debt for the 2001 tax year against GARY C LIZALEK, [SSN xxx-xx-xxxx] owed to the republic state named Wisconsin.

* * *

6. Said payment, tendered at the official exchange rate established by the United States Congress in accord with the Constitution for the United States of America, is:

Quantity 19, 1 oz. American Gold Eagle coins; lawful Money as defined by the United States Government.

7. I further witnessed that said Agent refused to accept said payment.

[emphasis in original].

The title of the affidavit was "A Tender of Payment without Contest (Though the alleged debt is not believed to be owed.)" Affidavit of Gary C Lizalek, filed December 10, 2009.

RELEVANT WISCONSIN STATUTES

71.02 Imposition of tax.

(1) For the purpose of raising revenue for the state... there shall be assessed, levied, collected and paid a tax on all net incomes of individuals... by every natural person residing within the state ... Every natural person domiciled in the state shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes...

(2) In determining whether or not an individual resides within this state for purposes of this section, the following are not relevant:

- (a) Contributions made to charitable organizations in this state.
- (b) Directorships in corporations operating in this state.
- (c) Accounts, ..., held in financial institutions, ..., located in this state.
- (d) Corpuses of trusts, in which the individual is a trustee or a beneficiary, located in this state.
- (e) Retention of professional services of brokers, ..., and of attorneys and accountants located in this state.

* * *

71.04 Situs of income; allocation and apportionment.

(1) Situs. (a) All income or loss of resident individuals ... shall follow the residence of the individual, ... Income from personal services of nonresident individuals, including income from professions, shall follow the situs of the services...

Wis. Stat. §§ 71.02 and 71.04 (2005-06).

OPINION

In this case, the Department has assessed Mr. Lizalek approximately \$56,000 in income tax, penalties, fees and interest for the years 2001-2006. Mr. Lizalek did not file individual Wisconsin income tax returns for those years, and claims here that he was domiciled in Illinois during that period. Mr. Lizalek concedes, however, that he lived in Wisconsin from 1991 to 2001 and his Wisconsin resident returns filed in 1997, 1998, and 1999 are part of the record in this case. This is a Summary Judgment Motion and the first part of this opinion will set forth the relevant law and standards

that apply here.⁴ The second part of this opinion will summarize Mr. Lizalek's arguments. The third part of this opinion will set forth the Department's position. Finally, we will discuss why the Department is entitled to judgment.

A. SUMMARY JUDGMENT STANDARDS

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). A material fact is one that would influence the outcome of the controversy. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58. The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991).

If the moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle him or her to trial. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis.2d 181, 188, 148 N.W.2d 641 (1967). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980), *citing* Wis. Stat. §

⁴ The Department's March 18, 2009 motion asks for a dismissal based on summary judgment, on a failure to state a claim upon which relief can be granted, and on *res judicata*. The Department also requested a protective order after the Petitioner served 78 requests to admit on the Department in a 14 page document. Our resolution of the Department's summary judgment motion renders the other requests moot.

802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar*, 34 Wis.2d at 188. Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents*, 94 Wis.2d at 673.

One of the purposes of summary judgment motions is to weed out unfounded claims, specious denials, and sham defenses. *Yahnke v. Carson*, 236 Wis. 2d 257, 613 N.W.2d 102 (2000). Summary judgment separates real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial. *Id.* Summary judgment motions “avoid trials where there is nothing to try.” *Transportation Ins. Co. v. Hunzinger Construction Co.*, 179 Wis. 2d 281, 507 N.W.2d 136, 139 (Ct. App. 1993).

B. THE RESPONDENT’S ARGUMENTS IN FAVOR OF ITS MOTION FOR SUMMARY JUDGMENT

The Department argues that the Petitioner was a Wisconsin resident from 1991 to 2001. Based on longstanding precedent, the taxpayer must clearly show that he or she no longer is domiciled here and has established a domicile in another state. In response to the Petitioner’s affidavits and exhibits, the Department also has produced additional affidavits and documents.

C. THE PETITIONER'S RESPONSES TO THE MOTION

The Petitioner does not challenge the Department's recitation of the applicable law. The Petitioner also does not challenge the assessment as to its amount.⁵ Instead, the Petitioner claims that he moved from Glendale, Wisconsin to Oak Lawn, Illinois in 2001, and thus is not liable for the Wisconsin income tax. In support of this claim, the Petitioner has submitted a photocopy of an Illinois driver's license issued August 11, 2001, a voter identification card and related letters from the Cook County Clerk, a 2007 standby jury summons from Cook County, and his own affidavits.⁶

D. DISCUSSION

This case requires us to decide if the Petitioner has adduced enough facts to defeat the Department's Motion for Summary Judgment. The Petitioner does not challenge the Department's position on the first part of the test. In support of his position that the income tax assessment is invalid because he lived in Illinois, the Petitioner has submitted a photocopy of his Illinois driver's license and a standby jury summons for service in Cook County, Illinois. After the Commission issued an order to the Petitioner dated July 2, 2009 directing him to address the relevant legal criteria on change of domicile, the Petitioner submitted an additional affidavit, a photocopy of an

⁵ The Department's assessment is presumed to be correct and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶1202-401 (WTAC 1984)*.

⁶ For unknown reasons, the Petitioner also submitted to us as an exhibit a purported photocopy of the social security cards of Lee Harvey Oswald and Jerry Lee Lewis. It also appears from the affidavits Petitioner filed with the Commission on December 10, 2009 that the Petitioner on December 4th, 2009 attempted to pay the income taxes at issue in these cases in person with gold coins. See Material Fact 19 above.

application form for a post office box in Illinois dated October 29, 2003, and 2001-2006 Illinois trust returns for the “Gary C Lizalek Trust.” The first part of this section will summarize the applicable law. The second part of this section will apply the facts and show why the Petitioner has not rebutted the Department’s *prima facie* case.

1. Applicable Law

Wisconsin may levy an income tax on all citizens domiciled within the state, as “domicile in itself establishes a basis for taxation.” *Lawrence v. State Tax Comm.*, 286 U.S. 276, 279 (1932). “Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.” *Id.* Pursuant to this authority to tax, Wisconsin imposes a personal income tax upon “every natural person residing within the state....” Wis. Stat. § 71.01. The state has an interest in ensuring that all residents of the state bear their responsibility for sharing the costs of government. *Anderson v. Department of Revenue*, 169 Wis. 2d 255, 484 N.W.2d 914 (1992).⁷ Justice Holmes defined domicile as “the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.”

⁷ The Wisconsin cases in the past have considered the term “residence” as used in this statute interchangeable with “domicile.” *Will of Baldwin*, 260 Wis. 195, 50 N.W.2d 463 (1951); *Estate of Morey*, 272 Wis. 79, 74 N.W.2d 823 (1956); *Estate of Eaton*, 186 Wis. 124, 202 N.W. 309 (1925); *Estate of Read*, 195 Wis. 128, 217 N.W. 709 (1925). In *Estate of Daniels*, 53 Wis. 2d 611, 614, 194 N.W.2d 847 (1972), the Supreme Court suggested that “residence” and “domicile” may represent two different concepts. However, Wis. Stat. § 71.02(1) uses the terms interchangeably. Wherever possible in this opinion, we will use the term “domicile” to describe the legal status that is the issue in this case.

A state's basis to impose an income tax may be lost by the state when the taxpayer moves his or her domicile and no longer meets the statutory tests. The leading case in Wisconsin on change of domicile is *Baker v. Wisconsin Department of Taxation*, 246 Wis. 611, 18 N.W.2d 331 (1945).⁸ In that case, from 1907 to July of 1941, Mr. Baker owned and occupied a house on Summit Avenue in Milwaukee, which he conveyed to his wife in 1941. In his income tax return filed in 1941 for his 1940 income, he made a declaration that he had changed his residence from Milwaukee, Wisconsin, to Beulah, Michigan. When he did not file a return for 1941, the Assessor requested that he file a return. On August 1, 1942, he stated in a return that Beulah, Michigan, was his legal residence and that he was not subject to income tax in Wisconsin. He omitted to state his gross income for 1941 or any statutory deductions. The Assessor, however, determined that Mr. Baker was domiciled in Wisconsin for 1941 and subject to income tax. In the income tax return filed for 1941 by his wife, who still lived on Summit Avenue, she claimed the full personal exemption of \$17.50 allowable to husband and wife.

Mr. Baker had been a lawyer at Northwestern Mutual Life at its general offices in Milwaukee since 1925, and traveled frequently. In 1925, Mr. Baker constructed a summer residence on his land at Beulah, and there he and his family spent vacations and week-ends. He planned on retiring in 1941, and decided to change his domicile from Wisconsin to Michigan. Early in 1941, however, Mr. Baker decided to

⁸ The rule the Wisconsin Supreme Court applied in *Baker* goes back much further. *Kellogg v. The Supervisors of Winnebago County*, 42 Wis. 97 (1877). A similar rule is applied in numerous other states. *Cass v. Gunnison*, 68 Mich. 147, 36 N.W. 45 (1888); *Julson v. Julson*, 255 Iowa 301, 122 N.W.2d 329 (1963); *Vickerstaff v. Vickerstaff*, 392 S.W.2d 559, 561-62 (Tex. Civ. App. 1965).

postpone retirement. Mr. Baker found it impossible to carry out his plan of living at Beulah during the entire year, but did spend many weekends there.

Mr. Baker claimed that he was not in Wisconsin more than seven months in the year, as he often traveled and spent weekends in Chicago. In 1941, Baker and his wife turned over active management of their home to their daughters-in-law, who came to live with them after their husbands (who were the Petitioner's sons) entered the armed services. However, Baker and his wife continued to occupy a bedroom in the attic. He spent little time in Beulah in the winter months. His wife continued to live during 1941 in their Summit Avenue house. He did not vote in Wisconsin after the fall election of 1940, and did not vote in Michigan.

The court stated the following in response to Mr. Baker's claim that he had moved his domicile to Michigan:

As this court has said: 'The well-established rule with respect to change of residence or domicile is thus stated in *Will of Eaton*, 186 Wis. 124[133], 202 N.W. 309, 312: 'A domicile once established is not lost until a new one is acquired. Every one must at all times have a domicile somewhere. Where an actual domicile has once been established, two things are necessary to create a new domicile, first, an abandonment of the old domicile, and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile, for before a person can be said to have changed his domicile, even though he manifests an intention to abandon the old domicile, a new domicile must be shown...

'A domicile, once established, is presumed to continue until a new domicile has been effectuated. One may change his domicile for any reason or for no reason. But whether he changes his domicile or not will depend upon intent and actual change of residence. As to these questions of fact the

usual rules of evidence apply.’ The determination of a person's domicile or of his choice of domicile involves the adjudication of questions of fact which must be settled by recourse not only to an analysis of the intention to establish a new domicile, but, more significantly, by weighing his overt acts which bear upon his carrying out of that intention so as to ascertain whether or not he had actually abandoned his old domicile. There must be more than an intention to acquire a new or different legal domicile. Until the old domicile has been actually abandoned and an intended new home has been actually and permanently occupied and established elsewhere, the latter cannot be considered the new domicile.

In this case the burden of proof rested upon Baker to establish by competent and clear, convincing and satisfactory evidence that he had in reality actually abandoned his domicile in Wisconsin and that he had actually by permanent occupancy established a new domicile in Beulah, Michigan. His testimony as to his expressed intentions and declarations to establish a new domicile elsewhere are admissible and entitled to weight, but such manifestations of intention cannot in and of themselves determine the case, and must be considered in connection with the background of his act. ...Where these declarations, intrinsically self-serving in effect, seriously conflict with the acts and conduct of the person making them, they are of such weakness that they may be disregarded.

Baker, 246 Wis. at 617 [citations omitted]. The Wisconsin Supreme Court ultimately decided that Mr. Baker had not done enough to end his Wisconsin domicile and upheld the Board's assessment of income tax.

The Wisconsin Supreme Court has since applied the *Baker* rule several times, including the following year again against Mr. Baker. In *Baker II*, Mr. Baker appealed to the circuit court from an order of the Wisconsin Board of Tax Appeals upholding an assessment of income tax on taxpayer's 1942 income by the Department of

Taxation. In addition to all of the facts recited in *Baker I*, in the following year the taxpayer obtained wartime ration books for himself and his wife in Beulah instead of in Milwaukee and an automobile which had been registered in Wisconsin the preceding year was registered in Michigan. Other than these facts and the additional fact that Mr. Baker registered as a voter in Michigan in 1943, the facts bearing on the second appeal were substantially the same. The Wisconsin Supreme Court stated that the additional facts were not of sufficient consequence to overcome the board's finding.

The Wisconsin Supreme Court next cited *Baker* in a probate matter where one of the issues became in what state the widower was domiciled. *In re Daniels' Estate*, 53 Wis. 2d 611, 194 N.W.2d 847 (1972). In that case, a widower appealed from an order allowing the will of Mrs. Alice E. Daniels to be admitted to probate. Mrs. Daniels lived all her life in Racine and was married to her first husband in 1926. After he died in 1967, she met Charles W. Daniels, the appellant, who was a resident of Ohio, and corresponded with him for several months. He came to Wisconsin to visit her. He was a widower. She visited him in his home in Wakefield, Ohio, and they returned to Racine to make plans for their marriage. On May 9, 1968, they were married in Kentucky and thereafter spent about two-thirds of their married life in Racine and one-third in Ohio. Mrs. Daniels made a will on December 5, 1968, in which she gave \$2,000 of an estate amounting to about \$30,000 to her husband. She died in January, 1969 and the executor offered her will for probate in Racine County. Mr. Daniels objected to the admission of the will and moved to dismiss the petition for probate on jurisdictional grounds because, in his view, his wife had died a resident of Ohio. The county court

held a hearing on the motion, rendered a decision that Mrs. Daniels was domiciled in Racine County at the time of her death and ordered the will admitted to probate. From that order, Mr. Daniels appealed. The court stated the following:

Where two homes are owned, domicile is determined by intention, and physical acts are considered to express which residence is to be considered the permanent home as domicile; ...

In re Daniels, 53 Wis. 2d at 619. The Wisconsin Supreme Court held that the evidence accepted by the trial court well sustained the finding that Mr. Daniels at the relevant point intended Racine to be his permanent domicile. The Court made this finding despite the fact that the testimony of Mr. Daniels himself was that he never intended to make Racine his permanent home, that he had an Ohio driver's license and his car had Ohio plates, and that he voted by absentee ballot in Ohio in 1968. While *Daniels* involved a *sui generis* probate question, the Supreme Court's analysis is instructive here.

The Wisconsin Tax Appeals Commission has applied *Baker* on numerous occasions and we will examine several of them in relation to the motion filed in this case.⁹ According to the circuit court, the Tax Appeals Commission and its predecessors have developed substantial experience in determining the question of residency for income tax purposes. *Marion George as Personal Representative of the Estate of Konstantine George, and Marion George v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-336, Case. No. 97-CV-1645 (Dane Co. Cir. Ct., December 23, 1997). Our review of the decisions of this Commission shows that these decisions are fact intensive and

⁹ A search of the *Westlaw* database on March 30, 2010 showed that this Commission has cited to *Baker* in at least 25 separate published opinions since 1979.

involve a balancing test, so that it will be necessary to set forth the facts in detail to understand the Commission's reasoning. We will examine a case where the taxpayer claimed not to be a resident of any state, a case where the taxpayer split his time between Wisconsin and another state, and a case where the taxpayer stayed in the other state the entire year.

For income tax purposes, a citizen must be a resident of a state. In *Samuel J. Campbell, Jr. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶202-210 (WTAC 1983), the issue was Mr. Campbell's 1980 income tax. The Petitioner was born and raised in Green Bay, Wisconsin. Late in 1975, the Petitioner purchased the first of four ocean-going sailboats and embarked on a career of sailing the eastern seaboard of the United States and the Bahamas. During 1980, the Petitioner spent January through March in the Bahamas, April through November on the eastern seaboard and December in Wisconsin, visiting his mother, sister and 3 children, who resided in the Green Bay area. In 1978, the Petitioner and his ex-wife and three children continued to live in Wisconsin. During the period involved, the Petitioner received his income from trusts and a vendor's interest in a land contract. The Petitioner's last employer was located in Green Bay, in 1973. During 1980, the Petitioner had a driver's license which was issued by the State of Florida. The Petitioner filed resident Wisconsin income tax returns for the years 1976 through 1979. The Petitioner did not file an income tax return with the State of Wisconsin, or any other state, for the year 1980. During the year 1980, the Petitioner lived on his sailboat, which contained all of his personal possessions. In December of 1980, the Petitioner put his sailboat into storage, and returned to

Wisconsin for a 3 month visit with his mother, sister and 3 children. During the period involved, the Petitioner did not establish or claim a residence or domicile in any other state or foreign country.

The Petitioner claimed that he permanently left the State of Wisconsin and relinquished his Wisconsin domicile late in 1975, when he first embarked on his sailing career and, thus, was not subject to Wisconsin income taxation. Applying *Baker*, the Tax Appeals Commission held that Mr. Campbell's legal domicile could not be based on his "stateless lifestyle." He was born and raised in Wisconsin, his family lived in Wisconsin, his sources of income were in Wisconsin, and at no time did he legally abandon his Wisconsin domicile or establish a new domicile in another state or country. Mr. Campbell, therefore, for purposes of his income tax liability in 1980, was deemed to be a resident of Wisconsin. As relevant to Mr. Lizalek's case, the important principle determined by the Commission in this case is that there is no such thing as a "stateless lifestyle."

The Tax Appeals Commission has also applied *Baker* to a fact situation where the Petitioner spent more time in Florida than in Wisconsin. *Konstantine and Marion George v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-301 (WTAC 1997). In that case, the Petitioners appealed an assessment of \$140,748.66 in income taxes for the years 1987 through 1991. In 1986, Dr. George bought a condominium in St. Petersburg, Florida. He voted there, acquired Florida driver's and motor vehicle licenses, made charitable contributions there in 1987, 1988 and 1989, and was granted a permanent resident homestead real estate tax exemption by Florida tax

authorities. In each year, Dr. George divided his time between Florida and Wisconsin. He testified that he spent the greatest portion in Florida, ranging from about 35% in 1991 to 41% in 1987. His estimate of time spent in Wisconsin ranged from about 18% in 1991 to 23% in 1987 and 1990. He retained his Wisconsin driver's license during the period under review. When he was in Wisconsin, he stayed at the Elm Grove residence he owned jointly with his wife.

Applying *Baker*, the Commission stated that it must consider not only Dr. George's expressed intention, but also his actions to determine whether he actually changed his domicile to Florida. As relevant to Mr. Lizalek's case, the Commission stated that testimony as to Dr. George's intentions and declarations to establish a new domicile in Florida were entitled to weight, but they must be considered in light of his actions. To the extent that the two seriously conflicted, his expressed intentions were disregarded as self-serving. Dr. George acquired a home in Florida, but he retained one in Wisconsin, owned jointly with his wife. He obtained a driver's license in both places, and he registered motor vehicles in his name in both states, although the Wisconsin registration was for a relatively brief period. He spent considerable time in both places. These facts did not constitute clear evidence that Dr. George established his domicile in Florida. In sum, Dr. George's actions during the period under review sent "mixed signals" concerning his state of domicile in spite of his expressed intentions and declarations.

The Tax Appeals Commission has also applied *Baker* where the taxpayer did not live in Wisconsin for any part of the tax year. *Crazy Jim v. Wisconsin Department*

of Revenue, Wis. Tax Rptr. (CCH) ¶400-483 (WTAC 2000).¹⁰ In that case, the taxpayer in 1996 filed an amended 1984 Wisconsin personal income tax return and claimed that he was a resident of Nevada in 1984. The Petitioner had originally filed a 1984 Wisconsin personal income tax return showing a Wisconsin address, work, and income. On November 4, 1996, the Department issued an income tax assessment to Petitioner for \$12,450.13 covering tax year 1984. This assessment was based on information contained in an IRS adjustment for that year. The Department's primary adjustment added \$52,640 of taxable dividends to petitioner's taxable income. The Petitioner rented and furnished a Nevada apartment under a written lease for December, 1983 and continued to rent it on a month-to-month basis during 1984. He had "phone wagering accounts" (i.e., checking accounts) at five Las Vegas casinos in 1984. The Petitioner also obtained a Nevada driver's license. He did not vote in either Nevada or Wisconsin in 1984.

The Commission applied a balancing test and stated that factors weighing in favor of Petitioner's abandoning his Wisconsin residence and establishing a Nevada residence included his moving to Las Vegas; renting and furnishing an apartment for an unspecified period under a month-to-month lease; not maintaining a home or apartment in Milwaukee in 1984; having five wagering accounts in Las Vegas casinos; and obtaining a Nevada driver's license. On the other hand, factors supporting the Department's finding that the Petitioner retained his Wisconsin residence included his filing a 1984 resident Wisconsin income tax return, including a W-2 form with that

¹⁰ The Plaintiff in that case had legally changed his name from James Groh to "Crazy Jim." He was known as a flamboyant used car dealer, demolition derby pioneer, gubernatorial candidate and a Las Vegas high roller who once played cards with Frank Sinatra. *Milwaukee Journal Sentinel*, March 17, 2002.

return showing a Wisconsin address, work and income; convalescing in Milwaukee after surgery in Nevada in December 1983; and a recuperation in West Allis 1984 after more surgery. As a result of the balancing test, the Commission concluded that the Petitioner had not substantiated his assertion that he had abandoned his Wisconsin residence.

Cases in which the Commission has applied the balancing test and decided in favor of the taxpayer show how substantial the taxpayer's burden of proof is. For example, in *Scott P. Kramer v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶202-622 (WTAC 1985) the Commission held that a taxpayer who left his Wisconsin residence to take an overseas assignment with his employer had abandoned his domicile, even though he later returned to his Wisconsin residence, because while away from the state he established a new domicile in England. At the time of his departure, the Petitioner owned a home in Racine, including two automobiles. The Petitioner sold his automobiles, transferred substantial personal belongings and possessions to his rented residence in England and put his remaining personal possessions in storage. He did not sell his home, but rather placed it in the hands of a real estate agent for rental. The Petitioner had a bank account in Racine for depositing payments from his real estate and his paychecks. When he moved to England in the fall of 1978, the Petitioner notified the post office in Racine of his forwarding address at his new home in England. He also notified his insurance companies and credit card issuers of the change of address. He withdrew from active membership in his local church. He closed his safety deposit box in Racine. During the time he was in England he did not vote in any

election for Wisconsin state office. He cancelled his local newspaper subscriptions, withdrew his children from Wisconsin schools and did not have a Wisconsin fishing license, hunting license, motor vehicle registration or boat license. He did retain his Wisconsin driver's license in order to drive in England. He and his wife subsequently passed England's driving tests, and valid English driver's licenses were issued to them. The Petitioner notified the Department of his change of residence by filling out its standard form of residence questionnaire. During the period involved, the Petitioner paid United Kingdom income taxes, obtained a United Kingdom driver's license, purchased an automobile, carried insurance there, banked and maintained a safety deposit box in England, joined clubs and a church. The Petitioner also filed United States income tax returns reflecting his United Kingdom address.

Applying the *Baker* test, the Commission found that the Petitioner considered his move to England in October of 1978 as permanent and that the Petitioner's physical acts during the period involved supported his intention to make England his permanent place of abode. Thus, the evidence clearly and convincingly showed that the Petitioner abandoned his Wisconsin domicile in October of 1978 and established a new one in England which lasted until his return to Wisconsin in September of 1981.

From a review of these cases, the following general rules apply to this motion. First, the burden is on the taxpayer to show he or she has changed domicile by clear, competent, convincing and satisfactory evidence. *Baker*. Second, as *Campbell* demonstrates, there is no such thing as a "stateless lifestyle" wherein the taxpayer is not

domiciled for tax purposes in any state.¹¹ Third, there is a preference for documentary proof, i.e. returns, receipts, etc., over self-serving declarations, especially where the declarations conflict with the facts. Where there is a conflict, the documentary proof prevails. *Konstantine George*. Fourth, maintaining substantial ties to the former state of domicile usually means that domicile continues there. *Id.* Fifth, what we ultimately must engage in is a weighing of factors, a totality of the circumstances analysis. *Id.* Sixth, domicile for income tax purposes can continue even if the Petitioner is living or staying in another state. *Crazy Jim*.

2. Application of the Law to the Facts for this Motion.

Under summary judgment methodology, once the moving party has made a *prima facie* case, as the Department has done by introducing the Petitioner's resident returns for 1997, 1998, and 1999 and relevant filings for the years at issue, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). In this case, our review of the motions and the materials submitted in connection with them establish that the material facts are not in dispute. Thus, we are presented here with a question of law: Do the facts establish a change of domicile? For the following reasons, we find that the Petitioner has not rebutted the

¹¹ The Commission recently in a small claims case applied the rule that a person cannot extinguish his or her Wisconsin domicile by adopting a stateless lifestyle. *Wolfgram v. Dep't. of Revenue*, Docket No. 05-I-158-SC (WTAC 2005). In that case, the Petitioner retired, sold his Wisconsin residence, and began using a recreational vehicle as his full-time residence. Petitioner began traveling throughout the United States, spending significant amounts of time in Nevada and returning to Wisconsin in the summer for approximately 2-4 weeks per year.

Department's *prima facie* case by raising a material fact showing that he changed his domicile to Illinois.

The Petitioner responds to the Motion for Summary Judgment in three basic ways. First, the Petitioner submits a photocopy of an Illinois driver's license. Second, the Petitioner has provided us with a standby jury summons for a service date of April 4, 2007.¹² Third, the Petitioner has submitted an affidavit in which he states that he lived in a condominium in Oak Lawn, Illinois with GC Lizalek¹³ from 2001 through 2006.¹⁴ In response to the Commission's order for more documentation, the Petitioner submitted Illinois and U.S. Trust returns for the Lizalek Trust for 2001, 2002, 2003, 2004, 2005, and 2006.¹⁵ For the following reasons, the Petitioner has failed to rebut the *prima facie* case put forth by the Department and we, therefore, find that the Department is entitled to judgment.

¹² There are also form letters from the Cook County Clerk to Mr. Lizalek concerning registration which are dated in 2002 and in 2006.

¹³ Mr. Lizalek does not reveal the exact nature of his relationship with this person, whose first name we identify only by initial.

¹⁴ As indicated above, a person's domicile will normally be that place where that person has his or her true, fixed and permanent *home*. Thus, with only a few exceptions, an individual who has one home will be domiciled at that place where his or her home is. However, it is not uncommon for an individual to have two or more homes or residences, any of which might be considered a principal home or domicile. The *Restatement, 2d Conflicts of Laws*, has a discussion of domicile of choice where an individual has more than one residence. Section 20 of the *Restatement* provides that "[w]hen a person with capacity to acquire a domicile of choice has more than one dwelling place, ... domicile is in the earlier dwelling place unless the second dwelling place is his principal home."

¹⁵ In each of those years, the Petitioner asserted on the trust returns that no tax was owed to the State of Illinois. From our examination of those returns, it appears to us that the Petitioner reported his compensation on those returns. The Petitioner's repeated assertion that he is a trust (and apparently not a person subject to income taxes) has been discredited by this Commission, the U.S. District Court, and the U.S. Tax Court.

There are numerous problems with the Petitioner's response to the motion. First, a driver's license does not equate to residency or domicile for tax purposes. On numerous occasions, this Commission has found that taxpayers having out-of-state driver's licenses still have a Wisconsin domicile for tax purposes. In *Campbell, George, and Crazy Jim*, the taxpayers had out-of-state driver's licenses during the periods in question. The acquisition of a new driver's license is a factor, but a weak one.¹⁶ In this case, the Petitioner's claim is further undermined by the fact that the Petitioner was an Illinois resident for 30 years prior to being domiciled in Wisconsin. Also undermining the significance of the Illinois driver's license is the fact that the Petitioner, according to his own exhibits, was issued a valid Wisconsin driver's license with a Milwaukee home address on January 2, 2007 with an expiration date of May 18, 2014.¹⁷ An Illinois driver's license would raise an issue of fact if the question were where the Petitioner had physically been during the relevant period, but it is not enough to raise an issue of fact where the issue is a purported change of legal domicile.

The jury summons for standby duty in 2007 is entitled to even less weight in raising a question of fact. The record in this case does not allow us insight into how jury summons are generated in that particular area of Illinois, but in many areas the production of jury summons is connected with motor vehicle records. *See, generally, Lake v. Neal*, 585 F.3d 1059 (7th Cir. 2009)(voter filed class action against the Chicago Board of Election Commissioners, unsuccessfully claiming a violation of the Driver's

¹⁶ Concerns over easy access to driver's licenses led Congress to pass the Real ID Act in 2005. David Zaring and Elena Baylis, *Sending The Bureaucracy To War*, 92 IALR 1359, 1376 (May, 2007).

¹⁷ Wisconsin law generally permits drivers to have only one state's license. Wis. Stat. § 343.05(1). The Petitioner's brief states that Illinois has the same rule.

Privacy Protection Act because of disclosure of his personal information which was obtained from voter registration records he completed at the Illinois Department of Motor Vehicles). Actually serving on a jury and taking an oath in open court would carry more weight in our eyes, but that is not what we are being asked to consider. The voter identification card is also less than compelling given the Petitioner's prior residence in Illinois from 1961 to 1991. In *Baker II*, *Daniels*, and *George*, the taxpayers also registered or voted in the foreign state and none of those taxpayers had previously been a resident of their respective states like Mr. Lizalek. To paraphrase the circuit court in *George*, there is no indication that the production of those documents was "the fruit of the kind of searching inquiry that would preclude the TAC from determining the residency issue for itself."¹⁸ In sum, none of these documents separately or together is sufficient to raise a factual question as to whether Mr. Lizalek ended his Wisconsin domicile.

The second major flaw in the Petitioner's response is a legal issue. The Petitioner's position that he owes no tax to Wisconsin because he lives in Illinois misses the mark. The fact is that personal services income may be taxed where it is earned.

Wis. Stat. § 71.07 provides as follows:

Income from personal services of nonresident individuals, including income from professions, shall follow the situs of the services...

¹⁸ The circuit court's opinion can be found at *Marion George as Personal Representative of the Estate of Konstantine George, and Marion George v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-336, Case. No. 97-CV-1645 (Dane Co. Cir. Ct., December 23, 1997).

In this case, the record shows W-2 forms that list to businesses in Wisconsin, apparently indicating that the situs of the services was here. The Petitioner's own affidavit dated August 27, 2009 states as follows:

52. Some of the Form W-2s filed for your Affiant reflect the P.O. Box 63, Butler, WI located very near the place of employment instead of the residence. This was due to mailing problems.

Earlier, in the same affidavit, Mr. Lizalek avers the following:

23. Your Affiant filed a Form W-220 with every Wisconsin employer from 2001 through 2005.

While Wisconsin does have a reciprocity agreement with Illinois under Wis. Stat. § 71.10(7e)(a), it applies only to personal services income under Wis. Stat. § 71.05(2) and does not apply to other types of income, such as the gain on the sale of the real property that the Petitioner experienced. Thus, even if the Taxpayer did have a *bona fide* domicile in Illinois from 2001 to 2006, the gain from the sale of the real property in Glendale would still be reportable and taxable here. Further, the personal services income earned in Wisconsin would have been reportable on a personal return in Illinois. Despite our specific request, the Petitioner provided no personal returns to us and from that we can only conclude that the income was not properly reported in Illinois. In our view, a trust return is not a valid substitute.¹⁹

¹⁹ Mr. Lizalek cites the Wisconsin statutes relating to reciprocity in his brief but apparently believes that filing the trust returns in Illinois completed his obligations.

The third major flaw in the Petitioner's case is that the record conclusively demonstrates that the Petitioner did not extinguish his Wisconsin domicile. While the Petitioner claims Illinois domicile, the record before us is, in fact, mixed.²⁰ The Petitioner clearly continued to work in Wisconsin and that fact alone may be enough to deny his claim. No Commission case has ever found someone to have changed his or her domicile under facts like these. *See, Baker*. Second, the Petitioner continued to have and to use mailing addresses in this state, one near a place of employment and another near the home in Glendale. Indeed, his address in connection with this litigation and his two other cases here before the Commission has been in Wisconsin. Third, the Petitioner continued to own the home in Glendale for at least half of the years in issue here, the same one he apparently lived in when he admittedly was domiciled in Wisconsin.²¹ Fourth, the Petitioner does not appear to have filed personal income tax

²⁰ The following advice is offered by Attorney Patrick R. Thiessen in an article in the Marquette Elder's Advisor, *The Death Of The State Death Tax Credit: Can It Be Resuscitated?* (Spring, 2009):

...A taxpayer seeking to establish a new domicile in a more tax-friendly locale should complete a number of steps besides simply moving to ensure that his or her heirs have the best chance of demonstrating domicile upon death. The taxpayer should: (1) register to vote; (2) relocate bank accounts, safe deposit boxes, and mailing addresses for correspondences with financial institutions to the new state; (3) obtain a driver's license and register automobiles in the new state; (4) document the new domicile on various personal records such as credit card accounts and revised last wills and testaments; (5) use the new address on federal income tax and gift tax returns; (6) file necessary documentation showing a claim and eligibility for a real estate tax homestead exemption if applicable; (7) file a resident state income tax return; and (8) locate professional advisors in the new state, specifically an estate planner familiar with the new state's tax laws. Additionally, in some states, such as Florida, a taxpayer may file a declaration establishing domicile and abandoning the previous domicile.

In this case, Mr. Lizalek reaches only 2 of the 9 criteria above.

²¹ From our review of the previous cases Petitioner has had before this Commission, it appears that in 2004 the Petitioner transferred his one half interest in the home in Glendale to the "Kelazil Religious Society." As we noted in the case involving the real estate transfer fee, "Kelazil" is Lizalek spelled backwards. As the Department points out, municipal records still list Mr. Lizalek as one of the owners of the Glendale home. Mr. Lizalek disputes the accuracy of the online records.

returns anywhere, despite our order to the Petitioner for the information.²² Fifth, the Petitioner does not explain where his family was domiciled. On his returns for 1997-1999, he claimed exemptions for a wife and two children with his same last name. In his last affidavit presented to this Commission, Mr. Lizalek averred, however, that he did not have children. Sixth, the Petitioner collected unemployment compensation from the Wisconsin Department of Workforce Development at a Wisconsin address in 2005 and 2006. The Form 1099-G's from the Wisconsin Department of Workforce Development issued to the Petitioner in 2005 and 2006 are part of the record before the Commission. Seventh, during the relevant time period here, the Petitioner commenced federal civil litigation in the Eastern District of Wisconsin where he listed a Wisconsin address for himself.²³ In sum, the evidence the Petitioner produced in opposition to the motion is entitled to weight, but that evidence under the case law must be considered in light of his actions, the other evidence before us, and common sense.²⁴ *Konstantine George*. Here, as in *Konstantine George*, there is a serious conflict and we must discount the assertions in the affidavits that are conclusory and self-serving.

²² Wis. Stat. § 71.89 (2) requires full disclosure to the Commission of any and all income that the person received.

²³ The brief filed on behalf of the Department in Eastern District Case No. 04-C-0309 states that Mr. Lizalek alleged in the complaint that the Department wrongfully collected an invalid income tax delinquency determination through garnishment of his wages during Mr. Lizalek's employ at Administaff. [Petitioner's Exhibits submitted in response to Commission's order for additional briefing]. In the other case (Case No. 03-C-1280), it appears that Mr. Lizalek sued two of his employers alleging *inter alia* that they violated his religious beliefs by requiring him to complete IRS forms. A U.S. District Court Judge dismissed both of the cases in 2005.

²⁴ We also note that part of the record before us consists of W-2s for Mr. Lizalek showing that in 2007 and 2008 he worked at a communications company located on N. 81st Street in Milwaukee. In 2007, he also worked for a different employer who lists a business address on the W-2 in Carmel, Indiana.

Finally, as the Department points out, the Petitioner took a federal income tax case to the Tax Court in the Eastern District of Wisconsin which covered roughly the same period that is before us in this case. *Gary C. Lizalek, et al. v. Commissioner*, T.C. Memo 2009-122, 97 T.C.M. (CCH) 1639. In that case, the Tax Court held a hearing where Mr. Lizalek testified concerning a number of things that relate to the question before us in this case. First, the Tax Court held that Mr. Lizalek's purported trust did not reflect economic reality and was not recognized. Second, Mr. Lizalek was subject to capital gains tax on \$90,000 from the sale of a 50% interest in real estate in Glendale, Wisconsin. Third, Mr. Lizalek's purported wife, Ms. Karen Lizalek, was not liable for taxes on one-half of the taxpayer's income under Wisconsin's marital property law because the two had, in fact, never married. Fourth, Mr. Lizalek was liable for a penalty for submitting a false Form W-4. And finally, the Tax Court denied the IRS's motion for sanctions against Mr. Lizalek for making frivolous arguments as this was Mr. Lizalek's first time in the Tax Court. The Tax Court set out the following facts:

Some of the facts have been stipulated. The stipulations of facts and the accompanying exhibits are incorporated by this reference. Petitioner and Karen Lizalek resided in Wisconsin at the time of filing their petitions.

In 2001 petitioner was an employee of both Motorola, Inc., and Innovatec Communications, LLC (Innovatec), and earned wage income of \$22,172 and \$62,019, respectively. In 2001 petitioner received retirement distributions from Advanced Clearing, Inc., Arrowhead Trust, Inc., Sterling Trust Co., and First Trust Corp. of \$29,322, \$3,000, \$2,525, and \$16,481, respectively. In 2001 petitioner received a capital gain distribution of \$14 from Salomon Smith Barney, Inc.

In 2002 petitioner was an employee of Innovatec and Administaff Cos. II, LP (Administaff), and earned wage income of \$32,539 and \$34,473, respectively. In 2002 petitioner also received interest income of \$11 from Sovereign Bank.

In 2003 petitioner was an employee of Administaff and earned wage income of \$75,122.

In 2004 petitioner was an employee of Administaff and Silver Springs Networks and earned wage income of \$21,131 and \$61,216, respectively. In 2004 petitioner sold a 50-percent interest in a residence located in Glendale, Wisconsin, for \$90,000.

In 2005 petitioner was an employee of both Silver Springs Networks and Invivo Corp. & Subs. (Invivo) and earned wage income of \$59,141 and \$6,460, respectively.

For the years at issue petitioner's employers reported his wages on Forms W-2, Wage and Tax Statement. None of the employers withheld Federal or State income taxes from petitioner's wages. Some of the Forms W-2 listed various Wisconsin addresses for petitioner. Others listed petitioner's address as Oak Lawn, Illinois. In addition, petitioner received a Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., for each retirement distribution, and Form 1099-B, proceeds from Broker and Barter Exchange Transactions, for the capital gain distribution. The Forms 1099-R and Form 1099-B listed a Wisconsin address for petitioner. Petitioner reported the wages and other income on Forms 1041, U.S. Income Tax Return for Estates and Trusts, filed for the Lizalek Trust, listing an address in Milwaukee, Wisconsin.

On each Form 1041 filed for the Lizalek Trust for the years at issue, the Lizalek Trust claimed deductions that offset any income reported. Accordingly, the Forms 1041 did not report any tax due. Respondent prepared substitute returns under section 6020(b) for petitioner for 2001 through 2005 and for Karen Lizalek for 2001, 2003, 2004, and 2005. Karen Lizalek filed a Form 1040, U.S. Individual Income Tax Return, for 2002.

As to the Petitioner's family situation, the Tax Court said the following:

Although petitioner denies that he was domiciled in Wisconsin during the years at issue, it is not necessary to determine his State of domicile because we find that petitioner and Karen Lizalek were not married during the years at issue. Accordingly, they are not subject to Wisconsin community property laws irrespective of petitioner's State of domicile. Petitioner testified that he is married to Karen Lizalek under the laws of God. However, he testified that they do not have a valid State-issued marriage license and they did not participate in a civil marriage ceremony. We find petitioner's testimony to be credible. Common law marriage is not recognized in the State of Wisconsin. *Watts v. Watts*, 137 Wis.2d 506, 405 N.W.2d 303, 309 (Wis.1987); see Wis. Stat. Ann. sec. 765.16 (West 2009).

The docket sheet reflects that the petition was filed in the Tax Court on February 12, 2007. See Attachment B to Respondent's September 30, 2009 Brief. The federal case involved five of the six years at issue here.²⁵

The written decision from the U. S. Tax Court case undermines Mr. Lizalek's claim here in several ways. First, the facts detailed by the Tax Court show substantial employment in Wisconsin. Second, the Petitioner's family appears to have continued to live in the home in Glendale for at least part of the relevant period after Mr. Lizalek claimed he extinguished his Wisconsin domicile. While the Tax Court noted that it need not decide for the Tax Court's purposes which state Mr. Lizalek was domiciled in, the Tax Court applied Wisconsin law to decide the issue of the tax liability between Mr. and Ms. Lizalek.

²⁵ It does not appear from an examination of the docket sheet that an appeal was taken from the Tax Court's decision. The federal income tax deficiency for 2001 through 2005 listed in the opinion is \$42,479 without penalties and interest.

In our view, the materials submitted by the Petitioner are insufficient to create a factual dispute to defeat summary judgment. To defeat summary judgment, the non-moving party may not rest upon allegations or conclusory statements, but must present positive admissible evidence to make a showing sufficient to establish the existence of an element essential to the party's case upon which it will bear the burden at trial. *Phillips v. Behnke*, 192 Wis. 2d 552, 563, 531 N.W.2d 619, 623 (Ct. App. 1995). As described in detail above, the driver's license, the voter registration information, and assertions similar to those offered by the Petitioner have all been discounted by Wisconsin courts and do not rise to the level necessary to defeat summary judgment in this case. To paraphrase the Wisconsin Supreme Court, we have found each of the plaintiff's individual arguments to be without substance. Adding them together adds nothing. Zero plus zero equals zero. *Mentek v. State*, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

What could have raised a factual issue so as to defeat summary judgment?²⁶ The following information is used by a commission in another state in a related context:

If an individual has more than one home or dwelling that could be considered his or her primary home, factors that may be considered in determining which dwelling is the individual's true domicile includes the following:

²⁶ Again, we note that after reviewing the initial submissions on this motion we ordered additional briefing from the Petitioner, requesting that he submit the appropriate information and providing Petitioner with photocopies of *Baker and Rowe v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶202-280 (WTAC 1983), as guides for the information that would help us decide this motion.

1. The nature and use of the home, such as whether it is used as a “vacation home,” “second home,” or “summer home.”
2. Whether the home is owned, rented, or provided free of charge.
3. The size of the home. Generally, as between two or more homes, the larger home is more likely to be considered the individual's principal or primary home.
4. Value of the home. Generally, as between two or more homes, the more valuable home is more likely to be considered the individual's principal or primary home.
5. How much time is spent at each home? Generally, as between two or more homes, the home that the individual spends the greater amount of time is more likely to be considered that individual's principal or primary home.
6. Which home the individual's spouse or minor children view as their primary home. Generally, as between two or more homes, the home that the individual's spouse or minor children regard as their primary home is more likely to be considered that individual's principal or primary home.
7. Which home the individual keeps his pets, valuable artwork, photo albums, hobby equipment, collectibles, and other “near-and-dear” items. Generally, as between two or more homes, the home where the individual maintains most of his “near-and-dear” items is more likely to be considered that individual's principal or primary home.²⁷

²⁷ As stated by one commentator: “It is clear that the lawyer cannot give his client any magic formula which will fix his domicile beyond dispute. Very much the contrary. The lawyer's text to his client must be, ‘As ye live, so shall ye be domiciled.’ Harrison Tweed and Christopher S. Sargent, *Death And Taxes Are Certain – But What Of Domicile?*, 53 Harv. L. Rev. 68 (November, 1939).

Charles Zalesky, *The Tax Commission's Approach to Domicile Audits*, 46-AUG Advoc 22 (August, 2003). A case with similarities to this case is *Litzkow v. Wisconsin Department of Taxation*, Dane County Circuit Court (February 10, 1960) (Case 241A) *affirming* 4 WBTA 279 (1956). In that case, the taxpayer went from Wisconsin to Alaska to work. In *Litzkow*, the Court stated that it was apparent that Mr. Litzkow had intentions of staying in Alaska if things worked out well for him there. However, it concluded that he did not reach the point of pulling up his roots in Wisconsin and putting them in Alaska. "Although he started to put one foot in Alaska he kept the other foot firmly anchored in Wisconsin," the court stated. To paraphrase the Court in *Litzkow*, to change his domicile, Mr. Lizalek could not have one foot in Illinois and the other foot in Wisconsin; he had to have both feet in Illinois. In our view, he has not shown a factual issue that he did.

One of the purposes of summary judgment motions is to weed out unfounded claims, specious denials, and sham defenses. *Yahnke v. Carson*, 236 Wis. 2d 257, 613 N.W.2d 102 (2000). Summary judgment separates real and genuine issues from those that are formal or pretended, so that only the former may subject the moving

party to the burden of trial.²⁸ While domicile is not always susceptible to determination upon summary judgment, our decision after reviewing all of the submissions is that the Petitioner's attempt to show that he extinguished his Wisconsin domicile is specious, unfounded, and possibly a sham. In this case, the materials produced by the Petitioner show at best either the Petitioner had contacts with both Illinois and Wisconsin or that he had a "stateless lifestyle," and neither is sufficient to overcome *Baker*. Thus, there are no issues to be tried here, and no reasonable finder of fact could find for the Petitioner based on what Mr. Lizalek has submitted to us. We, therefore, must grant the Department's Motion for Summary Judgment.

ADDITIONAL ASSESSMENT

The Commission may impose an additional assessment of up to \$1,000 if it determines that the arguments made by the taxpayer in an appeal are frivolous or groundless. Wis. Stat. § 73.01(4)(am); Wis. Admin. Code § TA 1.63. The Department has requested that we issue an additional assessment against Mr. Lizalek in each of the six appeals before us. The Department asserts that the Petitioner knew, or should have known, that this appeal was without reasonable basis in law or equity or could not be supported by a good faith argument for an extension, modification or reversal of existing law.

²⁸ During the pendency of these cases, the Petitioner filed numerous motions, including (but not limited to) Motions for the Commission to Uphold the Law of the Land, Motions to Demand the Commission Read All Pleadings, Motions Regarding Failure by the Commission to Confirm Abiding by Their Oath of Office, and Petitioner's Discovery Request for the Tax Appeals Commission (which contained 14 requests for admissions and 17 interrogatories of the Commission). While most of the filings constitute little more than a miasma of verbal gymnastics, there may be some contentions left from the Petitioner's submissions which we did not address directly. If there are, we consider them to be so without merit that they are not worth additional consideration by the Commission. As the Wisconsin Supreme Court has observed, "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent that we have not addressed these other contentions, they are rejected.

On two previous occasions, the Commission has found that Mr. Lizalek made arguments that were frivolous. In *Gary C. Lizalek v. Dep't of Revenue*, Docket No. 03-I-219-SC, we wrote in a ruling and order dated November 7, 2003 that "Petitioner's claim that he is a trust is frivolous and properly disregarded by respondent" and "Petitioner has filed other submissions that, like his petition for review and motion to strike, are filled with frivolous ramblings." Also, in *Gary C. Lizalek v. Dep't of Revenue*, Docket No. 04-T-110, (May 19, 2005), the Commission imposed an additional assessment of \$300 pursuant to Wis. Stat. § 73.01 (4)(am) where the Petitioner alleged *inter alia* that the Department refused to accept gold and silver and that he was a trust. Additionally, while this motion was pending, the Tax Court found similar assertions Mr. Lizalek made before it to be frivolous, but declined to impose sanctions because the Petitioner was making the arguments in a federal court for the first time.

While the Petitioner has a poor track record, we have decided that it is not appropriate to issue additional assessments in these cases. First, the Petitioner has not explicitly repeated in the briefs the two main arguments for which he has been taken to task by the Commission in the past, those being that he is a trust and not subject to Wisconsin's tax laws and that only gold is money. Second, while we have denied the Petitioner's claim of an Illinois domicile based on the record made before us, there was some evidence of connections to that state, however tenuous they were and short of the legal standard.

CONCLUSION

The Department is correct that under *Baker* a domicile continues until another one is acquired. On this Motion for Summary Judgment, the Petitioner has not submitted to the Commission evidence satisfactory to raise a genuine issue of material fact that he ended his Wisconsin domicile. Thus, the Department's motion is granted.

ORDER

The Department's Motion for Summary Judgment is granted and the Department's actions on the Petitions for Redetermination are affirmed.

Dated at Madison, Wisconsin, this 19th day of April, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"