

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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**MICHAEL DULEY,**

Petitioner,

**DOCKET NOS. 11-I-178,  
11-I-179 AND 11-I-180**

vs.

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**FINAL DECISION AND ORDER**

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**LORNA HEMP BOLL, CHAIR:**

These cases come before the Commission for decision after the parties tried the cases in Madison, Wisconsin, on July 16, 2012. Petitioner Michael Duley appears on his own behalf. The Department of Revenue (“the Department”) is represented by Attorney Axel F. Candelaria. The issue in these cases is whether the Petitioner was subject to Wisconsin income taxes for tax years 2001, 2002, and 2006, based on his legal domicile. Both parties have filed post-trial briefs. The Commission found for the Department as to the domicile issue but held the matter open to allow for new calculations of tax liability based upon actual income figures before the Commission rather than the estimates initially used in the assessments. This Final Decision and Order encompasses the Commission’s initial Ruling. We now uphold the Assessments as modified.

## I. FINDINGS OF FACT<sup>1</sup>

### A. Jurisdictional Facts

1. On July 13, 2010, the Department issued against the Petitioner Notices of Estimated Tax Amount Due for the taxable calendar years 2001, 2002, and 2006 in the amounts of \$10,185.43, \$11,159.04, and \$9,159.46, respectively. (Exhibits 1, 5, and 9.)

2. In September of 2010, Petitioner filed Petitions for Redetermination contending he was not domiciled in the State of Wisconsin during the tax years in question. (Exhibits 2, 6, and 10.)

3. On March 10, 2011, the Department denied Petitioner's Petitions for Redetermination. (Exhibits 3, 7, and 11.)

4. On May 27, 2011, Petitioner filed Petitions for Review with the Commission. (Exhibits 4, 8, and 12.)

5. On July 16, 2012, a trial was held before the Commission.

### B. Material Facts

These cases turn on an analysis of the facts in evidence. Here we will first set forth the facts which provide general background, then the facts which fall in favor of the Petitioner, then we will state the facts which fall in favor of the Department, i.e., those facts which support the argument that Petitioner is subject to taxation by the State of Wisconsin for the years in question -- 2001, 2002, and 2006.

#### *General background*

6. Petitioner was a resident of the State of Wisconsin and physically

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<sup>1</sup> The Department submitted a proposed statement of facts with its post-trial brief and the Petitioner's letter has included facts adduced at trial. We have made selections from both with edits for form, content, and punctuation.

lived in the State of Wisconsin from birth through much of 1999.

7. In mid-1999, Petitioner moved to Louisiana to work as a project manager for a casino project of a Wisconsin employer. He was laid off by that employer in September 1999 when the project was completed. (Exhibit 19, RTA 23 clarification.)

8. For the year 1999, Petitioner filed a Wisconsin Income Tax Form 1A (1999 tax return included in Exhibit 20); he did not use Form NP-R, the form for nonresidents and part-year residents. (Trial testimony of Resolution Officer.)

9. Petitioner worked for another company in Louisiana from 1999 until that company closed in 2000. That job ended sometime in 2000 at which time Petitioner became unemployed. (Exhibit 17, RTA 37.)

10. Petitioner then claimed and collected unemployment from the State of Wisconsin relative to the 1999 layoff from the Wisconsin-based company. (Exhibit 17, RTA 37.)

11. Petitioner moved from Louisiana to the State of Washington, traveling several weeks and staying for some time with a friend in Mississippi before arriving in Washington in late 2000.

12. Petitioner lived in the Seattle area from late 2000 until early 2003. While in Washington, Petitioner was employed by OB Williams. (Exhibit 17, RTA 42.) At the end of 2002, Petitioner declined to sign a new lease, opting for a month-to-month rental arrangement because his mother was ill in Wisconsin. (Trial testimony.)

13. In early 2003, Petitioner was laid off from OB Williams. At that time, his mother was ill so he moved back to Wisconsin. (Exhibit 17, RTA 48 and trial

testimony.)

14. In April 2003, Petitioner signed his 2002 federal and Wisconsin tax returns using his 2003 Wisconsin address. (Exhibit 17, RTA 54; and 2003 returns included in Exhibit 20.)

15. Petitioner lived in Wisconsin for most of 2003, all of 2004, and a portion of 2005. (Trial testimony and Exhibit 17, RTAs 67, 79, and 83.)

16. In early 2005, Petitioner moved back to Louisiana. (Exhibit 17, RTA 83.) Hurricane Katrina hit Louisiana in August 2005. Petitioner's living arrangements were destroyed. (Exhibit N, FEMA letter.) In January 2006, Petitioner relocated to another part of Louisiana, and, in approximately August 2006, Petitioner moved to Florida where he remained until his 2008 move to Texas. (Exhibit 19, RTA 80 clarification G.)

17. For the audit years, the Department estimated the Petitioner's annual adjusted gross income. The federal tax returns in the record contained actual income figures supported by W-2s and 1099s. (Exhibits I, K, and R.)

18. The Petitioner has now filed his Wisconsin tax returns for the years at issue. The Department has recalculated its assessments together with interest and waiving the negligence penalty. (Department's email attachment filed August 6, 2013.)

*Facts the record does not include*

There is no credible evidence that the Petitioner had a driver's license in any state other than Wisconsin. The Petitioner has claimed that he did have a Florida driver's license but no longer has it/them (Exhibit 17, RTA 99 and RFP 7); he does admit renewing his Wisconsin driver's license in 2003. (Exhibit 17, RTA 98.)

There is no credible evidence that the Petitioner voted in any of the states in which he lived during the audit period. The Petitioner has claimed that he did vote in Louisiana, Washington, and Florida. (Exhibit 19, general clarification p. 4 and trial testimony.) He has also claimed not to have voted in any state during the years in question. (Exhibit 17, RTA 97.)

There is no credible evidence that the Petitioner filed income tax returns in any state other than Wisconsin during the audit period. The states of Washington and Florida do not have state income tax, but Louisiana does. Petitioner submitted a 2005 Louisiana state income tax return. (Exhibit 17, RFP 5d.) That return is twice dated April 15, 2005, when in fact it would have been due on that date in 2006. The return further fails in light of the Department evidence showing the State of Louisiana has no record of ever receiving the return. (Exhibit 22.)

We further note there is no evidence that the Petitioner registered any vehicle in any states other than Wisconsin. There was, however, evidence that Petitioner re-registered a truck in Wisconsin in 2003. (Trial testimony.)

Finally, there is no evidence that Petitioner bought real estate outside Wisconsin, contracted for any type of property or casualty insurance in any other state, or engaged in any significant activity which could be construed to culminate in the establishment of a new residence during the audit period.

## OPINION

### A. APPLICABLE LAW

#### 1. 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.

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##### **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.

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

#### 2. The Burden of Proof

Assessments are presumed to be correct. The burden falls upon a petitioner to prove by clear and satisfactory evidence any errors in the Department's determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). With respect to domicile specifically, the taxpayer bears a substantial burden. *Lizalek v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-306 (WTAC 2010).

### 3. Case Law

A domicile once established is not lost until a new one is acquired. Everyone 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.**

*Baker*, 246 Wis. at 617 (emphasis added) (citations omitted).

Admittedly, in *Baker*, the Petitioner had retained significant ties with Wisconsin, continuing to occupy a room in his former home on a frequent basis. The Wisconsin Supreme Court consequently decided that Mr. Baker had not done enough to end his Wisconsin domicile and upheld the Board's assessment of income tax. Although the Petitioner here has made a better showing of some effort to cut ties with

Wisconsin, we find the standards stated in *Baker* instructive. We therefore look to 1) Petitioner's intention to establish a new domicile, and, more significantly, we weigh his overt acts which bear upon his carrying out of that intention so as to determine 2) whether or not he actually abandoned his old domicile.

Following *Baker*, the Commission's decisions have involved a balancing test. These fact intensive reviews are well-discussed in *Lizalek*. The *Lizalek* case summarizes how we must look at the facts of each case but emphasizes that the Petitioner bears a heavy burden to show not only an intent to leave Wisconsin permanently but affirmative actions to establish a new residency elsewhere.

For example, in the *Campbell* case, where the Petitioner claimed that he permanently left the State of Wisconsin and relinquished his Wisconsin home to embark on a sailing career in the Bahamas and, thus, argued he was not subject to Wisconsin income taxation, the Commission, following *Baker*, held that Mr. Campbell's legal domicile could not be based on his "stateless lifestyle." *Campbell. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-210 (WTAC 1983). The *Campbell* court found the Petitioner still was liable for income taxes in Wisconsin.<sup>2</sup> *Id.*

The Commission summarized the required analysis in *Lizalek*. First, the burden is on the taxpayer to show he or she has changed domicile by clear, competent, convincing and satisfactory evidence. *Baker*. Second, there is no such thing as a "stateless lifestyle" wherein the taxpayer is not domiciled for tax purposes in any state. *Campbell*. Third, there is a preference for documentary proof, i.e. returns, receipts, etc.,

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<sup>2</sup> In *Campbell*, the Petitioner himself had not set foot in Wisconsin for approximately seven years, but his family remained in Wisconsin.



over self-serving declarations, especially where the declarations conflict with the facts. Where there is a conflict, the documentary proof prevails. *Konstantine George v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-301 (WTAC 1997). 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 v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-483 (WTAC 2000).

## B. ANALYSIS AND DECISION

This case requires us to decide whether the Petitioner has proven enough facts to defeat the Department's contention of domicile. In light of the evidence in the record, we do not believe the Petitioner extinguished his Wisconsin residency nor did he establish a valid domicile in any of the states in which he lived during the years in question.

A similar Wisconsin case is particularly instructive. *Litzkow v. Wisconsin Department of Taxation*, Dane County Circuit Court (February 10, 1960) (Case 241A) *affirming* 4 WBTA 279 (1956). In *Litzkow*, the taxpayer left Wisconsin to work in Alaska. The court noted that it was apparent that the taxpayer 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 and ultimately pulled back from Alaska along with his employer.” *Id.* When the company’s work ended there, the Petitioner moved back to Wisconsin.

In *Lizkow*, the Petitioner had made overtures to establish a new domicile, but did not relinquish similar ties in Wisconsin. For example, he did obtain a driver’s license and a fishing license in Alaska and even registered a car there. In addition, he filed income tax returns in Alaska. He did also file Wisconsin tax returns listing a Wisconsin address. He also renewed a Wisconsin driver’s license during the period under review. *Id.*

The Petitioner in the instant cases made similar efforts to leave Wisconsin. In 1999, he moved to Louisiana for a work project but, as in *Lizkow*, the work did not last. He then moved on to the State of Washington in late 2000 where again the work project did not last. When he was laid off there, like the Petitioner in *Litzkow*, this Petitioner moved back to Wisconsin. During 2001 and 2002, this Petitioner did not obtain (or did not produce evidence of) a driver’s license in any other state, nor did he produce evidence of voter registrations, insurance policies, vehicle registrations, memberships or associations which might demonstrate the setting down of roots. We do know the Petitioner ultimately did move back to Wisconsin, albeit to care for his ailing mother, that he used a Wisconsin address on his 2002 federal tax return,<sup>3</sup> and, although he claimed to have moved back only temporarily, he renewed his Wisconsin driver’s license in 2003. Thus, we find this Petitioner similarly had not completed the

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<sup>3</sup> We note that Petitioner testified at trial that he thought one was supposed to use the address where you lived during that tax year as the address on the return.

process of extricating himself from the outer reaches of the taxing authority of the State of Wisconsin in 2001 and 2002 before returning to Wisconsin in 2003.

As for the period when he left Wisconsin the second time, we find that again Petitioner made a move to another state, this time Louisiana, but again failed to put down the sort of roots required to establish a new domicile. As with his previous moves, he did not obtain a driver's license, he claims to have filed a tax return in Louisiana in 2005 but the state denies ever receiving it, he has shown no driver's license, voter registration, insurance policies, or other indicia of permanence. In fact, Petitioner moved on to Florida during 2006. Also in 2006, Petitioner bought a vehicle which he registered in Wisconsin in admitted contemplation of returning to this state. It is clear that no new home was established and "permanently occupied" as per *Baker*. Thus, we further find that the Petitioner failed to extinguish his Wisconsin residency for the purposes of taxation in the year 2006.

The taxpayer has an obligation to make clear his change of domicile in order to avoid the reach of taxation by this state. In Petitioner's own words in his letter of October 31, 2010, he said as much: ". . . regarding my using a Wisconsin driver's license and having vehicles registered in Wisconsin for the years 2003-2007, it was my oversight in not getting everything changed over when I moved." (Petitioner's October 31, 2010 letter included in Exhibit 15.) In this state, the bar is high. Petitioner has not quite reached it.

There are many actions one may take to establish a new domicile. Our fact-intensive review looks at the totality of the circumstances to see whether, taken

together, these actions show a genuine effort to move one's residence. Although the Petitioner did not physically reside in Wisconsin during the years under review, we find that he did not sufficiently cut his ties with Wisconsin nor did he establish permanent residency in another state.

### CONCLUSIONS OF LAW

1. Petitioner has not met his burden to show that he was not domiciled in the State of Wisconsin during the tax years at issue.

2. Petitioner has, therefore, not met his burden to show that the Department's assessments were incorrect insofar as liability was concerned.

3. The Department's agent testified and the assessment itself noted that the initial assessments were based on departmental estimates. The W-2s and 1099s incorporated in the federal tax returns which were introduced into evidence provide more exact indicia of income to overcome the Department's estimates.

4. The assessments have been properly revised to reflect calculations of tax and interest based upon the more exact income figures introduced into the record and used on Petitioner's now-filed Wisconsin State Income Tax Returns. Negligence penalties have been waived.

### ORDER

The Department's actions denying the Petitions for Redetermination are affirmed. Petitioner has filed Wisconsin tax returns for the years at issue. The Assessments have been revised to reflect the Petitioner's actual income for the years in question. The Assessments are upheld, as modified.

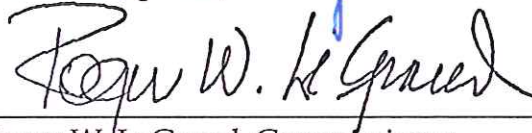
Dated at Madison, Wisconsin, this 19<sup>th</sup> day of August, 2013.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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Roger W. LeGrand, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

**NOTICE OF APPEAL INFORMATION**

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED  
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS  
RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.