THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0234

Robert Morris, & a.

v.

Commissioner, New Hampshire Department of Revenue Administration

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RULE 7 APPEAL FROM THE FINAL ORDER OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE COMMISSIONER OF THE NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

COMMISSIONER, NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION

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(Oral argument not requested)

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II. Whether the superior court was required to enter judgment on behalf of the plaintiffs at the summary judgment phase.

III. Whether the collection of interest and dividend taxes from Mr. and Mrs. Morris violated the New Hampshire or United States Constitutions.

IV. Whether the superior court acted within its discretion in declining to rule upon Mr. and Mrs. Morris's undeveloped claims that the income was not taxable pursuant to RSA 77:4.

V. Whether the superior court erred in denying Mr. and Mrs. Morris's request to vacate DRA's assessment of penalties and interest.

VI. Whether Mr. and Mrs. Morris were entitled to attorney's fees and costs under RSA 21-J:28-b.

STATEMENT OF THE CASE

This case arises from a tax assessment issued by the New Hampshire Department of Revenue Administration (DRA) following an audit of Mr. and Mrs. Morris. The audit determined the couple had substantial unpaid tax liability from a six-and-a-half-month period in 2017 in which they were residents of New Hampshire. The Morrises filed a petition for redetermination with the DRA Commissioner, which was denied. The Morrises appealed to the superior court via petition. After a two-day contested bench trial, the superior court (Ignatius, J.) denied the petition. This appeal followed.

STATEMENT OF FACTS

Mr. and Mrs. Morris own homes in Riverside, Connecticut and New London, New Hampshire. HT 74, 93-94.[1] Historically the Morrises have been residents of Connecticut and have used their New Hampshire `home for skiing and lake vacations. *Id.* However, things changed in 2017. According to Mr. Morris, this change was limited to the couple "looking at the possibility" of moving to their New Hampshire home. HT 290. He claimed that during the summer of 2017 they were exploring semi-retirement in New Hampshire. HT 100-01. However, according to Mr. Morris, they never followed through and, by the fall, it was clear to them that neither moving nor semi-retirement would be possible. HT 100-01.

The documentary and other evidence presented to the superior court established the following:

- In mid-April 2017, the Morrises filed paperwork with both federal and Connecticut tax authorities which listed their New Hampshire home—the home they now allege they only used for vacations—as the address at which their mail should be sent. HT 34-40, 273-75, 277-78.
- On June 15, 2017, the Morrises made a payment of $160,000 to New Hampshire authorities to cover their estimated tax liabilities. HT 187-89, 292.
- On June 16, 2017, both Mr. and Mrs. Morris applied for New Hampshire driver's licenses and thereby forfeited their Connecticut

[1] The following record citations are used throughout this brief: "HT" refers to the hearing transcript from February 12-13, 2024; "PA1", "PA2", and "PA3" refers to the plaintiff's appendix in three volumes; "PB" refers to the plaintiff's appellate brief; "DA" refers to the DRA's appendix.

driver's licenses. HT 259-61, 295-97, 318. In doing so, they listed their New Hampshire address as their residence and claimed, under penalties of sworn falsification, that they were New Hampshire residents. *Id.*

- A month later, in July 2017, Mr. and Mrs. Morris both registered to vote in New Hampshire. HT 205-09, 299-300. In doing so, they signed affidavits claiming New Hampshire as their domicile under penalties of voter fraud. *Id.*
- In mid-September 2017, the Morrises again paid New Hampshire authorities estimated taxes, this time in the amount of $350,000. HT 190-92, 301. They listed their New Hampshire address as their mailing address. *Id.*
- Also in September 2017, Mr. and Mrs. Morris filed a federal tax return and a Connecticut tax return and continued to consistently list their New Hampshire address as their current mailing address. HT 34-40, 275-79, 301.
- That fall (September/October 2017), Mr. Morris registered his LLC—Olympus Advisors—with the New Hampshire Secretary of State's Office in order to authorize it to do business in New Hampshire. HT 120-21, 192-94, 289, 302. When so doing, Mr. Morris used his New Hampshire mailing address. *Id.*
- Finally, in the first half of 2018, Olympus Advisors, LLC (of which Mr. Morris is sole owner and sole beneficiary) filed tax forms indicating it paid a portion of his 2017 compensation to a New Hampshire resident. HT 194-205, 237, 289.

In the late spring and summer of 2018, the Morrises' behavior shifted again. In May, Mr. Morris filed paperwork to cancel the registration of his LLC in New Hampshire. HT 122-23. In July, the Morrises filed tax returns with Connecticut and paid Connecticut income taxes for the entire year of 2017. HT 143-45. Around the same time, they also filed paperwork with New Hampshire authorities requesting a return of the $510,000 in estimated taxes they had paid in 2017. HT 99-100.

Following this request for a refund, in August of 2018, New Hampshire DRA opened an audit into the Morrises taxes. HT P.183. In the two months that followed the opening of the audit, Mr. and Mrs. Morris reapplied for Connecticut driver's licenses and Mr. Morris's LLC filed amended tax forms now claiming no compensation had been paid to a New Hampshire resident in 2017. HT 254-57.

In June of 2020, at the conclusion of the audit, DRA issued tax assessments against the Morrises. PA1 17-18. These assessments included $1,010,489.00 in interest and dividend taxes, plus $74,126.93 in interest and $50,048.90 in penalties. *Id.* The Morrises sought review of this assessment within an administrative proceeding. *Id*. DRA held a contested hearing and ultimately upheld the assessment with the only change being a reduction in the assessed interest. *Id.*

The Morrises then brought an action in superior court pursuant to RSA 21-J:28-b, IV. PA2 26-44. They filed a motion for summary judgment in early December 2022, and DRA filed an objection in early February 2023. PA2 45-129. The court denied the motion for summary judgment, finding no violation of either the New Hampshire Constitution or dormant Commerce Clause of the United States Constitution. PA1 7-16.

The court also found that it could not rule on any as-applied constitutional challenge without first resolving the contested issue of whether the Morrises had established residency in New Hampshire. *Id.* A two-day hearing on the merits was held in February of 2024, after which the superior court affirmed DRA's determination as to the Morrises residency and again concluded New Hampshire's taxation system did not violate the state or federal constitutions. PA1 17-31.

SUMMARY OF THE ARGUMENT

The Morrises were residents of New Hampshire within the meaning of RSA 21:6 between at least mid-June and the end of December 2017. While they maintained places of abode in both New Hampshire and Connecticut, they had a present intention—carried out through their actions—to "designate" the New Hampshire abode as their "principle place of physical presence for the indefinite future to the exclusion of all others." RSA 21:6 (2017). Their later change of heart, and efforts to walk back their previous actions, does not retroactively change their residency status for the second half of 2017.

The Morrises were not entitled to summary judgment in their favor because DRA substantially complied with the relevant statutory requirements and because, even if the Morrises' facts were accepted as admitted for purposes of the summary judgment motion, the motion would have remained properly denied.

New Hampshire's application of the interest and dividend tax upon Mr. and Mrs. Morris as New Hampshire residents violates neither the New Hampshire nor the United States Constitutions.

The superior court did not abuse its discretion or otherwise err in declining to rule on the Morrises' undeveloped claims, declining to modify the interest and penalty assessments, and refusing to award costs and attorney's fees to the Morrises.

ARGUMENT

I. MR. AND MRS. MORRIS WERE NEW HAMPSHIRE RESIDENTS DURING THE RELEVANT PERIOD OF TIME.

New Hampshire taxes income received from interest and dividends. RSA 77:3, I. Individuals must pay such interest and dividends taxes if they "are inhabitants or residents of this state for any part of the taxable year" and received "gross interest and dividend income. . . exceed[ing] $2,400[.]" *Id.* An individual is an inhabitant or resident if he or she is "a person who is domiciled or has a place of abode or both in this state … and who has, through all of his or her actions, demonstrated a current intent to designate that place of abode as his or her principle place of physical presence for the indefinite future to the exclusion of all others." RSA 21:6 (2017).

An intent to establish residency in New Hampshire is evidenced by things such as: (a) maintaining a home here; (b) spending the majority of one's time here; (c) having family live with one here; (d) advising governmental agencies that one considers oneself a New Hampshire resident; (e) being employed or conducting business here; and (f) registering to vote here. N.H. Admin. R. Rev 902.01. "Any individual claiming to be an inhabitant or resident of New Hampshire to any state agency or political subdivision of New Hampshire, shall be deemed an inhabitant or resident of New Hampshire for purposes of taxation of income unless the individual can prove, by a preponderance of evidence, that he or she is an actual resident of another jurisdiction." N.H. Admin. R. Rev 902.04.

In this case, it is uncontested that the Morrises maintained a place of abode in New Hampshire. The contested question is whether they, "through all of [their] actions, demonstrated a current intent to designate that place of abode as [their] principle place of physical presence for the indefinite future to the exclusion of all others." RSA 21:6 (2017). They undoubtedly did.

The Morrises began designating their New Hampshire home as the location where they would like to receive important mail as early as April 2017.[2] HT 34-40, 273-79, 277-78, 301. Then, over the summer and fall, the Morrises prepaid over half a million dollars in taxes to New Hampshire. HT 187-89, 190-92, 292, 301. Mr. Morris claimed these payments were made to avoid interest and penalties for back taxes should they choose to become residents of New Hampshire at some point in the future. HT 292-94, 301. However, this explanation defied logic as Mr. Morris is clearly not ignorant of tax law and one cannot owe interest and dividend taxes for any period of time prior to establishing residency. RSA 77:3, I(a); N.H. Admin. R. 901.16, 903.08. Nothing about looking into the possibility of a future relocation would require advance payment of taxes.

Mr. and Mrs. Morris also applied for driver's licenses in the State of New Hampshire. HT 259-61, 295-97, 318. In so doing, they expressly

[2] The Morrises argue that using a mailing address in New Hampshire "does not speak to having any *physical* presence in New Hampshire[.]" PB 21. DRA disagrees with this proposition. While it is certainly not dispositive, it is common sense that where an individual chooses to have their important documents sent bears some relationship to where that individual expects to be regularly physically present to receive those documents.

claimed to be New Hampshire residents[3] under penalties of sworn falsification. *Id*. These sworn statements are clear expressions of their present intent during the relevant time period to be New Hampshire residents. To find otherwise would require concluding that the Morrises lied under oath to acquire driver's licenses to which they were not entitled, a misdemeanor offense. RSA 263:5-a, VI; RSA 263:12, V. Similarly, they registered to vote in New Hampshire and, in so doing, signed an affidavit claiming to be domiciled[4] in New Hampshire under penalties of voter fraud. HT 205-09, 299-300. However, when testifying under oath, Mr. Morris changed course and claimed he was never so domiciled, instead stating that registering to vote was "part of the process we went through looking about whether or not we could" semi-retire in New Hampshire. HT 299-300. Mr. Morris offered no credible explanation as to why he and his wife would register to vote or get drivers licenses—actions which both require legal domicile/residence in New Hampshire to already exist—if they were

[3] Residency for purposes of the motor vehicle laws is determined by application of the same legal stand as for tax purposes. RSA 259:88 (cross referencing definition from RSA 21:6).

[4] In 2017 the definition of domicile for voting purposes was slightly different than the definition of residency for tax purposes. *Compare* RSA 654:1 *with* RSA 21:6 (2017). This difference related solely to the latter's use of the phrase "for the indefinite future". *See Casey v. N.H. Secy. of State*, 173 N.H. 266 (2020). The definitions are otherwise sufficiently similar that any person who is domiciled under RSA 654:1 is necessarily a resident under RSA 21:6. *Id.* Further, the "indefinite future" phase "was never intended to be applied so literally" as to preclude the establishment of domicile simply because one had "a firm intention of leaving that town at a fixed time in the future[.]" *Id.* at 275. Finally, and most importantly, the "indefinite future" phrase was not an issue in this case as the Morrises never claimed they intended to be domiciled only temporarily in New Hampshire as one might do to attend an institute of higher education. Instead, the Morrises claimed to have been considering establishing residency for a long-term purpose (semi-retirement).

merely engaged in a process of trying to decide if they should in the future move to New Hampshire.

Finally, Mr. Morris repeatedly provided a New Hampshire mailing address on official tax forms, HT 34-40, 273-79, 277-78, 301, and registered his LLC to allow it to conduct business in New Hampshire. HT 120-21, 192-94, 289, 302. Then, consistent with this registration, his LLC filed tax forms reporting to have paid a portion of Mr. Morris's compensation for work done in 2017 in New Hampshire. HT 194-205, 237, 289.

All these actions overwhelmingly demonstrate that between at least mid-June 2017 and the end of December 2017, Mr. and Mrs. Morris had a present intention to designate New Hampshire as their residence. They may have changed that intention in 2018. But they cannot retroactively erase their previously held residency.

The Morrises make three main arguments in response. The first relates to their physical presence, the second relates to the familial relationships, and the third relates to their professional and social relationships. None of these arguments are persuasive.

As to physical presence, Mr. Morris claims he was in New Hampshire only 51 days within the relevant six-and-a-half-month period. HT 101-02. The weight to be given to this claim is at best moderate. Mr. Morris's testimony lacked credibility given his insistence that he registered to vote and got a driver's license merely because he was considering a future move to New Hampshire. In addition to that, the parking garage data on which Mr. Morris relied suggested only that he was working short weeks in the office in Connecticut. *See* HT 211-14. As a separate matter,

the Morrises make no specific claims about the exact amount of time Mrs. Morris was physically present in New Hampshire. The physical location of Mrs. Morris, who had no employment obligations like Mr. Morris, seems far more relevant to the determination of the couple's intentions to designate a location their principle place of presence.

Finally, residency does not require one to be physically present in New Hampshire for the majority of a given timeframe. The question is whether the couple had a current intent to designate their New Hampshire abode as their "principle place of physical presence[.]" RSA 21:6 (2017). "Principle" is defined as: "most important, consequential, or influential: relegating comparable matters, items, or individuals to secondary rank." *Webster's Third New International Dictionary*, 1802 (unabridged ed. 2002). The location where one chooses to designate one's physical presence as "principle" relates to that place which is most important or consequential and not necessarily that place which is most common. Mr. Morris's physical presence in Connecticut for a portion of the work week was necessitated by his employment. That does not mean he considered it to be his most important or consequential place of physical presence.

As to familial relationships, Mrs. Morris testified that she had close relatives (three siblings and their spouses) living in Connecticut and had no close relatives in New Hampshire. HT 52. This testimony was at best misleading as Mr. and Mrs. Morris had two children, ages 22 and 23, living in the Morrises' New London home during the relevant period of time. HT 308-09, 311-12. When one's physical presence is spread across multiple locations, it is certainly relevant where one is surrounded by family. However, in the Morrises' case, that was their New Hampshire home—

where they lived with two of their three[5] children—and not their Connecticut home—which was simply in the general vicinity of extended family.

Beyond family, both Mr. and Mrs. Morris testified about how they had extensive social and professional connections in the vicinity of their Connecticut home, including medical providers and memberships in social clubs. HT 50-55,74-76, 91-92. They also discussed continuing to keep their most precious possessions in Connecticut. *Id.* This is not unexpected given the length of time the Morrises had been established residents of Connecticut and the fact that they continued to maintain a home in Connecticut at all relevant times. While a family of average means changing residences from one state to another can be expected to do things such as sell their house, move all their possessions, and establish new medical providers in the vicinity of their new residence, the Morrises are not a family of average means.

When all the evidence is examined in context it is clear that at some unknown point in time (presumably sometime in early 2017), Mr. and Mrs. Morris developed an intention to move their residency from Connecticut to New Hampshire and acted upon that intention. They engaged in a series of deliberate actions between spring of 2017 and spring of 2018. The sole credible explanation for these actions was that the Morrises had a present intention of establishing residency in New Hampshire from at least mid-2017 to the end of that year. Thereafter they clearly changed their

[5] The Morrises' third child, the youngest, was at college in Pennsylvania during the relevant period of time, and therefore not living at either the Connecticut or New Hampshire homes. *See* HT 114, 118, 137-38.

intentions again. But such a subsequent change of plans does not retroactively change their historical residency status.

II. THE SUPERIOR COURT WAS NOT REQUIRED TO ENTER JUDGEMENT ON BEHALF OF THE PLAINTIFFS AT THE SUMMARY JUDGMENT PHASE.

Mr. and Mrs. Morris claim that the superior court was required to enter judgment in their favor under RSA 491:8-a when the DRA did not file a counter-affidavit with their summary judgment opposition. This argument is flawed for several reasons.

First, the statute contemplates judgement being entered "in accordance with the facts" when no counter-affidavit is filed. RSA 491:8-a, IV. This language does not direct the court to automatically rule in favor of the moving party. *Id.* Instead, the facts laid out in the moving party's affidavits "shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contrary evidence can be presented at a trial but cannot be furnished by affidavits." RSA 491:8-a, II. With or without a responsive affidavit, the court is to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." RSA 491:8-a, III.

The superior court in this case declined to accept the Morrises facts as admitted for purposes of the motion. PA1 7 n.1. However, even if the

court had so accepted the Morrises' facts without consideration of which were disputed by the DRA and which were not, the ultimate ruling would have been the same given the nature of the claims raised. Mr. and Mrs. Morris's motion for summary judgment argued that imposition of the interest and dividend tax resulted in double taxation and was therefore in violation of the New Hampshire and United States Constitutions. PA2 45-64. Specifically, they wrote:

> New Hampshire I&D tax is imposed only on "[i]ndividuals who are inhabitants or residents of this state for any part of the taxable year." RSA 77:3, I. Resident individuals are subject to tax on all of their interest and dividend income, as defined in RSA 77:4, without a statutory credit to offset tax paid on the same income to another state or jurisdiction. Because New Hampshire is the only state that does not allow such a credit, there is a significant risk of unconstitutional double taxation. Any individual deemed to be a New Hampshire resident, who is also a resident of or has income sourced to another state, may well be taxed twice, in violation of the New Hampshire and U.S. Constitutions. That was the unconstitutional outcome here: The Department deemed Petitioners to be New Hampshire residents, and imposed I&D tax on their entire interest and dividend income—without any credit for tax already paid on the same income to Connecticut, the Petitioners' state of residence and domicile and the source of the double-taxed income.

PA2 50-51.

In making this argument, the Morrises were clear that they were not requesting the court make a finding related to residency at the summary judgment stage nor were they arguing that their residency status was an uncontested issue. PA2 46 n.2. The Morrises explained:

> The Court should grant Petitioners' motion for summary judgment because the undisputed materials facts establish that the I&D tax scheme fails the internal consistency test. The I&D tax scheme thus violates the dormant Commerce Clause of the U.S. Constitution because it discriminates against individuals, including Petitioners, who engage in interstate economic activity. The Court should also grant Petitioners' motion for summary judgment because there is no genuine dispute that the I&D tax scheme results in double taxation of Petitioners' income in violation of the New Hampshire Constitution. … [T]o grant Petitioners' motion for summary judgment, this Court does not need to determine whether Petitioners were properly treated as residents of New Hampshire, resolve any factual disputes, or wait for Respondent to gather more facts.

PA2 136-37.

Given that the Morrises themselves argued that the contested facts were not relevant to the court's summary judgment ruling, they cannot show that the court's summary judgment ruling should have been different because the court was obliged to accept their facts as admitted for purposes of summary judgment. The summary judgment motion denied the Morrises facial constitutional challenge, a ruling that did not require reliance on the facts of this case. *See* PA1 7-16. And, in ruling that the as-applied

constitutional challenge could not be ruled on at the summary judgment stage, the court was clear that the contested factual question needing resolution was the question of the Morrises' residency, something the Morrises never alleged to be an uncontested fact. *Id.*

Secondly, the Morrises' claim fails because the DRA substantially complied with RSA 491:8-a. A party opposing a motion for summary judgment must support that opposition with "one or more affidavits or refer specifically to affidavits, pleadings, depositions, answers to interrogatories or admissions on file which establish the existence of a disputed issue of material fact." *Omiya v. Castor*, 130 N.H. 234, 237, (1987) (citing *Lortie v. Bois*, 119 N.H. 72 (1979)). While the moving party's affidavit must be "based on the personal knowledge of a person who would be competent to testify at trial," the opposing party must only show "reasonable and specific grounds for believing that evidence disputing the moving party's affidavits can be produced at trial." *Id.*

When responding to the Morrises' motion for summary judgement, DRA filed both an objection and a consolidated statement of material facts.[6] PA2 90-129. In these documents, DRA responded to the Morrises legal arguments and offered detailed responses to their factual assertions

[6] DRA reads the Morrises arguments below as well as in the context of this appeal to be based upon an assertion that DRA's failure related to the insufficiency of their response (i.e. its failure to file an affidavit) rather than related to the timing of the filings that were made outside the 30-day deadline. *See* PB 28 ("The Commissioner never filed affidavits to oppose the facts set out in the Morris Affidavit, as required by RSA 491:8-a."). Had the Morrises wished to preclude the court from considering the late filing, a contemporaneous objection would have needed to be raised. *See generally Omiya v. Castor*, 130 N.H. 234, 236 (1987) (noting a filing made outside the 30-day period was allowed by the lower court and declining to consider the issue on appeal because, while the moving party objected below, he did not appeal the lower court ruling on the issue).

supported by citations to the record from the administrative proceeding. *Id.* While nothing specifically labeled as an affidavit was filed, DRA provided interrogatory answers. DA 308-330. DRA also produced the administrative ruling from below as well as extensive documentary evidence supporting that ruling. DA 3-307. These documents were sufficient to show that evidence disputing the moving party's affidavit would be produced at trial, particularly given that even the Morrises conceded that the question of their residency was a disputed fact.

III. NEW HAMPSHIRE'S TAXATION OF THE MORRISES' INTEREST AND DIVIDEND INCOME DID NOT VIOLATE PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

The Morrises challenge the constitutionality of New Hampshire's interest and dividend tax system described under issue I above. In doing so, they "bear[] the burden of proof." *Deere & Co. v. State*, 168 N.H. 460, 471 (2015) (quotation omitted). Courts must "presume [a legislative action] to be constitutional and will not declare it invalid except upon inescapable grounds." *Id.* (quotation omitted). "Thus, a statute will not be construed to be unconstitutional when it is susceptible of a construction rendering it constitutional." *Id.* "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.* (quotation omitted).

The Morrises raise two separate constitutional challenges. First, they claim the tax scheme violates the New Hampshire Constitution's prohibition against double taxation. Second, they claim New Hampshire's tax scheme discriminates against individuals such as themselves who

engage in interstate economic activities and thus violates the dormant Commerce Clause of the United States Constitution.

A. The New Hampshire Constitution

The New Hampshire Constitution imposes upon members of the public a civic duty to contribute monetarily and personally to the community, providing:

> Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary.

N.H. Constitution, Part I, Art. 12. To give effect to this duty, the Constitution grants "full power and authority" to the general court "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state[.]" N.H. Constitution, Part II, Art. 5.

It has long been accepted that when applying this taxing authority "[t]he laws shall not be so construed as to cause any property to be twice taxed." *Robinson v. Dover*, 59 N.H. 521, 525 (1880). *See also Opinion of the Justices*, 76 N.H. 588, 590 (1911) ("It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party either directly or indirectly."). Property is not appropriately "taxable … in each of two states" and, when such a double tax has been imposed, the "question left open" for the court to answer is: "In what state [is the property] taxable?" *Robinson*, 59 N.H. at 525-26.

When answering this question, the court is not tasked with deciding merely whether property has been taxed in another state but whether it is taxable in that other state. *Id.*; *see also Crosby v. Charlestown*, 78 N.H. 39, 43-44 (1915) (explaining that if property is taxable in New Hampshire, "the tax could not be abated on the ground that the property was wrongfully taxed in Massachusetts"); *Rand v. Pittsfield*, 70 N.H. 530, 530-31 (1900) (reasoning that because an estate was "rightfully taxed in Vermont," it generally could not be taxed in New Hampshire unless an exception applied).

Taxability depends on the location of property. This is a simple determination for real, tangible property.

> If the plaintiff owned New Hampshire land, its New Hampshire tax would not be abated by a taxation of it in Massachusetts. And if he owned Massachusetts land, the fact that it was not taxed in Massachusetts would be no cause for taxing it here.

Robinson v. Dover, 59 N.H. 521, 525 (1880). *See also Crosby*, 78 N.H. at 44 (reasoning that it "would be a strange perversion of justice to hold that the rightful tax here must be abated because the assessors of some other state have put the property on the list for taxation there, or because the owner has seen fit to pay the tax there assessed").

In this case, we are dealing with intangible assets. Such intangible assets are traceable to the person holding the assets. Specifically, a person is deemed to receive interest and dividend income in their state of domicile and, as such, the income is properly taxed by that state. *See, e.g., Conner v. State*, 82 N.H. 126, 132-33 (1925) ("The state can tax a person over whom it has jurisdiction, as to all his intangible personal property."); *Opinion of*

Justices, 117 N.H. 512, 520 (1977) (concluding that the state "may validly impose a tax on the capital gains income of a resident" and may do so even when this income is "derived from the sale or exchange of real property located in another state"); *Maguire v. Trefry*, 253 U.S. 12, 17 (1920) (recognizing that beneficial interests to income, profits, or benefits is received by a beneficiary in their state of domicile, and therefore can be properly be taxed by the domiciliary state).

As discussed above, New Hampshire imposes taxes of the interest and dividends earned by residents as defined by RSA 21:6. RSA 77:3. This definition of residence is consistent with common law principles of domicile. *See Casey v. N.H. Secy. of State*, 173 N.H. 266, 274 (2020) ("In order to acquire a domicile under the common law, a person must intend to reside in a place for a more or less definite time and make it his home."). As such, the taxability of the property turns on the residence status of the Morrises, an issue fully addressed above, and is therefore not in violation of the New Hampshire Constitution.

B. The United States Constitution

The Morrises claim that New Hampshire's tax system is unconstitutional in violation of the dormant Commerce Clause. The Commerce Clause grants Congress the power to "regulate Commerce … among the several States." U.S. Constitution, Art. I, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress, [the U.S. Supreme Court] has consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress failed to legislate on the subject."

Comptroller of the Treasury v. Wynne, 575 U.S. 542, 548-49 (2015) (internal citation omitted). Under the dormant Commerce Clause, "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.* (internal citations omitted). This prohibition including "subjecting interstate commerce to the burden of multiple taxation." *Id.* (internal citation omitted).

In determining whether a tax scheme runs afoul of the dormant Commerce Clause, courts are to apply the internal consistency test. *Id.* at 561-62. Under this test, one must "look to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* (internal citation omitted).

> By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. … The first category of taxes is typically unconstitutional; the second is not. … Tax schemes that fail the internal consistency test will fall into the first category, not the second: "[A]ny cross-border tax disadvantage that remains after application of the [test] cannot be due to tax disparities" but is instead

> attributable to the taxing State's discriminatory policies alone.

Id. at 562-63.

New Hampshire's tax on interest and dividend income earned by residents passes the internal consistency test. New Hampshire imposes the tax only on residents and only for income earned during the portion of the year in which the individual was a New Hampshire resident. *See* NH Admin. R. Rev 901.16 & 903.08. The definition of resident is expressly exclusive and allows an individual to be a resident of only one state at a time. *See* RSA 21:6 (defining New Hampshire residence to be "to the exclusion of all others"). Were all states to apply this same tax structure, each person would pay taxes on interest and dividend income in the one state in which he or she was a resident at the time he or she received the income.

IV. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO RULE ON MR. AND MRS. MORRIS'S UNDEVELOPED CLAIMS THAT THE INCOME BEING TAXED WAS NOT FROM INTEREST OR DIVIDENDS.

The Morrises raised this issue in a cursory manner in their petition for *de novo* appeal. *See* PA2 30. Mr. Morris then offered brief, conclusory testimony claiming that the income at issue in this case was compensation for services and not interest or dividends. HT 153-62. However, this argument was not mentioned in the Morrises' post-trial brief, which requested judgment be entered solely based on a residency ruling. PA2 152-

168. The Morrises did mention the issue in their motion to reconsider but again did so in a cursory manner. PA2 195-96.

The superior court did not err in concluding that these arguments were insufficiently developed to justify ruling. PA1 30, 34. *See Lonergan v. Town of Sanbornton*, 175 N.H. 772, 780 (2023); *State v. Blackmer*, 149 N.H. 47, 49 (2003) ("[W]e confine our review to only those issues that the defendant has fully briefed."); *Town of Londonderry v. Mesiti Dev., Inc.*, 168 N.H. 377, 380 (2015) (finding "issue waived" when issue "was not addressed in the body of their brief"). The entirety of the argument consists of conclusory assertion that the income was not "dividends," that the income did not come from an LLC with transferrable shares, and that RSA 77:4 "does not tax distributions from LLC's with non-transferable shares." PA2 195-96. This is insufficient, particularly given that the Morrises previously reported it as interest and dividend income when filing their estimated taxes in New Hampshire. PA3 4-9.

V. THE SUPERIOR COURT DID NOT ERR IN DECLINING TO VACATE DRA'S ASSESSMENTS OF PENALTIES AND INTEREST.

The Morrises argue that the penalties DRA imposed should have been abated under RSA 21-J:33. That statutory provision, in relevant part, provides:

> In addition to amounts due under this subdivision, penalties shall be imposed for failure to pay taxes when, and as, due as follows:

> I. If the failure to pay is not due to fraud, the penalty shall be equal to 10 percent of the amount of the nonpayment or underpayment. This penalty shall not be applied in any case in which the failure to pay was due to reasonable cause and not willful neglect of the taxpayer.

RSA 21-J:33. In determining whether a taxpayer acted with "reasonable cause and not willful neglect," one must ask "whether the filer's reason for so acting was objectively reasonable under the circumstances." *Appeal of Keith R. Mader 2000 Revocable Tr.*, 173 N.H. 362, 369 (2020). The taxpayer must "show that, despite exercising ordinary business care and prudence, it was not reasonably possible" to have complied with the statutory requirements and "further show that he or she was not recklessly indifferent to the" requirements with which he or she failed to comply. *Id.* at 370.

The Morrises' sole argument in an attempt to meet this standard is simply a recitation of the residency argument, i.e. that they had "reasonable cause to conclude that New Hampshire was not [their] principle place of physical presence for the indefinite future, to the exclusion of Connecticut." PB 44 (emphasis removed). As discussed above, the Morrises repeatedly asserted their intention to establish residency in New Hampshire in official documents which opened them up to criminal liability for false representations and made multiple prepayments related to their tax liability. Given these facts, they have not established that it was not "reasonably possible" for them to have properly paid their taxes through the exercise of "ordinary business care and prudence[.]" *Appeal of Keith R. Mader 2000 Revocable Tr.*, 173 N.H. at 370.

The Morrises' brief to this Court also asserts: "Interest should have been abated for similar reasons. See RSA 21-J:3, XVI." This argument is insufficiently developed to justify review. *See State v. Blackmer*, 149 N.H. 47, 49 (2003) ("[W]e confine our review to only those issues that the defendant has fully briefed."). It fails in any way to enumerate reasons why this Court should find the Commissioner abused her discretion in declining to apply her statutory authority to abate interest nor to discuss the fact that the interest assessment was in fact reduced in part by the DRA. *See* PA1 17-18.

VI. MR. AND MRS. MORRIS ARE NOT ENTITLED TO ATTORNEY'S FEES AND COSTS.

The Morrises' argument on attorney's fees and costs amounts to nothing more than a claim they should have prevailed on the residency issue and therefore should have been awarded reasonable costs and attorney's fees pursuant to RSA 21-J:28-b. As discussed at length above, the superior court did not err in affirming DRA's finding that the Morrises were New Hampshire residents during the applicable time frame. However, even if the Morrises had prevailed, they fail to make a sufficient argument as to why attorney's fees should have been awarded.

RSA 21-J:28-b, IV, in relevant part, provides that the superior court "may award reasonable costs and attorney's fees to the prevailing party, provided the prevailing party shows substantially unjustified action." The Morrises' appellate brief is devoid of any argument that they met this burden of showing substantially unjustified action on the part of DRA or

that the superior court abused its discretion in declining to order costs and fees.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

DRA does not request oral argument. If the Court schedules oral argument, Mary A. Triick will present argument on DRA's behalf.

Respectfully Submitted,

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

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October 30, 2024

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CERTIFICATE OF COMPLIANCE

I, Mary A. Triick, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,576 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 30, 2024 *<u>/s/ Mary A. Triick</u>*
Mary A. Triick

CERTIFICATE OF SERVICE

I, Mary A. Triick, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

October 30, 2024 *<u>/s/ Mary A. Triick</u>*
Mary A. Triick