

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT
Case No. 2024-0234**

ROBERT S. MORRIS & a.

v.

**COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF
REVENUE ADMINISTRATION**

**APPEAL FROM A FINAL ORDER OF THE MERRIMACK
COUNTY SUPERIOR COURT**

**REPLY BRIEF OF APPELLANTS
ROBERT S. MORRIS & a.**

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ARGUMENT

I. **The Morrises Never Through All of Their Actions Designated New Hampshire As Their Principal Place of Physical Presence for the Indefinite Future To the Exclusion of All Others**

Instead of considering “all of his actions,” as RSA 21:6 commands, the Commissioner’s brief focuses on a few isolated facts – and gets most of those facts wrong. The few facts that the Commissioner relies on are either irrelevant, or they do not speak to the Morrises’ “principal place of *physical* presence,” and their intent “for the *indefinite* future,” both of which are required for residency under RSA 21:6. Finally, the Commissioner ignores the overwhelming Connecticut facts, thereby attempting to bypass the “to the exclusion of all others” requirement of RSA 21:6.¹

Principal place of physical presence. Mr. Morris testified that he spent only 51 days in New Hampshire during the 6½ month audit period. (Tr. 101.) Morris further testified that he spent only 72 days in New Hampshire during the *entire year* of 2017 (Tr. 101-102), and that this was roughly the same amount of time that he spent in New Hampshire in all years before and after 2017 (Tr. 119). The house was used for summer vacations and occasional ski trips (Tr. 119), like thousands of other nonresidents of New Hampshire. Spending only 51 days of the audit period

¹ In order to avoid repetition, the Morrises stand by and do not repeat the arguments made in Section 1.E of their original brief concerning the application of Rev 902.01.

(72 days for the *entire year*) in New Hampshire cannot seriously be considered one's "principal" or "most important" place of physical presence.

Morris explained that he used his calendar and his Connecticut garage's entry/egress records (Apx. III at 82-92) to determine when he was at work in Connecticut (Tr. 101), and then used his credit card records (Apx. III at 112-128) and golf club receipts to determine where he was at all other times that were not accounted for in his calendar or garage records (Tr. 101). When he summed these days up, the result was 51 days in New Hampshire during the audit period and 72 days for the entire year (Tr. 101-102).² Both the garage records and credit card statements supporting Mr. Morris's calculation are in evidence. (Apx. III at 82, 111.)

The Commissioner offered no contrary evidence on these points, only wild speculation that whenever Morris worked a "short week" he must have immediately taken off to New Hampshire. However, this speculation was contrary to the documentary evidence, which showed where he was at virtually all times during the year. His credit card receipts demonstrated that he traveled to numerous places other than New Hampshire during the weekends that he was not in Connecticut. The Commissioner put forth zero evidence showing that that this documentary evidence was inaccurate.

² The trial judge misquoted the "72 days" as being the number of days that the Morrises were *in Connecticut* during the audit period (Apx. I at 21.) That was NOT the evidence. The evidence was that Mr. Morris was in New Hampshire for 51 days during the 6½ month audit period and 72 days during the *entire year* of 2017. (Tr. 101-102.)

The Commissioner speculates, without evidence, that *Mrs.* Morris could have traveled to New Hampshire more often than Mr. Morris. As far as *Mrs.* Morris goes, although she generally remained with her husband, her whereabouts are irrelevant because she had zero income in 2017. Mrs. Morris also testified that she packed a duffel bag and brought hanging clothes when visiting the Lake Sunapee house, and did not store any clothing there. (Tr. 54.) She would not have been living out of a duffel bag if New Hampshire was her “principal” residence.

There were no children living in the New Hampshire house. The Commissioner falsely claims that two of the Morris’s children were “living in the Morris’s New London home during the relevant period of time” and that the Morrises were “living with” two of their three children in New London. SB at 16-17. Wrong! There was no evidence that the two children were “living in the New London home.” In fact, the unrefuted evidence was that one of the adult children (age 22 in 2017) (Tr. 63) was attending college full-time in New York (Tr. 138), and the other adult child (age 19 in 2017) (Tr. 64) was a full-time college student in Pennsylvania (Tr. 138). Both children resided at a YMCA camp during the summer of 2017 when they were not at school. (Apx. II at 84, ¶¶ 31, 32.) Thus, neither of the adult children were “living with” the Morrises in the New London home. (Apx. II at 84, ¶ 32), and the State has produced no evidence to the contrary. Furthermore, it should go without saying that the residency choices of adult children who make their own life decisions do not necessarily align with the residency of their parents.

Mailing addresses. The State also places heavy reliance on the “mailing addresses” used on a few tax forms in 2017. SB at 15. Yet the

Commissioner's own witness, Director of Audit, Fred Coolbroth, testified that "mailing addresses" on tax forms are not determinative of residency:

Q. So is it fair to say that the address on the return itself is not the determining factor of residency, right?

A. Yes.

Tr. 233.

He further testified that estimated payment voucher forms just ask for an "address" not one's "domicile," and that they are not signed by anyone. (Tr. 224.) He further testified that the actual tax return for tax year 2017 signed and filed under penalties of perjury by the Morrises listed their Connecticut address. (Tr. 225-226.) Furthermore, Mr. Morris's accountant testified that the address used on a tax return or extension form is simply a "mailing address." (Tr. 37-40.) In other words, the address is not intended as a declaration of residency by the taxpayer. The State completely ignores the fact that *all* of the Morrises' important mail was received by them "at home in Connecticut," and never in New Hampshire. (Tr. 91.)

LLC registration. The State also points to the irrelevant fact that Olympus Advisors registered in New Hampshire as a foreign LLC. Yet, the Department's Mr. Coolbroth, testified that a foreign LLC can be registered in multiple states (Tr. 226) and that simply registering in a state does not mean that the company is actually doing business in that state. Tr. 226-227 (Coolbroth: "A company can register as a foreign LLC without conducting activity in New Hampshire.") Coolbroth further testified that the address used on the LLC registration form was not the Morrises' address, but that of a registered agent in Concord. Tr. 227-228.

Mr. Morris testified that he *never* worked in New Hampshire. (TR. 93.) Olympus did not conduct any business activities in New Hampshire either. (Tr. 312.) As far as the LLC filing a return showing “payroll” in New Hampshire, Mr. Coolbroth admitted that an amended return was subsequently filed that showed no payroll, and that amended returns are used to correct mistakes on the original return. (Tr. 229.) Coolbroth further admitted that the Commissioner accepted this amended return and refunded the taxes that had been erroneously paid by the LLC – even while the Commissioner’s audit of Mr. Morris was pending. (Tr. 230.)

Voter Registration. Mr. Coolbroth further testified that registering to vote in a particular state is not the determining factor of residency for tax purposes. (Tr. 233.) Rather, he testified that it is necessary “to look at the whole picture.” (Tr. 233.) We agree! The same would be true of a driver’s license, which is not “the whole picture.” Looking at “the whole picture” is precisely what the Commissioner has refused to do in this case!

Driver’s License. With regard to the driver’s licenses, Mr. Morris testified that his Connecticut license remained active in 2017. (Tr. 92-93.) He further testified that that he obtained the New Hampshire license and later the voter registration as a “step[] toward the process of becoming a New Hampshire resident.” (Tr. 97.) However, as Mr. Coolbroth agreed (Tr. 222), neither the driver’s license nor the voter registration speak to one’s “principal place of *physical* presence.” The Commissioner’s decision to peg the start of the audit period to one single fact -- the issue date of the New Hampshire licenses on June 16, 2017—rather than to their place of actual physical presence—was therefore entirely arbitrary. The Morrises

principal place of *physical* presence remained in Connecticut where they spent some 80% of their time.

Estimated Payments. The Morrises made two estimated tax payments to New Hampshire while they were contemplating the possibility of semi-retiring in New Hampshire. They were advised by their accountant that making such payments would reduce exposure to interest and penalties if they decided to become New Hampshire residents at some point later in the year (Tr. 40, 46, 98) – a plan that was aborted before it came to fruition (Tr. 95-96). Estimated payments are just that – “estimated.” RSA 77:18. They are not evidence of any actual liability. The Commissioner is required to return the estimated payments if there ends up being no tax liability for the year. RSA 77:18, III(b). The Commissioner has unlawfully refused to do so.

Connecticut Facts Never Changed. The Commissioner continues to avoid application of the statutory requirements for New Hampshire residency. A resident must:

- (1) Be domiciled or have a place of abode in New Hampshire; and
- (2) Through **all of his actions**, demonstrate a current intent to designate that place of abode as his **principal place of physical presence**
- (3) **for the indefinite future**;
- (4) **to the exclusion of all other places**. RSA 21:6 (2017).

The evidence established that:

- The Morrises continued to live for approximately 80% of the year at their 5-bedroom home in Riverside, Connecticut; spent only 51 days of the audit period (and 72 days during the *entire year*) in New

Hampshire (Apx II at 83; Tr. 101-02); and filed a full-year Connecticut resident income tax return for 2017 and paid Connecticut resident income tax on 100% of their income (Tr. 143-45; Apx. III at 62.)

- Mr. Morris continued to be employed full-time as the President and Managing Partner of Olympus Advisors (Tr. 64-65), whose office in Stamford was near his home in Riverside, Connecticut (Tr. 65-66.) He actively ran the company at all times, supervising many other employees. (Tr. 66-67.)
- He *never* worked in New Hampshire. (Tr. 94.)
- He was active in two major charitable endeavors, one in Connecticut and the other in nearby New York (Apx. III. At 170; Tr. 87-88.)
- All of the Morrises' physicians, dentists, accountants and other professional advisors remained in Connecticut and nearby New York (Tr. 50-51, 75-76.)
- The Morrises received their important mail only in Connecticut, including their tax and utility bills for the Lake Sunapee home (Apx. III at 79; Tr. 91); they attended church in Connecticut and not in New Hampshire (Tr. 91); their cherished possessions remained in Connecticut (Tr. 54-55); and Connecticut remained the center of the Morrises' civic, religious and charitable activities (Tr. 60, 91-95).
- Mrs. Morris actively participated in a book club and women's social group in Connecticut, and did nothing similar in New Hampshire (Tr. 60, 91-95.)

- The smaller Lake Sunapee house was used only for vacations, and the 5-bedroom Connecticut home remained their principal residence. (See Tr. 59, 91).
- Mr. Morris’s primary vehicle remained registered in Connecticut at all times (Tr. 136-37; Apx. III at 81.)
- The Morrises did not have any close family or friends in New Hampshire (See Tr. 51-52.)

“For the indefinite future” The Morrises were assessed tax for the 6½ month period running from June 16, 2017 to December 31, 2017. They were never assessed for 2018 or future years, and they testified that their consideration of semi-retirement abruptly ended in the fall of 2017, when it became clear that Mr. Morris would not be able to leave Connecticut for work reasons. At most, the Morrises’ exploration of semi-retirement lasted only a few months, and there was no suggestion that they actually made New Hampshire their principal place of physical presence “for the indefinite future.” If they had, they would have taken *some action in Connecticut*, like selling or renting out their Connecticut house, not paying Connecticut resident income tax on all of his 2017 income, Mr. Morris leaving his full-time job in Connecticut, or increasing the amount of time they spent in New Hampshire. They did *none* of these things. Even the Commissioner has never asserted that the Morrises were New Hampshire residents after the 6½ month audit period. Common sense dictates that 6½ months is not the “indefinite future.”

Given this mountain of facts pertaining to their life in Connecticut, which did not change one iota in 2017, it simply cannot

be said that the Morrises, “through *all of [their] actions*, demonstrated a current intent to designate [New Hampshire] as [their] *principal place of physical presence for the indefinite future to the exclusion of all others.*” RSA 21:6 (2017) (emphasis added).

II. The Morrises Were Entitled to Summary Judgment

The Morrises constitutional challenge was both facial and as-applied. Apx. I at 9. The Morris’s “as-applied” constitutional challenge was supported by the Affidavit of Robert Morris and exhibits thereto. Apx. II at 80. The Commissioner does not dispute that she never filed a counter-affidavit, as required by RSA 491:8-a.

The Commissioner states that she filed a response to the Morrises statement of material facts, and that should be good enough. However, none of the Commissioner’s answers to the Morris’s statement of material facts were supported by an affidavit, as required by RSA 491:8-a, II. (Apx. II at 107.) Furthermore, the Commissioner’s answers were not supported by reference to depositions, answers to interrogatories, or admissions as required by RSA 491:8-a, IV and Superior Court Rule 12(g)(3)(b). (Apx. II at 107.) Accordingly, each fact in the Morris Affidavit and in Petitioners’ Statement of Material Facts should have been taken as admitted for purposes of the Morris’s motion for summary judgment. RSA 491:8-a, II. When the party opposing summary judgment fails to support its opposition with an affidavit, “judgment **shall** be entered on the next judgment day in accordance with the facts. RSA 491:8-a, IV.

III. Double-Taxation

The Commissioner acknowledges that the New Hampshire Constitution forbids double-taxation. SB at 23. However, the Commissioner's logic is that since intangible income is taxable in the taxpayer's state of domicile, and the Morrises' state of domicile was allegedly in New Hampshire, there is no double-taxation. SB at 25.

The Commissioner's logic is both circular and flawed. Given the Morrises' "Connecticut facts," the State of Connecticut would clearly consider the Morrises to be domiciled in Connecticut. See Conn. Gen. Stat. § 12-701(a)(1)(A); and Conn. Agencies Reg. § 12-701(a)(1)-1(d) (defining domicile). In addition, regardless of common law domicile, they were automatically statutory residents of Connecticut because they "maintain[ed] a permanent place of abode" and spent more than 183 days in Connecticut in 2017. Even if they were not Connecticut residents (they were), the Morrises were required to pay Connecticut tax on all of their Connecticut-source income, which included Mr. Morris's distributive share income from running the Olympus business conducted exclusively in Connecticut. See Conn. Gen. Stat. § 12-711(a). In fact, Connecticut taxed Morris on 100% of his income in 2017. Now, New Hampshire wants to tax the same income that was properly taxed by Connecticut. The unconstitutional double-taxation should be obvious!

IV. Commerce Clause Violation

The Commissioner posits that there is no violation of the commerce clause because New Hampshire imposes the I&D tax only on residents, and an individual can only be a resident of one state at

a time. Br. at 27. Once again, the Commissioner's logic is circular. The fact that the Morrises could be considered residents of Connecticut under these facts is obvious. If Connecticut imposed the tax in the same way as the Commissioner, it would easily conclude that the Morrises were Connecticut residents. They had a 5-bedroom primary residence in Connecticut, Mr. Morris worked there, they spent 80% of the year there, etc. Accordingly, if other states adopted New Hampshire's tax scheme (as interpreted by the Commissioner), the Morrises would be treated as residents of at least two states, and taxed twice. Conversely, an individual who lived and worked only in New Hampshire would be subject to tax on his income only once. Hence, we have an internally inconsistent taxing scheme that discriminates against interstate commerce. *See Comptroller of Treasury of Maryland v. Wynne* 575 U.S. 542, 562 (2015).

V. The Non-Taxable Dividend Issue Was Adequately Developed

Count III of the Morrises' Petition alleged that the income he received was not subject to the I&D tax at all. (Apx. II at 30.) In the case of LLC's, the I&D tax only applies to "dividends," "the beneficial interest in which is represented by transferable shares." RSA 77:4, III. Furthermore, the tax does not apply to "reasonable compensation." See Rev 902.08(f).

Mr. Morris testified that the amounts he received from the Olympus LLC's were not "dividends," but rather were distributions from LLC's. (Tr. 153.) Furthermore, he testified that these LLC's did not have transferrable

shares. (Tr. 155.) He further testified that this was the manner in which he was compensated for his services provided to Olympus and its various investment funds. (Tr. 154, 165.) Thus, the amounts received from the Olympus LLC's were not subject to tax regardless of Mr. Morris's residency.

The taxability issue is simple: the LLC's did not have transferrable shares, and the amounts Mr. Morris received were not "dividends" but were compensation for his services. No contrary evidence was produced. There was nothing more to "develop," and it is telling that the Commissioner did not ask Mr. Morris a single question about this issue during her examination of him.

RENEWED ORAL ARGUMENT REQUEST

The Morrises strongly renew their request for oral argument, as it will be very helpful and informative to the Court.

COMPLIANCE WITH RULE 16(11)

We certify that this Brief complies with the word limitation under Rule 16(11). Excluding the Tables of Contents and Authorities, the foregoing Brief contains 2,998 words.

Date: November 18, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I have caused this Brief to be served upon counsel of record for the Commissioner of Revenue, pursuant to Sup. Ct. Supp. R. 18, through the Supreme Court's electronic filing system's means of service.

/s/ Jonathan A. Block

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