

**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**

BRIEF OF APPELLANTS ROBERT S. MORRIS & a.

PIERCE ATWOOD LLP
Jonathan A. Block, Esq. (NH Bar No. 10972)
Olga J. Goldberg, Esq. (NH Bar No. 268521)
254 Commercial Street
Portland, Maine 04101

*Attorneys for Robert S. Morris and
Mary H. Morris*

To be argued by Jonathan A. Block

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QUESTIONS PRESENTED

1. Whether the Superior Court erred in ruling that Robert and Mary Helen Morris were inhabitants or residents of New Hampshire from June 16, 2017 to December 31, 2017 (the “audit period”) in light of the fact that they spent only 51 days vacationing in New Hampshire during the audit period, and Connecticut remained their principal place of physical presence.¹ (Apx. II at 187-93.)

2. Whether the Superior Court erred in ruling that Robert and Mary Helen Morris, through all of their actions, demonstrated a current intent to designate New Hampshire as their principal place of physical presence to the exclusion of all others, within the meaning of RSA 21:6, when they spent only 51 days vacationing in New Hampshire during the audit period, and Connecticut remained their principal place of physical presence. (Apx. II at 187-91.)

3. Whether the Superior Court erred by not granting summary judgment pursuant to RSA 491:8-a, which required the Court to enter judgment when the Commissioner failed to timely file affidavits contradicting the moving party’s evidence. (Apx. II at 193.)

4. Whether the application of RSA 77 and/or Rev 902.01 to Plaintiffs results in double taxation in violation of Part 1, article 12 and Part II, article 5 of the New Hampshire Constitution. (Apx. II at 193-94.)

¹ “Apx” citations refer to the Appendix to Brief of Appellants. “Tr.” citations refer to the transcript of the trial that took place on February 12 and 13, 2024.

5. Whether the application of RSA 77 and/or Rev 902.01 to Plaintiffs discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. (Apx. II at 194-95.)

6. Whether the Superior Court erred in failing to rule that distributions that Robert Morris received from certain entities that did not have transferrable shares, and as reasonable compensation for his services, were incorrectly taxed as “dividends” under RSA 77. (Apx. II at 195-96.)

7. Whether the Superior Court erred in refusing to vacate the penalties and interest assessed against Petitioners (Apx. II at 196.)

8. Whether the Superior Court erred in refusing to award Petitioners their reasonable attorneys’ fees and costs pursuant to RSA 21-J:28-B, VI (Apx. II at 196.)

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

The text of the key constitutional provisions and statutes involved in this case is included in Apx. II at 4-25.

STATEMENT OF THE CASE

This appeal originated with an assessment of \$1,010,489 in tax, \$74,126.93 in interest, and \$50,048.90 in penalties issued by the Commissioner against Robert and Mary Helen Morris, and the Commissioner’s refusal to refund \$510,000 in estimated tax payments made in 2017. (Apx. II at 27, 35; Tr. 99-100.) The Assessment and refusal to refund the estimated tax payments were based on the Commissioner’s assertion that the Morrises became residents of New Hampshire on June 16, 2017 and remained residents until December 31, 2017, but not thereafter. (See Apx. III at 31.) The Morrises filed a timely petition for redetermination of the assessment, which petition was denied. (Apx. II at

27) The Morrises appealed the Commissioner’s denial to Merrimack County Superior Court. (Apx. II at 26.) The Morrises first moved for summary judgment on constitutional grounds, which motion was denied. (Apx. I at 7; Apx. II at 45.) The Superior Court (Ignatius, J.) then held a trial on February 12 and 13, 2024, after which the court issued an order affirming the assessment against the Morrises and ruling against the Morrises on all issues. (Apx. I at 17.) The Morrises filed a timely motion for reconsideration of the Superior Court order which the trial court also denied. (Apx. I at 34; Apx. II at 187.) This appeal followed.

STATEMENT OF FACTS²

I. Connecticut Facts Proven at Trial

The Morrises’ “primary” or “most important” residence was at 35 Cathlow Drive in Riverside, Connecticut. (Tr. 74, 94, 174.) This home has 5 bedrooms, many bathrooms, a pool, tennis court, and more than 5000 square feet of living space. (Tr. 74.) They have lived there since 1996. (See Apx. III at 76-78; Tr. 73.)

Because they believed they were domiciled in Connecticut, and intended to remain domiciled in Connecticut, the Morrises filed a resident Connecticut income tax return for all of 2017, and paid Connecticut resident income taxes³ on 100% of their 2017 income. (Tr. 143-45; see

² Unless otherwise stated, all facts recited in this brief relate to the audit period.

³ The Connecticut income tax rate is higher than New Hampshire’s 5% tax rate. (Tr. 141-42.) See Conn Gen. Stat. § 12-700(a).

Apx. III at 62.) The Commissioner now seeks to tax them a second time on the very same income that they have already paid taxes on to Connecticut.

The Morrises spent only about 20% of their time in New Hampshire (51 days during the 6½ month audit period; 72 days during the entire year), spending the remainder of their time principally in Connecticut. (Apx. II at 83; Tr. 101-02).

Robert Morris worked full time in Stamford, Connecticut for Olympus Advisors, a company that he founded, and served as its President and Managing Partner. (Tr. 64-65.) He actively ran the company at all times, and supervised many other employees. (Tr. 66-67.) Olympus's office in Stamford, Connecticut was a short 10-12 minute drive from Mr. Morris's home in Riverside, Connecticut. (Tr. 65-66.)

Robert Morris did not "commute" between New London, New Hampshire and Stamford, Connecticut, which would have been at least a 4.5 hour drive each way. (Tr. 66.)

All of the Morrises' professional advisors (doctors, dentists, accountants, attorneys, etc.) were located in Connecticut or in nearby New York. (Tr. 50-51, 75-76.) None were located in New Hampshire. (Tr. 76.)

Mr. Morris belonged to two golf clubs, one in Greenwich, Connecticut and the other nearby in New York. (Tr. 76, 86-87.)

Mr. Morris served on the Board of a charity school, located in Stamford. (Apx. III at 170; Tr. 87-88.) Mr. Morris also served on the Board of Hamilton College in Clinton, New York. (Apx. III at 175; Tr. 88-91.)

The Morrises received their important daily mail in Connecticut. They did not forward mail to their New Hampshire vacation home. The

utility bills from the New Hampshire vacation home were sent to their Connecticut home. The Town of New London sent its property tax bills to the Connecticut home. (Apx. III at 79; Tr. 91.)

The Morrises attended a church near their home in Connecticut. They did not attend a church in New Hampshire. (Tr. 91.)

The Morrises' cherished family possessions were kept at their Connecticut home, including such items as their family portrait, and Mr. Morris's book manuscript. (Tr. 55, 92.)

Mrs. Morris testified that her clothing wardrobe and jewelry were kept in Connecticut and that she lived out of a suitcase when visiting the New Hampshire home. (Tr. 54-55.)

Mrs. Morris testified that she actively participated in a book club and women's social group in Connecticut, and did nothing similar in New Hampshire. (Tr. 52-54.)

The Morrises testified that Connecticut was the center of their social and professional relationships as well as their civic, religious and charitable activities. (*See* Tr. 60, 91-95.)

The Morrises only ever voted in Connecticut. (Tr. 92.)

Mr. Morris's primary vehicle was an Audi A8. It was registered in Connecticut at all times. (Tr. 136-37; Apx. III at 81.)

II. Limited New Hampshire Facts

The Morrises had a 3-bedroom house on Lake Sunapee in New London, New Hampshire, that they used only for vacations. (*See* Tr. 59, 94, 119-20.) This home was not their primary residence. (Tr. 74, 94.) Nor was it their "most important" residence. (Tr. 94, 142.)

Mr. Morris spent only 51 days in New Hampshire during the 6½ month audit period, and 72 days for the entire year of 2017. (Tr. 101-02.) His calculations were derived from his Connecticut garage records (Apx. III at 82-92) and by records of the Morrises' credit card purchases of physical goods and services to determine where they were was on days that Mr. Morris's car was not at the office. (Apx. III at 111-28; Tr. 101.)

Mr. Morris never worked in New Hampshire. (Tr. 94.)

Mr. Morris had no involvement in any New Hampshire charities. (See Tr. 87-91.)

The Morrises had no doctors, dentists, lawyers, accountants or other professional advisors in New Hampshire. (Tr. 50, 75-76.)

The Lake Sunapee home was purchased solely for vacation use. It continued to be used solely for vacation purposes in 2017. (See Tr. 59, 91.)

Mrs. Morris owned two cars registered in New Hampshire, but one was used exclusively by the Morrises' adult children and the other was used by the Morrises to drive to and from the New Hampshire house with their vacation gear.⁴ (Tr. 137-38.)

⁴ A vehicle registered in New Hampshire is not evidence of residency. While a New Hampshire resident is required to register his or her vehicle with the New Hampshire Division of Motor Vehicles, RSA 261:45, I, a nonresident may register his or her vehicle in New Hampshire if the vehicle is "principally garaged or is regularly kept overnight in New Hampshire" and if the nonresident owns another vehicle that is registered in the nonresident's state of residence. RSA 261:45.

The Morrises did not have any close family or friends in New Hampshire. (*See* Tr. 51-52.)

III. The Morrises' Short-Lived Consideration of Residency Change and Decision Not To Change Residency

The Morrises testified that in mid-2017 they began considering (without deciding) the possibility of changing their domicile to New Hampshire, that they took a few preliminary steps while they were considering such a change, but that they aborted this process before it ever came to fruition. (Tr. 97, 100-01.) Mr. Morris testified that he quickly came to realize that it would not be possible to move to New Hampshire, primarily because he was in the process of raising a new \$3 billion investment fund for Olympus and his investors wanted him to remain actively involved in running the business in Stamford in order to ensure the success of this fund. (Apx. II at 83; Tr. 95-96.) Once Mr. Morris came to realize this, the Morrises' consideration of moving to New Hampshire abruptly ended. (*See* Tr. 100-01, 322.)

What preliminary steps were taken? On June 16, 2017, they obtained New Hampshire driver's licenses. (Tr. 97.) However, Mr. Morris testified that they never took any action to inform the State of Connecticut that their Connecticut driver's licenses should be cancelled. (*Id.*) They were issued new Connecticut driver's licenses in 2018. (Apx. III at 80.) On July 21, 2017, the Morrises registered to vote in New Hampshire. (Tr. 97, 207.) However, the Morrises testified that they never actually voted in New Hampshire, and that they only ever voted in Connecticut. (*See* Tr. 98.)

The Morrises also made two estimated tax payments to the State of New Hampshire for 2017. (Tr. 292, 295.) Mr. Morris, as well as his

accountant, Craig Gelman, testified that these estimated payments were made solely to avoid the possibility of interest and penalties if later in 2017 the Morrises decided to actually become New Hampshire residents. (Tr. 40-41, 46, 98.) These tax returns used the New London address. (Tr. 187-88, 190.)

Mr. Gelman also testified that the address on a tax filing is merely the address where the taxpayer can receive mail, and with respect to the Morrises, the address had nothing to do with declaring their state of residency. (Tr. 37-39.) Gelman further testified that he advised Mr. Morris to file estimated interest and dividend tax payments if Mr. Morris was considering changing his residency to New Hampshire in order to avoid penalties and interest in the event that the Morrises later decided to become residents of New Hampshire – something that never happened. (Tr. 40-41.) These estimated payments were made, Gelman explained, with the full expectation that, if the Morrises decided not to follow through with establishing New Hampshire residency, the Commissioner would issue a refund. (Tr. 44.) Mr. Morris also testified that he understood that these “estimated” payments that he made in good faith would be returned to him if he did not follow through with his change of. (Tr. 171.)

Not only were these two estimated payments never returned to him, but Mr. Morris was assessed an additional \$1,010,489 on top of the estimated payments. (Apx. II at 27.)

Mr. Morris also testified that he did not receive “dividends” from Olympus or from its various investment partnerships. Rather, he received distributions from these LLC’s and partnerships, and these amounts constituted the reasonable compensation for the services he provided to

these entities. (Tr. 153-55, 164-65.) He also testified that these entities did not have transferrable shares. (Tr. 155-56.)

SUMMARY OF ARGUMENT

The Morrises never became residents of New Hampshire. They changed nothing about their lives or primary residence in Connecticut. They did not, through all of their actions, demonstrate a current intent to designate their Lake Sunapee home as their principal place of physical presence for the indefinite future to the exclusion of their home in Connecticut, as New Hampshire law requires. RSA 21:6. Connecticut remained their principal place of physical presence at all times.

The distributions that the Commissioner seeks to tax were not taxable dividends under the interest and dividends tax. Rather, they were reasonable compensation for Mr. Morris's services, and they were received from entities with non-transferable shares, making them non-taxable.

The Superior Court was required to grant summary judgment in the Morrises' favor on the Constitutional issues, as required by RSA 491:8-a, when the Commissioner failed to file an affidavit contradicting the moving party's affidavit. The Superior Court erroneously refused to do so.

The Assessment against the Morrises violated the double-taxation prohibitions of the New Hampshire Constitution and discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution.

The Superior Court erred by refusing to abate penalties and interest, where the Morrises' position was supported by reasonable cause.

The Morrises should have prevailed: The Commissioner’s position was substantially unjustified, and therefore the Morrises are entitled to their reasonable attorneys fees and costs.

STANDARD OF REVIEW

This Court reviews the trial court’s application of the law to the facts *de novo*. *N.H. Resident Partners of Lyme Timber Co. v N.H. Dep’t of Rev. Adm.*, 162 N.H. 98, 101 (2011).

A portion of this appeal involves the Superior Court’s failure to grant summary judgment on the Morrises’ Constitutional arguments. In reviewing a trial court’s summary judgment rulings, this Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *Id.* If this Court finds that no genuine issue of material fact existed, and the moving party was entitled to judgment as a matter of law, this Court will hold that summary judgment should have been granted. *Steward v. Bader*, 154 N.H. 75, 85 (2006).

ARGUMENT

I. The Superior Court Failed to Properly Apply the Controlling Statute to the Facts

The interest and dividends (“I&D”) tax is imposed only on individuals who are “inhabitants or residents” of New Hampshire. RSA 77:3, I(a). These terms were defined by RSA 21:6 (as it existed in 2017) as follows:

A resident or inhabitant or both of this state . . . shall be a person who is domiciled or has a place of abode or both in this state . . . , and who has, through all of his actions,

demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.⁵

Thus, to qualify as a resident or inhabitant of New Hampshire, the statute established four distinct elements, all four of which must be satisfied.⁶ The individual must:

⁵ The 2017 version of the statute is applicable to this case, which involved an audit period of July 16, 2017 to December 31, 2017. This statute was later amended, effective July 1, 2019, to remove the “for the indefinite future” requirement. Laws 2018, ch. 370.

⁶ *Cf. Casey v. Secretary of State*, 173 N.H. 266, 273 (2020), in which this Court summarized the post-2017 statutory requirements as follows: “Thus, a person is a New Hampshire ‘resident’ under RSA 21:6 and has a New Hampshire residence under RSA 21:6-a if they live in New Hampshire and have indicated through all of their actions that New Hampshire is their ‘most important’ place of physical presence, to the exclusion of all other places in which they may live.”

It is important to note that *Casey* was dealing with the post-2017 versions of RSA 21:6 and 21:6-a, and therefore the repealed “for the indefinite future” requirement was not at issue in *Casey*. The statute in effect in 2017 imposed an additional requirement for residency than the post-2017 statute at issue in *Casey*.

Casey also articulated the common law. Under the common law, “one cannot lose one’s domicile until a new one is clearly established” and “a temporary absence from a domicile, once acquired, does not result in a

- (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**.⁷

While the Morrises had a vacation home in New Hampshire, as proven at trial, they did not “through all of [their] actions” demonstrate that their vacation home was their “principal (or most important) place” of “physical presence,” “for the indefinite future” “to the exclusion of all other[] places.” Required elements 2, 3 and 4 are thus entirely lacking. The Superior Court, however, failed to analyze these statutory requirements or apply them to the Morrises’ facts.

A. “Through all of his actions”

Rather than analyze “all of [their] actions,” the Superior Court relied only on a few isolated New Hampshire facts and utterly failed to apply this element of the statute. While the Morrises took a few isolated actions toward establishing a New Hampshire domicile while they were pondering semi-retirement, they did not “*through all of [their] actions*” demonstrate

change of domicile.” *Id.* at 274 (cleaned up). A person can have “only one domicile.” *Id.* at 274. Given that the Morrises could have only one domicile, and that their Connecticut domicile continued to follow them until a new one was “clearly established,” the Morrises continued to be domiciled in Connecticut under the common law.

⁷ RSA 21:6-a (as in effect in 2017) defined “residence or residency” in similar fashion.

that their New London vacation house had become their principal place of physical presence for the indefinite future as required by the statute.

The evidence established that they continued to live for 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; and filed a full-year Connecticut resident income tax return for 2017 and paid Connecticut resident income tax on 100% of their income.

The evidence further established that Mr. Morris continued to be employed full-time as the CEO of Olympus partners, whose office in Stamford was less than 15 minutes from his home in Riverside, Connecticut; Mr. Morris *never* worked in New Hampshire; and Mr. Morris was active in two charitable endeavors, one in Connecticut and the other in nearby New York.

The evidence also established that all of the Morrises' physicians, dentists, accountants and other professional advisors remained in Connecticut and nearby New York; they received their important mail in Connecticut, including their New London tax bills and the utility bills for the New London home; they attended church in Connecticut and not in New Hampshire; their cherished possessions remained in Connecticut; and Connecticut remained the center of the Morrises' civic, professional, and social activities.

In sum, when considering "all of [their] actions," the facts established at trial do not come even close to establishing that the New London home had become the Morrises' domicile. Yet, the Superior Court failed to consider the overwhelming facts on the Connecticut side of the

ledger and focused solely on the isolated New Hampshire facts. (See Apx. I at 26-27.)

B. “Principal Place of Physical Presence”

The Morrises testified that the 3-bedroom Lake Sunapee house was used only for vacations, and that the 5-bedroom Riverside, Connecticut home remained their principal residence. Mr. Morris testified that he spent only 51 days in New Hampshire during the 6½ month audit period. Mr. Morris testified that he spent only 72 days in New Hampshire during the entire year of 2017.

The Morrises also testified that the Lake Sunapee house was neither their principal residence nor their most important residence.

In summary, the Lake Sunapee house was not the Morrises’ “principal place of physical presence” during the audit period.

Furthermore, it is important to understand that the statute looks only to the principal place of “*physical*” presence. The facts relied on by the Superior Court do not speak at all to *physical* presence. As DRA Director of Audit, Fred Coolbroth, agreed, a New Hampshire driver’s license or voter registration does not speak to physical presence; a person can have a driver’s license and voter registration, but spend no time in the State during any particular year. (Tr. 222.) Furthermore, the fact that Mr. Morris used his New Hampshire address on certain federal and state tax forms does not speak to having any *physical* presence in New Hampshire, nor does the fact that Olympus registered to do business in New Hampshire as a foreign LLC.

C. “for the indefinite future”

The version of RSA 21:6 in effect in 2017 also required that the person demonstrate a current intent to designate a New Hampshire place of abode as his principal place of physical presence *for the indefinite future* to the exclusion of all others.

The Morrises were assessed I&D tax for the 6½ month audit 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 was 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 had any plans to make New Hampshire their principal place of physical presence “for the indefinite future.” If they had any such plans, they would taken *some* action *in Connecticut*, like selling their Connecticut house, not paying Connecticut resident income tax, 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. Not even the Commissioner has asserted that the Morrises were New Hampshire residents after the 6½ month audit period. Common sense dictates that half a year is not the “indefinite future.”

Given all of these facts, the Morrises proved that New Hampshire never became their most important place of *physical* presence “for the indefinite future.” Yet, the Superior Court failed to even consider this statutory requirement.

D. “to the exclusion of all others”

This element is crucial because it prevents someone from being considered a domiciliary of more than one state at a time. The Superior Court never even applied this critical statutory requirement to the Morrises. Had the Court done so, it could not have found the Morrises to be residents of New Hampshire. Once again, they continued to live for 80% of the year at their 5-bedroom home in Riverside, Connecticut; spent only 51 days of the audit period in New Hampshire; filed a full-year Connecticut resident income tax return for 2017 and paid Connecticut resident income tax on 100% of their income; Mr. Morris continued to be employed full-time as the CEO of Olympus partners, whose office in Stamford was 15 minutes from his home in Riverside, Connecticut; Mr. Morris *never* worked in New Hampshire; Mr. Morris was active in two major charitable endeavors, one in Connecticut and the other in New York; all of the Morrises’ professional advisors remained in Connecticut and nearby New York; they received their important mail in Connecticut, including their Town of New London tax bills and the utility bills for the New London home; they attended church in Connecticut and not in New Hampshire; their cherished possessions remained in Connecticut; and Connecticut remained the center of the Morrises’ civic, professional and social activities. They continued to vote in Connecticut.

In short, the Morrises changed absolutely nothing about their Connecticut lives. Based on the multitude of Connecticut facts, it is simply impossible to conclude that New Hampshire became their principal place of physical presence “to the exclusion of all others.”

E. The Facts and Rule Relied on by the Superior Court do not Speak to Principal Place of Physical Presence to the Exclusion of all Others

In ruling that the Morrises were residents of New Hampshire for the audit period, the Superior Court relied primarily on the following isolated facts: that the Morrises were considering semi-retirement to New Hampshire; that they obtained New Hampshire driver's licenses and voter registrations; that they made two estimated tax payments; that they used a New Hampshire mailing address on several tax returns; and that Olympus registered as a foreign limited liability company in New Hampshire. None of these facts reflect "all of [their] actions" and none of them speak to their "*principal place of physical presence.*"

Furthermore, even if a person established a "domicile" for purposes of voter registration under RSA 654:1, I, this Court has held that that fact alone is insufficient to conclude that the person was also a "resident" within the meaning of RSA 21:6 (2017 version). *See Guare v. State*, 167 N.H. 658, 662 (2015).

Instead of applying the controlling statute to the Morrises' facts, the Superior Court relied on a DRA rule, Rev 902.01, that is incompatible with RSA 21:6 and therefore invalid. *Appeal of Cover*, 168 N.H. 614, 621 (2016) (administrative rules may not add to, detract from, or modify the statute which they are intended to implement).

Rev 902.01 does not concern itself with RSA 21:6's focus on principle place of *physical* presence for an indefinite period to the exclusion of all others. Instead, Rev 902.01 relies on 6 factors, only one of which concerns physical presence. Rule 902.01 provides:

An individual's intent to establish residency by an ongoing physical presence within New Hampshire which is not transitory in nature, shall be evidenced by:

- (a) Maintaining a home or other living quarters in New Hampshire;
- (b) Spending a greater percentage of time in New Hampshire than in any other state;
- (c) Having family living with them in New Hampshire;
- (d) Advising any federal, state, or local agency that the individual considers herself or himself a resident of New Hampshire;
- (e) Being employed or conducting business activity within New Hampshire or at a place to which the individual can readily commute from New Hampshire; or
- (f) Registering to vote in New Hampshire.

Even if this rule were valid, the Superior Court misapplied it. Factor (a) should have been decided in the Morrises' favor because their primary "home" was unmistakably in Connecticut, and their New Hampshire home was simply used for vacation purposes. (*See* Tr. 59, 94.) Otherwise, everyone that has a vacation home in New Hampshire would be considered a New Hampshire resident, which is clearly not the case.

Factor (b) should have clearly been decided in the Morrises' favor because they spent only 51 days in New Hampshire during the audit period, and only 72 days during the entire year of 2017. The Superior Court also misunderstood the evidence regarding the number of days Mr. Morris spent

in New Hampshire. He testified that, based on his records, he spent only 51 days in New Hampshire during the 6½ month audit period, and 72 days for the entire year of 2017. The Superior Court completely misunderstood and misstated this testimony and stated that “he was in New Hampshire for 51 days and in Connecticut for 72 days” which is simply not what he testified. (Apx. I at 21; Tr. 119.)

Factor (c) should have been decided in the Morrises’ favor because the two “children” they had who lived in New Hampshire were both *adults*, and these adult children did not “live with them” in New Hampshire. (Tr. 137-38.) Furthermore, the domicile of fully-grown adult children says nothing about the domicile of their “empty-nest” parents.

Factor (d): The Morrises did this as they were pondering whether or not to retire in New Hampshire. However, Rev 902.04 provides that “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 the evidence, that he or she is an actual resident of another jurisdiction.” The Morrises proved just that, as evidenced by all of the facts recited above.

Factor (e): This should have been decided in the Morrises’ favor because Mr. Morris *never* worked in New Hampshire, and Olympus *never* conducted any business activity there. (Tr. 29, 124.) The fact that Olympus was registered to do business in New Hampshire does not mean that it actually did any business there. (Tr. 227.)

Factor (f): We agree that the Morrises registered to vote on July 21, 2017 as they were considering whether or not to retire in New Hampshire. However, they never actually voted in New Hampshire and continued to vote in Connecticut. (*See* Tr. 98.)

In short, even assuming Rev 902.01 is a valid rule, the preponderance of the evidence (4 out of the 6 factors) indicates non-residency.

II. The Commissioner’s Failure to File a Counter-Affidavit Should Have Resulted in Summary Judgment in Favor of the Morrises

RSA 491:8-a, sets out the mandatory procedure for seeking and opposing summary judgment. In particular, RSA 491:8-a, II provides, in relevant part:

Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying 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 contradictory evidence can be presented at a trial but cannot be furnished by affidavits. (Emphasis added.)

The Morrises fully complied with RSA 491:8-a, II. On December 6, 2022, they filed their Motion for Summary Judgment and Statement of

Material Facts, which were supported by the sworn Affidavit of Robert S. Morris, and exhibits thereto. The Morris Affidavit was made on Morris's personal knowledge of admissible facts, including but not limited to facts regarding the Morrises' 2017 activities in both New Hampshire and Connecticut. (Apx. II at 80-86.)

The Commissioner never filed affidavits to oppose the facts set out in the Morris Affidavit, as required by RSA 491:8-a. A party objecting to a motion for summary judgment must support her objection 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). The Commissioner never made any such filing.

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 (emphasis added). In *Chemical Insecticide Corp. v. State*, 108 N.H. 126, 129 (1967), this Court held:

Obviously if no counter-affidavits are filed to indicate that a genuine issue of fact exists, summary judgment should have been entered, and no occasion would arise for entry of some alternative order...In the case before us, had the defendant taken no action after the plaintiff's motion for summary judgment, it is evident that under the statute the plaintiff would have been entitled to judgment "on the next judgment day."

That is precisely what happened in this case – the Commissioner never filed a counter-affidavit.

The Superior Court erroneously believed that following the summary judgment statute is “discretionary with the Court.” With all due respect, following the statute (which uses the word “shall”) is not discretionary. Summary judgment should have been granted in favor of the Morrises for this reason alone.

III. The Superior Court Erred by Failing to Grant Summary Judgment on constitutional grounds

A. Introduction

The trial court should have granted the Morrises’ motion for summary judgment because the Commissioner’s application of the I&D tax to them results in double taxation in violation of both the New Hampshire and United States Constitutions. First, New Hampshire prohibits double taxation where, as here, the “incidence” of two taxes falls on the same income—here, the Morrises’ interest and dividend income. *See* N.H. Const. Pt. I, Art. 12, and Pt. II, Art. 5; *First Fin. Grp. of New Hampshire, Inc. v. State*, 121 N.H. 381, 386 (1981) (citing *Opinion of the Justices*, 111 N.H. 210, 212 (1971)). Second, by failing to provide a credit for tax paid to other states, the I&D tax impermissibly discriminates against individuals, including the Morrises, engaged in interstate economic activity, in violation of the dormant Commerce Clause of the U.S. Constitution.

The Assessment against the Morrises results in double taxation. If upheld, the assessment would impose I&D tax on **all** of the Morrises’ interest and dividend income earned between June 16 and December 31, 2017. At the same time, as Connecticut residents and domiciliaries, the

Morrisises properly paid Connecticut income tax on all of their 2017 income, including **all** 2017 interest and dividend income. (*See* Apx. II at 72.)

Although the Decision would clearly tax the Morrisises' interest and dividend income twice, the Commissioner failed to provide **any** credit against the I&D tax for Connecticut tax paid on the 2017 interest and dividend income.

Without a credit to remedy the burden of double taxation, the I&D tax, as applied, is unconstitutional.

B. Double Taxation

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,⁸ there is

⁸ *See* Hellerstein, Hellerstein & Appleby, *State Taxation*, ¶ 20.10 (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through July 2024) (online version accessed on Checkpoint (www.checkpoint.riag.com) on Aug. 30, 2024) (“Indeed, every state with a broad-based personal income tax provides a credit for taxes that their residents pay to other states, thereby reverting the final tax to the state that is the source of the taxed income.”). Hellerstein notes that New Hampshire, “which imposes a limited personal income tax on dividends and interest, does not provide such a credit for its residents,” is the only state that currently provides no credit, which leads to some instances of double taxation. *See id.* ¶ 20.10 n.1034.

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 Commissioner deemed the Morrises 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 Morrises’ state of residence and domicile and the source of the double-taxed income.⁹

⁹ The Morrises’ 2017 interest and dividend income was subject to Connecticut income tax. (*See* Apx. II at 72-73.) First, in 2017, they were residents of Connecticut subject to Connecticut income tax on all of their income, Conn Gen. Stat. § 12-700(a), because they were both: (1) domiciled in Connecticut, Conn. Gen. Stat. § 12-701(a)(1)(A), Conn. Agencies Reg. § 12-701(a)(1)-1(d) (defining domicile); and (2) statutory residents of Connecticut who “maintain[ed] a permanent place of abode” and spent more than 183 days in Connecticut in 2017, Conn. Gen. Stat. § 12-701(a)(1)(B). However, even if they were not Connecticut residents in 2017 (they were), the Morrises were required to pay Connecticut income tax on all of their Connecticut-source income. *See* Conn Gen. Stat. § 12-700(b). Their 2017 Connecticut-source income included Petitioners’ distributive share income from the Olympus business, which was conducted in Connecticut, *see* Conn. Gen. Stat. § 12-711(a); all income from a business, trade, profession or occupation carried out in Connecticut, like Mr. Morris’s income from his active management of the Olympus business,

The New Hampshire Legislature has been aware of the I&D tax’s potential constitutional infirmity for nearly a century. When the I&D tax was enacted in 1923, the Legislature expressly stated its intent that the I&D tax must be construed “not to impose any tax upon any income in violation of the Constitution of the United States . . . or in violation of the constitution of this state.” RSA 77:2. Ignoring the Legislature’s plain directive, the Commissioner has instead construed the I&D tax to double tax the Morrises’ income in violation of **both** the State and federal Constitutions.

C. The Commissioner’s Failure to Give the Morrises a Credit for 2017 Connecticut Tax Paid on Dividend Income is Unconstitutional

The prospect of double taxation has long been repugnant to the State of New Hampshire. *See* N.H. Const. Pt. I, Art. 12 & Pt. II, Art. 5 (each enacted June 2, 1784); *see generally Phillips v. City of Concord*, 145 N.H. 522, 523-24 (2000) (double taxation may violate N.H. Const. Pt. I, Art. 12 & Pt. II, Art. 5). It is well-established that “any statutory construction making any property liable to double taxation is erroneous.” *Robinson v. Dover*, 59 N.H. 521, 525 (1880) (holding that money deposited in a Massachusetts savings-bank by a Dover, New Hampshire resident, and which is taxed by Massachusetts, cannot also be taxed in New Hampshire).

see Conn. Gen. Stat. § 12-711(b)(1)(B); and income from intangible property, including interest and dividends, employed in a business, trade, profession or occupation carried on in Connecticut, as the Olympus distributions were, *see* Conn. Gen. Stat. § 12-711(b)(3).

The prospect of double taxation is not only “unjust, oppressive, and unconstitutional,” *id.* at 525, it is also bad policy that could “encourag[e] the emigration of persons and their property” from New Hampshire, *id.* at 529.

This state has not adopted the policy of repulsion and expulsion, but has adopted the contrary policy of inviting people to remain in, and to come into, a territory where the principle prevails that every one is bound to bear his share, and no more than his share, of the common burden. **Upon this principle, property is not taxable twice in one state, nor once in each of two states.**

Id. at 529 (emphasis added).

Simply put, New Hampshire may not impose a tax on property that has already been taxed in another state. This prohibition on double taxation applies with equal force to the I&D tax on an individual’s income earned in Connecticut in 2017 as it did to the Dover property tax on a Massachusetts savings-bank deposit in 1880.

To determine whether unconstitutional double taxation has occurred, the dispositive inquiry is whether the “incidence of the two taxes is determined by separate and distinct factors.” *First Fin. Grp. of New Hampshire*, 121 N.H. at 386 (citing *Opinion of the Justices*, 111 N.H. at 212); *see also Phillips*, 145 N.H. at 524. For example, when the incidence of two taxes “depends upon the receipt of income,” *Opinion of the Justices*, 111 N.H. at 212, imposing both taxes is prohibited double taxation.

The incidence of both the I&D tax and the Connecticut individual income tax “depends upon the receipt of [interest and dividend] income.”

See Opinion of the Justices, 111 N.H. at 212. In the case of I&D tax, tax is imposed when a New Hampshire “inhabitant or resident” receives interest and dividends. *See* RSA 77:3, 77:4. In the case of the Connecticut tax, as discussed in footnote 9, above, Connecticut residents are taxed on all of their Connecticut taxable income, which includes interest and dividend income. *See* Conn Gen. Stat. § 12-700(a) (imposing Connecticut individual income tax on the Connecticut taxable income of a resident).¹⁰ Accordingly, the I&D tax cannot be imposed on interest and dividend income that is subject to Connecticut income tax without running afoul of New Hampshire’s constitutional prohibition on double taxation.

Had the I&D tax statute allowed the Morrises a credit for Connecticut tax paid on their interest and dividend income, or had the Commissioner provided one, the unconstitutional result would have been remedied. *See Opinion of the Justices*, 111 N.H. at 212 (a tax credit for a second tax imposed on the same basis is “effective to preclude taxation of the same income twice”). But, under the New Hampshire Constitution, the

¹⁰ For a Connecticut resident, the Connecticut individual income tax base begins with the individual’s federal adjusted gross income, which includes both interest and dividend income. *See* Conn. Gen. Stat. §§ 12-701(a)(8), (19) & (20) (defining “Connecticut taxable income of a resident,” “adjusted gross income” and “Connecticut adjusted gross income” by reference to federal adjusted gross income); 26 U.S.C. § 61(4) & (7) (defining “gross income” for federal income tax purposes to include interest and dividends); 26 U.S.C. § 62 (defining “adjusted gross income” as gross income less enumerated deductions).

Commissioner’s attempt to tax the Morrises on the income already taxed by Connecticut, without providing a credit, is simply impermissible.

D. The Commissioner’s Failure to give the Morrises Credit for 2017 Connecticut Tax Paid on Interest and Dividend Income Discriminates Against Interstate Commerce

Because New Hampshire does not allow a credit for income taxes paid to another state, New Hampshire’s I&D tax scheme results in double taxation of alleged New Hampshire residents who, like the Morrises, principally live and work out-of-state, but only taxes residents with exclusively in-state income once. The Supreme Court recently ruled that this higher tax burden on individuals who earn income across state lines discriminates against interstate commerce in violation of the dormant Commerce Clause of the U.S. Constitution. *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 548, 564-65 (2015); *see also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (a state may not impose a tax that discriminates against interstate commerce “by subjecting interstate commerce to the burden of multiple taxation”) (citations omitted).

The Supreme Court has developed a simple test to determine whether a state’s tax scheme—or, the Commissioner’s application of the state’s tax scheme—unconstitutionally discriminates against interstate commerce: the internal consistency test. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Wynne*, 575 U.S. at 562. The *Wynne* Court explained the internal consistency test as follows:

This test, which helps courts identify tax schemes that discriminate against interstate commerce, looks 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.

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.

Wynne, 575 U.S. at 562 (cleaned up).

New Hampshire's I&D tax, and its application to Petitioners, plainly fails the internal consistency test. As described above, to test the internal consistency of the I&D tax, we assume that every state has the same tax structure as New Hampshire. In the hypothetical, like New Hampshire, every state has enacted a tax imposed on the interest and dividend income of its "inhabitants or residents," without a credit for tax paid on the same income to another jurisdiction. Every state also determines which individuals are residents of the state in the exact same way the Commissioner determined that the Morrises were residents of New

Hampshire. As discussed below, the effect is that, under the Morrises' facts, individuals engaged in interstate economic activities are treated as residents of multiple states and are subject to multiple taxation on the same income, without an offsetting credit for income tax paid to another state. The effect is that the I&D tax inherently discriminates against interstate commerce in violation of the Commerce Clause.

1. Internal Consistency Test – Step 1

The first step of applying the internal consistency test to the I&D tax scheme is to identify when an individual will be treated as a New Hampshire resident subject to I&D tax. Under the Commissioner's application of the I&D tax structure to the Morrises, a New Hampshire resident is anyone who owns a house in New Hampshire and takes preliminary, ministerial steps toward establishing residency. (*See* Apx. III at 47.)

By regulation, the Commissioner has set out six factors used to determine an "individual's intent to establish residency by an ongoing physical presence within New Hampshire which is not transitory in nature." Rev. 902.01. The six factors are:

- (a) Maintaining a home or other living quarters in New Hampshire;
- (b) Spending a greater percentage of time in New Hampshire than in any other state;
- (c) Having family living with them in New Hampshire;
- (d) Advising any federal, state, or local agency that the individual considers herself or himself a resident of New Hampshire;

- (e) Being employed or conducting business activity within New Hampshire or at a place to which the individual can readily commute from New Hampshire; or
- (f) Registering to vote in New Hampshire.

Rev 902.01. The Commissioner interprets the regulation's use of the disjunctive "or" to mean that an individual "would only need to meet one of the criteria to be considered a resident of [N]ew Hampshire." (Apx. III at 42.)

In addition, the Commissioner will presume that an individual is a resident if the individual claims to be an "inhabitant or resident" to a New Hampshire agency or political subdivision, unless the individual proves "by a preponderance of evidence" that he or she is an actual resident of another state. Rev 902.04.

In applying the above criteria to the Morrises, the Commissioner has taken the position that an individual who takes even the most superficial, preliminary steps toward residency will be treated as a New Hampshire resident. For example, the Commissioner determined that the Morrises met the Rev 902.01 criteria in 2017 through the following activities:

1. Owning a vacation home in New Hampshire;
2. Registering to vote in New Hampshire;
3. Obtaining a New Hampshire driver's license;
4. Conducting business in New Hampshire by Olympus registering as a foreign limited liability company doing business in the State; and
5. Filing paperwork with New Hampshire agencies consistent with residency, including the voter registration, driver's license application,

two I&D tax estimated returns, two vehicle registrations, and use of the New Hampshire house as a mailing address. (Apx. III at 42-44.)

The Commissioner also concluded that Petitioners did not meet the preponderance of the evidence standard to overcome the residency presumption in Rev 902.04. (*See* Apx. III at 47.) The Commissioner was not persuaded by the fact that the Morrises had been domiciled in Connecticut for over two decades and maintained strong ties to the state throughout 2017. (Apx. II at 71-73; Apx. III at 21-28.) For example, as discussed above, Mr. Morris worked full-time from Connecticut in 2017, running Olympus, a nearly \$9 billion private equity firm whose office was located only a 15-minute drive from his Connecticut home.¹¹ (Apx. II at 72-73; Apx. III at 22, 28-29.) And, as the Commissioner has agreed, *see* Apx. III at 42, the Morrises spent the vast majority of the year in Connecticut and a mere 72 days in New Hampshire in 2017—about the same number of days they spent vacationing in New Hampshire in prior years. (Apx. II at 74.) The Commissioner nonetheless concluded that the Morrises’ evidence regarding their 2017 Connecticut activities was insufficient to prove that their most important place of physical presence was Connecticut, not New Hampshire. The Commissioner therefore determined that the Morrises were New Hampshire residents. (*See* Apx. III at 47-48.)

¹¹ Olympus’s office in Stamford, Connecticut is about a 9-hour roundtrip drive from the Morrises’ New London, New Hampshire house. (Apx. II at 77.)

2. Internal Consistency Test –Step 2

Under the internal consistency test, we assume that all other states, including Connecticut, would mirror the Commissioner’s application of the I&D tax. Thus, Connecticut would impose an I&D tax on any individual who owned a home in Connecticut and who engaged in the most basic ministerial steps toward establishing residency. There was no genuine dispute that, during 2017, the Morrises engaged in all of the same activities in Connecticut, as they did in New Hampshire:

1. The Morrises owned a home in Connecticut, which they used as their primary residence since 1996, Apx. II at 71;
2. The Morrises were both registered to vote and only ever voted in Connecticut (they never voted in New Hampshire), *id.* at 72;
3. The Morrises both held Connecticut driver’s licenses, *id.*;
4. Mr. Morris conducted business in Connecticut by registering his firm, Olympus, to do business as a foreign limited liability company in Connecticut since at least 2009, as well as working from the state full time, *id.* at 72-73; and
5. The Morrises filed paperwork with Connecticut consistent with residency, including their ongoing voter registrations, Connecticut estimated income tax returns, Connecticut resident income tax returns, payment of Connecticut tax on the entirety of Petitioners’ income, registration for the primary family vehicle, and use of the Connecticut home as a mailing address, including for New Hampshire property tax bills. (*Id.* at 71-72.)

Applying the Commissioner’s reasoning, Connecticut would find that the Morrises represented that they were residents of the state and that

they did not prove by a preponderance of the evidence that they were residents of any other state—especially given the Morrises’ decades-long residency, full-time employment, and spending the greatest percentage of time in Connecticut. If Connecticut imposed I&D tax in the same way as the Commissioner, it would conclude that the Morrises were Connecticut residents because Connecticut was their “most important place of physical presence.”

Accordingly, if other states adopted New Hampshire’s I&D tax regime, the Morrises would be treated as residents of at least two states and would be subject to I&D tax on their interest and dividend income at least twice, once in New Hampshire and again in Connecticut. Conversely, an individual who lived and worked only in New Hampshire and who earned income only from New Hampshire sources, would be treated as a resident of New Hampshire only and would be subject to I&D tax on his or her interest and dividend income just once.

Plainly, the I&D tax is an internally inconsistent taxing scheme that “inherently discriminates against interstate commerce without regard to the tax policies of other States.” *See Wynne*, 575 U.S. at 562. The impermissible burden on the Morrises’ interstate activities violates the dormant Commerce Clause and cannot be upheld by this Court.

3. By Failing to Provide a Credit against Connecticut Tax, the I&D Tax Discriminates against Interstate Commerce

It is well-established that a tax credit for tax paid to other states will remedy an otherwise unconstitutional, internally inconsistent tax. *See Wynne*, 575 U.S. at 568 (ruling that Maryland would “remedy the infirmity in its [individual income] tax scheme by offering, as most States do, a credit

against income taxes paid to other States”); *see also Tyler Pipe Industries, Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 249 (1987) (ruling that a credit granted to out-of-state manufacturers against Washington’s otherwise internally inconsistent manufacturing tax for manufacturing taxes paid to other states would remedy the constitutional defect). Had New Hampshire enacted a credit for taxes paid on interest and dividend income to other jurisdictions, the tax would not be internally inconsistent in violation of the dormant Commerce Clause. However, because neither the I&D tax statute, nor the Commissioner, allowed the Morrises a credit against I&D tax for the Connecticut tax paid on the same 2017 interest and dividend income, the I&D tax is unconstitutionally discriminatory.

Accordingly, the I&D tax, as applied to the Morrises, violates the dormant Commerce Clause, and the Morrises were entitled to summary judgment on this issue.

IV. The Superior Court Refused to Address the Fact that Mr. Morris did not Receive Taxable “Dividends”

New Hampshire’s tax on “dividends” applies, as relevant to this case, on “dividends” “on shares in partnerships, limited liability companies, or associations the beneficial interest in which is represented by transferable shares.” RSA 77:4.

Mr. Morris testified that he was compensated for his services in two ways: (a) he received distributions from Olympus Advisors, LLC to compensate him for his management of the company, and (b) he received distributions from the various investment partnerships to compensate him for the services he provided to those partnerships.

Rev 901.09 defines a “dividend” as “an amount of property distributed, with respect to their ownership interest, other than in liquidation of the organization, to shareholders or interest-holders of an organization from: (a) Current year profit; or (b) Accumulated profits of such entity.” Plainly, by definition, a distribution that is intended to provide reasonable compensation for services rendered is not a “dividend.” A “dividend” is based solely on ownership of shares and not on compensation for services rendered.

Mr. Morris also testified that these partnerships do not have “transferrable shares.” Dividends received from entities that do not have transferrable shares are not taxable. RSA 77:4.

Although Mr. Morris testified that much of the income that New Hampshire was seeking to tax him on as a resident was his reasonable compensation in the form of distributions from entities that do not have transferrable shares, and an exhibit was admitted that detailed the sources of his alleged dividends, as well as his tax return, the Superior Court inexplicably concluded that the Morrises did not “develop” this claim beyond their complaint. That ruling was clearly erroneous.

V. Penalties and Interest Must Be Abated for Independent Reasons

Even though the Morrises clearly remained Connecticut residents for all of the reasons discussed above, the Superior Court should have abated interest and penalties for independent reasons. RSA 21-J:33 provides that the failure to pay 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.” Given all of the Connecticut facts recited in this brief, there was

most certainly reasonable cause to conclude that New Hampshire was not the Morrises *principal* place of *physical* presence for the *indefinite future, to the exclusion of Connecticut*. Interest should have been abated for similar reasons. See RSA 21-J:3, XVI.

VI. The Morrises Should Have Been Awarded Their Costs and Attorneys' Fees

The Commissioner's actions in this case were substantially unjustified. See RSA 21-J:28-b. A reasonable person could not have concluded that, based on *all of the facts*, the Morrises' *principal* place of *physical* presence for the *indefinite future* was New Hampshire, *to the exclusion of Connecticut*. Accordingly, the Morrises should prevail in this matter and be awarded their reasonable costs and attorneys fees pursuant to RSA 21-J:28-b.

CONCLUSION

For all of the foregoing reasons, the decision of the Superior Court should be reversed; the Notice of Assessment against Robert and Mary Helen Morris should be vacated; and the Commissioner should be ordered to refund the Morrises' 2017 estimated tax payments in the amount of \$510,000.

STATEMENT ON ORAL ARGUMENT

Pursuant to Supreme Court Rule 16(3)(h), Appellee requests oral argument before the full court and designates Jonathan A. Block to be heard.

COMPLIANCE WITH RULE 16(11)

The undersigned counsel hereby certify that this Brief complies with the word limitation under Supreme Court Rule 16(11). Excluding the Table

of Contents, Table of Authorities and Certificates of Compliance and Service, the foregoing Brief contains 9,379 words.

Respectfully submitted,

ROBERT S. AND MARY H. MORRIS

By its attorneys,

PIERCE ATWOOD LLP

Date: August 30, 2024

By: /s/ Jonathan A. Block

Jonathan A. Block

NH Bar No. 10972

Olga J. Goldberg

NH Bar No. 268521

254 Commercial St.

Portland ME, 04101

(207) 791-1100

jblock@pierceatwood.com

ogoldberg@pierceatwood.com

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
Jonathan A. Block