COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

THOMAS R. KENNEDY v. COMMISSIONER OF REVENUE

Docket No. C332038

Promulgated:
October 31, 2019

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("appellee" or "Commissioner") to grant an abatement of personal income tax, interest, and penalty assessed to Thomas R. Kennedy ("appellant") for tax years ended December 31, 2010, December 31, 2011, and December 31, 2012 ("tax years at issue").

Commissioner Scharaffa heard this appeal. Chairman Hammond and Commissioners Rose, Chmielinski, and Good joined him in a decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Judith G. Edington, Esq. and *David J. Nagle,* Esq. for the appellant.

Celine E. de la Foscade-Condon, Esq. and *Julie A. Flynn,* Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts and the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On October 14, 2011, the appellant filed a 2010 Massachusetts Form 1-Nonresident/Part-Year Resident Income Tax Return ("Form 1-NR/PY") as a resident from January 1, 2010 to June 1, 2010 and a nonresident from June 2, 2010 to December 31, 2010. On October 9, 2012, the appellant filed a 2011 Massachusetts Form 1-NR/PY, and on October 11, 2013, the appellant filed a 2012 Massachusetts Form 1-NR/PY. The appellant's filing status for the tax years at issue was "Married filing separate return."

After an audit, the Massachusetts Department of Revenue Audit Division advised the appellant that he had not met his burden of demonstrating the establishment of a new domicile outside of Massachusetts, and therefore he remained domiciled in Massachusetts during the tax years at issue. As a result of the audit, the Commissioner issued to the appellant a Notice of Intention to Assess dated January 4, 2015 and then a Notice of Assessment dated February 19, 2015, notifying the appellant of assessments of tax, together with interest and underreporting penalty, as detailed below:

	2010	2011	2012	Total
Tax deficiency	$ 213,852	$3,964,038	$2,548,214	
Interest	$ 37,717	$ 485,777	$ 199,204	
Penalty	$ 42,770	$ 792,807	$ 509,643	
Total	$ 294,339	$5,242,622	$3,257,061	$8,794,022

On April 21, 2015, the appellant filed Form CA-6, Application for Abatement/Amended Return, seeking abatement of the deficiency and penalty assessments for the tax years at issue, which the Commissioner denied by a Notice of Abatement Determination dated October 18, 2016. On December 15, 2016, the appellant seasonably filed his appeal with the Board. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Based upon the parties' subsequent discussions, the appellant has conceded liability for a portion of the assessed tax deficiencies, for issues unrelated to the domicile issue in dispute. The amounts of tax deficiency, not including interest and penalty, that remain in dispute are as follows:

	2010	2011	2012	Total
Total tax deficiency	$ 213,852	$3,964,038	$2,548,214	$6,726,104
Less amount conceded	$ (137)	$ (22,064)	$ (0)	$ (22,201)
Tax amount at issue	$ 213,715	$3,941,974	$2,548,214	$6,703,903

Witnesses

At the hearing of this appeal, the appellant testified and presented testimony from the following five witnesses.

Patricia Kennedy ("Ms. Kennedy") is the appellant's wife. The appellant and Ms. Kennedy (collectively the "Kennedys") had been married for nearly thirty years at the time of the hearing of this appeal.

Charles Nardi is a longtime business associate of the appellant, who, at the time of the hearing, was the chief executive officer ("CEO") of Vinyl Development, LLC, doing business as Zudy ("Zudy") and who had previously worked at BackOffice Associates, Inc. ("BackOffice"). BackOffice and Zudy are companies founded by the Kennedys.

Erin Maker served as the personal assistant for both Ms. Kennedy and the appellant at BackOffice.

Robert Olmsted is a longtime business associate and friend of the appellant. He was a one-third owner of a prior business endeavor started by the appellant known as Kennedy & Associates. He later joined BackOffice in 1995. Mr. Olmsted was the appellant's best man at his wedding, and at the time of the hearing was an independent contractor working for Zudy.

George Martin met the appellant in Miami Beach, Florida during the summer of 2011. Mr. Martin owned the house adjacent to the appellant's Miami Beach property.

Personal history

The appellant was born in Massachusetts and moved to Florida when he was seven years old. He went to school in Tampa and graduated from the University of South Florida in 1973. After college, the appellant attended graduate school at the University of North Carolina ("UNC") and also worked as a computer programmer at UNC's computer center. The appellant did not complete his graduate school coursework, choosing instead to work at UNC for several years. Subsequently, the appellant worked as a computer programmer or software consultant for several companies across the country.

In 1982, the appellant moved to Richmond, Virginia where he met Ms. Kennedy. The Kennedys married in June 1988 and subsequently had four sons, all of whom were born in Virginia: Matthew, born in 1989; Michael, born in 1991; Marshall, born in 1993; and Mitchell, born in 1994. From 1990 through 1992, the Kennedys continued to live in Virginia and vacation on Cape Cod during the summer, staying at the vacation home of a friend. In 1993, the Kennedys built their own vacation home in Brewster, Massachusetts.

The Kennedys' home in Brewster, Massachusetts

Ms. Kennedy testified that during the time that their children were young, both she and the appellant were not happy with the expansion happening in Richmond. While the appellant testified

that he traveled for work frequently and professed that he did not mind where he lived, both Kennedys readily admitted that they thought that Cape Cod would provide a better environment for raising a family. In 1997, when their sons were between the ages of three and eight years old, the Kennedys sold their home in Virginia and moved to their vacation home in Brewster, making it their full-time home. The Kennedys no longer owned any property in Virginia once they relocated to Massachusetts.

In 2005 the Kennedys moved to a larger, waterfront property in Orleans, and then in 2008 they moved to 285 Long Pond Road in Brewster ("Brewster Farm property"), an even larger sixty-acre parcel of land that was improved with a 5,000-square-foot farmhouse that was originally constructed in 1900 ("Brewster farmhouse"). Also located on the Brewster Farm property were several smaller buildings, including a chicken coop and a pony barn, an outdoor pool, and tennis courts. The Kennedys made substantial renovations to the Brewster farmhouse and renovated the outdoor tennis courts. They also built a pool house and an indoor sports complex that included an indoor tennis court, a racquetball court, an exercise room, and a golf simulator, which Ms. Kennedy testified was for the appellant, as she did not play golf. Although she was responsible for the day-to-day overseeing of the renovations on the property, Ms. Kennedy testified that the appellant was involved

in the "high-level decision making" and was personally responsible for the Brewster Farm property's landscaping.

The Kennedys' home in Miami Beach, Florida

Ms. Kennedy testified that, prior to the tax years at issue, the Kennedys had often discussed purchasing a property in Miami Beach. She testified that both she and her husband loved the ambiance of Miami Beach, and they enjoyed many activities there, including dining, attending sporting events and concerts, visiting art galleries, and shopping. Ms. Kennedy testified that she actually did the "heavy lifting" in actively looking for a property, going to Miami Beach on numerous occasions without her husband, assisted by her chief of staff at BackOffice and by the head of marketing at BackOffice, who had ties to Florida, and her Florida realtor, Jaime Goff.

After Ms. Kennedy had visited between forty and fifty properties, she found 303 East Dilido Drive, a furnished property along Miami Beach ("Miami Beach house"). Ms. Kennedy testified that the Kennedys together visited the Miami Beach house upon the advice of her Florida realtor. While she testified that her husband was the one to make the verbal offer, Ms. Kennedy readily admitted her involvement, that "we came back through a couple of times to confirm certain things," including the terms of their offer to purchase the property. The Kennedys closed on the Miami Beach house

on June 15, 2010. Title to the Miami Beach house was held by both the Patricia Kennedy Revocable Trust and the Thomas Kennedy Revocable Trust.

The appellant contended that he furnished the Miami Beach house to his taste while Ms. Kennedy furnished the Brewster farmhouse to hers. In an attempt to demonstrate that the Miami Beach house was his enclave and the Brewster farmhouse was Ms. Kennedy's domain, the appellant offered evidence of supposedly sentimental items that he moved to the Miami Beach house as well as suggestive artwork in the foyer. However, Ms. Kennedy testified to having significant influence in furnishing the Miami Beach house, particularly in selecting certain dining room bar stools. The appellant's children, who visited the Miami Beach house on their school vacations, "thought it was very cool" to have a place in Miami Beach to visit, according to Mr. Olmsted's testimony.

Business activities

The appellant testified that he and his wife had a "great marriage" and that they accomplished many things together, particularly related to their highly successful business ventures. Around the time they got married, the Kennedys started a software company called Kennedy & Associates. The appellant's role was primarily to develop software and provide technical support while Ms. Kennedy's role was to manage the business operations. The

appellant testified that they made a great team, with the appellant producing innovative products and Ms. Kennedy negotiating contracts at prices that the appellant would never have asked. The Kennedys sold Kennedy & Associates in December 1992 to Tredegar Corporation. The Kennedys used the proceeds of this sale to build the Brewster vacation home in 1993.

Then in 1994, while still in Virginia, the appellant founded BackOffice, a global software and consulting-service company that focused on providing information governance and data migration services. When the Kennedys moved to Massachusetts in 1997, they also moved the BackOffice headquarters to the adjacent town of Orleans. The Kennedys first rented a small office in Orleans then moved to larger spaces as the business grew, eventually locating BackOffice in an 11,000-square-foot office in South Harwich.

In 2007, Ms. Kennedy began working at BackOffice as vice president of sales and marketing, eventually becoming president and CEO. The appellant served as the head software developer, chief technical officer ("CTO"), and chairman of the board of directors.

The appellant testified that the other software developers were not physically present in Massachusetts, and that he could do the software-development work remotely from any location. His leadership positions, however, required him to travel extensively, consulting and supporting the technical design and sale of BackOffice software at many events and trade shows, as well as to

be on location frequently at the BackOffice headquarters. Ms. Maker testified that the appellant had to be in Massachusetts frequently during the tax years at issue because "there were people within the company that were pulling on him, that wanted time with him, face time with him." Calendars maintained by the appellant during the tax years at issue corroborated the appellant's attendance at frequent meetings at the BackOffice headquarters in South Harwich.

As BackOffice continued to grow in the following years, the Kennedys began to acquire additional business properties on Cape Cod, several that were leased to BackOffice to be used for parking, housing, and training facilities. During the tax years at issue, BackOffice had an office in Boston as well as offices in non-Massachusetts locations: San Jose, California; Georgia; Alvarado, Texas; and Austin, Texas. BackOffice also had offices outside of the United States in Singapore, London, and Sydney. On April 8, 2011, BackOffice entered into an Office Use License Agreement for use of an 800-square-foot office and training room in Miami Beach. The lease allowed BackOffice to use this space for four days per month, not to exceed twelve times during the term of the one-year lease. The appellant rarely used the Miami Beach office, working instead from the Miami Beach house. At all times relevant to this appeal, BackOffice's principal address was 940 Main Street, South Harwich.

As BackOffice continued to grow, the Kennedys became interested in transforming the privately held company to a public company with shares of stock for sale on the public market. Extensive negotiations began with Goldman Sachs ("Goldman"), which became the frontrunner for the investment. Preparations were made, which included the formation of an entity, BAOF Holdings, Inc. ("Holdings"), to hold the appellant's interest in BackOffice. In January 2008, Goldman purchased a fifteen percent interest in BackOffice for $30 million. Pursuant to that investment, Goldman also obtained two seats on BackOffice's board of directors. The 2008 Goldman investment provided the Kennedys with a sizeable amount of cash, which facilitated the purchase of the Miami Beach house.

At the first BackOffice board of directors meeting in the spring of 2008, after Goldman's initial investment, Goldman's directors on BackOffice's board informed the other BackOffice board members that Goldman wanted to change BackOffice's management team; they wanted to replace Ms. Kennedy as CEO, because Goldman did not believe that a husband-and-wife management team was conducive to a public offering. Then in May 2011, Goldman purchased additional shares of the company for $125 million, giving Goldman a fifty-one percent ownership in BackOffice and a controlling interest in the company. On May 10, 2011, the appellant signed an employment agreement to continue his employment as CTO

for BackOffice. On that same day, at the direction of Goldman, Ms. Kennedy was dismissed from her duties as president and CEO of BackOffice and later, on September 9, 2011, she resigned as an employee. On November 15, 2011, the appellant resigned as CTO. On the same day, Ms. Kennedy replaced the appellant as Holdings' appointed manager of BackOffice, with a seat on the BackOffice board of directors. The appellant also retained his thirty percent interest in BackOffice, held through Holdings. On December 18, 2012, after what the Kennedys testified was a strained relationship with Goldman, the appellant, through Holdings, divested himself of his remaining interest in BackOffice, which Goldman purchased for approximately $85 million.

While the appellant testified that he was surprised when Goldman acquired the controlling interest in BackOffice in 2011, he nonetheless admitted that, upon Goldman's initial investment in 2008, he expected that he would exit BackOffice within five years, and that either an Initial Public Offering ("IPO") or an acquisition would occur and that "everybody was excited about it." The appellant thus understood that he would be realizing a large capital gain within about five years from Goldman's original investment. When Goldman offered to purchase the majority interest in BackOffice in early 2011, both the appellant and Ms. Kennedy testified that it was the appellant who made the ultimate decision to sell. The appellant further admitted on cross-examination that

tax savings was a consideration for his decision to change his domicile to Florida. Ms. Kennedy did not own any shares in BackOffice and thus did not report any of the gain.

In 2012, the Kennedys started SportsMoney, LLC ("SportsMoney"), a business venture whose purpose was to help professional athletes manage their wealth. SportsMoney was short-lived, however, and by 2013, the Kennedys started another husband-and-wife business venture, Zudy, a software development company. The Kennedys formed Zudy in Delaware on October 21, 2012 and registered it as a foreign LLC in Florida on March 17, 2015 and in Massachusetts on February 2, 2016. As of the time of the hearing, Zudy was headquartered in Miami Beach with an office in Massachusetts. Ms. Kennedy testified that the appellant is primarily responsible for software development while she runs Zudy's day-to-day operations from Massachusetts and that she reports to Zudy's CEO, Mr. Nardi.

Finally, the Kennedys together own a property management company, K&M Management, Inc. ("K&M Management"), and a personal finance company, K&M Investments, LLC ("K&M Investments"), to manage their real estate holdings and their personal finances, respectively. Both companies were headquartered in South Harwich during the tax years at issue. Virtually all of the Kennedys' bills, including all bills from Florida with the exception of bills from the City of Miami Beach, were directed to K&M Management's

finance director. K&M Management purchased the appellant's health insurance, and his health insurance card at the time of the hearing showed K&M Management's South Harwich address.

Family

Ms. Kennedy testified that the appellant and his sons shared a very close relationship. The appellant also enjoyed a close relationship with his wife. The appellant conceded that Ms. Kennedy was domiciled in Massachusetts during the tax years at issue and that three of the Kennedy sons were attending high school or college in Massachusetts during that time period; the oldest son, Matthew, attended the University of South Florida in Tampa. During the tax years at issue, two of the appellant's sons graduated from high school, and the appellant attended both graduation ceremonies in Massachusetts.

The appellant traveled extensively for his work, but the appellant testified that he demanded that BackOffice lease additional private jet time so that he could fly back to Massachusetts to be with his children. For example, he flew home for his son Marshall's Friday night high school football games. Marshall went on to attend Springfield College in Massachusetts, where he wrestled. The appellant's calendar reveals that he attended Marshall's wrestling tournaments in Massachusetts during

2010 and 2011, and that he brought his son Michael to college at Massachusetts Maritime Academy in August 2010.

Sports remained a strong interest for the appellant and a means to bond with his sons Michael and Marshall. However, his other two sons, Matthew and Mitchell, were more interested in art than sports. The appellant shared a passion for art with these two sons, and he testified that he often attended art galleries with them during the tax years at issue.

Despite a busy travel schedule, the Kennedys had a committed and "great marriage." The appellant testified, using a Venn diagram as an example, that he had warned Ms. Kennedy prior to getting married that he needed a certain amount of space and independence in order for their marriage to work. The Venn diagram he created at trial showed just a sliver of shared activities with Ms. Kennedy. The Kennedys enjoyed some leisure activities separately from each other. The appellant enjoyed playing golf, an activity that he did not share with anyone else in his family. Statements entered into evidence indicate that the appellant had memberships at country clubs - first Captains Golf Course in Brewster and then Eastward Ho! in Chatham - attended golf events and took golf lessons at various locations on Cape Cod during 2010 and 2011. He also played golf in Georgia during the same general time period. In Florida, the appellant played golf about five or six times a

year during the tax years at issue, but he was not a member of any country clubs there.

Both the appellant and Ms. Kennedy testified to many shared activities, particularly starting businesses together. The appellant once told a reporter that he and his wife "treat business as an all-consuming hobby. Some people like to play chess, some like to play tennis. We like to start up and run businesses." Their businesses were hugely successful endeavors.

The Kennedys also enjoyed several leisure activities together. During the tax years at issue, Ms. Kennedy owned two boats in Massachusetts, which the Kennedys enjoyed with their sons Michael and Mitchell. The appellant testified that those were Ms. Kennedy's boats. He further testified that she knew how to operate them and that he would never go on those boats without her. The appellant claimed that he moved to Florida to boat more often, and he did purchase, for use in Florida, a forty-one-foot Tiara yacht in October 2012, near the end of the tax years at issue. However, Mr. Nardi dubbed the boat "the artwork that was outside," since it was rarely used.

The Kennedys also enjoyed dining out together, and they had favorite restaurants in both Massachusetts and Florida. The appellant testified to enjoying Cuban coffee and dining out in Miami Beach on his own. However, Ms. Kennedy also testified to

enjoying the dining scene and shopping in Miami Beach, testifying that "[t]he shopping is really good."

In addition to the nuclear family of Ms. Kennedy and their sons, the appellant also has extended family, namely a father and sister. The appellant's father and sister lived in North Carolina during most of the relevant time period. In December 2012, the appellant bought a residence for his father and sister in Miami Beach, a short distance from the Kennedys' Miami Beach house. The appellant testified that he enjoyed spending time with his father in Miami Beach. However, after approximately eight months, his father and sister moved back to North Carolina.

Properties

The Kennedys owned the following properties in Massachusetts, Florida, and other locations during the tax years at issue:

Massachusetts properties

The Kennedys owned the Brewster farmhouse. It is undisputed that Ms. Kennedy was domiciled in Brewster during the tax years at issue.

The Kennedys, through various LLCs, also owned several investment properties in Massachusetts during the tax years at issue. Ms. Kennedy testified that they selected names for the LLCs to help the appellant remember where each property was located.

The entity Cranberry Investments, LLC held BackOffice's headquarters building, which was purchased from Mr. Nardi in January 2005. The LLC owned this property throughout the entire relevant time period.

The entity 3 Indian Trail, LLC held a small three-bedroom ranch that was located adjacent to BackOffice's headquarters in South Harwich. The LLC rented this property to BackOffice to house visiting out-of-town BackOffice employees. The LLC acquired this property in December 2007 and sold it in July 2011.

The entity 928 Main Street, LLC purchased the parcel at this address to increase the parking area for BackOffice by ten parking spots. The LLC purchased this property in July 2000 and sold it in September 2012.

The entity Capt. Harry Hunt House, LLC held a property improved with a six-bedroom home located on Little Pleasant Bay in Orleans, which the LLC rented to BackOffice for housing and training. The LLC acquired this property in 2006 and owned it throughout the entire relevant time period.

The entity Building Down the Road, LLC held a commercial building located adjacent to the BackOffice parcel and was used to expand BackOffice. The LLC acquired the property in October 2008 and owned it throughout the entire relevant time period.

The entity Six Crown, LLC held a parcel of land adjacent to the BackOffice headquarters. This property was purchased for

expansion of BackOffice and its parking lot. The LLC retained this parcel throughout the entire relevant time period.

The entity Sears House of Brewster, LLC owned a parcel on the Brewster Farm property that was improved with a 1933 mail-order Sears and Roebuck house, which the LLC rented to BackOffice. The LLC owned this parcel throughout the entire relevant time period.

The entity Finlay Road, LLC held two small condominium buildings in Orleans for investment purposes. The entity purchased the property sometime during 2004 and sold it in May 2011.

The entity Main Street Orleans, LLC held an office building in Orleans. The Kennedys used the upstairs as office space and the LLC rented the downstairs to commercial businesses. The LLC acquired this property in April 2006 and sold it in two separate transactions in July and September 2012.

The entity 21 Tom Hollow Lane, LLC owned the parcel at this address, located adjacent to the waterfront property that the Kennedys built in Orleans. This parcel was improved with a house, and the Kennedys held the parcel throughout the entire relevant time period.

Finally, the entities Satucket Path, LLC, Other Side of the Road, LLC, and Musket Hill, LLC each owned a parcel of land that was part of the Brewster Farm property. The LLCs owned these parcels throughout the entire relevant time period.

In addition to these properties jointly owned with Ms. Kennedy, the appellant also owned, through K&M Investments, his deceased mother's farm in Dartmouth. Ms. Kennedy testified that the appellant intended to retain ownership of that parcel.

Florida properties

The appellant and Ms. Kennedy owned the Miami Beach house jointly. In December 2012, the appellant purchased a second Florida property at 625 East Dilido Drive that was to be used by his father and his sister.

Properties in other locations

The appellant owned a property located on a golf course on Sea Island, Georgia, which he acquired in 2007. The appellant testified that he typically spent his birthdays on Sea Island with friends; however, the appellant's calendar showed that he did not spend his birthdays there in 2010 and 2012. The appellant testified that he and his wife never went to the Sea Island property together. Ms. Kennedy testified that she went to the Sea Island property with her girlfriends on one occasion, and that her sons only rarely went there because they did not like the golf community.

The Kennedys together owned other properties as well in New York, St. Barts, and Plymouth, Vermont.

Holidays, sports, and leisure

The Kennedys celebrated three major holidays together: Thanksgiving, Christmas, and the Fourth of July. Thanksgiving and Christmas were celebrated strictly with the Kennedy family while the Fourth of July included friends and colleagues. During the tax years at issue, the Kennedys celebrated all but one of these holidays in Massachusetts, the only exception being Thanksgiving in 2012, when the Kennedys went to see the New England Patriots ("Patriots") play the New York Jets in New York. The Kennedys did not celebrate any of these holidays in Florida during the tax years at issue.

Spectator sports was an important leisure activity to the appellant. The Kennedys were both avid Patriots fans, and two of their sons accompanied them regularly to Patriots games. After the sale of their interest in BackOffice to Goldman, Ms. Kennedy purchased a luxury suite at Gillette Stadium. The appellant preferred to sit at the club level outdoors. The appellant owned eight club-level, season-ticket seats for the Patriots.

The appellant was also a Boston Red Sox ("Red Sox") fan. During the relevant time period, the Thomas R. Kennedy Jr. Trust, of which the appellant was a beneficiary, owned season tickets to Red Sox games. Ms. Kennedy testified that the appellant attended some regular-season Red Sox games and that they both attended playoff and World Series games together. The appellant testified

that he had attended Red Sox spring training in Ft. Myers for the past ten years. However, according to his calendar, the appellant spent no days at Ft. Myers spring training in 2010 and only four days at spring training in 2011. The appellant did attend some Miami Marlins games in 2012, but he was not a season-ticket holder during the tax years at issue. Finally, BackOffice owned a suite at TD Garden for Boston Celtics ("Celtics") and Boston Bruins ("Bruins") games, and during the tax years at issue, the appellant attended some Celtics and Bruins games. Neither the appellant nor his businesses owned any season tickets for any sports teams in Florida during the tax years at issue, nor did any other entity associated with the appellant.

In Florida, the appellant enjoyed companionship with some friends. The parents of an early investor in BackOffice lived in Estero. When in Florida, the appellant would take them to Red Sox spring training games and doctor appointments. In return, they would cook for him and at times insist on cleaning his laundry. The appellant also attended some Miami Heat basketball games in Florida with a financial advisor whom the appellant had utilized to invest funds he had received from the Goldman sale.

The appellant very much enjoyed his time at the Miami Beach house. The appellant, Ms. Maker, and Mr. Nardi testified to the appellant's enjoyment of the Miami Beach lifestyle, particularly Cuban-styled coffees and the restaurant scene. Ms. Maker testified

that the appellant was far more relaxed in Miami Beach, even when he was working, and that "he liked to go off the grid a bit. He was harder to reach" while in Miami Beach. The appellant himself described being at the Miami Beach house as "[y]ou feel like you are on vacation."

Motor vehicles

The Kennedys maintained an extensive car collection throughout the tax years at issue. Ms. Kennedy testified that these cars were kept both in Massachusetts and Florida. The Kennedys sold and purchased new cars frequently. Mr. Nardi testified to a certain yellow Ferrari that was a prized possession, which the appellant kept at the Miami Beach house. However, the appellant did not own the yellow Ferrari during the tax years at issue; the parties stipulated that he acquired this vehicle in 2013.

Charitable/medical/ministerial activities

The appellant volunteered with the University of South Florida, but he admitted that this endeavor was not time consuming and consisted of soliciting donations by telephone, and thus could be performed in any location. In 2010, the appellant made an aggregate charitable contribution of $3 million to the University of South Florida, his alma mater. The University of South Florida

Magazine, in its Spring & Summer 2010 edition, recognized that the appellant and Ms. Kennedy, "a Harwich MA couple," made the gift.

During the tax years at issue, the appellant's primary physician was located in Massachusetts. The appellant offered no evidence of having a primary physician in Florida. On January 14, 2011, the appellant had surgery on his Achilles tendon in Massachusetts. He recuperated in Massachusetts for a month. He testified that after the recovery period he went to Miami Beach to do his physical therapy. However, the appellant's calendar shows that he left Massachusetts on February 10, 2011, spent one day in Miami Beach, and then traveled extensively; he did not return to Miami Beach until March 23.

The appellant also had an accountant who was located in Massachusetts. The appellant testified that his accountant, who was also his tax return preparer, advised him to look at a domicile website he recommended and "to make sure you do these things so they recognize the fact that you moved there." Along those lines, the appellant executed various estate-planning documents, which described him as being "of Miami Beach." The appellant obtained his Florida driver's license on June 29, 2010, and at that time he also registered to vote in Florida. The appellant voted only in the Presidential election in November 2016.

Comparison of physical presence in Massachusetts and Florida

The parties stipulated to the number of days that the appellant was physically present in Massachusetts and Florida during the tax years at issue:

Calendar year	Massachusetts day count	Florida day count
2010	178	83
2011	146	142
2012	153	157

The appellant's calendar shows that on June 2, 2010, the day the appellant purported to have become domiciled in Florida, he was not physically present in Florida; rather, he was in San Francisco. He was not physically in Florida until June 23, 2010, for one day, and then not again until June 29, 2010, for only one day when he obtained his Florida driver's license. His travel to Florida remained sporadic until the end of 2011, when he ceased his employment with BackOffice. During 2012, the appellant spent more time in Miami Beach; however, his calendar reveals that he continued to spend significant time in Massachusetts, including spending the important holidays in Brewster, with the exception of the Thanksgiving in New York to watch the Patriots game.

The Board's findings:

The Board ultimately did not find credible many aspects of the appellant's testimony upon which his Florida domicile argument depended.

The Board found that the evidence did not support the appellant's insistence that he lived a very separate life from his wife and that they maintained separate legal domiciles during the tax years at issue. Rather, the Board found that the appellant and his wife were very much a united couple who shared the same domicile. While it is true that the appellant traveled extensively for work during the tax years at issue, thus preventing him and his wife from sharing a daily weekday routine, the appellant nonetheless shared much of his life with Ms. Kennedy, including not only personal and family activities, but also a robust professional and business life. The Kennedy husband-and-wife partnership, with the appellant as the product developer and his wife as the business manager and contract negotiator, was incredibly successful. Starting with their first venture, Kennedy & Associates, they together created fast-growing companies and turned substantial profits.

Although on a personal level the Kennedys each had separate interests, they also enjoyed many activities together, in both Massachusetts and Florida, during the tax years at issue. By all accounts, Ms. Kennedy also enjoyed Miami Beach, particularly the

shopping, and she was the one to do the "heavy lifting" in finding the Miami Beach house, exploring between forty and fifty houses to find the right one. Moreover, contrary to the appellant's reliance on sentimental items or differences in decorating style to show that the Miami Beach house was his private enclave, the Board found that personal effects merely demonstrated a conscious choice to give the Miami Beach house a distinctive ambiance.

The appellant was also very close with his four sons, three of whom were in Massachusetts attending high school or college during the tax years at issue. The Kennedys had the means to provide more than one home for their family's enjoyment, but the Board found that the crux of the Kennedy family life was based in Massachusetts. The boys enjoyed time at the Miami Beach house, but they regarded it as just another place they could visit. By contrast, the family spent the bulk of the major holidays together at their family home, the Brewster farmhouse. The appellant was actively present in the lives of his sons, in fact refusing to travel unless he could be back in Massachusetts for his son's Friday night games. While the appellant enjoyed spending some time with his father in Miami Beach, his father did not live in Miami Beach until the very end of the tax years at issue. Moreover, the Board found that the appellant spent the vast majority of his family time with his wife and his sons in Massachusetts during the tax years at issue. The Board thus found and ruled that the center

of the appellant's family life remained in Brewster during the tax years at issue.

The appellant also had stronger business ties to Brewster than he did to Miami Beach during the tax years at issue. The appellant's businesses - namely BackOffice, SportsMoney, K&M Management, and K&M Investments - were all headquartered in Massachusetts, not in Florida. While BackOffice rented physical space in Florida, the lease was limited to four days per month, not to exceed twelve times during the term of the one-year lease. By contrast, BackOffice occupied numerous parcels in Massachusetts.

The appellant's job as a programmer involved extensive travel and the ability to do many aspects of his job from any location. However, Ms. Maker testified that many people were "pulling on him" and required "face time" with the appellant; that "face time" occurred at BackOffice's headquarters in Massachusetts. By contrast, when he was in Miami Beach, the appellant was more "off the grid" and by all accounts far more "relaxed"; in fact, he viewed his Miami Beach retreat to be akin to a "vacation" that included work but also leisure activities. Rather than establish that his business life centered in Miami Beach, the Board found that the evidence established the opposite - that Miami Beach provided a secluded respite for the appellant from his Massachusetts-based work.

Even after the appellant resigned from his position as CTO of BackOffice in November 2011, he nonetheless remained involved in BackOffice. The appellant technically resigned from the board of directors, but rather than letting his position go to an unrelated third party, he assigned his seat to his wife and he retained a thirty-percent interest in BackOffice. The fact that the appellant could exercise his authority to designate his replacement on the board of directors, and that he did so delegate the position to a close family member, indicated strong business ties to his Massachusetts-based business through the end of the tax years at issue.

The Board further found that the appellant's social life was primarily centered in Massachusetts during the tax years at issue. The appellant spent much leisure time attending sporting events. He held season tickets to four major Massachusetts professional sports teams, yet he held no season tickets to any sports teams in Florida. The appellant also played golf and boated primarily in Massachusetts. He belonged to country clubs in Massachusetts during the tax years at issue and he boated more often with Ms. Kennedy on her boat in Massachusetts than he did alone on "the artwork that was outside" in Florida.

Further, the appellant retained his primary physician in Massachusetts, where he also had surgery during the tax years at issue.

The appellant also held significant property interests in Massachusetts, both business and personal. The appellant owned the Brewster farmhouse jointly with Ms. Kennedy. It housed his family and it included amenities and features to his taste, particularly the golf simulator as well as much of the landscaping. Together with Ms. Kennedy, the appellant also, through various LLCs, owned numerous Massachusetts properties that were leased to BackOffice for visitor housing, parking, and expansion of its headquarters. The appellant and Ms. Kennedy also jointly held additional investment properties in Massachusetts. By contrast, the appellant did not own any business or investment properties in Florida during the tax years at issue. His property interests in Florida consisted solely of the Miami Beach house and the nearby property at 625 East Dilido. The appellant also owned vacation homes in other locations – Georgia, New York, St. Barts, and Vermont.

Comparing his activities, relationships, and real estate holdings in Massachusetts versus Florida, the Board found that the appellant's business, family, and personal lives were centered in Massachusetts. By contrast, Florida was primarily a destination where the appellant could relax and be "off the grid."

Upon the advice of his Massachusetts-based accountant, the appellant consulted a website designed for the purpose of proving a change of domicile for tax purposes, and he took some of the recommended ministerial steps in an attempt to make a convincing

show of his change of domicile to Florida. These changes included executing some estate-planning documents, obtaining a Florida driver's license, and registering to vote in Florida. However, the appellant did not vote in Florida during the tax years at issue, nor did he change care from his Massachusetts physician. The Board found that the appellant's perfunctory, ministerial steps were not sufficient to demonstrate that he had changed the center of his life from Massachusetts to Florida.

The Board likewise found that the appellant's extensive car collection, a hobby that the appellant was able to afford, failed to prove that the center of his life had moved to Florida, as some of his vehicles were garaged in Florida and some in Massachusetts.

The number of days that the appellant spent in Florida during the tax years at issue did not establish a change of domicile from Massachusetts. The appellant spent fewer days in Florida than in Massachusetts during tax years 2010 and 2011 and only four more days in Florida than in Massachusetts during tax year 2012. Moreover, for a taxpayer who travels extensively for work and pleasure and has multiple homes, the more important inquiry is the location of the taxpayer's center of life. The Board found that the center of the appellant's life remained in Massachusetts during the tax years at issue.

The Board further found a tax motivation for the appellant's claimed change of domicile. Goldman acquired an interest in

BackOffice in 2008, the controlling interest in 2011, and then acquired the appellant's remaining interest from Holdings in 2012. The appellant himself testified to understanding, from the start of negotiations with Goldman in 2008, that Goldman was planning to take control of BackOffice's management as part of either an IPO or an acquisition of BackOffice. The appellant knew that he would be realizing a large capital gain within five years from Goldman's initial investment, and he in fact sold additional shares to Goldman in 2011. The Board thus found that tax planning served as the impetus for the appellant to attempt to change his domicile to Florida, a jurisdiction that imposes no income tax.

For all of these reasons, the Board found and ruled that the appellant failed to meet his burden of proving that the center of his life had moved to Florida and that he was no longer domiciled in Massachusetts during the tax years at issue.

Based on the Board's finding and ruling that the appellant was domiciled in Massachusetts at all relevant times, and on Massachusetts law as explained in the Opinion, the appellant was subject to Massachusetts tax on all his taxable income for each of the tax years at issue. The additional assessment of tax for each tax year at issue was, therefore, valid. The amount of tax that the appellant was required to show on his return exceeded ten percent of the amount that was shown on his return for all three tax years at issue. Therefore, as will be explained in the Opinion,

the Board found that the appellant had a substantial underpayment in each of the tax years at issue and he failed to establish a basis for abatement of the substantial underpayment penalty imposed pursuant to G.L. c. 62C, § 35A.

Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

Domicile

For Massachusetts income tax purposes, "[r]esidents shall be taxed on their taxable income." G.L. c. 62, § 4. The starting point for determining Massachusetts taxable income is "federal gross income" with certain modifications not here relevant. G.L. c. 62, § 2(a). Federal gross income is defined as "all income from whatever source derived." I.R.C. § 61(a). Accordingly, a Massachusetts taxpayer is taxable on all income, regardless of its source.

In contrast, Massachusetts taxes nonresidents only on income from Massachusetts sources. G.L. c. 62, § 5A. The term "resident" is defined as:

> (1) any natural person domiciled in the commonwealth, or (2) any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth, including days spent partially in and partially out of the commonwealth.

G.L. c. 62, § 1(f). Accordingly, if the appellant was domiciled in Massachusetts during the tax years at issue, he is taxable on all of his income regardless of the number of days he spent in the Commonwealth.

Domicile has been defined as "the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." ***McMahon v. McMahon***, 31 Mass. App. Ct. 504, 505 (1991). "The hallmark of domicile is that it is 'the place where a person dwells and which is the center of his domestic, social and civil life.'" ***Dotson v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2010-997, 1017, 1018 (quoting ***Reiersen v. Commissioner of Revenue***, 26 Mass. App. Ct. 124, 125 (1988)), *aff'd*, 82 Mass. App. Ct. 378 (2012).

While domicile is ultimately a legal question, a person's domicile is primarily a question of fact. *See* ***Reiersen***, 26 Mass. App. Ct. at 124-25. When a taxpayer has factors on more than one side of the "domicil ledger," the Board "must weigh the evidence and determine where it is that the taxpayer has his 'home,' that is, the center of the major facets of the taxpayer's life." ***Swartz v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2010-252, 266 (citations omitted). "The weight to be assigned to particular factors and combinations of factors, together with the

credibility of the testimonial evidence, are committed to the fact finder's resolution." ***Horvitz v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2002-252, 257, *aff'd,* 60 Mass. App. Ct. 1103 (2003).

In the instant appeal, the appellant had the means to establish residences in Florida and Massachusetts, as well as maintain houses in a few vacation destinations, "in each of which he carried on important parts of his life." ***Horvitz,*** Mass. ATB Findings of Fact and Reports at 2002-256. Having more than one residence can lead to factors on more than one side of the "domicil ledger." ***Reiersen,*** 26 Mass. App. Ct. at 127. However, only one of those locations can be the appellant's domicile for purposes of taxation. ***Hershkoff v. Board of Registrars of Voters of Worcester,*** 366 Mass. 570, 576 (1974). Therefore, a determination of domicile depends upon a comprehensive facts-and-circumstances analysis with the ultimate question being the location of the center of the appellant's life. *See, e.g.,* ***Tax Collector of Lowell v. Hanchett,*** 240 Mass. 557, 561 (1922) (finding that proof of domicile "depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case").

Massachusetts follows the common law rule that a person with legal capacity is considered to have changed his or her domicile by satisfying two elements: the establishment of physical

residence in a different state and the intent to remain at the new residence permanently or indefinitely. ***Dotson***, 82 Mass. App. Ct. at 383; *see also* ***Reiersen***, 26 Mass. App. Ct. at 125 (quoting ***Hershkoff***, 366 Mass. at 577). The determination of intent goes beyond merely accepting the taxpayer's expression of intent and instead requires an analysis of the facts closely connected to the taxpayer's major life interests, including family and social relations, business connections, and civic and religious activities, in order to determine his true intent. *See* ***Reiersen***, 26 Mass. App. Ct. at 125 (citing ***Hershkoff***, 366 Mass. at 576-77).

"It is a general rule that the burden of showing a change of domicil is upon the party asserting the change." ***Mellon Nat'l Bank & Trust Co. v. Commissioner of Corporations and Taxation***, 327 Mass. 631, 638 (1951); ***Horvitz v. Commissioner of Revenue***, 51 Mass. App. Ct. 386, 394 (2001). *See also* ***Commonwealth v. Davis***, 284 Mass. 41, 49 (1933) ("The burden of proof that his domicil was changed rested on the defendant because he is the one who asserted that such change had taken place.").

The appellant was undisputedly very close to his wife and four children; therefore, an analysis of the center of the appellant's life must focus particularly on the appellant's family and how and where he connected with them. The appellant pointed to cases where a taxpayer was found to have created a domicile in a different state while other close family members, particularly

grown children, parents, or siblings, remained domiciled in Massachusetts. *See, e.g.*, ***Mee v. Commissioner***, Mass. ATB Findings of Fact and Reports 2010-274; ***Arena v. Commissioner***, Mass. ATB Findings of Fact and Reports 2010-11; ***Williams v. Commissioner***, Mass. ATB Findings of Fact and Reports 2009-629.

However, married taxpayers have been far less successful in proving a domicile apart from a spouse. A few taxpayers have shown a center of life outside of the Massachusetts marital home when they were essentially estranged from their spouses. For example, in ***Reiersen***, the Appeals Court affirmed the Board's finding that the appellant had established a domicile in the Philippines apart from his wife, when the taxpayer and his wife were married in name only and had avoided divorce merely because of their in-laws and religious beliefs. 26 Mass. App. Ct. at 126. Similarly, in ***Scagel v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1990-311, the taxpayer was legally separated from his wife when he claimed a separate domicile in New Hampshire.

Far less common is the situation that the appellant here claims – a center of life apart from a spouse with whom he shares a solid marriage. The Board previously decided that a married taxpayer had established a separate domicile in one unique situation involving unusual circumstances. The taxpayer in ***Altman v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2013-292, 295, suffered from serious health conditions that

required him to undergo repeated surgeries. Gradually over several years prior to the tax year at issue there, the aging taxpayer, who was retired, spent increasing amounts of time in his house in Florida. ***Id.*** at 2013-296. As his conditions progressed, the taxpayer realized that he could no longer remain in Massachusetts for most of the year, as doing so would risk his health, particularly in the colder months. ***Id.*** Moreover, the retired taxpayer's social life had shifted to Florida as he aged: "as most of his friends had either passed away or had relocated to Florida over the years, the taxpayer gradually found himself more closely aligned with his community in Florida - particularly his country club which he attended very frequently - than with the community in Massachusetts." ***Id.*** at 2013-314. With his children grown and raising families of their own, and being unable to work, the only real Massachusetts tie remaining for the taxpayer was his wife, who, being considerably younger than he, was still actively working in Massachusetts and thus could not completely relocate to Florida. She did, however, significantly scale back her work so as to spend as much time as possible in Florida with her husband, a substantial ten days out of every two-week period. ***Id.*** at 2013-300. Thus, the taxpayer's "valid health concerns," and his established social circle in Florida that included his wife for substantial amounts of time, together helped the taxpayer in ***Altman*** to establish a domicile in Florida. *See* ***id.*** at 2013-313.

The instant appeal, however, lacks the special circumstances in ***Altman*** and is instead more akin to ***Brew v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2010-767, 785, where the taxpayer was found not to have changed his domicile when he "had a close and loving marriage" with his spouse and "was actively engaged in the lives of his two children," all of whom remained Massachusetts residents. Like the taxpayer in ***Brew***, the appellant continued to return to Massachusetts on a frequent and regular basis during the tax years at issue to be with his wife and children. The Board here likewise considered the appellant's close family ties to have "the greatest weight" in its determination that the appellant had not abandoned his Massachusetts domicile in favor of a new one in Florida during the tax years at issue. ***Id.*** *Contrast* ***Devens v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2012-1001, 1024 (Board placed considerable weight on the location of the taxpayer's fiancé in Florida in determining that the taxpayer had the requisite intent to change his domicile to Florida).

The Board also gave weight to the appellant's business ties. Unlike the taxpayer in ***Salah v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1997-842, whose Massachusetts business activities were reduced to occasional consultation on isolated matters and his attendance at annual meetings, the appellant was very active in BackOffice during the tax years at

issue through November 15, 2011, when he resigned as an employee of BackOffice. As a programmer, the appellant could perform certain aspects of his job from anywhere, and he was required to travel frequently to meet with clients. However, as a manager, the appellant's business also required a significant amount of "face time." The Board found that the "face time" occurred in Massachusetts, at the South Harwich headquarters of BackOffice, where employees worked and where BackOffice rented property to host corporate guests, as opposed to Miami Beach, where BackOffice had a lease that was restricted to no more than four days a month and where the appellant went to get "off the grid" and relax.

Then in 2012, after he was no longer an employee of BackOffice, the appellant retained an interest in BackOffice through his appointment of his wife as a member of the company's board of directors, as well as his retention of a thirty-percent investment in the company. Moreover, the appellant endeavored to establish SportsMoney in Massachusetts during 2012, and his other business ventures - K&M Management and K&M Investments - were headquartered in Massachusetts, not in Florida. The Board thus found and ruled that the center of the appellant's business life remained in Massachusetts through tax year 2012, at the end of which he finally divested himself of his interest in BackOffice. *See* ***Schussel v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2013-106, 129-30, *aff'd*, 86 Mass. App. Ct. 419

(2014), 472 Mass. 83 (2015) (ruling that the taxpayers remained domiciled in Massachusetts, in part because "Mr. Schussel remained intimately involved with the operation of [the] business").

The appellant also enjoyed several social activities in Massachusetts that he did not partake of in Florida. Contrary to the appellant's claim that a strong motivation for the supposed move to Florida was boating, his good friend characterized the appellant's boat as "the artwork that was outside" for its lack of use. By contrast, the appellant and his wife spent quality time boating with their sons in Massachusetts during the tax years at issue. Another of the appellant's favorite pastimes was golf. The appellant was a member of golf clubs in Massachusetts at least during tax years 2010 and 2011. In Florida, he played golf only minimally, and he did not join any clubs there. With respect to another favorite pastime, spectator sports, the appellant held season tickets, either individually or through an entity of which he was a beneficiary, to all four major sports teams in Massachusetts, yet he held no season tickets to any major sports teams in Florida. The Board thus found that the center of the appellant's social life remained in Massachusetts during the tax years at issue.

Upon the advice of his Massachusetts accountant and pursuant to his independent internet research, the appellant made sure he had completed basic ministerial steps in line with a change of

domicile, including obtaining a Florida driver's license, registering to vote in Florida, and executing estate-planning documents to reflect a Florida address. However, the Board has previously cautioned that ministerial steps cannot alone establish a change of domicile if the center of the taxpayer's life is not already on that side of the "domicil ledger." *See* ***Swartz***, Mass. ATB Findings of Fact and Reports at 2010-263, 264 (finding that modest ministerial acts such as changing driver's license and voter registration were not persuasive evidence that taxpayers had changed their domicile to Florida in light of substantial evidence to the contrary). Moreover, the appellant did not vote in Florida until the 2016 election. He did not perform any charitable activities in Florida but instead made a passive donation to his alma mater. In addition, the appellant retained his primary physician in Massachusetts, and he had his surgery and recuperated for a month in Massachusetts.

On the basis of the facts in evidence, the Board found that the center of the appellant's life remained in Massachusetts during the tax years at issue. The Board thus found and ruled that the appellant failed to meet his burden of proving a change of domicile from Massachusetts to Florida for any of the tax years at issue.

Underpayment penalty

Pursuant to G.L. c. 62C, § 35A ("§ 35A"), the Commissioner may impose a twenty-percent penalty when an underpayment is either: attributable to negligence or disregard of Massachusetts tax laws or public written statements; or when an understatement of tax liability is substantial. In this appeal, the issue was whether the understatement for each tax year was substantial.

An understatement is "substantial" if it "exceeds the greater of 10 per cent of the tax required to be shown on the return for the period or $1,000" ("substantial-understatement threshold"). § 35A(c). For each of the tax years at issue, an understatement of taxes existed that exceeded the substantial-understatement threshold. Therefore, the § 35A penalty applies unless one of the exceptions at § 35A(d) is met.

1. The exclusion at § 35(d)(i)

Pursuant to § 35A(d)(i), an understatement will be reduced by any portion for which a taxpayer had substantial authority for the position taken on a return. The appellant contended that he had substantial authority for his change-of-domicile position. According to the Commissioner's regulations, "a return position is supported by substantial authority only if the weight of the authorities supporting the position is substantial in relation to the weight of authorities supporting the contrary position." 830 CMR 62C.33.1(2).

As discussed above, relevant case law does not support the appellant's position that he was domiciled outside of Massachusetts. The substantial weight of authority for a taxpayer in the appellant's position – happily married with a spouse domiciled in Massachusetts, family ties predominantly located in Massachusetts, and businesses in which he was actively engaged that are also primarily located in Massachusetts – strongly supports a ruling that the appellant did not change his domicile during the tax years at issue. The Board thus found and ruled that the understatement is not reduced pursuant to § 35A(d)(i) for any of the tax years at issue.

2. The exclusion at § 35(d)(ii)

Pursuant to § 35A(d)(ii), the understatement will be reduced by any portion attributable to any item if, on the return or in a statement attached to the return, the taxpayer discloses the relevant facts affecting the tax treatment of the item, and there is a "reasonable basis" for the tax treatment of the item. While alluded to in his petition, the appellant's briefs filed with the Board did not further address whether he had made an "adequate disclosure" of the relevant facts affecting his tax treatment, nor did the appellant enter any evidence specifically addressing whether he had made this disclosure. 830 CMR 62C.33.1. The appellant bears the burden of proving the facts that entitle him to relief from penalty. *See* ***Stella, Executor v. Commissioner of***

Revenue, Mass. ATB Findings of Fact and Reports 2003-44, 54. The Board reviewed the appellant's returns, and none includes a statement, either within the return or as an attached statement, disclosing the underlying relevant facts affecting his tax treatment for the tax years at issue. *See* 830 CMR 62C.33.1(2) (defining "adequate disclosure" to require "a written statement setting out the relevant facts including, without limitation, the basis for the challenge and identifying the tax law or public written statement being challenged"). The appellant did not indicate to the Board any part of his returns that allegedly served as a disclosure of the underlying facts affecting his tax treatment. The Board found that merely filing a Form 1-NR/PY is not adequately disclosing the underlying facts supporting that claim for purposes of § 35A(d)(ii). The Board thus found and ruled that the appellant failed to meet his burden of proving his entitlement to relief under § 35A(d)(ii).[1]

3. The good-faith defense at G.L. c. 62C, §35B

The appellant further cited G.L. c. 62C, § 35B ("§ 35B"), which precludes the imposition of the § 35A penalty on any portion of an underpayment for which "reasonable cause" existed for the

[1] The Board need reach the issue of whether there was a "reasonable basis for the tax treatment of the item" since the conjunctive language of the statute requires that the taxpayer first adequately disclose "the relevant facts affecting the tax treatment of the item." § 35A(d)(ii). However, given the foregoing findings and rulings, it is clear that no reasonable basis exists for the appellant's tax treatment of the income at issue.

taxpayer's position and for which the taxpayer acted in "good faith" in taking his position. The appellant contended that, because he relied upon and followed the advice of his accountant in attempting to establish a domicile in Florida, he acted in good faith. The appellant testified that, in preparation for his attempt to change his domicile, he met with his accountant and tax return preparer, who referred the appellant to a checklist of ministerial steps and told him "to make sure you do these things so they recognize the fact that you moved there."

Reasonable cause may be found when a taxpayer has relied on tax advice given by a competent tax professional, provided, however, that the taxpayer still exercises "ordinary business care and prudence." ***United States v. Boyle***, 469 U.S. 241, 251 (1985); ***Samia v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1993-127, 133. According to his own testimony, the appellant's accountant merely referred the appellant to a website with a checklist of ministerial steps to take in order to make his case for a change of domicile. As stated previously, mere ministerial acts do not carry sufficient weight when the Massachusetts side of the "domicil ledger" has the stronger weight. *See, e.g.*, ***Swartz***, Mass. ATB Findings of Fact and Reports at 2010-263, 264. The Board thus found that the appellant's reliance on his accountant's advice, consisting merely of ministerial steps intended to make a show of domicile for the taxing authorities,

was not sufficient to establish that he acted in good faith, and that he therefore had reasonable cause for the position he took on his returns for the tax years at issue. Therefore, the Board found and ruled that the good-faith defense at § 35B did not apply to abate the § 35A underpayment penalty.

Conclusion

The Board found and ruled that the appellant failed to meet his burden of proving that he was domiciled outside of Massachusetts during the tax years at issue. The Board further found and ruled that the appellant failed to establish a basis upon which to waive the underpayment penalty authorized under §§ 35A and 35B.

Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board