

IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

TYLER R. and TALBOT DEBUTTS)
CAIN,)
Petitioners,)
v.) No.
THE ILLINOIS DEPARTMENT OF)
REVENUE,)
Respondent.)

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PETITION OF TYLER CAIN, A FLORIDA RESIDENT

The Petitioners, Tyler R. Cain, and TALBOT DEBUTTS CAIN (deceased), complain of the Respondent, the Illinois Department of Revenue, as follows:

Allegations Common to All Counts

1. On July 16, 2012, the Illinois Appellate Court, First District, First Division, ended 6 years of hard-fought litigation between the Petitioners and the Respondent with a final decision that Tyler R. Cain and Talbot Debutts Cain (the “Cains”) were, for purposes of the Illinois Income Tax Act (“IITA”) [35 ILCS 5/101, *et seq.*] for the tax years 1996 through 2004, not residents of Illinois and were instead residents of Florida; and therefore, the Cains had overcome the Department of Revenue’s (the “Department”) Notice of Deficiency and the Department had failed to carry its burden of proof. *Cain v. Hamer*, 2012 IL App (1st) 111283 (July 16, 2012).
See Exhibit A.

2. During the *Cain v. Hamer* litigation, the Department took the sworn deposition of Tyler Cain, and of his accountant, Mr. Robert Jacobson, and the Department retained transcripts of these depositions. Mr. Cain’s deposition was taken in 2008.

3. Through the deposition of Tyler Cain, the Department elicited testimony under oath.
4. Mr. Cain testified that he was retired (i) at the time of the deposition, December 22, 2008, and (ii) during the calendar year 1995.
5. Mr. Cain testified that his income was from interests, dividends and capital gains, and that, as an example, he had sold “a hundred shares of Abbott Laboratories, not in these partnerships, in my name.” Mr. Cain had prior in the deposition testified that he had multiple “family partnerships set up over a period of time . . . for the purpose of transferring assets from my name to our children’s name,” and responded affirmatively that “it would be fair to say that’s – they were created mostly for estate planning purposes.”
6. Mr. Cain testified that one of his entities, TRC Trading Inc. is “an S corporation” formed “back when I joined the CBOE [Chicago Board of Options Exchange] . . . in the mid-1970s.”
7. Mr. Cain testified that he did not, since retirement in 1990, perform any personal services for TRC Trading, Inc.
8. When asked by the Department if he was “aware that TRC Trading was taking deductions for contributions to your pension plan?” Mr. Cain responded “Yes.”
9. Mr. Cain testified that since retaining Bob Jacobson as his accountant it was Mr. Jacobson’s decision to not take the pension deduction on the TRC Trading returns.
10. The Department elicited testimony from Mr. Robert Jacobson under oath on February 17, 2009.
11. Mr. Jacobson testified that “TRC Trading, Inc. was originally formed as an Illinois corporation, and “being a corporation, did not follow the investment partnership rules, so it had no choice but to file in Illinois.”

12. Mr. Jacobson testified that TRC Trading Inc. “was originally where he [Mr. Cain] did all of his active trading when he held a seat on one of the exchanges.”

13. Mr. Jacobson testified as follows with respect to the salary and defined benefit plan expenses incurred by TRC Trading Inc.:

BY MR. WYNNE:

Q: And to your understanding TRC Trading was the S corp he had when he had a seat on the exchange here?

A: Yes, that’s correct.

Q: Now, you also said he was paid a salary by TRC Trading?

A. Correct.

Q: Do you know whether or not that salary continued to be paid?

A. No. The salary stopped.

Q: And why was that, do you know?

A: Well, it appeared that he kept paying the salary because that’s what he always did and he thought he had to. He was incurring payroll taxes on it. But he thought he always had to pay himself a salary.

When I told him back in ’02, this was before I started working on his personal return, and I believe my conversation was with the other accountant, I said, Why are you continuing to issue payroll? **All he is doing is lending his company money to turn around and pay him. And they realized that they should be putting a stop to it. There was no purpose to be issuing payroll.**

Q: You are familiar with the defined benefit plan Deduction the S corp was taking?

A: Yes.

Q: Do you know if that continued?

A: It continued through ’03 or ’04. I believe it was ’04.

Q: Do you know the reasons why it stopped?

A: Yes. I consulted with him, and I don’t know whether the prior accountant just left or whether I was

working with him on it. **There was no reason to keep that liability going. There was no business going on anymore,** that it should be closed, and they closed it.

(Emphasis added).

14. With respect to the trading activities of TRC Trading after Mr. Cain's retirement, Mr. Jacobson's sworn testimony was that:

BY MR. WYNNE

Q: When you reviewed the returns of TRC Trading Inc. did you get a sense of the trading activity that the entity conducted?

A: Yes. It was minimal amounts of trading.

For example, there may be only, from '99, when I looked through the returns, from '99 through 2004, I think the highest number of sales of stock was ten for the whole year.

Before that I didn't have a copy of the Schedule D to tell you, but there was not active trading going on.

Q: **And to your knowledge TRC Trading has never traded for anybody other than Mr. Cain's accounts?**

A: **That's correct.** (Emphasis added)

15. With respect to his working interaction with Mr. Cain, Mr. Jacobson testified as follows:

BY MR. WYNNE

Q: In your dealings with Mr. Cain, how does he normally contact you?

A: Phone and e-mail.

Q: Is that communication exclusively from Florida?

A: No. He can call me or phone me or e-mail from anywhere in the world.

Q: Do you know him to travel frequently?

A: Yes. He travels quite extensively.

16. In addition to the sworn testimony of Mr. Cain and of Mr. Jacobson which the Department obtained during the *Cain v. Hamer* proceedings, upon the close of discovery the Department also entered into a Stipulation of Facts with the Cains.

17. In the Stipulation of Factual Matters in the *Cain v. Hamer* litigation, which was relied on by the parties and the Circuit and Appellate courts, the Department and the Cains “agreed and stipulated” to the following facts (emphasis added):

58. During the Relevant Period, Mr. Cain did not perform any personal services for TRC Trading, Inc.

59. TRC Trading, Inc., an S corporation under the federal Internal Revenue Code, had no paying clients at any time during the Relevant Period.

60. During the Relevant Period, TRC Trading, Inc. never offered or provided services to the public.

* * *

64. Mr. Jacobson recommended that Mr. Cain’s pension plan be terminated in 2004 when he began preparing TRC Trading, Inc.’s tax returns, since there was no business activity taking place and there is no reason to have such liability. TRC Trading, Inc. did not file any amended federal income tax returns for any tax years in the Relevant Period.

18. The Appellate Court’s discussion of the many facts pertaining to the tax residency issue, taking into account all facts of record, commented that “Although plaintiffs owned companies during the relevant period, they had limited involvement in those companies.” *Cain v. Hamer*, 2102 IL App (1st) 112833, ¶ 9.

19. Section 1501(a)(1) of the IITA, in pertinent part, provides that “The term ‘business income’ means all income that may be treated as apportionable business income under the Constitution of the United States.” 35 ILCS 5/1501(a)(1).

20. Section 1501(a)(13) of the IITA provides that “The term ‘nonbusiness income’ means all income other than business income or compensation.” 35 ILCS 5/1501(a)(13).

21. Section 301(c)(2) of the IITA, in pertinent part provides as follows:

Sec. 301. General Rule.

(a) Residents. . . .

(b) Part-year residents. . . .

(c) Other persons.

(1) In general. Any item of income or deduction which was taken into account in the computation of base income for the taxable year by any person other than a resident and which is referred to in Section 302, 303 or 304 (relating to compensation, nonbusiness income and business income, respectively) shall be allocated to this State only to the extent provided by such section.

(2) Unspecified items. Any item of income or deduction which was taken into account in the computation of base income for the taxable year by any person other than a resident and which is not otherwise specifically allocated or apportioned pursuant to Section 302, 303 or 304 (including, without limitation, interest, dividends, items of income taken into account under the provisions of Sections 401 through 425 of the Internal Revenue Code, and benefit payments received by a beneficiary of a supplemental unemployment benefit trust which is referred to in Section 501(c)(17) of the Internal Revenue Code):

(A) in the case of an individual, trust, or estate, shall not be allocated to this State; and

(B) in the case of a corporation or a partnership, shall be allocated to this State if the taxpayer had its commercial domicile in this State at the time such item was paid, incurred or accrued.

22. With respect to nonbusiness income, section 303 of the IITA, in pertinent part, provides as follows:

Sec. 303. (a) In general. Any item of capital gain or loss . . . to the extent such item constitutes nonbusiness income, together with any item of deduction directly allocable thereto, shall be allocated by any person other than a resident as provided in this Section.

(b) Capital gains and losses.

* * *

(3) Intangibles. Capital gains and losses from sales or exchanges of intangible personal property are allocable to this State if the taxpayer had its commercial domicile in this State at the time of such sale or exchange.

23. Section 1501(a)(2) of the IITA provides that “The term ‘commercial domicile’ means the principal place from which the trade or business of the taxpayer is directed or managed.” 35 ILCS 5/1501(a)(2).

24. Section 1501(a)(20) limits the term “resident” to individuals, trusts and estates. 35 ILCS 5/1501(a)(20).

25. All material facts established through the testimony of Mr. Cain and Mr. Jacobson, and through the Stipulation of Factual Matters, remained substantially unchanged with respect to the 2007 Illinois income tax year.

26. At some point during 2007, Mr. Cain sold stock in Abbott Laboratories which Mr. Cain had contributed as capital to TRC Trading, Inc. upon its formation, the title of which remained registered to Tyler R. Cain, resulting in capital gain income to TRC Trading, Inc.

27. In 2007, TRC Trading, Inc. distributed to Tyler R. Cain the proceeds from the 2007 sale of stock.

28. TRC Trading Inc. filed an original return reporting the capital gain on the sale of stock as business income on the IL 1120-ST for TYE 12/31/2007.

29. More than three years after the filing of the original IL 112-ST return, TRC Trading Inc. filed an amended return reporting the capital gain on the sale of stock as nonbusiness income, but the amended return did not seek a refund of the resulting overpayment of tax to Illinois.

30. After the Department lost the *Cain v. Hamer* case after a six year legal battle during which, sadly, Talbot D. Cain deceased, on October 10, 2013 the Department issued a Notice of Audit Initiation for the 2007 tax year of TRC Trading, Inc.

31. Notwithstanding the above alleged deposition testimony of Mr. Cain and Mr. Jacobson and the above alleged Stipulation of Factual Matters in the *Cain v. Hamer* litigation, just six days after the Notice of Audit Initiation was sent to TRC Trading, Inc. on October 16, 2013, the Department issued to Tyler R. Cain and Talbot D. Cain a Notice of Proposed Deficiency for the 2007 tax year proposing to assess a tax of \$64,304, and a penalty of \$19,291, plus interest, for the 2007 tax year because the amended return “is out of statute and the treatment of income as ‘Nonbusiness’ income is improper.”

32. Mr. Cain, through his counsel, advised the Department on October 29, 2013, as follows:

... We believe that if the Department issues a Notice of Deficiency the Department will be taking a position contrary to judicially established facts that it is collaterally estopped from litigating yet again, without reasonable cause to do so (*i.e.*, the development of any new information), and it will expose itself to a claim for attorney fees under Section 10-55(a) of the Administrative Procedure Act and Section 7 of the Taxpayers’ Bill of Rights Act if we have to protest and defeat this position.

33. On February 5, 2015, the Department issued a Notice of Deficiency to the Cains assessing a personal income tax deficiency for the 2007 Illinois income tax year of \$118,761.00 (tax, penalty and interest) because, as the Department’s Informal Conference Board concluded in November 26, 2014, “Tyler R. Cain’s distribution from TRC Trading Inc. is business income and should be sourced to Illinois.” (Emphasis added). See **Exhibit B** (Notice of Deficiency) and **Exhibit C** (Informal Conference Board, Action Decision).

COUNT I

The Department is collaterally estopped from establishing, contrary to the sworn testimony and the Stipulation of Factual Matters in the *Cain v. Hamer* case, that TRC Trading Inc. had a commercial domicile for purposes of IITA section 1501(a)(2). Therefore the NOD cannot establish the *prima facie* case under IITA section 904(c) that the 2007 distribution by TRC Trading Inc. of capital gain income to Mr. Cain was of Illinois source business income.

34. Plaintiff repeats and realleges the allegations in paragraphs 1 through 33 hereof as though fully set forth herein.

35. The deposition testimony of Mr. Cain and of Mr. Jacobson, and the Department's Stipulation of Factual Matters in the *Cain v. Hamer* litigation established conclusively that TRC Trading, Inc. was not engaged in a trade or business carried during 1996 through 2004.

36. Because TRC Trading Inc. is a corporation it is not a "resident" for purposes of sections 301(a) and 1501(a)(20) of the IITA.

37. Because TRC Trading Inc. had no trade or business during 1996 through 2004 it had no "commercial domicile" within the meaning of that term in section 301(c)(2).

38. The Department is collaterally estopped from asserting that capital gain income earned by TRC Trading, Inc. in 2007 arose from an active trade or business engaged in by TRC Trading, Inc.

39. Because TRC Trading Inc. did not have a commercial domicile in this, or any other, State, the capital gain of TRC Trading, Inc. cannot be allocated to this State under IITA Section 303(b)(3).

40. Because TRC Trading Inc. did not have a commercial domicile in this, or any other, State, the capital gain of TRC Trading, Inc. cannot be allocated to this State under IITA section 301(c)(2)(B).

41. Because the 2007 capital gain income of TRC Trading Inc. could not be allocated to this State under section 303(b)(3) nor under section 301(b)(3), its distribution of the income to Mr. Cain was not a distribution of Illinois source income.

42. Having been adjudged by the Illinois courts to be a resident of Florida, and a nonresident of Illinois, in 2007 Mr. Cain was only subject to tax under the IITA with respect to distributions of Illinois source income made to him by TRC Trading, Inc.

WHEREFORE, Mr. Cain prays that the Tax Tribunal enter an order declaring that: (1) the Department of Revenue is collaterally estopped from establishing, contrary to the testimony and the Stipulation of Factual Matters in the *Cain v. Hamer* case, that TRC Trading Inc. had a commercial domicile within the meaning of IITA section 1501(a)(2), and therefore, (2) that the NOD cannot establish the statutory *prima facie* case under IITA section 904(c) that the 2007 distribution of capital gain income to Mr. Cain from TRC Trading, Inc. was a distribution of Illinois source business income.

COUNT II

In the alternative, either as business income, or as nonbusiness income, TRC Trading Inc.'s distribution of income to Mr. Cain was properly allocated to Mr. Cain's state of residence, Florida.

43. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

44. The Department’s IITA Regulations, in pertinent part concerning Special Apportionment, provides as follows:

§ 100.3380. Special Rules (IITA Section 304)

(c) Sales Factor. The following special rules are established in respect to the Sales Factor in IITA Section 304(a)(3):

* * *

4) Where business income from intangible property cannot readily be attributed to any income producing activity of the person, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor.

86 Ill. Admin. Code § 100.3380(c)(4).

45. Even if the capital gain from the sale of stock held by TRC Trading, Inc. is presumed by the Department to have generated business income, there was no income producing business activity of TRC Trading Inc. identified by the Department to which the capital gain could be readily attributed to in order to allocate the income as Illinois source income of TRC Trading, Inc.

46. The Department’s IITA regulation addressing business and nonbusiness income, 86 Ill. Admin. Code. § 100.3010, provides no guidance for sourcing nonbusiness capital gain income from the disposition of *intangible* assets, and refers to IITA section 301(c)(2) for “rules for the allocation by these persons [persons other than residents] of unspecified items of nonbusiness income.”

47. Under IITA section 301(c)(2) unspecified items of nonbusiness income “in the case of a corporation” can only be sourced to Illinois if the corporation had its commercial domicile in Illinois.

48. TRC Trading, Inc. had a legal domicile in Illinois but no commercial domicile within the meaning of IITA section 1501(a)(2) and 86 Ill. Admin. Code § 100.3210, and thus the capital gain could not be allocated to Illinois under IITA section 301(c)(2)(B)

49. Under IITA section 301(c)(2)(A), unspecified items of nonbusiness income “in the case of an individual, trust, or estate, shall not be allocated to this State.”

50. Mr. Cain was adjudged to be a nonresident of Illinois, and thus the distribution of capital gain income from TRC Trading, Inc. could not be allocated to Illinois under IITA section 301(c)(2)(A).

WHEREFORE, Plaintiff prays that this Tax Tribunal enter an Order declaring that the 2007 capital gain distributed to Mr. Cain by TRC Trading Inc. is not allocable to Illinois as Illinois source income under the IITA either as business or nonbusiness income.

COUNT III

The Department’s NOD, contrary to the testimony and the Stipulation of Factual Matters in *Cain v. Hamer* and without reasonable cause, makes the untrue assertion that Mr. Cain received a distribution of Illinois source business income from TRC Trading, Inc. Therefore, the Department has subjected itself to the payment of the reasonable expenses, including reasonable attorney’s fees, actually incurred by Mr. Cain in defense of the action initiated by the NOD.

51. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

52. Section 10-55 of the Administrative Procedure Act (“APA”), in pertinent part, provides as follows:

Sec. 10-55. Expenses and attorney's fees.

(a) In any contested case initiated by any agency that does not proceed to court for judicial review and on any issue where a court does not have jurisdiction to

make an award of litigation expenses under Section 2-611 of the Civil Practice Law, any allegation made by the agency without reasonable cause and found to be untrue shall subject the agency making the allegation to the payment of the reasonable expenses, including reasonable attorney's fees, actually incurred in defending against that allegation by the party against whom the case was initiated. A claimant may not recover litigation expenses when the parties have executed a settlement agreement that, while not stipulating liability or violation, requires the claimant to take correction action or pay a monetary sum.

5 ILCS 100/10-55(a).

53. The Department was warned by Mr. Cain's counsel, in writing, prior to issuing the NOD that the liability the Department was proposing would be contrary to established, adjudicated facts, without reasonable cause to do so, and would expose itself to potential liability for costs and fees under the APA.

54. Ignoring the testimony and Stipulation of Factual Matters in *Cain v. Hamer*, ignoring the submissions by Mr. Cain's accountant and Mr. Cain's counsel that there was no reasonable basis for the proposed assessment of liability, and ignoring Mr. Cain's counsels admonition that the Department may trigger liability for reasonable expenses and fees Mr. Cain would incur to defend against a proposed assessment, the Department issued the NOD that is the subject of this contested case proceeding.

55. The General Assembly has failed to amend Section 10-55 of the APA to reflect that Civil Practice Law has been replaced by the Illinois Code of Civil Procedure, and to reflect that Supreme Court Rule 137 [Ill. S. Ct. R. 137] preempted former Section 2-611 of the Civil Practice Law. There is currently no Section 2-611 of the Code of Civil Procedure [735 ILCS 5/Art I, *et seq.*]. The Tax Tribunal therefore does not have jurisdiction to make an award of expenses under Section 2-611 of the Civil Practice Law, and thus Section 10-55 of the APA is applicable to this contested case proceeding.

WHEREFORE, Plaintiff prays that the Tax Tribunal enter an Order declaring that the Department, through its NOD, made an untrue allegation, without reasonable cause to do so, and that the Department shall award to Plaintiff the amount of his reasonable expenses and attorney fees incurred to defend against the Department's NOD and in obtaining the award pursuant to Section 10-55 of the APA.

COUNT IV

In issuing an NOD without reasonable cause to take a position contrary to testimony and a Stipulation of Factual Matters in *Cain v. Hamer*, even after being advised that in so doing it would expose itself to an award for reasonable expenses and attorney's fees, the Department acted with intentional or reckless disregard of tax laws and regulations, subjecting itself to suit for damages under Section 5 of the Taxpayers' Bill of Rights.

56. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

57. The Taxpayers' Bill of Rights provides as follows:

Sec. 5. Taxpayer's suits. Taxpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be \$100,000. If a taxpayer's suit is determined by the court to be frivolous the court may impose a penalty on the taxpayer not to exceed \$10,000 to be collected as a tax.

20 ILCS 2520/5.

58. The Department *deliberately chose* to proceed to issue a NOD against Mr. and Mrs. Cain after having been specifically cautioned that proceeding to assessment for the 2007 tax year on a basis factually contrary to the testimony and stipulated facts in *Cain v. Hamer* would expose the Department to potential damages under the Taxpayers' Bill of Rights. The Department *deliberately chose* to proceed to issue an NOD even though it had developed no new facts regarding the 2007 tax year (during which the Cains were locked in litigation with the

Department) from those it had uncovered after more than 6 years of expensive litigation with the Cains in a failed effort to assess liability against them as Illinois residents under the IITA for the 1996 through 2004 tax years, which involved invasive and burdensome discovery of every aspect of Tyler and Talbot Cain's lives and even an illegal procurement of their credit report.

59. During the course of the aforementioned proceedings in *Cain v. Hamer* the Department was advised by Mr. Cain's counsel in the litigation that Talbot D. Cain had died, before having received the full disbursement of funds due under the State Officers and Employees Money Disposition Act in *Cain v. Hamer*. Nevertheless the Department *deliberately chose* to include Talbot D. Cain in the NOD.

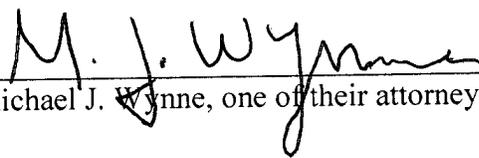
60. The assessment of liability for the 2007 tax year against Tyler and Talbot Cain is the result of intentional or reckless disregard of the tax laws and regulations, for which Tyler Cain is entitled to the maximum amount of damages under the Taxpayers' Bill of Rights.

WHEREFORE, Plaintiff prays that the Tax Tribunal enter an order awarding Tyler Cain the maximum amount of damages allowed under the Taxpayers' Bill of Rights, or such other amount as the Tax Tribunal deems just.

Respectfully submitted,

Tyler R. Cain and Talbot D. Cain (deceased)

By:


Michael J. Wynne, one of their attorneys 

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EXHIBIT A

ILLINOIS OFFICIAL REPORTS
Appellate Court

Cain v. Hamer, 2012 IL App (1st) 112833

Appellate Court Caption	TYLER R. CAIN and TALBOT D. CAIN, Plaintiffs-Appellees and Cross-Appellants, v. BRIAN HAMER, in his official capacity as DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE; THE ILLINOIS DEPARTMENT OF REVENUE; and JUDITH BAAR TOPINKA, in her official capacity as STATE TREASURER of the State of Illinois, Defendants-Appellants and Cross-Appellees.
District & No.	First District, First Division Docket No. 1-11-2833
Filed	July 16, 2012
Held <i>(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)</i>	Where the relevant factors supported the conclusion that plaintiffs had abandoned Illinois and were Florida residents for purposes of the Illinois Income Tax Act during the tax years at issue, they were entitled to summary judgment on their complaint seeking a declaration that they were not required to pay resident Illinois income taxes for those years.
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 06-L-050986; the Hon. Elmer J. Tolmaire III, Judge, presiding.
Judgment	Affirmed; cross-appeal dismissed.

Counsel on
Appeal

Lisa Madigan, Attorney General, of Chicago (Michael A. Scodro, Solicitor General, and Timothy K. McPike, Assistant Attorney General, of counsel), for appellants.

Reed Smith LLP, of Chicago (Michael J. Wynne, Michael D. Richman, and Adam P. Beckerink, of counsel), for appellees.

Panel

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court, with opinion.

Justices Karnezis and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 The defendants, the Illinois Department of Revenue (Department), the Department's Director Brian Hamer, and Illinois State Treasurer Judith Baar Topinka, appeal the decision of the circuit court granting summary judgment to the plaintiffs, Tyler and Talbot Cain, on their complaint for a declaration that they are not required to pay resident Illinois income taxes for the years from 1996 through 2004. On appeal, the parties dispute whether the plaintiffs qualified as Illinois residents during the relevant time period. The plaintiffs have also cross-appealed to argue that, in the event they were residents during the relevant time period, the Department should be barred from collecting their taxes due to certain procedural infirmities. For the reasons that follow, we affirm the judgment of the circuit court on the defendants' appeal, and we dismiss the plaintiffs' cross-appeal as moot.

¶ 2 In August 2006, the Department sent the plaintiffs a notice of tax deficiency, which asserted that the plaintiffs owed \$1,842,582 in unpaid income taxes and penalties for the years from 1996 through 2004. After submitting payment under protest, the plaintiffs filed a complaint seeking a declaration that they were not Illinois residents during the disputed period. Prior to filing cross-motions for summary judgment, the parties stipulated to the facts of the case.

¶ 3 As the stipulation recites, the plaintiffs married "46 years ago" (approximately 1964, by the date of the stipulation's filing) and began living in Illinois, where Mr. Cain worked as a self-employed trader at the Chicago Board of Options Exchange until 1990. They lived in their longtime Illinois home until 1995, when they purchased another lot in Illinois as part of a plan to sell their old home and build a smaller one. They eventually abandoned that plan, and, in August 1995, began work on an addition to their longtime Illinois home.

¶ 4 In November 1995, the plaintiffs executed and filed in Florida a "declaration of domicile" indicating that they had changed their domicile from Illinois to a Florida home they had constructed in 1990. In the document, the plaintiffs renounced their Illinois residency and declared themselves Florida residents. In 1995 and 1996, the plaintiffs

obtained permanent-resident identification cards in Florida. The plaintiffs also held Florida drivers' licenses, voted in Florida, and received Florida jury duty summonses in the relevant time period, and Mr. Cain held a Florida firearm license. They had newspapers delivered to their Florida residence, and Mr. Cain used a cellular telephone with a Florida area code. They also purchased burial plots in Florida.

¶ 5 During the relevant period, the plaintiffs developed relationships with several medical professionals in Florida, but they also continued relationships with Illinois doctors. Likewise, the plaintiffs retained legal advisors in both states. They used Illinois income tax preparers to help them file their federal tax returns, and they made political contributions to Illinois and national candidates, and some other-state candidates, but no Florida candidates.

¶ 6 During the relevant period, the plaintiffs divided their time between Illinois and Florida, with only minimal variation in the time allotment from year to year. In 1996, for example, they spent 159 days in Florida, 161 in Illinois, and 45 elsewhere, while, in 2004, the plaintiffs spent 170 days in Florida, 171 in Illinois, and 24 elsewhere. In total, from 1996 through 2005, the plaintiffs spent 1,700 days in Florida, 1,666 in Illinois, and 284 elsewhere. Testimonial evidence indicated that the plaintiffs had a pattern of going to Florida near the end of October, returning to Illinois for the Christmas holiday, then returning to Florida until May of each year.

¶ 7 The stipulation cites the plaintiffs' July 2001 through August 2004 credit card statements as showing that "73% of their expenditures were made outside of Illinois, and they were making those expenditures outside of Illinois 61% of the time." The plaintiffs maintained private club memberships in both states: their expenditures at those clubs for the years 2003 through 2007 totaled approximately \$236,000 for the Illinois clubs and \$422,500 for the Florida clubs. Mrs. Cain participated in a Florida bridge club, and the plaintiffs were members, board members, or committee members of several organizations in both Florida and Illinois. They attended regularly scheduled meetings at clubs in both states.

¶ 8 Mrs. Cain, an interior designer, renewed her Illinois interior designer license throughout the relevant period, and, on her renewal forms, she did not indicate that her address had changed. However, she never used her decorator's license for business in either Illinois or Florida.

¶ 9 Although the plaintiffs owned companies during the relevant period, they had limited involvement in those companies. They also controlled a foundation that made charitable donations in both Florida and Illinois, but Mr. Cain was shifting the contributions to focus more on Florida charities.

¶ 10 After considering the parties' cross-motions for summary judgment based on these stipulated facts, the circuit court ruled that the plaintiffs were "mere seasonal visitors," not residents, of Illinois. Accordingly, the circuit court granted the plaintiffs' motion for summary judgment and denied the defendants' cross-motion. Because there were other matters pending at the time, including claims for discovery sanctions against the defendants, the circuit court entered a finding that there was no just reason to delay enforcement or appeal of its summary judgment order. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The defendants now appeal.

¶ 11 On appeal, the defendants argue that the circuit court erred in granting the plaintiffs' motion for summary judgment and ruling that they did not owe Illinois income tax from 1996 through 2004. "Summary judgment is proper where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Empress Casino Joliet Corp. v. Giannoulis*, 231 Ill. 2d 62, 68-69, 896 N.E.2d 277 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "We review the circuit court's grant of summary judgment *de novo*." *Empress Casino*, 231 Ill. 2d at 69.

¶ 12 The parties spend some effort disputing the burden of proof applicable to the plaintiffs in this case. The dispute, however, is somewhat misdirected. "[T]he term 'burden of proof' encompasses both the burden of producing evidence that will satisfy a judge of the existence of an alleged fact and the burden of persuading the trier of fact that the alleged fact is true." *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 462, 448 N.E.2d 872 (1983). Here, there are no disputed facts. The parties stipulated to all the relevant facts and submitted the matter to the court for a legal decision. To the extent the stipulated facts establish the plaintiffs' change of residence as a matter of law, the plaintiffs have carried any burden of proof assigned to them. Thus, this burden-of-proof question is no more than a reframing of the real issue on appeal: whether, under the stipulated facts, the plaintiffs were obligated to pay Illinois income tax from 1996 through 2004. We address that issue now.

¶ 13 Section 201(a) of the Illinois Income Tax Act (Act) (35 ILCS 5/201(a) (West 2010)) imposes an income tax "on the privilege of earning or receiving income in or as a resident of this State." The parties focus their arguments on the question of whether the plaintiffs were Illinois residents during the relevant time period. Although there are many Illinois decisions defining the concept of residency in several different contexts, those decisions are not controlling here. As explained in the Department's regulations related to the Act, "[t]he term 'resident' is defined differently for different purposes. For example, an individual may be a 'resident' for Illinois income tax purposes but not a 'resident' eligible to vote." 86 Ill. Adm. Code 100.3020(i) (2012).

¶ 14 In lieu of citing unrelated case law, the parties rely primarily on the controlling statutes and regulations. The first of those statutes, section 1501(a)(20)(A) of the Act, defines the word "resident" as "an individual (i) who is in this State for other than a temporary or transitory purpose during the taxable year; or (ii) who is domiciled in this State but is absent from the State for a temporary or transitory purpose during the taxable year." 35 ILCS 5/1501(a)(20)(A) (West 2010). The Act further explains the term "resident" in section 1501(a)(17), which defines the term "part-year resident" as follows:

"The term 'part-year resident' means an individual who became a resident during the taxable year or ceased to be a resident during the taxable year. Under Section 1501(a)(20)(A)(i) residence commences with presence in this State for other than a temporary or transitory purpose and ceases with absence from this State for other than a temporary or transitory purpose. Under Section 1501(a)(20)(A)(ii) residence commences with the establishment of domicile in this State and ceases with the establishment of domicile in another State." 35 ILCS 5/1501(a)(17) (West 2010).

¶ 15 The Department’s regulations expound on these definitions of “resident”:
“The purpose of the general definition is to include in the category of individuals who are taxable on their entire net income, regardless of whether derived from sources within or without Illinois, all individuals who are physically present in Illinois enjoying the benefit of its government, except those individuals who are here temporarily, and to exclude from this category, all individuals, who, although domiciled in Illinois, are outside Illinois for other than temporary and transitory purposes, and, hence, do not obtain the benefit of Illinois government. If an individual acquires the status of a resident by virtue of being physically present in Illinois for other than temporary or transitory purposes, he remains a resident even though temporarily absent from Illinois. If, however, he leaves Illinois for other than temporary or transitory purposes, he thereupon ceases to be a resident. If an individual is domiciled in Illinois, he remains a resident unless he is outside Illinois for other than temporary or transitory purposes.” 86 Ill. Adm. Code 100.3020(b).

¶ 16 Under the above statutory and regulatory language, individuals are considered Illinois residents if they are present in the state for other than a “temporary or transitory purpose” or are “domiciled” in Illinois but leave for a temporary or transitory purpose. 35 ILCS 5/1501(a)(20)(A) (West 2010). If individuals leave the state for other than a temporary or transitory purpose, or establish domicile elsewhere, they cease to be Illinois residents. 35 ILCS 5/1501(a)(17) (West 2010). The plaintiffs here were admittedly Illinois residents prior to their move to Florida in 1995. The questions for us are whether their move to Florida constituted a change in domicile or a departure from Illinois for “other than a temporary or transitory purpose” so that they lost their Illinois residency, and, conversely, whether their periodic returns to Illinois were for “other for a temporary or transitory purpose” so that they should be classified as Illinois residents.

¶ 17 We begin by examining whether the plaintiffs can be said to have changed their domicile to Florida. Although the Act does not define the term “domicile,” the Department’s regulations do:

“Domicile has been defined as the place where an individual has his true, fixed, permanent home and principal establishment, the place to which he intends to return whenever he is absent. It is the place in which an individual has voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. Another definition of ‘domicile’ consistent with the above is the place where an individual has fixed his habitation and has a permanent residence without any present intention of permanently removing therefrom. An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he retains that domicile until he acquires another elsewhere. Thus, if an individual, who has acquired a domicile in California, for example, comes to Illinois for a rest or vacation or on business or for some other purpose, but intends either to return to California or to go elsewhere as soon as his purpose in Illinois is achieved, he retains his domicile in California and does not acquire a domicile in Illinois. Likewise, an individual who is domiciled in Illinois and who leaves the state

retains his Illinois domicile as long as he has the definite intention of returning to Illinois. On the other hand, an individual, domiciled in California, who comes to Illinois with the intention of remaining indefinitely and with no fixed intention of returning to California loses his California domicile and acquires an Illinois domicile the moment he enters the state. Similarly, an individual domiciled in Illinois loses his Illinois domicile:

1) by locating elsewhere with the intention of establishing the new location as his domicile, and

2) by abandoning any intention of returning to Illinois.” 86 Ill. Adm. Code 100.3020(d).

¶ 18 As the defendants observe in their brief, this definition of “domicile” closely tracks the definition Illinois law ascribes the term generally. See, e.g., *Viking Dodge Inc. v. Hoffman*, 147 Ill. App. 3d 203, 205, 497 N.E.2d 1346 (1986) (“The four elements required for a change of domicile are physical abandonment of the first domicile; an intent not to return to the first domicile; physical presence in the new domicile; and an intent to make that one’s domicile.”). Here, there is no dispute that, in 1995, the plaintiffs physically left their Illinois home, renounced their Illinois residency, physically moved to Florida, and declared Florida their domicile. The difficulty comes in determining whether the plaintiffs “abandon[ed] any intention of returning” to their Illinois home.

¶ 19 After their move, the plaintiffs split their time roughly equally between the two states. Thus, in some sense, the plaintiffs have maintained an intent to return to both Illinois and Florida for approximately half of their time throughout the relevant period. However, as the regulations explain, individuals may have only one domicile, and none of the parties propose that the plaintiffs’ domicile alternated between the two states. Accordingly, this concept of “intent to return” cannot govern our result. Instead, we rely on the concept of domicile as an intended permanent home (and of “return” as a permanent, indefinite, or lengthy return). In that sense, the plaintiffs chose Florida as their domicile. Although they maintained contacts and memberships (and real property holdings) in Illinois after their 1995 move, the plaintiffs changed their voter registrations to Florida, paid Florida income taxes, obtained residency cards and drivers’ licenses in Florida, and even filed a declaration of their Florida residency. Thus, the plaintiffs’ intent is quite clear: they wished to establish Florida as their permanent residence in 1995, even though they planned to keep ties in Illinois and have regular seasonal visits. That is, the plaintiffs intended to live in Florida for half the year and visit Illinois, not the other way around.

¶ 20 Our conception of “domicile” finds harmony with the regulatory explanation of the other major component of a residency analysis under the Act: the idea of individuals’ presence in, or departure from, the state being for a “temporary or transitory purpose.” The Department’s regulations define this phrase at some length:

“Whether or not the purpose for which an individual is in Illinois will be considered temporary or transitory in character will depend upon the facts and circumstances of each particular case. It can be stated generally, however, that if an individual is simply passing through Illinois on his way to another state, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular

engagement, which will require his presence in Illinois for but a short period, he is in Illinois for temporary or transitory purposes, and will not be a resident by virtue of his presence here. If, however, an individual is in Illinois to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to Illinois with no definite intention of leaving shortly thereafter, he is in Illinois for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may also maintain an abode in some other state.” 86 Ill. Adm. Code 100.3020(c).

¶ 21 This prefatory portion of the regulatory definition provides us little guidance. The plaintiffs’ presence in Illinois was not “simply passing through ***, here for a brief *** vacation, or to complete a particular transaction,” or the like, nor was their presence “long or indefinite” or “permanent[] or indefinite[].” 86 Ill. Adm. Code 100.3020(c). The regulations follow, however, with several helpful illustrations:

“1) Example 1. X is domiciled in Fairbanks, Alaska, where he had lived for 50 years and had accumulated a large fortune. For medical reasons, X moves to Illinois where he now spends his entire time, except for yearly summer trips of about three or four months duration to Fairbanks. X maintains an abode in Illinois and still maintains, and occupies on visits there, his old abode in Fairbanks. Notwithstanding his abode in Fairbanks, because his yearly sojourn in Illinois is not temporary or transitory, he is a resident of Illinois, and is taxable on his entire net income.

AGENCY NOTE: If in the foregoing example, the facts are reversed so that Illinois is the state of original domicile and Alaska is the state in which the person is present for the indicated periods and purposes, X is not a resident of Illinois within the meaning of the law, because he is absent from Illinois for other than temporary or transitory purposes.

2) Example 2. Until the summer of 1969, Y admitted domicile in Illinois. At that time, however, to avoid the Illinois income tax, Y declared himself to be domiciled in Nevada, where he had a summer home. Y moved his bank accounts to banks in Nevada, and each year thereafter spent about three or four months in Nevada. He continued to spend six or seven months of each year at his estate in Illinois, which he continued to maintain, and continued his social club and business connections in Illinois. The months not spent in Nevada or Illinois he spent traveling in other states. Y is a resident of Illinois and is taxable on his entire net income, for his sojourns in Illinois are not for temporary or transitory purposes.

AGENCY NOTE: If, in the foregoing example, the facts are reversed so that Nevada is the state of his original domicile, and the state in which the person is present for the indicated periods and purposes, Y is not a resident of Illinois within the meaning of the law because he is absent from Illinois for other than temporary or transitory purposes.

3) Example 3. B and C, husband and wife, domiciled in Minnesota where they

maintain their family home, come to Illinois each November and stay here until the middle of March. Originally they rented an apartment or house for the duration of their stay here but three years ago they purchased a house here. The house is either rented or put in the charge of a caretaker from March to November. B has retired from active control of his Minnesota business but still keeps office space and nominal authority in it. He belongs to clubs in Minnesota, but to none in Illinois. He has no business interests in Illinois. C has little social life in Illinois, more in Minnesota, and has no relatives in Illinois. Neither B nor C is a resident of Illinois. The connection of each to Minnesota, the state of domicile, in each year is closer than it is to Illinois. Their presence here is for temporary or transitory purposes.

AGENCY NOTE: If, in the foregoing example, the facts are reversed so that Illinois is the state of domicile and B and C are visitors to Minnesota, B and C are residents of Illinois.” 86 Ill. Adm. Code 100.3020(c).

¶ 22 The most challenging aspect of this case is the fact that the plaintiffs split their time roughly equally between Florida and Illinois. However, the above examples make clear that this level of time-splitting does not render individuals’ presence in Illinois other than “temporary or transitory.” In the first two examples above, the hypothetical individuals’ three- to four-month yearly trips to another state do not affect their residency, because other factors regarding their intent are considered controlling. The third example is particularly telling. In this example, the hypothetical individuals spend over four months in Illinois and actually own a home in Illinois, but are nonetheless considered Minnesota residents because “[t]he connection of each to Minnesota *** in each year is closer than it is to Illinois.” The same holds true here. Although the plaintiffs maintain some Illinois ties, including social club memberships and the continued ownership of their longtime home, the stipulated facts demonstrate their much stronger connection to Florida. As noted, they spend more money on Florida social clubs, hold drivers’ licenses and residency cards in Florida, and vote in Florida. Mr. Cain uses a Florida telephone number. Although the ties between Illinois and their companies continue, the plaintiffs have distanced themselves from their companies. Likewise, although the plaintiffs’ charitable foundation is still involved in Illinois causes, the plaintiffs have begun to shift its focus to Florida. The plaintiffs also spend more money in Florida than in Illinois, and they have purchased burial plots in Florida. All of these facts demonstrate the plaintiffs’ much stronger connection to Florida than to Illinois. Based on the examples given in the regulations’ definition of “temporary and transitory purpose,” the regularity and duration of the plaintiffs’ visits to Illinois do not affect their residency status in the face of this disparity in connections.

¶ 23 One last portion of the Department’s regulations lends further support to our conclusion that the plaintiffs were not Illinois residents for purposes of the Act during the relevant period. After laying out the above definitions, the Department’s regulations list types of evidence that may help to determine whether an individual is an Illinois resident. Those types of evidence include evidence of “voter registration, automobile or drivers license registration, filing an income tax return as a resident of another state, home ownership or rental agreements, club and/or organizational memberships and participation, telephone and/or other utility usage over a duration of time.” 86 Ill. Adm. Code 100.3020(g)(1). Because we

have already described the plaintiffs' actions at length, we will not repeat those facts to discuss each of these types of evidence individually. Instead, we note that the balance of these factors leads us to conclude that, for purposes of the Act, the plaintiffs were residents of Florida, and not Illinois, during the relevant time period. For that reason, and for the reasons stated above, we reject the defendants' argument that the circuit court erred in granting summary judgment to the plaintiffs.

¶ 24 Although the plaintiffs have filed a cross-appeal, their cross-appeal is devoted to providing another, separate basis for excusing them from Illinois income tax for the relevant time period. In their brief, the plaintiffs explain that their cross-appeal "will be unnecessary to decide if [we] affirm[]" the circuit court's judgment. Because we do, indeed, affirm the circuit court's judgment, we dismiss the cross-appeal as moot.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court and dismiss the plaintiffs' cross-appeal.

¶ 26 Affirmed; cross-appeal dismissed.

EXHIBIT B

Notice of Deficiency
for Form IL-1040, Individual Income Tax Return



February 5, 2015



Letter ID: CNXXXX554X321445

#BWNKMGV
#CNXX XX55 4X32 1445#
TYLER R. and TALBOTDEBUTTS CAIN
ATTN: TYLER R CAIN

316 S BEACH RD
HOBE SOUND FL 33455-2605

Taxpayer ID: XXX-XX-9184
Audit ID: A1423254016
Reporting period: December 2007
Total Deficiency: \$118,671.60
Balance due: \$118,671.60



We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to "Illinois Department of Revenue," write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

If you do not agree, you may contest this notice by following the instructions listed below.

- **If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed but the total penalties and interest are more than \$15,000**, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- **In all other cases**, file a protest with us, the Illinois Department of Revenue, within **60 days** of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at tax.illinois.gov). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case**, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total deficiency under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the balance due in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012

(217) 558-4960

EXHIBIT C



Illinois Department of Revenue

Informal Conference Board
Louise Calvert
100 West Randolph Street, 7-286
Chicago, Illinois 60601
Phone: 312 814-1722
Fax: 312-814-3109

RE: Docket No. 13-0443
Name: Tyler R. Cain
SS#: xxx-xx-9184
Audit ID: A1423254016
Audit Period: 1/1/2005 – 12/31/2008

ACTION DECISION

The Informal Conference Board has reviewed the Illinois Department of Revenue Audit Bureau's proposed adjustments in this matter and finds that the proposed adjustments are correct.

Tyler R. Cain's distribution from TRC Trading Inc is business income and should be sourced to Illinois.

The Taxpayer's Offer of Disposition is rejected.

The Audit Bureau is instructed to conclude and process the audit in a manner consistent with this decision.

Taxpayer Request for Audit Adjustments Denied.

A handwritten signature in cursive script, appearing to read "Laura Riva".

LAURA RIVA
MEMBER, INFORMAL CONFERENCE BOARD

A handwritten signature in cursive script, appearing to read "Brian Stocker".

BRIAN STOCKER
MEMBER, INFORMAL CONFERENCE BOARD

BRIAN WOLFBERG
MEMBER, INFORMAL CONFERENCE BOARD

A handwritten date "11-26-14" in cursive script.

DATE ENTERED