

IN THE ILLINOIS INDEPENDENT
TAX TRIBUNAL

BRIAN K. AND SHELLEY G. TURNER,

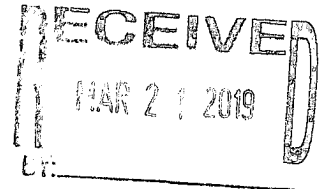
Petitioners,

v.

ILLINOIS DEPARTMENT
OF REVENUE,

Respondent,

No.



19041

PETITION

The Petitioners, Brian K. Turner (“Petitioner”) and Shelley G. Turner, (hereinafter “Petitioner’s wife,” and, collectively with Petitioner, the “Petitioners”), by their attorneys of record, David Kupiec and Natalie Martin of Kupiec & Martin, LLC, hereby petition the Illinois Independent Tax Tribunal to review, and withdraw and/or modify the Notice of Claim Denial (hereinafter “Notice”) issued by the Illinois Department of Revenue (hereinafter “Department”) on January 22, 2019, for the reasons set forth below.

INTRODUCTION

1. Petitioners are individual residents of the State of Washington. The Taxpayer ID associated with Petitioners is XXX-XX-XXXX.

2. Petitioners residence is XXXX, XXXX, Washington and their phone number is XXX-XXX-XXXX.

3. The Department issued the Notice on January 22, 2019, for the reporting period ending December 31, 2016, denying a claim for refund on overpayment of income tax. A copy of the Notice is attached to this Petition.

JURISDICTION

4. The Tax Tribunal has jurisdiction pursuant to 35 ILCS 1010/1-45(a) because the alleged tax liability in question from the Illinois Income Tax Act (hereafter “IITA”) in the aggregate exceeds, \$15,000, exclusive of penalties and interest, and because Petitioners have remitted the \$500 filing fee.¹

BACKGROUND AND RELEVANT FACTS

5. Petitioners are residents of the State of Washington and have been since 2005.

6. Petitioner previously worked as Chief Operating Officer of Company A from August, 2005 through July, 2016.

7. As part of his employment with Company A, Petitioner earned certain stock-based compensation that would vest at various intervals subsequent to the award date.

8. In August 2016, Petitioner joined Company B LLC and Company B Trading (hereafter collectively referred to as “Company B”) as Vice Chairman and Chief Executive Officer.

9. Under the terms of Petitioner’s employment contract with Company B, he was to be paid a “make-whole” bonus. This payment was intended to replace certain previously awarded but unvested Company A stock-based compensation to which Petitioner would forfeit his rights by accepting the position at Company B.

10. As a result of Petitioner resigning from his position with Company A in July 2016, Petitioner forfeited his rights to at least \$XXXXXX in previously awarded but unvested stock-based compensation from Company A.

11. Petitioner was paid the full amount of the “make-whole” bonus in his first paycheck with Company B received in September 2016. Petitioner’s first Company B paycheck was a direct deposit into Petitioner’s bank account located in the State of Washington.

¹ Petitioners will provide further detailed information to the Department.

12. Petitioner did not move to Illinois prior to or after accepting the position at Company B. The Petitioners maintained their home in Washington with their high-school age daughter.

13. Upon commencing employment with Company B in August 2016, Petitioner typically commuted to Company B's Offices in Illinois during each week by flying from Washington to Illinois on Monday morning and returning to Washington on Thursday or Friday. Petitioner leased an apartment in Chicago, Illinois for use during the part of each week that was spent in Illinois.

14. Petitioners intended to maintain their Washington residence at least until their youngest child graduated from high school in 2020.

15. Petitioner left his position with Company B on January 27, 2017.

16. Petitioner did not regularly visit or spend time in Illinois after leaving Company B and as of the date of this Petition continues to reside in Washington.

17. At no time during the 2016 or 2017 tax years at issue did Petitioner change his state of residence or his domicile from the State of Washington.

18. During the tax years at issue Company B withheld Illinois income tax on all compensation paid to Petitioner and issued Petitioner a W-2 for each year reflecting that Illinois income tax was withheld on all of Petitioner's Company B compensation.

19. Petitioners timely filed their 2016 Illinois Form IL-1040 as non-residents in October 2017, designating Petitioner's full Company B compensation as Illinois-source income and claiming the Illinois income tax withheld by Company B as provided on the Company B W-2.

20. Petitioners included the "make-whole" bonus in their 2016 Illinois income on their originally filed Form IL-1040.

21. Petitioners' 2016 federal income tax return, Illinois income tax return and W-2 reported a State of Washington address.

22. Petitioner subsequently timely filed an amended 2016 Illinois return to claim a refund for tax paid only on the "make-whole" bonus. All other income from Company B remained in Petitioners' Illinois taxable income.

23. Petitioners' position per the amended return is that this "make-whole bonus" was not compensation paid in Illinois as the income was not related to any activity engaged in by Petitioners in Illinois.

24. The Department denied this claim for refund of overpayment of income tax.

25. The Department issued the Notice of Claim Denial on January 22, 2019.

APPLICABLE LAWS, REGULATIONS AND CASES

26. Petitioners rely upon the following statutory authority, regulatory authority and court cases to dispute the Department's claim: 35 ILCS 5/201; 35 ILCS 5/302; 35 ILCS 5/304; 35 ILCS 701; 35 ILCS 5/1501(a) and 86 Ill. Admn. Code Sections 100.3020, 100.3100 and 100.7000.

35 ILCS 5/201(a)

(a) In general. A tax measured by net income is hereby imposed on every individual, corporation, trust and estate for each taxable year ending after July 31, 1969 on the privilege of earning or receiving income in or as a resident of this State. Such tax shall be in addition to all other occupation or privilege taxes imposed by this State or by any municipal corporation or political subdivision thereof.

35 ILCS 5/302

(a) In general. All items of compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual who is a nonresident at the time of such payment and all items of deduction directly allocable thereto, shall be allocated to this State.

35 ILCS 5/304(a)(2)(B)

(B) Compensation is paid in this State if:

(i) The individual's service is performed entirely within this State;

- (ii) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or
- (iii) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

35 ILCS 5/701

(a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:

(1) compensation paid in this State (as determined under Section 304 (a)(2)(B) to an individual; or

(2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) of Section 201.

(b) Payment to Residents.

Any payment (including compensation, but not including a payment from which withholding is required under Section 710 of this Act) to a resident by a payor maintaining an office or transacting business within this State (including any agency, officer, or employee of this State or of any political subdivision of this State) and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601 (b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state. Notwithstanding any other provision to the contrary, no amount shall be withheld from unemployment insurance benefit payments made to an individual pursuant to the Unemployment Insurance Act unless the individual has voluntarily elected the withholding pursuant to rules promulgated by the Director of Employment Security.

(c) Special Definitions.

Withholding shall be considered required under the provisions of the Internal Revenue Code to the extent the Internal Revenue Code either requires withholding or allows for voluntary withholding the payor and recipient have entered into such a voluntary withholding agreement. For the purposes of Article 7 and Section 1002 (c) the term "employer" includes any payor who is required to withhold tax pursuant to this Section.

35 ILCS 5/1501(a)(20)

(20) Resident. The term "resident" means:

- (A) 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;
- (B) The estate of a decedent who at his or her death was domiciled in this State;
- (C) A trust created by a will of a decedent who at his death was domiciled in this State; and
- (D) An irrevocable trust, the grantor of which was domiciled in this State at the time such trust became irrevocable. For purpose of this subparagraph, a trust shall be considered irrevocable to the extent that the grantor is not treated as the owner thereof under Sections 671 through 678 of the Internal Revenue Code. Illinois Regulation Section 100.3020 – Effective April 19, 2013

Section 100.3020 Resident (IITA Section 301)

a) General definition. The term "resident" is defined in IITA Section 1501(a)(20) to mean:

- 1) an individual who is in Illinois for other than a temporary or transitory purpose during the taxable year or who is domiciled in Illinois but is absent from Illinois for a temporary or transitory purpose during the taxable year;
- 2) the estate of a decedent who, at his or her death, was domiciled in Illinois;
- 3) a trust created by the will of a decedent who, at his or her death, was domiciled in Illinois; and
- 4) an irrevocable trust, the grantor of which was domiciled in Illinois at the time the trust became irrevocable. For the purpose of this subsection (a)(4), a trust is considered irrevocable to the extent that the grantor is not treated as the owner of the trust under 26 USC 671 through 678.

b) Individuals. 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, and 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 or she remains a resident even though temporarily absent from Illinois. If, however, he or she leaves Illinois for other than temporary or transitory purposes, he or she ceases to be a resident. If an individual is domiciled in Illinois, he or she remains a resident unless he or she is outside Illinois for other than temporary or transitory purposes.

c) Temporary or transitory purposes. 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 or her way to another state, or is here for a brief rest or vacation or to complete a particular transaction, perform a particular contract, or fulfill a particular engagement that will require his or her presence in Illinois for but a short period, he or

she is in Illinois for temporary or transitory purposes and will not be a resident by virtue of his or her presence here. If, however, an individual is in Illinois to improve his or her health and his or her illness is of such a character as to require a relatively long or indefinite period to recuperate, or he or she is here for business purposes that 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 or she is in Illinois for other than temporary or transitory purposes and, accordingly, is a resident taxable upon his or her entire net income even though he or she may also maintain an abode in some other state.

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.

d) Domicile. Domicile has been defined as the place where an individual has his or her true, fixed, permanent home and principal establishment, the place to which he or she intends to return whenever absent. It is the place in which an individual has voluntarily fixed the habitation of himself or herself 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 adoption of some other permanent home. Another definition of "domicile" consistent with this is the place where an individual has fixed his or her habitation and has a permanent residence without any present intention of permanently moving. An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he or she retains that domicile until he or she 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 or her purpose in Illinois is achieved, he or she retains domicile in California and does not acquire domicile in Illinois. Likewise, an individual who is domiciled in Illinois and leaves the State retains Illinois domicile as long as he or she 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 or her California domicile and acquires Illinois domicile the moment he or she enters the State.

Similarly, an individual domiciled in Illinois loses Illinois domicile:

- 1) by locating elsewhere with the intention of establishing the new location as his or her domicile; and
- 2) by abandoning any intention of returning to Illinois.

e) Minors. The domicile of a minor is ordinarily the same as the domicile of his or her parents or guardians. If the father is deceased, the domicile of a minor is ordinarily the same as the domicile of the mother and vice versa. In either case, if the minor's parents are divorced, the domicile of the minor is the same as the domicile of the parent having custody.

f) Presumption of residence. The following create rebuttable presumptions of residence. These presumptions are not conclusive and may be overcome by clear and convincing evidence to the contrary.

- 1) An individual receiving a homestead exemption (see 35 ILCS 200/15-175) for Illinois property is presumed to be a resident of Illinois.
- 2) An individual who is an Illinois resident in one year is presumed to be a resident in the following year if he or she is present in Illinois more days than he or she is present in any other state.

g) Proof of residence or nonresidence

- 1) The type and amount of proof that will be required in all cases to establish residency or no residency or to rebut or overcome a presumption of residence cannot be specified by a general regulation, but will depend largely on the circumstances of each particular case. The taxpayer may submit any relevant evidence to the Department for its consideration. The evidence may include, but is not limited to, affidavits and evidence of: location of spouse and dependents; voter registration; automobile registration or driver's license; filing an income tax return as a resident of another state; home ownership or rental agreements; the permanent or temporary

nature of work assignments in a state; location of professional licenses; location of medical professionals, other healthcare providers, accountants and attorneys; club and/or organizational memberships and participation; and telephone and/or other utility usage over a duration of time. In appropriate instances, the Department may request any relevant evidence that may assist it in determining the taxpayer's place of residence.

2) The location of any corporation, foundation, organization or institution that is exempt from taxation under IRC section 503(c)(3) to which the taxpayer makes financial contributions, gifts, bequests, donations or pledges in any amount qualifying for a deduction as an IRC section 170(a) charitable contribution or as an IRC section 2055(a) bequest, legacy, devise or transfer is not evidence used to establish domicile or nondomicile, or residence or nonresidence, in any state.

3) If an individual is presumed under this Section to be a resident for any taxable year, he or she should file a return for that year even though he or she believes he or she was a nonresident who, as such, would not incur an Illinois income tax liability because he or she would have no income allocable or apportionable to Illinois. The return will enable the individual to avoid the possible imposition of penalties for failure to file under IITA Section 1001 should it later be determined that he or she was a resident for the taxable year. The return should be marked as a nonresident return, though Schedule NR is not required. The return should exhibit the computation of net income as though the individual were a resident. The line on the return provided for entering the tax liability should have the following notation: "No liability –nonresident". The return should be accompanied by a signed statement indicating which presumption of residence the individual was subject to and setting forth in detail the reasons why the individual believes he or she was a nonresident for the taxable year. The return should also be accompanied by any evidence, such as certificates or affidavits, that the individual is able to obtain showing that he or she was a nonresident for the taxable year. If the Department is not satisfied that the individual was a nonresident, it will so inform the individual and provide him or her with an opportunity to submit additional information supporting his or her contention. If the individual fails to submit additional information, or if the additional information submitted does not, when considered with the information appended to the return, overcome the presumption that the individual was a resident for the taxable year, the Department will issue a notice of deficiency asserting a liability against the individual on the following basis:

A) that the individual is a resident for the taxable year; and

B) that the individual's net income for the taxable year is:

i) the amount reflected, with appropriate mathematical error adjustments under IITA Section 903(a)(1), on the return filed by the individual under this subsection (g)(3)(B)(i); or

ii) whatever other amount the Department has determined by an examination under IITA Section 904.

4) An individual who, for any taxable year, believes himself or herself to be a nonresident, but who is presumed to be a resident under this Section, may file a return (including a Schedule NR) as a nonresident if, as a nonresident, he or she incurs an Illinois income tax liability due to income allocated or apportioned to Illinois as a nonresident. However, the return should be accompanied by a signed statement indicating which presumption of residence the individual is subject to and setting forth in detail the reasons why the individual believes he or she was a nonresident for the taxable year. The return should also be accompanied by any evidence, such

as certificates or affidavits, that the individual is able to obtain showing that he or she was a nonresident for the taxable year. If the Department is not satisfied that the individual was a nonresident, it will so inform the individual and provide him or her with an opportunity to submit additional information supporting his or her contention. If the individual fails to submit additional information, or if the additional information submitted does not, when considered with the information appended to the return, overcome the presumption that the individual was a resident for the taxable year, the Department will issue a notice of deficiency asserting a liability against the individual on the following basis:

- A) that the individual was a resident for the taxable year;
- B) that the individual's net income for the taxable year is:
 - i) his or her entire base income, as reflected on the return with appropriate mathematical error adjustments under IITA Section 903(a)(1), less the appropriate standard exemption prescribed by IITA Section 204; or
 - ii) his or her entire base income, as determined by the Department in an examination under IITA Section 904, less the appropriate standard exemption prescribed by IITA Section 204.

...

i) Resident: Legal Definition: Usage. The 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 (see IITA Section 5-1501(a)(20) with Sections 3-1 through 3-4 of the Election Code [10 ILCS 5/3-1 through 3-4]). Similarly, a person may be a resident of Illinois for Illinois income tax purposes and also a resident of another state for purposes of that state's income tax law (see IITA Section 5-1501(a)(20) with Ky. Rev. Stat. Ann. Section 141.010(17)). (Source: Amended at 37 Ill. Reg. 5823, effective April 19, 2013)

Section 100.3100 Compensation (IITA Section 302)

a) General definition

Compensation is defined in IITA Section 1502(a)(3) to mean wages, salaries, commissions and any other form of remuneration paid to employees for personal services. The term is thus comparable to the term "wages" as used in 26 U.S.C. Section 3401(a), except that the exceptions set forth in the Code section are inapplicable for purposes of Article 3 of the Act. (See Section 100.7000 for definition of compensation subject to withholding.)

b) Employee

Compensation is defined as remuneration for personal services performed by an "employee". If the employer-employee relationship does not exist, remuneration for services performed does not constitute "compensation." The term "employee" includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term has the same meaning under the Illinois Income Tax Act as under 26 U.S.C.

Section 3401(c) and 26 CFR 31.3401(c)-1.

c) Types of compensation

The name by which remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, and pensions and retired pay are compensation within the meaning of the statute if paid for services performed by an employee for his employer.

Section 100.7000 Requirement of Withholding (IITA Section 701)

a) General rules. Every employer maintaining an office or transacting business within this State and required under the provisions of 26 USC 3401 through 3404 to withhold and pay federal income tax on compensation paid in this State (see Section 100.7010 of this Part) to an individual is required to deduct and withhold from such compensation for each payroll period (as defined in 26 USC 3401), an amount computed in accordance with IITA Section 701 and 702. Illinois income tax is not required to be withheld on any compensation paid in this State of a character which is not subject to federal income tax withholding (whether or not such compensation is subject to withholding for federal taxes other than income tax, e.g., F.I.C.A. (Social Security taxes). (As to what constitutes "transacting business within this State", see Section 100.7020 of this Part).

United States and Illinois Court Cases

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

Goldberg v. Sweet, 488 U.S. 252 (1989)

Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175 (1995)

Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct 1787 (2015)

Cain v. Hamer, 2012 IL App (1st) 112833 (July 16, 2012)

Corbin v. Illinois Department of Revenue, Illinois Independent Tax Tribunal, 14 TT 9 (July 15, 2015)

**ERROR I – FOR 2016 ILLINOIS INCOME TAX PURPOSES, PETITIONER WAS A
NON-RESIDENT AS HE NEVER CHANGED HIS STATE OF WASHINGTON
RESIDENCY AND PETITIONER HAD NO INTENT TO DO SO**

27. Petitioners reallege and reincorporate paragraphs 1-26 of the Petition herein.

28. Section 201(a) of the IITA imposes an income tax “on the privilege of earning or receiving income in or as a resident of this State”, 35 ILCS 5/201(a), including compensation paid to Illinois residents, 35 ILCS 5/304(a)(2)(B).

29. Section 1501(a)(20)(A) of the IITA defines “resident” as: “an individual 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).

30. Moreover, 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)(20)(A)(ii).

31. Although the term “domicile” is not defined in the IITA, the Department’s regulations define “domicile” as:

d) Domicile. Domicile has been defined as the place where an individual has his or her true, fixed, permanent home and principal establishment, the place to which he or she intends to return whenever absent. It is the place in which an individual has voluntarily fixed the habitation of himself or herself 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 adoption of some other permanent home. Another definition of "domicile" consistent with this is the place where an individual has fixed his or her habitation and has a permanent residence without any present intention of permanently moving. An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he or she retains that domicile until he or she 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 or her purpose in Illinois is achieved, he or she retains domicile in California and does not acquire domicile in Illinois. Likewise, an individual who is domiciled in Illinois and leaves the State retains Illinois domicile as long as he or she 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 or her California domicile and acquires Illinois domicile the moment he or she enters the State. Similarly, an individual domiciled in Illinois loses

Illinois domicile: 1) by locating elsewhere with the intention of establishing the new location as his or her domicile; and 2) by abandoning any intention of returning to Illinois.

86 Ill. Admin. Code 100.3020(d).

32. Moreover, the Illinois Appellate Court in Cain held that the underlying facts must show that Petitioners simultaneously abandoned the State of Washington by leaving that state for an indefinite period and established a presence in the State of Illinois that was more than temporary or transitory. Cain v. Hamer, 2012 IL App (1st) 112833 (July 16, 2012).

33. The Illinois Independent Tax Tribunal added that the Department must also review the underlying facts and circumstances to determine the strength of Petitioners' connection with each of those states. Corbin v. The State of Illinois Department of Revenue, Illinois Independent Tax Tribunal 14 TT 9 (July 15, 2015).

34. Furthermore, Regulation Section 100.3020(g)(1) expressly states:

The type and amount of proof that will be required in all cases to establish residency or no residency or to rebut or overcome a presumption of residence cannot be specified by a general regulation, but will depend largely on the circumstances of each particular case. The taxpayer may submit any relevant evidence to the Department for its consideration. The evidence may include, but is not limited to, affidavits and evidence of: location of spouse and dependents; voter registration; automobile registration or driver's license; filing an income tax return as a resident of another state; home ownership or rental agreements; the permanent or temporary nature of work assignments in a state; location of professional licenses; location of medical professionals, other healthcare providers, accountants and attorneys; club and/or organizational memberships and participation; and telephone and/or other utility usage over a duration of time. In appropriate instances, the Department may request any relevant evidence that may assist it in determining the taxpayer's place of residence.

86 Ill. Admin. Code 100.3020(g)(1).

35. The facts stated above clearly state that Petitioner commuted to the State of Illinois for his employment at Company B starting in August 2016 and rented a temporary apartment in the State of Illinois. He lived in this apartment during the week but typically returned to the State of Washington on weekends. He did not obtain an Illinois driver's license, change his voter registration to vote in the State of Illinois, register his vehicle in the State of

Illinois or change any of his social or professional affiliations from the State of Washington to the State of Illinois.

36. Petitioner's family did not move from the family home and remained in the State of Washington.

37. Petitioner never intended to move to the State of Illinois permanently.

38. Petitioner's family never intended to move to the State of Illinois permanently and in fact, never resided in the State of Illinois.

39. Based on the information provided above, it is unequivocally clear that Petitioner was not a resident of the State of Illinois and never intended to become a resident of the State of Illinois for Illinois income tax purposes pursuant to 35 ILCS 5/201, 35 ILCS 5/304, 35 ILCS 5/1501, Regulation 100.3020, the Illinois Appellate Court Cain decision and the Illinois Independent Tax Tribunal Corbin Summary Judgment Order. Accordingly, the Department should withdraw the Notice of Denial and grant the refund requested.

ERROR II – PETITIONER'S "MAKE-WHOLE" BONUS WAS NOT COMPENSATION PAID IN ILLINOIS PURSUANT TO IITA SECTION 304(a)(2)(B)

40. Petitioners reallege and reincorporate paragraphs 1-26 of the Petition herein.

41. Petitioner was paid a "make-whole" bonus based on his Company A prior employment and compensation foregone by virtue of joining Company B.

42. Under IITA Section 302(a), all items of compensation that are "paid in Illinois" to a nonresident at the time of such payment are allocated to Illinois. 35 ILCS 5/302(a).

43. Moreover, IITA Section 304(a)(2)(B) expressly provides that:

(B) Compensation is paid in this State if:

(i) The individual's service is performed entirely within this State;

(ii) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or

(iii) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some

part of the service is performed, but the individual's residence is in this State.
35 ILCS 5/304(a)(2)(B).

44. This “make-whole” bonus was included in the Petitioner’s Company B compensation for the first pay period following his August 2016 start date (payment dated September 16, 2016).

45. The only requirements for payment of the “make-whole” bonus expressly stated in Petitioner’s Company B employment contract were that in the first pay period “(i) you have not given notice of your intent to voluntarily resign your employment with Good Reason and (ii) Company B has not terminated your employment for Cause.”

46. It is clear from this clause that the “make-whole” bonus was not related to Petitioner’s Company B employment or to any service or services performed for Company B in the State of Illinois.²

47. Illinois Regulation Section 110.3100 notes that “bonuses...are compensation within the meaning of the statute if paid for services performed by an employee for his employer.”

48. It is clear from the language that this “make-whole” bonus had nothing to do with services performed by Petitioner for his Illinois employer (Company B). The bonus was paid in the first paycheck and had nothing to do with any Illinois services Petitioner performed.

49. Based on the information provided under ERROR II above, Petitioners contend that the Department should withdraw the Notice of Denial and grant the refund requested.

ERROR III – PETITIONER’S “MAKE-WHOLE” BONUS WAS MISTAKENLY INCLUDED IN ILLINOIS INCOME ON HIS W-2 AND ILLINOIS INCOME TAX WAS MISTAKENLY WITHHELD BY HIS EMPLOYER

50. Petitioners reallege and reincorporate paragraphs 1-26 of the Petition herein.

² An Administrative Law Judge found that “the signing bonus and the option year buy-out provision should not be considered remuneration for services performed and thus should not be allocated to Illinois under 35 ILCS 5/304(a)(2)(B). See, 35 ILCS5/302(a).” Illinois Administrative Hearing IT 01- 6 (March 23, 2001)

51. Petitioners contend that the “make-whole” bonus at issue should not have been subject to Illinois income tax withholding as the it was not “compensation paid in this State.”

52. Illinois Regulation Section 100.7000 provides that:

Every employer maintaining an office or transacting business within the State of Illinois and required under the provisions of 26 USC 3401 through 3404 to withhold and pay federal income tax on compensation paid in the State of Illinois to an individual is required to deduct and withhold from such compensation for each payroll period an amount computed in accordance with IITA Section 701 and 702. 86 Ill. Adm. Code 100.7000.

53. Moreover, IITA Section 701 provides that withholding is required with respect to “compensation paid in this State.” 35 ILCS 5/701.

54. As indicated above, nonresidents are subject to Illinois income tax withholding and W-2 reporting if the “compensation is paid in this State.”

55. Since the “make-whole” bonus at issue was paid to Petitioner, a State of Washington resident, and related directly to his activities in the State of Washington for Company A and not to his activities in the State of Illinois for Company B, IITA Section 701 withholding requirements do not apply. Moreover, since the Illinois withholding requirements do not apply to the “make-whole” bonus at issue, such amounts should also not have been reported as Illinois compensation on Petitioner’s W-2 for the period at issue.

56. Based on the information provided under ERROR III above, Petitioners contend that the Department should withdraw the Notice of Denial and grant the relief requested pursuant to IITA Section 701 as well as Regulation Section 7000.

**ERROR IV - THE DENIAL OF PETITIONERS’ REFUND CLAIM
DISCRIMINATES AGAINST INTERSTATE COMMERCE AND VIOLATES THE
COMMERCE CLAUSE AS IT FAILS THE INTERNAL CONSISTENCY TEST**

57. Petitioners reallege and reincorporate paragraphs 1-26 of the Petition herein.

58. Petitioners contend that the Department’s imposition of Illinois income tax on the “make-whole” bonus at issue places a higher overall tax burden on non-residents who engage in business in Illinois than it does on Illinois residents who conduct business solely in Illinois.

59. The United State Supreme Court provides a four-prong test to determine if a state tax unconstitutionally burdens interstate commerce under the United States Commerce Clause, which looks to whether the tax at issue: 1) is applied to an activity with a substantial nexus to the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

60. The United States Supreme Court also set forth an “internal consistency” and “external consistency” test to determine the fair apportionment prong of the test. Goldberg v. Sweet, 488 U.S. 252, 260-261 (1989).

61. A tax is internally consistent when interstate commerce does not bear more tax than intrastate commerce if every State were to impose the same tax. Oklahoma Tax Commission v. Jefferson Lines, Inc. 514 U.S. 175, 185 (1995). In this case Illinois is attempting to tax 100% of a nonresident “make-whole” bonus representing services provided for a prior employer outside the State of Illinois.

62. Petitioners also note that the United States Supreme Court more recently explained the internal consistency test as:

“This test, which helps courts identify tax schemes that discriminate against interstate commerce, ‘looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.’”
Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct. 1787, 1802 (2015).

63. Accordingly, Petitioners contend that the Department’s attempt to tax 100% of the “make-whole” bonus does not comply with the four-prongs of the Complete Auto test resulting in the failure of the internal consistency test and a violation of the Commerce Clause.

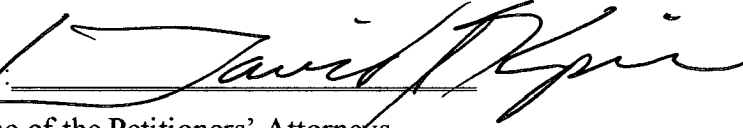
64. Based on the information provided under ERROR IV above, Petitioners contend the Department’s taxation of 100% of the “make-whole” bonus violates the Commerce Clause and the Department should withdraw the Notice of Denial at issue and grant the refund requested.

CONCLUSION AND RELIEF REQUESTED

THEREFORE, as supported by the facts and ERROR I, ERROR II, ERROR III and ERROR IV presented above, the Department is required to withdraw, cancel and/or modify the Notice of Claim Denial issued to Petitioners on January 22, 2019 and issue Petitioners the requested refund at issue plus interest. We respectfully request that the Tax Tribunal rule in favor of Petitioners.

Respectfully Submitted,

Brian K. and Shelley G. Turner

By: 
One of the Petitioners' Attorneys

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Attorney No. 58817

IN THE INDEPENDENT TAX TRIBUNAL

BRIAN K. AND SHELLEY G. TURNER)	Doc.
Petitioners)	
Vs.)	
THE ILLINOIS DEPARTMENT OF)	
REVENUE)	
Respondent)	

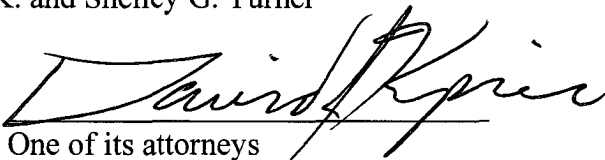
NOTICE OF FILING

TO:
Illinois Department of Revenue
100 W. Randolph St.
SUITE 7-900
Chicago, IL 60601

Please take note that on March 21, 2019 the undersigned representative for Brian K. and Shelley G. Turner, filed with the Illinois Independent Tax Tribunal, 160 N. LaSalle St. Room 506, Chicago, IL 60601 a Petition, a copy of which is attached and served on you.

Date: March 21, 2019

Respectfully Submitted,
Brian K. and Shelley G. Turner


By: 
One of its attorneys

David J. Kupiec
Kupiec & Martin, LLC
600 West Van Buren Street, Ste 202
Chicago, Illinois 60607

CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **Petition** to be served upon other counsel of record herein by causing the same to be delivered in person before the hour of 5:00p.m. on the 21st day of March, 2019.

Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

By: 
One of its attorneys

David J. Kupiec
Kupiec & Martin, LLC
600 West Van Buren Street, Ste 202
Chicago, Illinois 60607

Notice of Claim Denial
for Form IL-1040-X, Amended Individual Income Tax Return



#BWNKMGV
#CNXX X1X2 9295 6967#
BRIAN K. and SHELLEY G. TURNER

January 22, 2019



Letter ID: CNXXX1X292956967

Account ID:

Reporting period:

December 31, 2016

Dear Taxpayer:

We are writing regarding your 2016 Form IL-1040-X, Amended Individual Income Tax Return, dated September 17, 2018

Based on our review, we denied your claim for refund of overpayment of income tax. This review is not the result of an audit.

If you do not agree with our determination and the amount of this tax deficiency, exclusive of penalty and interest, is

- \$15,000 or less, you must 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 our denial, and if requested, grant you or your authorized representative an administrative hearing. Your protest must be filed by sending us a completed Form EAR-14, Format for Filing a Protest for Income Tax. You should include with your protest all documentation supporting your refund claim, especially any documents requested in this letter. If we do not receive your protest within 60 days, this denial shall become final. A protest of this notice does not preserve your rights under any other notice.
- more than \$15,000, you may 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.). Note: If no tax deficiency is assessed but the total penalties and interest is more than \$15,000, you may file a petition with the Tribunal.

Under Section 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 2a.1), you may instead 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, etc.

We determined that Schedule NR, Column B, Line 5 remains [REDACTED]

We corrected the Illinois base income on your Schedule NR, Nonresident and Part-Year Resident Computation of Illinois Tax, Step 5. We changed the amount of wages on your Schedule NR to agree with the Illinois wages on your W-2 forms. We tax wages earned in Illinois regardless of whether you earned these wages while you were an Illinois resident, a nonresident, or part-year resident.

If you disagree with the changes made and you are

- a nonresident or part-year resident of Illinois, send us a statement from your employer, on company letterhead, stating the correct amount of Illinois wages and Illinois tax withheld along with your protest. We will not accept a letter from a tax preparer.
- a U.S. nonresident alien, send us copies of Pages 1, 2, and 5 of your federal Form 1040NR or copies of Pages 1 and 2 of your federal Form 1040NR-EZ, U.S. Nonresident Alien Income Tax Return along with your protest