BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

MARC J. FLEURY & NATHALIE MASON-FLEURY,	*	
Petitioners,	*	
	*	**TAX TRIBUNAL DOCKET NO.:**
v.	*	**TAX – IIT - 1532748 & 1552226**
	*	
LYNNETTE T. RILEY, in her official capacity as COMMISSIONER, GEORGIA DEPARTMENT OF REVENUE,	*	
Respondent.	*	

DECISION

2015 – 6 Ga. Tax Tribunal, December 1, 2015

I. INTRODUCTION

Nathalie Mason-Fleury and her husband, Marc Fleury, ("Petitioners") challenge Official Assessments and Demands for Payment issued by the Georgia Department of Revenue ("Respondent" or "Department") seeking income tax from the Petitioners for tax years 2009, 2010, 2011, and 2012. The issue in this case is whether the Petitioners, who moved abroad in 2008, ceased to be Georgia residents for Georgia income tax purposes. The hearing in this matter was held on October 27, 2015. The Petitioners were represented by William France, Esq. The Respondent was represented by Mitchell Watkins, Esq. For the reasons stated herein, the Assessments and Demands for Payment for tax years 2009, 2010, 2011, and 2012 are **REVERSED**.

II. FINDINGS OF FACT

1.

Nathalie Mason-Fleury was born in Atlanta, Georgia in 1972. She attended high school

in Atlanta, with the exception of one year when she studied abroad in Rennes, France. Mrs. Mason-Fleury attended Wellesley College in Massachusetts, where she met her husband, Marc Fleury. Mr. Fleury was born in 1968, in Paris, France. Mr. Fleury has French and American citizenship.[1] (Testimony of Mrs. Mason-Fleury; Exhibits R-10(B), R-10(I).)

2.

The Petitioners were married in 1995. Subsequently, the couple lived in Paris, France for two years, and California for three years. The Petitioners moved to Atlanta, Georgia in 2001. The Petitioners have four children. (Testimony of Mrs. Mason-Fleury; Exhibit R-10(I).)

3.

In March 2001, Mrs. Mason-Fleury obtained a Georgia driver's license, which she currently maintains. (Exhibit R-10(I).)

4.

On May 30, 2001, the Petitioners purchased a home at 2520 Sharondale Drive, N.E., Atlanta, Georgia 30305 ("Sharondale Drive"). (Exhibit R-10(Q).)

5.

Mr. Fleury is a software entrepreneur who started JBoss, a world-wide software company, which he sold in 2006. The Petitioners were able to retire after the sale of JBoss. In June 2008, however, Mr. Fleury founded Open Remote, Inc. On the application for certificate of authority for foreign corporation, Mr. Fleury provided the Sharondale Drive address as the principal office mailing address and the address of the registered office address in Georgia. On June 24, 2008, Open Remote, Inc. was licensed to do business in Georgia. (Testimony of Mrs. Mason-Fleury; Exhibits R-10(U), R-10(W), R-10(X), R-10(Y).)

[1] Mr. Fleury and Mrs. Mason-Fleury have French and U.S. passports and use both while traveling. (Testimony of Mrs. Mason-Fleury; Exhibits P-H, P-J.)

6.

On June 27, 2008, the Petitioners purchased another property in Atlanta, Georgia at 133 Blackland Road, N.W. ("Blackland Road"). The property was composed of approximately two acres of land and a house. The Petitioners demolished the existing house in order to construct a new house on the property. According to Mrs. Mason-Fleury, this property served investment purposes. (Testimony of Mrs. Mason-Fleury; Exhibit R-10(O).)

7.

At some point in 2008, the Petitioners decided to move their family to Madrid, Spain to be closer to Mr. Fleury's parents who live in Madrid.[2] In preparation for moving to Spain, the Petitioners took the following steps:

A. notified their children's schools that they would not re-enroll;

B. obtained their children's academic records in order to enroll them in school in Madrid;

C. obtained health insurance in Spain;

D. transferred their dental and certain medical records from Georgia to Spain;

E. obtained an apartment in Madrid; and

F. changed their membership status at the Piedmont Driving Club from resident to non-resident.

Although they considered renting the Sharondale Drive house, the family instead used it as a vacation home in order to visit Mrs. Mason-Fleury's family who still resided in Atlanta during the month of July and two weeks at Christmas each year. Mrs. Mason-Fleury's father managed the Sharondale Drive house after they moved. (Testimony of Mrs. Mason-Fleury; Exhibits P-B, P-C, P-E, R-10(I).)

[2] The Respondent averred that the Petitioners decided to move to Spain for better tax treatment based on a statement Mr. Fleury wrote in a blog regarding Spain's lack of a "wealth tax." (Exhibit R-16.) The blog, however, does not undermine Mrs. Mason-Fleury's credible testimony that they moved to Spain to be closer to Mr. Fleury's family.

8.

Mrs. Mason-Fleury testified that she did not know how long they would stay in Spain, and that the move was for an indefinite duration.[3] Mr. Fleury signed a three-year lease, with an option to renew, for an apartment in Madrid, which began on August 1, 2008.[4] When the Petitioners moved, they took the furniture, clothing, and books that "made a house a home." The Petitioners spent approximately $10,000 in moving expenses to move those items. The Petitioners enrolled their children in private school in Madrid. (Testimony of Mrs. Mason-Fleury; Exhibits P-C, P-D.)

9.

Mr. Fleury and the Petitioners' four children had French citizenship and passports. The Petitioners also obtained a Spanish tax identification number, called an NIE (Número de Identificación de Extranjero). Mrs. Mason-Fleury secured a Spanish Residency Card in 2008, granting her legal resident status until 2013. Mrs. Mason-Fleury pursued French citizenship while she lived abroad, which she acquired on April 23, 2009, which negated the 2013 limitation of her legal residence. (Testimony of Mrs. Mason-Fleury; Exhibits P-F, P-G, P-I, R-10(A), R-10(B), R-10(C), R-10(D), R-22.)

10.

On February 6, 2009, Mr. Fleury obtained a Spanish driver's license. The Petitioners also purchased a minivan in Spain, for which they paid a car tax in Madrid. (Testimony of Mrs.

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[3] Mrs. Mason-Fleury's testimony was credible that the family did not have a definite end date in mind during their move. To impeach Mrs. Mason-Fleury, the Respondent offered two blog entries written by Mr. Fleury, who was not called to testify. Both entries were written prior to their move. The first blog entry, written on June 12, 2008, stated, "For my ATL/US friends, we are coming back. This is a short term arrangement. We just bought land in ATL and we are building a house. So this is a 2 or 3 year affair, we are ATL bound." (Exhibit R-16.) In the second blog entry, written on July 23, 2008, Mr. Fleury wrote, "We are coming back. We just bought some land in Atlanta, and while we are building I intend to cool it off in Madrid. It will take us 2-3 years. We have time. Madrid is a good place to be." (Exhibit R-17.) These blogs alone, without more, did not undermine Mrs. Mason-Fleury's credible testimony regarding the family's intent.

[4] The Petitioners exercised their option to renew after three years. (Testimony of Mrs. Mason-Fleury.)

Mason-Fleury; Exhibits P-K, P-L; R-10(I).)

11.

On March 11, 2009, Mr. Fleury shipped a new car to the Sharondale Drive house. The Petitioners maintained insurance coverage on that and other cars that remained at the Sharondale Drive house. (Exhibits R-10(I), R-20.)

12.

Between 2008 and 2012, the Petitioners spent approximately six weeks each year at the Sharondale Drive house. (Testimony of Mrs. Mason-Fleury; Exhibit R-10(I).)

13.

On July 18, 2012, the Petitioners moved back to Atlanta, Georgia. Mrs. Mason-Fleury testified that the family returned to the U.S. because she had concerns for her father's health. The Petitioners moved back to the house on Sharondale Drive. They moved to the house on Blackland Road in February 2013. (Testimony of Mrs. Mason-Fleury; Exhibit P-M.)

14.

W. Barry Henry, a partner at Smith, Adcock and Company, has been the Petitioners' CPA since 2002. Mr. Henry assisted the Petitioners with preparing their federal and state returns for 2008. (Testimony of Mr. Henry, Mrs. Mason-Fleury.)

15.

On October 7, 2009, the Petitioners filed a part-year resident Georgia Form 500 for taxable year 2008, which reflected a substantial federal adjusted gross income. The Petitioners indicated therein that they resided in Georgia from January 1, 2008 until July 31, 2008. Mr. Henry testified that he never spoke with the couple about their intent to return to Georgia. The Department accepted the 2008 part-year return and did not conduct an audit, or in any way

challenge the Petitioners' implied declaration of residency change from Georgia to Madrid, Spain.[5] (Testimony of Mr. Henry, Mrs. Mason-Fleury; Exhibit R-5.)

16.

Petitioners claimed a homestead exemption on the Sharondale Drive house for city of Atlanta taxes and Fulton County property taxes for taxable year 2008. In 2009, Mrs. Mason-Fleury removed the homestead exemption from the Sharondale Drive house. (Testimony of Mrs. Mason-Fleury; Exhibit P-A.)

17.

The Petitioners filed Spanish tax declarations for taxable years 2009, 2010, and 2011. The Petitioners engaged Price Waterhouse Cooper ("PWC") to prepare their Spanish income tax returns. (Testimony of Mrs. Mason-Fleury; Exhibits R-10(Petitioners' A), R-10(Petitioners' B), R-10(Petitioners' C), R-10(Petitioners' D).)[6]

18.

The Petitioners filed a federal Form 1040 for taxable years 2008, 2009, 2010, 2011, and 2012. On the 2010 Form 1040, the Sharondale Drive address was listed as their home address. (Testimony of Mrs. Mason-Fleury; Mr. Henry; Exhibit R-6.)

19.

The Petitioners did not file individual income tax returns in Georgia for tax years 2009, 2010, or 2011. (Testimony of Mrs. Mason-Fleury.)

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[5] Mr. Henry's testimony insinuated that filing the part-year return was tantamount to a declaration of residency change from Georgia to Spain. (See testimony of Mr. Henry.) It is easy to see how the taxpayers and even sophisticated tax professionals could be misled by the Department's election not to audit—or even inquire through a residency questionnaire—such a dramatic declaration of Georgia taxpayer liability status based on the abandonment of the taxpayer's residency at that time, especially considering the amount of money at stake that year.

[6] Mrs. Mason-Fleury stated that the Petitioners did not file returns in Spain in 2008 and 2012 because Spain does not require part-year returns. (Testimony of Mrs. Mason-Fleury.)

20.

On October 21, 2013, the Petitioners filed a part-year resident Georgia Form 500 for taxable year 2012. The Petitioners indicated that they were Georgia residents from July 15, 2012 to December 31, 2012. (Testimony of Mrs. Mason-Fleury; Exhibit R-7.)

21.

At the Department's request, Mrs. Mason-Fleury submitted a "Residency Questionnaire and Document Request" on September 26, 2014. Based on her responses, the Department determined that the Petitioners were legal residents of Georgia during their move to Spain in 2008 through 2012 within the meaning of O.C.G.A. § 48-7-1. The Department issued Official Assessment and Demand Letter ID L0917040656 for taxable year 2009, seeking tax in the amount of $140,251.00, a penalty of $35,062.80, and interest of $84,150.60. The Department issued Official Assessment and Demand Letter ID L0362284304 for taxable year 2010, seeking tax in the amount of $44,077.00, a penalty of $15,497.75, and interest of $26,917.76. The Department issued Official Assessment and Demand Letter ID L0229125648 for taxable year 2011, seeking tax in the amount of $67,402.00, a penalty of $19,703.68, and interest of $24,264.72. The Department issued Official Assessment and Demand Letter ID L0580437920 for taxable year 2012, seeking additional tax in the amount of $67,464.00, a penalty of $20,887.96, and interest of $16,191.36. (Exhibits R-1, R-2, R-3, R-4, R-10(I).)

22.

On January 9, 2015, the Petitioners filed a tax tribunal petition, Docket No. Tax-IIT-1532748, appealing the Department's assessment for the 2010 tax year. On April 29, 2015, the Petitioners filed a tax tribunal petition, Docket No. Tax-IIT-1552226, appealing the Department's assessments for the 2009, 2011, and 2012 tax years. In an order entered on

October 21, 2015, the Tribunal consolidated both cases for trial.

III. CONCLUSIONS OF LAW

1.

The standard of review in all proceedings before the Georgia Tax Tribunal are *de novo* in nature, and the evidence presented is not limited to the evidence considered by the Department. Ga. Comp. R. & Regs. 616-1-3-.11(a). De novo judicial review is defined as "a court's *nondeferential* review of an administrative decision . . . ." Black's Law Dictionary (8th ed. 2004) (emphasis added). The Tribunal is therefore required to make an "independent determination of the issues." See United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 368 (1967).[7]

2.

The United States taxes its citizens on their world-wide income irrespective of where they reside, subject only to credits or exclusions permitted under the Internal Revenue Code. I.R.C. § 61; Cook v. Tait, 265 U.S. 47, 54-56 (1924); see also I.R.C. §§ 861-989. Because Georgia taxable income is derived from federal adjusted gross income, taxpayers residing in Georgia are likewise subject to taxation on their world-wide income, subject only to certain state-specific adjustments. See O.C.G.A. §§ 48-7-20, 48-7-27 (imposing tax on any income, regardless of source). The Petitioners are therefore subject to Georgia taxation on world-wide income if they were legal residents[8] of Georgia during the assessment period. If the Petitioners,

[7] The Respondent argues that the Commissioner's determination regarding the Petitioners' residency status is entitled to "greater deference than under a preponderance of the evidence standard of review." This argument, however, conflates the standard of review—which addresses deference—with the standard of proof—which is "[t]he degree or level of proof demanded in a specific case, such as . . . preponderance of the evidence." See Black's Law Dictionary (7th ed. 1999); see also Jones v. Comm'r, 927 F.2d 849, 852 (5th Cir. 1991) (explaining that the court may "freely substitute its judgment" for that of the U.S. Tax Court's under a de novo standard of review).

[8] Under Georgia law, the terms "legal resident" and "domiciliary" are synonymous terms that are used interchangeably in this context. Petitioner F-1 v. Comm'r, TAX-IIT-134974, 6-7 (Ga. Tax Tribunal Dec. 10, 2015) (internal citations omitted).

however, were "taxable nonresidents" of Georgia, they are not subject to taxation on their non-Georgia source income. See O.C.G.A. §§ 48-7-1(11), 48-7-20. Thus, the crux of this case turns on whether the Petitioners were residents of Georgia during the taxable years in question.

3.

The Georgia Code section 48-7-1(10)(A) defines the term "resident" as:

> (i) Every individual who is a legal resident of this state on income tax day;
>
> (ii) Every individual who, though not necessarily a legal resident of this state, nevertheless resides within this state on a more or less regular or permanent basis and not on the temporary or transitory basis of a visitor or sojourner and who so resides within this state on income tax day; and
>
> (iii) Every individual who on income tax day has been residing within this state for 183 days or part-days or longer, in the aggregate, of the immediately preceding 365 day period.[9]

Moreover, the Code states that "[e]very individual who, having become a resident of this state for income tax purposes . . . is deemed to continue to be a resident of this state until the person shows to the satisfaction of the commissioner that he or she has become a legal resident or domiciliary of another state . . . ." O.C.G.A. § 48-7-1(10)(B); see also Ga. Comp. R. & Regs. 560-7-3-.02(1)(a). In other words, once one has established a domicile in Georgia, a new domicile cannot be acquired simply by moving to a new place. See Williams v. Williams, 191 Ga. 437, 438 (1940). Rather, to establish a new domicile, a person must (a) abandon the old domicile and (b) move to another place with (c) the present intent to remain there permanently or indefinitely. Id. Accordingly, in order for the Petitioners to prevail, they must affirmatively demonstrate that they have both abandoned their domicile in Georgia and established a new

[9] It is uncontroverted that the Petitioners never spent 183 days or more in Georgia during 2009, 2010, or 2011.

domicile in Spain.[10]

4.

Although one may have many homes, one may only have one domicile, which is the place where he or she intends to remain. See Avery v. Bower, 170 Ga. 202, 204 (1930). Intent to remain indefinitely in one's place of actual residence establishes domicile, even if one has "a floating intention to return [to some earlier residence] or to move somewhere else at some future period." Black v. Black, 292 Ga. 691, 693 n.3 (2013) (quoting Campbell v. Campbell, 231 Ga. 214, 215 (1973)). In a previous case, the Tribunal determined that an attaché and his wife continued to be domiciled in Georgia while living in London, England based on the following four factors:

> A. The petitioners' residence in the United Kingdom was temporary and tied to a tour of employment that had a specific end date, at which point their visas would expire unless he renewed his position.
>
> B. The petitioners did not seek "permanent residence permits," in the U.K.
>
> C. The petitioners did not obtain driver's licenses in the U.K.
>
> D. The petitioners did not pay income taxes in the U.K. because they were not permanent residents and therefore not subject to British income taxes.

Petitioner F-1, TAX-IIT-134974, at 8-9.

5.

The facts in this case stand in stark opposition to those in Petitioner F-1, which compels

[10] "Unless otherwise provided by law, the standard of proof on all issues in a hearing shall be preponderance of the evidence." Ga. Comp. R. & Regs. 616-1-3-.11(b). The Respondent asserts that because O.C.G.A. § 48-7-1(10)(B) is "partly patterned" after I.R.C. § 911 (relating to the foreign earned income exclusion), interpretations of that code section provide guidance on the standard of proof governing this case. I.R.C. § 911 requires a taxpayer to establish "to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country . . . ." I.R.C. § 911(d)(1)(A). Courts have interpreted this language to require a heightened standard of proof; specifically, the Respondent advocates for a "strong proof" standard. Harrington v. Comm'r, 93 T.C. 297, 311 (1989); Schoneberger, v. Comm'r, 74 T.C. 1016, 1023-24 (1980). The Tribunal declines to interpret the precise contours of the phrase "to the satisfaction of the Commissioner" in this case because, as discussed below, the Petitioners have proven their case under both a preponderance standard and a strong proof standard.

the Tribunal to reach the antithetical conclusion.[11] Each of the four deciding factors in Petitioner F-1 is distinguished here, as follows:

A. The Petitioners' living arrangement was not tied to employment, but based on familial roots in Spain. Moreover, they were not limited by visas.

B. There is no evidence that the Petitioners and their children, as EU citizens, needed any additional permit to remain in Spain indefinitely.

C. Mr. Fleury obtained a driver's license in Spain and bought a car there.[12]

D. The Petitioners obtained tax identification numbers and paid income tax in Spain.

Moreover, additional facts in this case provide convincing evidence regarding the Petitioners' intent to remain in Spain indefinitely, including:

E. The Petitioners dis-enrolled their children from school in Georgia, transferred the children's educational records, and enrolled the children in school in Spain.

F. The Petitioners obtained health insurance for themselves and their children in Spain, and transferred dental records and some medical records to Spain.

G. The Petitioners signed a three-year lease, with an option to renew, on an apartment in Spain. They exercised their option to renew after the first lease term expired. The Petitioners moved all of the items that "made a house a home" to Spain when they moved.

H. The Petitioners altered their status at their country club from resident members to non-resident members.

I. The Petitioners only spent approximately six weeks per year in Georgia to visit family during holidays and summer vacations.

J. The Petitioners removed the homestead exemption on their house in Georgia.

Based on these facts, taken as a whole, the Tribunal finds strong evidence that the Petitioners

[11] The Tribunal is bound by its previous interpretation of a tax statute and the application of facts to such statute in subsequent cases. O.C.G.A. § 50-13A-15(c) ("The tribunal judges shall adhere to the principle of stare decisis.").
[12] Although Mrs. Mason-Fleury did not obtain a Spanish driver's license and maintained a Georgia driver's license, the fact that Mr. Fleury obtained a Spanish license sufficiently distinguishes this case from Petitioner F-1, and other similar cases.

intended to remain in Spain indefinitely.

6.

The Tribunal is not moved by the Respondent's attempt to discredit the Petitioners' intentions based on Mr. Fleury's blog posts and evidence regarding their property in Georgia. First, the blog statements do not outweigh the long list of acts that corroborate Mrs. Mason-Fleury's testimony regarding their intent. "[A]cts are generally regarded as more important than declarations, and written declarations are more reliable than oral ones." Hoover v. Comm'r, No. 3281-S, 1982 Minn. Tax LEXIS 79, at *11 (Minn. T.C. Apr. 2, 1982). Thus, even if the Tribunal found Mr. Fleury's written statements more reliable than his wife's testimony, the acts corroborating her testimony convince the Tribunal of the Petitioners' intent.

The Tribunal is likewise unaffected by the fact that the Petitioners were building a house in Georgia while they lived in Spain. The Respondent alleged that the Petitioners planned to move back to Georgia once they finished building the house on Blackland Road. Indeed, a person has not established domicile if his or her stay in another state or country is contingent on a certain event. See, e.g., Whetstone v. Dep't of Revenue, 434 So. 2d 796, 797 (Ala. Ct. App. 1983) (husband's retirement); Comptroller of Treasury v. Mollard, 455 A.2d 72, 638-39 (Md. Ct. Spec. App. 1983) (limited visa); Mlady v. Dir. of Revenue, 108 S.W.3d 12, 16-18 (Mo. Ct. App. 2003) (temporary work assignment); Reiersen v. Comm'r, Nos. 112968, 141988, 1987 Mass Tax LEXIS 56, at *9-10 (Mass. App. Tax Bd. May 12, 1987) (place of residence controlled by employer's will); Larson v. Comm'r, No. 4909, 1988 Minn. Tax. LEXIS 104, at *18-19 (Minn. T.C. Aug. 19, 1988) (temporary employment); Hoover, 1982 Minn. Tax LEXIS 79, at *12-13 (temporary work visa); McGarvey v. Dir. of Revenue, No. RI-83-2813, 1985 Mo. Tax LEXIS 45, at *8-9 (Mo. Admin. Comm'n Apr. 23, 1985) (temporary visa); Quick v. Dir., Div. of

Taxation, 9 N.J. Tax 288, 297-98 (1987) (contingent on specific work completion).

To begin, the Tribunal is not convinced that the Petitioners intended to move to Georgia upon the completion of the Blackland Road house, and this allegation is largely undermined by the fact that the Petitioners actually moved back to Georgia seven to eight months prior to the home's completion. Moreover, this case is distinguishable from the above-mentioned cases, which all involved events subject to third-party control or testimony from the taxpayers that their stay would expire upon the occurrence of a certain event. Here, the Petitioners were free to stay in Spain as long as they wanted, subject to their own whim. There is no evidence that fixes a time certain for their return.

The Respondent also made much of the fact that the Petitioners did not sell their Sharondale Drive house, stored cars at the Sharondale Drive house, and used the Sharondale Drive address on certain documents, including their 2010 Form 1040. None of these facts sway the Tribunal to believe that the house on Sharondale Drive was used for any other purpose than a vacation house to visit family during vacations.[13]

7.

Based on the foregoing, the Petitioners provided strong proof that they abandoned their home on Sharondale Drive, physically moved to Madrid, Spain, and intended to stay in Spain indefinitely. Accordingly, the Petitioners were not residents of Georgia during tax years 2009, 2010, 2011, and for the first half of 2012, and were therefore not subject to taxation in Georgia

[13] The Tribunal acknowledges that the facts in this case are unique and therefore distinguishable from the many cases wherein taxpayers are tied to their original domicile through employment, economic, or other limitations that inherently limit their stay in a foreign country. Here, however, the Petitioners were financially independent and had dual-citizenship, making their ties to Georgia no different than individuals who invest in Georgia property. Thus, the taxing power exerted by Georgia in this instance simply does not bear a fiscal relation to the protections, opportunities, and benefits provided by the state.

on their world-wide income during those periods.[14]

IV. CONCLUSION

In accordance with the Findings of Facts and Conclusions of Law, the Respondent's Official Assessments and Demands for Payment for tax years 2009, 2010, 2011, and 2012 are hereby **REVERSED**.

SO ORDERED, this 1st day of December, 2015.

LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

MARC J. FLEURY & NATHALIE MASON-FLEURY,

PETITIONERS

WILLIAM E. FRANTZ, ESQ.,

ATTORNEY FOR PETITIONER, MARC J. FLEURY & NATHALIE MASON-FLEURY

SAMUEL S. OLENS, Attorney General, W. WRIGHT BANKS, JR., Deputy Attorney General, WARREN R. CALVERT, Senior Assistant Attorney General, MITCHELL P. WATKINS, Assistant Attorney General,

ATTORNEYS FOR RESPONDENT, LYNNETTE T. RILEY, Commissioner, Georgia Department of Revenue

[14] Because the Tribunal finds that the Petitioners were not subject to taxation in Georgia during the subject tax years, there is no need to address the propriety of the amount of taxes, interest, and penalties assessed.