STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE NORTH CAROLINA DEPARTMENT OF REVENUE
11 REV 14832

Steve W. Fowler and Elizabeth P. Fowler, Petitioner, v. North Carolina Department of Revenue, Respondent.	**FINAL AGENCY DECISION**

THIS MATTER came before the North Carolina Department of Revenue ("Department") pursuant to N.C. Gen. Stat. § 150B-36 for the Department to make a final agency decision. The matter was previously heard on November 13-16 and 27-28, 2012 by Administrative Law Judge ("ALJ") Beecher R. Gray of the Office of Administrative Hearings ("OAH") who issued a recommended decision ("ALJ's Recommended Decision") on December 31, 2012. The ALJ's Recommended Decision reversed and vacated Respondent's assessments against Petitioner in their entirety.

On March 19, 2013, the Department received the official record transmitted by OAH. The parties agreed to extend the time to issue the Final Agency Decision in this matter by sixty days, until July 17, 2013.

PARAMETERS OF FINAL DECISION MADE BY AN AGENCY

An agency making a final decision is to adopt findings of fact contained in an administrative law judge's proposed decision ("proposed decision") unless the finding is contrary to the preponderance of the admissible evidence in the official record. N.C. Gen. Stat. § 150B-36(b). For any finding of fact in the proposed decision which is not adopted by the agency, the agency must give reasons for not adopting the finding of fact and cite the evidence in the record relied upon in rejecting the finding of fact. N.C. Gen. Stat. § 150B-36(b1). The agency may adopt findings of fact that are not contained in the proposed decision if they are supported by a preponderance of the admissible evidence and are not inconsistent with another finding of fact adopted by the agency. N.C. Gen. Stat. § 150B-36(b2).

After reviewing the official record, an agency shall adopt the proposed decision unless the agency demonstrates the proposed decision is contrary to a preponderance of the admissible evidence in the record. N.C. Gen. Stat. § 150B-36(b3). In such case, the agency is required to set forth its reasons for the agency's final decision in light of the findings of fact and conclusions

of law in that decision. *Id*. Thus, an agency may decline to adopt a proposed decision when the proposed decision is not supported by a preponderance of the admissible evidence or is contrary to the law.

After a full review of the entire record in this matter, including the official record as defined in N.C. Gen. Stat. § 150B-37 and the documents submitted by the parties, the Department makes the following Final Agency Decision.

Deletions from the ALJ's Recommended Decision are marked with ~~strikethroughs~~ and additions and modifications are in **bold.**

STATEMENT OF HEARING AND REPRESENTATION

Petitioners were present throughout the hearing and were represented by John R. Wester and Thomas Holderness of Robinson, Bradshaw, & Hinson, P.A. and W. Curtis Elliott, Jr. of Culp, Elliott, & Carpenter PLLC. Respondent was represented by Perry Pelaez and Andrew Furuseth of the North Carolina Attorney General's office.

STATEMENT OF ISSUES

The Department finds that the statement of issues in the ALJ's Recommended Decision is incomplete and erroneous. N.C. Gen. Stat. § 105-241.9(a) instructs that "[a] proposed assessment of the Secretary is presumed correct." The North Carolina Court of Appeals has also recognized that "[i]t is a fundamental principal of the law that tax assessments are presumed correct." *Riggs v. Coble*, 37 N.C. App. 266, 271, 245 S.E.2d 831, 834 (1978). As such, Petitioners bear the burden of demonstrating that the Department's assessments issued against them are incorrect. *See id.* (petitioners failed to carry their burden of overcoming the presumption of correctness).

In addition, the North Carolina Supreme Court has specifically held: "A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation." *Reynolds v. Cotton Mills*, 177 N.C. 412, 415, 99 S.E. 240, 242 (1919) (citing *Mitchell v. United States*, 88 U.S. 350, 353 (1894)). "To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home." *Hall v. Board of Elections*, 280 N.C. 600, 608-09, 187 S.E.2d 52, 57 (1972).

The North Carolina Court of Appeals has held that a "three-part test" is to be applied in determining whether an individual has met his burden to prove a change in domicile, specifically: "To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home." *Farnsworth v. Jones*, 114 N.C. App. 182, 187, 441 S.E.2d 597, 601 (1994) (citing *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57). The Supreme Court has further held that

these "well-established rules of law . . . are applicable to any situation in which it is necessary to locate an individual's domicile." *Hall*, 280 N.C. at 607, 187 S.E.2d at 56.

The statement of the issues to be resolved in the ALJ's Recommended Decision is also incomplete because it omits two issues. Accordingly, the Department strikes the statement of the issues in the ALJ's Recommended Decision and rewrites it as follows:

~~At issue in this contested case is Respondent's assessment of income tax against Petitioners for income earned by Petitioners in tax years 2006 and 2007. Also at issue is Respondent's assessment of gift tax against Petitioners for gifts made in 2006. All of Respondent's assessments are based on Respondent's conclusion that Petitioners were residents of North Carolina for all of 2006 and 2007. Petitioners claimed not to be residents of North Carolina after January 19, 2006, and therefore that Respondent's assessments were incorrect. Thus, the sole issue presented in this case is whether Petitioners were residents, *i.e.*, domiciled, in North Carolina after January 19, 2006 and in 2007~~.

ISSUES

I. Did Petitioners meet their burden of proving a change in their North Carolina domicile by showing: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home?

II. Did Petitioners meet their burden to show that the Department improperly imposed the large tax deficiency penalties?

III. Did the ALJ improperly abate interest on the assessments?

The Department also finds that the applicable law found in the ALJ's Recommended Decision is incomplete. Decisions from the North Carolina appellate courts provide the applicable legal standards for evaluating whether Petitioners satisfied their burden to prove a change in domicile.

In addition, the ALJ failed to consider the following applicable statutes: N.C. Gen. Stat. §§ 105-241.9(a), 105-241.13, 105-241.14, 105-241.21, 105-236(5)b and 55D-30(a). Accordingly, the Department strikes the statement of the applicable law in the ALJ's Recommended Decision and rewrites it as follows:

~~The applicable statute is N.C. Gen. Stat. § 105-134.1(12) and the applicable portion of the Administrative Code is 17 NCAC 06B.3901~~.

The applicable statutory law regarding whether Petitioners have met their burden to prove a change in domicile is N.C. Gen. Stat. § 105-134.1(12). This statute provides the definition of resident and instructs that "[a] resident who removes from the State during a

taxable year is considered a resident until he has <u>both</u> established a definite domicile elsewhere <u>and</u> abandoned any domicile in this State." (Emphasis added).

The applicable regulatory authority is 17 N.C.A.C. § 06B.3901(a), which explains, in part, that "[a] mere intent or desire to make a change in domicile is not enough; voluntary and positive action must be taken."

The applicable case law includes *Mitchell v. United States*, 88 U.S. 350, 353 (1894); *Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E. 240 (1919); *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972); and *Farnsworth v. Jones*, 114 N.C. App. 182, 441 S.E.2d 597 (1994).

<u>FINDINGS OF FACT</u>

After a full review of the entire record of this matter, including the official record as defined in N.C. Gen. Stat. § 150B-37 and the documents submitted by the parties, and having given due regard to the opportunity of the ALJ to evaluate the credibility of the witnesses, the Department makes the following Findings of Fact:

Petitioners introduced evidence through the testimony of Lynwood Mallard, William Graef, Victoria Harrison, Kim Dennis, Graham Clements, Robert Pearce, Cooper Pulliam, Judy Shelton, and Robert Fowler. Both Petitioners testified. Petitioners also introduced testimony from three Department of Revenue officials (Gail Beamon, Rhonda Smith, and Carolina Krause-Iafrate). Several of these witnesses spoke to or sponsored documents that were admitted into evidence and will be referred to below.

Findings of Fact Nos. 1 and 2 of the ALJ's Recommended Decision are adopted by the Department.

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. Petitioners filed a timely appeal to the Office of Administrative Hearings ("OAH") from the Notices of Final Determination issued October 27, 2011 by Respondent.

The Department rejects Findings of Fact Nos. 3-4 as incomplete and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the additions made to Findings of Fact Nos. 3-4 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 3-4 as follows:

3. In the 1990s, Petitioners began considering Florida as a potential location for their eventual retirement. **(T. p. 1205-1207). Steve Fowler was born and raised in Wake County, North Carolina. (T. p. 262:15-18). All of Steve Fowler's brothers live in North Carolina and he has no family in Florida. (T. p. 263:4-8, 263:9-11). For Steve**

Fowler's entire life through the end of 2005, he was a resident of North Carolina and filed North Carolina individual income tax returns. (T. pp. 264-5, 265:15-18). Elizabeth Fowler was born and raised in North Carolina and was a resident of North Carolina through the end of 2005. (T. pp. 1339:19-20, 1339:23-25). Elizabeth Fowler's mother and father both lived in North Carolina until their deaths in 2006 and 2007, respectively. (T. pp. 660:4-15, 1340:1-6).

4. Over several years, Petitioners visited several cities in Florida, including Naples, before deciding to buy a house in Naples. In 2002, Petitioners bought a three-bedroom, 3,400 square-foot house in Naples (the "Tiburon House") for approximately $1.6 million. In 2003, Petitioners furnished the Tiburon House with furniture from their North Carolina home that was being sold. Furniture moved from North Carolina to the Tiburon House included furniture considered by Petitioners to be family heirlooms and favorite furniture not to be disposed of. *See* Pet. Ex. 55. **In 1999, Petitioners lived at 109 Murdock Creek, Apex, North Carolina. (T. p. 273:6-8). In April 2003, Petitioners moved from Murdock Creek to 7801 Old Stage Road, Raleigh, North Carolina. (T. p. 273:9-15). For the years 2003-2005, Petitioners' primary residence was at 7801 Old Stage Road, Raleigh, North Carolina and Petitioners' secondary residence was the Tiburon house in Naples, Florida. (T. pp. 274:2-9, 13-15, 19-21, 22-25, 275:1-10). At the time Petitioners purchased the Tiburon house, Elizabeth Fowler had not seen the house in-person. (T. p. 1349:8-16).**

The Department rejects Findings of Fact Nos. 5-7 because they erroneously reference information that is not contained in the record and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modifications made to Findings of Fact Nos. 5-7 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 5-7 as follows:

5. ~~In 2003~~ **During late 2001 or early 2002**, Petitioners discarded their architecturally-drawn plans for an 11,000 square-foot house on their Old Stage Road property in Raleigh, North Carolina, (*see* Pet. Ex. 26), instead designing and building a one-bedroom, 2,080 square-foot house there. Petitioners built the smaller house primarily because of their decision that Florida would be their retirement home and they had no need for a large house in Raleigh. **(T. pp. 249:25, 250:1-3, 215-218, 1218, 1265). In 1999, Steve Fowler purchased the property located at 7801 Old Stage Road, Raleigh, North Carolina. (T. p. 266:6-9). Petitioners hired an architect to design a custom one bedroom house at Old Stage Road specifically to Petitioners' preferences and likings. (T. p. 267:3-17). The Old Stage property has two garages, each 3,000 square feet, one garage with six bays and the other with two bays, an office, washer-dryer, dog wash area, and car wash. (T. pp. 267:18-25, 268:1-6). A wall and gate were constructed near the road of the Old Stage property. (T. p. 268:11-16). A second architect was hired to design the entrance gate. (T. p. 1351:5-16). A landscape architect was hired to design the Old Stage home's landscape. (T. p. 1352:4-18). Judy Shelton was hired to design the home's interior. (T. p. 1351:17-**

20). The Old Stage home was furnished with new furniture. (T. pp. 1351:21-1352:3). The total cost of the Old Stage property for the land, the house, two garages, and the wall and gate was approximately $2.8 to $2.9 million. (T. pp. 268:20-25, 269:1-9).

6. As explained by Petitioner Elizabeth Fowler and Interior Designer Judy Shelton at trial, Petitioners decorated their houses in Florida and South Carolina in a contemporary style which Ms. Fowler preferred **and to match the market. (T. pp. 842:18-21, 844:14-19).** Petitioners decorated their house at Old Stage Road in Raleigh in a traditional manner to make it easier to sell. **(T. pp. 841:20-23, 1219:11-25, 1220:1-3).**

7. For many years starting in 1984, ~~both Petitioners~~ **Steve Fowler** devoted extraordinary time and effort into building Fowler Contracting into a highly successful enterprise. **In 1984, Steve Fowler started the company known as Commercial Grading, Inc. which did business as "Fowler Contracting." (T. pp. 123:8-14, 125:7-9, 263:12-14, 264:5-9). Steve Fowler was the president and 100% shareholder of Commercial Grading, a North Carolina company which only did business in North Carolina. (T. pp. 123: 23-24, 263:23-25, 264:1-19, Resp. Ex. 60). Elizabeth Fowler worked at Commercial Grading, Inc. beginning in 1999. (T. pp. 1220:4-7, 1340:19-20).**

Finding of Fact No. 8 of the ALJ's Recommended Decision is adopted by the Department.

8. In 2004, Steve Fowler was diagnosed with kidney cancer. In September 2004, he underwent surgery that removed his kidney. As a result of that illness, Petitioners resolved to accelerate two features of their lives: their sale of Commercial Grading, Inc., (a/k/a Fowler Contracting), and their retirement to Florida.

The Department rejects Findings of Fact Nos. 9-11 as incomplete and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the additions made to Findings of Fact Nos. 9-11 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 9-13 as follows:

9. In January 2005, with the assistance of Florida counsel, Petitioners created Fowler Aviation, Inc., a Florida company, to sell a new type of private jet identified as a Sino-Swearingen SJ30-2. *See* Pet. Exs. 27, 29. This enterprise was to serve as Steve Fowler's post-Fowler Contracting pursuit, consistent with his love of airplanes and his not having developed a significant hobby to occupy his retirement days. Petitioners invested $1.775 million to purchase sales territories throughout the southeastern United States, created a website, and sent individuals for training regarding these jets. *See* Pet. Exs. 29 & 54. As explained by Petitioners, Robert Fowler, and Robert Pearce, Steve Fowler was to cover the Florida territory with other states in Petitioners' territories assigned to others who would work for Fowler Aviation. The Sino-Swearingen SJ30-2 aircraft failed to achieve FAA Type Certification prior to 2006, which it was required to obtain prior to being

commercially produced and sold. After that development, Fowler Aviation ceased operations in January, 2006. **By December 2005, Steve Fowler was no longer interested in pursuing the deal with the Sino-Swearingen aircraft. (T. pp. 285:14-25, 286:1-5). In January 2006, Steve Fowler received a full refund of his $1.775 million investment, including interest. (T. p. 267:5-13). During the initial audit, Michael Custer, Steve Fowler's Power of Attorney, reported to the Department in a letter dated March 18, 2010 when responding to an IDR that "Fowler Aviation was created to acquire an aircraft distributorship. The transaction never transpired. The entity has been inactive since its inception." (T. pp. 293:5-25, 1146:1-23, Resp. Ex. 1).**

10. In early 2005, Petitioners engaged The Orr Group, an investment banking firm, to solicit buyers for Fowler Contracting. **Steve Fowler received at least three bona fide offers to purchase Fowler Contracting. (T. pp. 299:12-25, 300:1-13).**

11. Also in 2005, anticipating selling Fowler Contracting and retiring in Florida, Petitioners searched for a larger house in Naples, one that had an additional bedroom to accommodate Petitioners' brothers when they visited and a fenced-in yard for their dog. **Petitioners sought a home with privacy, a yard for their dogs, and additional garages. (T. pp. 1352:23-1353:14). The Tiburon house in Naples had 15 feet between houses and a small back yard. (T. p. 1350:4-18).**

12. On October 25, 2005, Steve Fowler signed a Letter of Intent with a private equity firm, Long Point Capital, to sell ~~controlling interest~~ **60% of his shares (T. pp. 38:14-18, 67:21-25, Resp. Ex. 60)** in Fowler Contracting. *See* Pet. Ex. 30. Lynwood Mallard, an experienced transactional lawyer, served as counsel to Petitioners throughout the process of their selling Fowler Contracting. **After Long Point Capital purchased a portion of Steve Fowler's shares in Commercial Grading, he retained 32.6% ownership of shares, had a $29 million investment in the company, and would manage the day to day operations of the company. (T. pp. 159:1, 308:12-19, 309:8-10, 311:10-12, 407:9-12, 1045:8-13, 1046:15-18, Resp. Exs. 26, 30).**

13. Within a week of securing the Letter of Intent on October 25, 2005, Petitioners contracted to buy a four-bedroom, 9,300 square foot house in Naples, Florida (the "Quail West House"). *See* Pet. Ex. 37. At that time, Petitioners paid a $576,750 deposit toward the Quail West House, which then was being built. *See* Pet. Ex. 49. Petitioners closed on their purchase of the Quail West House in August 2006, having listed the house for sale in March, 2006 without ever having moved into the house. *See* Pet. Ex. 39. **Petitioners listed the Quail West property for sale in March, 2006, while the house was still under construction. (T. p. 277:18-20, Resp. Ex. 83). Petitioners never occupied Quail West as their residence. (T. p. 280:16-19). Quail West was sold around April 2009. (T. p. 228:19-21).**

The Department rejects Finding of Fact No. 14 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the

modification made to Finding of Fact No. 14 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department.

In addition, the Department rejects Finding of Fact No. 14 because it contains erroneous conclusions of law. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 676 (1997). A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. 52, 60, 642 S.E.2d 404, 409 (2007). The final statement beginning with "but the testimony of greatest import for this case" is a legal conclusion which requires the exercise of judgment and the application of legal principles.

Further, the conclusion that testimony regarding Petitioners' stated intention is "of greatest import for this case" is erroneous as a matter of law. This conclusion is contrary to the "axiomatic" principles governing the determination of domicile. Those firmly established legal principles hold that conduct and actions are the most important evidence when determining domicile and that declarations of intent are of slight weight and are to be accepted with considerable reserve. *See* Conclusion of Law No. 5. Thus, the Department modifies Finding of Fact No. 14 as follows:

14. As explained by Petitioners and supported by the testimony of Graham Clements (Petitioners' long-time accountant), Petitioners told Mr. Clements in November 2005 that they were moving to Florida, asking his advice about what they needed to do to accomplish that change. Mr. Clements advised Petitioners ~~that they needed to own a home there~~, ~~that soon after January 1, 2006~~ ~~was the ideal time to effect this change,~~ that they should hire an attorney in Florida for advice, file a Declaration of Domicile in Florida, spend at least 183 days in Florida, and ~~that they should take some "official action~~" **Mr. Clements advised Petitioners to change their driver's licenses and register to vote** to indicate their intention to become Florida citizens. **(T. pp. 612:3-7, 622:4-23)** Mr. Clements' recollection of his advice includes more specifics than Petitioners recall. ~~but the testimony of greatest import for this case is consistent among these three witnesses: Petitioners expressed their clear intention to move to Florida and requested Mr. Clements' advice.~~

    In 2005, Steve Fowler discussed the Florida intangible tax with his accountant, Graham Clements, who advised that if he was a Florida resident on January 1, 2006, he would be required to pay the intangible tax. (T. pp. 153:2-14, 318:21-25, 319:1-19). Graham Clements advised Steve Fowler to attempt to change his residency after January 1, 2006, so as to avoid being subject to Florida intangible tax. (T. pp. 153:2-14, 318:21-25, 319:1-25, 612:10-17, 623:18-25, 624:1-23). Steve Fowler sent an email dated April 7, 2006 to Graham Clements where he advised Clements to change his permanent address to Naples, Florida and requested that "all records are changed to reflect this as of January 1, 2006." (T. pp. 367:3-25, 633:1-25, Resp. Ex. 75). Steve Fowler signed his 2006 North Carolina individual

income tax return certifying that he was a non-resident of North Carolina for the entire 2006 year. (T. pp. 323:10-25, 324:1, Resp. Ex. 98). Steve Fowler never paid Florida intangibles tax and testified that he was not a Florida resident on January 1, 2006. (T. pp. 319:20-25, 320:1-4).

Inconsistent with the 2006 North Carolina income tax returns, from January 1, 2006 through January 19, 2006, Petitioners were residents of North Carolina and their primary residence was 7801 Old Stage Road, Raleigh, North Carolina, even though Petitioners simultaneously owned the Tiburon property and had a contract on Quail West. (T. pp. 314:1-7, 315:7-12, 318:3-6, Resp. Ex. 98). On January 20, 2006, even though Steve Fowler owned the same Old Stage Road house in North Carolina, the Tiburon property in Florida, and had a contract on Quail West in Florida, he claimed to be a Florida resident. (T. p. 325:2-6). Petitioners did not spend 183 days in Florida during either 2006 or 2007 and did not file a Declaration of Domicile in Florida until March 10, 2006. (T. p. 1372:6-9).

Graham Clements continued to work as Petitioners' Certified Public Accountant until at least September 2007. (T. p. 634:8-13).

The Department rejects Finding of Fact No. 15 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modifications made to Finding of Fact No. 15 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 15 as follows:

15. ~~Another perspective on Petitioners' retirement planning came from~~ William Graef **was** ~~(~~the owner of Aviation Management Group, a company from whom the Fowlers had chartered planes for several years~~)~~. In November or December of 2005, Steve Fowler told Mr. Graef that Petitioners were moving to Florida and asked for Mr. Graef's assistance in buying, maintaining, storing, and managing an airplane, as well as complying with FAA regulations. Mr. Graef's company, based at the RDU Airport in Raleigh, served numerous customers who lived outside North Carolina and could perform all of the aircraft care and management tasks needed by Petitioners. At trial, Mr. Graef detailed the various support elements integral to owning an airplane and what his company provided. Although direct efforts were made in Naples, neither Petitioners nor Mr. Graef could find any company nor individual in Naples that could provide suitable hangar space and the sophisticated range of services that Petitioners' aircraft required. In January 2006, Petitioners contracted to buy an airplane and engaged Mr. Graef to provide pilots and the related aircraft care and management services referenced above. **The frequency of trips Petitioners took aboard planes chartered from Aviation Management Group did not change from late 2005 through the purchase of their own airplane in 2007. (T. pp. 523:24-526:5). In January 2006, Petitioners purchased a plane for over $19.2 million. (T. p. 528:12-20, Resp. Ex. 67). In October 2007, the aircraft was delivered to Raleigh. (T. pp. 517:20-24, Ex. 64). The**

plane was based in Raleigh and registered in North Carolina. (T. pp. 518:21-24, 529:5-11, Resp. Exs. 64, 68). Pilots and maintenance personnel, living in North Carolina, were trained in connection with the purchase of Petitioners' aircraft. (T. pp. 530:12-533:1).

The Department rejects Finding of Fact No. 16 as incomplete and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the additions made to Finding of Fact No. 16 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 16 as follows:

16. Prior to January 2006, Petitioners advised Lynwood Mallard that they were going to live in Florida and that they anticipated a significantly slower lifestyle after selling their business. As shown in the Letter of Intent and explained by Mr. Mallard during trial, in November or December of 2005, he and Steve Fowler learned that Long Point Capital required--as a condition of purchasing ~~a controlling interest~~ **60% of Steve Fowler's shares (T. pp. 38:14-18, 67:21-25)** in the business--that Petitioners continue working for Fowler Contracting for a significant period after the purchase closed. **By Letter of Intent dated October 25, 2005, Long Point Capital offered "to partner with the Fowler Family" and "to structure the transaction as a recapitalization that would permit you [Steve Fowler] to realize an attractive valuation on your current investment and to retain a meaningful continuing equity investment in the Company." (Resp. Ex. 59, pg. 1). Long Point Capital wanted to provide capital for Commercial Grading. (T. p. 67:18-21). After Long Point Capital purchased a portion of Steve Fowler's shares in Commercial Grading, he would manage the day to day operations of the company. (T. pp. 311:10-12, 407:9-12, 1045:8-13, 1046:15-18, Resp. Exs. 26, 30).**

The Department rejects Findings of Fact Nos. 17-21 because they erroneously reference information that is not contained in the record and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modifications made to Findings of Fact Nos. 17-21 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 17-21 as follows:

17. This continued work requirement was contrary to Petitioners' strong preference and became a point of negotiations with Long Point Capital. ~~Petitioners acceded to a requirement to stay on for three years (Long Point had asked for five years)~~ **Petitioners were employed with Commercial Grading under three year employment contracts (Resp. Exs. 26, 30)** because of their desire to effect a fundamental change in their living patterns and because the final negotiated terms of their continued service provided flexibility. **Pursuant to the terms of the Employment Agreement dated February 3, 2006, Steve Fowler contracted to continue being employed as president of Commercial Grading for a term of three years and would manage the day to day**

operations of the company. (T. pp. 159:1, 308:12-19, 309:8-10, 311:10-12, Resp. Ex. 26). Steve Fowler completed the term of this contract and his last day with Commercial Grading was February 3, 2009. (T. p. 1038:15-24). Pursuant to the terms of the Employment Agreement dated February 3, 2006, Elizabeth Fowler contracted to be employed as the Assistant Secretary of Commercial Grading for a term of three years. (Resp. Ex. 30). Elizabeth Fowler completed the term of this contract and her last day with Commercial Grading was February 3, 2009. (T. pp. 1347:16-1348:5). Elizabeth Fowler's role with the company did not change from 2005 through 2008. (T. p. 1347:9-15).

18. Steve Fowler repeatedly asked his attorney, Lynwood Mallard, whether his new employment contract would allow him to live in Florida and work remotely, either from Florida or while traveling. Mr. Mallard advised Steve Fowler that he could live anywhere he pleased as long as he performed his responsibilities according to the contract. ~~Petitioners often did work remotely during 2006 and 2007.~~ **Lynwood Mallard advised Steve Fowler that he could terminate the employment contract with Commercial Grading at any time and it would have no impact on the $70 million that was paid to him. (T. pp. 75:23-25, 76:1-9).**

19. Petitioners ~~returned to~~ **lived in** North Carolina throughout 2006 and 2007 ~~as necessary~~ to fulfill their contractual employment obligations to Fowler Contracting. The nature of the business that Fowler Construction conducted required Petitioners to perform some of their duties "face-to-face," including "riding the jobs" in North Carolina. **During 2006 and 2007, Petitioners spent the majority of days during the year in North Carolina, not in Florida. (Compiled from Fowler's Schedule of Days in North Carolina and Flight records. Resp. Exs. 14, 15, 16, 17). During 2006, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 162 and 173 days, respectively, in North Carolina, while spending 51 and 47 days, respectively, in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 213 and 225 days, respectively, in North Carolina during 2006. (Resp. Exs. 14, 15, 16, 17). During 2007, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 168 and 180 days, respectively, in North Carolina while spending 27 days in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 204 and 216 days, respectively, in North Carolina during 2007. (Resp. Exs. 14, 15, 16, 17).**

Despite being advised by Graham Clements, their North Carolina accountant, that they needed to spend at least 183 days in Florida in order to establish a change in domicile, Petitioners did not heed this advice in either 2006 or 2007. (T. pp. 622:18-20, Resp. Exs. 14, 15). Steve Fowler and Elizabeth Fowler were not in Florida for the entire period from April 9, 2007 through October 3, 2007, a period of 177 consecutive days. (T. pp. 398:15-25, 399:6-9, Resp. Exs. 14, 15). During the time Petitioners spent in North Carolina, they performed many activities other than those necessary to fulfill their employment obligations to Fowler Contracting. ***See***

Findings of Fact Nos. 42, 44 and 47. Further, Steve and Beth Fowler could have terminated the employment contract at any time. *See* Finding of Fact No. 18.

20. In 2006 ~~and 2007~~, Petitioners searched for a new President of Fowler Contracting to enable Steve Fowler to cease working in North Carolina. Although an individual, believed to be a suitable replacement, was identified~~,~~ and interviewed~~, and offered the position, that individual accepted a competing offer on short notice.~~ **by the time Long Point called to offer him a job, he had already accepted a job elsewhere. (T. pp. 161:11-25, 162:1-14, 203:17-25, 204:1, 1241:2-7).**

21. Lynwood Mallard, Steve Fowler's attorney, testified that Steve Fowler told him that as due diligence was nearing its completion, Mr. Mallard suggested to Steve Fowler that he sign the Securities Purchase Agreement (~~the contract to sell Fowler Contracting~~)**, which was the contract for the sale of 60% of Steve Fowler's shares of Commercial Grading (Resp. Ex. 60),** on January 20, 2012. Petitioners answered that they needed to sign the Securities Purchase Agreement on January 19, 2006 because they needed to go to Florida the following day ~~to complete one or more official acts there to effect their change of domicile~~. **(T. pp. 56:22-25, 57:1-5). Lynwood Mallard, Steve Fowler's attorney, testified that Steve Fowler "intended to change his residence before the completion of this transaction, before the closing." (T. p. 62:4-6).**

The Department rejects Finding of Fact No. 22 as an incomplete statement of the facts and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 22 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 22 as follows:

22. Steve Fowler signed the Securities Purchase Agreement on January 19, 2006. *See* Pet. Ex. 31 & Resp. Ex. 60. **Pursuant to the terms of the Securities Purchase Agreement dated January 19, 2006, Steve Fowler owned all of the stock of Commercial Grading. (Resp. Ex. 60). Steve Fowler agreed to sell 60% of his shares to Long Point Capital for $106 million and would retain a 32.6% ownership interest in Commercial Grading. (T. p. 67:21-25, Resp. Ex. 60). The closing date for the sale occurred on February 3, 2006 and approximately $70 million was wired to Steve Fowler's account with Wachovia Bank. (T. pp. 72:6-14, 74:1-4, 12-19, 190:14-21).**

Finding of Fact No. 23 of the ALJ's Recommended Decision is adopted by the Department.

23. For their entire lives through January 19, 2006, Petitioners were residents of North Carolina.

The Department rejects Finding of Fact No. 24 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the

modification made to Finding of Fact No. 24 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 24 as follows:

24. On January 20, 2006, Petitioners left for Naples Florida on a chartered plane at 5:03 a.m. *See* Pet. Ex. 34. Upon arrival there, the Fowlers ate breakfast, went to the local government center to inquire about getting driver's licenses and registering to vote, and went to a local driver's license office. At the driver's license office, Petitioners presented their North Carolina licenses and asked for Florida driver's licenses. Petitioners were unable to obtain Florida driver's licenses that day because they did not have further identification papers requested by Florida authorities. For the same reason, Petitioners were unable to register to vote. Petitioners were able, however, to register a car that they had moved to Florida previously. *See* Pet. Ex. 5. Petitioners moved a second car to Florida later in 2006. Also on January 20, 2006, Petitioners went to a local post office to obtain a post office box. They did not succeed in doing so on January 20 because none was available in the size desired. On January 20, Petitioners attempted to register their dog, but could not do so because they did not have the dog's vaccination records present. **On January 20, 2006, Steve Fowler was unable to get a Florida driver's license or register to vote because he did not have his passport, social security card or birth certificate, which were all located in his personal safe in Cary, North Carolina, not at the Tiburon property in Naples, Florida. (T. pp. 326:8-25, 327:1-20, 328:2-5). On January 20, 2006, Steve Fowler was unable to register his dog because the dog's vaccination records were located at the Old Stage Road property in Raleigh, North Carolina. (T. pp. 328:15-25, 328:1-4).**

From the time Steve Fowler owned the Tiburon house in Naples, Florida until December 30, 2005, he had only one car at Tiburon; the first time a car was moved to Tiburon was approximately February 2005, and the rest of the cars Steve Fowler owned were located at the Old Stage Road property in Raleigh, North Carolina. (T. pp. 330:12-15, 24-25 331:3-4, 332:14-18). Following January 20, 2006, the cars remaining in Raleigh included a Ferrari, a Porsche and two vehicles which Petitioners used as their primary means of transportation. (T. pp. 331:3-24; Resp. Ex. 49). Steve Fowler signed, under penalty of perjury, a car registration dated January 20, 2006, which designated him as a non-resident of Florida. (Resp. Ex. 23 – which shows each character typed on the first line of the form as being one space to the right of where it should be). The registration also shows the owner's name and address to be: Steve William Fowler, 7801 Old Stage Rd., Raleigh, NC 27603-5521. (Resp. Ex. 23). Steve Fowler never attempted to correct the residency status on the car registration. (T. p. 337:1-5). Elizabeth Fowler did not complete any actions with Florida government officials on January 20, 2006. (T. p. 1372:13-22).

The Department rejects Findings of Fact Nos. 25-26 because they contain erroneous conclusions of law. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination,

however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Findings of Fact Nos. 25-26 misstate and misapply the well-established North Carolina legal standards regarding a change in domicile. *See* Conclusion of Law No. 5. The evidence as a whole demonstrates that Petitioners failed to meet their burden to prove that they changed their domicile on January 20, 2006. Petitioners' three day visit to Naples on January 20, 2006 was consistent with their previous trips to Naples for vacation. Further, the car registration with Florida states that Petitioners were not residents of Florida on January 20, 2006 and reflects their address as 7801 Old Stage Road, Raleigh, NC. Petitioners' actions show an intent to avoid both North Carolina gift and individual income taxes and Florida intangibles taxes, while continuing to live, work, and base their lives in Raleigh, North Carolina. Accordingly, the Department rejects Findings of Fact Nos. 25-26 as erroneous conclusions of law. The Department modifies Finding of Fact No. 25 as follows:

25. ~~The trial evidence shows that Petitioners intended to become domiciled in Florida on January 20, 2006. Taken as a whole, the evidence reviewed above displays numerous indications of such an intention prior to January 20 (*e.g.*, two purchases of residential property in Naples and the starting of a Florida business), and then, through the Petitioners' taking, or attempting to take on January 20, a series of official acts consummating that intention.~~ **Steve Fowler testified that he returned to Raleigh from his weekend trip to Naples on January 22, 2006 and stayed at the house on Old Stage Road in Raleigh from January 22 through February 2, 2006, from February 6 through February 16, 2006, and from February 20 through March 9, 2006. (T. pp. 338:19-25, 329:1-19, 341:8-15, 345:1-5). Further, Steve and Beth Fowler were not in Florida at any time between April 9, 2007 and October 3, 2007. (T. pp. 398:15-25, 399:6-9, Resp. Exs. 14, 15).**

26. ~~Petitioners' actions on the consecutive days, January 19 (signing the definitive agreement to sell control of Fowler Contracting) and January 20 (the Florida government activity detailed above), expressed the Petitioners' intention to change their domicile to Florida.~~

The Department rejects Finding of Fact No. 27 because it is contrary to the evidence of record. The Department introduced evidence as set forth in the Department's Exception to Finding of Fact No. 24 that Petitioners did not register to vote, did not obtain new driver's licenses, did not register their dog on January 20, 2006, and that Elizabeth Fowler did not complete any actions with Florida officials on January 20, 2006. (T. pp. 326:8-25, 327:1-20, 328:1-5, 15-25, 1372:13-22). Thus, the Department rejects Finding of Fact No. 27.

27. ~~Respondent neither contested nor introduced any evidence indicating that Petitioners failed to take all of the foregoing actions on January 19 and 20.~~

The Department rejects Finding of Fact No. 28 because it contains erroneous conclusions of law and erroneously references facts that are not contained in the record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is

more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 28 purports to determine Petitioners' true fixed and permanent home and principle establishment. This determination requires the application of legal principles and is a conclusion of law. While Petitioners simultaneously owned houses both in North Carolina and Florida, the preponderance of the evidence demonstrated that Petitioners' true, fixed permanent home and principal establishment was in Raleigh, North Carolina during 2006 and 2007. This did not change when Petitioners registered a vehicle as non-residents on January 20, 2006. This single act is insufficient to prove a change of residency. *See* Conclusion of Law No. 5. That Raleigh, North Carolina was Petitioners' true fixed home and principal establishment is further demonstrated by Petitioners' travel patterns, everyday living activities and their professional, business and personal ties to North Carolina. The ALJ improperly relied on Petitioners' investment in a vacation property many years before 2006 to support his finding that the previously-acquired Florida property constituted Petitioners' true fixed home on January 20, 2006.

In addition, the ALJ's statement that Rhonda Smith admitted that Tiburon was Petitioners' true, fixed permanent home and their principal establishment on January 20, 2006 is not supported by a preponderance of the evidence in the record. Rhonda Smith repeatedly denied that Petitioners' Tiburon house in Naples was a true, fixed permanent home and their principle establishment on January 20, 2006. (T. pp. 990:22-991:16, 1023:18-25). Accordingly, the Department rejects Finding of Fact No. 28 as an erroneous conclusion of law and as not being supported by a preponderance of the evidence in the record.

28. ~~As admitted at trial by Respondent's official Rhonda Smith, on January 20, 2006 Petitioners' Tiburon House in Naples was a true, fixed permanent home and their principal establishment. Other evidence, including Petitioners' moving heirlooms and family furnishings to their Tiburon House, the size of that residence, and the investment Petitioners made in it, confirms this testimony. Rhonda Smith's contradictory testimony after the Thanksgiving break during trial neither was credible nor an accurate characterization of the Tiburon House~~.

The Department rejects Finding of Fact No. 29 because it contains erroneous conclusions of law and is contrary to the preponderance of the evidence in the record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

In addition, Finding of Fact No. 29 misapplies the well-established North Carolina legal standards regarding a change of domicile. *See* Conclusion of Law No. 5. During 2006 and 2007, Petitioners spent the majority of days during the year in North Carolina, not in Florida.

(Compiled from Fowler's Schedule of Days in North Carolina and Flight records. Resp. Exs. 14, 15, 16, 17). **During 2006, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 162 and 173 days, respectively, in North Carolina, while spending 51 and 47 days, respectively, in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 213 and 225 days, respectively, in North Carolina during 2006. During 2007, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 168 and 180 days, respectively, in North Carolina while spending 27 days in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 204 and 216 days, respectively, in North Carolina during 2007. (Resp. Exs. 14, 15, 16, 17).** Steve Fowler testified that based on his personal calendars submitted to the Department, he and Elizabeth Fowler were not in Florida for the entire period from April 9, 2007 through October 3, 2007, 177 consecutive days. (T. pp. 398:15-25, 399:6-9).

Accordingly, the Department finds that Finding of Fact No. 29 is an erroneous conclusion of law and is contrary to the preponderance of the evidence.

29. ~~The credible trial evidence also establishes that after January 20, 2006, Petitioners intended, when they were absent, to return to their home in Naples, Florida~~.

The Department rejects Findings of Fact Nos. 30-31 because they erroneously reference information that is not contained in the record and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modifications made to Findings of Fact No. 30-31 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 30-31 as follows:

30. On February 3, 2006, Petitioner Steve Fowler closed the transaction to sell **shares in (T. p. 67:21-25)** ~~control of~~ Fowler Contracting to Long Point Capital. **Steve Fowler agreed to sell 60% of his shares to Long Point Capital for $106 million and he would retain a 32.6% ownership interest in Commercial Grading. (T. p. 67:21-25, Resp. Ex. 60). On February 3, 2006, approximately $70 million was wired to Steve Fowler's account with Wachovia Bank. (T. pp. 72:6-14, 74:1-4, 12-19, 190:14-21). Steve Fowler testified that after Long Point Capital purchased a portion of his shares in Commercial Grading, he would manage the day to day operations of the company. (T. p. 311:10-12).**

31. On March 10, 2006, Petitioners ~~completed the government registration actions they had begun on January 20. Specifically, they~~ obtained Florida driver's licenses and registered to vote in Florida. ~~Shortly thereafter, Petitioners turned in their North Carolina Driver Licenses. *See* Pet. Exs. 18, 19, and 22~~. **(not found in the evidence)** That same day, Petitioners signed and filed a Declaration of Domicile in Florida. *See* Pet. Exs. 16 & 17. Since January 20, 2006, Petitioners have voted in every election in person in Florida and have not voted in North Carolina. *See* Pet. Exs. 20 & 21. **Steve Fowler signed, under**

the penalties of perjury, a Florida Homestead Exemption which indicated that he was a Florida resident on March 10, 2006. (T. pp. 346:24-25, 347:1-25, 348:1-12, Resp. Ex. 25). On March 10, 2006, Petitioners obtained Florida driver's licenses and registered to vote in Florida. (Pet. Exs. 18, 19, and 22). Steve Fowler signed and swore before a notary public a Declaration of Domicile which indicated he was a Florida resident on March 10, 2006. (Resp. Ex. 24).

Findings of Fact Nos. 32 and 33 of the ALJ's Recommended Decision are adopted by the Department.

32. In August 2006, Petitioners notified the Wake County Board of Elections that they were Florida residents and should be removed from the voting rolls of Wake County. *See* Pet. Ex. 38.

33. On March 11, 2006, Petitioners obtained a post office box in Naples, Florida. *See* Pet. Ex. 41.

The Department rejects Finding of Fact No. 34 because it erroneously references information that is not contained in the record. (T. pp. 804:7-12, 21-25, 805:1).

34. ~~At trial, Respondent's official, Gail Beamon, acknowledged that the official actions the Petitioners took on March 10 and 11 were actions they had begun on January 20, but could not complete because of inadequate documents in their possession~~.

The Department rejects Finding of Fact No. 35 as an incomplete statement of the facts and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 35 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 35 as follows:

35. Based on the advice of their North Carolina real estate agent, Kim Dennis, Petitioners did not list their Old Stage Road house for sale in 2006. As Petitioners and Ms. Dennis explained at trial, Ms. Dennis advised Petitioners against selling their North Carolina house at that time because Petitioners required a place to stay when returning to North Carolina for work. Further, Ms. Dennis also advised against a sale at that time because the market for their kind of house and grounds had started to decline. **The property located at 7801 Old Stage Road in Raleigh was not listed for sale until December 1, 2010 at the list price of $7.9 million. (T. p. 402:11-17, Resp. Ex. 80).**

The Department rejects Finding of Fact No. 36 because it contains erroneous conclusions of law and erroneous facts that are not supported by the evidence of record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the

appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 36 states that Petitioners "resided" in Naples during 2006 and 2007. This "finding" is erroneous because the question of residence is a conclusion of law. In addition, the determination that Petitioners resided in Florida is erroneous. *See* Conclusion of Law No. 9.

Furthermore, the finding that Petitioners repeatedly returned to Naples through 2006 and 2007 is contrary to the preponderance of the evidence in the record. Accordingly, the Department rejects Finding of Fact No. 36 as erroneous and modifies it as follows:

36. ~~As explained by Petitioners and shown by flight records, throughout the rest of 2006 and throughout 2007, Petitioners repeatedly returned to their home in Naples and resided there.~~ Pursuant to their plans to get away from their business lives, Petitioners also travelled extensively throughout the country, spending a substantial amount of time in Myrtle Beach, South Carolina. **During 2006, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 162 and 173 days, respectively, in North Carolina, while spending 51 and 47 days, respectively, in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 213 and 225 days, respectively, in North Carolina during 2006. During 2007, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 168 and 180 days, respectively, in North Carolina while spending 27 days in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 204 and 216 days, respectively, in North Carolina during 2007. (Compiled from Fowler's Schedule of Days in North Carolina and Flight Records submitted by Petitioners to the Department in response to an IDR. Resp. Exs. 14, 15, 16, 17). Steve Fowler testified that according to calendars he submitted to the Department in response to an IDR, he and Beth were not in Florida from April 9, 2007 through October 3, 2007, a period of 177 consecutive days. (T. pp. 398:15-25, 399:6-9).**

During 2006 and 2007, the majority of Petitioners' trips throughout the country departed from Raleigh-Durham International Airport ("RDU") and returned to RDU. (T. pp. 1363:16-1371:24; Exhibit 18). Trips to places other than Naples that began and ended at RDU during 2006 and 2007 include:

Date:	**Trip:**
April 14, 2006	**RDU to Atlanta, GA to RDU**
February 23-26, 2006	**RDU to Calhoun, GA, to Grand Cayman Island, to West Palm Beach, FL to Calhoun, GA to RDU**
April 19, 2006	**RDU to Charlotte to RDU**

April 20, 2006	**RDU to Greenville, SC to RDU**
April 25-May 2, 2006	**RDU to Pittsfield, MA to Asheville to RDU**
May 23-24, 2006	**RDU to Tampa, FL to RDU**
May 25-30, 2006	**RDU to Salina, KS to Las Vegas, NV to Jackson, WY to Salina, KS to RDU**
June 11, 2006	**RDU to Knoxville, TN to RDU**
July 10-11, 2006	**RDU to Boca Raton, FL to RDU**
August 15-17, 2006	**RDU to Teterboro, NJ (NYC) to RDU**
September 8-11, 2006	**RDU to Teterboro, NJ (NYC) to RDU**
September 30-October 1, 2006	**RDU to Georgetown, SC to RDU**
October 18, 2006	**RDU to Orlando, FL to RDU**
February 1-4, 2007	**RDU to Myrtle Beach, SC to Grand Cayman to RDU**
February 2007	**RDU to Calhoun, GA to Hawaii to Calhoun, GA to RDU (T. pp. 1368:21-1371:24)**
May 17, 2007	**RDU to Detroit, MI to RDU**
May 18-20, 2007	**RDU to Teterboro, NJ (NYC) to RDU**
August 10-12, 2007	**RDU to Teterboro, NJ (NYC) to RDU**
September 20-23, 2007	**RDU to Georgetown, KY to RDU**
October 12-14, 2007	**RDU to Teterboro, NJ (NYC) to Lewisburg, WV to RDU**
October 15, 2007	**RDU to Orlando, FL to RDU**
October 18-21, 2007	**RDU to Grand Cayman to RDU**
October 25-28, 2007	**RDU to Lebanon, NH to RDU**
November 8-11, 2007	**RDU to Lebanon, NH to RDU**

November 15-18, 2007	**RDU to Grand Cayman to RDU**
November 30, 2007	**RDU to Teterboro, NJ (NYC) to RDU**
December 5, 2007	**RDU to Miami, FL to RDU**

The Department rejects Finding of Fact No. 37 as an incomplete statement of the facts and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 37 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 37 as follows:

37. Petitioners hired Cooper Pulliam, an investment advisor in Atlanta Georgia, to buy municipal bonds for them. As Petitioners and Mr. Pulliam testified, Petitioners told Mr. Pulliam that they were Florida residents. The residence of Mr. Pulliam's clients is an important investment consideration. Mr. Pulliam purchased a portfolio of municipal bonds for Petitioners from across the country based on Petitioners having become Florida residents in 2006. *See* Pet. Ex. 47. **Cooper Pulliam began investing for Petitioners in April 2006. (T. p. 214:4-12). For the entire 2006 year, Steve Fowler maintained an investment account with Wachovia Bank. (T. pp. 403:12-404:5). In 2006, Wachovia invested only in North Carolina state and municipal bonds with transactions totaling over $91 million. (T. pp. 405:15-25, 406:1-5, Resp. Ex. 92).**

The Department rejects Finding of Fact No. 38 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 38 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 38 as follows:

38. ~~Petitioners used their Florida address on tax returns that were filed in April 2006 and thereafter. *See* Pet. Exs. 23, 24 & 25; Resp. Ex. 98.~~ **Elizabeth Fowler continued to use her North Carolina addresses on her privilege tax returns from 2006 through 2010. (T. pp. 1366:22-1380:8, Resp. Ex. 96).**

The Department rejects Findings of Fact Nos. 39-42 as incomplete and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the additions made to Findings of Fact Nos. 39-42 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 39-42 as follows:

39. Throughout 2006, Petitioners changed their address from North Carolina to Florida with various businesses. *See* Pet. Exs. 42, 43, 45, and 46; Resp. Ex. 51. **Throughout 2006,**

2007, and 2008, Petitioners continued to use the 7801 Old Stage Road, Raleigh, North Carolina address for correspondence and billing statements with attorneys, K-1s, 1099s, bills, and bank statements. (Resp. Exs. 53, 54, 56, 56, 57, 58, 85, 87, 88, 89, 90, 107, 112).

40. In 2006 and 2007, Elizabeth Fowler went to church both in Naples and in Raleigh and contributed to churches in both locations. Her contributions to Westover United Methodist Church in Raleigh were motivated by her appreciation for the significant care and support that church provided to Ms. Fowler's late father in the years preceding his death. **Petitioners donated cash and property to Westover United Methodist Church in Raleigh in the amounts of $102,580 in 2006 and $24,985 in 2007. (T. pp. 1299:5-1300:1, 1300:19-1301:1, 280:1-15, Resp. Exs. 9-10). During 2006 and 2007, Petitioners also donated to numerous other North Carolina charitable organizations. (Resp. Exs. 9-10). Petitioners did not produce any documentation for any contributions to churches in Naples.**

41. In 2006 and 2007, Petitioners were members of the Tiburon Club and the Quail West Club in Florida. *See* Pet. Exs. 35 & 40. Petitioners were not members of any club in North Carolina. **Steve Fowler testified that he purchased the Quail West Club membership after the Quail West property was placed on the market for sale to make the property more attractive to prospective buyers. (T. pp. 278:2-24, 279:24-25, 280:1-15, Resp. Ex. 40).**

42. Elizabeth Fowler retained her North Carolina real estate license to allow her to receive referral fees in connection with properties she bought and sold for herself. Ms. Fowler has never worked as a real estate agent for other people. Ms. Fowler received referral fees for properties in South Carolina and Florida, but never for property sold in North Carolina. **Elizabeth Fowler could earn referral fees with a non-North Carolina real estate license. (T. p. 1381:13-25). Elizabeth Fowler was required to complete eight hours annually of continuing education to maintain her real estate license and the continuing education could be completed either online or in-person. (T. pp. 1380:21-1381:1). During 2006 and 2007, Elizabeth Fowler completed her continuing education requirements in North Carolina. (T. p. 1381:2-4). Elizabeth Fowler never obtained a Florida real estate license. (T. p. 1381:1-3).**

Finding of Fact No. 43 of the ALJ's Recommended Decision is adopted by the Department.

43. Petitioners paid more property tax in Florida in both 2006 and 2007 than they paid in North Carolina for those years. *See* Resp. Exs. 12 & 13.

The Department rejects Finding of Fact No. 44 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 44 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ

which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 44 as follows:

44. In 2006 ~~and 2007, Petitioners~~ **Steve Fowler** used doctors in ~~Florida,~~ North Carolina, and Massachusetts. **In 2007, Steve Fowler used doctors in North Carolina, Massachusetts, and visited an Urgent Care medical clinic once in Florida.** ~~Petitioners called on doctors in North Carolina as needed in emergencies or as follow-up treatment to Mr. Fowler's cancer surgery~~. The ~~vast~~ majority of Petitioners' medical expense in 2006 and 2007 was incurred in Massachusetts at a facility associated with the Cleveland Clinic. **The invoices and medication from the Massachusetts facility were mailed to North Carolina. (T. p. 1402:1-14). During 2006 and 2007, the only doctor Steve Fowler visited in Florida was a single visit to the Collier County Urgent Care. (Resp. Ex. 22). During 2006 and 2007, Elizabeth Fowler saw doctors in North Carolina and Massachusetts. (T. p. 1398:14-17). Elizabeth Fowler did not go to Collier County Urgent Care during 2006 or 2007. (T. p. 1398:2-17). The medical facilities where Elizabeth Fowler received treatment in North Carolina during 2006 and 2007 included:**

Dr. Catherine Hren, Cary Dermatology (T. p. 1399:9-1401:12; Resp. Ex. 21).
Dr. Michael James, Internal Medicine Associates (T. p. 1398:18-1399:2).
Dr. Robbie Smith, DDS (T. p. 1308:7-14)
Dr. Durland, Eye Ear Nose Throat practice in Cary (T. p. 1306:22-1307:12).

Finding of Fact No. 45 of the ALJ's Recommended Decision is adopted by the Department.

45. In 2006 and 2007, Petitioners kept two trained guard dogs, a Doberman and a German Shepherd, at their Raleigh property to protect the property.

The Department rejects Finding of Fact No. 46 because it erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 46 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 46 as follows:

46. In 2006 and 2007, Petitioners' pet, a dog named D8, often travelled with Petitioners. **When D8 was unable to travel with Petitioners, D8 stayed at Petitioners' Old Stage Road property in North Carolina. (T. p. 1341:3-19).** In 2006 and 2007, Petitioners took D8 to vets in Florida, North Carolina, and Colorado. **D8 visited a vet in Colorado once and received emergency care in Florida once. (T. pp. 1343:15-1344:5; 1310:11-13). P**~~etitioners took D8 to vets in North Carolina and Colorado for emergencies or as convenient in conjunction with care of the guard dogs.~~ **During 2006 and 2007, D8 received primary care in North Carolina at Brookwood Veterinary Clinic. (T. p. 1343:7-10; Resp. Ex. 28).**

The Department rejects Findings of Fact Nos. 47-48 as incomplete and finds that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the additions made to Findings of Fact Nos. 47-48 are supported by the preponderance of the admissible evidence in the record and are not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Findings of Fact Nos. 47-48 as follows:

47. In 2006 and 2007, Petitioners did everyday "hometown" activities wherever they happened to be, including Florida and North Carolina. **During 2006, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 162 and 173 days, respectively, in North Carolina, while spending 51 and 47 days, respectively, in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 213 and 225 days, respectively, in North Carolina during 2006. During 2007, when travel days or partial days spent within a state are not included in the calculations, Steve and Beth Fowler spent 168 and 180 days, respectively, in North Carolina while spending 27 days in Naples, Florida. When travel days or partial days spent within a state are included in the calculations, Steve and Beth Fowler spent 204 and 216 days, respectively, in North Carolina during 2007. (Compiled from Petitioners' Schedule of Days in North Carolina and Flight Records, Resp. Exs. 14, 15, 16, 17). Petitioners were not in Florida for the entire period from April 9, 2007 through October 3, 2007, a period of 177 consecutive days. (T. pp. 398:15-25, 399:6-9).**

During 2006 and 2007, Petitioners shopped for groceries in North Carolina (T. p. 1316), shopped at a warehouse club in North Carolina (E. Fowler Deposition Transcript p. 269), received haircuts and purchased hair products in North Carolina (T. p. 1316), received dry cleaning services in North Carolina (T. pp. 1316-1317), purchased tailoring in North Carolina (T. pp. 1435-1436), had house cleaners in North Carolina (T. pp. 1319-1320) and made deposits at banks in North Carolina (T. pp. 1441-1445). Petitioners were also members of a North Carolina gym (T. p. 155:7-20); Steve Fowler was a member of a Raleigh health club (T. p. 433:4-13), and Elizabeth Fowler purchased and received personal training services in North Carolina. (T. pp. 1426:7-1467:5).

48. In 2006, Petitioners hired Florida counsel to create wills and other estate documents. These documents were Petitioners' first estate plan. **During 2006, 2007, and 2008, the Charlotte office of Kilpatrick Stockton continued to provide Steve Fowler with legal services. (T. pp. 89:2-8, 18-20, 96:10-13, 97:2-16, 422:13-25, 423:1-6, Resp. Ex. 113, Check Nos. 2683 and 2465). During 2006, Moore & Van Allen, a North Carolina law firm, also provided Steve Fowler with legal services. (T. p. 422:13-25, Resp. Ex. 113, Check No. 2425).**

The Department rejects Finding of Fact No. 49 because it contains erroneous conclusions of law and is not based on evidence in the record. As a general rule, any determination requiring

the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 49 also misapplies the well-established North Carolina legal standards regarding a change in domicile. *See* Conclusion of Law No. 5. The evidence as a whole demonstrates that Petitioners failed to meet their burden to prove that they changed their domicile on January 20, 2006. Petitioners' three day visit to Naples on January 20, 2006 was consistent with their previous trips to Naples for vacation. Further, the car registration with Florida stated that Petitioners were not residents of Florida on January 20, 2006 and reflected a North Carolina address. Rather, Petitioners' actions show an intent to avoid both North Carolina gift and individual income taxes and Florida intangibles taxes, while continuing to live, work, and base their lives in Raleigh, North Carolina. Accordingly, the Department rejects Finding of Fact No. 49 as an erroneous conclusion of law.

In addition, there is no evidence in the record to suggest that Petitioners' business experience guided any attempt to become Florida residents. Accordingly, the Department also rejects Finding of Fact No. 49 as erroneous based on the evidence of record.

49. ~~Petitioners went about becoming Florida residents in a manner consistent with their experience in business not as a lawyer or accountant may have done. They reached various features of their affairs (changing addresses, registrations, and the like), as time allowed. Their accomplishing the transition in the manner they did reflects busy lives and is fully consistent with an intention to call Naples, Florida their home no later than January 20, 2006~~.

The Department rejects Finding of Fact No. 50 because it contains erroneous conclusions of law and is not based on evidence in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 50 misapplies the well-established North Carolina legal standards regarding an individual's domicile. *See* Conclusion of Law No. 5. All aspects of an individual's life, including personal and professional ties, are factors in the determination of domicile. The evidence of record demonstrates that Petitioners maintained both personal and professional domiciliary ties during 2006 and 2007.

In addition, as shown by the record cites below, the modification made to Finding of Fact No. 50 is supported by the preponderance of the admissible evidence in the record and is not

inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 50 as follows:

50. During trial, the Petitioners acknowledged their continuing activity in North Carolina, following the sale of Fowler Contracting. ~~What came through in their testimony, and through Mr. Mallard's testimony, was the central feature of this activity: helping Fowler Contracting from several angles, in contrast to maintaining any personal or "domiciliary" ties to North Carolina.~~ For example, Petitioners donated to candidates running for office in North Carolina who had helped protect job-site property of Fowler Contracting (*e.g.*, a candidate for Sheriff), made certain charitable donations at the request of Fowler Contracting customers, hosted an elaborate dual purpose party for customers and employees and Steve Fowler's birthday, and invested in property in North Carolina to secure work to protect Fowler Contracting employees. ~~All the evidence concerning these actions reflects a desire to benefit Fowler Contracting, especially as economic conditions made its viability more difficult.~~**For the years 2006, 2007, and 2008, Steve Fowler was the registered agent for Venture 487, LLC, a North Carolina limited liability company, using 7801 Old Stage Road, Raleigh as the address for the registered office. (Resp. Exs. 37, 38). For the years 2007 and 2008, Steve Fowler was the registered agent for Fowler Property Investments, LLC, a North Carolina limited liability company. (Resp. Exs. 41 and 42). For the years 2006 and 2007, Steve Fowler was the registered agent for Fowler Holding, Inc. and Commercial Grading, Inc., both North Carolina companies. (Resp. Exs. 44, 45, 47 and 48). A registered agent must be an individual who resides in this State. N.C. Gen. Stat. § 55D-30(a).**

On February 1, 2007, Steve Fowler established Buffaloe Country, LLC, a North Carolina limited liability company, which held 150 acres of land in Raleigh. (T. p. 454:13-15, Resp. Ex 40). The property was never held by Fowler Contracting. (T. p. 454:21-22). On March 12, 2007, Steve Fowler established East Durham Land Company, LLC, a North Carolina limited liability company, which held 424 acres of land in Durham, North Carolina. (T. p. 458:2-5, Resp. Ex 43). The property was never held by Fowler Contracting. (T. p. 458:11-13, 459:1-3). On March 12, 2007, Steve Fowler incorporated and was the sole owner of Leesville Road Ventures, LLC, a North Carolina limited liability company, which was established to hold 50% of the stock of East Durham Land Company, LLC. (T. p. 453:9-15, Resp. Ex. 39).

Steve Fowler was a 2006 Ernst and Young Entrepreneur of the Year for the Carolinas. (Steve Fowler Deposition T. p. 253:14-18). During 2006 and 2007, Petitioners donated to a North Carolina Sheriff's political campaign (T. p. 1432:10-12) and a Raleigh City Council candidate (T. pp. 429:1-430:2). Steve Fowler testified that during 2006 and 2007, he did not make any political contributions in Florida. (T. p. 430:3-5). Steve Fowler testified that Petitioners bought a homeowners insurance policy for his home at 7801 Old Stage Road in Raleigh for the period July 31, 2006 through July 31, 2007 and the policy included the stipulation that "The described dwelling is not seasonal or secondary." (T. pp. 400:21-25, 401:1-10, Resp. Ex. 81). Petitioners insured the contents of the Old Stage Road property for $371,000. (Resp. Ex. 81).

The Department rejects Finding of Fact No. 51 as an erroneous conclusion of law. *See* Finding of Fact No. 49.

51. ~~Reviewing Petitioners' actions following January 19, 2006 as a whole, including their testimony and related documents concerning these actions, the undersigned finds that Petitioners presented credible evidence of their intention to make Naples, Florida their home on January 20, 2006 and to return to that home when they were called away for work or were able to travel on vacation~~.

The Department rejects Finding of Fact No. 52 because it contains erroneous conclusions of law and is an incomplete statement of the facts and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 52 at least implies that the Department misapplied or applied the wrong legal test in this matter. The determination of the application of a legal standard in a matter is a conclusion of law. North Carolina case law has made clear that when examining an individual's domicile, one must look at "all of the surrounding circumstances and the conduct of the person." *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 601. The testimony of employees of the Department is consistent with this requirement.

In addition, as shown by the record cites below, the modification made to Finding of Fact No. 52 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 52 as follows:

52. ~~Respondent's officials testified that they applied what they termed a "facts and circumstances test" or "totality of circumstances test" to this controversy. Their testimony and Respondent's Final Determination, however, failed to demonstrate an understanding and appreciation of the intent of the criteria for domicile set forth in 17 NCAC 06B.3901(a) "Definition of Resident." Accordingly, Respondent has not demonstrated specialized knowledge and expertise regarding the applicable legal test to change domicile or the application of that test~~. **The Department's officials testified repeatedly that they considered all the facts and circumstances related to Petitioners' claimed residency. (T. pp. 960:9-13, 961:5-6, 970:2, 979:10-11, 1177:13-17).**

The Department rejects Finding of Fact No. 53 because it erroneously references information that is not contained in the record and is contrary to the evidence and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modifications made to Finding of Fact No. 53 is supported

by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 53 as follows:

53. ~~In addition, Respondent also failed to consider what its announced test demands: all the facts and circumstances~~. Respondent's officials revealed through their testimony and their Final Determination that they either (i) failed to consider the reasons why Petitioners took numerous actions; or (ii) decided the reasons did not matter. For example, ~~Gail Beamon testified that it does not matter why Petitioners continued to work for Fowler Contracting, only that they did so, and~~ Caroline Krause-Iafrate (the lead auditor) testified that Petitioners obtaining Florida driver's licenses and registering to vote in Florida held no substance. The evidence also was clear that no official from Respondent interviewed, or asked to interview, either Steve or Elizabeth Fowler at any time, either by telephone or face to face. **The Department officials considered all the facts and circumstances related to Petitioners' claimed residency. (T. pp. 960:9-13, 961:5-6, 970:2, 979:10-11, 1177:13-17). "The determination of domicile depends upon no one fact or combination of circumstances."** ***Hall*****, 80 N.C. at 609, 187 S.E.2d at 57. One must look at "all of the surrounding circumstances and the conduct of the person."** ***Farnsworth*****, 114 N.C. App. at 187, 441 S.E.2d at 601. In addition, Caroline Krause-Iafrate's testimony is supported by the Department's Rules and Bulletins which state, in its pertinent part, that "an individual's legal state of residence is reflected more by the routine events of life rather than events such as voting or obtaining a driver's license which may occur every four or five years." North Carolina Department of Revenue Individual Income Tax Rules and Bulletins at 32.**

Petitioners did not allow the Department to have direct contact with them. During the audit, Petitioners were represented by Michael Custer, an accountant who acted as their Power of Attorney. (T. pp. 376:22-24, 462:20-23). During the administrative review process, Petitioners were represented by three law firms: Nelson Mullins Riley & Scarborough; Culp Elliot & Carpenter; and Robinson Bradshaw & Hinson. (T. pp. 470:22-25, 471:1-19). In November 2010, the Department conducted a telephone conference with Petitioners' attorneys. (T. p. 738:4-20). Before the final determination was issued, the Department held two in-person conferences with Petitioners' attorneys, in May 2011 and on September 15, 2011. (T. pp. 740:1-25, 742:5-19). Steve Fowler attended the second in-person conference and had the opportunity to state his position. (T. pp. 471:25, 472:1-25, 473:2-16).

The Department rejects Finding of Fact No. 54 because it contains erroneous conclusions of law and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination

and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 54 purports to determine what facts and inferences regarding residency are within "the specialized knowledge" of Respondent. The determination of "the specialized knowledge" of an agency requires the exercise of judgment and application of legal principles. Accordingly, the Determination is a conclusion of law, not a finding of fact. Further, the evidence cited below demonstrates that the facts and inferences regarding residency was within the specialized knowledge of Respondent.

In addition, as shown by the record cites below, the modification made to Finding of Fact No. 54 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 54 as follows:

54. ~~The evidence did not show any facts and inferences regarding residency of these taxpayers within the specialized knowledge of Respondent.~~ **Carolina Krause-Iafrate, the primary auditor in this case, is a licensed Certified Public Accountant, holds a law degree, and has 8 years of experience in the private sector advising clients on residency issues. (T. pp. 1134:14-1135:15, 1136:5-1137:18). Gail Beamon is the Assistant Director of the Income Tax Division, Personal Taxes section, has been employed with the Department for over 30 years (over nine years as an auditor and 8 years as an administrative officer), and has been involved with hundreds of audits over the past ten years. (T. pp. 727:24-25, 728:2-19).**

The Department rejects Finding of Fact No. 55 because it contains erroneous conclusions of law. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409. The standards the Department must follow in performing its duties are well-established. In this case, the Department reviewed the proposed assessment, conducted a conference, and issued a "final determination," all as required by N.C. Gen. Stat. §§ 105-241.13 and 105-241.14(b). These steps satisfy the statutory requirements imposed upon the Department. There is no requirement, statutory or otherwise, that imposes the duties upon the Department that are stated in Finding of Fact No. 55. Furthermore, this "finding" is contrary to N.C. Gen. Stat. § 105-241(b)(1) which provides that although the Department must provide the basis for the determination, the statement of the basis does not prevent the Department from changing the basis. Accordingly, the Department rejects Finding of Fact No. 55 as an erroneous conclusion of law.

55. ~~The Department owes the citizens of North Carolina a complete explanation regarding the Department's analysis of cases. Applied here, the Department owed taxpayers an explanation why it rejected or ignored the detailed reasons for the position that taxpayers advanced, both in writing (*e.g.*, August 5, 2011 letter to Department officials and counsel,~~

~~Pet. Ex. 2) and at conference several weeks before the Department issued its Final Determination~~.

The Department rejects Finding of Fact No. 56 because it contains an erroneous conclusion of law and erroneously references information that is not contained in the record and finds that it should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the modification made to Finding of Fact No. 56 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department modifies Finding of Fact No. 56 as follows:

56. On September 15, 2011, Steve Fowler and Lynwood Mallard appeared at a conference hosted by the Department. After summarizing his clients' position, Petitioners' counsel tendered Mr. Fowler and Mr. Mallard for questions by Respondent's officials and counsel. ~~Respondents declined to make any meaningful inquiry of either of them.~~**Before the final determination was issued, the Department held two in-person conferences and Steve Fowler and his attorneys attended the second conference on September 15, 2011 where Steve Fowler had the opportunity to state his position. (T. pp. 471:25, 472:1-25, 473:2-16). Steve Fowler did not attend the first conference but his attorneys were present. (T. p. 472:3-10).**

The Department rejects Finding of Fact No. 57 because it contains erroneous conclusions of law. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

In addition, Finding of Fact No. 57 is contrary to the well-established North Carolina legal principle that conduct is of greater evidentiary value than declarations. It is also contrary to the principle that Petitioners actually must be physically present in the new state in order to effect a change in domicile. *See* Conclusion of Law No. 5. Accordingly, the Department rejects Finding of Fact No. 57 as an erroneous conclusion of law.

57. ~~In summary, the evidence shows that the Department focused too much on where Petitioners were, at any given time, instead of why Petitioners were there. The reasons for Petitioners' actions reveal their intention to become Florida residents far better than their physical presence in any place on any particular date~~.

The Department rejects Finding of Fact No. 58 because it contains erroneous conclusions of law. As a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 676. A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. at 60, 642 S.E.2d at 409.

Finding of Fact No. 58 imposes a burden on Respondent that is not found in North Carolina law. Instead, the burden is squarely placed on Petitioners to prove that they changed their domicile. *Reynolds*, 177 N.C. at 416, 99 S.E. at 242. No case exists that requires Respondent to prove that Petitioners' reasons for their actions lacked "sincerity or credibility." Furthermore, this conclusion is contrary to the established principles governing residency. The test does not look to the reasons for the actions, but rather to the actions themselves. *See* Conclusion of Law No. 5. Accordingly, the Department rejects Finding of Fact No. 58 as an erroneous conclusion of law.

58. ~~Taking into account all that Respondent advanced to detract from or diminish the evidence from Petitioners, Respondent failed to show that Petitioners' reasons for their actions lacked sincerity or credibility~~.

The Department determines that the Findings of Fact are incomplete and that they should be appended in light of the preponderance of the admissible evidence in the record. As shown by the record cites below, the addition made in Finding of Fact No. 59 is supported by the preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact recommended by the ALJ which is adopted by the Department. Thus, the Department appends the ALJ's Recommended Decision by adding finding of Fact No. 59 as follows:

59. **On February 8, 2006, Steve Fowler made gifts to both Robert Fowler and Ricky Fowler in the amount of $500,000 each, where each check listed a North Carolina address for Steve Fowler. (T. pp. 419:14-21, 420:3-3-12, Resp. Ex. 113, Check Nos. 2327 and 2328). On February 8, 2006, Elizabeth Fowler made gifts to both Robert Fowler and Ricky Fowler in the amount of $500,000 each, where each check listed a North Carolina address for Elizabeth Fowler. (T. pp. 1414:24-1415:1, Resp. Ex. 114, Check Nos. 6767 and 6768).**

CONCLUSIONS OF LAW

With regard to the Conclusions of Law contained in the ALJ's Recommended Decision and based upon the foregoing Findings of Fact, the Department decides as follows:

The Department adopts Conclusion of Law No. 1 of the ALJ's Recommended Decision:

1. The parties properly are before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

The Department rejects Conclusion of Law No. 2 of the ALJ's Recommended Decision as erroneous as a matter of law. The entire statutory definition of resident is relevant to a determination of an individual's domicile. In *Jones v. Board of Education*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923), the North Carolina Supreme Court explained that "[a] statute is passed as a whole and not in parts or sections" and that the entire statute must be "considered as parts of a connected whole."

The ALJ indicated only two sentences of N.C. Gen. Stat. § 105-134.1(12), the statute concerning residence, were applicable to this contested case. One of the missing sentences concerns a statutory presumption that applies when an individual is present within the State for more than 183 days during the taxable year. Unfortunately, the statute provides no definition of the word "day." Therefore, it is unclear whether the required presence means any portion of a day or a period of 24 hours. If partial days are included when calculating the number of days within the State, Steve and Beth Fowler spent 213 and 225 days in North Carolina, respectively, in 2006 and 204 and 216 days in North Carolina, respectively, in 2007. These amounts of time are greater than 183 days during a taxable year and would trigger the statutory presumption that both Petitioners were North Carolina residents in 2006 and 2007. Should counting partial days be proper resulting in the application of the statutory presumption of residency in North Carolina, the Findings of Fact show Petitioners cannot overcome this presumption.

Conclusion of Law No. 2 is therefore rewritten as follows:

2. The applicable statute for this case is § G.S.105.134.1(12), captioned "Resident." ~~This portion of the statute contains four sentences, two of which have application here~~.

The Department rejects Conclusion of Law No. 3 of the ALJ's Recommended Decision as erroneous as a matter of law. N.C. Gen. Stat. § 105-134.1(12) contains the definition of "Resident." A court "must consider the [statute] as a whole, having due regard to each of its express provisions." *Jones*, 185 N.C. at 307, 117 S.E. at 39. Conclusion of Law No. 3 is therefore rewritten as follows:

3. ~~The opening sentence of the statute~~ **N.C. Gen. Stat. § 105-134.1(12)** defines ~~as resident~~ **"Resident"** as:

> An individual who is domiciled in this State at any time during the taxable year or who resides in this State during the taxable year for other than a temporary or transitory purpose. **In the absence of convincing proof to the contrary, an individual who is present within the State for more than 183 days during the taxable year is presumed to be a resident, but the absence of an individual from the state for more than 183 days raises no presumption that the individual is not a resident. A resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State. The fact of marriage does not raise any presumption as to domicile or residence.**

N.C. G**en**. S**tat**. § 105-134.1(12) ~~(emphasis added)~~.

The Department rejects Conclusion of Law No. 4 of the ALJ's Recommended Decision for the reasons explained in Conclusions of Law Nos. 2 and 3. The entire statutory definition of "Resident" is set forth in the Department's Conclusion of Law No. 3, including the third sentence of the definition, and Conclusion of Law No. 4 is therefore stricken as unnecessary.

4. ~~The third sentence provides:~~

~~A resident who removes from North Carolina during a taxable year is considered a resident of North Carolina until he has both established a definite domicile elsewhere and abandoned any domicile in North Carolina.~~

~~G.S. § 105-134.1(12) (emphasis added)~~.

The Department rejects Conclusion of Law No. 5 of the ALJ's Recommended Decision as erroneous as a matter of law. N.C. Gen. Stat. § 105-134.1(12) provides the statutory definition of resident and instructs that "[a] resident who removes from the State during a taxable year is considered a resident until he has **both** established a definite domicile elsewhere **and** abandoned any domicile in this State." (Emphasis added). Consistent with this statutory mandate, the North Carolina Supreme Court has held: "To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home." *Hall v. Board of Elections*, 280 N.C. 600, 608-09, 187 S.E.2d 52, 57 (1972).

The seminal case on domicile in North Carolina is *Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E. 240 (1919). That case establishes certain principles which "are axiomatic in the law upon the subject." *Reynolds*, 177 N.C. at 416, 99 S.E. at 242. Those axiomatic principles include:

> "It therefore is settled that before there can be a change of domicile there must be not only an intent to acquire another home but that intention must be fully executed by *actual* residence in the new place, with the purpose of remaining there and not returning to the former domicile."

Id. at 415-16, 99 S.E. at 242.

> "The original domicile or, as it is called, the *forum originis*, or the domicile of origin, is to prevail until the party has not only acquired another but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile."

Id. at 417, 99 S.E. at 243.

> "The mere intention to acquire a new domicile without the fact of an actual removal avails nothing, neither does the fact of a removal without the intention."

Id. at 421, 99 S.E. at 245.

> "One of the fixed rules on the subject is this, that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove, without the intention of going back."

Id. at 422, 99 S.E. at 245.

> The relevant cases "emphasize sharply the necessity of actual presence and residence in the new location, as an essential condition or prerequisite to a change of domicile."

Id. at 422, 99 S.E. at 245.

> "One cannot make a home in a place merely intending to do so. Whensoever the intention is conceived the home does not exist until the intention is executed by an actual concurring *bodily* presence."

Id. at 422, 99 S.E. at 245-46.

> "To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home."

Id. at 421, 99 S.E. at 245.

Based on *Reynolds* and *Hall*, the North Carolina Court of Appeals has explained that a "three-part test" is to be applied in determining whether an individual has met his burden to prove a change in domicile, specifically: "To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home." *Farnsworth v. Jones*, 114 N.C. App. 182, 187, 441 S.E.2d 597, 601 (1994) (citing *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57). The Court further held that "[w]here someone retains his original home with all its incidental privileges and rights, there is no change in domicile." *Id*. at 186, 441 S.E.2d at 600. The North Carolina Supreme Court has instructed that these "well-established rules of law . . . are applicable to any situation in which it is necessary to locate an individual's domicile." *Hall*, 280 N.C. at 607, 187 S.E.2d at 56.

Accordingly, Conclusion of Law No. 5 of the ALJ's Recommended Decision is stricken and rewritten as follows:

5. ~~N.C.G.S. § 105-134.1(12) does not require that an individual abandon all ties with the State of North Carolina to effect a change of domicile~~.

5. **N.C. Gen. Stat. § 105-134.1(12) requires that an individual actually abandon his first domicile before a change in domicile can occur.**

The Department rejects Conclusion of Law No. 6 of the ALJ's Recommended Decision as erroneous as a matter of law. There is nothing in the North Carolina Administrative Code that

provides any "specific direction" for the erroneous statement of law in Conclusion of Law No. 5. The North Carolina Administrative Code simply provides additional guidance regarding the definition of "Resident." *See* N.C. Gen. Stat. § 105-264. Moreover, this administrative guidance is consistent with the applicable principles established by the North Carolina courts as explained in Conclusion of Law No. 5 and with the statutory definition. Specifically, 17 N.C.A.C. § 06B.3901(a) states, in part, that "[a] mere intent or desire to make a change in domicile is not enough; voluntary and positive action must be taken."

Conclusion of Law No. 6 is therefore rewritten as follows:

6. ~~The North Carolina Administrative Code provides specific direction in this regard~~. The section titled "Definition of Resident" states **in part**:

> A person's domicile is the place where he has a true, fixed permanent home and principal establishment, and to which place, whenever absent, the individual has the intention of returning. **. . . A mere intent or desire to make a change in domicile is not enough; voluntary and positive action must be taken**.

17 N.C.A.C. § 06B.3901(a).

The Department rejects Conclusion of Law No. 7 of the ALJ's Recommended Decision as an inaccurate and incomplete statement of the law. As explained in Conclusion of Law No. 5, N.C. Gen. Stat. § 105-134.1(12) provides that "[a] resident who removes from the State during a taxable year is considered a resident until he has **both** established a definite domicile elsewhere **and** abandoned any domicile in this State." (Emphasis added). The North Carolina Supreme Court has held: "To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home." *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57.

Conclusion of Law No. 7 of the ALJ's Recommended Decision ignores or misstates a number of the "axiomatic" principles governing the law of domicile set forth in Conclusion of Law No. 5. First, and perhaps most importantly, there is no mention of abandonment. As explained in Conclusion of Law No. 5, both the statutory definition and the applicable case law require an individual to actually abandon his first domicile. Unless and until he has done so, he remains a resident of the original state and there can be no change of domicile. "To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it." *Reynolds*, 177 N.C. at 421, 99 S.E. at 245. The original domicile prevails until the individual "has manifested and carried into execution an intention of abandoning his former domicile." *Id.* at 417, 99 S.E. at 242. Finally, "[o]ne of the fixed rules" is that "a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile." *Id.* at 422, 99 S.E. at 245. The ALJ's Conclusion of Law No. 7 ignores this fundamental requirement of the law.

Second, it is not enough to simply have a "home" as the ALJ's Conclusion of Law No. 7 states. As explained in Conclusion of Law No. 5, an intention to acquire another home "must be

fully executed by *actual* residence in the new place." *Reynolds*, 177 N.C. at 415-16, 99 S.E. at 242. The relevant cases "emphasize sharply the necessity of actual presence and residence in the new location, as an essential condition or prerequisite to a change of domicile." *Id.* at 422, 99 S.E. at 245. The Supreme Court has similarly explained that: "One cannot make a home in a place merely intending to do so. Whensoever the intention is conceived the home does not exist until the intention is executed by an actual concurring *bodily* presence." *Id.* at 422, 99 S.E. at 245-46.

Accordingly, Conclusion of Law No. 7 of the ALJ's Recommended Decision is stricken and rewritten as follows:

7. ~~To change one's domicile, in addition to having a home and the requisite intent, a person desiring to effect such a change must also take voluntary and positive action. 17 NCAC 06B.3901(a).~~

7. **As the North Carolina Court of Appeals has explained, North Carolina courts apply a "three-part test" to determine whether an individual has met his burden to prove a change in domicile, specifically: "To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home." *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 601 (citing *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57).**

The Department rejects Conclusion of Law No. 8 of the ALJ's Recommended Decision on the grounds that it is an incomplete statement of the events listed in 17 N.C.A.C. § 06B.3901(a) as indicating when a change of residence occurs. 17 N.C.A.C. § 06B.3901(c) lists seven events which may indicate a change in residency. These events are (1) selling a house and buying a new one; (2) directing the U.S. Postal Service to forward mail to a new address; (3) notifying senders of statements, bills, subscriptions and similar items to a new address; (4) transferring medical records to a new health care provider; (5) transferring memberships for church, a health club, a lodge or similar activity; (6) registering a vehicle in a new jurisdiction; and (7) applying for professional certification in a new jurisdiction. Although Petitioners presented evidence that they registered one vehicle in Florida on January 20, 2006, they failed to present any evidence that any of the other six events occurred prior to or on January 20, 2006.

Conclusion of Law No. 8 of the ALJ's Recommended Decision is also incomplete because 17 N.C.A.C. § 06B.3901(b) lists some of the factors that are to be considered in determining the legal residence of an individual for income tax purposes.

The Department also rejects Conclusion of Law No. 8 of the ALJ's Recommended Decision as contrary to the law. The North Carolina Supreme Court has held that "[t]he determination of domicile depends upon no one fact or combination of circumstances, but upon the whole, taken together, showing a preponderance of evidence in favor of some particular place as the domicile." *Hall*, 280 N.C. at 609, 187 S.E.2d at 57.

Conclusion of Law No. 8 is therefore stricken and rewritten as follows:

8. ~~A sub-part of the Administrative Code lists seven "events" that "indicate [when] a change in residency" occurs. Registering a vehicle in a new jurisdiction is one of the events indicating when a change in domicile occurs. 17 NCAC 06B.3901(c)(5).~~

8. **"The determination of domicile depends upon no one fact or combination of circumstances, but upon the whole, taken together, showing a preponderance of evidence in favor of some particular place as the domicile."** ***Hall*****, 280 N.C. at 609, 187 S.E.2d at 57. 17 N.C.A.C. § 06B.3901(b) lists some of the factors that are to be considered in determining the legal residence of an individual for income tax purposes. 17 N.C.A.C. § 06B.3901(c) lists seven events that indicate a change in residency.**

The Department rejects Conclusion of Law No. 9 of the ALJ's Recommended Decision as an erroneous statement of the law and as an erroneous application of the law to the facts as established by a preponderance of the evidence. The ALJ's erroneous conclusion that Petitioners' domicile from January 20, 2006 through the end of 2007 was Florida is based on the same error that affects the ALJ's Conclusion of Law No. 7, namely, an inaccurate and incomplete statement of the law. The ALJ has improperly substituted his own three-part test – which consists of (1) a home; (2) an intent; and (3) voluntary and positive action – for the three-part test established by the North Carolina courts. As previously explained, North Carolina courts apply a "three-part test" to determine whether an individual has met his burden to prove a change in domicile, specifically: "To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home." *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 601 (citing *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57). The ALJ failed to apply the proper test and Conclusion of Law No. 9 is erroneous for the same reasons as explained in Conclusion of Law No. 7.

The Department also rejects Conclusion of Law No. 9 of the ALJ's Recommended Decision because it is contrary to the well-established law regarding burden of proof and the standards by which the question of residency is to be evaluated. Regarding the burden of proof, the North Carolina Supreme Court has specifically held: "A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation." *Reynolds*, 177 N.C. at 416, 99 S.E. at 242 (citing *Mitchell v. United States*, 88 U.S. 350, 353 (1894)).

The standards by which residency cases are evaluated also have been firmly established. The North Carolina Supreme Court has held: "A person's testimony regarding his intention with respect to acquiring a new domicile or retaining his old one is competent evidence, but it is not conclusive of the question. All of the surrounding circumstances and the conduct of the person must be taken into consideration." *Hall*, 280 N.C. at 609, 187 S.E.2d at 57. Similarly, "[a] person's own testimony regarding his intention with respect to acquiring or retaining a domicile is not conclusive; such testimony is to be accepted with considerable reserve, even though no

suspicion may be entertained of the truthfulness of the witness." *Id.* Most importantly: "*[C]onduct is of greater evidential value than declarations*. Declarations as to an intention to acquire a domicile are of slight weight when they conflict with the facts." *Id*. at 609, 187 S.E.2d at 58. Finally: "Although a person's testimony regarding his or her intent regarding the acquisition of a new domicile is competent evidence, it is not conclusive. We must consider the evidence of all the surrounding circumstances and the conduct of the person in determining whether he or she has effectuated a change in domicile." *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 601.

Here, Petitioners had the burden of establishing all three prongs of the three-part test by the preponderance of the evidence. Thus, they were required to demonstrate: "(1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home." *Farnsworth,* 114 N.C. App. at 187, 441 S.E.2d at 601. In evaluating whether Petitioners satisfied this burden, conduct is of greater evidential value than declarations. Petitioners' declarations as to their intent are to be accepted with considerable reserve and are of slight weight when they conflict with the facts, as here. The ALJ failed to evaluate the evidence under these well-established standards.

The Department further rejects Conclusion of Law No. 9 of the ALJ's Recommended Decision because each of the three "factual findings" recited by the ALJ are either properly characterized as conclusions of law or are contrary to the preponderance of the evidence of record evaluated under the proper legal standards.

First, as to whether the Tiburon house was Petitioners' true, fixed, permanent home and principal establishment from January 20, 2006 through the end of 2007, this is properly characterized as a conclusion of law, not a "factual finding." An application of the proper legal standard demonstrates that the Tiburon house was not Petitioners' true fixed, permanent home and principal establishment from January 20, 2006 through the end of 2007. To effect a change of domicile, there first must be an actual abandonment of the first domicile, coupled with an intention not to return to it. Here, the preponderance of the evidence demonstrates that Petitioners did not abandon their domicile in North Carolina on January 20, 2006. The ALJ found as a fact that Petitioners were residents of North Carolina for their entire lives through and including January 19, 2006. Finding of Fact No. 23. On January 19, 2006, Petitioners owned three houses, one in Raleigh, North Carolina and two in Naples, Florida. Finding of Fact No. 14. Petitioners had owned the Tiburon house since 2002. Finding of Fact No. 4. Petitioners never occupied the other house in Florida. Finding of Fact No. 13. Petitioners continued to use the North Carolina address during 2006 and 2007, including as a registered office for various businesses with the North Carolina Secretary of State. Findings of Fact Nos. 39 and 50. "Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile." *Farnsworth*, 114 N.C. App. at 186, 441 S.E.2d at 600. Petitioners failed to meet their burden to establish the first prong of the test.

In addition, Petitioners did not meet the second prong of the test. Here, there was not an acquisition of a new domicile by actual residence at another place. "Whensoever the intention is conceived the home does not exist until the intention is executed by an actual concurring *bodily*

presence." *Reynolds*, 177 N.C. at 422, 99 S.E. at 245-46. Here, the preponderance of the evidence established that Steve and Elizabeth Fowler were only actually present in Florida for 51 and 47 days, respectively, in 2006, and were only in Florida for 27 days in 2007. Finding of Fact No. 28. In contrast, Steve Fowler was present in North Carolina for 162 days in 2006 and for 168 days in 2007, when calculated using 24-hour days. When calculated using any part of a day spent in North Carolina, Steve Fowler was present in North Carolina for 213 days in 2006 and for 204 days in 2007. Finding of Fact No. 28. Elizabeth Fowler was present in North Carolina for 173 days in 2006 and for 180 days in 2007, when calculated using 24-hour days. When calculated using any part of a day spent in North Carolina, Elizabeth Fowler was present in North Carolina for 225 days in 2006 and for 216 days in 2007. Finding of Fact No. 28. Calculating days using any part of a day spent in North Carolina results more than 183 days within the State for both Steve and Elizabeth Fowler during tax years 2006 and 2007. This would trigger the statutory presumption that Petitioners were residents of North Carolina in both 2006 and 2007, which the Findings of Fact show the Petitioners cannot overcome. Therefore, Petitioners failed to meet their burden to establish the second prong of the test.

Regarding the third prong of the test, the intent to make the newer residence a permanent home, although Petitioners declared that it was their intention to make Florida their permanent home on January 20, 2006, these declarations conflict with the facts and therefore are of slight weight. *Hall*, 280 N.C. at 609, 187 S.E.2d at 58. Conduct is of greater evidential value than declarations. Moreover, as explained, "[o]ne cannot make a home in a place merely intending to do so." *Reynolds*, 177 N.C. at 422, 99 S.E. at 245. "The mere intention to acquire a new domicile without the fact of actual removal avails nothing." *Id*. at 421, 99 S.E. at 245. Although Petitioners claimed to have possessed the intent to make Florida their home on January 20, 2006, they did not execute this intent by actual concurring bodily presence. As such, Petitioners failed to meet their burden to meet the third prong of the test. It should be emphasized that, in order to prove a change of domicile, Petitioners must meet their burden with respect to all three prongs of the test.

Second, as to whether Petitioners intended to return to the Tiburon House whenever absent, this is properly characterized as a conclusion of law, not a "factual finding." Further, as explained, intention without action is insufficient. "One of the fixed rules on the subject is this, that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove, without the intention of going back." *Reynolds*, 177 N.C. at 422, 99 S.E. at 245. Here, the preponderance of the evidence establishes that the home to which Petitioners returned whenever absent was the Raleigh home, not the Tiburon house.

Finally, as to whether Petitioners took voluntary and positive action to change their domicile to Florida, this is properly characterized as a conclusion of law, not a "factual finding." More importantly, as explained, the ALJ improperly substituted his three-part test for the three-part test established by the North Carolina courts. Nevertheless, the preponderance of the evidence does not establish that Petitioners took sufficient action necessary to change their domicile to Florida on January 20, 2006. Specifically, after January 20, 2006, Petitioners continued to work in Raleigh (Finding of Fact No. 17), established new business entities in North Carolina (Finding of Fact No. 50), made political and charitable contributions in North Carolina

(Findings of Fact Nos. 40 and 50), were registered to vote in North Carolina (Finding of Fact No. 31), were licensed to drive in North Carolina (Finding of Fact No. 31), had the majority of their vehicles in North Carolina (Finding of Fact No. 24), engaged in travel centered in North Carolina (Finding of Fact No. 36), conducted everyday living actives in North Carolina (Finding of Fact No. 47), visited doctors in North Carolina (Finding of Fact No. 44), had family in North Carolina (Finding of Fact No. 3), used their North Carolina addresses on official documents (Findings of Fact Nos. 38 and 39), and spent significantly more time in North Carolina than Florida (Finding of Fact No 47).

The Department therefore strikes and rewrites Conclusion of Law No. 9 as follows:

9. ~~Given the above factual findings that (i) Petitioners' Tiburon House was their true, fixed permanent home and principal establishment from January 20, 2006 through the end of 2007; (ii) from January 20, 2006 through the end of 2007, Petitioners intended to return to their Tiburon House, whenever absent; and (iii) Petitioners took voluntary and positive action to change their domicile to Florida (including, but not limited to, registering a vehicle in Florida on January 20, 2006); Petitioners' domicile from January 20, 2006 through the end of 2007 was Florida.~~

9-1. Petitioners did not meet their burden to prove that Tiburon was their true, fixed permanent home and principal establishment from January 20, 2006 through the end of 2007.

9-2. Petitioners did not meet their burden to prove that from January 20, 2006 through the end of 2007, they intended to return to their Tiburon House, whenever absent.

9-3. Petitioners did not meet their burden to prove that they took sufficient action to change their domicile to Florida on January 20, 2006 or at any time from that date through 2007.

9-4. Petitioners did not meet their burden to demonstrate an actual abandonment of the first domicile, coupled with an intention not to return to it, on January 20, 2006 or at any time through 2007. *See Farnsworth,* 114 N.C. App. at 187, 441 S.E.2d at 601.

9-5. Petitioners did not meet their burden to demonstrate the acquisition of a new domicile by actual residence at another place on January 20, 2006 or at any time through 2007. *See Farnsworth,* 114 N.C. App. at 187, 441 S.E.2d at 601.

9-6. Petitioners did not meet their burden to demonstrate the intent of making the newer residence a permanent home on January 20, 2006 or at any time through 2007. *See Farnsworth,* 114 N.C. App. at 187, 441 S.E.2d at 601.

9-7. All three prongs of the three-part test articulated in *Farnsworth* must be met to prove a change in domicile.

9-8. Petitioners failed to meet the three-part test articulated in *Farnsworth*.

9-9. Petitioners' domicile from January 20, 2006 through the end of 2007 was North Carolina.

The Department rejects Conclusion of Law No. 10 of the ALJ's Recommended Decision as erroneous as a matter of law. The ALJ's conclusion that "the true establishment of a new domicile results in the de jure abandonment of one's old domicile" is contrary to the case law discussed above as well as the statutory definition of resident.

The Department therefore rewrites Conclusion of Law No. 10 as follows:

10. The North Carolina Administrative Code also declares: "A longstanding principle in tax administration, repeatedly upheld by the courts, is that an individual can have but one domicile" at any given time. 17 N.C.A.C. § 06B.3901. ~~As a result, the true establishment of a new domicile results in the de jure abandonment of one's old domicile~~.

The Department rejects Conclusion of Law No. 11 of the ALJ's Recommended Decision as erroneous as a matter of law for the reasons given for Conclusions of Law Nos. 9 and 10. The Department also rejects Conclusion of Law No. 11 of the ALJ's Recommended Decision as contrary to a preponderance of the evidence. As explained in Conclusion of Law No. 9, Petitioners failed to meet their burden to meet the three-part test to prove a change in domicile as articulated in *Farnsworth*. "A domicile once acquired is presumed to continue until it is shown to have been changed." *Reynolds*, 177 N.C. at 416, 99 S.E. at 242. "Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile." *Farnsworth*, 114 N.C. App. at 186, 441 S.E.2d at 600. As set forth in Conclusion of Law 9-4, Petitioners did not meet their burden to demonstrate an actual abandonment of the first domicile. As set forth in Conclusion of Law 9-5, Petitioners did not meet their burden to demonstrate the acquisition of a new domicile by actual residence at another place.

The Department therefore strikes Conclusion of Law No. 11:

11. ~~Accordingly, when Petitioners established their domicile in Florida on January 20, 2006, Petitioners abandoned their North Carolina domicile on January 20, 2006.~~

The Department rejects Conclusion of Law No. 12 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence.

First, the events listed in Subsection (i) and (ii) are inaccurate based upon a preponderance of the admissible evidence. With Subsection (i), the event is more accurately stated that after selling a portion of his shares of Commercial Grading on February 3, 2006, Steve Fowler retained a 32.6% ownership in the company. (Finding of Fact No. 22). With Subsection (ii), the event is more accurately stated that during 2006 and 2007, Petitioners consistently and repeatedly returned to their Old Stage Road home in Raleigh, North Carolina. (Findings of Fact Nos. 25 & 36). With Subsection (ix), there is no evidence that Petitioners turned in their North Carolina driver's licenses. These events fail to demonstrate abandonment but show that Steve Fowler retained ownership in his North Carolina business and Petitioners

continued to enjoy the privileges and benefits of their Old Stage Road, Raleigh, North Carolina home throughout 2006 and 2007.

Next, the events noted in Subsections (iii) and (iv) occurred in 2000-2001 and 2003 (T. pp. 216:2-7), years *before* Petitioners purportedly established a new domicile on January 20, 2006. As was admitted by Steve Fowler, the business venture noted in Subsection (v) never materialized and concluded by December 2005. (Finding of Fact No. 9). These events fail to demonstrate an actual removal from Petitioners' North Carolina domicile as required by North Carolina law. "[T]he mere intention to acquire a new domicile without the fact of an actual removal avails nothing." *Reynolds v. Cotton Mills*, 177 N.C. at 421, 99 S.E. at 245 (1919). Most importantly, Petitioners admitted that they were North Carolina residents from 2000-2005, the years when these events occurred.

Of equal importance, the events noted in Subsections (vi), (x), (xi)-(xiv) occurred well *after* January 20, 2006 and cannot demonstrate that Petitioners abandoned their North Carolina domicile and established a new one on January 20, 2006. As noted in the Exceptions to Findings of Fact, when considering the date of occurrence, the record reflects as follows: Subsection (vi) Quail West was never Petitioners' residence and was sold in April 2009; Subsection (x) Petitioners sent a letter to be removed from North Carolina voting rolls on August 23, 2006; Subsection (xi) Cooper Pulliam was hired in March 2006 (T. p. 210:6-8); Subsection (xii) a national investment portfolio occurred in April 2006 (Pet. Ex. 42); Subsection (xiii) hiring Florida counsel for an estate plan occurred after February 3, 2006 (T. p. 245:9-11); and Subsection (xiv) searching for a replacement for Steve Fowler in Commercial Grading dba Fowler Contracting occurred after March 2006 (T. p. 161:24-162:2).

In addition, most of the descriptions of these events are significantly incomplete. For example, Subsections (vii), moving cars from Raleigh to their Tiburon House, occurred either well after or well before January 20, 2006. The evidence also demonstrated that Petitioners had four cars remaining in Raleigh, including a Porsche and Ferrari. (Findings of Fact Nos. 24, 38). Subsection (viii), stating that Petitioners changed addresses to Naples, lists an event that also occurred well after January 20, 2006. Furthermore, Petitioners continued to use North Carolina addresses on and well after January 20, 2006. (Finding of Fact Nos. 38 & 44; Resp. Ex. 23).

Finally, with respect to Subsection (xv), the ALJ erroneously concluded that Petitioners' "expressing their intention to change domiciles to numerous individuals" demonstrated an abandonment of their North Carolina domicile. This conclusion is contrary to the law.

These events do not demonstrate an actual abandonment of North Carolina as Petitioners' domicile as a matter of law. As set forth in Conclusion of Law 9-4, Petitioners did not meet their burden to demonstrate an actual abandonment of the first domicile.

The Department therefore strikes Conclusion of Law No. 12:

12. ~~Independent of the above, Petitioners also abandoned their North Carolina domicile through the following acts: (i) their selling control of Fowler Contracting, the company to which Petitioners had devoted their personal and business lives for some 22 years at the~~

~~time of sale; (ii) working less in Raleigh and working remotely when feasible, after the sale; (iii) abandoning their architect-drawn plans to build an estate-size residence on Old Stage Road; (iv) moving their most valued heirlooms and furniture from their North Carolina residence to their Florida residence; (v) creating and investing in the Florida company, Fowler Aviation, Inc.; (vi) buying the Quail West House in Naples; (vii) moving cars from Raleigh to their Tiburon House; (viii) changing addresses on tax returns and with businesses from North Carolina to Florida; (ix) turning in their North Carolina drivers licenses; (x) removing themselves from the voting rolls in North Carolina; (xi) hiring Cooper Pulliam in Atlanta Georgia as their investment advisor; (xii) investing in a national portfolio of municipal bonds; (xiii) hiring Florida counsel to create an estate plan; (xiv) searching for someone to replace Steve Fowler as President of Fowler Contracting; and (xv) expressing their intention to change domicile to numerous individuals who provided some services to them – some of those services depending upon where Petitioners were domiciled~~.

The Department rejects Conclusion of Law No. 13 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence. First, whether or not "Petitioners had decided to abandon North Carolina for a new life in Naples, Florida" is insufficient as a matter of law to effect a change in domicile, for the reasons previously explained. Intent alone is not enough; there must be both abandonment and actual residence in the new home. *See* Conclusions of Law Nos. 5, 7 and 9. Further, the statement that "Petitioners' enlistment of numerous individuals to assist in relinquishing their 'North Carolina lives' is additional evidence of abandonment of their North Carolina domicile" is both erroneous as a matter of law and contrary to a preponderance of the evidence. *See* Conclusion of Law Nos. 5, 7 and 9.

The individuals listed in this Conclusion of Law did not conduct activities which led to an abandonment of Petitioners' "North Carolina lives." Specifically, the undisputed admissible evidence showed that Lynwood Mallard, a North Carolina attorney, prepared three-year employment contracts for Petitioners to continue working in their North Carolina business. Finding of Fact 18. Mr. Mallard repeatedly used Petitioners' North Carolina address for correspondence and billing statements during 2006 through 2008. Finding of Fact 39. Kim Dennis, a North Carolina real estate agent, did not list Petitioners' Raleigh home for sale until December 1, 2010, more than 4 years after January 20, 2006. Finding of Fact No. 35. Graham Clements, a North Carolina CPA, provided advice to Petitioners regarding what actions to take to change residency that Petitioners did not follow. Finding of Fact No. 14. Cooper Pulliam, a Georgia investment broker, made investments for Petitioners in April 2006, several months after January 20, 2006. Finding of Fact No. 37. Victoria Harrison assisted Petitioners in purchasing the Quail West house in Florida which Petitioners sold and never used as their residence. Finding of Fact No. 13. Judy Shelton decorated many houses for Petitioners, including the houses located in both North Carolina and Florida. Finding of Fact No. 6. William Graef, owner of a North Carolina aircraft management group, assisted Petitioners with the purchase of an aircraft which was based in North Carolina during 2007. Finding of Fact No. 15. The activities conducted by these individuals do not reflect an abandonment of Petitioners' "North Carolina lives," but instead, demonstrate Petitioners' continued ties to the state of North Carolina. As set

forth in Conclusion of Law 9-4, Petitioners did not meet their burden to demonstrate an actual abandonment of the first domicile.

The Department therefore strikes Conclusion of Law No. 13:

13. ~~Petitioners' enlistment of numerous individuals to assist in relinquishing their "North Carolina lives" is additional evidence of abandonment of their North Carolina domicile by January 20, 2006. Those individuals include Lynwood Mallard, Kim Dennis, Graham Clements, Cooper Pulliam, Victoria Harrison, Judy Shelton, and William Graef. Their collective testimony yields a consistent theme that Petitioners had decided to abandon North Carolina for a new life in Naples, Florida~~.

The Department rejects Conclusion of Law No. 14 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence. N.C. Gen. Stat. § 105-134.1(12) defines resident, in part, as an individual who is domiciled in this State at any time during the taxable year for other than a temporary or transitory purpose. The statute further states, however, that "[a] resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State." Petitioners admit and the ALJ found that "[f]or their entire lives through January 19, 2006, Petitioners were residents of North Carolina." Finding of Fact No. 23. The second quoted portion of the statute is therefore the relevant portion of the definition. For the reasons stated in Conclusions of Law Nos. 5, 7 and 9, Petitioners neither established a definite domicile elsewhere nor abandoned their domicile in this State on January 20, 2006 or at any point through the end of 2007. Petitioners therefore continued to be residents of this State from January 20, 2006 through the end of 2007. *See* Conclusions of Law Nos. 5, 7 and 9.

The Department also rejects the second sentence of Conclusion of Law No. 14 of the ALJ's Recommended Decision as contrary to the preponderance of the evidence. The preponderance of the evidence demonstrates that the home to which Petitioners returned whenever absent was their North Carolina home, not their house in Florida. *See* Conclusion of Law No. 8. "Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile." *Farnsworth*, 114 N.C. App. at 186, 441 S.E.2d at 600. Further, the preponderance of the evidence establishes that Petitioner conducted many activities in Raleigh other than "to fulfill the terms of their agreement with Long Point Capital," including an elaborate birthday party for Steve Fowler. Finding of Fact No. 50.

The Department therefore strikes Conclusions of Law No. 14.

14. ~~The time Petitioners spent in North Carolina during the period of January 20, 2006 through the end of 2007 was for a temporary or transitory purpose, as the applicable statute contemplates. Specifically, only when the nature of the tasks called for them to do so did Petitioners return to North Carolina to fulfill the terms of their agreement with Long Point Capital~~.

The Department rejects Conclusion of Law No. 15 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence for the reasons explained in Conclusions of Law Nos. 5, 7, 9 and 14.

The Department therefore strikes Conclusion of Law No. 15:

15. ~~"The term 'nonresident' includes an individual who resides in North Carolina for a temporary or transitory purpose and is, in fact, a domiciliary resident of another state or country." State of North Carolina Individual Income Tax Rules and Bulletins at 34 (Pet. Ex. 8). This provision describes Petitioners in 2006 and 2007.~~

The Department rejects Conclusion of Law No. 16 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence for the reasons previously explained in Conclusions of Law Nos. 1 - 15.

The Department therefore strikes and rewrites Conclusion of Law No. 16 as follows:

16. ~~Taking all of the above into account, Petitioners established by a preponderance of the evidence that Respondent acted erroneously in deciding that Petitioners had failed to change their domicile to Florida for 2006 and 2007.~~

16. Based on all of the foregoing, Petitioners have not established that Respondent acted erroneously in concluding that Petitioners failed to meet their burden to demonstrate a change of domicile from North Carolina to Florida for 2006 and 2007.

The Department rejects Conclusion of Law No. 17 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence for the reasons previously explained in Conclusion of Law Nos. 1 - 16.

The Department therefore strikes and rewrites Conclusion of Law No. 17 as follows:

17. ~~Under N.C. Gen. Stat. §105-134.1(12), Petitioners were not residents of North Carolina after January 19, 2006 through the end of 2007 and therefore not subject to North Carolina income or gift tax for that period, except for income earned in North Carolina~~.

17. Under N.C. Gen. Stat. §105-134.1(12), Petitioners were residents of North Carolina during 2006 and 2007 and were therefore subject to North Carolina income and gift taxes for those years.

The Department rejects Conclusion of Law No. 18 of the ALJ's Recommended Decision as erroneous as a matter of law and as contrary to a preponderance of the evidence for the reasons previously explained in Conclusions of Law Nos. 1 - 17.

The Department therefore strikes Conclusion of Law No. 18:

18. ~~There are no facts and inferences regarding residency, arising from the evidence produced in this case, within the demonstrated, specialized knowledge of Respondent. *See* N.C. Gen. Stat. § 150B-34(a).~~

The Department makes the following additional Conclusion of Law regarding North Carolina Registered Agents:

19. N.C. Gen. Stat. § 55D-30(a)2a requires that a registered agent must be an individual who resides in this State.

The Department makes the following additional Conclusions of Law regarding the issue of whether Petitioners met their burden to show that the Department improperly imposed the large tax deficiency penalties:

20. N.C. Gen. Stat. § 105-236(a)(5)(b) states: "if a taxpayer understates taxable income, by any means, by an amount equal to twenty–five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency."

21. In *Wal-Mart Stores East, Inc. v. Hinton*, 197 N.C. App. 30, 58, 676 S.E.2d 634, 653-54 (2009), the North Carolina Court of Appeals held that N.C. Gen. Stat. § 105-236(a)(5)(c) does not require a finding of negligence. Instead, if a taxpayer's income is understated by more than 25%, the "large tax deficiency" penalty is invoked without a finding of negligence. *Id.*

22. Subdivision (a)(5)(c) of the statute is captioned "Other large tax deficiency" and subdivision (a)(5)(b) is captioned "Large individual income tax deficiency." The two subdivisions require the Secretary to impose the penalty when tax liability or taxable income, respectively, is understated by 25% or more.

23. The holding and rationale of *Wal-Mart* apply to both the "Other large tax deficiency" and the "Large individual income tax deficiency."

24. Because Petitioners' taxable income was understated by 25% or more, the large individual income tax deficiency penalty was properly imposed.

25. In addition, because Petitioners' gift tax liability was understated by 25% or more, the other large deficiency penalty was properly imposed.

The Department makes the following additional Conclusions of Law regarding the issue of whether the ALJ improperly abated interest on the assessments:

26. By statute, interest accrues on an underpayment of tax from the date set by statute for payment of the tax until the tax is paid. N.C. Gen. Stat. § 105-241.21(b).

27. **Every tax and all interest and penalties thereon are a debt from the taxpayer to the State of North Carolina. N.C. Gen. Stat. § 105-238.**

28. **Federal courts have held that courts lack authority to waive or reduce interest on unpaid taxes under Internal Revenue Code § 6601, the federal counterpart to N.C. Gen. Stat. § 105-241.41(b). For example, the Federal Court of Claims has held that "once it is established that taxes due for a given year have not been paid by the last date prescribed for payment, interest related to such taxes must be paid as a matter of law." *Anderson Columbia v. United States*, 54 Fed. Cl. 756, 758 (2002).**

29. **The Court in *Anderson* reiterated the "salutory principle, long established in the tax law," *Lorillard Co. v. United States*, 226 F. Supp. 694, 698 (S.D.N.Y), *aff'd per curiam*, 338 F.2d 499 (2nd Cir. 1964), that "interest is not a penalty but, rather, is intended only to compensate the Government for delay in the payment of a tax." *Anderson*, 54 Fed. Cl. at 698 (citation and internal quotations omitted). "If tax is not properly paid, interest is assessed to compensate for the Government's loss of use of the money, irrespective of the reasons for the late payment." *Id*.**

30. **The Court further held that "[u]nless a statutory exception applies, neither the [taxing authority] nor the Courts have discretion to excuse a taxpayer from payment of interest." *Id*.**

31. **The North Carolina Supreme Court has instructed that "generally it is preferable that state taxation statutes be interpreted consistently with their federal counterparts." *Stone v. Lynch*, 312 N.C. 739, 745, 325 S.E.2d 230, 234 (1985).**

32. **No statutory exception exists that allows the Secretary or a court to excuse the payment of interest. N.C. Gen. Stat. § 105-237 authorizes the Secretary of Revenue to waive penalties but not interest. N.C. Gen. Stat. § 105-237.1 authorizes the Secretary to compromise a taxpayer's liability for a tax that has become collectible. Neither of these exceptions authorizes the Secretary or a court to waive or reduce interest on unpaid taxes.**

33. **Consistent with *Anderson*, the Court of Appeals for the Sixth Circuit has explicitly held that a court cannot abate interest due by statute on unpaid tax through the exercise of its equitable powers. *Johnson v. United States*, 602 F.2d 734 (6th Cir. 1979). The Court held that the district court improperly "used its equitable powers to deny enforcement of the mandatory provisions of section 6601(e)(3), an admittedly valid tax law" and this was "in contravention of the direct expression of the legislative will." *Id*. at 738-39.**

34. **The Court in *Johnson* concluded that "the district court's invocation of equity to alter and reduce the statutorily defined period for the accruing of prejudgment interest was beyond the court's equitable powers" and was "plainly erroneous." *Id*. at 739.**

35. Finally, the United States Supreme Court has distinguished between interest and penalties, holding that "[a] penalty is a means of punishment; interest is a means of compensation." *United States v. Childs*, 266 U.S. 304, 306 (1924). The Court further held: "The imposition of a tax is certainly a function of government and creates an obligation, and the power that creates the obligation can assign the measure of its delinquency – the detriment of delay in payment." *Id*. at 308.

36. The Court held in *Childs* that interest on the nonpayment of a tax is "clearly intended to compensate the delay in the payment of the tax" and that "the detriment of its non-payment [is] to be continued throughout the time of its non-payment." *Id*. at 310.

37. It is undisputed that the Petitioners have never paid the tax assessed. By statute, interest began to accrue from the date set by statute for paying the tax and will continue to accrue until paid. N.C. Gen. Stat. § 105-241.21(b). No statutory exception exists that allows an abatement of interest on unpaid taxes.

38. The ALJ therefore lacked authority to abate interest on the underpayment or to alter the statutorily defined period for the accrual of interest under N.C. Gen. Stat. § 105-241.21(b).

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department determines that the ALJ's Recommended Decision is contrary to the preponderance of admissible evidence in the record and to the law as applied to that evidence. The ALJ's Recommended Decision does not reflect that the proper burden of proof was applied, nor does it address the statutory presumption of correctness set out in N.C. Gen. Stat. § 105-241.9(a). Accordingly, and for the reasons set out herein, the Department rejects the ALJ's Recommended Decision. The Notices of Final Determination dated October 27, 2011 issued to Petitioners by Respondent concerning individual income tax and gift tax assessments are sustained as to the tax, penalties, and interest, plus interest accruing, until paid in full.

APPEAL

Pursuant to N.C. Gen. Stat. §150B-45 a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 150-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Agency Decision. Before filing a Petition for Judicial Review, a

taxpayer must pay the amount of tax, penalties, and interest that this Final Agency Decision states is due. N.C. Gen. Stat. § 105-241.16. Tax, penalties, interest, and the rate interest accrues are calculated as of July 17, 2013 as follows:

Individual Income Tax -- Petitioners

Tax:	**$ 6,325,106.00**
Penalty:	**$ 1,581,276.50**
Interest:	**$ 2,138,925.56**
Total Due as of July 17, 2013	**$10,047,039.78**

Plus daily interest which accrues at the rate of $865.86 per day.

Gift Tax – Steve Fowler

Tax:	**$ 96,560.00**
Penalty:	**$ 57,936.00**
Interest:	**$ 33,159.53**
Total Due as of July 17, 2013	**$187,681.97**

Plus daily interest which accrues at the rate of $13.22 per day.

Gift Tax – Beth Fowler

Tax:	**$ 118,180.00**
Penalty:	**$ 70,908.00**
Interest:	**$ 40,584.03**
Total Due as of July 17, 2013	**$ 229,704.39**

Plus daily interest which accrues at the rate of $16.18 per day.

Under N.C. Gen. Stat. 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department as well as the Department's Final Agency Decision, with the reviewing court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, PO BOX 871, Raleigh, North Carolina 27602-0871, at the time the appeal is initiated to insure timely filing of the record.

This the 17th day of July, 2013.

/s/ ***Janice W. Davidson***

Janice W. Davidson
Agency Legal Specialist II
North Carolina Department of Revenue