

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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DESMOND BARTHOLOMEW
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF TAX
AND REVENUE
Respondent

Case No.: 2011-OTR-00015

FINAL ORDER

I. Summary of Final Order

HELD: Petitioner Desmond Bartholomew was not a bona fide resident of the U.S. Virgin Islands during the tax period of 2003 and 2004. Petitioner was required to file U.S. and DC tax returns for the requisite period because Petitioner never relinquished his residency in the District of Columbia and never changed his domicile. Petitioner must pay taxes due and owing the District of Columbia Government in the amount of \$7,033, exclusive of interest and penalties.

II. Introduction

On June 21, 2011, Petitioner Desmond Bartholomew filed a Taxpayer's Protest of a Proposed Assessment with the Office of Administrative Hearings ("OAH"). Petitioner is appealing a Notice of Proposed Assessment of Taxpayer Deficiency ("NPATD"), dated May 26,

2011, that assessed an income tax, interest and penalty in the total amount of \$10,997¹, for the 2003 and 2004 tax years.

By electing a hearing with the Office of Administrative Hearings, the taxpayer has waived the right to have this matter adjudicated in the District of Columbia Superior Court. D.C. Official Code § 47-4312(c), as amended.

The predominant issue in this case is whether Petitioner was a District of Columbia resident in tax years 2003 and 2004 because he worked full-time in the United States Virgin Islands from 2002 through 2005. D.C. Official Code §§ 47-1805.02 and 47-1801.04(17).

This matter came before this administrative court for an evidentiary hearing on September 8, 2011. On the date of the hearing, Petitioner Desmond Bartholomew appeared on his own behalf. The Government appeared represented by Assistant Attorney General Edward Blick, of the OTR. Richard Mack, a tax auditor for OTR testified on behalf of the Government. I admitted Petitioner's Exhibits "PX" 100-113 and Respondent OTR's Exhibits "RX" 200-214 into evidence during the hearing.

The parties were invited twice to file post hearing briefs on the issue of whether or not Petitioner was a bona fide resident of the U.S. Virgin Islands or the District of Columbia. All post-hearing briefs have been submitted, and this case is now ripe for ruling.

¹ On September 14, 2011, the DC Government filed an updated Status Report with this administrative court and clarified that the amount due and owing the Government for 2003 and 2004 totals \$7,039, when subtracting the garnished amount of \$931. Petitioner, however, provided proof that the actual amount garnished from his pay was \$937.

Based on the testimony of the witnesses, my evaluation of their credibility, the documents admitted into evidence, and the post hearing brief submissions, I now make the following findings of fact and conclusions of law.

III. Findings of Fact

1. At all relevant times, Petitioner's wife and child have resided in the District of Columbia.
2. Petitioner left the District of Columbia in May 2002 to commence a position in the local government in St. Thomas, U.S. Virgin Islands (USVI).
3. He was employed as chief economist for the Bureau of Economic Research in the USVI from May 2002 until May 2005.
4. Notification of Personnel Action forms completed by Petitioner's employer, identified Petitioner as "married" and claimed two exemptions. RX 209 and 213.
5. Petitioner signed a lease agreement to rent a residence from May 2002 through December 2002, after which Petitioner became a month-to-month tenant. RX 207.
6. In May 2005, he resigned from his job and returned to the District of Columbia to his wife and child.
7. When he left the District of Columbia in May 2002, he left his automobile in the District of Columbia.

8. During his tenure as a chief economist in the USVI, Petitioner returned to the United States a few times, once for a four-day conference in Miami, Florida. He also returned to the District of Columbia at the USVI's expense.
9. When Petitioner returned to the District of Columbia in May 2005, he returned to his wife and child at the residence he left at 236 Farragut Street, NW #103.
10. In 2005, Petitioner subsequently purchased the residence where his wife and child were living at 236 Farragut Street, NW #103.
11. Petitioner never filed a local jurisdiction U.S. Virgin Islands tax return.
12. In 2003 and 2004, Petitioner filed federal tax returns and used his Washington, DC address on those returns.
13. Petitioner amended his 2003 federal tax return to reflect that he was married filing a joint return. He further changed the return by removing all itemized deductions totaling \$20,163 on his original federal return, when those expenses were disallowed because they were not substantiated. PX 111.
14. According to the tax transcript, Petitioner's adjusted gross income for the tax period ending December 31, 2003 was \$56,878. Respondent's Exhibit 201.
15. According to the tax transcript, Petitioner's adjusted gross income for the tax period ending December 31, 2004 was \$56,400. RX202.

16. Petitioner provided one blank check from a U.S. Virgin Island bank with his name on the personal check. Petitioner's Exhibit "PX" 113.
17. On his tax returns filed in 2003 and 2004, Petitioner did not check boxes regarding his marital status, but on page 2 of his IRS Form 1040 return in the direct deposit information line, Petitioner sought a refund and identifies a bank account number 60757523, which does not match the account number on the check he presented from the U.S. Virgin Islands bank account (Account No. 192 069756) in PX 113.
18. Petitioner did not disclose the location of this bank account identified on his IRS Form 1040.
19. In 2004, Petitioner's wife filed a DC tax return.
20. Petitioner did not vote in either the District of Columbia or the USVI from 2002-2005.
21. Respondent was delayed in completing an audit. It took three years. PX 101.

IV. Conclusions of Law

Jurisdiction of this case is conferred under D.C. Official Code § 47-4312,² and the Office of Administrative Hearings Establishment Act, D.C. Official Code § 2-1831.03(b)(4), as amended.

Petitioner disputes OTR's contention that he owes taxes to the District of Columbia on his 2003 and 2004 earnings, as he remained a "resident" of the District of Columbia as that term

is defined under DC law, even though he worked full time in the USVI for the entire years in 2003 and 2004.

The relevant provisions of law in force during the applicable period of 2003 and 2004 were 26 U.S.C. Section 932, which states in pertinent part:

(c) *Treatment of Virgin Islands residents.*

(1) Application of subsection. This subsection shall apply to an individual for the taxable year if—

(A) such individual is a bona fide resident of the Virgin Islands during the entire taxable year, or

(B) such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement. **Each individual to whom this subsection applies for the taxable year shall file an income tax return for the taxable year with the Virgin Islands. [Emphasis supplied.]**

(3) Extent of income tax liability. In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654 [26 USCS Section 7654]) as relates to the taxes imposed by this chapter [26 U.S.C.S. Sections 1 et seq.], the Virgin Islands shall be treated as including the United States.

(4) Residents of the Virgin Islands. In the case of an individual –

(A) who is a bona fide resident of the Virgin Islands during the entire taxable year,

(B) who, on his return of income tax to the Virgin Islands, reports income from all sources and identifies the source of each item shown on such return, and

(C) who fully pays his tax liability referred to in section 934(a) [26 USCS 934(a)] to the Virgin islands with respect to such income, for purposes of calculating income tax liability to the United States, gross income shall not include any amount included in gross income on such return, and allocable

deductions and credits shall not be taken into account.
[Emphasis supplied.]

A. IRS Publication 570 in 2003 and 2004

IRS Publication 570 also states the following for tax years 2003 and 2004²:

Resident of the Virgin Islands. If you are a bona fide resident of the Virgin Islands on the last day of the tax year, you must file your tax return on Form 1040 with the Government of the Virgin Islands. You do not have to file with the IRS for any tax year in which you are a bona fide resident of the Virgin Islands on the last day of the year, provided you report and pay tax on your income from all sources to the Virgin Islands and identify the source(s) of the income on the return.

Non-Virgin Islands resident with Virgin Islands income. If you are not a bona fide resident of the Virgin Islands on the last day of your tax year, you must file identical tax returns with the United States and the Virgin Islands if you have:

- (1) Income from sources in the Virgin Islands...

File the original return with the United States and file a copy of the U.S. return...with the Virgin Islands Bureau of Internal Revenue by the due date for filing Form 1040.

The amount of tax you must pay to the Virgin Island is figured as follows:

Your tax on U.S. return (after certain adjustments) x VI AGI/ worldwide AGI

Form 8689. Use Form 8689 to make this computation. You must complete this form and attach it to each copy of your return. You should file your return with the Virgin Islands Bureau of Internal Revenue. You receive credit for taxes paid to the Virgin Islands by including the amount on Form 8689, line 38, in the total on Form 1040, line 68. On the dotted line next to line 68, enter FORM 8689 and show the amount.

² For tax years beginning after October 22, 2004, an individual must be present in the possession for at least 183 days during the tax year. If you were a calendar year taxpayer, this rule applied to your tax returns for 2005 and later years. *See generally* 26 C.F.R. § 1.871-2.

In 2003 and again in 2004, IRS Publication 570 also stated the following as it pertains to double taxation:

A mutual agreement procedure exists to settle issues where there is an inconsistency between the tax treatment by the IRS and the taxing authorities of the following possessions: ...The Virgin Islands.

These issues usually involve ...determinations of residency...

Thus, the United States Government clearly envisioned a situation in which an individual taxpayer could have two residences and a determination of residency would be at issue, which is the case at bar.

B. *Bona Fide Residence Test*

In order for Petitioner to be a bona fide resident of the U.S. Virgin Islands for tax years 2003 and 2004, he was required to file a U.S. Virgin Islands tax return as a resident. 26 USC 932(c); *see also* IRS Publication 570 for 2003 and 2004. There is no record evidence that he did. Instead, he filed a U.S. tax return using his D.C. residence as his address of record in 2003 and 2004.

In the recent case of *VI Derivatives, LLC v. U.S.*, 2011-1 U.S. Tax Cas. (CCH) P50,245 (2011); 2011 U.S. Dist. LEXIS 16795; 107 A.F.T.R.2d (RIA) 951, the U.S. District Court for the District of the Virgin Islands addressed a similar issue for five taxpayers seeking to declare bona fide residency in the Virgin Islands for the tax year 2001. That federal court applied the facts and circumstances test and stated the following:

Because there is little case law relating specifically to residency in the Virgin Islands for tax purposes, both parties rely heavily on a line of cases addressing residency in foreign jurisdictions under 26 U.S.C. § 911. Under this body of law, a petitioner bears the burden of proof to show he is a bona fide resident of a foreign jurisdiction. *Lansdown v. Commissioner*, 1995 U.S. App. LEXIS 36140, *6 (10th Cir. 1995). Both Petitioners and the United States agree this Court should apply the standard set forth in *Sochurek v. Commissioner*, 300 F.2d 34 (7th Cir. 1962), to decide whether Petitioners have met their burden to show they were bona fide Virgin Islands residents at the end of 2001. In *Sochurek*, the Seventh Circuit found the petitioner, a Singapore-based foreign correspondent for Life Magazine, was a bona fide resident of Singapore and was thus not required to report his gross income to the United States. *Id.* at 36. In making this determination, the Seventh Circuit held that, because the tax statute did not define the term “bona fide resident,” residency status must be determined “on the basis of its own unique attendant circumstances.” *Id.* at 37-8 (citing *Nelson v. Commissioner*, 30 T.C. 1151, 1153 (1958)). The court explained that in determining residency status, “one of the proper distinctions to be recognized is that of ‘transients and sojourners on the one hand and residents on the other.’” *Sochurek*, 300 F.2d at 38 (citation omitted); see also Treas. Reg. § 1.871-2(B) (2001) (defining a resident as a person who is “actually present” and is “not a mere transient or sojourner”). In deciding where a petitioner falls in this spectrum, his or her “intentions with regard to the length and nature of his stay” are of primary importance. *Id.* Such intentions are “determined by considering the facts and circumstances of the case.” *Preece v. Commissioner*, 95 T.C. 594, 609 (Tax Ct. 1990) (citing *Sochurek*, 300 F.2d at 37-38). The court noted, however, that the standard for establishing residence is “far less than [the standard] for determining domicile[,] which requires an intent to make a fixed and permanent home.” *Sochurek*, 300 F.2d at 38 (citations omitted).

After reviewing a number of cases, the *Sochurek* court summarized the relevant subjective and objective factors, which courts consider to determine residency:

- (1) intention of the taxpayer;
- (2) establishment of his home temporarily in the foreign country for an indefinite period;
- (3) participation in the activities of his chosen community on social and cultural levels, identification with the daily lives of the people and, in general, assimilation into the foreign environment;
- (4) physical presence in the foreign country consistent with his employment;
- (5) nature, extent and reasons for temporary absences from his temporary foreign home;

- (6) assumption of economic burdens and payment of taxes to the foreign country;
- (7) status of resident contrasted to that of transient or sojourner;
- (8) treatment accorded to his tax status by employer;
- (9) marital status and residence of his family;
- (10) nature and duration of his employment;
- (11) whether his assignment abroad could be promptly accomplished within a definite or specified time; [and]
- (12) good faith in making his trip abroad; whether for purpose of tax evasion.

Sochurek, 300 F.2d at 38.

The court in *VI Derivatives*, *supra* further concluded:

“While all these factors may not be present in every situation, those appropriate should be properly considered and weighed.” *Jones v. Commissioner*, 927 F.2d 849, 853 (5th Cir. 1991) (citing *Sochurek*, 300 F.2d at 38); see also *Bergersen v. Commissioner*, 109 F.3d 56, 61 (1st Cir. 1997) (“These [factors] have to be used with some caution because they are framed broadly, to cover disparate problems.”).

The Government contends the abandonment of a prior residence is required to show residence elsewhere. Petitioners correctly note no such action is required because, unlike the legal concept of domicile, a person may have more than one residence. See *Jones v. Commissioner*, 927 F.2d 849, 853 (5th Cir. 1991) (“Residence is therefore much less than domicile[,] which requires an intent to make a fixed and permanent home.”); see also *Dawson v. Commissioner*, 59 T.C. 264, 270 (1972) (“[I]t is possible to be a bona fide resident of one country while retaining one's domicile in another.”). While the law does not require taxpayers to abandon their prior residences to claim residency elsewhere, a court may consider whether a petitioner maintains strong ties to a location other than the claimed residence. See *Bergersen*, 109 F.3d at 61-62 (holding the petitioners had not “moved their base” so as to be considered residents of Puerto Rico when they maintained close ties to their home state of Illinois, where they had recently purchased and renovated a house).

Based on my evaluation of the testimony of the Petitioner and for many reasons associated with the factors outlined above, I cannot credit Petitioner’s testimony that he relinquished his domicile in the District of Columbia, when he left in May 2002 for the U.S. Virgin Islands.

First, in assessing the first factor in *Sochurek, supra*, I assign no weight to Petitioner's self-serving testimony that he intended to stay in the U.S. Virgin Islands as a bona fide resident. I agree with the Government citing *Wilson v. Wilson*, 189 S.W.2d 212, 214 (Tenn. 1945), that bare testimony as to an intention to establish a new domicile is not enough unless accompanied by acts and declarations showing such intent. *Id.* at 214. To the contrary, Petitioner did not intend to change his domicile to the U.S. Virgin Islands from 2002 through 2005, because he consistently used his District of Columbia address on his U.S. tax return. As the court in *VI Derivatives, supra* outlined, Petitioner in this case had not "moved his base" so as to be considered a resident of the U.S. Virgin Islands because his family and automobile remained in the District of Columbia. *Id.*

Second, Petitioner satisfied the second factor in that he established a temporary home by signing a lease agreement, RX 207, while he was employed in the U.S. Virgin Islands. This leased housing accommodation was for a temporary time period of May 2002 through December 2002. RX 207. After December 2002, the lease likely converted to a month-to-month tenancy. Thus, I conclude that the evidence of record establishes that Petitioner had a temporary residence in the U.S. Virgin Islands for the time period he was employed in the U.S. Virgin Islands.

Third, there is no record evidence that establishes that Petitioner participated continuously in the activities of his chosen community on social and cultural levels, identified with the daily lives of the people and, in general, assimilated into the foreign environment. Petitioner contended that he went to the All Saints Church, donated to Friends of Virgin Islands National Park and to the Salvation Army in St. Thomas. However, Petitioner's proof of donations to a charity is insufficient to address continuous activities such as joining a church and

paying tithes and offering to a specific church each week. This is, in part, because on Petitioner's Amended Tax Return Form 1040X, all of the itemized deductions totaling \$20,163, which included gifts to charities, were subtracted from the original 2003 tax return filed. PX 111. Beyond this, Petitioner did not provide any other conclusive evidence such as canceled checks made to charities or community events to substantiate his social activities in the U.S. Virgin Islands.

Fourth, Petitioner does meet the fourth factor of the test in that it is not disputed that Petitioner had a physical presence in the U.S. Virgin Islands consistent with his employment. He leased an apartment there that substantiates this fact.

Fifth, we address the nature, extent and reasons for temporary absences from his temporary foreign home. Petitioner testified that he did make trips to the U.S. during 2002 through 2005. More specifically, he attended a conference in Miami, Florida for four days for U.S. Census Bureau training. He admitted coming to Washington, DC during this relevant time period. But he cautiously stated that if he was in Washington, DC and came to a meeting, he came to visit, and his expenses were paid for by his employer.

Petitioner further conceded that he purchased a home in 2005, which is the same address where his wife and child were staying, 236 Farragut Street, NW #103 in Washington, DC. I assign no weight to this testimony because it did not clarify his relationship with his family. He never explained any relationship or visits to his family during the relevant time period of 2003 and 2004, yet he clearly identified on his U.S. tax returns and amended returns filed in 2003 and 2004, that he was the head of household, married, filing jointly, and claimed his daughter, Olivia,

as an exemption on these returns. PX 110, 111, and 112. I, thus, conclude that Petitioner has not met his burden of proving this factor.

Sixth, Petitioner provided no evidence of assumption of economic burdens and payment of taxes to the USVI. He conceded he never filed a tax return with the appropriate Virgin Islands Bureau of Internal Revenue. While it is true that Petitioner's W-2VI forms for 2003 and 2004 reflect U.S. Virgin Islands income taxes withheld, Petitioner may very well seek a refund of these taxes withheld since he only filed U.S. tax returns and never filed a tax return with the Virgin Islands Bureau of Internal Revenue claiming he was a bona fide resident during 2003 and 2004. RX 208. Petitioner's failure to file a tax return with the Virgin Islands Bureau of Internal Revenue is indicative of his intention to not change his residency to the U.S. Virgin Islands. Therefore, I conclude that Petitioner did not satisfy the sixth factor of assumption of economic burdens and payment of taxes to the foreign country.

Seventh, based on the testimony in this case, Petitioner satisfied the seventh factor of being a resident in that his purpose was his employment with the Bureau of Economic Research. I further conclude that his employment was of such a nature that an extended stay was necessary for its accomplishment. To that end, he made a temporary home in the Virgin Islands, though it was his intention at all times to return to his domicile in Washington, DC when his job ended. *See generally US v. Auffenberg, Jr.*, 2008 U.S. Dist. LEXIS 66729, 66735; 2008-2U.S. Tax Cas. (CCH) P50, 530; 102 A.F.T.R.2d (RIA) 6000 (2008). It bears emphasis that Petitioner never confirmed a bona fide residency status by filing a U.S. Virgin Islands tax return in 2003 and 2004. And when considering the District of Columbia's definition, as set forth below, of "resident" being one who is *domiciled* in the District, I must conclude that Petitioner met the

District Government's definition of "resident" for filing income taxes with the District of Columbia. To the extent a mutual agreement exists between the U.S. and USVI, any possible issue of double taxation can be resolved in compliance with this mutual agreement.

Eighth, we turn to factors eight and nine, which are the treatment accorded his income tax status by his employer and his marital status and residence of his family. In evaluating RX 209 and 213, which are Notification of Personnel Action forms completed by Petitioner's employer, Petitioner identified himself as "married" and claimed two exemptions. This weighs against his intentions to establish anything but a temporary residency in the U.S. Virgin Islands. Thus, I conclude that Petitioner clearly did not intend to establish residency, but instead intended to return to the District of Columbia where his wife and child resided based on these forms, which are substantiated by his marital status and dependent claims on his tax returns in 2003 and 2004. PX 110, 111 and 112.

Ninth, in assessing factor 10, the nature and duration of his employment, and whether his assignment could be promptly accomplished within a definite or specified time period, it is not disputed that Petitioner was employed in the U.S. Virgin Islands from May 2002 through May 2005. RX 209.

Finally, in assessing factor 11, there is no evidence that Petitioner acted in bad faith in making his trip to the U.S. Virgin Islands for the purpose of tax evasion. The record evidence establishes that he was gainfully employed during this time period.

When weighing all of these aforementioned factors together, I conclude that Petitioner remained a resident of the District of Columbia during 2003 and 2004 because the location of his

permanent home was in the District of Columbia when he left his automobile here. No one with the intent to stay permanently in the U.S. Virgin Islands abandons something as significant as a newly purchased automobile in the United States as well as spouse and child. He clearly intended to return to the U.S. to pick up and use this automobile. Otherwise, logic dictates that he would have sold the automobile if he could not take it with him, and remain in the U.S. Virgin Islands. Secondly, he left his wife and child here, and claimed a head of household exemption on his federal tax return. There is no evidence in this record that Petitioner filed for divorce or otherwise legally separated from his family, or gave his automobile to his wife as part of a separation agreement or divorce proceeding.

Third, Petitioner never adequately proved he had a continuous and current relationship with social, political, cultural, professional or religious organizations. The evidence presented in Petitioner's case is scant. As previously noted, there is no concrete evidence that Petitioner continuously supported a specific religious, social political cultural, professional or charitable organization from 2003 to 2004. A simple paper trail of continuous checks cashed by the charitable organization from 2003 through 2004 would have sufficed, but no such paper trail was presented as any record evidence in this proceeding.

Fourth, Petitioner presents one single blank check from a check book with his name on a U.S. Virgin Island bank account number on it to substantiate his testimony that he engaged in personal banking in the U.S. Virgin Islands. I assign no weight to this testimony for several reasons. First, there were no banking statements to support any of Petitioner's ongoing banking activity in the U.S. Virgin Islands from 2003 through 2004. Second and foremost, it bears emphasis that on Petitioner's U.S. tax returns filed in 2003 and 2004, Petitioner sought refunds

and a direct deposit of those refunds to a bank account with an account number 60757523, which does not match the account number on the check he presented from the U.S. Virgin Islands bank account (Account No. 192 069756). It should have been easy for Petitioner to provide a blank check from the bank with account number 6075723, along with personal banking statements to support his testimony that he relinquished his domicile in the District of Columbia in March 2002, with the intent never to return to the District of Columbia.

Sixth, Petitioner never presented any evidence of a U.S. Virgin Islands driver's license, application for such a license, or any other identification card reflecting his connection with the U.S. Virgin Islands. Nor did Petitioner produce any information such as a voter registration card from the U.S. Virgin Islands. The country of residence Petitioner designated on his IRS 1040 tax returns for 2003 and 2004 was always his Washington, DC, USA address. And finally, his W-2 U.S. Virgin Islands income tax forms for 2003-2004 do not reflect a U.S. Virgin Islands address.

When I also consider the fact that Petitioner *never* filed a U.S. Virgin Islands tax return for 2003 and 2004, this critical fact alone demonstrates his intent to never relinquish his District of Columbia residency and become a bona fide resident of the U.S. Virgin Islands. Petitioner asks us to apply Section 932 of the IRS regulations. That regulation was addressed in the case of *USA v. James Auffmanberg, Jr., et al*, 2008 U.S. Dist. LEXIS 66729; 2008-2 U.S. Tax Cas. (CCH) P50, 530; 102 A.F.T.R.2d (RIS) 6000. In *Auffmanberg*, the court noted the following:

We acknowledge that it was not until October 23, 2004...that Congress enacted 26 U.S.C. 937, which defines "bona fide resident of the Virgin Islands" as it is used in 932(c) as:

A person ---

- (1) Who is present for at least 183 days during the taxable year in...the Virgin Islands...and

- (2) Who does not have a tax home (determined under the principles of section 911(d)(3) without regard to the second sentence thereof) outside such specified possession during the taxable year and does not have a closer connection (determined under the principles of section 7701(b)(3)(B)(ii) to the United States or a foreign country than to such specified possession.

...Prior to October 23, 2004, a United States Treasury regulation was in effect, which provided:

...One who comes to the [Virgin Islands] for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment and to that end the alien makes his home temporarily in the [Virgin Islands], he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.

26 C.F. R. § 1.871-2(b).

It is true that Petitioner meets the definition of resident of the USVI when applying this treasury regulation to the facts of this case; however, Petitioner was required to file a USVI tax return. Petitioner never did so. Petitioner had a duty to file his tax return with either the USVI or District of Columbia government and pay taxes in one of the jurisdictions and receive credit in the other jurisdiction.

This outcome of filing local tax returns in more than one jurisdiction is not prejudicial to a taxpayer when evaluating the case examples presented in the 2010 edition of IRS Publication 570. On page 13 of the publication, the following example is presented:

Thomas Red is a bona fide resident of Puerto Rico and a U.S. citizen. He traveled to the Dominican Republic and worked in the construction industry for one month. His wages were \$20,000. Because the wages were earned outside Puerto Rico and outside the United States, Thomas must file a tax return with Puerto

Rico and the United States. He may also have to file a tax return with the Dominican Republic.

This example illustrates that the IRS is aware that a taxpayer may have two residences or an inconsistent outcome involving double taxation. To that end, mutual agreement procedures are in place to settle issues where there is inconsistent tax treatment between the IRS and the taxing authorities of the USVI. These issues, as noted above, usually involve determinations of residency.

C. Petitioner is domiciled in and a bona fide resident of the District of Columbia

The District of Columbia Government argues that Petitioner never relinquished his domicile in the District of Columbia when he left to work in the U.S. Virgin Islands for the temporary period of time of 2002- 2005. I agree. The Government cites *Sweeney v. District of Columbia* 72 App.D.C. 30, 113 F.2d 25 (1940) as controlling authority. In *Sweeney*, the U.S. Court of Appeals for the District of Columbia Circuit reversed a Board of Tax and Appeals decision that imposed tax liability on a member of the military service who was domiciled in Boston in 1918. When he was discharged in 1919, he continuously resided in the District of Columbia. The Board of Tax Appeals unsuccessfully argued that his long continued residence in Washington ripened into domiciliary change. The court concluded that domicile is a compound of fact and law. *Id.*

In a subsequent case, *Butler v. District of Columbia*, 153 F.2d 617 (1946), the U.S. Court of Appeals for the D.C. Circuit reached the same conclusion of no change in domicile, applying the same reasoning in *Sweeney, supra*, that mere absence from a fixed home, however long

continued, cannot of itself effect a change of domicile. *Id* at 618. The court specifically held that there must be the animus to exchange the prior domicile for another. *Id*. Until the new one is acquired, the old one remains. *See Dixon v. Dixon*, 190 A.2d 652, 654 (D.C. 1963) (once domicile is established, it is presumed to continue until it is shown to have been changed); *see also District of Columbia v. Woods*, 465 A.2d 385, 387 (D.C. 1983) (quoting *Heater v. Heater*, 155 A.2d 523, 524 (D.C. 1959) (The two requisites for establishing a change of domicile are (1) physical presence, and (2) an intent to abandon the former domicile and remain [in the new on] for an indefinite period of time);

In the case at bar, there is no record evidence that Petitioner changed his domicile in 2002. His job in the U.S. Virgin Islands was nothing more than a temporary job, which he abandoned and returned to the District of Columbia where his wife and child were residing, and where his automobile was. There is no evidence that Petitioner ever filed U.S. Virgin Islands tax returns or voted in any of its elections.

Furthermore, in the District of Columbia, the controlling law on who is a “resident” is D.C. Official Code § 47-1801.04, which defines a resident as follows:

“resident” means **every individual domiciled within the District at any time during the taxable year**, and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year...In determining whether an individual is a “resident,” **such an individual’s absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode.** [Emphasis supplied.]

This definition applies to Petitioner because Petitioner is a U.S. citizen, not an alien. There is no evidence that Petitioner is not a U.S. citizen. His tax returns for the requisite period

of 2003 and 2004, disclose use of his social security number and residential address in the District of Columbia. PX 110, 111, and 112. These two matters are partial indications of U.S. citizenship.

When applying this definition of resident to the facts of this case as discussed above, Petitioner was domiciled in the District of Columbia in 2002, and never relinquished his domicile when he returned in 2005. He, thus, was required to file a tax return in the District of Columbia.

When applying the facts and circumstances test as set forth above to this case, Petitioner had closer ties to the District of Columbia than to the Virgin Islands in 2003 and 2004 based on his actions, and was required to file a tax return in the District of Columbia. Because Petitioner never filed a U.S. Virgin Islands tax return during the requisite period, he never became a bona fide resident of the U.S. Virgin Islands.

For the foregoing reasons, I affirm the D.C. Office of Tax and Revenue's decision to assess taxes to Petitioner for the tax years 2003 and 2004. However, given the unusual delay in completing its audit, I reverse the imposition of interests and penalties. I, furthermore, accept Petitioner's accounting of monies garnished of \$937, which should be deducted from the amount due the D.C. Government. Total amount due and owing the Government is \$7,033.

V. Order

Based on the foregoing, it is this _____ day of _____, 2011:

ORDERED, that Government's Notice of Proposed Assessment is **AFFIRMED in part and REVERSED in part**; and it is further

ORDERED, that Petitioner was a District resident because he was domiciled for purposes of income tax in 2003 and 2004 in the District. Petitioner is therefore required to file an income tax return in the District for the tax years 2003 and 2004, and to pay income tax on his income received from May 2002 through March 2005, minus a credit for \$937 already paid; and it is further

ORDERED, that Petitioner shall pay taxes due and owing the District of Columbia Government in the amount of **(\$7,033) SEVEN THOUSAND THIRTY-THREE DOLLARS, exclusive of interests and penalties**; and it is further

ORDERED, that any party may file a motion for reconsideration of this final order for any reason set forth in OAH Rule 2828 within 15 calendar days of the date of service of this Order. The 15 calendar days consists of ten calendar days, plus five days when service is made by regular mail. 1 DCMR 2812.5; and it is further

ORDERED, that the appeal rights of any party aggrieved by this order are set forth below.

Claudia Barber
Administrative Law Judge

