This article, by State & Local Tax Practice Group partner Timothy P. Noonan was originally published in the October 15, 2012 State Tax Notes. Reprinted with permission.

(C) Tax Analysts 2012. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

New Nonresident Audit Guidelines

by Timothy P. Noonan

In late June the New York State Department of Taxation and Finance issued a revised version of its Nonresident Audit Guidelines (the 2012 guidelines or the guidelines). For practitioners who work in the residency area, the release of new guidelines is — or should be — an important event. These guidelines, you see, aren't just fodder for auditors working residency audits in the many district offices throughout the state. Indeed, for practitioners, these guidelines contain a wealth of information about policy and interpretation that you won't find in the law or regulations. Moreover, by comparing and reviewing the changes in these guidelines from past versions, we can also gain some insight into the questions the department considers most important.

The first versions of the guidelines were issued in the 1990s, when New York's residency program was first getting its legs. But after 1997, though revisions may have been made internally, the department didn't release a new version until 2009. The 2009 guidelines, as reported in this column, contained some interesting changes involving the analysis of the "primary" domicile factors, and a much-improved discussion on statutory residency.[1] The new 2012 guidelines don't disappoint either, hence this article. The 2012 guidelines contain significant changes in guidance and policy on some residency questions, and this article will discuss the most significant differences — as well as some of the minor ones — between the 2012 guidelines and the former version (the 2009 guidelines).

[1]Timothy P. Noonan and Elizabeth Pascal, "New York Issues New Nonresident Audit Guidelines," *State Tax Notes*, May 10, 2010, p. 457, *Doc 2010-9829*, or *2010 STT 89-8*.

> ***Department officials deserve much credit for letting everybody know what they are looking for and how they will go about looking for it.***

One final note before getting into the good stuff. Previous versions of the guidelines weren't readily available to the viewing public. You could get them under the state's freedom of information law, and versions were available in some legal databases. But this time around, the department has made the guidelines available to the public.[2] The department certainly deserves kudos for the transparency. Often — and yes, even in this space — the department gets criticized for its overaggressive pursuit of residency cases and issues. But department officials also deserve much credit for letting everybody know what they are looking for and how they will go about looking for it. Indeed, these guidelines are not just guidelines for auditors; practitioners can and should use the guidelines to better understand what happens in these audits and to hold auditors accountable when they are not following the rules.

The Primary Domicile Factors

As opposed to the 2009 guidelines, which added the "family factor" as a primary domicile factor, the 2012 guidelines did not make any significant changes to the factors themselves. However, there were some changes in the guidelines' discussion of the business, time, and family factors that are worth discussing here.

- *Business Factor*. The 2009 guidelines contained a discussion of the fact that taxpayers may have an active business involvement in New York, even if they are not physically present.

[2]State of New York Department of Taxation and Finance, *Nonresident Audit Guidelines* (June 2012), *available at* http://www.tax.ny.gov/pdf/2012/misc/nonresident_audit_guidelines_2012.pdf.

The 2012 guidelines eliminated the 1990s language addressing "electronic gadgetry and instant communications" in the discussion of the business factor. Good move there — that sounds like something a grandfather would say! However, the essence of rules remains the same — taxpayers cannot avoid active business involvement in New York by working remotely. The wonders of modern technology . . .

- *Time Factor*. The 2012 guidelines added a discussion of the 2006 Division of Tax Appeals (DTA) case, *Matter of Knight*,[3] for the proposition that presence in New York on most days, without more, does not create a New York domicile in the case of suburban commuters. That is a critical point that many auditors sometimes don't appreciate in domicile cases in which a taxpayer's claimed "home" is in a bordering state. Practitioners should take note of this argument.
- *Family Factor*. Most of the changes in the guidelines' discussion of the factors appeared in the "family factor" section. First, the 2012 guidelines eliminated language advising auditors not to request information on the family factor until they have analyzed the initial residency questionnaire. That eliminated any lingering doubt that the family factor is as important as the other four primary factors. Second, the 2012 guidelines amended language regarding the location where minor children attend school. Although the 2009 guidelines called that "an important factor," the 2012 guidelines state that it can be "one of the *most important* factors" (emphasis added) in determining where someone is domiciled. That could, obviously, influence where those claiming to be nondomiciliaries send their children to school. Finally, the 2012 guidelines confirmed that spouses can have different domiciles. That is especially relevant when a New York domiciliary marries a non-New York domiciliary. Under the 2012 guidelines, the fact of the marriage itself will not result in a change of domicile by either spouse.

Foreign Domicile Changes — More Than a 'Normal' Change of Domicile

The 2012 guidelines include a new section addressing foreign domicile changes. Again, this might be an area in which the department is increasing its focus, and the recent tribunal decision in *Matter of Taylor*, also reported here, illustrates that these foreign domicile cases involve different sets of questions.[4] These are situations in which a New York domiciliary attempts to establish a change of domicile to a foreign country. The department has always maintained that changing one's domicile to a foreign country is exceedingly difficult. The 2012 guidelines echo that sentiment, stressing that the presumption against a foreign domicile is stronger than the general presumption against a change of domicile. Indeed, the guidelines, citing the regulations,[5] state that U.S. citizens generally must show they intend to reside in the foreign country *permanently* in order to prove a change of domicile by clear and convincing evidence. Because these cases present a "unique set of issues unlike those found in the typical nonresident audit," the guidelines conclude that "a comparison of the domicile factors between New York and the foreign country may not necessarily be a true measure of the taxpayer's intent."

> ***The guidelines state that U.S. citizens generally must show they intend to reside in the foreign country*** **permanently** ***in order to prove a change of domicile by clear and convincing evidence.***

To aid auditors in assessing a taxpayer's intent in foreign domicile cases, the guidelines instruct auditors to consider the following factors:

- Whether the taxpayer has been admitted for permanent residence in the foreign country. The guidelines state that this act indicates a signal of intent that is lacking in taxpayers who have temporary work visas that have to be periodically renewed.
- Retention of the New York residence or periodic return visits. Those types of continued connections to New York may suggest that the taxpayer lacked the intention to abandon the New York domicile.
- Retention of New York business interests.
- The filing of tax returns as a resident of the foreign country. That a U.S. citizen files tax returns as a resident of a foreign country, *reporting his worldwide income,* is an action consistent with a change of domicile that should be given some consideration. The department often scrutinizes filing positions in some countries (that is, the United Kingdom)

---

[3]*Matter of Knight*, N.Y. Tax Appeals Tribunal (Nov. 9, 2006). For the decision, see *Doc 2006-24114* or *2004 STT 235-13*.

[4]Timothy P. Noonan, "Resident Evil Part 3: Fighting Back With New Technology," *State Tax Notes*, Apr. 30, 2012, p. 317, *Doc 2012-8267*, or *2012 STT 83-6*. *Matter of Taylor*, N.Y. Tax Appeals Tribunal (Dec. 1, 2011). For the decision, see *Doc 2011-26363* or *2011 STT 245-15*.

[5]20 NYCRR section 105.20(d)(3).

(C) Tax Analysts 2012. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

where taxpayers can file as "residents" without paying tax on their worldwide income.

Lastly, the guidelines state that the acquisition of citizenship in the foreign country is generally a non-factor, because domicile is not dependent on citizenship.

548-Day Rule

The 2012 guidelines made two adjustments to its discussion of the 548-day rule. First, reflecting a law change in 2009, the guidelines made clear that presence in New York state for purposes of the 90-day limit is not in any way tied to the taxpayers' New York place of abode. In other words, time spent at a hotel or a friend's residence is counted the same as time spent at a taxpayer's New York principal place of abode. Second, reflecting a recent advisory opinion, in counting days spent in a foreign country, in order to reach the 450-day requirement, taxpayers may count both full and part days.[6] That puts days spent in the foreign country on equal footing to days spent in New York — where the rules already stated that a day equals "any part of a day."

Other Minor Domicile Points

'Leave and Land'

Citing the 2004 *Rubin* case,[7] the 2012 guidelines confirmed that an old domicile may continue even when a taxpayer no longer maintains a residence in the old domicile. As we often say, to change domicile a taxpayer must "leave and land." Relinquishing the New York residence may show that the taxpayer "left" New York. However, without the acquisition of a residence in the newly claimed domicile, the taxpayer has not "landed" anywhere.

Filing of Nonresident Returns Without Audit

That a taxpayer has filed nonresident returns in New York for many years without being audited does not prove a change of domicile. Though this may seem like tacit acceptance of the taxpayer's nonresident status by New York, the 2012 guidelines state that this is not the case. That fact may still be introduced as one piece of evidence at audit. Getting an auditor to give weight to the fact, that is a different story.

Sale of Historic New York Residence

A claimed domicile change often takes the typical "downsizing" fact pattern: (1) The taxpayer sells a historic New York residence, (2) the taxpayer purchases a smaller residence in the same geographic area of New York, and (3) the taxpayer purchases a residence in the newly claimed domicile. The 2009 guidelines stated that this type of transition *does not* change the attraction the taxpayer has for the particular area of New York. The 2012 guidelines change "does not" to "may not." Not a huge change, admittedly. But it's at least an acknowledgement by the department that a taxpayer's affinity for his historic residence can change.

Permanent Place of Abode (PPA) Questions

Over the last few years, the definition of a PPA has been the source of much debate at audit and during later litigation. Recent decisions in *Matter of Barker*[8] and *Matter of Gaied*[9] have sent shockwaves through the nonresident and state tax practitioner population. Though the Tax Appeals Tribunal's most recent decision in *Gaied* seemingly changed the long-standing definition of a PPA, the 2012 guidelines reflect (what appears to be) the department's disagreement with the tribunal's analysis in the *Gaied* decision.

Under the 2012 guidelines, the department made clear that an abode will not be deemed to be "permanent" unless it meets "two key requirements" involving the physical attributes of the abode and the "nature of relationship" to the abode. First, the dwelling must be suitable for year-round use. That is a fairly simple test that is easily satisfied. Under the tribunal's *Barker* decision, the taxpayer's actual (subjective) use of the residence is not important. Rather, all that matters is that the residence is (objectively) suitable for year-round use. Second, the nature of the taxpayer's relationship to the dwelling must be examined.[10] In order to have the requisite relationship, the taxpayer must only do "whatever is necessary to continue [his or her] living arrangements" at the particular abode. That type of relationship can take many forms. As such, the 2012 guidelines laid out specific factors to be considered in analyzing the nature of a taxpayer's relationship to the dwelling[11]:

- Whether the taxpayer has ownership or other property rights (that is, the legal right to occupy) in the dwelling. The 2012 guidelines call

---

[6]TSB-A-11(3)I (May 6, 2011).

[7]*Matter of Rubin*, N.Y. Tax Appeals Tribunal (Nov. 10, 2004). For the decision, see *Doc 2004-22314* or *2004 STT 228-9*.

[8]*Matter of Barker*, N.Y. Tax Appeals Tribunal (Jan. 13, 2011). For the decision, see *Doc 2011-1276* or *2011 STT 16-18*.

[9]*Matter of Gaied*, N.Y. Tax Appeals Tribunal (June 16, 2011). The tribunal's 2011 decision in *Gaied* found that when a taxpayer had property rights in the abode in question, the taxpayer's use of the abode was of no consequence in determining whether it was a PPA. For the decision, see *Doc 2011-13773* or *2011 STT 125-17*.

[10]The tribunal in both *Barker* and *Gaied* found (incorrectly, in our book) that those "relationship factors" do not have to be examined when the taxpayer has property rights in the abode.

[11]Those factors are also summarized in chart form in the appendix to the 2012 guidelines at p. 95.

(C) Tax Analysts 2012. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

that a "key factor" in determining whether the requisite relationship exists. However, the possession of property rights, without more, does not necessarily make a dwelling a PPA (a position that appears to be at odds with the language in *Gaied*).

- Whether the taxpayer uses the dwelling or has unfettered access. A taxpayer would not have the requisite relationship to a dwelling used *exclusively* by others, even if the taxpayer has ownership rights in that dwelling. Ownership and unfettered access will lead to the conclusion that the dwelling is a PPA of the taxpayer, regardless of how often the taxpayer actually uses it.
- The taxpayer's relationship to the cohabitants of the dwelling. That can be an important factor when the taxpayer has no ownership or property rights in the dwelling.[12]
- Whether the taxpayer has his or her own room or keeps personal items at the dwelling. When a taxpayer maintains an apartment *primarily* for use by a child, the apartment is more likely to constitute a PPA of the taxpayer if it is a two-bedroom apartment than if it is a studio apartment lacking separate sleeping quarters.
- Whether the taxpayer makes monetary contributions or contributions in-kind in order to maintain the dwelling. Taxpayers may maintain a residence by making monetary contributions (that is, by sharing the costs of ownership or operating costs) or by making in-kind contributions (that is, repairs, cleaning, cooking, and so on).
- Registration for governmental or business services. The taxpayer's use of the address for government or business purposes is an indication that the taxpayer has the requisite relationship to the dwelling.

Just as in analyzing domicile factors, auditors are instructed to analyze all of the above factors in determining whether a taxpayer's relationship to the dwelling rises to the level of a PPA. That, quite frankly, is an important change in the statutory residency rules, because the test has long been thought of as a more mechanical, black-and-white test. But in *Barker* and *Gaied*, the taxpayers argued that a more thorough, domicile-like analysis is required even in statutory residency cases, recognizing the tribunal's commentary in *Evans* that, even in statutory residency cases, "determinations of a taxpayer's status as a resident or nonresident . . . 'frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals.'"[13] Though the department seemingly took the opposite path in arguing *Gaied* and especially with its arguments in *Barker*, this new formulation of the PPA rules by the department is much more consistent with the intent underlying the law and with past tribunal decisions (despite *Barker* and *Gaied*). Again, kudos for the department for getting this (basically) right.

A Day Spent in New York — Counting Days

Anyone who has ever handled a statutory residency audit on behalf of a client knows all about counting days. In fact, we previously dedicated an entire article to the topic.[14] Mostly as a result of the tribunal's decision in *Matter of Robertson,*[15] the department added some language to the 2012 guidelines discussing the use of testimonial evidence in establishing day counts.[16]

According to the 2012 guidelines, taxpayers can meet their burden of proving that they spent less than 184 days in New York, using testimonial evidence, documentary evidence, or a combination of the two. In discussing whether some evidence will in fact be "clear and convincing," the guidelines acknowledge a predicament in which many taxpayers find themselves — how do you prove a negative? The 2012 guidelines provide a tool that can be used by taxpayers when that question arises. Namely, when there is *no* evidence placing the taxpayer in New York on a given day, but the taxpayer submits evidence showing presence in his state of domicile (that is, phone bills showing calls made from a Connecticut home during the day), it is reasonable to conclude the taxpayer was not in New York.

Although it remains to be seen how auditors will treat those sorts of days, this new language could prove especially helpful for taxpayers trying to prove their presence outside New York on weekends and holidays.

Resident Credit Rules

The rules regarding resident credits have been included in the Tax Law and regulations for years. However, for the first time, the 2012 guidelines included a discussion of the general requirements for claiming the resident credit. When a taxpayer

[12]*See, e.g., Matter of Evans*, N.Y. Tax Appeals Tribunal (June, 18, 1992), *aff'd*, 199 A.D.2d 840 (1993).

[13]*Id*. (*citing Matter of Newcomb*, 192 N.Y. 238 (1908)).

[14]Timothy P. Noonan and Joshua K. Lawrence, "Day Counts and the Importance of Testimony in Statutory Residency Audits," *State Tax Notes*, Apr. 28, 2008, p. 317, *Doc 2008-8845*, or *2008 STT 83-26*.

[15]*Matter of Robertson*, N.Y. Tax Appeals Tribunal (Sept. 23, 2010). For the decision, see *Doc 2010-23153* or *2010 STT 207-25*.

[16]We also dedicated an entire article to the *Robertson* decision. Timothy P. Noonan, "A New Day Dawns for Determining What Constitutes a New York Day," *State Tax Notes*, Nov. 8, 2010, p. 431, *Doc 2010-23125*, or *2010 STT 215-4*.

(C) Tax Analysts 2012. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

has been determined to be a resident of New York, she may be entitled to a resident credit (against New York state taxes only) for taxes paid to other states or localities in that same year, if three elements are proved:

- The income at issue was subject to tax by the other state or locality.
- The income was "derived from" the other state.
- The income was subject to tax under Article 22 of the Tax Law.

In defining what it means for income to be derived from the other state for purposes of the resident credit, the New York definition of source income (found in 20 NYCRR section 120.4(d)) must be used. Thus, items taxable to nonresidents (wages, business income, income from real property, and so on) are items for which a credit may be allowed. However, items not taxable to nonresidents (trust income, income from intangibles, and so on) are items for which New York will not allow a credit. We've recently seen those questions play out in resident credit audits of New York resident taxpayers working in other states. Auditors are questioning credits claimed for taxes paid on wages in another state, for instance, in situations in which the taxpayer may have also done work for her employer in New York or even in other states. The prevalence of those types of audits may have led to the inclusion of this more detailed guidance in these recent guidelines. So be on the lookout for those audits.

Conclusion

For practitioners involved in handling residency cases, the guidelines are probably the most important document out there. And though they don't carry to force and effect of law — and never let an auditor tell you otherwise — they nonetheless provide a window into the mind of the residency auditor. So these guidelines should be required reading for all practitioners in this area. In addition, of course, to this column! ✰

Noonan's Notes on Tax Practice is a column by Timothy P. Noonan, a partner in the Buffalo and New York offices of Hodgson Russ LLP.

(C) Tax Analysts 2012. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.