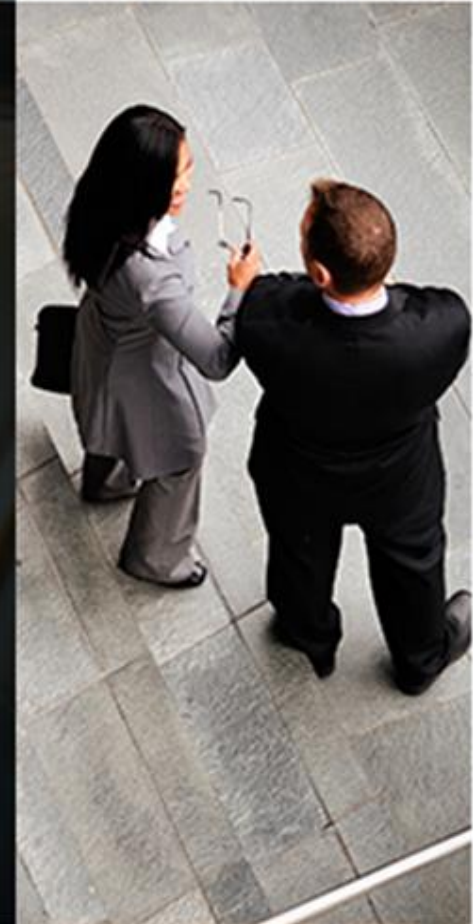


# New York Residency and Personal Income Tax Update

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# RESIDENCY

- Why do we care?
  - Income tax
  - 17 states still impose an estate or inheritance tax
- Domicile or by statute?
- “Leave and land”
- When did you “move” or “change” your domicile?
- Explain the “change”
- Who proves what?
- Foreign domicile problems (and safe-harbor)

# RESIDENCY AUDITS

*HOW THEY FIND YOU!*

Year of residency change — almost automatic

Substantial difference between federal and state income

Answer to “living quarters” question

Number of days in NY on return

Past audit history

Cross-check with real property records

Any STAR or NYC parking exemptions

NY addresses reported on a Form 1099 or K-1

All press is not good press

Unhappy ex-spouse

Audits of related parties, partners, etc.

Whistleblower



# FOR NEW YORK, ITS HUGE TAX DOLLARS...

**Taxing non-New Yorkers is big money for New York**



**\$1 Billion**

collected from non-residency audits over the last five years

Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# ...DOLLARS THEY DON'T LET GO WITHOUT A 'FIGHT'



Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# RESIDENCY – FACTS and FIGURES

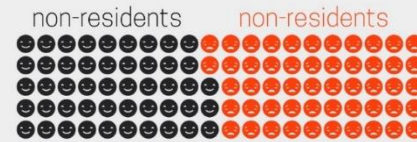
## 1-IN-2 TAXPAYERS AUDITED, LOSES



**15,122**

New York non-residency audits in the last five years

**Most non-New Yorkers can't prove they're non-residents of New York**



**52%**

lose their non-residency audit to New York state

Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# TAX APPEALS ANNUAL REPORT

- In short, it's bleak!
- ALJ Determinations
  - 108 total.
  - 97 sustained.
  - Only (!) 4 cancellations and 7 modifications.
- Tribunal Decisions on Taxpayer Exceptions
  - 35 total.
  - 33 denied or dismissed.
  - Only (!) 1 exception granted + 1 (remanded to ALJ).
- Division's odds a bit better – 2 of 4 exceptions granted.

# DOMICILE – PRIMARY FACTORS

## ➤ Home

- Bigger, better, more valuable
- Nature of use
- Watch out for “STAR” and IRC § 121 issues

## ➤ Business

- Limited to active involvement
- Location of business headquarters, your office, assistant, etc.



# DOMICILE – PRIMARY FACTORS (CONT.)

## ➤ Time

- Not 183-day rule!
- Domicile day count
- Qualitative analysis of time

## ➤ Near and Dear

- Where is your teddy bear?
- Safe deposit box?
- And insured and other “valuables”?
- Moving vans v. storage



# DOMICILE

- Family Factor
  - Most spouses share their domicile
  - Minor children (and schooling) can be critical
- Other Factors
  - Checklist items – nice but not determinative
  - Parking tax exemption
- 548- and 30-day safe-harbor rules

# DOMICILE: NEW CASES

- *Patrick* – love conquers all
- *Blatt* – loving your dog works, too
- *Campaniello* – failure to check the box is negligence
- *Ruderman* – Affidavits have little value
- *Biggar* – Burden of proof is on the party asserting the change of domicile

# RESIDENCY (CONT.)

## ➤ Statutory Residence

- 183 days and a permanent place of abode (PPA)
- What is a “day”?
- 11-month rule
- Proof
- Exceptions
  - Travel
  - In-patient



# PERMANENT PLACE of ABODE (PPA)

**Start Here**

Does the dwelling exhibit the physical characteristics ordinarily found in a dwelling suitable for year-round habitation?

**NO**

It's not a PPA

**YES**

Does the taxpayer have a legal right to occupy it as a residence?

**YES**

Does the taxpayer exercise that right by enjoying a residential interest in the place?

A taxpayer "enjoys a residential interest" in the place by actually residing there, per the Tribunal's holding

**YES**

It is a PPA

**NO**

Can be maintained on a temporary basis (*Mays*)

Exclusive Use

Unfettered Access

Sharing common living expenses in rent-free abode (*Evans*)

Examine the taxpayer's relationship with the dwelling

# STATUTORY RESIDENCY – DAY COUNT RECORDS

<b>Credit Card Statements</b>	<b>ATM Usage</b>	<b>Personal Diary</b>	<b>Outlook Calendar</b>
Flight Records (frequent flyer reports)	EZ Pass	Limo Logs	Landline Phone
Cell Phone Logs!!	Special Software (MONAEO)	Travel Itineraries	Swipe-Card Records

# PERSONAL INCOME TAX TAKE-AWAYS

- Move out of NYC before the closing
- Avoid permanent place of abode (PPA) rules with a brokerage agreement
- Effective 2019, statutory residence trumps domicile (anti-*Sobotka* statute)
- Keep an eye on *Wynne*-based cases – petition for cert. to U.S. Supreme Court denied October 8, 2019 in *Edelman*.
- Opportunity Zone possibilities?

# TOP TEN RESIDENCY ERRORS

1. Nobody moves on January 1
2. Statutory residence trumps domicile
3. The “Living Quarters” box
4. Consistency!
5. Husbands and wives usually share a domicile
6. Don’t start an audit with an offer to settle
7. Don’t let client “chat” with auditors
8. Credits for taxes paid elsewhere
9. Never amend a return under audit
10. Many states have an accrual rule



# OTHER INCOME TAX ISSUES

- Wages (including “convenience” rule)
- Deferred comp.
- Business and flow-through income
- Post-retirement remuneration
- Accrual rule (a cruel rule)
- Withholding audits (over \$60M collected in 2016). Audits up over 150%, only 21% resulted in no-change.
- Resident credit audits



# AUDIT HOT TOPICS AND EXPERIENCES

- Obtaining domicile determinations at audit
- Field Audit Management's increased oversight of domicile audits
- Abode issues and application of 11-month rule
- Day count and medical days
- Anti-Sobotka Law – impact with 548 Day Rule?
- Resident tax credits

# FAM'S OVERSIGHT ON DOMICILE AUDITS

- Increased involvement by FAM in routine residency audits— appears FAM getting involved both early and often.
- Almost every domicile case being reviewed by FAM.
- Increasing appearance that FAM, not the audit team conducting the audit and making final determination on domicile.
- Uptick in cases where Audit is arguing change of domicile into NY despite their burden of proof. Can be difficult given Audit's reluctance to rely on testimonial evidence.

# ABODE CASE STUDIES: THE 11-MONTH RULE

- Law silent, regulations require abode maintained for “substantially all of year,” Department says more than 11 months required (but attempt to limit its application to year of acquisition or disposal of abode).
- Facts:
  - Taxpayers acquire NYC apartment end of Year 1.
  - Begin renovations immediately. Renovations span Year 2 and completed in the early part of Year 3.
- Clearly 11-month rule applies in Year 1 and Year 2.
- But what about Year 3?

# ABODE AFFIDAVITS

- City residency audits often involve requests for affidavits related to maintenance of living quarters in NYC
- Should taxpayers be required to sign this type of affidavit?
- Should the audit wrap up after the taxpayer signs the affidavit?
- Be careful with these determinations, level of aggressiveness seems to only be going up
- And is an affidavit even enough or must the taxpayer prove a negative?

# DAY COUNT CASE STUDIES: MEDICAL DAYS

- Law in *Stranahan* still good, but is audit policy changing?
- Even relatively serious medical procedures sometimes no longer require lengthy inpatient stays. Has the medical days exception kept up with medical advances?
- When a taxpayer has a serious medical procedure in NYC (i.e., heart surgery) and advised to convalesce nearby (i.e, at a NYC abode), how will Audit treat those days?
- What about where a spouse or parent must be present because of a serious medical procedure of a family member?

# “ANTI-SOBOTKA” LAW AND ITS IMPACT ON 548-DAY RULE?

- In 2018, in order to address an issue raised by an ALJ decision in *Matter of Sobotka*, NYS’s legislature amended the definition of “statutory resident” under Tax Law § 605(b).
- Though it was initially proposed as a retroactive law change, the legislature ultimately decided to make the law change effective only a prospective basis, beginning in 2019.
- Change in law was simple. Legislature eliminated the phrase in § 605(b)(1)(B) that limited the definition of statutory residents to those “not domiciled in this state” and added language that those meeting the abode and day count tests would be statutory residents “whether or not they are domiciled” in NY.
- What about NY domiciliaries who begin or end a 548-day period in tax years beginning in 2019?
  - Say a TP begins a 548-day period on October 1, 2019.
  - At the end of the 548-day period, the TP meets the 548-day rule requirements.
  - However, during the 2019 tax year, the TP maintained a PPA and spent more than 183 days in NY.
  - What result?

# RESIDENT TAX CREDITS

- Continue to see many audits of New Yorkers each year.
- Example: New York resident takes a credit for taxes paid to NJ on 100% of her wages. Audit requires proof that resident worked 100% of her time in NJ and did not travel elsewhere
- Issues to keep an eye on:
  - Does the statute of limitation toll in the other state?
  - If not, does other state allow protective claims?
  - Some states don't do either (Colorado example).
  - Different sourcing rules (Connecticut recently adopted convenience rule).



# THANK YOU



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