A Snowbird Must Carefully Plan Its Flight

Establishing Tax Residency under the Laws of New York and Florida

By Mark Klein and Dan Kelly

In Brief

New York residents sometimes relocate to Florida to take advantage of that state's more lenient tax laws (not to mention more moderate climate). While establishing residency in Florida to the satisfaction of that state's taxing authorities is relatively straightforward, New York looks upon such arrangements with greater scrutiny. The authors lay out the process of a residency audit, describing the domicile and residency factors the New York authorities examine and how CPAs can advise taxpayers to arrange their affairs to ensure that the relocation is respected.

For the past 35 years, the authors have frequently been asked to explain exactly what it takes to successfully move out of New York and many other northern states into Florida. The rules are very complex, with many traps that snare taxpayers even after a successful move to Florida, and both taxpayers and representatives are regularly surprised by the results of audits. This article describes all of these issues, as well as others that come across the desks of CPAs and attorneys practicing in Florida. It provides a starting place to assist individuals who are moving or have moved from New York to Florida in establishing Florida residency and to focus their response once the inevitable New York income tax audit notice arrives. While the focus is on the New York rules, it should be noted that many northeastern states (e.g., New Jersey, Connecticut, Massachusetts) employ the same tests.

Planning Accordingly

Why is establishing residency in Florida so important? If a taxpayer buys a home in Florida, gets a Florida driver's license, registers to vote in Florida, files a Florida Declaration of Domicile form, and is given Florida homestead protection by the county clerk, then—in the eyes of most interested Florida parties—Florida residency has been established. The New York Department of Taxation and Finance (DTF)—the monitor of compliance with New York State's 8.82% and New York City's 3.876% tax rates—will not necessarily feel the same way. It is critical for taxpayers to appropriately establish residency in Florida in the eyes of the DTF, because that audit notice is likely to arrive not long after the claimed move.

A residency audit is usually triggered when a taxpayer files as a New York nonresident for the first time, when she files as a New York part-year resident, or when she ceases filing New York tax returns. Nonresidents pay tax only on their New York–source income, which could be quite low if most of the income is intangible in nature. Residents, on the other hand, pay tax on their worldwide income, no matter the source. The tax difference in terms of New York State

and City tax can be staggering. Residency audits can arise in other ways, but once a taxpayer has received a New York audit notice, the review usually covers three bases:

- Where was the taxpayer domiciled?
- If the taxpayer was domiciled outside of New York, was she a statutory resident?
- If the taxpayer was not a resident of New York, was her income properly sourced to New York? (This income allocation is outside the scope of this article.)

The audit usually does not conclude until the DTF is satisfied that it is not entitled to any additional tax revenue, based on residency or otherwise.

New York's Residency Rules

Taxpayers from every state move to Florida for all kinds of reasons. This article focuses on the New York residency rules and New York residency audits, in large part because New York is such a populous state with such high tax burdens—facts that induce residency flight—but also because the DTF is one of the most aggressive state revenue agencies in the country when it comes to auditing residency. In the authors' experience, taxpayers whose income exceeds a modest threshold and who begin filing as a nonresident or cease filing altogether should expect to receive an audit notice. Exactly how the state uses data analytics and computer programs to identify such taxpayers is not clear, but IBM has helped the DTF find taxpayers who change residency ("Leadership Series: How Predictive Modeling Improves Tax Revenues and Citizen Equity," IBM, Jul. 8, 2011, http://ibm.co/2hBTVuN).

Several states define "resident" in similar ways to New York and test a change in domicile using similar methods. In 1996, 12 states joined together in a cooperative agreement regarding domicile, statutory residence, and allocation, called the North Eastern States Tax Officials Association. The authors suggest that CPAs check the rules in the state from which the taxpayer is moving to learn about any specific nuances, such as Connecticut's "28-factor" domicile analysis.

New York Domicile

Under New York's rules, residency for personal income tax purposes can be established through one of two tests. The first test is based on domicile; if the taxpayer is domiciled in New York, then he is taxable as a New York resident. Domicile refers to a taxpayer's principal, primary, and permanent home. A person can have many residences, but only one domicile. Domicile is not defined in New York tax law; DTF regulations define it as "in general … the place which an individual intends to be such individual's permanent home." Thus the understanding of a taxpayer's New York domicile has been shaped by common law for over a century, and not just through tax cases. The difference between domicile and residence, as noted by New York's highest court in 1908, is based on intent: "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile" [*Matter of Newcomb*, 192 N.Y. 238 (1908)].

Intention is a murky concept. There is nothing more frustrating for a taxpayer than a New York auditor questioning or doubting her intent to be domiciled in Florida from a desk 1,000 miles away. Furthermore, because New York taxpayers who move to Florida have usually been domiciled in New York for many years prior, the law requires that the *taxpayer* prove, by clear and convincing evidence, that at some point she abandoned the former New York domicile and established a new one in Florida [20 NYCRR section 105.20(d)]. If the call is a close one, the New York residency audit can be a difficult process. If, however, the DTF alleges that a taxpayer moved from Florida into New York, the state, not the taxpayer, has the burden of proof.

Because domicile deals with a taxpayer's subjective intent, the DTF has established five objective factors that its auditors examine and compare to infer that intent. These five factors are a taxpayer's housing, business, time, possessions, and family ties in Florida and New York. During its review of these factors, the DTF looks at the extent to which a taxpayer retains ties in New York and whether the taxpayer's actions indicate an intent to *abandon* his historic New York domicile and *acquire* a new domicile in Florida. This is often referred to as the "leave and land" test, and it is important for a taxpayer to meet both aspects. If a taxpayer lands in Florida but fails to leave New York, he loses. If a taxpayer leaves New York, but fails to land in Florida, he loses.

Other secondary factors are also reviewed, such as the state of a taxpayer's driver's license, the location of taxpayer's bank accounts, or the location of a taxpayer's primary physician. These kinds of checklist items, however, are not as important to New York auditors as the strength of a taxpayer's case under the five primary factors. The balance of secondary factors can help swing a close case one way or another, but they cannot be the basis to prove a change of domicile out of New York.

In analyzing the five factors, the location with the strongest ties is most likely the taxpayer's domicile—or so the theory goes. The authors have recently seen a trend of victories in contested domicile cases in the New York Division of Tax Appeals based heavily on the taxpayer's credible testimony regarding intent. So while the five primary factors and other factors might be helpful indicators, a case in many ways will boil down to the taxpayer's testimony and ability to accurately and honestly convey intent.

The Primary Domicile Factors

Home. New York will compare the size, market value, and amenities of the taxpayer's home in Florida with any property the taxpayer retains in New York. For many taxpayers, the purchase of a Florida home is a critical event marking or surrounding the change of residency, and auditors always look for this change of lifestyle and intent. With a significant life event, such as acquiring a new home in Florida, a taxpayer can signal her intent to change domiciles.

The home factor sometimes encompasses more nuanced aspects of a taxpayer's living situation. For example, did the taxpayer treat the Florida property as her home in all instances? Did she claim the Florida Homestead exemption? Did her property insurance list the Florida home as the primary residence? Did she join local civic and recreational groups? Did she decorate the home with her important items? Did family visit there? Is the Florida home owned instead of rented? Are items in storage, and if so, where? The home factor covers these and many more questions beyond the home's architectural specifications and market value. Finally, sometimes in a residency audit, the taxpayer's representatives focus too closely on the Florida home. It is also important to highlight minimized New York connections. If the taxpayer downsizes in New York, sells the historic home but keeps a cottage, or begins renting in New York while owning in Florida, these are all facts of great significance.

Active business connections. Often taxpayers moving to Florida are retiring, so there are few active business connections left in New York, Florida, or anywhere else. Still, taxpayers often earn income from former New York concerns, or remain involved at some level in a New York business after moving. Expect a New York auditor to analyze the taxpayer's business connections in New York and Florida, and to compare the source of the taxpayer's income. If the taxpayer remains actively involved in a New York business after moving, New York courts and auditors alike might give this fact a significant amount of weight in the domicile analysis [see *Matter of Kartiganer*, 599 N.Y.S. 2d 312 (3rd Dept. 1993), but also *Matter of Burke*, Administrative Law Judge Determination No. 810631 (Aug. 5, 1993), Tax Appeals Tribunal (Jun. 2, 1994)]. There are ways for a taxpayer to remain involved in the New York business after retirement, perhaps as a limited consultant, while avoiding undue scrutiny on audit. Taxpayers need to be very careful here, though, and document their limited role and activities with respect to how they earn any income from their former employers or companies.

One common problem occurs when taxpayers move to Florida while their children take over the New York family business. Sometimes these new Floridians need day-to-day cash, so they may be employed by the New York business as consultants or as off-site employees. Even though they may not be active in the business, it will be hard to explain that to an income tax auditor when he sees the business taking a deduction for those very same expenses.

Time. For better or worse, the time factor is often the most important in a residency audit. The authors receive many calls from taxpayers asking if it is possible to avoid New York residency simply by not spending more than 183 days in the state. The answer is a resounding "no!" The 183-day test is critical to New York *statutory residency*—discussed below—but the domicile time factor analyzes the taxpayer's time spent in New York and Florida from a number of perspectives, both qualitative and quantitative.

The New York auditor will expect to see the taxpayer spend the majority of his time in the claimed place of domicile. If a taxpayer spends more time in New York than in Florida in a given tax year, this fact is not necessarily determinative or fatal, but it is certainly not helpful. Again, what auditors look for with a change of domicile is change in lifestyle and proof of a taxpayer's intent to make Florida his home. For example, if a taxpayer goes from spending 180 days in New York and 10 in Florida in one year to 150 days in New York and 145 days in Florida in the next, he certainly may be able to establish a change of domicile, even if the pattern does not overwhelmingly favor Florida. The 2014 New York Nonresident Audit Guidelines state as much: "During [the time factor] analysis, the auditor should focus on the overall living pattern of the taxpayer, asking whether the patterns present strong evidence that the new location has become the taxpayer's domicile" (http://on.ny.gov/2fTnPWa). A significant shift in time pattern is strong evidence of a change in domicile.

The *quality* of a taxpayer's time pattern also matters. A New York auditor will look at where a taxpayer spends holidays and special occasions, as well as where a taxpayer visits with family and friends. To the extent possible, a taxpayer should try to spend this kind of time in Florida.

Finally, taxpayers should expect to be able to prove on audit where they were on each day of the year. If the taxpayer cannot prove where she was, the auditor will assume she was in New York. This can be a difficult and costly aspect of a residency audit, but a taxpayer can lighten the load by keeping accurate and complete records. Taxpayers can expect a DTF auditor to ask for diaries and calendars, expense reports, credit card statements, E-ZPass and commuting records, phone bills, frequent flyer statements, passports, and building and gym access records. Sometimes it is helpful for an accountant to audit the taxpayer's day count records prior to receipt of an audit notice to make sure the taxpayer is on track.

Items near and dear. This factor is unique to each audited taxpayer. DTF auditors will identify where a taxpayer

keeps his most valuable possessions, both in terms of market and sentimental value, as an indication of his domicile intent. It would certainly be odd for a Floridian to keep his most valuable possessions in New York. The auditor might ask to see photos of items that were once in New York and are now in Florida, or moving records documenting the transit of the items, or copies of insurance policies to see if there are riders for any of the taxpayer's valuable items. According to the nonresident audit guidelines, these items are not furniture, but "family heirlooms, works of art, collections of books, stamps and coins, and those personal items which enhance the quality of lifestyle." Some taxpayers do not treasure possessions, and others treasure possessions such as family photos or pictures painted by grandkids over those that have market value. The search for such items is sometimes called the "teddy bear" test.

Family. The family factor in a New York residency audit is supposed to cover only a taxpayer's spouse and minor children. Did both spouses move to Florida? Did the taxpayer move her minor children to Florida and enroll them in school there? Taxpayers rightfully bristle at having to explain their personal family situations to inquisitive auditors, which is why this factor is supposed to be limited. Sometimes, however, taxpayers follow their parents, children, close friends, and other relatives to Florida. Occasionally there are entire family migrations, or children following in the footsteps of their parents, and when this happens, CPAs should bring it to the auditor's attention.

The family factor is subtly cooked into the other four primary factors: Do other family members live near the Florida home? Does a taxpayer keep tabs on a family business? Does a taxpayer spend time with family in Florida or New York? Does a taxpayer keep family mementos and heirlooms in Florida? Thus, while the family factor is supposed to be limited, it often touches most aspects of a domicile analysis and residency audit.

Other Domicile Factors

As noted above, auditors will often inquire about items beyond the five primary factors. These pro forma steps can be used to provide documentary proof of a taxpayer's intent to establish residency in Florida, but they are less important than the five primary factors discussed above. A taxpayer's domicile case is won and lost with the five factors, but the following other factors listed in the Nonresident Audit Guidelines still have some impact:

- The address where bank statements, bills, financial data, and correspondence concerning other family business are primarily received
- The physical location of safe deposit boxes used for family records and valuables
- The location of auto, boat, and airplane registrations, as well as driver's or operator's licenses
- The location where the taxpayer is registered to vote and the exercise of said privilege
- Possession of a Manhattan Parking Tax exemption
- An analysis of telephone services at each residence, including the nature of the listing, the type of service features, and the activity at the location
- The citation in legal documents that a particular location is to be considered the individual's place of domicile or that a particular residence is considered to be a primary residence; examples would include, but are not limited to, wills, divorce decrees or separation agreements, applications for school tax relief exemption (STAR), and leases for rent-controlled or rent-stabilized apartments
- Green cards indicating that an immigrant can legally reside in the United States on a permanent basis.

When advising a taxpayer who is planning to move to Florida, CPAs should suggest that he take all of these actions and more, such as obtaining a Florida Declaration of Domicile, applying for the Florida Homestead exemption, or joining the local Florida library. The value of these steps should not, however, be overstated.

New York Statutory Residency

The first stop in most residency audits is a taxpayer's domicile. If a taxpayer moves to Florida but is still domiciled in New York, the matter is settled. Even if a taxpayer is domiciled outside of New York, however, the case is not closed. New York can still impose tax on a taxpayer's worldwide income if she is found to be a New York statutory resident. Under the statutory residency test, a taxpayer is treated as a New York resident for income tax purposes if she 1) maintains a permanent place of abode in New York and 2) spends more than 183 full or partial days in New York during the year. This test applies separately to New York State and City. A breakdown of the steps in this test follows.

183-day test. The burden of proof is on the taxpayer to show that she was not present in New York for more than 183 days, and *any part of a day* spent in New York is generally counted as a New York day. For example, if a taxpayer wakes up in New York and catches a flight to Florida at 11:00 am, this counts as a full New York day for purposes of the statutory residency test, even though the same day counts as a Florida day for purposes of the domicile time analysis. Many taxpayers overlook this fact.

Auditors are generally reasonable about small time gaps in a taxpayer's records, provided they make sense. If a taxpayer is in Florida on Monday, for example, proven by a credit card charge, and there is no activity of any kind on Tuesday and Wednesday before another credit card charge on Thursday, an auditor will likely consider all four days to be Florida days. Also, if a taxpayer is simply traveling through New York to elsewhere, the day will not count for pur-

poses of the statutory residency test. Furthermore, if a taxpayer is receiving in-patient medical care, such days will not count. There are few exceptions to the minute-is-a-day time rule, however, so be careful. Funerals in New York are days spent in New York. Outpatient medical treatments are days spent in New York. Taxpayers and CPAs may disagree, but an auditor will likely assert that 30 minutes spent in a New York grocery store is an entire day spent in New York. These rules do not make much sense, but New York courts have upheld them. The best defense is for a taxpayer to keep complete, contemporaneous records of her location throughout the year, and to avoid spending close to 183 days in New York during the year. This will help avoid surprises on audit.

Permanent place of abode test. Any type of dwelling can qualify as a permanent place of abode (PPA), and it is irrelevant whether a taxpayer owns or leases it. The taxpayer must maintain the abode as his residence in New York [*Matter of Gaied*, 22. N.Y.3d 592 (2014)]. This is still a controversial area in New York residency audits, and a comprehensive analysis of the subject is outside the scope of this article [see Timothy Noonan and Joshua K. Lawrence, "The Goods on *Gaied*: What It Means, From the Front Lines," *State Tax Notes*, May 19, 2014; Timothy Noonan, "New York Tax Department's Response to *Gaied* Misses the Mark," *State Tax Notes*, July 21, 2014]. If a taxpayer keeps an apartment or home—even a summer home—he will be considered as maintaining a PPA in New York. It does not matter if the PPA is in the taxpayer's name, in a limited liability company's name, or owned by a corporation or trust. A PPA can even be a place where the taxpayer has the right to spend the night whenever he wants; ownership is irrelevant.

The rules also require, however, that a dwelling must be maintained for "substantially all of the taxable year" [N.Y. Tax Law section 605(b)(1)(B); 20 NYCRR section 105.20(a)(2)] in order to be considered a PPA for statutory residence purposes, which is a period exceeding at least 11 months. Thus, if a taxpayer acquires an abode or disposes of one mid-year in New York, statutory residency should not be an issue for that year. Similarly, if a taxpayer owns a remote campsite in northern New York and cannot stay there (or even access the camp) in the winter, it will not count as a PPA.

Other Considerations

The following are small points that might help when a taxpayer receives the New York audit notice, and even beforehand.

Social media. Social media use is increasing daily, and often by older users. Social media is also taking on new forms and is available on an increasing number of devices. It is important to remember, however, that auditors can access taxpayers' Facebook profiles, web pages, and tweets as easily as anyone else. Taxpayers should keep this in mind. It is better to avoid the issue altogether by making such postings as private as possible.

Expectations, audit resolutions, and re-audits. If a taxpayer receives a New York income tax audit notice, she should prepare for the long haul. Despite best efforts on both sides, these cases tend to progress slowly. A residency audit review is very document-intensive, and it can take months to gather all of the needed information. An audit can progress more quickly and affordably if a taxpayer keeps appropriate records as they are generated, preventing the need to contact third parties and others when the audit notice arrives.

The best resolution is a no change letter from the DTF (or, rarely, a tax refund), but sometimes audit adjustments are necessary, and a professional advisor's ability to negotiate a resolution will be directly impacted by the documentation available. Interest on any liability is statutory and cannot be adjusted, but penalties—and New York imposes a variety of penalties—can for the most part be abated if the liability is the result of reasonable cause and not willful neglect.

If a New York audit results in the DTF accepting the taxpayer's Florida domicile and there are no statutory residency issues or nonresident income allocation adjustments, then the state will likely leave the taxpayer alone. What's more, the fact that the DTF audited the taxpayer's change of residency and respected it will be excellent evidence of Florida domicile for future income tax and New York estate tax purposes. This is not to say that the taxpayer should begin taking unusual filing positions after a successful residency audit defense, however. In contrast, if the DTF audits the taxpayer's nonresident returns and issues an audit adjustment, there is a strong likelihood that it will take another look after additional returns are filed, to make sure the audit resulted in future compliance.

Federal implications. Generally speaking, a New York income tax audit has no direct impact on a taxpayer's federal filings for the same period. A payment of additional state and local tax, however, could provide a valuable federal tax deduction if the taxpayer itemizes and is not subject to the Alternative Minimum Tax.

Forewarned Is Forearmed

This article covers only the basics of New York residency and audit strategy. The issues outlined above are among the most prevalent, and CPAs with clients considering a New York–Florida relocation are encouraged to consider them carefully—as well as perhaps consult a knowledgeable attorney. ❑

Mark Klein, JD, *is a partner at Hodgson Russ LLP, New York, N.Y. He is also the coauthor of the 2016 New York Residency and Allocation Audit Handbook.* ***Dan Kelly, JD,*** *is an associate at Hodgson Russ.*