

Day Counts and the Importance of Testimony in Statutory Residency Audits

by Timothy P. Noonan and Joshua K. Lawrence

Any state and local tax practitioner who's been involved in a residency audit knows how burdensome a task it can be when the audit comes down to a taxpayer's day count and attempts to prove the taxpayer was not present in a state for the threshold number of days to justify taxation as a statutory resident. For taxpayers fortunate enough (or unfortunate enough in some circumstances) to have a home in a state other than their state of domicile, day counts can become a perennial problem. Those who aren't careful about how they spend and document their time between states face the possibility of double taxation as a resident of two different states.



For the practitioner asked to step in on a statutory-residency audit, the devil is usually in the day counts. And unless the client is either a naturally compulsive record-keeper or has been through a residency audit before, it's likely there will be substantial gaps and inconsistencies in the records supplied to prove the client steered clear of the state for enough days to avoid statutory residency.

One of the common issues that arise in statutory residency cases in New York is whether and to what extent those gaps in documentary evidence can be bridged by credible testimony by the taxpayer.¹ For example, consider the typical New York snowbird with houses in New York and Florida. If she cannot retrace and document through credit card statements, canceled checks, diaries, travel records, and other commonly used documents each day spent in Florida in a tax year, can she still meet her burden of proof by testifying about her general seasonal pattern of time spent between the two states? In New York, the answer is yes. Although nonresident taxpayers who maintain a residence in New York are required by regulation to keep and produce adequate records of their time spent within and outside the state,² the New York Tax Appeals Tribunal has held that credible testimony on a taxpayer's "general habit of life," even when not specifically corroborated by records, can suffice to satisfy the taxpayer's burden of proof.³



Some background on statutory residency is probably in order. In New York, as in most other states, a person can be deemed a resident either by being domiciled in the state or by maintaining a residence in the state for most or all of the year and spending the requisite number of days in the state.⁴ To be taxed as a New York state resident (and thus on income from all sources), an individual must either be domiciled in the state or be a "statutory resident," by maintaining a permanent place of abode and spending more than 183 days in the state during the tax year.⁵ In cases that turn solely on day counts, a handful of undocumented days can mean the difference between the taxpayer being taxable as a nonresident on only New York-source income or as a statutory resident on income from all sources.⁶ New York courts have held that being taxed as a resident in two states under this regime does not offend the U.S. Constitution.⁷

What makes statutory residency particularly thorny in New York is that many of those it affects often own houses within relatively close proximity to each other. Though many cases involve the aforementioned snowbirds circulating between New York and warmer climes, a substantial number of residency cases involve persons with apartments in New York City and homes just a short commute away in Connecticut, New Jersey, or Long Island. Add in New York's rule that "presence within New York State for any part of a calendar day constitutes a day spent within New York State,"⁸ and it becomes clear why day counts and the evidence used to establish them can be hotly contested in New York state and New York City residency audits. Taxpayers who spend a good deal of time within the state and maintain a residence but who keep poor records documenting their whereabouts face an uphill climb in New York. That's because the state places the burden on taxpayers facing statutory residency inquiries to prove, by clear and convincing evidence, they were not present in the state for more than 183 days -- and an undocumented day, absent any other compelling evidence, is usually treated as a day in the state.⁹ Indeed, most income tax auditors start with the premise that, absent other evidence, the taxpayer spent 365 days in New York during the tax year.

However, the New York Tax Appeals Tribunal has made it clear in several significant rulings that in statutory residency cases, credible testimony alone can be sufficient to establish a "general habit of living" or to prove days out of state not otherwise substantiated with documentary evidence.¹⁰ That can be very important when -- as is often the case -- a client's paper trail is full of gaps.

In *Matter of Avildsen*,¹¹ the tax tribunal rejected an administrative law judge's ruling that testimonial evidence, even if credible, is insufficient as a matter of law to prove that presence in New York was under 184 days. In *Avildsen* and several later rulings, the tribunal concluded that even though state regulations require taxpayers with residences in the state or city to "keep and have available for examination . . . adequate records" to substantiate their time outside of New York,¹² the lack of that documentation does not prevent a taxpayer from proving through testimonial evidence that he was not a statutory resident.

In *Avildsen*, the taxpayer's minimal proof describing his whereabouts in and out of New York City consisted of telephone and utility bills as well as a list compiled by the taxpayer's secretary summarizing his daily locations throughout the tax years. The secretary appeared at the hearing and testified about the taxpayer's locations on the list, saying the list was compiled from business diaries that she kept but that were not produced at the hearing. The ALJ found the secretary's testimony to be credible because:

- it was based on her examination and analysis of the diaries she kept;
- she was the one who prepared the summary;
- the diaries themselves were created contemporaneously with the reported activities; and
- the taxpayer offered a "rational justification" for not providing the diaries.¹³

Nonetheless, the ALJ held that testimonial evidence alone was insufficient and that the regulations requiring taxpayers to keep adequate records required those records to be produced for the taxpayer to prevail.¹⁴

In reversing, the tribunal said that nothing in New York City's residency statute dictates how a taxpayer may prove his residency status.¹⁵ Moreover, even if the city Department of Finance intended its regulation to set an evidentiary standard for proving day counts at the hearing level, that regulation would exceed the agency's administrative powers, the tribunal held.

The tribunal applied the same analysis to a later case involving New York state's (rather than New York City's) residency regulations. In *Matter of Armel*,¹⁶ a couple who divided their time between New York and Florida had been successful before the ALJ in proving a change of domicile to Florida. However, statutory residency and day count remained at issue, and the ALJ ruled that the couple failed to prove they had not spent more than 183 days in New York. The couple had conceded they were in New York from May through October of each year, but testified that it was their established routine to spend the rest of the year based in Florida. They offered their own testimony as well as letters from friends and neighbors supporting this routine.

Again, the ALJ found the taxpayer's testimony credible, but interpreted the state's record-keeping regulation¹⁷ as requiring records to be produced to substantiate the taxpayers' whereabouts, especially when, as in that case, nearly the whole month of December was undocumented. The ALJ found the taxpayers' "general habit" testimony to be credible, but nonetheless insufficient without corroborative documents to prove non-New York days. The tax appeals tribunal reversed, saying again that nothing in the residency statute defines how a taxpayer may prove residency and that the record-keeping regulation doesn't dictate what must be produced at a hearing to prevail:

We can see no basis to find Mr. Armel's testimony credible on the issue of domicile but to find it incredible on the intertwined issue of statutory residency.¹⁸

The tribunal said that "the degree of specificity required . . . regarding days in and out of the State must be evaluated based on the factual issue raised."¹⁹ In this case, the disputed, undocumented days involved a continuous block of time, that is, a winter month. "Under these circumstances, petitioners can prevail by proving that they stayed in Florida for the entire winter of 1988. They need not establish their whereabouts each specific day."²⁰

Although *Matter of Armel* involved the somewhat simpler case of snowbirds with a predictable seasonal pattern, the same reasoning has been applied in more haphazard commuter cases. In *Matter of Reid*,²¹ the taxpayer kept not one but two apartments in New York City, but lived in and commuted from nearby Connecticut. Because the taxpayer worked in the city for part of each week, his day count hovered close to the 184-day threshold. With weekdays pretty well documented in business diaries, the case came down to the sole question of where the taxpayer spent his weekends. Once again, the ALJ had found the taxpayer's testimony as to his general habit of life to be credible and, based on that, had accepted Connecticut as the taxpayer's domicile. However, on the more fact-intensive question of days spent outside New York, the ALJ ruled that such testimonial evidence was insufficient to meet the taxpayer's burden.

Once again, the tribunal reversed. As in *Armel*, the tribunal ruled that is a situation in which the taxpayer's testimony need not involve a day-to-day breakdown of his whereabouts throughout the year. Because the ALJ had found testimony on the taxpayer's general habit of life sufficient to prove a Connecticut domicile, it found "no basis to conclude petitioner's testimony is not equally relevant and probative" on the question of day count.²² Here, the taxpayer demonstrated through his credible testimony that his weekly routine never involved returning to New York City, either for work or for leisure.

Of course, "credible" is the operative word. Taxpayers have also been unsuccessful in relying on testimony to fill holes in proving their whereabouts on undocumented days. In *Matter of Kern*,²³ a New York City commuter who lived just outside the city but maintained an apartment in Manhattan faced a day count in which undocumented days put him a mere 14 days over the threshold for statutory residency in the city. The taxpayer attempted to supplement his lack of documentary evidence for those days with testimony of his pattern of conduct. For example, he testified that while he was usually in his New York City office on Fridays, he was rarely there on Mondays, and that he generally visited the office only two or three days a week.

The tax appeals tribunal distinguished that situation from that in *Armel* and *Reid*, saying there was no specific or repeating period of time at issue (that is, winter months or weekends), but rather a situation in which a person sporadically traveled in and out of the city on weekdays for work and other reasons. In that situation, testimony of a general pattern of conduct regarding work routine only and not accounting for other trips into the city could not stand in for day-by-day documentary proof.²⁴

The rule that seems to emerge from that often-cited line of cases -- aside from the affirmation that credible testimony alone can be sufficient as a matter of law to prove day counts -- is that the specificity required in the taxpayer's testimonial evidence depends on the nature of the facts in contention. When the documentary evidence is sketchy and the facts reveal frequent and inconsistent travel in and out of the state, general pattern evidence will not suffice. However, if the taxpayer can establish a pattern that involves consistent blocks of time (that is, winter months, weekends), gaps, and inconsistencies in other evidence may be overlooked.

Nor is that analysis limited only to the evidentiary requirements at the litigation level. Auditors, at least in New York, are instructed to be sensitive to the taxpayer's burden in producing the usually voluminous records it takes to prove a day count. The state's nonresident audit guidelines instruct auditors to be practical in determining what documentation will suffice, and they reflect what the courts have concluded themselves:

A taxpayer does not necessarily need additional documentation beyond his or her statements as to the amount of time spent in New York. Since it is normal for people to display certain predictable and repetitive migratory patterns, and it is abnormal for people to document their presence in a particular location on every day of the year, an auditor should measure the credibility of a personal account in the context of an audit.²⁵

Also, auditors are instructed not to tell a taxpayer who has not maintained a diary or other such account of his time in-state that "if you can't prove exactly where you were each day, I will hold it as a New York Day."²⁶ Nor should practitioners accept such a hard-line approach from auditors.

Although residency statutes based on day counts present a more rigid, bright-line test than the subjective test for domicile, both are tuned to the same goal: determining whether an individual should be taxed as a full-fledged resident of the state. As the courts in New York have proven, statutory residency need not be fought on paper alone, but can be determined on the credibility of the taxpayer's own account. Taxpayers with two homes are often creatures of habit, and when those habits and patterns don't show themselves in the form of travel logs, credit card receipts, and other commonly examined day count materials, practitioners should not discount their ability to exploit those patterns through testimony of the taxpayer or from credible third parties.

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FOOTNOTES

¹ Although those issues most commonly arise in New York, the same concepts can and do apply in other states with the same statutory residency concepts, such as Connecticut, New Jersey, and Massachusetts.

² 20 NYCRR section 105.20(c).

³ See *Matter of Avildsen*, New York Tax Appeals Tribunal (May 19, 1994); *Matter of Armel*, New York Tax Appeals Tribunal (Aug. 17, 1995); *Matter of Reid*, New York Tax Appeals Tribunal (Oct. 5, 1995).

⁴ See N.Y. Tax Law section 605(b)(1)(B).

⁵ *Id.* The permanent place of abode issue has been discussed and addressed in previous editions of Noonan's Notes. See "New York Practice Issue -- More Developments in the Temporary Stay Area," *State Tax Notes*, July 30, 2007, p. 313, *Doc 2007-16738* [PDF], or *2007 STT 147-5* ; "Temporary Stays in New York: A New Set of Rules in Residency Audits?" *State Tax Notes*, Feb. 21, 2005, p. 551, *Doc 2005-2554* [PDF], or *2005 STT 34-17* ; and "A Very Good Knight for Taxpayers," *State Tax Notes*, Mar. 19, 2007, p. 815, *Doc 2007-6221* [PDF], or *2007 STT 54-13* .

⁶ NY Tax Law section 612; see also *Matter of Tamagni v. Tax Appeals Tribunal*, 91 NY2d 530, 535 (N.Y. 1990), *cert. denied*, 525 U.S. 931.

⁷ See *Matter of Tamagni v. Tax Appeals Tribunal*, *supra* note 6.

⁸ 20 NYCRR section 105.20(c).

⁹ *Matter of Smith v. State Tax Commn.*, 68 AD2d 993 (3rd Dept. 1979); *Matter of Kornblum v. Tax Appeals Tribunal*, 194 AD2d 882 (3rd Dept. 1993).

¹⁰ *Supra* note 2.

¹¹ N.Y. Tax Appeals Tribunal (May 19, 1994).

¹² See N.Y. Tax Law section 105.20(c).

¹³ *Id.*

¹⁴ 20 NYCRR Appendix 20, section 1-2(c).

¹⁵ New York City's definition of a resident mirrors that of New York state, substituting only the word "City" for the word "State."

¹⁶ N.Y. Tax Appeals Tribunal (Aug. 17, 1995).

¹⁷ 20 NYCRR section 105.20(c) (requiring residents to "keep and have available . . . adequate records to substantiate days out of New York").

¹⁸ *Matter of Armel*, *supra* note 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ NY Tax Appeals Tribunal (Oct. 5, 1995).

²² *Id.*

²³ NY Tax Appeals Tribunal (Nov. 9, 1995), *aff'd*, 240 AD2d 969.

²⁴ *Id.*; Compare *Matter of Siskind*, Administrative Law Judge Determination (Mar. 11, 1999) (credible testimony from a taxpayer regarding his work schedule in and out of New York City over a three-year period (amounting to 600 pages of trial transcript) was sufficient to support an otherwise insufficient business diary).

²⁵ N.Y. nonresident audit guidelines para. 5.E.c.

²⁶ *Id.* at section 1.

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