

PERSONAL INCOME TAXES

Clear and Convincing: Murky Evidentiary Standards in New York Personal Income Tax Matters

Burden of proof and the standard of proof issues pervade tax audits, settlement discussions, and tax appeals.

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Defending New York tax controversies is difficult. The laws can be ambiguous. Regulations may be dated or just plain wrong. The application of department policies and legal precedents by auditors may be inconsistent. The client's facts may be difficult or unclear. And the playing field is not level. The burden of proof is almost always on taxpayers and, to prevail, taxpayers are required to prove their points at the very high "clear and convincing evidence" standard.

Burden of proof and the standard of proof issues pervade tax audits, settlement discussions, and tax appeals. The New York Tax Law, the New York Tax Department's regulations, and decisional authority from the New York Division of Tax Appeals provide relatively consistent guidance to determine which party has the burden of proof. But these tools don't always create a clear rendering of how that burden of proof is satisfied.

This article explores the boundaries of different evidentiary standards in New York personal income tax matters, and suggests a framework and strategies for taxpayers to meet their burden of proof.¹

New York Personal Income Tax: Evidentiary Standards of Proof

I recently wrote in this space about the perils (1) inherent in a taxpayer's decision to change their domicile from New York to another jurisdiction, and (2) for taxpayers who are obligated to prove their location on a day-by-day basis in a given tax year.² A meaningful aspect of these perils stems from unpredictability. Faced with inconsistent application of evidentiary standards in these cases, taxpayers lack the ability to rely on a framework to take action and ensure they have prepared themselves to satisfy the applicable burden of proof.

There are multiple "burdens" on taxpayers facing an audit, appeal, etc. These burdens are acknowledged in the New York Tax Department's Guidelines: "The nonresident audit could place a heavy burden on the taxpayer due to the subjective nature of the areas reviewed The auditor, team leader and section head should attempt to streamline the audit where possible, identifying the scope of the audit in the early stages and pinpointing the specific records needed to accomplish the task."³ The burdens referenced in this passage from the Tax Department, and the more important burden—the one that must be met by clear and convincing evidence—are different. Taxpayers defending their filing positions often carry significant burdens on their time, economic resources, dealings with family, representatives, and so on. These constraints make the real burden in the context of a residency case—the burden of proof by clear and convincing evidence—more difficult.

Changing domiciles to a location outside of New York State

Let's set the table: Married taxpayers are winding down long and productive careers in New York and are ready to make a move down to Florida, where the weather is warm and the tax climate equally inviting. Let's give these taxpayers names: Jane and John Smith. The Smiths are stepping back from involvement in a New York-based business, they are building a new Florida home and, when that home is ready, they plan to "stick their landing," taking all of the widely relied upon tax residency "checklist" item actions you would expect, consistent with a move and major life event.

The Smiths register to vote in Florida, they obtain Florida driver's licenses, they declare their domicile, they join a church in Florida, and they begin spending about half of the year in Florida. At the same time,

the Smiths have given up their New York voter registrations and licenses, left their New York church, moved many of their near and dear personal possessions out of their New York home, and announced to all their friends and family that the move is complete. The Smiths spend less time in New York than Florida, and spend "important" time, including holidays and vacations with family, in Florida. The weather is pleasant. They are happy.

A few years go by, and a New York audit notice arrives at the Smiths' Florida home. They are confident—and they should be. They moved, they dramatically altered their pattern of living and lifestyle around the move, and their accountant told them when leaving New York that if they were able to shift their lives in a meaningful way, their move would be respected.

And the Smiths' move *should* be respected. The problem, though, with facts like these is that the move often is not respected. This is so, in large part, because of who shoulders the burden of proof in these cases, *and especially the level of proof that will satisfy that burden*. New York's highest court, over 100 years ago, confirmed for each of us that, "As we have seen, a person may select and make his own domicile and no one may let or hinder. He may elect between his winter and summer residence and make a domicile of either. The right to choose implies the right to declare one's choice, formally or informally as he prefers, and even for the sole purpose of making evidence to prove what his choice was."⁴ Electing to move should be achievable based on a reasonable amount of action and, importantly, a taxpayer's good-faith intention. Completing the move from New York to Florida is important for income and estate tax purposes. Taxpayers who do not succeed in changing domiciles out of New York are deemed to maintain their historic domicile. For taxpayers like the Smiths, that means they would continue to be New York domicilaries.⁵

Taxpayers attempting a change of domicile out of New York hold the burden of proof to substantiate the move. As noted in the New York Tax Department's regulations:

A domicile once established continues until the individual in question moves to a new location with the *bona fide* intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. *The burden is upon any person asserting a change of domicile to show that the necessary intention existed*. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are

contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.⁶

In our example, as with most taxpayers, the burden of proving the domicile change is on the Smiths. But what level of proof is required? According to a frequently cited New York appellate court decision, "*The evidence to establish the required intention to effect a change in domicile must be clear and convincing.*"⁷ The standard, we say, is "clear and convincing" evidence. This is where taxpayers may first feel that, despite their ability to live anywhere, extricating themselves from New York is more difficult than it should be.

Baseline comparison: the three key evidentiary standards of proof

To understand how the "clear and convincing" standard operates in New York tax matters, it is important to understand what happens above and below it. In addition to "clear and convincing evidence," two other important evidentiary standards are often deployed. Sometimes, more than one standard is deployed in the same litigation. All three are necessary to understand each standard's boundaries and intended purpose.

Proof beyond a reasonable doubt. The first, and highest, standard of proof is "beyond a reasonable doubt." The "reasonable doubt" standard, used in criminal prosecutions, is well defined.⁸ In criminal matters the prosecution shoulders the burden of proof,⁹ the defendant is presumed innocent, and the prosecution must prove evidence of guilt "beyond a reasonable doubt." A set of New York jury instructions notes the following:

What does our law mean when it requires proof of guilt "beyond a reasonable doubt"? The law uses the term, "proof beyond a reasonable doubt," to tell you how convincing the evidence of guilt must be to permit a verdict of guilty. The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt. On the other hand, it is not sufficient to prove that the defendant is probably guilty. In a criminal case, the proof of guilt must be stronger than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt. It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence. Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.¹⁰

Consider the "proof beyond a reasonable doubt" standard the top of all evidentiary standards, civil or criminal. We know that taxpayers leaving New York do not need this level of proof in order to successfully demonstrate a move.

Proof by a preponderance of the evidence. Proof beyond a reasonable doubt is our ceiling here. To help us define the "clear and convincing" standard, let's set a floor: proof by a preponderance of the evidence.

In many New York civil trials, the plaintiff—the party asserting the claim and the party generally bearing the burden of proof—is often required to prove the elements of a cause of action "by a preponderance of the evidence."¹¹ This standard, which for example a plaintiff would be obligated to prove in a personal injury action, is defined in a New York pattern jury instruction:

[The elements of a plaintiff's suit] must be established by a fair preponderance of the credible evidence that the claim plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. *The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds.* The law requires that in order for the plaintiff to prevail on a claim, the evidence that supports (his, her) claim must appeal to you as more nearly representing what took place than the evidence opposed to (his, her) claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must decide the question in favor of the defendant. It is only if the evidence favoring the plaintiff's claim outweighs the evidence opposed to it that you can find in favor of plaintiff.¹²

"Proof beyond a reasonable doubt" puts nearly all of the onus of proof on the government/prosecution, in a way intended to avoid erroneous convictions and the deprivation of a defendant's liberty. "Proof by a preponderance of the evidence," which is basically a more-likely-than-not standard, allows a party to succeed in cases between civil litigants where, mostly, money is at stake. One example that highlights the gulf between these two standards is the O.J. Simpson criminal trial (acquittal, on grounds of reasonable doubt) and the O.J. Simpson civil trial (found liable in tort, based on preponderance of the evidence).

Proof by clear and convincing evidence. Occupying the gulf between these two standards is the "clear and convincing" standard of evidence. As the U.S. Supreme Court stated in *Addington v. Texas*: "The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,' is less commonly used, but nonetheless 'is no stranger to the civil law.'"¹³ The "clear and convincing" standard is typically used in cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases."¹⁴

New York has followed suit with this logic, noting that "[w]here particularly important personal interests are at stake, clear and convincing evidence should be required . . . [W]e have recognized the need for the higher standard in exceptional civil matters."¹⁵ In addition, apparently contrasting the "clear and convincing" standard with the lesser "preponderance" standard, New York notes that "clear and convincing" "forbids relief whenever the evidence is loose, equivocal or contradictory."¹⁶

The "clear and convincing" standard is used and required in New York matters beyond the Tax Law. New York pattern jury instructions on the "clear and convincing" standard note:

The burden is on the plaintiff to prove [the elements of plaintiff's suit] (e.g., fraud, malice, mistake, a gift, the contract between the plaintiff and the deceased, incompetency, addiction) by clear and convincing evidence. This means evidence that satisfies you that *there is a high degree of probability* that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.

To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in the plaintiff's favor. A party who must prove (his, her) case by a preponderance of the evidence only need satisfy you that the evidence supporting (his, her) case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish (his, her) case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what (he, she) claims is what actually happened.

*If, upon all the evidence, you are satisfied that there is a high probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction) as I (have defined, will define) it for you, you must decide for the plaintiff. If you are not satisfied that there is such a high probability, you must decide for the defendant.*¹⁷

These three evidentiary standards create a sliding scale, where "beyond a reasonable doubt" is meant to require almost no doubt, based on evidence, that the defendant committed the crime he is accused of. On the other end, "preponderance of the evidence" is a far more relaxed standard, requiring only that the trier of fact fall on one side or another of a disputed matter depending only on the weight of the evidence. In the middle, "clear and convincing" fills the gap, and seems to slide on its own scale, somewhere between "reasonable doubt" and "more-likely-than-not."

Taxpayers Meeting the "Clear and Convincing" Standard

Now back to our example with the Smiths, who are happily residing in Florida. They are in the process of responding to the initial audit notice, which is extensive. It may have 20 inquiries, diving into all corners of their lives, from the clubs they quit in New York, to the boat they registered at the local marina in Florida, and many other matters in between.

The Smiths fire off responses to all relevant inquiries. The responses confirm the litany of "checklist" items they executed and include copies (driver's licenses, voter registrations, etc.) obtained as part of their move. They send diaries that track their locations throughout the three-year audit period, bills from their doctors, dentists, and veterinarians in Florida. They expect to receive a "no change" letter—an acceptance of the returns under audit as filed—in a matter of weeks.

Sometimes it actually works out like this. Many times, it does not. The New York Tax Department, for its part, seems to acknowledge the disparate treatment from audit to audit, although its guidance implies a rosier environment for taxpayers than our experience suggests is realistic. In its Nonresident Audit Guidelines, the Tax Department says "a taxpayer who has been historically domiciled in New York State who is claiming to have changed his domicile must be able to support his intentions with unequivocal acts. *In some instances, this is a very easy burden to support, while in others it is, in varying degrees, more difficult.*"¹⁸ Our experience is that taxpayers subjected to residency audits often find them overly intrusive and onerous. And the agents who apply the rules, who work hard to accomplish a challenging task, might look for brighter lines to assist their efforts, but will not find many.

Inferring intention from objective actions

The most important element for taxpayers proving a change of domicile is demonstrating their intention to give up the old domicile and to take up a new domicile somewhere else.¹⁹ Auditors and triers of fact typically determine a taxpayer's intention from the taxpayer's response to the initial request for information, follow-up responses, public records and Internet/Google searches, and in conferences with the taxpayers or their representatives.

New York auditors are first instructed to analyze five "primary" factors (housing, business, time, items near and dear (possessions), and family ties), comparing what the taxpayer once had (and continues to have) in New York with his/her new home and lifestyle elsewhere, as a means of trying to infer from objective factors the taxpayer's subjective intention.

The strength of a taxpayer's case under the five primary factors will often dictate the taxpayer's success in a New York residency audit. The primary factors are important,²⁰ often much more important than the "other" factors and connections a taxpayer may have to a given state. The "other" factors—where the taxpayer keeps a driver's license, where a taxpayer is registered to vote, where the taxpayer's vehicles are registered, etc.-are important in their own right, but generally only considered when the taxpayer's case is inconclusive under the "primary" factors.²¹

We can appreciate auditors applying a balanced, factor-based approach to analyzing a taxpayer's change of domicile. Proceeding in this way can help normalize the process required to move, and provide needed guidance for taxpayers looking to make a clean break. But when analyzing the various acts and actions taxpayers take to solidify and complete their moves, taxpayers should remember that not all acts reflect

their intention equally. If the "factors" do not, in and of themselves, point conclusively towards the new state of domicile, the taxpayer does not automatically lose, however.

So when planning a move, and then when defending the move, the taxpayer should take as many acts as possible to sever meaningful ties back in New York, and to establish meaningful ties in the new state. These actions will be used by the taxpayer, and analyzed by the auditors, in attempting to determine whether the "clear and convincing" standard of proof has been met. The more actions that favor, and are consistent with, the move, the more likely the taxpayer's intention to change domiciles will appear and be deemed clear and convincing.

Inferring intention from statements and testimony

It is important to remember that, in order to change domiciles, a taxpayer need not abandon "New York." Instead, a taxpayer must abandon his/her historic New York domicile, and take up a new one somewhere else. Sometimes this distinction gets lost in the scuffle of an audit or appeal. Taxpayers should be allowed to keep a home in New York, spend time in New York, visit family (and doctors, etc.) in New York after the move, among other relevant facts and connections.

The Tax Department has blessed taxpayers' continued connections to New York after a move, noting: "A lack of balance [in reviewing the factors] would create a heavy burden of proof for taxpayers, one which they feel they may not be able to overcome simply with statements of intent, or the existence of certain ties in the new location. As a result, some individuals may be given wrong advice that they can only accomplish the change with the severance of almost all ties to New York."²² Despite the Tax Department's acknowledgment that it's fine for taxpayers to keep ties to New York after a move, taxpayers are still getting advice that they must sever all ties with New York in order to change domiciles, and they follow this advice. While severing all ties to New York is *not* necessary to succeed, in some cases, it can unfortunately seem necessary to succeed in a reasonable and efficient fashion.

The value of competent, credible testimony. The value of a taxpayer's competent, credible testimony in meeting the "clear and convincing" standard of proof cannot be understated.²³ Testifying about "home" is not an automatic recipe for winning,²⁴ but it can carry the day, even when the objective factors do not, in and of themselves, establish clear and convincing evidence of a move. The value of a taxpayer's statements and appearance when testifying about the decision to move, what steps the taxpayer took to complete it, the taxpayer's new life after the move, and related facts can make the difference.

The importance of testimony in exceeding the "clear and convincing" threshold in domicile cases is evident in two recent Division of Tax Appeals Administrative Law Judge decisions, *Matter of Blatt* and *Matter of Patrick*.²⁵ In *Matter of Blatt*, the court noted that "this matter devolves to whether petitioner has established that he gave up his domicile in NYC and effected a change to Dallas, Texas." Blatt, a single taxpayer moved from a New York City apartment to Dallas, Texas, largely because of employment opportunities. He left a house back in New York as a safety net, worked for a subsidiary in Dallas that had its parent company back in New York, and spent time after the move vacationing annually in the Hamptons after the move. Blatt also kept other New York connections. But the taxpayer's testimony (along with many Dallas-centric actions and connections such as: purchasing a house, dating and enjoying the Dallas social scene, using Texas doctors, moving his dog, and joining a gym) all helped carry the day. In particular, Blatt sent a contemporaneous email to a friend announcing his move. The New York ALJ found Blatt met his burden to prove by clear and convincing evidence that he changed domiciles.

Matter of Blatt was followed in short succession by *Matter of Patrick*. On paper, the taxpayer in *Matter of Patrick* faced an even greater uphill battle. Patrick claimed to change domiciles from New York to Paris, France. After the move, Patrick continued to own real property in New York, he continued to spend more time in New York than France, and he had other meaningful connections to New York. However, he took a number of meaningful actions in France, including marrying a French woman, attempting to become a permanent resident of France, and paying French "wealth" taxes. The Tax Department disagreed that Patrick had actually changed domiciles and the matter went before an ALJ.

The ALJ found that Patrick testified credibly about his intentions. Instead of living alone and spending long days at the office, petitioner now lived with his wife and was able to enjoy life in Paris in ways he could never enjoy New York City. Patrick also began to travel the world and "do the things that [he] had never been able to do" before he retired. He fulfilled long-standing dreams to become a certified master scuba diver and to climb Mount Kilimanjaro in Tanzania. In considering Patrick's testimony with his actions, the ALJ found that Patrick actually had changed domiciles from New York to France. His entire life, every detail good and bad, was put on display for the world to see. But in the end, he prevailed, overcoming the steep "clear and convincing" evidence standard.

There are countless and varied topics a taxpayer may testify to (in an interview, deposition, during a trial, etc.) in an effort to prove his or her intention. Consider some of the following areas as key points to examine:

- *Historic connections to the new place of domicile.* Did the taxpayer vacation at the location of the new domicile for many years and later decide to make the place "home"? Was she born and raised there, later returning "home"? Was it a place that her parents or grandparents also retired to, and that she has familiarity with?
- *Efforts taken to sever ties with New York.* No action is too small here. What did the taxpayer think meaningful or important in abandoning the New York domicile? How many "checklist" items did she effectuate?
- *When did action meet "intention" in the new place of domicile.* What specific day did the change occur? What comments about the transition, about walking to the new DMV, the local county appraiser's office, the new church, etc., can support the taxpayer's stated intention to establish a new home?
- *What market or life factors contributed to the move, and connections in both places.* Sometimes taxpayers list a home for sale in New York, but it just won't sell. Sometimes taxpayers rent in Florida as they wait for their New York home to sell, or to make sure they like waking up to the same view for the rest of their lives. In other words, on paper a retained connection to New York or an apparently diminished connection to the new place of domicile might not support the burden of proof. A taxpayer's comments and explanation can mitigate this.

Flipping the Burden: When the Tax Department Shoulders It

If the New York Tax Department wants to argue a non-New Yorker moved into New York, it has the burden of proof. And it will face many of the same issues encountered by taxpayers trying to leave New York or prove their location on a day-by-day basis after years have gone by.²⁶

It is less likely for the Tax Department to litigate cases when it has the burden of proof—the task of proving by "clear and convincing evidence" that a taxpayer moved from somewhere else into New York against the taxpayer's belief and statements is very difficult. In the limited instances where the Tax Department has tried in the New York Division of Tax Appeals to pull taxpayers into New York from elsewhere, it has generally failed.²⁷ It is not enough, as the Tax Appeals Tribunal put it, to simply compare the taxpayer's connections in various places, and determine a domicile based on where the taxpayer's ties are strongest.²⁸ Instead, the Tax Department must prove—as it makes outbound taxpayers, at great expense and significant effort, prove—by clear and convincing evidence that he or she moved to New York with the intention to remain indefinitely.

So there's a silver lining here for taxpayers. As difficult as it can be for taxpayers trying to change domiciles out of New York, the Tax Department cannot arbitrarily pull taxpayers into New York. Instead,

absent a clear intention by the taxpayer of making his permanent, primary home in New York, the Tax Department will not succeed. To the extent we all agree that New York residency cases involve "particularly important individual interests" such that outbound taxpayers must prove their intention by the heightened "clear and convincing" standard, we can all certainly agree that arbitrary or wrongful assertions of residency by New York must be proven by that same standard.

Applying the "Clear and Convincing" Standard to Statutory Residency Cases

Taxpayers domiciled outside New York still face the prospect of resident taxation, through New York's statutory residency rules. Taxpayers domiciled outside New York, and who maintain a permanent place of abode in New York for substantially all of the taxable year and who spend in excess of 183 whole and part days in New York during the year, are subject to full New York State/City resident taxation as "statutory" residents.²⁹ This test runs on a year-to-year basis.

Taxpayers who have a permanent place of abode in New York, and therefore run the risk of taxation as statutory residents, also interact with the "clear and convincing evidence" standard of proof. When the Tax Department audits a taxpayer's change of domicile, proving the taxpayer's whereabouts on a one or multi-year period often comes into play. Taxpayers produce extensive documentation to substantiate their location, with the goal of contributing to proving their intention to reside in the new place of domicile by "clear and convincing" evidence.

In statutory residency cases, the "day count" documentation is used by the taxpayer to prove that he or she did not spend in excess of 183 whole and part days in New York during the tax year. The taxpayer must prove this fact by "clear and convincing" evidence.³⁰ This standard of proof is back again, and many of the same issues inherent in the application of this standard to domicile cases pop back up in statutory residency cases. It is not uncommon for New York auditors to require taxpayers to dig deep into their personal lives and documentation to prove their whereabouts. And proof that would satisfy one auditor (and the taxpayer's representative), may not always satisfy another. The scope and type of documentation required to substantiate a taxpayer's location on a day-by-day basis in statutory residency matters varies based on the value and overall weight of the evidence the taxpayer creates and retains.

It is difficult for a taxpayer, particularly those who are not alert to this type of audit or statutory residency rules in general, to create a paper trail documenting the taxpayer's location every day for a number of

years. When analyzing the gap days, auditors are instructed to be reasonable in their review of the provided day count information. Taxpayers should still work to avoid any material gaps in their records. In addition to a taxpayer's calendars, diaries, third-party records (credit card, phone statements, bank statements, EZ Pass, etc.), taxpayers should keep the value of their credible testimony as to their whereabouts on certain days, along with established patterns, as tools to meet their burden of proof with regard to their whereabouts. Testimony and established patterns can help taxpayers prevail in statutory residency controversies.

Summary

"Clear and convincing," a standard of proof reserved for matters of significant public importance, is supposed to bridge the gap between "preponderance of the evidence" and "beyond a reasonable doubt." This gap is wide. Until the contours of the "clear and convincing" standard in personal income tax matters are brighter and more predictable, taxpayers faced with the "clear and convincing" burden should plan for it to be significant.

Despite the taxpayer's best efforts, after the audit or appeal they may be left wishing they simply cut all ties with New York. For the many taxpayers who move, but keep some presence back in New York-which as New Yorkers we should genuinely encourage-do not forget the importance of intention in domicile matters, or the diverse ways intention can be proved and substantiated.

¹ While this article focuses on personal income tax matters, the "clear and convincing" standard is also applied in civil controversies involving numerous New York tax types.

² Daniel P. Kelly, "Coast-to-Coast Residency Issues: New York and California," 28 *Journal of Multistate Taxation and Incentives* 6 (May 2018).

³ New York State Nonresident Audit Guidelines ("Guidelines") at p. 8.

⁴ *Matter of Newcomb's Estate*, 192 N.Y. 238, 251-52 (N.Y. 1908).

⁵ *Id.* at 250 ("The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change.")

⁶ N.Y. Comp. Codes R. & Regs. tit. 20, §105.20(d) (emphasis added).

⁷ *Bodfish v. Gallman*, 50 A.D.2d 457 (N.Y. App. Div. 3d Dept. 1976) (emphasis added).

⁸ See, e.g., N.Y. Crim. Proc. Law §300.10(2); *People v. Antommarchi*, 80 N.Y.2d 247, 252-253 (N.Y. 1992).

⁹We leave aside the separate burden for defendants to prove affirmative defenses, etc.

¹⁰Criminal Jury Instructions & Model Colloquies, C.J.I. 2d Instructions of General Applicability, *Reasonable Doubt*, available at https://www.nycourts.gov/judges/cji/1-General/CJI2d.Presumption.Burden.Reasonable_Doubt.pdf (omitting footnotes) (emphasis added).

¹¹Carmody–Wait, 2d, *Cyclopedia of New York Practice with Forms* §56:14 (Nov. 2018 update).

¹²Committee on Pattern Jury Instructions Association of Supreme Court Justices, PJI 1:23, *Burden of Proof* (Dec. 2017 update) (emphasis added).

¹³*Addington v. Texas*, 441 U.S. 418, 424 (1979).

¹⁴*Id.*

¹⁵*Matter of Storar*, 52 N.Y.2d 363, 378-79 (N.Y. 1981) (superseded by statute).

¹⁶*Id.*

¹⁷Committee on Pattern Jury Instructions Association of Supreme Court Justices, PJI 1:64, *Burden of Proof* (Dec. 2017 update) (emphasis added).

¹⁸Guidelines at p. 12 (emphasis added).

¹⁹*Matter of Newcomb's Estate*, 192 N.Y. 238 (N.Y. 1908) ("There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration.")

²⁰Mark Klein and Dan Kelly, "A Snowbird Must Carefully Plan Its Flight," *The CPA Journal* (Jan. 2017).

²¹Guidelines at pp. 38-39.

²²Guidelines at p. 35.

²³See *Matter of Impath*, No. 818143 (N.Y. Tax App. Trib. Jan. 8, 2004) ("We note that the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony Credibility has two components: competency and veracity. Opportunity and capacity to perceive combined with capacity to recollect and communicate constitute the ingredients of competency. The truthfulness of the witness determines his veracity.")

²⁴Taxpayers have, of course, testified about their intention and actions in efforts to meet their burden of proof in losing matters. See, e.g., *Matter of Eileen J. Taylor*, No. 822824 (N.Y. Tax App. Trib. Dec. 8, 2011); *Matter of Robin R. Ingle*, No. 822545 (N.Y. Tax App. Trib. Dec. 1, 2011); *Matter of Philip Terranova*, No. 822699 (N.Y. Tax App. Trib. Sept. 20, 2012); *Matter of Thomas Campaniello*, No. 825354 (N.Y. Tax App. Trib. July 21, 2016).

²⁵New York Administrative Law Judge decisions cannot be cited as precedent in the New York Division of Tax Appeals. See *Matter of Blatt*, Administrative Law Judge DTA, No. 826504 (Feb. 2, 2017); see also *Matter of Patrick*, Administrative Law Judge DTA, No. 826838 (June 15, 2017).

²⁶ *Matter of Robertson*, No. 822004 (N.Y. Tax App. Trib. Sept. 23, 2010) ("In order to overcome the deficiency asserted in this case, petitioner bears the burden to 'come forward with clear and convincing evidence proving . . . that . . . he did not spend in the aggregate more than 183 days' in New York City in 2000.")

²⁷ See, e.g., *Matter of Knight*, No. 819485 (N.Y. Tax App. Trib. Nov. 9, 2006); *Matter of Bostwick*, Administrative Law Judge DTA, No. 820637 (April 12, 2007); and *Matter of Kaltenbacher-Ross*, Administrative Law Judge DTA, No. 818499 (May 29, 2003).

²⁸ See *Matter of Knight*, *supra* note 27, where the Tribunal stated that it was not engaged in the exercise of choosing among three places based on the number of nights spent at each, but rather its task was to determine whether the Division met its burden of establishing that the taxpayer intended to establish a permanent home in New York.

²⁹ N.Y. Tax Law §605(b)(1)(B).

³⁰ *Matter of Robertson*, *supra* note 26.