taxnotes® state

Volume 99, Number 9 ■ March 1, 2021

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Reprinted from *Tax Notes State*, March 1, 2021, p. 897

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In this installment of Noonan's Notes, Noonan and Savino explore the variety of residency and tax issues that have arisen over the past year as a result of pandemic-related moves from high-tax states such as New York.

We have seen all sorts of changes in behavior over the past 12 months as a result of the COVID-19 pandemic. Remote working. No live music. Limited (or no) family gatherings. And, for some, an extra 15 pounds. But in the state and local tax world, we've seen another striking change in people's behavior.

People. Are. Moving.

They are moving to Florida. They are moving to the Hamptons. They are moving home to live with their parents. They are moving in with their kids. They are leaving California, Illinois, New Jersey, and New York, and they are landing in places with lower taxes and, usually, better weather. And many need tax advice!

Here at Noonan's Notes World Headquarters, we've generated more residency-change checklists and playbooks in the past 12 months than we've probably sent out in the last 10 years. And the types of situations we've seen are so much more varied and different from the typical retirees shuffling off to their shuffleboards in Florida. Hedge-fund millennials are moving. Parents with young kids are moving. Taxpayers in their working prime are moving. And with these moves come a whole host of interesting tax issues.

So this month, we thought we'd dive into these residency issues a bit more and give you a glimpse into the world of a tax residency practitioner during 2020 and 2021.

Residency Overview

We've covered this ground many times before in this space,[1] but here's a quick overview of the legal landscape.

There are two residency tests that apply in most states. The first test, and the more objective test, is generally called "statutory residency." This is the more black-and-white, day-count based residency test. In New York, a taxpayer is a statutory resident if he maintains living quarters in the state (often referred to as a "permanent place of abode") and spends more than 183 days of the tax year in the state.[2] This test applies separately in New York City as well. And this test is easy enough to understand and apply in practice: if you spend less than 184 days in the state (or city), the test doesn't apply.

But the other residency test is significantly more subjective and is based on the location of the

[1] *See, e.g.*, Timothy P. Noonan and Daniel P. Kelly, "The Nuts and Bolts of a New York Residency Audit, Revisited," *State Tax Notes*, Oct. 27, 2014, p. 207.

[2] N.Y. Tax Law section 605(b)(1)(B).

taxpayer's domicile. A person's domicile is the "place which an individual intends to be such individual's permanent home — the place to which such individual intends to return whenever such individual may be absent."[3] This is a fuzzier, fact-specific test, and it looks to a taxpayer's subjective intent. The general standard is that ''the test of intent with respect to a purported new domicile [depends on] 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it.'''[4]

A person's existing domicile continues until a new one is acquired.[5] So to change domicile, we look to the "leave and land" rule: The taxpayer must "leave" New York with the intention of not moving back and also "land" in the new state with the intention of living there on a permanent, or, at least, indefinite basis. Merely being absent from New York for some period of time without landing in another place will not suffice.[6] Remember that point for later!

The party asserting a change of domicile bears the burden of proving, by clear and convincing evidence, a change in domicile.[7] So if it's a close case, the taxpayer loses. And while the taxpayer must prove his subjective intent based on objective indications of that intent,[8] most states apply a comparison of factors to determine the taxpayer's subjective intent. The typical ones, and those used by New York and many other states, are home, time, active business involvement, near and dear items, and family connections.[9]

Residency in a Pandemic

Enough of the background, let's get to it. To get a sense of how these rules apply in the new world dominated by COVID-19, what follows is a series of case studies — based on real-life examples we've dealt with over the past year. As is clear, the moves and the issues come in all shapes and sizes, and they demonstrate the various nuances that arise in trying to apply the basic residency tests in the COVID-19 era.

The Comeback

Facts. The taxpayer is a New York City domiciliary, and he lives in the city with his wife and children. Since March 2020 the entire family has been hiding out at their home in the Hamptons, and they do not plan to return to New York City until at least September 2021. The taxpayer's office is in New York City, but he's working remotely, and his children have been remote learning from the Hamptons. In 2020 they will have spent only 75 days in New York City, and their total New York City days will probably be in the same range in 2021. But, fingers crossed, they'll all be back in the city in the fall.

Analysis. Many clients like this believe they are "home free" when it comes to New York City taxes. After all, in both 2020 and 2021, they will have spent less than 184 days in New York City. So they won't be statutory residents in either year. But don't forget, we have to look at the domicile issue as well. And on that issue, did the taxpayers "leave" New York City and "land" in the Hamptons? If they come back in the fall of 2021 and the kids start back up at their New York City school, they may have a tough time proving that they intended to land in the Hamptons. And hindsight here will be, well, 20/20. The audit of these taxpayers' 2020-2021 tax returns isn't likely to take place until 2022 or probably 2023. If these taxpayers are back in the city, with their kids in school, and going to Broadway shows, etc., it may be hard for them to prove that they really intended on giving New York City up for good in 2020.

Vacation Home Becomes Home

Facts. This case is similar to the above example, but these taxpayers intend to stay in the Hamptons. They left the city in March 2020 and quickly thereafter decided that they could live in the Hamptons permanently. Both parents believe they'll be able to telecommute even post-

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[3] 20 NYCRR 105.20 (d)(1).

[4] *Matter of Bodfish v. Gallman*, 50 A.D.2d 457 (N.Y. App. Div. 3d Dep't 1976) (quoting *Matter of Bourne*, 181 Misc. 238, 246, *aff'd*, 267 App. Div. 876, *aff'd*, 293 N.Y. 785 (Sur. Ct. 1943)).

[5] *Matter of Bodfish*, 50 A.D.2d at 458.

[6] *See Matter of Knight*, DTA No. 819485 (Tax Appeals Tribunal 2006).

[7] 20 NYCRR 105.20 (d)(2).

[8] *Matter of Simon*, DTA No. 801309 (Tax Appeals Tribunal 1989).

[9] New York State Department of Taxation and Finance, Nonresident Audit Guidelines, 14-50 (2014). For an in-depth discussion of the factors, see Noonan and Kelly, *supra* note 1.

pandemic, and they enrolled their kids in the local school.

Analysis. Here, it seems we have a much better case for landing. Yes, the taxpayers simply moved into their vacation home. But the proof is in the pudding. They are now living in the Hamptons mostly full time. And when dealing with parents with school-age kids, where the kids go to school is often determinative in the domicile analysis. So these taxpayers should have a good case for a change in domicile.

But when did their domicile change? Recall that the domicile test is based on intent. We have to determine when the taxpayers actually made the decision to stay in the Hamptons permanently. Maybe it was in March 2020, when they first went out there. Or maybe it was in June 2020, when they realized life in the city may never be the same. In either case, ideally, we'll have some evidence backing up the date. It could be the date they applied for schools in the Hamptons. Or maybe the date they terminated their New York City lease. Or it could be as simple as the date they registered to vote out east. The type of proof will vary by person, but it's important to point to some event or document to nail down the date.

Florida Here We Come

Facts. The taxpayer was a New York domiciliary, and she lived there with her husband and children. She ran a small hedge fund that was based in New York, earning management fee income as well as substantial incentive fee income. Once COVID-19 hit in March 2020, the taxpayer and her husband and children headed down to Florida to stay with family for a few months, but, while down there, they decided that a more permanent move made sense. So they entered into a lease for a long-term rental in July 2020, and the taxpayer immediately started the process of getting the place ready and finding an office for the business. Her husband and the kids head back to the city for the summer, but they join her in late August for the start of the school year. Their New York City lease expires at the end of 2020.

Analysis. Clearly, the taxpayer had left New York, but when did she "land" in Florida? Should she claim the move in March, July, or September? Claiming the move in March would likely be problematic as she and her husband and children did not intend to remain in Florida permanently when the pandemic began and, at the time, they were just staying with family. By July the taxpayer and her husband had decided to make the move and have the objective actions of beginning a lease in Florida, so this is an option for a date to claim the change. The conservative date, of course, is the date in late August when the taxpayer's husband and children joined her in Florida. As we mentioned above, where a taxpayer's children are living is always an important consideration in the analysis. But clearly the taxpayer had started her new life in Florida in July, so that date seems the sensible one to pick.

Because the taxpayer was a part-year resident of New York, income received before the move is fully taxed by New York City; income received after the move is not subject to any city tax; and income that's earned ratably throughout the year (like interest income) is prorated between the taxpayer's New York City resident and nonresident periods. The same calculation applies for New York state taxes too, except that New York-source income earned after the move would still be subject to New York state taxes. For this taxpayer, the math could get interesting, particularly regarding her hedge fund income. While her management fee income likely would be prorated between her resident and nonresident periods, the portion of her hedge fund income, normally referred to as the incentive fee, probably would not have to be prorated. Instead, under New York's part-year residency rules, income flowing through partnerships can be allocated on a direct-accounting basis, based on the date the income accrued to the partnership. And with most hedge funds, an argument can be made that the incentive fee has not crystallized until the fund closes its books at year-end (December 31), so none of that income should accrue to her 2020 resident period. Also, because this type of capital gain income is considered intangible, none of it will be sourced to New York state.[10] Thus, she would avoid paying New York tax on her incentive fee income in 2020, as well as future tax

[10] N.Y. Tax Law section 631(b)(2).

years, so long as she continues to be a nonresident of New York.

Watching Out for Statutory Residency

Facts. The taxpayer is a New York domiciliary and, pre-pandemic, he lived and worked in New York City. After working remotely from his apartment for most of the spring and summer, he gets clearance from his employer to work remotely for good and decides to just up and move to Texas. In September 2020 he puts his New York City place on the market, goes to Austin, buys a condo, and starts his new life there. His New York City place, not surprisingly, still has not sold.

Analysis. Clearly the taxpayer has effectuated a domicile change, even though his New York City place has not sold. And the date of the move, September 2020, is pretty clear. Unfortunately though, he spent in excess of 183 days in New York during 2020 and maintained his apartment for the whole year. Thus, he'll end up getting taxed as a statutory resident in 2020, so all his income will be subject to tax in New York state and New York City. One way around this would be for him to empty out his New York City place and not spend any nights there after September 2020. Under guidance given by the Tax Department in its most recent set of audit guidelines, if a taxpayer empties out his place in this fashion and no longer maintains a "residential interest," then the place ceases to be a "permanent place of abode" under New York's rules.[11] And without a permanent place of abode for more than 11 months, the taxpayer can avoid statutory residency.[12] A similar rule applies if the taxpayer has a listing agreement with a broker that restricts his right to use the place as well.

The other issue that arises here — and one that is probably the biggest tax issue concerning COVID-19 remote-work arrangements — relates to New York's convenience of the employer rule. Normally, a taxpayer is required to allocate wage income to New York based on the number of days worked in New York over the course of the tax year. However, in computing New York workdays, New York's convenience rule provides that days worked at home by the taxpayer for their own convenience, and not for the employer's necessity, are treated as New York workdays.[13] And New York state has already made clear that it will treat remote work during the pandemic as convenience days, meaning that for New York allocation purposes, the taxpayer would be required to allocate those days to New York.[14] Never fear, there are ways around this as well. One way is to have the taxpayer assigned to an out-of-state office of the company and actually maintain that office as the taxpayer's primary office. Then the taxpayer can take the position that they are telecommuting to the out-of-state office, not to the New York office. Another potential option is for the taxpayer to create a "bona fide employer office" at home, which we've addressed in prior articles,[15] and stay tuned for an update on these rules later this year in this space!

Early Retirement

Facts. The taxpayer and his wife are semi-retired, and they have been splitting their time between New York and Florida as "snowbirds" for the last few years. They typically spend eight months in New York and four months in Florida. They have a large primary residence in Westchester, and their children and grandchildren all live in New York. In 2020, though, this pattern flipped, with eight months in Florida and four months in New York. And much to their surprise, they liked it!

Analysis. Snowbirds like them sometimes have a problem because they have been claiming New York residency for many years, even while spending significant time in Florida and maintaining a home down there. Domicile cases are won and lost around changes of lifestyle. To be successful here, the taxpayers need to exhibit that 2020 brought on a significant change in lifestyle,

[11] New York State Department of Taxation and Finance, Nonresident Audit Guidelines, 52-55 (2014).

[12] *Id.* at 63.

[13] 20 NYCRR 132.18(a); TSB-M-06(5)I (May 15, 2006).

[14] New York State Department of Taxation and Finance, Frequently Asked Questions About Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax (updated Oct. 19, 2020).

[15] Paul R. Comeau, Timothy P. Noonan, and Joseph N. Endres, "New York's Revised Convenience Rule Provides Some Clarity and Continued Controversy," *J. Multistate Tax'n Incentives* 18-27 (Aug. 2006).

not just for 2020 but for future years as well. And if the taxpayers can continue to spend twice as much time in Florida compared to New York, then they probably have a strong case for a change of domicile, even if they keep their home up in Westchester and visit their children and grandchildren in the summer months.

Double Trouble

Facts. The taxpayer lives and works in New York City, but she left in March 2020 and stayed at her home in Connecticut for most of the rest of the year. She does not plan to return to New York City until fall 2021, so she will exceed the 183-day statutory residency threshold in Connecticut in both 2020 and 2021. She also has significant intangible income during both 2020 and 2021.

Analysis. This is a sticky situation. Consistent with some of the examples above, because the taxpayer intends to come back to the city in 2021, she will not have effectuated a change in domicile to Connecticut. But Connecticut has the same rules as New York, so although she will not have established a domicile in Connecticut, she could run afoul of Connecticut's statutory residency rules by virtue of her maintaining a place in Connecticut and spending more than 183 days there.

A couple thoughts on addressing the problem. First, we will tell this taxpayer to make sure she categorically does not spend more than 183 days in Connecticut in 2021 to avoid repeating this problem in this tax year. As for 2020, however, the taxpayer might have an argument that her place should be considered only a temporary place of abode given Connecticut's regulations about places maintained "during a temporary stay for the accomplishment of a particular purpose."[16]

But if not addressed, the risk here is double taxation of the taxpayer's intangible income. New York will claim jurisdiction to tax her intangible income because she is a resident of New York under the domicile rules. Connecticut will similarly claim jurisdiction because the taxpayer is a statutory resident. Under existing law, neither state will provide a credit for taxes paid on "unsourced" income like intangible or investment income, and New York courts affirmed this in a couple of cases in 2019.[17] We've seen this problem arise around the country because lots of taxpayers are living and working in different states during the pandemic. Fortunately, some states provide friendlier resident credit rules, which can eliminate the double taxation. And in some states, we might have similar arguments about residency not attaching because of a taxpayer's temporary presence in the state. Regardless, this dual taxation problem is something to be especially mindful of when you have taxpayers living and working in multiple states.

Safety in Safe Harbors

Facts. The taxpayers here are a married couple with no kids who very much love New York City and can't wait for it to return to normal. When the pandemic hit, they started traveling around the country and staying in Airbnbs at different spots. As 2020 turned into 2021, they realized that life likely wouldn't return to normal for several more months. On top of that, they are expecting a huge capital gain from the exit of a family company in July 2021. And while they don't expect to be in New York much in 2021, they very much hope, and plan, to return.

Analysis. On the surface these taxpayers have a problem under the leave and land rule. Luckily, a potential solution could be possible for 2021, opening up the ability for them to eliminate New York state and City taxes on their significant July 2021 capital gain. It is found in New York's 30-Day Rule. Under the 30-Day Rule, New York domiciliaries can be treated as nonresidents if they meet this three-part test:

- they do not maintain a permanent place of abode in New York for the year;
- they maintain a permanent place of abode somewhere else for the entire year; and
- they do not spend more than 30 days in New York during the year.[18]

[16] Conn. Agencies Regs. 12-701(a)(1)-1(e)(1).

[17] *Chamberlain v. New York State Department of Taxation and Finance*, 166 A.D.3d 1112 (N.Y. App. Div. 3d Dep't 2018), *appeal dismissed* 128 N.E.3d 627 (N.Y. 2019), *cert. denied*, 140 S. Ct. 133 (2019); and *Edelman v. New York State Department of Taxation and Finance*, 162 A.D.3d 574 (N.Y. App. Div. 1st Dep't 2018), *appeal dismissed* 122 N.E.3d 557 (N.Y. 2019), *cert. denied*, 140 S. Ct. 134 (2019).

[18] N.Y. Tax Law section 605(b)(1)(A); and 20 NYCRR section 105.20(b).

Here, to be treated as nonresidents in 2021, these taxpayers have to eliminate their New York City living quarters by selling or renting it out by December 31, 2020; have a place for the entire year in some other state; and not spend more than 30 days in New York state and New York City. If they do that, even if they come back to New York City in full force and effect on January 1, 2022, they can be treated as nonresidents for the 2021 tax year.

This safe harbor is something that we've seen arise in our practice only on a handful of occasions over the past couple of decades. But this year, with taxpayers having the ability to be out of New York for long stretches of time, we have many taxpayers taking advantage of it and doing "30-Day Rule plans."

Conclusions and Take-Aways

The many different factual scenarios that have been presented to us over the past year have uncovered so many interesting and nuanced residency and nonresident income allocation issues. On the whole, we can take away a few important points from these scenarios:

- **People are moving.** There's no getting past the tremendous flight from New York and, to some extent, from states like Connecticut and New Jersey over the past 12 months. This creates many tax policy issues beyond the scope of this article, but it also raises an interesting audit issue. Can these states chase everybody? The New York State Department of Taxation and Finance, in particular, has had the most sophisticated and aggressive audit program in the nation for years. In most cases, not only can we predict circumstances that will lead to an audit, but, sometimes, we are also pretty good at guessing when the audit will happen. Historically, high-income taxpayers who claimed a change of residency from New York had almost a 100 percent chance of being audited. But will that change? Will New York be able to audit everybody?
- **Be mindful of both residency tests.** In 2020, and maybe in 2021, many people will probably be absent from New York for more than 183 days. But we should never forget that this alone does not make a taxpayer a nonresident. Be mindful of the "leave and land" rule — residency is not just six months and a day outside New York.
- **20/20 hindsight will be key.** A taxpayer who moves in 2020 or 2021 is not likely to be audited until 2023 or 2024. And where the taxpayer is living and working in 2023 or 2024 could be as critical a fact in the analysis of the residency case as his work and living locations in 2020 and 2021. This is the "leave and land" rule in action — the taxpayer must be able to prove that they "stuck the landing" in the new state.
- **No COVID-19 relief here.** COVID-19 relief bills are all the rage, but do not expect any easing of day counting or residency rules because of COVID-19 travel restrictions or quarantine rules. No state has yet relaxed any residency rules because of COVID-19 circumstances. The world may be different, but the rules are still the same. ■