

## Resident Evil Part 3: Fighting Back With New Technology

by Timothy P. Noonan



As regular readers of my column know, I try to cover those issues and concepts I see most often in my day-to-day practice. Indeed, the title of this column is more than just a catchy heading; I really do try to give “notes” on tax practice. Thus, I end up covering lots of “on the ground” audit issues that I see all the time as a practitioner, and often these issues involve sales

tax audit problems and issues, multistate compliance matters, and so on. (*Editor’s note:* The author represents clients involved in some cases discussed in this article. He also has served as a legal adviser to MONAEO.)

And of course, I cover lots of topics in the residency and personal income tax area. This isn’t because I have a particular fascination with the issue (I don’t). Instead, it’s simply because residency is one of the more talked about issues in tax circles these days, and states like New York and Connecticut continue to focus on residency audits and problems. And, particularly in New York, new cases continue to generate publicity in tax publications as well as in the popular press. Just recently *The New Yorker* published a significant piece on happenings in New York residency cases.<sup>1</sup>

And now, as the emergence of new technologies continues to play an important role in the day-to-day lives of all Americans, we are seeing the potential benefit of those technologies in — you guessed it — residency cases. In this article, I’ll highlight some of the more interesting issues that have arisen in the

residency area over the past year or so, and I’ll talk about an exciting new tool to help taxpayers and practitioners better manage their residency issues and fight back in difficult residency audits.

### Scope of the Issues

Most states follow a similar scheme for taxation of individuals. We’ll use New York’s rules as an example. In New York a person can be taxed as a resident by either being domiciled in New York or by meeting the so-called statutory residency requirements. If you’ve been following both the popular press as well as the news and tax publications like this, you surely have seen and read about developments in both those residency areas.

On the domicile front, courts continue to grapple with the age-old question of where someone’s domicile — or “permanent and primary home” — is located. New York’s Tax Appeals Tribunal, in fact, issued two decisions addressing domicile issues just last December. In *Matter of Ingle*,<sup>2</sup> the taxpayer had asserted a change of domicile from New York City to Tennessee roughly three weeks before she sold stock and reported a large gain. In holding that the taxpayer had not changed her domicile until after the sale, the tribunal focused on the fact that the taxpayer’s lifestyle continued unchanged even after she claimed a change of domicile, and reaffirmed that an existing domicile continues until a new one is acquired, which requires an actual change in residence coupled with the intention to abandon the old domicile and acquire a new one. This is often referred to as the “leave and land” rule. In *Ingle*, the taxpayer couldn’t prove that she “stuck the landing” before she sold her stock and recognized a large capital gain. Her failure to present day count evidence regarding where she was spending her time created the biggest problem for her in this regard.

<sup>1</sup>James B. Stewart, “Tax Me if You Can: The Things Rich People Do to Avoid Paying Up,” *The New Yorker*, Mar. 19, 2012, available at [http://www.newyorker.com/reporting/2012/03/19/120319fa\\_fact\\_stewart](http://www.newyorker.com/reporting/2012/03/19/120319fa_fact_stewart).

<sup>2</sup>*Matter of Ingle*, N.Y. Tax Appeals Tribunal (Dec. 1, 2011). For the decision, see *Doc 2011-26031* or *2011 STT 241-16*.

In *Matter of Taylor*,<sup>3</sup> the tribunal was faced with a taxpayer who claimed a change of domicile to London. Focusing on both her continued contacts to New York (she maintained two residences in New York) and the arguably short-term nature of her employment contracts in London during the audit period, the tribunal held that the taxpayer did not change her domicile to London before or during the audit period. Interestingly, though, the Department of Taxation and Finance did agree that at some point shortly after the audit period, the taxpayer did indeed change her domicile. To me, that's what makes this case so interesting. Domicile is about intent plus action. Taylor clearly demonstrated her intent to live permanently in the United Kingdom. And her actions backed that up — indeed, she stayed there! How is it that the tax department can get into her head and claim she didn't move until two years after she said she did?

Domicile cases like these show no signs of letting up, with taxpayers and practitioners forced into the facts and circumstances analysis that is necessarily required in these cases.

More attention has been focused on the statutory residency provisions, again mainly on developments in New York. These statutory residency tests are applied independent of a domicile analysis. Under statutory residency rules, taxpayers can be treated as residents if they (1) maintain a permanent place of abode in the state and (2) spend more than 183 days in the state. Much of the recent press has focused on the permanent place of abode requirement, and the unusual position taken by the New York tax department in those cases. In *Matter of Barker*, the department successfully asserted that a Connecticut couple's rarely used vacation home qualified as a permanent place of abode subjecting them to full state taxes because of the husband's presence in New York for purposes of his employment.<sup>4</sup> *Matter of Gaied* involves another unusual situation, in which an apartment that a taxpayer maintained for his parents was also deemed to qualify as a permanent place of abode subjecting the taxpayer to state and city resident taxation.<sup>5</sup> Both those cases have been discussed in this column in prior articles.<sup>6</sup> And, because I'm currently representing both taxpayers, I can tell you that both are under appeal. So stay tuned.

<sup>3</sup>*Matter of Taylor*, N.Y. Tax Appeals Tribunal (Dec. 8, 2011). For the decision, see *Doc 2011-26363* or *2011 STT 245-15*.

<sup>4</sup>*Matter of Barker*, N.Y. Tax Appeals Tribunal (Jan. 13, 2011). For the decision, see *Doc 2011-1276* or *2011 STT 16-18*.

<sup>5</sup>*Matter of Gaied*, N.Y. Tax Appeals Tribunal (June 16, 2011). For the decision, see *Doc 2011-13773* or *2011 STT 125-17*.

<sup>6</sup>See Timothy P. Noonan and Joshua K. Lawrence, "Residency Ruling Raises Stakes for Owning an 'Abode' in New York," *State Tax Notes*, July 18, 2011, p. 187, *Doc 2011-14620*, or *2011 STT 137-4*; Timothy P. Noonan, "An Easier Fix to New York's Statutory Residency Problem," *State Tax Notes*, May 9, 2011, p. 425, *Doc 2011-8930*, or *2011 STT 89-6*.

(Footnote continued in next column.)

The word on the street is that the New York tax department is working on new audit guidelines (last updated in 2009), partly to address the recent permanent place of abode cases. So stay tuned for those as well.

### Day Count Issues

Somewhat lost in the fray of these more recent developments, however, are the cases and issues involving the more mundane, yet equally important, question of day count. Indeed, in most statutory residency cases, there is no question whether a taxpayer maintains a permanent place of abode. Instead, audits are centered on counting up the number of days a taxpayer spent in a particular tax jurisdiction.

Of course, this issue is anything but mundane or simple. Over the past several years, I have twice covered the legal and factual complexities arising in day count cases. In 2008 I argued in this column that state tax departments should respect a taxpayer's testimony — in addition to documentary evidence — in determining how a taxpayer can prove his location outside a tax jurisdiction.<sup>7</sup> In 2010 I reported on the *Julian Robertson* case, a case in which this "testimony" argument was validated and accepted by the Tax Appeals Tribunal in canceling a residency determination made by the New York City Department of Finance.<sup>8</sup> *Robertson* was viewed by many, including me, as an important victory for taxpayers — as well as an important message for tax departments — that the "clear and convincing" standard of proof imposed on taxpayers to prove their day-to-day location still allows for flexibility, use of testimony, "pattern of conduct" evidence, and so on.

Unfortunately, problems in this area continue to persist. Indeed, just months after *Robertson* was issued, an administrative law judge in New York's Division of Tax Appeals issued a decision in another complicated statutory residency case, making clear that the age-old day count problems that many taxpayers face won't be swiped away by *Robertson*.<sup>9</sup> In *Matter of Puccio*, a Connecticut resident taxpayer was faced with a daunting task of proving his

York," *State Tax Notes*, July 18, 2011, p. 187, *Doc 2011-14620*, or *2011 STT 137-4*; Timothy P. Noonan, "An Easier Fix to New York's Statutory Residency Problem," *State Tax Notes*, May 9, 2011, p. 425, *Doc 2011-8930*, or *2011 STT 89-6*.

<sup>7</sup>Timothy P. Noonan and Joshua K. Lawrence, "Day Counts and The Importance of Testimony in Statutory Residency Audits," *State Tax Notes*, Apr. 28, 2008, p. 317, *Doc 2008-8845*, or *2008 STT 83-26*.

<sup>8</sup>Timothy P. Noonan, "A New Day Dawns for Determining What Constitutes a New York Day," *State Tax Notes*, Nov. 8, 2010, p. 431, *Doc 2010-23125*, or *2010 STT 215-5*.

<sup>9</sup>*Matter of Puccio*, ALJ (Jan. 27, 2011). For the decision, see *Doc 2011-2389* or *2011 STT 26-16*.

location in and out of New York City on dozens of days during the tax year. Unlike Robertson, Puccio didn't have numerous assistants tracking his day-to-day location, or scores of friends and relatives willing to testify on his behalf about his particular location on hundreds of days in question over the course of several tax years. Instead, Puccio, like most taxpayers, had credit card evidence, phone records, E-ZPass, and so forth. And he tried to cobble all that together into a sensible and reasonable day count, documenting his presence each and every day over the tax year. Unfortunately for Puccio, that wasn't good enough. And the ALJ aptly summarized the problem:

The record does establish that, in general, petitioner's pattern of conduct was to stay in Connecticut on the weekends. However, due to the proximity of petitioner's office and home in Connecticut to petitioner's New York City cooperative apartment and office, and after reviewing the documents on the record, it does not appear to be unusual for petitioner to be in Connecticut for one part of a day and New York City for another part. Therefore, credit card charges in Connecticut do not necessarily mean that petitioner could not have also been in New York City in the same day.

And that, my friends, is precisely the problem in these cases. As outlined in my 2008 article on the use of testimony in day count audits, this pattern of conduct evidence is all well and good for Floridians needing to document their presence in Florida on particular days referencing credit cards or other activities via testimony. And, as *Robertson* highlights, New York's rigorous day count standards can be overcome with a ridiculously significant amount of work and effort. Indeed, the *Robertson* litigation itself spanned an eight-year period of time, four days of trial, and likely hundreds of pages of briefs, ultimately to determine where the taxpayer was on *two days* in one tax year! But in *Puccio*, when faced with a residency situation of a commuter in a surrounding state, day count proof becomes incredibly more difficult and rigorous. And no Noonan's Notes article on day counts and testimony can solve that.

### A New Solution Using New Technology?

Enter new technology from stage right. I've commented before in this column that I've spent far too many hours across the table from a New York auditor trying to argue that my client didn't make this phone call or that phone call, didn't use the E-Z Pass on that date or this date, didn't travel into New York on a particular day in question, and so on. And all too many times, I've heard auditors question the credibility of those statements, the veracity of the taxpayer, and so on. And often I've heard them make

the same exact statement made by the ALJ in *Puccio*: That is, just because there's a credit charge in Connecticut on a Saturday, that doesn't mean the taxpayer wasn't also in New York on that day. "How do I know the taxpayer didn't come into New York?" is a question I've heard too many times to remember.

So how *do* you prove someone wasn't in New York, particularly when that person may live close by? The answer, unfortunately, may be that this is unattainable, particularly given the high standards of proof expected by auditors. There are often just too many so-called gaps in the records. A credit charge on a particular day in Connecticut doesn't mean the taxpayer didn't come into New York. A cellphone log might be insufficient if there are too many gaps in calls. False positives constantly arise with E-Z Pass records, landline phone logs, and credit card charges. There just doesn't seem to be a way to completely close the loop and help taxpayers prove that negative, that is, that they did not come into New York on a particular day in question.

**New mobile technology can empower taxpayers with data — their own location data — to track and make a record of the number of days spent in different taxing jurisdictions.**

Or is there? Now, with the advent of smart phones, GPS technology, and so on, one company has come up with an innovative new service to do just that: That company is called MONAEO, and the service it has developed leverages mobile technology to empower taxpayers with data — their own location data — to track and make a record of the number of days spent in different taxing jurisdictions.<sup>10</sup> What if you could prove where your client was every hour of every day? Wouldn't that make it easier to track days in and out? Wouldn't that help you and your client determine their correct filing status at tax time? And wouldn't a comprehensive report, listing the taxpayer's location on an hour-by-hour basis over 365 days a year, really help streamline the incredibly difficult audit process?

Well, as subscribers of MONAEO, taxpayers get access to a brand new mobile app that leverages location awareness of smartphones to automatically and discreetly create comprehensive reports and data in real time. That could end up helping taxpayers on a couple of levels.

<sup>10</sup>Visit <http://www.monaeo.com> for more details. I've had the pleasure of serving as the company's special legal adviser on the project.

First, often I've seen taxpayers just not paying attention, and "stepping over the line" just a few too many times. Or more often, it's just too hard to keep track. People are too busy to sit down and actually count their in and out days, especially when a minute counts as a day. But MONAEO does the counting for you, and will even send alerts letting the taxpayer (or, if they choose, their tax adviser) know they are getting close to the day count limitations in whatever tax jurisdictions they choose to monitor. It's like having a personalized early warning system for residency. Very cool.

But just as important, this data should help taxpayers adequately arm themselves in the event of an audit. Imagine walking into a residency audit with a detailed, day-by-day, hour-by-hour reporting of where the taxpayer was on every day of the year. I think Ingle might have liked that; perhaps it would have helped her prove her move to Tennessee. I can guarantee that Puccio and Robertson would've loved something like this. Who needs eight years of litigation (besides us residency lawyers, of course)? So many other layers of day count proof have limitations, as recognized in cases like *Puccio*. Indeed,

even detailed self-created diaries or calendars often can't provide auditors with enough assurance to accept them as legitimate proof, as demonstrated by the years of litigation in *Robertson*. But this new technology should make many of these problems go away. And it could be a game changer in the residency area. That's very cool too.

### Conclusion

You know when I said I don't really have any particular fascination with residency issues? Well, I lied. This is actually pretty interesting stuff. Perhaps that's why we see the issued covered so much. There are so many important developments in the case law, in administrative circles, and now even in the "real world," with actual companies being formed to address the issues arising in these cases. Who said being a tax lawyer was boring? ☆

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