

# 2022 Summer Tax Series: Residency

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# Topics

- Overview of New York Residency Issues During and After the Pandemic
- The Audit Process
- Case Studies and Scenarios
- Resident Credit Issues

# Residency During and After the Pandemic

# New 2021 Tax Rates!

- The Budget abolishes and replaces NY's former highest rate (8.82%) with three new graduated rates of:
  - 9.65% (for married-filing-joint-return incomes over \$2,155,350, but not over \$5 million),
  - 10.3% (for incomes over \$5 million, but not over \$25 million), and
  - 10.9% (for incomes over \$25 million).
- The new rates are effective as of 1/1/2021, and prevail through 2027. In 2028, the rates will allegedly revert to the pre-2021 schedule.

# Residency Basics

- **Importance of Residency Status**

- Residents: Taxed on everything.
- Nonresidents: Taxed on NY source income only.
- NYC income tax: All or nothing.

- **The Two Residency Tests**

1. Domicile

- One permanent, primary home.
- The “Leave and Land” Rule.
- Burden of proof on TP moving out of NY.

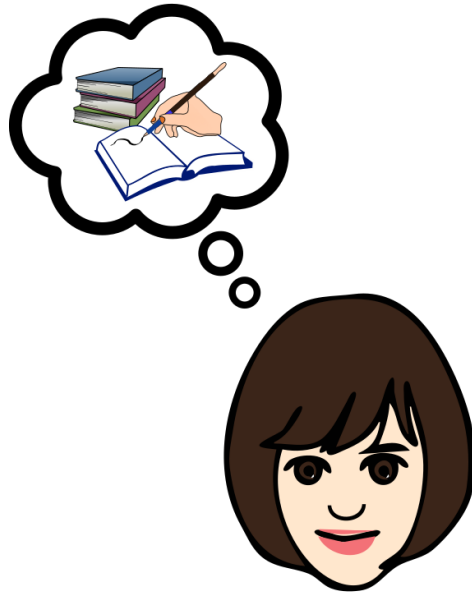
2. Statutory Residency

- 183 days + a Permanent Place of Abode.
- A minute in the state counts as a day in state.
- Few exceptions to day count rules.

# Domicile

## *What is it?*

### INTENT



### ACTIONS



# Domicile Factor Considerations

Domicile Factor	Normal Considerations
Home	<ul style="list-style-type: none"><li>- Size, value, etc.</li><li>- Historical ties</li><li>- Upsize/downsize</li></ul>
Business	<ul style="list-style-type: none"><li>- Active day-to-day management</li><li>- High salary vs. retirement</li></ul>
Time	<ul style="list-style-type: none"><li>- More time in new place, 2-to-1?</li><li>- Changes in patterns</li></ul>
Near and Dear	<ul style="list-style-type: none"><li>- Moving stuff, teddy bear, etc.</li><li>- Insurance records</li></ul>
Family	<ul style="list-style-type: none"><li>- Focus on spouse/minor kids</li></ul>
Other/Formalities	<ul style="list-style-type: none"><li>- Best offense is good defense</li></ul>

# Statutory Residency: 183 Days and a PPA

- A “day” in New York – a minute is a day
  - Matter of Zanetti: Part of a day is still a day.
  - Burden of proof: Proving the negative.
  - Few exceptions.
  - Cell phones!
- PPA
  - Suitable for year-round living.
  - Gaied and Obus cases.
  - The 11-month rule is now a 10-month rule!
  - Requisite relationship.
    - “Unfettered” access.
    - Use.
    - Must have a “residential interest.”



# Key Residency Considerations: COVID-19

- Lots of People Moved!
  - Can NY chase everybody?
  - Desk audits being used as triage, but system is imperfect to say the least...more in next section.
  - Seeing 2021 desk audits now as well.
- Audit Considerations
  - 20/20 hindsight on 2020-2021 moves: some audits already happening...perhaps too soon (from NY Tax Department perspective)?
  - Auditors are looking to see 2021 and even 2022 time patterns: was the move permanent or just pandemic-related?
- Taxation of Remote Work
  - Will also be huge audit issue.

# The Audit Process

# Residency/Income Tax Audits

- **Huge Enforcement Area**
  - About 3,000 audits per year.
  - 250-300 auditors.
  - \$343 million in revenue in 2018!
- **Two Main Audit Areas**
  - Residency.
  - Income Allocation.
- **Other Issues**
  - Resident credits.
  - Federal tax issues.
  - Flow-through audit issues.

# Residency Audits – Best Practices

- Answer the Questions Asked. Period.
- Meetings vs. Submissions?
  - COVID changed this, of course,
- Getting the Domicile Narrative on Paper
- Doing the Day Count
  - Importance of cell records.
- Closing the Audit
  - No changes.
  - Closing agreements.
  - Consents.

# Special Desk Audit Programs!

- We saw tons of 2020 and 2021 “Desk Audit” letters
- Sent before tax return is processed
- What’s a Desk Audit?
  - How does it compare to a normal residency “field” audit?
  - How do 2020 desk audit notices differ from the residency notices desk audit has historically sent?
- Letters focused on verifying residency status and/or nonresident allocation issues around telecommuting days
- Notices issued if Tax Department disagrees – no real “audit”
- More recently we’ve seen tons of 2019 Desk Audit Letters
  - A similar program was in place for 2018 too.

# 2020-21 Requests for Information – Excerpts

 <b>Department of Taxation and Finance</b> Audit Division-Income/Franchise Desk W A Harriman Campus, Albany NY 12227	<b>Request for Information</b> Notice date: 3/23/2021 Tax type: Personal Income Tax DLN:   Case ID:   Tax year: 2020 Form number: IT-203
21035142347900-A100	
<b>We need more information by April 22, 2021 about your 2020 New York State income tax return.</b>	

If you either: (A) are domiciled in New York State, OR (B) maintained a permanent place of abode AND spent 184 days or more in New York State, you must file a resident tax return, Form IT-201, regardless of the location where you may have been working or telecommuting from in 2020.

If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York State work days. In particular, days you telecommuted from a location outside New York State are considered New York State work days unless your employer has established a bona fide employer office at your telecommuting location.


## What must you do?

1. You must complete the enclosed Nonresident Audit Questionnaire (Form AU-262.3) to explain your residency status in New York City and/or New York State.

You must also verify your income allocation by providing the following (for each taxpayer if a joint return):

- A copy of your federal W-2, *Wage and Tax Statement*, for each employer;
- A completed *Income Allocation Questionnaire* (Form AU-262.55, enclosed) for each employer; and
- A full description of the composition of your wages (base compensation, bonuses, stock options, sick pay, vacation pay, severance pay, gambling income, unemployment compensation, etc.).

# 2018 and 2019 Desk Audit Notices


 **Department of  
Taxation and Finance**

Audit Division-Income/Franchise Desk-AG15  
W A Harriman Campus, Albany NY 12227-9995

October 16, 2020

Case ID:  
DLN:  
Tax year: 2018

20104579342900-AD00



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**We need more information about your New York State income tax return.**

We need additional information about the capital gains reported on your return for the tax year above.

If you do not respond to this letter within **30 days**, we will consider all your capital gains to be New York source income, which may result in a bill.

**Send us:**

- The date you moved out of New York State: \_\_\_\_\_
- A copy of the federal Schedule D, *Capital Gains and Losses*, and Form(s) 8949, *Sales and Other Dispositions of Capital Assets*.
- For each capital gain or loss, provide the date of sale.
- If any of the gains or losses were from a partnership, S corporation, trust, or estate, provide an explanation of how you allocated the gains or losses to your New York State residency period.
- If you sold property, provide the address of the property and the date it was sold:

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- If the capital gain is the result of an installment sale, provide a copy of federal Form 6252, *Installment Sale Income*, with Part 1 completed from the year of the sale.
- A daytime phone number so we may contact you if we need more information: \_\_\_\_\_

# Desk Audit Programs – Best Practices

- Answer the Questions Asked. Period.
- File Response Through Online Account if Available
- Watch the Mail!
- Be Ready to Deal with Incompetent Responses
  - How to take advantage of mistaken responses.
  - How do 2020 desk audit notices differ from the residency notices desk audit has historically sent?
  - Appeal opportunities and issues



# Case Studies and Scenarios

# Client #1: Left NYC, but returned

## ▪ Facts

- Taxpayer is a NYC domiciliary, works in NYC, and lives there with his wife and kids. Spouse works too, but from home.
- Been in the Hamptons since March 2020. NYC place was rented out.
- Kids did 2 school years in Hamptons.
- Decided to come back to NYC in Fall 2022.
- But only 75 days in NYC in 2020, same in 2021.

## ▪ Issues

- “Leave and Land” issue.
- 20/20 hindsight – was there an intent to return?
- What can be done now?

# Client #2: Off to FL—For Good (Really)

## ▪ Facts

- Taxpayer is a NYC domiciliary and lives there with her husband and kids.
- She runs a small hedge fund based in NYC and gets management fee income plus a big carry.
- Taxpayer and her family went to Florida during the early stages of pandemic. Shortly after, they decided they're "done" with NYC and planned a move to Florida.
- She got a rental in Florida that started July 1, 2020 and she started spending time down there, but her husband and kids didn't move until September.
- Sold NYC place and terminated office lease in 2021.

## ▪ Issues

- A real "leave" and "land."
- Timing of move: March 2020, July 2020, September 2020, later?
- Part-year residency? Accrual?

# Client #2.5: Off to FL For Good (but 2020?)

## ▪ Facts

- Same facts as #2, but assume taxpayer was in NYC every day between January 1 and June 30.
- NYC home not listed for sale in 2020.
- Or NYC home listed for sale in 2020, but does not sell.

## ▪ Issues

- September 2020 domicile change, no one would disagree.
- BUT, statutory residency issue in 2020? 182 days between January 1 and June 30, 2020. Any days after June 30? If so, statutory residency in 2020 and no *Sobotka* argument.

# Client #3: Accelerating Retirement

## ▪ Facts

- Taxpayers are mostly retired and have been “snowbirds,” living in New York for 8 months and Florida for 4 months.
- Big home in Westchester and their adult children and grandchildren are in New York.
- In 2020, they spent many more days in Florida. Question is: Do they give Florida residency a go?

## ▪ Issues

- Keeping it up in 2021 and 2022? What if they revert to something more like 6 months and 6 months?
- Picking the date in 2020.
- What to do with New York home (sell, rent, downsize)?

# Client #4: Dual Residency Problem

## ▪ Facts

- Taxpayer is a NYC domiciliary that, in normal times, works in NYC.
- When pandemic hit in March 2020, taxpayer went to CT vacation place he had owned for years and stayed the balance of the year.
- Came back to NYC in Fall 2021.
- Significant intangible income in 2020 and 2021.

## ▪ Issues

- No “landing” in Connecticut.
- But Connecticut statutory residency problem: Taxpayer spent more than 183 days in Connecticut in 2020 and 2021!
- Resident credit implications and double tax issues.
- How to mitigate double tax?
  - Should taxpayer just “move?”
  - Will Connecticut chase this issue?

# Client #5: COVID Relief?

## ▪ Facts

- Taxpayers moved in 2019, pretty legit move, but kept place in NY.
- Would have spent 240 days in FL and 120 days in NY and did so in 2019.
- But several trips to NY lengthened because of COVID stuff and medical issues in 2020 and 2021.
- Ended up around 190 FL and 160 NY.

## ▪ Issues

- Enough of a landing without 2-1 ratio?
- COVID relief? Is that an excuse for bad day count?
- How does 2022 look?

# Client #6: COVID Benefit?

## ▪ Facts

- Taxpayer moved to TX in March 2020, single, kept place in NY.
- Awesome day count in 2020 and 2021, only around 50 days in NY and 300 in TX.
- 2022 days different, back to 175 or so in NY, only 150 in TX, and lots of travel.

## ▪ Issues

- Hurry up and get audited!
- COVID benefit? Will auditors claim 2020 and 2021 not representative?
- Expect inquiries in 2022 time.



# Client #7: 548-Day Rule

## ▪ Facts

- Taxpayers live in NYC and love NYC, can't wait to be back.
- But had huge capital gain in late 2020 or early 2021.
- Planned to leave NYC for a while.
- And they like to travel!

## ▪ Issues

- Getting on the 548-day program: July 1, 2020-December 31, 2021.
- The test:
  - Within any period of 548 consecutive days the taxpayer must be present in a foreign country or countries for at least 450 days.
  - During that same 548-day period, neither the taxpayer nor the taxpayer's spouse or minor children can be present in New York State for more than 90 days.
  - During any portion of the 548-day period that is less than a full tax year (the "short period"), the ratio of the number of days the taxpayer is present in New York (X) over 90 days must not exceed the ratio of the total number of days in that short period (Y) over 548 days.
- Application of statutory residency in year of departure/return?

# Client #8: 30-Day Rule

## ▪ Facts

- Taxpayers left NYC in mid-late 2020 and terminated NYC lease.
- Moved to Florida or Texas or New Hampshire in late 2020 and rented or bought a place there.
- Hope to make the move last, but no one can predict the future.
- Taxpayers don't need to be in NYC much in 2021.

## ▪ Issues

- Getting on the 30-day program for 2021.
  - The test:
    - No PPA in NY (rent or list?).
    - PPA outside of NY.
    - Less than 30 days in NY.
- Can spouse spend more than 30 days?
- What if taxpayers have been staying in parents' vacation home in Florida?

# Resident Tax Credit Issues

# Sourcing Income

- Taxable Income
  - Residents – Everything
  - Nonresidents – Income from in-state sources is taxable
- What qualifies as “income from in-state sources”?
  - Wages for services performed in-state
  - Income/loss from real property
  - Income/loss from in-state business
- Not All Income Has a Source
  - Think “unearned income” or income from investments/intangibles
  - Generally not taxable for nonresidents
  - Double-taxation possible for dual-residents

# Resident Tax Credits

- States generally allow their residents a credit for taxes paid to other states
- Credit cannot exceed the tax due in home state
- Two General Approaches:
  - Most common – Credit allowed for tax paid to other state on income sourced to that state, typically based on the home state’s allocation rules (i.e. if we would tax a nonresident on the income, we will give the resident credit on taxes paid to the other state on that income)
    - E.g., New York, Rhode Island
  - Less common – Credit allowed for tax paid to other state on income not sourced to the home state (intangible income)
    - E.g., New Jersey

# Resident Tax Credit Statutes

*Limited to tax paid on income sourced to the taxing state*

## ■ New York's statute:

“A resident shall be allowed a credit against the tax otherwise due . . . for any income tax imposed on such individual for the taxable year by another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada, **upon income both derived therefrom** and subject to tax under this article.” [N.Y. Tax Law § 620(a) (emphasis added)].

## ■ Connecticut's statute:

“Any resident . . . of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident . . . for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia **on income derived from sources therein** and which is also subject to tax under this chapter.” [Conn. Gen. Stat. § 12-704(a)(1) (emphasis added)].

## ■ California's statute:

“The credit shall be allowed only for taxes paid to the other state . . . **on income derived from sources within that state** which is taxable under its laws irrespective of the residence or domicile of the recipient.” [Cal. Rev. and Tax Code § 18001(a)(1) (emphasis added)].

# Resident Tax Credit Statutes

*For tax paid to other state on income not sourced to home state*

- **New Jersey**
  - The resident credit is only limited to the extent that (i) the income is not from New Jersey sources and (ii) the income is actually taxed by the other jurisdiction
  - Result: NJ allows a resident credit for tax paid to another jurisdiction on intangible income
- Michigan, Montana and Oregon offer similarly structured resident credits

# Resident Credit Examples

## Work and Live in Different States

- 1. Employee lives in NJ and receives wages from NY employer. Employee also received \$1M in dividends.**
  - **NY** – Taxes all wage income.
  - **NJ** – Taxes all income (wages & dividends) but gives a credit for the tax paid to NY on wage income.
- 2. Employee is domiciled in NY and telecommuting from CA during COVID.**
  - **CA** – Taxes all wage income.
  - **NY** – Taxes all wage income and doesn't allow a credit for the tax paid to CA since days commuting from CA are deemed NY workdays under NY's convenience rule.



# Resident Credit Examples

## Dual-Resident (Resident of Two States)

3. **Executive is domiciled in NJ and is a statutory resident of NYC where she works and has an apartment. Executive received \$1M in dividends.**
  - NY - Taxes all income (wages & dividends). NYS and NYC PIT imposed.
  - NJ – Taxes all income (wages & dividends) but gives a credit for the tax paid to NY on **all non-NJ income (which covers wages & dividends)**. But NJ's tax rate lower than the combined NYS/NYC PIT rate.
  
4. **Executive is domiciled in CT and is a statutory resident of NYC where she works and has an apartment. Executive received \$1M in dividends.**
  - NY - Taxes all income (wages & dividends). NYS and NYC PIT imposed.
  - CT – Taxes all income (wages & dividends) but gives a credit for the tax paid to NY on **NY-sourced income (which covers wages only)**. No credit allowed for tax paid to NY on dividend income.

# Questions?



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