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COVID-19: FAQS FOR NEW YORK TAX AND RESIDENCY CONSIDERATIONS

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As of the writing of this alert, New York City is, unfortunately, the epicenter of the COVID-19 outbreak in the United States. As the State and City scramble to deal with this unprecedented pandemic, state and local taxes may be the furthest thing from the minds of those who typically spend significant time in the Empire State. Nevertheless, there will come a time when it will be necessary to calculate your 2020 state and local tax liability. Actions taken now will likely impact that calculation. In light of this, the attorneys in Hodgson Russ's State and Local Tax Practice Group have put together the following FAQs to respond to some of the New York residency-related questions we've encountered during these extraordinary times. We are still early in this outbreak, and the New York State Department of Taxation and Finance ("Tax Department") hasn't specifically addressed any of these issues yet. So the information below should be considered to be our current "best guess" on the topic and subject to change.

FAQ 1:
I recently changed my domicile from New York to another state, but now I find myself back in New York to help family deal with COVID-19. Will this impact my claimed domicile change?

Because domicile is a fact-specific analysis, and because the location where you spend time is a crucial component of that analysis, it could certainly impact your case if you are audited. Taxpayers claiming to have moved out of New York must prove, with clear and convincing evidence, that they left their former New York domicile and established a new permanent residence outside the state. If the taxpayer spends substantially more time in New York as a result of COVID-19, a state auditor might argue that the taxpayer never truly changed his or her "home" to the new state. The auditor could argue that, in a time of difficulty, the taxpayer's continued connections to New York caused them to choose to stay in New York, thereby undermining the claimed move.

But the domicile analysis is not limited to just the amount of time spent in the state. Auditors are instructed to analyze the case in light of several relevant facts, including real and personal property location and use, business connections, and family connections, to name a few. All other things being equal, a person whose spouse and

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minor children remain in Florida while they return to New York to care for an ailing parent, should still have a strong domicile case. On the other hand, a person who claims to be a resident of Greenwich, CT, but who complied with the Governor's "stay-at-home" executive order by sheltering in place in their NYC apartment, might have a tougher time explaining that fact on audit. So you would have to consider your case in relation to the other relevant factors to truly understand how the additional New York time impacts your case.

Moreover, keep in mind that audits typically happen several years after the year at issue. For example, a timely 2020 tax return will not be filed until 2021. Because the state has three years to audit the return, the audit might not occur until 2022 or 2023. If this spike in New York time occurs only in 2020 and disappears in later years, the time anomaly should not significantly undercut a domicile change.

FAQ 2:
My domicile is outside New York State, but I have a vacation home in New York where I typically spend summers. Because of COVID-19, I have decided to spend more time in New York. Will this impact my New York taxes?

Yes, it could. Taxpayers who are domiciled outside New York but who maintain a home in the state (referred to in tax parlance as a "permanent place of abode") can be treated as a resident of the state if they spend more than 183 days in the state. Thus, if your additional time in New York puts you over the 183-day threshold, you could qualify as a New York resident.

You might be thinking, "Come on, will the state really use those days against me in an audit?" Absent clear guidance from the Tax Department, you are at risk. The Tax Department doesn't have a great track record on bending these rules. Remember Hurricane Sandy and the devastation it caused to the tristate area and Long Island? Well, numerous taxpayers had their New Jersey or Long Island homes destroyed by the hurricane and had to spend more time than they otherwise would have in their NYC apartments. Did the difficulty of the situation stop the Tax Department from applying the rules in a draconian manner and holding those people as NYC residents? Absolutely not. While this situation isn't exactly analogous to Hurricane Sandy, owners of property in the state/city should recognize that they risk becoming residents or state/city if they exceed the 183 day threshold.

FAQ 3:
What if I can't travel due to governmental declarations or medical emergencies? Will those days still count against me?

This gets a bit complicated and again there is a lack of any official guidance. Here's our current thinking: New York already has an exception to the 183-day threshold for medical emergencies. If you are at a New York medical facility, ***on an inpatient basis***, those days won't count toward your 183 day total. In other words, if you are stricken by COVID-19 and your symptoms require hospitalization, it's clear those days won't count towards your New York day count. But as we move away from this stark situation, the analysis gets a bit murkier.

For example, what if you have COVID-19, which requires you to self-quarantine, but your symptoms remain relatively mild and do not require hospitalization? Will those days spent at the New York home qualify as New York days for purposes of the 183 day total? In the past, the Tax Department has held out-patient medical procedures in New York, including chemotherapy treatments, to be New York days. An auditor could argue that you could have self-quarantined outside the state. This seems harsh, but is it really any harsher than treating outpatient trips to a NYC hospital for chemo treatments as

days spent in the City/State? And keep in mind that, if New York is consistent with its previous positions, any days that a spouse spends in New York caring for someone with COVID-19 likely count as New York days for purposes of the spouse's 183 day threshold.[1]

What about the New York Governor's executive order? Can those days still count towards the 183 days threshold? Again, there is no clear guidance, but we think there is a risk that those days could count as New York days. The order does not prohibit all movement. A person, especially someone not diagnosed with or showing signs of COVID-19, could reasonably engage in social distancing by driving out of the state/city and heading to their out-of-state properties. Indeed, it is still possible, as of the writing of this alert, to book a flight and fly to Florida. So is the executive order really a valid bar to counting those days as New York days?

It might be. Consider the following: what if you live in another state but are stuck in New York because your home state has enacted rules that make it difficult if not impossible to travel back home. For example, states like Florida and Rhode Island are targeting visitors from New York, and have actually set up checkpoints on highways to identify cars from New York, stop these drivers, direct them to self-quarantine, and, in some instances, threaten them with 60 days in jail if they don't comply!

Indeed, there's ample authority for the concept that a taxpayer's involuntary presence in New York should not be counted against him. The genesis of this comes from *Stranahan*, where the court ruled that time spent in a New York medical facility for treatment of an illness should not be counted as a New York day for statutory residency purposes because the time spent was not voluntary.[2] But this has also been referenced in other cases as well. For example, in *Klingenstein,* the ALJ noted that exceptions arise in the day-count context when presence in New York on particular day is "unintended, unavoidable, unplanned, inadvertent or involuntary."[3] Also, in *Brush,* the ALJ recognized that *Stranahan* places the focus on whether the taxpayer's in-state presence on a given day is "involuntary."[4] Even the Nonresident Audit Guidelines note a special circumstance when talking about travel days where travel is interrupted by outside factors that create an "unavoidable delay or stopover."[5] On these days, auditors can exercise discretion in determining whether to count the day as a New York day.

We're obviously in unprecedented times, but the restrictions on travel and various executive orders could most certainly rise to the level of adding New York days to a day count that were unintended, unavoidable, unplanned, inadvertent or involuntary. Still, taxpayers that plan to be close to the 183-day limit by year end should spend more time out of the state/city later in the year (hopefully after this emergency situation subsides) to counterbalance any additional time currently being spent in New York.

FAQ 4:
The federal government has urged Americans to reconsider traveling abroad and to return from foreign destinations. If I follow this advice, do I jeopardize my 548-day filing position?

First, a little background is in order because this is a bit of an esoteric rule. New York will agree to treat some domiciliaries as nonresidents of the state/city for tax purposes if they satisfy certain requirements. The 548-day rule provides that domiciliaries who spend 450 days in a foreign country during any 548-day period, and spend no more than 90 days in the state, will not be treated as residents for tax purposes (there is one other component of this rule regarding the proportion of New York days during parts of the 548-day period that cover less than one full tax year, but we'll leave that out for now).

We have some clients who are overseas, in the midst of a 548-day period, who are considering whether to return home or who have already done so. We have others who were planning to begin a 548-day period around the time the outbreak started and now can't leave due to international travel restrictions.

The natural question is whether additional days spent in the U.S. would cause a taxpayer to lose the benefit of this filing position. Though no official guidance has been provided by the Tax Department, the state has a history of aggressively auditing these filing positions. Nonetheless, there's also an argument that these days should not count, again looking to the "involuntary-presence" concepts from *Stranahan* and other cases. Certainly, if we could advise someone now on what to do, it's better to be safe than sorry, so getting out is the best advice. But that may not be possible or even legal. And unlike the statutory residency test, which is a calendar-year test that could allow for a taxpayer to make up time later in the year outside New York, a taxpayer may not have that luxury under the 548-day rule, which has a hard and fast limit on the number of days allowable in the U.S.

FAQ 5:
What about telecommuters and New York's Convenience Rule?

New York is one of only 6 states (NY, NJ, CT, DE, PA, NE) that applies a "convenience rule" to telecommuters. Put simply, the convenience rule says that when a New York-based employee works from his or her home outside of the state, those days still count as New York workdays for income allocation purposes. However, as the name of the rule suggests, New York typically only applies the rule when the employee works from home for his or her own convenience (as opposed to at the necessity of the employer). For out-of-state employees that would normally work at a New York office, but must now work from their home outside New York as a result of the Governor's order, the convenience rule could dictate the same tax treatment as if they spent those days working at the New York office. Again there has not been any guidance, but this is certainly an issue taxpayers and tax professionals have to keep an eye on in the coming months.

Looking to some of the older cases on this issue, it appears a good argument can be made that these are "necessity" days, not "convenience" days. In *Matter of Unterweiser*, a New York employer eliminated a nonresident employee's desk job and asked her to perform different duties.[6] But because the corporate office was not equipped to adequately satisfy the requirements of her amended position, the taxpayer performed her duties from her New Jersey home. Despite these facts, the Tax Department argued, and the Division of Tax Appeals agreed, that the taxpayer was working from home out of convenience, not necessity. And in *Matter of Kakar*, even where the taxpayers tried to prove that the New York workspace was inadequate and lacked necessary privacy, an administrative law judge (ALJ) concluded that with a "minimum of ingenuity, arrangements could have been made" to provide the taxpayer with an adequate and secure work environment at the employer's New York office.[7] However, in *Matter of Devers*, a New York employer, again in an attempt to minimize rent costs, eliminated the nonresident taxpayer's office space. The employer formally "relocated" the taxpayer to its Virginia office, although the taxpayer worked out of his home in Connecticut. The taxpayer access to the New York building was rescinded and he no longer communicated with the New York personnel. Based on these facts, an ALJ with the Division of Tax Appeals determined that the taxpayer worked outside of New York by necessity.[8]

So here, no level of ingenuity or creativity would allow an employee to work in the New York office—especially a non-essential employee—without violating the Governor's executive order. Like the taxpayer in *Devers*, an employee forced to work at home by her employer, as a result of the Governor's order should be in a good position to argue that these days are

work-at-home days by necessity, not convenience.

One interesting, somewhat related note: New Jersey recently amended its telecommuting rules in response to the pandemic, specifically as it relates to nexus:

As a result of COVID-19 causing people to work from home as a matter of public health, safety, and welfare, the Division will temporarily waive the impact of the legal threshold within N.J.S.A. 54:10A-2 and N.J.A.C. 18:7-1.9(a) which treats the presence of employees working from their homes in New Jersey as sufficient nexus for out-of-state corporations. In the event that employees are working from home solely as a result of closures due to the coronavirus outbreak and/or the employer's social distancing policy, no threshold will be considered to have been met.

Thus, employees who telecommute from New Jersey for out-of-state employers will not create nexus for the employers in New Jersey. We suspect we may see guidance from other states along the same lines in the coming weeks or months.

FAQ 6:
My audit is now going to be delayed. If the audit ends up in some tax liability, will there be any relief from the extra interest caused by this situation?

Maybe. For now, at least, it appears most New York auditors are telecommuting, and audits are continuing. But there will no doubt be delays, especially with cases in the appeals process, since proceedings in the Division of Tax Appeals will be delayed for some time.[9] Under New York law, interest generally continues to accrue—and compounds daily—until the liability is fully paid.[10] However, the Tax Department's Commissioner has the authority to suspend interest for a period of 90 days,[11] and the same authority exists for cases pending before the Division of Tax Appeals and Tax Appeals Tribunal.[12] Furthermore, as these delays are attributed to Governor Cuomo mandating nonessential personnel (which evidently includes the auditors) to work remotely, the governor should exercise his authority under Executive Law § 29-a to suspend the accrual of interest for the duration.

For more details on these and other COVID-19-related New York residency and allocation topics, please contact Joe Endres (716.848.1504) or Tim Noonan (716.848.1265).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

[1] *Matter of Brush*, Division of Tax Appeals, April 12, 2001 (DTA 817204).

[2] *Stranahan v. New York State Tax Commn.*, 68 AD2d 250 (3d Dept 1979).

[3] *Matter of Klingenstein*, Division of Tax Appeals, August 6, 1998 (DTA No. 815156) (Conclusion of Law "H").

[4] *Brush*, *supra* (Conclusion of Law "M").

[5] NYS Nonresident Audit Guidelines (2014) at pg. 68.

[6] *Matter of Unterweiser*, Division of Tax Appeals, June 13, 2002, *aff'd* Tax Appeals Tribunal, July 31, 2003 (DTA No. 818462).

[7] *Matter of Kakar*, Division of Tax Appeals, February 16, 2006 (DTA 820440).

[8] *Matter of Devers*, Division of Tax Appeals, May 5, 2005 (DTA 819751).

[9] *See* Ariele Doolittle, *Coronavirus/COVID-19 Update from the NYS Division of Tax Appeals*, Noonan's Notes Blog (Mar. 23, 2020).

[10] *See*, *e.g.*, N.Y. Tax Law § 684 (personal income tax); N.Y. Tax Law § 1145 (sales tax).

[11] *See* Tax Law § 171(28)(a).

[12] *See* Tax Law § 2026.