taxnotes® state
Volume 111, Number 3 ■ January 15, 2024

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Reprinted from *Tax Notes State*, January 15, 2024, p. 219

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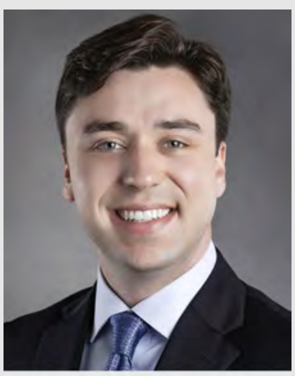

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In this installment of Noonan's Notes, the authors continue their multipart series on multistate residency rules by examining those of Illinois, Oregon, and Pennsylvania.

Welcome back! Last time, we covered the nuts and bolts of the residency rules of California, Connecticut, and New Jersey.[1] But Illinois, Oregon, and Pennsylvania also have seen significant outbound migration in the recent past, clocking in with the second, sixth, and eighth most departures in 2022, respectively. So, we decided to dedicate another article to the residency rules of three more states that simply can't get their residents to stay put.

Illinois

Illinois had the second highest level of outbound migration (behind New York) — 0.08 percent of its population left in 2022, which is about 100,656 people.[2]

Residency Rules: The Basics

Illinois's rules are like the California rules that we outlined in Part I. The state defines the term "resident" as an individual who either (1) is in the state for more than a temporary or transitory purpose during the taxable year; or (2) is domiciled in the state but is absent from the state for a temporary or transitory purpose during the taxable year.[3] If an individual acquires the status of a resident by virtue of being physically present in Illinois for other than temporary or transitory purposes, he remains a resident even though temporarily absent from Illinois. If, however, he leaves Illinois for other than temporary or transitory purposes, he ceases to be a resident. If an individual is domiciled in Illinois, he remains a resident unless he is outside Illinois for other than temporary or transitory purposes.[4]

Illinois tax regulations define the term "domicile" as the place where an individual has his true, fixed, permanent home and principal

[1] Timothy P. Noonan et al., "The Nuts and Bolts of State Residency Rules, Part I (Non-N.Y. Edition)," *Tax Notes State*, Nov. 20, 2023, p. 555.

[2] Janelle Fritts, "Americans Moved to Low-Tax States in 2022," Tax Foundation, Jan. 10, 2023.

[3] Ill. Comp. Stat. section 5/1501(a)(20); 86 Ill. Admin. Code section 100.3020(a)(1).

[4] 86 Ill. Admin. Code section 100.3020(b).

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establishment. In other words, domicile is a place to which he intends to return when he is absent. It is the place in which an individual has voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose but with the present intention of making a permanent home, until some unexpected event occurs to induce him to adopt some other permanent home.[5]

Residency Rules: The Guidance

The Illinois Department of Revenue has issued guidance as to who exactly is an Illinois resident.[6] It reiterates that domicile is the place where one resides and intends to return after temporary absences.[7] Temporary absences may include duty in the U.S. armed forces, residence in a foreign country, out-of-state residence as a student, or out-of-state residence during the summer or winter.[8] One does not have to be physically present in Illinois for the entire year to be considered a full-year resident.[9]

In a 2005 general information letter, the DOR offered further guidance as to Illinois's residency rules. It noted that there is a rebuttable presumption of residence when (1) an individual receives a homestead exemption for Illinois property; or (2) an individual who is an Illinois resident in one year is present in Illinois the following year for more days than he is present in any other state. These presumptions are not conclusive and may be overcome by clear and convincing evidence to the contrary.[10]

Residency Rules: The Cases

In a 2010 administrative ruling, the presiding administrative law judge drew on a variety of factors in determining that the taxpayer, an attorney, was domiciled in Illinois and not in Florida as he claimed.[11] The taxpayer owned a condo in Illinois, was employed by multiple companies in Illinois, and was a member of a limited liability company located in Illinois. He leased a vacation condo in Miami (that he shared with three others), and although he obtained a Florida driver's license and voter's card, he listed his parents' Florida address on both.

The ALJ emphasized that if an individual acquires a domicile at one place, he retains that domicile until he acquires another elsewhere. Then, in determining that the taxpayer had not abandoned his Illinois domicile, the ALJ considered the taxpayer's Illinois driver's license and voter registration, home ownership and rental agreements, club and organizational memberships, business ties, mailing address, location of bank accounts, location of doctors, dentists, accountants, and attorneys, telephone and utility usage, and more. These factors demonstrated that the taxpayer was still domiciled in Illinois.[12]

Similarly, in a 2014 determination, the ALJ held that a taxpayer who claimed to change his domicile to an overseas location was, in fact, still domiciled in Illinois. The taxpayer had been hired by the U.S. government as a construction consultant for the U.S. Air Force. During the designated deployment period, he lived on an overseas Air Force base and did not purchase or rent property (you see where this is going). He claimed that he should be taxed as either a part-year resident or nonresident.[13]

The ALJ disagreed and drew on similar factors, noting that during his roughly six-month absence overseas, the taxpayer maintained an apartment in Illinois, kept his Illinois driver's license, and retained the same medical support professionals. Further, the taxpayer's work assignment was scheduled to be temporary, as was reflected in his employment contract. In fact, the taxpayer expressly indicated in his employment contract that he intended to return to Illinois, which he ultimately did after his employment terminated. Therefore, the ALJ found that the taxpayer had not shown by a preponderance of the evidence that he abandoned his intent to return to his domicile in Illinois and

[5] 86 Ill. Admin. Code section 100.3020(d).

[6] Illinois DOR, Who is an Illinois resident? (undated).

[7] *Id.*

[8] *Id.*

[9] Illinois DOR, First-Time Filer Residency Information (undated).

[10] Illinois DOR, Letter No. IT 2005-0032-GIL (June 16, 2005) (citing 86 Ill. Admin. Code section 100.3020(f)).

[11] *Illinois DOR v. John Doe, Taxpayer*, IT 10-02 (Feb. 25, 2010).

[12] *Id.*

[13] *Illinois DOR v. John Doe, Taxpayer*, IT 14-03 (Feb. 4, 2014).

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accordingly failed to establish a new domicile overseas.[14]

Oregon

The top personal income tax rate in Oregon is a whopping 9.9 percent, and correspondingly, Oregon saw a 0.4 percent decrease in population in 2022.[15]

Residency Rules: The Basics

Oregon has two tests for determining who is a resident of the state, but they are a little different from the typical tests used in other states. There is both an objective statutory residency test plus a domicile test. The statutory resident test provides that someone who maintains a permanent place of abode in Oregon and spends more than 200 days of the year in Oregon is a resident *unless* they can prove they are only in the state for a "temporary or transitory purpose."[16] In other words, if a taxpayer can prove they are in Oregon for a purpose that is not permanent and not expected to last indefinitely, they will not be considered a statutory resident.[17] A taxpayer assigned to work in the state for a fixed, limited time is not considered a resident, even if he or she spends more than 200 days of the year in Oregon.[18] Don't forget — any fraction of a calendar day is counted as a whole day.[19]

A permanent place of abode does not necessarily mean *permanent* — even a rental property can be considered a permanent place of abode. Oregon considers the following factors to determine if a residence is permanent: the amount of time spent in the locality; the nature of the place of abode; activities in the locality; and the taxpayer's intentions of length and nature of the stay.[20] The key is, though, the taxpayer or the taxpayer's family has to actually use the property as a dwelling in which to live. A vacation home or home that does not have proper cooking or bathing facilities cannot be a permanent place of abode.[21]

On the other hand, the subjective domicile test holds that someone who is domiciled in Oregon is a resident of the state unless they maintain no permanent place of abode in Oregon, maintain one elsewhere, and spend no more than 30 days of the year in Oregon.[22] Oregon defines domicile as the place an individual considers to be the individual's true, fixed, permanent home.[23] The state's tax regulations consider four primary factors when determining domicile: family; time spent; business involvement; and "near and dear" items.[24] Secondary factors, such as mailing addresses, a driver's license, car registrations, or voter registrations, will be considered but are inferior to the four primary factors.

Residency Rules: The Guidance

The state's website explains domicile in an easy-to-understand way: A taxpayer is domiciled, and therefore a resident, in Oregon if they think of Oregon as their permanent home; Oregon is the center of their financial, social, and family life; and Oregon is the place they plan to return to when they are away.[25] For more specific tax guidance, the Individual Income Tax Guide is an effective reference tool.[26] The guide has information on everything personal-income-tax-related from residency rules to adjustments to how to file your return.

Residency Rules: The Cases

Backman is an illustrative Oregon case analyzing whether the taxpayer was a resident of the state.[27] There, the taxpayer tried to show he had changed his domicile from Oregon to New York. Yet, "Oregon was the one constant element" in the taxpayer's life. He had kept all his ties there,

[14] *Id.*

[15] Timothy Vermeer, "State Individual Income Tax Rates and Brackets for 2023," Tax Foundation, Feb. 21, 2023; Fritts, *supra* note 2.

[16] Or. Admin. r. 150-316-0025(2).

[17] *Id.*

[18] Or. Admin. r. 150-316-0025(2)(a).

[19] Or. Rev. Stat. section 316.027(1)(a)(B), (2).

[20] Or. Admin. r. 150-316-0025(1)(b)(A).

[21] Or. Admin. r. 150-316-00225(1)(b)(C).

[22] Or. Rev. Stat. section 316.027(1).

[23] Or. Admin. r. 150-316-0025(1)(a).

[24] *Id.*

[25] Oregon DOR, Individuals (last visited Oct. 23, 2023).

[26] Oregon Publication OR-17, Individual Income Tax Guide (rev. Sept. 30, 2022).

[27] *Backman v. Department of Revenue*, TC-MD 909254 (Or. Tax Ct. Oct. 25, 1999).

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owned two homes there, registered his vehicles there, maintained bank accounts, and renewed his Oregon driver's license. The tax court considered the extensive set of facts and concluded that "the totality of the facts in this case refutes the conclusion [the taxpayer] abandoned his Oregon domicile." However, the taxpayer spent less than 30 days in Oregon for the tax years, so he was deemed a nonresident domiciliary of the state.[28]

In *Harlan*, a similar question was whether a taxpayer had the present intent to change domicile by moving from Oregon to Washington.[29] While her husband was working in Washington, the taxpayer continued to live in their Oregon home and attempted to prepare it for sale. She maintained a job in Oregon, registered her car in Oregon, and maintained a joint bank account at an Oregon bank. The tax court found that the taxpayer had not changed residency and the "possibility of a new location as [taxpayer's] permanent home was in the future and with no degree of certainty as to time."[30]

Pennsylvania

With a personal income tax rate of 3.07 percent, Pennsylvania has one of the lower tax rates in the country. But it's still not zero, and the commonwealth was one of the top 10 states for outbound migration in 2022 with 0.03 percent of its population, or about 38,916 people, leaving the state.[31]

Residency Rules: The Basics

Cue the New York rules! An individual is a resident of Pennsylvania if he is domiciled in Pennsylvania or if he maintains a permanent place of abode in Pennsylvania and spends a total of more than 183 days of the taxable year in Pennsylvania, even though he is not domiciled in Pennsylvania.[32] As with other states, a domicile, once established, continues until the individual in question moves to a new location with the bona fide intention of making his fixed and permanent home there.[33] The burden is on the individual asserting a change of domicile to show that the necessary intention existed.[34] Some factors Pennsylvania will consider in determining domicile are motor vehicle registration, voter registration, location of children's actual residence and children's school, location of bank accounts and other property, location of the taxpayer's principal place of business, and location of memberships in religious or fraternal organizations.[35] Pennsylvania is also a Northeastern States Tax Officials Association signatory and thus, like New Jersey, has agreed to examine the aforementioned four primary factors of home, time, near and dear possessions, and business involvement when determining domicile for income tax purposes.

Like Connecticut and New York, Pennsylvania also has a 30-day safe harbor rule, which says a domiciliary will not be taxed as a resident if:

- she did not maintain a permanent place of abode in Pennsylvania for herself and her family;
- she did maintain a permanent place of abode outside Pennsylvania for the entire year; and
- she did not spend in the aggregate more than 30 days of the taxable year in Pennsylvania.[36]

Interestingly, however, the state does *not* have a 548-day safe harbor rule.

Residency Rules: The Guidance

The Pennsylvania DOR has published guidance on determining residency for personal income tax purposes. It states that an individual's domicile is his fixed and permanent home to which he always has the intention of returning, whenever absent, even though he may live elsewhere. A person can have only one domicile at a time, and it does not change until they move

[28] *Id.*

[29] *Harlan v. Department of Revenue*, TC 2568 (Or. Tax Ct. Nov. 23, 1987).

[30] *Id.*

[31] Fritts, *supra* note 2.

[32] 72 Pa. Stat. Ann. section 7301(p).

[33] 61 Pa. Code section 101.3(b).

[34] *Id.*

[35] Paul R. Comeau, Mark S. Klein, and Noonan, *New York Residency Audit and Allocation Handbook* (2018) (citing letter from Michael J. Roach, chief, Gross Income Tax Audit Branch, New Jersey Division of Taxation, to Andrew B. Sabol (Mar. 13, 1998) (on file with book's authors)).

[36] *Id.*

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to another state or country with the intention of making a new permanent home there, thus abandoning the previous domicile.

Pennsylvania guidance also states that if a person moves to another state or country but intends to stay there only for a fixed or limited time (no matter how long), domicile does not change. Domicile is not dependent on continuous physical presence and is not abandoned by absence there or by presence in a former domicile so long as there is no firm, sincere, unconditional intention of remaining in the other jurisdiction for an indefinite and uncertain period.[37]

Residency Rules: The Cases

In *Southwest Regional Tax Bureau v. Kania*, the bureau filed a tax collection action against William Kania for nonpayment of income taxes alleging that he had not changed his domicile from Pennsylvania to Florida, as he claimed. Kania explained that he had owned a home in Pennsylvania since 1966, that he had purchased his Florida home in 1982, and that he changed his domicile in 1998.[38] To prove his change, Kania offered evidence of his Florida voter registration card and testimony that he had voted in every Florida election since 1998 (and had not voted in Pennsylvania since 1997). His vehicles were registered in Florida, he had a Florida driver's license, he used his Florida address on his tax filings, and he maintained his bank accounts in Florida. In addition, he was a member of multiple professional and social organizations in Florida and had resigned from the like in Pennsylvania.

The bureau argued (weakly) that Kania had an intention of returning to his Pennsylvania home whenever absent and that, as a member of a Pennsylvania accounting firm, he had significant business ties to Pennsylvania. In rejecting the bureau's argument, the court pointed to the mountain of evidence to the contrary and concluded that Kania's testimony and documentary evidence amply supported his change of domicile.[39]

Conversely, in *Hvizdak*, the commonwealth court held that the taxpayer was domiciled in Pennsylvania.[40] In 2003 the taxpayer first claimed that he was a Florida resident on his Pennsylvania personal income tax returns because he owned homes in both locations. Then, in 2004 (the tax year in question), the taxpayer was issued a driver's license, registered to vote, worshipped regularly, participated in social organizations, joined a golf club, fished, and attended all his social events in Florida. However, he visited Pennsylvania to spend Christmas with his children. Importantly, the taxpayer and his wife were still married in 2004 (they divorced in 2007), and the taxpayer provided the entire support necessary for her and their two children, who were all domiciled in Pennsylvania during the year in question. Given these factors, the taxpayer argued that he was a Florida domiciliary.

The court disagreed. It stated that a domicile of choice may not be retained by intention alone and that it must be shown by one's conduct. Once a domicile has been acquired, the burden of proving a change in domicile is on the person making the allegation. The court noted that the fact that an individual registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place. Therefore, given that the taxpayer and his wife were married throughout 2004, that their minor children resided in Pennsylvania throughout 2004, that they had joint custody of their children throughout 2004, and that the taxpayer provided all support for his family throughout 2004, the court held the taxpayer, by his intention and conduct, made Pennsylvania his domicile throughout 2004.[41]

There you have it. Residents are leaving these states by the tens of thousands in search of more advantageous tax policies. So, as we ring in the new year, we'll be interested to see which states turn their focus towards outward migration in 2024. ■

[37] Pennsylvania DOR, PA Personal Income Tax Guide: Brief Overview and Filing Requirements (last visited Nov. 13, 2023).

[38] *Southwest Regional Tax Bureau v. Kania*, 49 A.3d 529 (Pa. Commw. Ct. 2012).

[39] *Id.*

[40] *Hvizdak v. Commonwealth of Pennsylvania*, 50 A.3d 788 (Pa. Commw. Ct. 2012), *aff'd*, 69 A.3d 170 (Pa. 2012).

[41] *Id.*

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