**Florida Residency**

**How you know you have it, and what you may
want to do if another state says you don’t**

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| **Paul R. Comeau, Esq.**716-848-1424pcomeau@hodgsonruss.com | **Mark S. Klein, Esq.**716-848-1411mklein@hodgsonruss.com | **Timothy P. Noonan, Esq.**716-848-1265tnoonan@hodgsonruss.com |

# **NEW YORK RESIDENCY RULES AND GUIDELINES**

## **Personal Income Tax Law**

### Generally **-** Like many states, New York taxes its residents on all income, regardless of whether it is attributable to New York activities or property. To be taxed as a New York resident, an individual must either be domiciled in New York or be a statutory resident (i.e., maintain a permanent place of abode and spend more than 183 days in the state during the tax year). New York City applies identical rules for determining who is a New York City resident for income tax purposes.

## **The Domicile Test**

### Domicile - An individual will be taxed as a New York resident if that individual is domiciled in New York during the tax year. The New York Regulations define domicile as “the place which an individual intends to be such individual’s permanent home - the place to which an individual intends to return whenever such individual may be absent.”

### Must “Leave and Land” - “Leave and Land” “Domicile…is established by physical presence coupled with an intent to establish a permanent home…Once established, an individual’s original or selected domicile continues until there is a clear manifestation of an intent to acquire a new one.” *Abdelaziz El-Tersli v. Commissioner*, 787 NYS2d 526 (3d Dep’t. 2005). According to the Tax Appeals Tribunal:

[I]f a domiciliary of New York terminated his residence in New York with the intention of never returning and spent the following several years traveling among the capitals of Europe, residing for a few months in each, and finally returned to the United States to make a home in Florida, he would remain a domiciliary of New York until his new home in Florida was established. *Knight* (TAT November 9, 2006).

### Any Physical Presence Will Do - So long as the requisite intent is present, any physical presence in the new location, even for a day, will effectuate a change of domicile. Domicile is not predicated on a real estate closing if the taxpayer has already “moved” to the new location. *Reichstetter*, ALJ (Oct. 31, 2002).

### Burden of Proof **-** is on the party asserting the change of domicile. 20 NYCRR 105.20(d)(2) and this can include the Tax Department. *Bostwick* (ALJ April 12, 2007). The burden of proof is “clear and convincing evidence.” Connecticut follows this same standard. *See Rizzuto*, CT Supreme Ct. (February 28, 2007).

### Proof of Voting - The location where a taxpayer votes can be used in a domicile analysis, but it is not a primary or determinative factor. *Webb Property Owners Assoc.*, TSB‑A‑08(2)I.

## **Exceptions to Domicile Rule** - a New York domiciliary who fully satisfies either of the following exceptions to the domicile rule will be considered a nonresident of New York for personal income tax purposes:

### The 30-Day Rule - A New York domiciliary will not be taxable as a resident if he or she: (1) maintains a permanent place of abode outside of New York; (2) does not maintain a permanent place of abode in New York; and (3) spends no more than 30 days of the taxable year in New York. N.Y. Tax Law § 605(b)(1)(A)(i).

### The 548-Day Rule - A New York domiciliary will not be taxable as a resident if he or she, within a period of 548 consecutive days is: (1) present in a foreign country or countries for at least 450 days; (2) is not present in New York State for more than 90 days; nor are his or her spouse (unless such spouse is legally separated) or minor children in New York for more than 90 days; and (3) during the nonresident portion of the taxable year with or within which such period of 548 consecutive days begins and nonresident portion of the taxable year with or within which such period of 548 consecutive days ends, such person is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such portion of the taxable year bears to 548. N.Y. Tax Law § 605(b)(1)(a)(ii).

## **Note:** The description above applies to tax years beginning with 2009, and is based on the Tax Department’s 2009 amendment of the 548-day rule. Formerly, a taxpayer’s spouse and/or minor children could be present in New York for more than 90 days during the period, but not *in a permanent place of abode maintained by the taxpayer.* See *Matter of Gass*, ALJ (May 2004). Now neither the taxpayer, spouse, nor minor children may be present in New York for more than 90 days.

## **The FIVE Domicile Factors**

### New York’s audit guidelines identify five primary domicile factors and eight secondary factors. Prior guidelines had four primary factors: housing, business, time, and near and dear possessions. The fifth factor, family, was only considered if the first four were inconclusive.

### The “family factor” is now one of the five primary domicile factors. Auditors may look at traditional or non-traditional family structures (grandparents, etc.), depending on the circumstances.

### Each of the five primary factors is evaluated determine whether, on balance, it points to New York or points to the claimed place of domicile.

### Auditors may focus on “lifestyle” factors, if circumstances suggest that they are more relevant to domicile than the five primary factors.

### If the five primary factors are inconclusive, the auditors are instructed to evaluate secondary factors such as voting and auto registrations, drivers’ licenses, addresses used for tax returns and other legal documents, the location of safe deposit boxes, telephone activity at each residence, etc.

### The location where a taxpayer votes can be used in a domicile analysis, but it is not a primary or determinative factor. Webb Property Owners Assoc., TSB A 08(2)I.

### There are certain “nonfactors” – items that auditors are told not to consider. The new guidelines slightly expand that list to include not only charitable contributions but also the place of burial, the place a will is probated, passive interests in partnerships and small corporations, the location of bank accounts, political contributions, and the place tax returns are prepared.

### Charitable days still do not constitute time in New York for domicile purposes, but auditors are cautioned to make sure that the taxpayer’s presence in NY is solely for charitable purposes. But a day spent in New York for charity still constitutes a New York day for statutory residency purposes.

## **2012 Nonresident Audit Guidelines: Foreign Domicile**

### After changes to the domicile factors in the 2009 version of the guidelines, the 2012 version did not change the factor analysis.

### However, the 2012 guidelines do include a section that specifically addresses foreign domicile changes—i.e., situations where New York domiciliary attempts to establish a change of domicile to a foreign country.

### The guidelines state that, in these types of cases, “a comparison of the domicile factors between New York and the foreign country may not necessarily be a true measure of the taxpayer’s intent.”

### To aid the auditor in assessing a taxpayer’s intent in these cases, auditors are instructed to consider the following factors:

## Whether the taxpayer has been admitted for permanent residence in the foreign country;

## Retention of the New York residence and/or periodic return visits;

## Retention of New York business interests; and

## The filing of tax returns as a resident of the foreign country.

### Finally, the guidelines state that whether or not a taxpayer acquires citizenship in the foreign country is generally a non-factor.

## **Domicile for Purposes of New York’s Estate Tax Law**

### For estate tax purposes, the term resident is intended to mean domiciliary.

### The Tax Department’s Estate Tax Domicile Affidavit must be completed if it is claimed that the decedent was not domiciled in New York State at the time of death (for periods on or after May 25, 1990):

### To determine the domicile of the estate, the Tax Department looks at a broad array of domicile factors, focusing on the five year’s prior to the decedent’s death:

## a. If born outside U.S., whether decedent was a naturalized U.S. citizen;

## b. Whether decedent ever lived in New York State or owned (individually or jointly) any interest in real estate located in New York;

## c. Whether decedent leased a safe deposit box in New York at the time of death;

## d. Information from the five years preceding death regarding: decedent’s residences within and without New York State; locations where decedent filed income tax returns; the states where decedent was registered to vote; the employment or business activities engaged in by the decedent, any legal proceedings in New York to which the decedent was a party; and the execution of any trust indentures, deeds, mortgages or other documents describing decedent’s residence;

## e. Whether decedent had a license to operate a business, profession, motor vehicle, airplane, or boat or was a member in any church, club or organization; and

## f. Any other information supporting the contention that decedent was not domiciled in New York State at the time of death.

## **Recent Domicile Cases**

### *Matter of Cooke* (ALJ, November 15, 2012): The main issue in this audit was whether the taxpayers were domiciliaries of New York City or New York State. At audit, the Department concluded that the taxpayers were domiciliaries of New York City. However, the ALJ found that the taxpayers had proved, by clear and convincing evidence, that they gave up their former New York City domicile and acquired a domicile in the Hamptons as of the years at issue. Notably, the ALJ focused on the taxpayers’ “general habit of life,” discussing things like: where they spent their free time, hosted parties, celebrated holidays, attended church, and undertook leisure activities. The ALJ also spent time discussing the substantial investment the taxpayers made in building and furnishing their Hamptons home and the fact that they moved artwork, family heirlooms and treasured keepsakes to the Hamptons home.

### *Matter of Ingle* (TAT December 1, 2011): The taxpayer was attempting to claim that her change of domicile from New York City to Tennessee took place before a sale of stock (on April 23, 2004) that yielded her substantial income. The taxpayer argued that she changed her domicile to Tennessee on April 1, 2004. While the Tribunal agreed that the taxpayer ultimately changed her domicile to Tennessee on July 9, 2004, it held that the taxpayer had not abandoned her New York domicile and acquired a new one in Tennessee by April 1. An existing domicile continues until a new one is acquired—this requires an actual change in residence coupled with the intention to abandon the old domicile and acquire a new one. While the Tribunal focused (incorrectly?) on the fact that the taxpayer’s move was predicated by a desire to escape New York taxes on her sale of stock, it also found that her lifestyle as it existed prior to April 1, 2004, continued until July 9, 2004, when taxpayer actually left New York and landed in Tennessee.

### *Matter of Taylor* (TAT December 8, 2011): The taxpayer was a New York native who worked and resided primarily in London during the audit years, even though she maintained two NY residences. Subsequent to the audit period, she became a UK citizen. The Tribunal affirmed the ALJ’s determination, which found that the taxpayer’s pattern was to live abroad for temporary work assignments and that there was not yet a strong personal connection to London during the audit years. There was insufficient evidence that the taxpayer had abandoned her NY domicile and “landed” in the UK during the years at issue. However, the Tribunal did find that the taxpayer later developed a personal life in and ties to London and eventually adopted it as her domicile and home.

### In *Handel* (ALJ Nov. 25, 2009), the ALJ found in favor of the taxpayers on domicile (but not on statutory residency), primarily based on a comparison of the “home” factor between the taxpayers’ East Hampton home and their downsized NYC apartment. Citing the *Knight* case, the ALJ downplayed the time spent in New York, given that the taxpayer’s pattern was similar to that of a commuter.

### In *Marcinek* (ALJ Nov. 6, 2008), a taxpayer who claimed that he had changed his domicile to New Jersey to move closer to his son did not meet his burden of proof that he had abandoned his New York domicile and established a new domicile since he only submitted a few documents showing a New Jersey address and nothing to demonstrate his intent to change domiciles.

### In *Santos* (ALJ February 1, 2007), a taxpayer who moved to California for a new job did not change his domicile where his California furnished apartment was rented on a month-to-month basis. Additionally, the taxpayer never obtained a California driver’s license or changed the address on his bank accounts. He also returned to New York within a year (Was this a case of 20-20 hindsight?).

### In *Bostwick* (ALJ April 12, 2007), the taxpayer did not change her domicile from New Jersey to New York even though she had a New York apartment and spent 163 days in New York versus three in New Jersey. She was in transition and had not yet committed herself to New York City. Even though she acquired a furnished apartment in New York, the ALJ recognized that “Wealth permits individuals to live in a manner that is unlike the average person. Actions that may very well be indicative of a ‘life change’ for the average person, do not necessarily result in the same conclusion in the case of individuals with significant wealth.”

### A taxpayer’s existing domicile continues until a new one is acquired, but the law does not require ownership of a home at the new location. A taxpayer can move, live with family or friends, or rent a new home in the new location and still not be considered to have changed domicile. *See* *Jeter*, (ALJ November 8, 2007).

## **Statutory Residency**

### Generally - A statutory resident is an individual who is not domiciled in New York, but maintains a permanent place of abode in New York and spends, in the aggregate, more than 183 days of the taxable year in New York. The only exception from this rule is for individuals in the active service of the United States Armed Forces.

### The 183-Day Rule - This continues to be an area of focus on audit. The taxpayer has the burden of proving that he or she was present in New York for less than 184 days. For purposes of this test, any part of a day spent in New York is counted as a “New York day.” Proof is usually provided by an examination of diaries, calendars, credit card slips, phone bills, bank statements and other business or personal records. In the absence of proof, however, you still can prove day count. *See* Noonan’s Notes, *The Importance of Testimony in Statutory Residency Audits* (State Tax Notes, April 2008).

## The value of testimony was on full display in *Matter of Robertson* (TAT September 23, 2010). The case is significant both for the amount of money at issue and the length of the decision. The sole question was whether the taxpayers were NYC residents for the 2000 tax year and the case came down to an analysis of four days. Ultimately, the taxpayers’ success in this case came down to their convincing testimony regarding such issues as whether Mrs. Robertson would have preferred not to have her husband “in her hair” as she packed for a trip. This case is also significant for the weight given to a contemporaneous diary, which was supported by the taxpayers’ testimony.

### Permanent Place of Abode - A permanent place of abode is a “dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse.” The regulations provide that a dwelling must be maintained for “substantially all of the taxable year” in order to be considered a permanent place of abode for statutory residence purposes. 20 NYCRR §102.20(e). However, a taxpayer need not dwell in the abode in order for the taxpayer to “maintain” it. *Matter of Holt* (TAT July 17, 2008).

## Presence by an historic nonresident in a New York nursing home (or adult care facility) may not create a New York domicile and does not count as a permanent place of abode in the State. *Furman*, TSB‑A‑06(6)I.

## Substantially All of the Taxable Year - The Department’s Guidelines define substantially all of the taxable year as a period exceeding 11 months. However, this rule is treated more as a general rule than an absolute rule and a case in which a taxpayer only had access to an apartment for ten and one half months was found be substantially all of the taxable year. *Brodman & Grimm* (ALJ November 7, 2002). In addition, the 2012 Audit Guidelines state that, because of the potential for abuse, auditors should only apply the 11-month rule where a taxpayer acquires or disposes of a New York residence, and not where a taxpayer rents out his or her residence.

## Maintenance vs. Use – The 2012 Audit Guidelines, citing *Matter of Panico* (ALJ August 17, 1990), state that a taxpayer would not have the requisite relationship to a dwelling that he owns, but which is used exclusively by others. In *Matter of Gaied* (TAT June 16, 2011), the Tribunal found that an apartment owned by the taxpayer, but occupied by his parents, was a permanent place of abode for the taxpayer. The Tribunal first found that the apartment was NOT a permanent place of abode of the taxpayer. However, on reargument, the Tribunal withdrew its prior decision, finding that it had incorrectly added an additional element to the definition of permanent place of abode that is not contained in either the statute or regulations—that a dwelling place must have a bedroom or bed to qualify as a permanent place of abode. The Tribunal stated that “where the taxpayer has a *property right* to the subject premises, it is neither necessary nor appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer’s subjective use of the premises.” In other words, there is no requirement that the taxpayer maintain the premises for his/her own use. Here, the taxpayer had purchased a property in New York that included several rental units and the first floor was occupied by the taxpayer’s parents. The parents relied fully on the taxpayer for financial support and the taxpayer occasionally spent the night in the apartment due to the parents’ medical needs. Additionally, the taxpayer kept keys to the other units inside his parent’s apartment—a fact which led the Tribunal to conclude that it would be “incredible” to believe that the taxpayer did not have unfettered access to the parent’s apartment.

## On appeal, the Appellate Division of the New York Supreme Court (N.Y. App. Div. Dec. 27, 2012), upheld the Tribunal’s decision by a 3-to-2 vote. The Appellate Division’s opinion focused on the following facts: the taxpayer owned the building, he maintained telephone and utilities in his own name, he paid those bills as well as other expenses, he retained unfettered access to the apartment, and he occasionally slept at the apartment. Thus, under the majority’s view of the law, Mr. Gaied maintained a permanent place of abode.

## The Dissenting Opinion, which focused on the purpose of the statutory residence provision, concluded that the apartment was not a permanent place of abode for the taxpayer. Because two judges dissented on a matter of law, the taxpayer is granted automatic leave to appeal to the decision to the New York Court of Appeals.

## Corporate Apartment as a Permanent Place of Abode - If a company leases an *apartment* for the use of a company executive and the dwelling was *principally available* to that executive, the executive would be considered as maintaining a permanent place of abode in New York even though others might use the apartment on an occasional basis.

## Corporate Apartment Not a Permanent Place of Abode - A corporate apartment would not be considered a permanent place of abode for a taxpayer if the primary purpose and use of the corporate apartment is for reasons other than as living quarters for the taxpayer or the taxpayer’s family.

## A Spouse’s Apartment - can be imputed to the other spouse if (s)he has a key and unfettered access to the unit (regardless of the amount of actual use). Overnight stays are not required. In *Donovan* (TAT February 26, 2004), a Connecticut domiciliary (New York City commuter) married a man who owned an apartment in New York City, and the apartment was found to be her permanent place of abode as well. However, the same result does not apply to an abode owned by a friend where the taxpayer did not pay for expenses, did not have unfettered access to a particular room and kept no belongings in the abode. *Knight* (TAT November 9, 2006).

### The Permanence Test and the 2012 Audit Guidelines - The permanence of a dwelling place for purpose of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. The 2012 Audit Guidelines make clear that permanence must encompass both the physical aspects of the dwelling place as well as the individual’s relationship to the place.

## *Physical Attributes/Equipped for Year-Round Occupation* - A permanent place of abode does not include “a mere camp or cottage, which is suitable and used only for vacations . . . . Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc. will generally not be deemed a permanent place of abode.” 20 NYCRR §105.20(e).

## *The Nature of the Relationship* –To be a PPA, a taxpayer must maintain the abode within the standard set forth in *Matter of Evans.* In the new version of the Audit Guidelines, the Department lists a number of factors that are to be examined in evaluating a taxpayer’s relationship to the abode in question:

##### Whether the taxpayer has ownership or property rights in the dwelling;

##### Whether the taxpayer uses the dwelling or has unfettered access;

##### Whether the taxpayer makes contributions either in money or in kind;

##### The taxpayer’s relationship to co-habitants of the dwelling;

##### Whether the taxpayer has his own room or keeps personal items at the dwelling; and

##### Registration for Governmental/Business services

## In *Matter of Barker* (TAT January 13, 2011), the Tribunal affirmed an ALJ decision rejecting the taxpayers’ argument that their Hamptons vacation cottage in the remote area of Napeague was not a permanent place of abode. The taxpayers argued that the vacation home was not subjectively suitable for year-round use and that it was not *their* permanent place of abode because they only used it for occasional family vacations, and had no mail delivery, town sewer, or waste removal services. The Tribunal held that “maintenance of a permanent place of abode” is an objective standard, rather than a subjective one, and here the residence was clearly suitable for year-round use even though the taxpayers only used it 10-15 days a year. The Tribunal concluded that “it is well settled that a dwelling is a permanent place of abode where, as here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling.”

## In *Matter of Slavin* (ALJ June 7, 2007), the ALJ held that a two-bedroom, 1000 square foot mountain cabin (located in the high peaks region of the Catskill Mountains) was not a permanent place of abode, even though the cabin had electric baseboard heating, running water and indoor plumbing. The cabin was accessible only by a dirt trail (which was nearly impossible to access in the winter months) and was used solely as a vacation home. Moreover, it did not have town services (such as trash collection), cable service or television reception. After this case came out, however, the taxpayer applied for attorneys’ fees, and the Judge deciding that question not only rejected the taxpayer’s request for costs, but also questioned whether the first ALJ even got it right! *Slavin* (ALJ November 29, 2007).

## **Resident Credits—Credits for Tax Paid to Other Jurisdictions**

### A taxpayer who is domiciled outside of New York, but is a statutory resident of New York, may be required to pay resident personal income taxes on their entire income, without any credit for taxes paid to the other state on income from intangible assets, to two states.

### The 2012 Audit Guidelines contain a section on resident credits, which spells out three elements that must be proved in order for a taxpayer to receive a resident credit:

## The income must have been subject to tax by the other state or political subdivision;

## The income must have been derived from the other state; and

## The income must have been subject to tax under Article 22.

### In determining whether income was “derived from sources within another state” for purposes of the rule, the definition of New York source income found in Tax Law §631 must be used. Thus, items taxable to a nonresident of New York (i.e., wages, business income, income from real property, etc.) are those for which a resident would be allowed the credit. Those items for which a nonresident would not be taxable (i.e., trust income, dividend income, etc.).

### What about “dual residents?” These are individuals who are taxable on all their income, regardless of source, in two states. These taxpayers are subject to an additional limitation. For purposes of the credit, the tax these individuals paid to the “other state” must be prorated by the following formula: (other state income subject to the resident credit ÷ total income taxable by the other state) × total tax due to the other state.

## **2012 Nonresident Audit Guidelines: Changes Related to Statutory Residency**

### Aside from the clarification to the definition of a PPA (discussed on page 9 above), there were not any big changes to the Guideline sections dealing with statutory residency.

### However, the 2012 Guidelines include a helpful chart (found in the appendix on page 95) that provides a visual explanation of the two pronged “permanence test” (PPA = physical attributes + relationship).

### Finally, the new Guidelines confirm that where a taxpayer has proof of time spent outside New York (i.e., call from Connecticut home) with no evidence establishing that time was spent in New York, this can be enough to prove the taxpayer was not in New York on a given day. This will be especially helpful for nondomiciliaries who are attempting to prove their location outside of New York on weekends and holidays.

# **INCOME ALLOCATION**

## **New York’s Allocation Rules**

### Constitutional Limitations - The United States Constitution prohibits New York from taxing a nonresident’s income unless it has some connection to the state. The income must be derived from or connected to New York sources. N.Y. Tax Law § 601(e).

### New York Source Income - Generally includes all items of income, gain, loss and deduction entering into the taxpayer’s federal adjusted gross income that are attributable to: (1) the ownership of any interest in real or tangible property located in New York; or (2) a business, trade, profession or occupation carried on in New York. N.Y. Tax Law §§ 631(a) & (b).

## *Intangibles* - Income from intangible personal property is not considered to be from New York sources unless the income is derived from property employed in a business, trade, profession or occupation carried on in New York. N.Y. Tax Law § 631(b)(2).

##### **LLC/Partnership Interests** – The 2009-10 New York State budget amended the Tax Law so that when a nonresident sells an interest in a partnership, LLC, S-corporation, or closely held C-corporation (100 or fewer shareholders) that owns real property in New York State, the gain from the sale is taxable as New York source income if the value of the real property in New York is greater than 50% of the entity’s total assets. The new provision allocates the income based on a fraction determined by the value of the New York real property to the total assets held by the entity. It also includes a two-year look back provision.

##### **Deemed Asset Sale** – In *Matter of Baum* (TAT, Feb. 12, 2009), nonresident taxpayers sold all of their shares of a New York S-Corporation and with the purchaser made the election to treat the transaction for federal income tax purposes as a deemed asset sale under IRC §338(h)(10). The Tribunal held that the federal election had no effect on the treatment of the stock sale as a nontaxable sale of an intangible asset for purposes of allocating a nonresident’s income to New York.

##### **Installment Obligation** – In *Matter of Mintz* (ALJ June 4, 2009), the ALJ determined that income received by nonresident shareholders of a New York S-Corporation pursuant to an installment obligation was a nontaxable intangible asset. The payments were distributed to the shareholders upon the corporation’s liquidation after the corporation had received the payment in exchange for its assets. The ALJ found that the income did not “make the cut” as New York source income.

##### **Co-Op Shares** **- The** Tax Law was amended to treat certain sales of shares in New York cooperative housing units as taxable sales of real property that are sourced to New York. Effective date is January 1, 2004. N.Y. Tax Law § 631(b)(1)(E); TSB-M-04(5)I. The nonresident must estimate the amount of income tax due on the gain and remit the tax to the Commissioner within 15 days of the delivery of the instrument effecting the disposition of the stock. *See* IT-2664.

### Services Performed Wholly in New York - When a nonresident earns compensation for services performed wholly in New York State, the nonresident’s entire compensation is subject to New York’s personal income tax. 20 NYCRR § 132.4(b).

### Services Performed Wholly Outside of New York - When a nonresident earns compensation for services rendered wholly outside of New York, none of the compensation is subject to New York State income tax. 20 NYCRR § 132.4(b). *See also* *Matter of Kumar* (ALJ May 6, 2010) (even though employer had NY sales office, taxpayer did not spend any days working from NY).

### Services Performed Partly Within New York - When a nonresident earns compensation for services performed both within and without New York State, the nonresident must allocate his or her earnings based upon a ratio that the number of days worked in New York bears to the total number of days worked both within and without the State. 20 NYCRR § 132.4(b) & 132.18(a).

### Directors’ Fees: Fees should be allocated separately from other income based on the number of board meetings attended in New York divided by the total number of board meetings everywhere. The 2009 Allocation Guidelines reiterate that the basis for allocated fees should be actual board meetings attended and not days spent in preparation of the meeting.

### Partnership Income: Nonresident partners are taxed on their distributive shares of partnership income to the extent they are connected with New York sources based on the partnership’s NY business allocation percentage. In *Matter of Tosti* (ALJ July 1, 2010), the ALJ recently upheld the rule that a nonresident non-equity partner, even if he is a “glorified employee,” must allocate his guaranteed payments from a New York law firm using this rule, so long as he holds himself out as a partner.

### *Matter of Siegel* (ALJ August 18, 2011): A resident taxpayer gifted shares of Blimpie stock to his nonresident wife in anticipation of the sale Blimpie. The issue was whether the taxpayer owed income tax on the gain from the sale of the stock. The ALJ determined that the transfers of stock from husband to wife lacked economic substance, because they were merely a conduit for shielding the gain from New York tax, and thus were invalid for tax purposes. The ALJ relied on correspondence between husband and wife to conclude that there was no separation of legal title from economic enjoyment of the benefits of the stock sale. The taxpayer’s briefs to the ALJ had also focused the issue of assignment of income. However, the ALJ ignored that issue and focused solely on the issue of the economic substance of the transactions.

## **The Convenience Rule**

### Generally - Nonresidents who work for a New York employer must treat days worked outside of the state as New York work days if the taxpayer worked outside of New York for his or her convenience.

## *Does Not Apply Where Work Performed Outside of New York Due to Necessity* - If the employer requires the employee to perform services out of state and the nature of the services are such that they cannot be performed in New York, then the convenience rule does not apply.

### It’s OK to Double Tax- The convenience rule is not unconstitutional, even though it can create double taxation. *See Edward and Doris Zelinsky v. Tax Appeals Tribunal* (2003) regarding a law school professor who taught in New York three days a week and worked at home the rest of the time. According to the Court of Appeals, a taxing scheme is not unconstitutional simply because a taxpayer can be taxed twice on the same income. Note:  On April 26, 2004, the United States Supreme Court denied certiorari. The new 2009 Allocation Guidelines highlight this case as support for the convenience rule.

### A Double Standard?- *See Maxine Allen v. Commissioner of Labor* (July 2, 2003) where New York’s highest court denied an unemployment insurance claim by a Floridian who telecommuted from her home for a New York employer. Apparently, it is only New York income for purposes of paying New York tax, not receiving New York unemployment benefits.

### Applies to Distant Employees Also- In *Huckaby v. New York State Division of Tax Appeals* (2005) the convenience rule was applied to a Tennessee resident (non-commuter) who only spent 25% of his time in New York. Unlike *Zelinsky*, the Tax Department could not argue that the taxpayer was only paid to work in New York and chose to work at his home. Huckaby was paid to work at home. Unfortunately, it did not matter, though the Court indicated that constitutional infirmities may exist if the nonresident commuter were to perform services in New York for only a “trivial” number of days. The United States Supreme Court denied certiorari. For more background, *see* *Faber*, State Tax Notes, April 25, 2005 – *Divided New York State Tax Court of Appeals Applies Convenience of Employer Test to Telecommuter*.

### You Could Have Not Worked in NY Also- In *Louis & Florence Friedman* (TAT March 2, 2000), an ALJ found that no work done in or out of New York could be characterized as “wages” performed in both jurisdictions.

### It Even Applies if the Taxpayer Doesn’t Have an Office- In *Unterweiser* (TAT July 31, 2003), a taxpayer’s New York desk job was eliminated and she was only allowed to continue to work if she stayed at her home and telecommuted. In spite of the fact that she had no office available to her in New York, the Tax Appeals Tribunal held that the convenience rule applied. Similarly, in *Kakar* (Small Claims, February 16, 2006), inadequate work space and the need for privacy were not sufficient to demonstrate that the taxpayer’s work-at-home office in New Jersey qualified as non-New York days.

### And Then There Was Devers- However, in *Devers* (ALJ May 5, 2005), a taxpayer was able to allocate days worked at home where the employer required the taxpayer to work out of his home.

### Exception- Note that wages will not be allocated to New York (under the convenience test) even if the individual continues to be employed by his New York-based employer, if he performs no services in New York. *Friedman* (ALJ June 27, 2002). *See also* *Lopez, Edwards, Frank & Co., LLP*, TSB‑A‑99(4)I. The 2009 Allocation Guidelines also now state this rule.

### Reverse Convenience- *Zelinsky* (supra) discusses New York’s unstated “reverse convenience rule.”

### Possible Legislation- In 2005, legislation was introduced in the United States Senate to prohibit a state from taxing an individual taxpayer in the absence of physical presence. S.2588 (Sen. Dodd & Lieberman). *See* “Telecommuter Tax Fairness Act of 2005: Restoring Balance to State Taxation of Telecommuters,” Tax Foundation (January 31, 2006). The legislation was reintroduced in 2007 and again in 2009.

### Departmental Guidance - New York has issued rules somewhat ameliorating the tax impact of its treatment of nonresidents who work out of their homes. This guidance was issued on May 15, 2006 and is effective for tax years beginning on or after January 1, 2006. See TSB-M-06(5)I. It allows an employee to allocate days worked at home if they satisfy either (1) the primary factor or (2) four out of six secondary factors plus three out of ten other factors. The factors are as follows:

## *Primary Factor* -The home office contains or is near specialized facilities.

## *Secondary Factors* - (1) the home office is a requirement or condition of employment; (2) the employer has a bona fide business purpose for the employee’s home office location; (3) the employee performs some of the core duties of his or her employment at the home office; (4) the employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office; (5) the employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business; (6) the employer reimburses the expenses of the home office.

## *Other Factors* - (1) the employer maintains a separate telephone line and listing for the home office; (2) the employee’s home office address and phone number is listed on the business letterhead and/or business cards of the employer; (3) the employee uses a specific area of the home exclusively to conduct the business of the employer (and has a separate living area); (4) the employer’s business is selling products at wholesale or retail and the employee keeps an inventory of the products or samples in the home office; (5) business records of the employer are stored at the home office of the employee; (6) the home office location has a sign indicating a place of business of the employer; (7) advertising for the employer shows the employee’s home office as one of the employer’s places of business; (8) the home office is covered by a business insurance policy or by a business rider to the employee’s homeowner insurance policy; (9) the employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes; (10) the employee is not an officer of the company.

## **Post-Employment Compensation**

### Federal Legislation- New York’s regulations do not reflect P.L. 104-95, which prohibits the states from taxing most “retirement income.” Rather, the regulations indicate that certain retirement income (attributable to New York services) is taxable unless it constitutes an “annuity” as defined by the New York Tax Law. The federal legislation takes precedent. Note that nothing in the federal rules prohibits New York from taxing the retirement income of its own residents. *Osborne*, ALJ (June 23, 2005).

### Payments to Retired Partners - In TSB-M-06(3)I, New York’s Audit Division had taken the position that payments made to a nonresident retired partner pursuant to a nonqualified retirement plan would not be exempt under Public Law § 104-95. The Audit Division had concluded that a nonqualified plan payment is exempt under P.L. 104-95 only if paid to an *employee*. An ALJ had previously held that such payments were exempt from tax since, once retired, the taxpayer was no longer a partner. *McDermott* (ALJ February 2, 2006).

### Public Law § 109-264 - Following New York’s issuance of TSB-M-06(3)I, federal legislation was adopted to prohibit the states from taxing nonqualified retirement payments to retired or retiring partners. The law was adopted to “clarify” the intent of Congress to exempt such payments under Public Law § 104-95.

### Annuities - New York still has an annuity rule that exempts certain payments to nonresidents. In order to qualify, the plan must be in writing and the benefits must be: (1) paid in cash (not securities); (2) payable at a certain rate; (3) paid in equal annual installments over a period of at least ½ of the recipient’s life expectancy. 20 NYCRR § 132.4(d).

### Termination/Severance Pay- While consideration for the relinquishment of future employment may not constitute New York source income, payment relating to past New York services is sourced to New York. *Evans* (ALJ 1998).

## *The Regulations*- According to the regulations, termination pay is allocable to New York based on New York compensation over total compensation for the year of retirement plus the preceding three years. 20 NYCRR § 132.20. The regulations have not been amended to reflect case law rulings, which have held that certain termination payments are not allocable to New York.

## *The McSpadden Exception* - In *Matter of McSpadden*, TAT (Sept. 15, 1994), the Tribunal held that termination pay granted to a nonresident employee does not constitute New York source income if it was paid to buy out the remainder of the employee’s employment contract.

##### **Must Show a Right to Future Employment** - a taxpayer must show they had a right to future employment and that they were not an employee at will. *Morgan* (ALJ May 22, 2003); *see Martin Davis* (ALJ January 14, 1999). *See also Donahue v. Chu*, 104 AD2d 523 and *Gordon*, TSB‑A‑00(7)I.

##### **Does it Have to Be in Writing?** - the Department says yes. In order to qualify for severance payment exclusion, the terminated taxpayer must have had a written employment contract. *Braun*, TSB-A-05(2)I. This does not comport with the holding in *Matter of Brophy*, Tax App. Trib. (Dec. 7, 1995). Moreover, *Matter of Davis*, ALJ (Jan. 14, 1999) says that a separate written termination agreement is not required.

## *Paid But No Work Performed* - Compensation paid to an employee in a year where he did not perform any services represents compensation for past services and must be allocated using the year prior to retirement and the three immediately preceding years. Commissions received from a particular year that were deferred from one year to another are taxable by New York based on the ratio of days worked in New York over the total work days for the year in which the bonus was generated. *Braun*, TSB-A-05(2)I

### Non-Compete Payments- Though the regulations state that non-compete payments made to nonresidents are taxable by New York, the case law has held otherwise. In *Matter of Colitti*, TAT (June 19, 2003) the Tribunal held that the stock option income of a nonresident was not subject to New York tax because the taxpayer’s right to receive the income was contingent on a covenant not to compete. The 2009 Allocation Guidelines recognize that compensation in exchange for a covenant not to compete is generally not taxable to a nonresident so long as an auditor can determine whether the income is truly for the covenant and not for past services. Auditors are advised to analyze the entire contract or agreement to determine whether “the consideration attributable to each clause is taxable to New York.”

## *Must be More Than Mere Window Dressing* - Stock option and incentive awards represented compensation for services rendered, at least partially, in New York. The non-compete clause did not render the payment nontaxable. *Matter of Colitti* is distinguishable. *Clapes*, TAT (Jan. 6, 2005), *aff’d* at 825 N.Y.S.2d 168 (3d. Dep’t 2006). The Court of Appeals recently refused to consider the *Clapes* case on appeal.

### 2010 Changes to Termination Pay to Nonresidents: The legislature carried through with its amendment to Tax Law §631(b)(1)(F), which upends the Tribunal’s holdings in *McSpadden* and *Colitti* by expanding the definition of “New York Source income” for nonresidents to include income from a termination agreement, a covenant-not-to-compete, or other (non-retirement) income “related to a business, trade, profession or occupation previously carried on within the state, whether or not as an employee.” The change applies to income received on or after January 1, 2010, even if the contact or agreement was entered into in a previous year. The income is to be allocated to New York based on a fraction of the New York source income for the year of termination and the three previous tax years over the total income received during that period.

## **2009 Nonresident Allocation Guidelines: Changes to Audit Techniques**

### Similar to the 2009 Nonresident Audit Guidelines, the new Allocation Guidelines advise auditors that if taxpayers have not provided requested information, the auditor may consider serving a subpoena on a third-party, such as an employer, or on the taxpayer herself.

# **UPDATES FOR RESIDENT AND NONRESIDENT TRUSTS**

## **Definition of a Resident Trust** – Under Tax Law §605(b)(3), a resident estate or trust is defined as one of the following:

### The estate of a decedent who was domiciled in New York at death;

### A trust consisting of property transferred by the will of a decedent who was domiciled in New York at death; or

### A trust consisting of the property of a) a person domiciled in New York at the time the property was transferred to the trust, if the trust was then irrevocable or if it was revocable and has not since become irrevocable; or b) a person domiciled in New York at the time the trust became irrevocable, if it was revocable when the property was transferred to the trust but later became irrevocable.

## **New York Tax Obligations of a Resident Trust** – Under Tax Law §605(b)(3)(D), a resident trust is not subject to tax if all of the following conditions are satisfied:

### All trustees are domiciled in a state other than New York;

### The entire corpus of the trust is located outside of New York; and

### All income and gains of the trust are derived from or connected with sources outside New York, determined as if the trust were a nonresident trust.

## **What about Corporate Trustees?**

### In a 2003 New York County Surrogate’s Court case involving a trust created by William Rockefeller (773 N.Y.S.2d 529, 2003 N.Y. Slip Op.), the Court refused the trustee’s request to change the situs of the trust from New York to Delaware, despite the fact that the Court had previously granted a request for a change of the corporate trustee from a New York to a Delaware corporation. The Surrogate’s Court held that unless there were benefits to the trust from a change of situs other than tax benefits, such applications would be denied.

### And a 2004 advisory opinion (TSB-A-04(7)I) issued to JP Morgan Chase Bank, the successor trustee for five irrevocable trusts created by John D. Rockefeller Jr., states that the domicile for purposes of determining whether the trust is subject to New York tax under Tax Law §605(b)(3)(D) is not the state of incorporation of the corporate trustee but the domicile of the individuals who direct the corporate trustee. In this case, the individuals serving on the Committee that had decision-making power over the assets of the trusts would be treated as co-trustees and thus it was the domicile of these individuals that determined the New York tax obligations of the trusts. The advisory opinion also left open the question of whether other individuals providing investment advice or management services to the trusts could be considered co-trustees as well.

## **New Filing Requirements of a Resident Trust Not Subject to Tax** – Under prior Departmental policy (TSB-M-96(1)I), a resident trust that met the conditions above and was not subject to tax, was also not required to file a return. But effective for tax years beginning on or after January 1, 2010, this policy is revoked. Under the new policy outlined in TSB-M-10(5)I, a resident trust must file a New York fiduciary income tax return if the trust:

### Is required to file a federal return for that year;

### Had any New York taxable income for the year;

### Had tax preference items for minimum income tax purposes in excess of the specific deduction; **or**

### Is subject to a separate tax on lump-sum distributions.

## **2014-2015 Executive Budget – Proposal to Close the Resident Trust Loophole**

### Governor Cuomo’s Executive Budget for Fiscal Year 2014-2015 seeks to amend the Tax Law regarding the taxation of trusts in two respects:

### Distributions of accumulated trust income would be taxed to New York beneficiaries of nonresidents trusts and exempt trusts; and

* + - 1. Incomplete gift, non-grantor trusts set up by New York residents would be subject to New York income tax.

### The bill would also tax New York beneficiaries of nonresident trusts and exempt resident trusts on the accumulated income of the trusts when the income is distributed to the beneficiary. In addition, the income of an ING trust established by a New York resident would be included in the current income of the grantor.

## **2010 Higher New York City Resident Tax Rates**

### Effective for tax years beginning after 2009, New York City residents face a new tax rate applicable to income in excess of $500,000:

### *Married filing jointly, qualified widow(er), or head of household*: $18,028 plus 3.876% of the excess over $500,000.

### *Single, married filing separately, or estates and trusts*: $18,122 plus 3.876% of the excess over $500,000.

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