



Residency Rules in New York

Tax Issues and Audits



Presented by

Timothy P. Noonan, Esq.

Summary of Topics

- Section 1: Overview of New York Residency Rules, Part 1: Domicile
- Section 2: Overview of New York Residency Rules, Part 2: Statutory Residency
- Section 3: Residency Audits: Nuts and Bolts Issues

Section 1

Overview of New York Residency Rules, Part 1: Domicile

Domicile

- Importance of Residency Status
 - The One Thing
- The Two Residency Tests
 - Domicile
 - “Statutory” Residency
- Exceptions to Domicile
 - The 30-Day Rule
 - The 548-Day Rule

Domicile

What is it?



Domicile

- “Leave and land”
- Burden of proof issues
 - The *Jeter* case
- Looking for a “lifestyle change”
- Examples
 - Typical snowbird
 - Retirement
 - Upsizing and downsizing
 - Health issues



Domicile

🌐 The 5 Domicile Factors



- Home
- Business
- Time
- Near and Dear
- Family

🌐 The “Other” Factors



Polling Question #1



What do you think is the most important domicile factor?

- Home
- Business
- Time
- Near and dear
- The “other” factor
- Tim, this is a stupid trick question

Domicile

🌐 The HOME Factor

- Comparing size, value, etc.
- Keeping the historical home?
- Transferring title?

🌐 The BUSINESS Factor

- What you do, not just where you do it
- Focus on active business ties



Domicile



🌐 The TIME Factor

- NOT the 183-day test!
- Looking for a change in patterns
- Less days in NY than claimed domicile state
- Not as important in “commuter cases”; quality, not quantity

Domicile

● The NEAR AND DEAR Factor

- Where's your teddy bear?
- Use of pictures
- Moving bills/insurance



Domicile

🌐 The FAMILY Factor

- The Presumption: Dinner time at the Noonans'
- Separate Spousal Domicile

🌐 The OTHER Factors

- Best Offense is a Good Defense
- Planning Considerations

🌐 Bringing it “Home”

- Focus on Big Picture, Lifestyle Factors



Domicile

Foreign Domicile Changes

Matter of Taylor (TAT, December 8, 2011)

- Insufficient evidence that taxpayer “landed” in UK

New Audit Guidelines

- “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.”

Domicile

Other Factors Considered

- 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
- The filing of tax returns as a resident of the foreign country
- Whether or not a taxpayer acquires citizenship in the foreign country is generally a non-factor

Domicile

Foreign Domicile Changes

- *Matter of May* (ALJ, January 8, 2015)
 - Taxpayer moved to UK to begin career with new employer under “unlimited duration” employment contract
 - Taxpayer was not a native NYer
 - Taxpayer was treated as a UK-based employee; not expat
 - ALJ found taxpayer established new domicile in UK even though he ultimately returned to NY after audit period

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webinar.

residency

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Section 2

Overview of New York Residency Rules, Part 2: Statutory Residency

Statutory Residency

● The Statutory Residency Test

- 183 days + a “PPA”
- It trumps domicile
 - i.e., Oct 2013 domicile change

● Double Tax **NOT** Unconstitutional (2014 *Noto* Case)



Statutory Residency

Factor #1: Day Counting



- A “day” in New York: a minute is a day
 - *Matter of Zanetti* (TAT, Feb. 2014): Part of a day is still a day
 - The *Julian Robertson Case* (see attached article)

Statutory Residency *Day Count Records*

Credit card
statements

ATM usage

Personal
diary

Outlook
calendar

Flight records
(frequent
flyer reports)

EZ Pass

Limo logs

Landline
phone

Cell phone
logs

IP address?

Travel
itineraries

Swipe Card
records

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Statutory Residency

Factor #2: A ‘Permanent Place of Abode’

- Type of dwelling
- The “11-month” rule
- Habitability issues



Statutory Residency

Issues in Recent Audits/Litigation

● Issues in Recent Audits/Litigation

- *Knight*: Girlfriend/company apartment
- Barker: A vacation home?
- Other people's usage
- Non-usage or minimal use

● Does “Relationship” Matter?



February 2014 *Gaied* Case

NY's High Court Speaks

Facts

- NJ resident, worked in NYC (Staten Island)
- Owned 3-unit apartment building in Staten Island, near workplace
- 2 units generally rented
 - 1 for parents
- Taxpayer paid all bills; stayed occasionally when parents needed assistance

February 2014 *Gaied* Case

NY's High Court Speaks

Gaied I & II

- TAT originally says not his place
 - “relationship” does matter
- Tribunal changed mind and reversed itself, saying “property rights plus suitability” is enough
- Upheld on initial appeal, but with a Dissent

February 2014 *Gaied* Case NY's High Court Speaks

Oral Argument
Before NY High Court
(see video clip)

What's Point
of the Law?

“It Just
Doesn't Make
Sense!”

What's the
Right Test?

February 2014 *Gaied* Case

NY's High Court Speaks

- Court's Decision (see copy of case and article attached)
 - Intent of law
 - Taxpayers who “really are residents”
 - In order to be statutory resident, taxpayer must use an abode “as a residence”
 - Must have “residential interest”

February 2014 Gaied Case

NY's High Court Speaks

- New June 2014 Audit Guidelines
 - *Gaied* is consistent with current audit policy (Really?)
 - New Examples: incorporating the “residential interest” test, *sort of ...*
 - Prior Guidelines were just fine
 - See attached Noonan’s Notes article: “NY Tax Department Response to Gaied Misses the Mark” (July 21, 2014)

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domicile audit



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Return in 5 Minutes



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Section 3

Residency Audits: Nuts and Bolts Issues



Polling Question #2



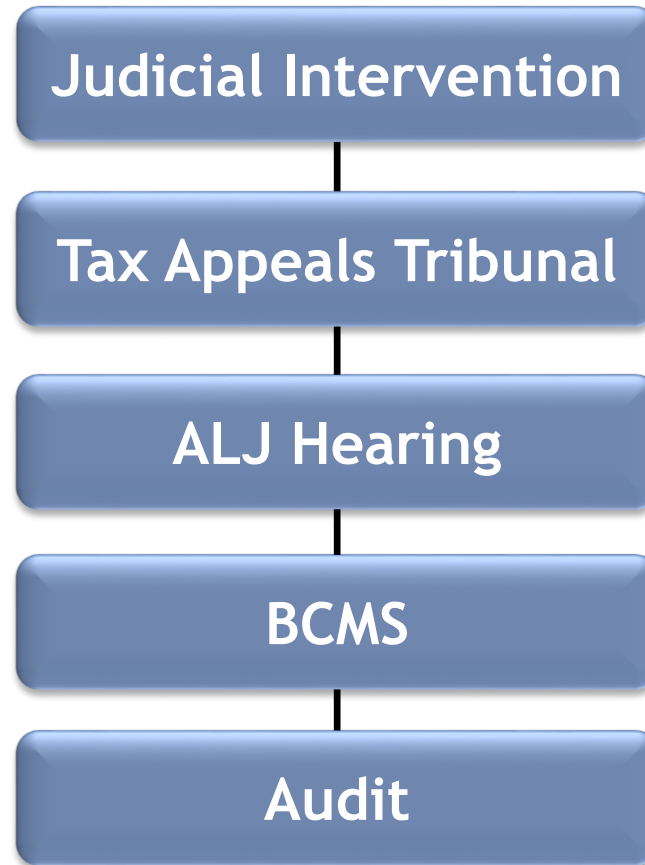
How many nonresident audits does NYS do each year?

- 1,000
- 3,000
- 5,000
- 10,000

Residency Audits

Nuts and Bolts Issues

Overview of the System



Residency Audits

Nuts and Bolts Issues

Year of residency change – almost automatic

Substantial difference between federal and state

Answer to “living quarters” question

Number of days in NY on return

NY addresses reported on a Form 1099 or K-1

Cross-check with real property records

Any STAR or NYC parking exemptions

Past audit history

All press is not good press

Audits of related parties, partners, etc.



Residency Audits

Nuts and Bolts Issues

First steps in process – Audit Phase

- Initial IDR

- Nonresident questionnaire
- Summary of residence and employment
- Federal audits

Residency Audits

Nuts and Bolts Issues

- IDR #2

- Domicile stuff

Property records

Employment agreements

Utilities

Insurance policies

- Day count stuff

Cell phone

Credit cards

Calendars

Swipe cards

- Other stuff

Bank statements

Cancelled checks

- Remaining IDRs – Case Specific
- Meetings, calls, Up-the-Chain, etc.

Residency Audits

Nuts and Bolts Issues

Appeals Process

- BCMS

- Does it make sense?
- Conduct of hearing

- ALJ

- Continued (and often more productive) settlement talks
- Live hearing – the power of testimony

Residency Audits Nuts and Bolts Issues

Is that it?



New York Residency and Allocation Audit Handbook

by Paul R. Comeau, Esq., Mark S. Klein, Esq., and Timothy P. Noonan, Esq.

2014 EDITION

New York Residency and Allocation Audit Handbook

PAUL R. COMEAU, ESQ.
MARK S. KLEIN, ESQ.
TIMOTHY P. NOONAN, ESQ.



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In this updated edition of *New York Residency and Allocation Audit Handbook*, noted tax practitioners Paul R. Comeau, Mark S. Klein, and Timothy P. Noonan provide a comprehensive overview of all the issues a taxpayer can expect to see if he finds himself in the unfortunate position of being subject to a nonresident personal income tax audit.

Topics covered include:

- A detailed overview of New York's residency rules, using New York's recent Audit Guidelines as a guide
- A discussion of nonresident income allocation issues, looking at allocation issues addressed in New York's Allocation Guidelines
- A nuts and bolts discussion of what a taxpayer can expect in a residency audit and, if possible, how to avoid an audit in the first place
- An expansive discussion of New York State's penalty and enforcement issues
- A discussion of the withholding tax guidelines issued by the Tax Department with guidance and advice to employers on how to deal with withholding tax issues for residents and nonresidents alike

Also included is an extremely useful state-by-state guide addressing a variety of residency and audit questions and issues arising in every state in the nation. This summary provides a useful tool for taxpayers to understand the highlights of residency issues in all states. Helpful Appendices reproduce New York's residency and allocation guidelines, and provide excerpts from the withholding tax guidelines.

Pub. Dec 2013. 472 pages.

Put the Experts on Your Team

Paul R. Comeau, Esq. has practiced New York law since 1974 and Florida law since 1975. He lectures frequently throughout the United States on tax topics of importance to business executives and high-net-worth individuals. Mr. Comeau is an editor of CCH's *New York Tax Analysis* and has also coauthored *Contesting New York State Tax Assessments* and the New York chapter of the *Sales and Use Tax Handbook* published by the American Bar Association. Mr. Comeau's articles have appeared in many national tax publications. He is listed in *The Best Lawyers in America* (Tax Law and Trusts and Estates); *The New York Area's Best Lawyers, 2008-2010* editions (Tax Law and Trusts and Estates) and *Super Lawyers* (Tax); and was the recipient of the 2004 Burton Award for excellence in legal achievement.

Mark S. Klein, Esq. is a partner at Hodgson Russ LLP, where his practice is concentrated in New York State and New York City tax matters. Mr. Klein is contributing editor of CCH's *Guidebook to New York Taxes*; co-author of *Contesting New York Tax Assessments* and the ABA *Sales and Use Tax Desk Book*; co-author of CCH's *New York Sales and Use Tax Answer Book*; the general editor of *LexisNexis Tax Practice Insights: New York*; former member, Board of Advisors, *The Journal of New York Taxation* (Faulkner & Gray); and member of The CPA Journal Editorial Review Board. Mr. Klein is chair of the State and Local Taxation Section of Accountants' Continuing Education (ACE) Accounting Society.

Timothy P. Noonan, Esq. is a partner at Hodgson Russ LLP, where his practice focuses on New York State and City tax controversy work and litigation. He lectures frequently on New York State and multi-state tax matters across the country and is the author of a monthly column in *State Tax Notes*, a national multi-state publication, entitled "Noonan's Notes on Tax Practice." He is also a contributor to Lexis.com's Tax Center, the general editor of *LexisNexis Tax Practice Insights: New York* (2009 edition), and a contributing author to the CCH *New York Sales and Use Tax Answer Book*. In February 2011, Mr. Noonan was featured on the front page of a New York Times story on residency issues. Over the years, Mr. Noonan has been quoted in *Fortune Magazine*, *The Wall Street Journal* and other publications on cases and issues in the residency area.

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CONCLUSION

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Kathleen K. Wright
CPA, J.D., LL.M., M.B.A.

Friday, May 15, 2015