

## **An Open Letter to Massachusetts Residents: Here's How to Move!**

**by Timothy P. Noonan and Katherine Piazza McDonald**

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In this installment of Noonan's Notes, Noonan and McDonald provide some guidance on how to make the move to lower-tax states.

Dear Massachusetts Resident:

It's been a while since we last connected, and we wanted to check in to see how you are doing. We can't imagine how tough it's been to watch your once-powerful football team ceding the AFC East crown to the upstart team from upstate New York, especially since that same team ousted you from the playoffs the past two years. We know it hurts. But worse, while you haven't been able to keep up with your New York counterparts on the football field, your state (or commonwealth, sorry) is catching up to New York in another way: with its tax rates. As you probably know, last November your fellow Massachusetts voters approved a constitutional amendment that does away with the state's flat income tax system and imposes an additional 4 percent tax on incomes

over \$1 million,<sup>1</sup> raising the overall income tax rate on affected taxpayers to 9 percent.

We're writing to you today, however, to let you know that you do have options. Indeed, in our tax practice we've seen firsthand how high tax rates can motivate taxpayers to seek greener, cheaper, and often warmer pastures. And through much trial, and thankfully little error, we've helped thousands of taxpayers make the move from high-tax states like New York and helped countless more defend themselves when audited by their former states. So in this letter, we're hoping to give you some guidance on how to make the move yourself. This is, of course, not legal advice; you'll have to engage us for the real thing. But hopefully this letter raises your spirits, lets you know that (with the exception of your football team) all is not lost, and that there is a way for you to address (and avoid) those new pesky high tax rates.

### Residency Rules: The Basics

Massachusetts's personal income tax functions similarly to New York's. It starts with the concept of residency. Every resident of Massachusetts is subject to the state income tax, and all their income is subject to that tax.<sup>2</sup> Nonresidents pay tax to Massachusetts only on Massachusetts-source income.<sup>3</sup> So an understanding of what makes an individual a resident of Massachusetts for tax purposes is key to this analysis.

Like many states, Massachusetts has two tests for determining whether an individual is a resident of the state for tax purposes: (1) statutory

<sup>1</sup> Mass. Articles of Amendment 44, Mass. Constitution Article XLIV, as amended by Ballot Question 1 of 2022 (approved Nov. 6, 2022).

<sup>2</sup> Mass. Gen. L. chapter 62, section 25.

<sup>3</sup> Mass. Regs. Code 830 CMR section 62.5A.1.

residency and (2) domicile. Statutory residency is a bright-line, objective test under which the taxpayer must meet both requirements of the test to be taxed as a Massachusetts resident.

To be taxed as a resident under the statutory test, an individual must (1) maintain a permanent place of abode in Massachusetts and (2) spend more than 183 days in the state.<sup>4</sup> This is generally a more mechanical, objective residency test, easy to understand and follow.

The domicile test is more subjective. A person's domicile is different from his or her residence. A person can have many places of residence but can have only one domicile.<sup>5</sup> Domicile is an individual's true, fixed, and permanent home, determined by established common law principles and the facts and circumstances of each case.<sup>6</sup> A domicile determination relies on an interpretation of an individual's subjective intent, which is a largely factual determination that takes into consideration many factors relating to a person's social, economic, and political life.<sup>7</sup> To determine a taxpayer's domicile, all the factual circumstances connected to the taxpayer's major life interests, including family, business connections, social activities, and healthcare, are examined.<sup>8</sup>

According to a release on the Massachusetts Department of Revenue's website, Massachusetts tax auditors will look at a number of factors to determine where a taxpayer is domiciled.<sup>9</sup> Important factors include whether the taxpayer has purchased or leased a home in the new location; where their personal items of value, active business connections, and bank accounts are located; and whether the taxpayer sold their home in Massachusetts, as well as more formal indicators like whether the taxpayer has a driver's license and is registered to vote in the new domicile.<sup>10</sup> If a taxpayer is audited, the DOR will

require that taxpayer to provide detailed information about time spent in Massachusetts over the past five years and time they expect to spend in Massachusetts and other locations in future years.<sup>11</sup> The DOR will also take a close look at a taxpayer's community, religious, and political ties.<sup>12</sup> In short, the taxpayer's entire life will be examined under a microscope, and the DOR will look to see whether there has been a dramatic shift in patterns away from Massachusetts and toward the new domicile.

It is also important to keep in mind that in a Massachusetts residency audit, the taxpayer bears the burden of proof as the party asserting the change of domicile. And the change in domicile must be supported by compelling evidence.<sup>13</sup> So if your claimed move to another state is a close call, you will probably lose.

### Residency Rules: The Cases

We didn't see a lot of residency litigation in the early 2000s, and it appears that no domicile cases were reported by the Massachusetts Appellate Tax Board (ATB) from 2003 to 2008. This changed in 2009 when the ATB released 11 domicile cases over the course of just a few years.

The first of these cases was *Williams*.<sup>14</sup> The taxpayers claimed a change of domicile to Florida in 2002 when they bought a house. But the husband continued working for a company in Massachusetts, both taxpayers voted in Massachusetts elections that fall, and the taxpayers stayed in Massachusetts to spend Christmas with their daughters. However, the court found that by 2003 the taxpayers had changed their domicile to Florida. At that point, their connections to Florida had strengthened because Mrs. Williams took a job with a hospital in Florida, the taxpayers registered to vote in Florida and did in fact vote in their new state, and they joined a local church in Florida, among other objective actions. The ATB found that even though the taxpayers continued to spend five

<sup>4</sup>Mass. Gen. L. chapter 62, section 1(f).

<sup>5</sup>Massachusetts Technical Information Release 95-7 (Jan. 10, 1996).

<sup>6</sup>Mass. Regs. Code 830 CMR section 62.5A.1(2).

<sup>7</sup>Massachusetts Technical Information Release 12-10 (Dec. 12, 2012).

<sup>8</sup>*Id.*

<sup>9</sup>Massachusetts Department of Revenue, "Learn About Legal and Residency Status in Massachusetts."

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Estate of Palmer v. Commissioner of Revenue, Massachusetts Appeals Court*, 56 Mass. Ct. App. 1110 (2002).

<sup>14</sup>*Williams v. Commissioner of Revenue*, Nos. C288160, C294635, C288161, and C294634 (Mass. App. Tax Bd. 2009).

months per year in Massachusetts, their connections to Florida had grown to the point that it was their true home.

Another case worth noting is *Brew*,<sup>15</sup> in which the taxpayer claimed a move from Massachusetts to Florida. The taxpayer took a new job in Florida but returned to Massachusetts two weekends per month to visit his wife and son, who stayed behind so as to not disrupt the child's education in Massachusetts. The ATB ruled against the taxpayer, finding that his employment and home in Florida did not outweigh his continued family connections in Massachusetts. Further, his "intent" to move to Florida full time was not credible considering his family did not move to Florida even after his son graduated from high school. This case represents a counterpoint to the takeaway from *Williams* — though the location of employment is an important factor, the locations of family and schooling of minor children are more significant.

In *Swartz*,<sup>16</sup> the taxpayer lost again. The taxpayers tried to move to Florida before a large capital gain event. They took care of various formalities, including changing driver's licenses and registering to vote, but these changes did not take effect before their capital gain event. More importantly, they split time between Florida and Massachusetts in a manner that was identical to their historic time patterns since the husband's retirement, which occurred years before the claimed move. This case further supports the notion that you need to show a dramatic change in life patterns to effectuate a change of domicile. Merely changing your formal documents and maintaining the status quo is patently insufficient to make this kind of move. As an additional note, if you're going to move before a large capital gain event, better to give yourself plenty of runway to actually effectuate the move. Changing your domicile takes time and planning, and really cannot be done on a whim!

It's not all bad news, though. In *Evans*,<sup>17</sup> the taxpayers successfully convinced the ATB that they moved to Florida. Before their move, the taxpayers were longtime residents of Massachusetts. During the audit period, they maintained three residences in Florida, Boston, and Nantucket, and they spent at least 150 days in Massachusetts each year of the audit period. But the taxpayers asserted that they needed to change domicile to Florida following Mrs. Evans's diagnosis with multiple sclerosis. They were able to provide plentiful proof of the transition of their social and civic lives to Florida. And they could prove that a large number of their trips back to Massachusetts were for either vacation or medical reasons. The detailed day counts provided by the taxpayers were key to helping them win this case. Their credibility was bolstered because they had supplemented and reinforced their position that Florida was their true domicile.

### A How-To Guide to Moving

We know we promised at the beginning of this letter to give you some tips on how to move, so here it goes.

First, let's start with the obvious. As the discussion above illustrates, moving out of Massachusetts involves a lot more than changing your driver's license or registering to vote. And it involves more than just spending "six months and a day" outside Massachusetts. If you want to move out of Massachusetts, you have to actually move. We must be able to show actual changes in your day-to-day living patterns, and we have to be able to point to specific facts and circumstances that indicate a new life and lifestyle in your new state. To put this another way, we once had a client respond to this advice by saying, "OK, I get it. To move to Florida, I actually have to *move to Florida!*"

On the other hand, as the cases above illustrate, you don't have to cut every single tie to Massachusetts and never set foot there again. You are allowed to keep a place in the state, to visit the state, to have some ties to the state, and so forth. Ultimately, it's all about balancing the facts and factors in the new locations against the facts and

<sup>15</sup> *Brew v. Commissioner of Revenue*, No. C293965 (Mass. App. Tax. Bd. 2010).

<sup>16</sup> *Swartz v. Commissioner of Revenue*, No. C287671 (Mass. App. Tax. Bd. 2010).

<sup>17</sup> *Evans v. Commissioner of Revenue*, Nos. C298827 and C310439 (Mass. App. Tax. Bd. 2013).

factors in Massachusetts. We just have to make sure that the balance heavily tilts toward your new home state, being mindful that we have the burden of proof and that such proof needs to be clear and convincing.

With that background, here's a punch list of the kinds of things we'd like you to be thinking about as you plan your move:

- **Housing:** The first thing you must keep in mind is a comparison between your home(s) in Massachusetts and your home in your new state. Is the new place in Florida bigger, more expensive, and so forth? Did you downsize in Massachusetts, or did you keep your long-standing historical home where your kids were raised? Again, as noted above, all things really are on the table here. It's about balancing factors. But in the ideal scenario, we'll see a change in the taxpayer's housing situation, such as downsizing in Massachusetts and upsizing or purchasing a brand-new place in Florida.
- **Businesses:** Active business ties are generally the focus of the "business factor" analysis. Are you still tied to a business in Massachusetts? Do you have to return there often for work purposes? Or have you been able to establish a new business down in Florida, or open up a new office location? Passive investments and the like generally don't factor in here, but keep an eye on the more active business ties.
- **Time:** When thinking about your move, we urge you not to underestimate the importance of the time factor. As noted above, changing a residency requires an actual change in your living patterns. Plus, a domicile analysis is focused on where the taxpayer's primary home is located. In our experience, the best way to prove the location of your primary home is to focus on how much time you are spending in your different homes. For example, if a taxpayer is spending more than half the year in Florida and less than half that time in Massachusetts (that is, a 2-1 ratio of Florida-to-Massachusetts time), that's pretty good evidence that Florida has become that taxpayer's primary home. Often this factor is strengthened when the living patterns

have changed significantly from one year to the next.

- **Possessions:** It's also important to keep in mind where your "stuff" is. It's usually good to have moving bills evidencing the move of at least some possessions from your old home to your new home. In many cases, we see taxpayers who want to keep a place in Massachusetts and therefore need beds, furniture, and so forth. Plus, their home in Florida is or has been furnished already, based on a style more appropriate for a Florida home. That's okay, but it's still helpful to show the movement of some personal items, often referred to as "near and dear" items, to show the change in lifestyle and overall living pattern.
- **Family:** This is most relevant regarding spouses and minor children; normally you would maintain the same domicile as your spouse, and if you're a good parent, you'll live in the same state where your kids go to school. Other familial ties, such as extended family and relatives, also sometimes come into play, but their location is less important in a residency determination.
- **Other Stuff:** Then there's a whole checklist of other things that come up, which perhaps affect overall living patterns less but still indicate where someone's true "home" is located. Here we're talking about things like bank accounts, driver's license, motor vehicle registration, membership in churches and clubs, and community involvement, among others. So when moving, be mindful of these things too. Of course, don't base your whole case on these "other factors," but it's good to be mindful of them to help provide more incidental evidence around the move.

In closing, we wish you well on your future endeavors. It takes some courage to pack up, move to another state, and change up your life. But also know that it takes careful planning and good legal guidance. So if that 9 percent tax rate is really bugging you, know now that you have options. Good luck in the future, and go Bills!

Very truly yours,  
Tim and Katie

