

Farewell 2019, Hello 2020!

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A Lot of 'Huge' Audits to Look Forward To?



Timothy P. Noonan

Timothy P. Noonan is a partner in the Buffalo and New York City offices of Hodgson Russ LLP.

As 2019 fades into 2020, we bid at least a temporary farewell to the post-*Wynne* challenges to New York's double tax on dual residents. This is, in fact, a personal farewell for me, having

represented the two taxpayers who had the courage and fortitude to take on such a noble effort. The taxpayers in *Chamberlain*²⁸ and *Edelman*²⁹ argued that New York's statutory residency taxing scheme, which subjected taxpayers who qualified as dual residents of New York and Connecticut to double taxation, was unconstitutional and in violation of the commerce clause.

The cases, which were covered extensively this past year in this and other publications,³⁰ were grounded in the Court's 2015 decision in *Wynne*,³¹ when the Court made clear the protections of the commerce clause extended to individual income taxes, and that the commerce clause could be used to protect in-state residents from discriminatory or burdensome state taxation. After a long fight through the New York courts, the cases reached their pinnacle this year, getting all the way to the doorstep of the Supreme Court, after our petition for certiorari was filed in June.³² Unfortunately, and despite significant support both from the practitioner community as well as from five outside organizations that filed amicus briefs, the

Court denied cert in early October. This leaves intact, for now, what many believe is at least an unconstitutionally discriminatory and burdensome double taxation regime in New York. And long term, the New York decisions could have the more nationwide ripple effect of limiting the impact of the dormant commerce clause analysis applied by the court in *Wynne*.

As for what's on the horizon in a 2020 state tax world, I envision audits. And lots of them, particularly in the personal income tax space. One of the least technical but most publicized provisions of the Tax Cuts and Jobs Act was the significant limitation put on a taxpayer's ability to deduct state and local taxes as itemized deductions. As many blue-state politicians predicted, it has been widely reported that this one change alone has caused many a taxpayer to reconsider their life decisions and seek safe haven in states like Florida, Nevada, Tennessee, or New Hampshire.³³ Are such changes merely weather-related?³⁴ Not likely. The near-elimination of the SALT deduction seems more like the straw that broke the camel's back, leading taxpayers to realize that the best way to limit the impact of the elimination of the SALT deduction is to simply eliminate their SALT all together. We've seen this in our own practice anecdotally, and we can expect that 2020 will bring significant enforcement efforts by states like California, New York, Connecticut, and maybe even New Jersey, seeking to audit all those nonresident or part-year resident 2018 returns that were likely filed a couple months ago.

I certainly know of one nonresident tax return that the New York tax department will be especially interested in auditing!³⁵ So as the calendar turns to 2020, a new and potentially explosive audit season could be on the horizon.

²⁸ 166 A.D.3d 1112 (3d Dept. 2018), 104 NYS3d 550 (2019).

²⁹ 162 A.D.3d 574 (1st Dept. 2018), 98 NYS3d 759 (2019).

³⁰ There were around 20 articles in this publication, just in the past year on the cases. See, e.g., Edward Zelinsky, "Wynne and the Double Taxation of Dual State Residents," *Tax Notes State*, Apr. 1, 2019, p. 31. Jennifer Carr, "New York Can't Ignore *Wynne* Forever," *Tax Notes State*, Feb. 18, 2019, p. 571. Andrea Muse, "Court Rejects Challenge to Credit Denial," *Tax Notes State*, Apr. 1, 2019, p. 72. Muse, "Appellate Court Rules No Credit for Taxes Paid on Intangible Income," *Tax Notes State*, July 2, 2018, p. 101. Muse, "Organizations Urge Supreme Court to Hear New York Credit Case," *Tax Notes State*, Aug. 5, 2019, p. 544.

³¹ 135 S. Ct. 1787 (2015).

³² Natasha Mishra, "Taxpayers Ask Court to Review Tax Credit Denial," *Tax Notes State*, July 1, 2019, p. 66.

³³ Lukas Mikelionis, "As Residents Flee New York High Taxes, State Uses Intrusive Audits to Get Cash From Defectors," *Fox News — State & Local Alert* (Mar. 9, 2019). Zak Failla, "Here's Why Rich Are Fleeing New York, According to Cuomo," *Daily Voice* (Feb. 24, 2019).

³⁴ At one time, New York's governor suggested that taxpayer migration had more to do with climate than taxes. See Jimmy Vielkind, "Cuomo Blames Cold Weather on New York's Population Drain," *Wall Street Journal* (Sept. 26, 2018). This narrative changed after the near-elimination of the SALT deduction.

³⁵ Ashlea Ebeling, "President Trump Thumbs Nose at New York Tax Collector With Move to Florida," *Forbes* (Oct. 31, 2019).