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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*

Overview of Residency Rules

Part 1: 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

Overview of Residency Rules

Part 1: Domicile

Domicile: What is it?



Overview of Residency Rules

Part 1: 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



Overview of Residency Rules

Part 1: 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

Overview of Residency Rules

Part 1: 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



Overview of Residency Rules

Part 1: 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

Overview of Residency Rules

Part 1: Domicile



- The NEAR AND DEAR Factor
 - Where's your teddy bear?
 - Use of pictures
 - Moving bills/insurance

Overview of Residency Rules

Part 1: 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



Overview of Residency Rules

Part 1: 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.”

Overview of Residency Rules

Part 1: 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

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(it should be the 4th page in your Handout Materials)



Keep this form handy!
We'll have two more
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residency

REMINDER!

You can e-mail your questions during today's
seminar to be passed along to our presenter for
response during the Q&A session -



Send your questions to
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Section 2

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

Overview of Residency Rules

Part 2: 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)

CONSTITUTION
OF



UNITED STATES
OF AMERICA

Overview of Residency Rules

Part 2: 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)

Overview of Residency Rules

Part 2: 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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Overview of Residency Rules

Part 2: Statutory Residency

- Factor #2: A “Permanent Place of Abode”
 - Type of dwelling
 - The “11-month” rule
 - Habitability issues



Overview of Residency Rules

Part 2: Statutory Residency

● 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

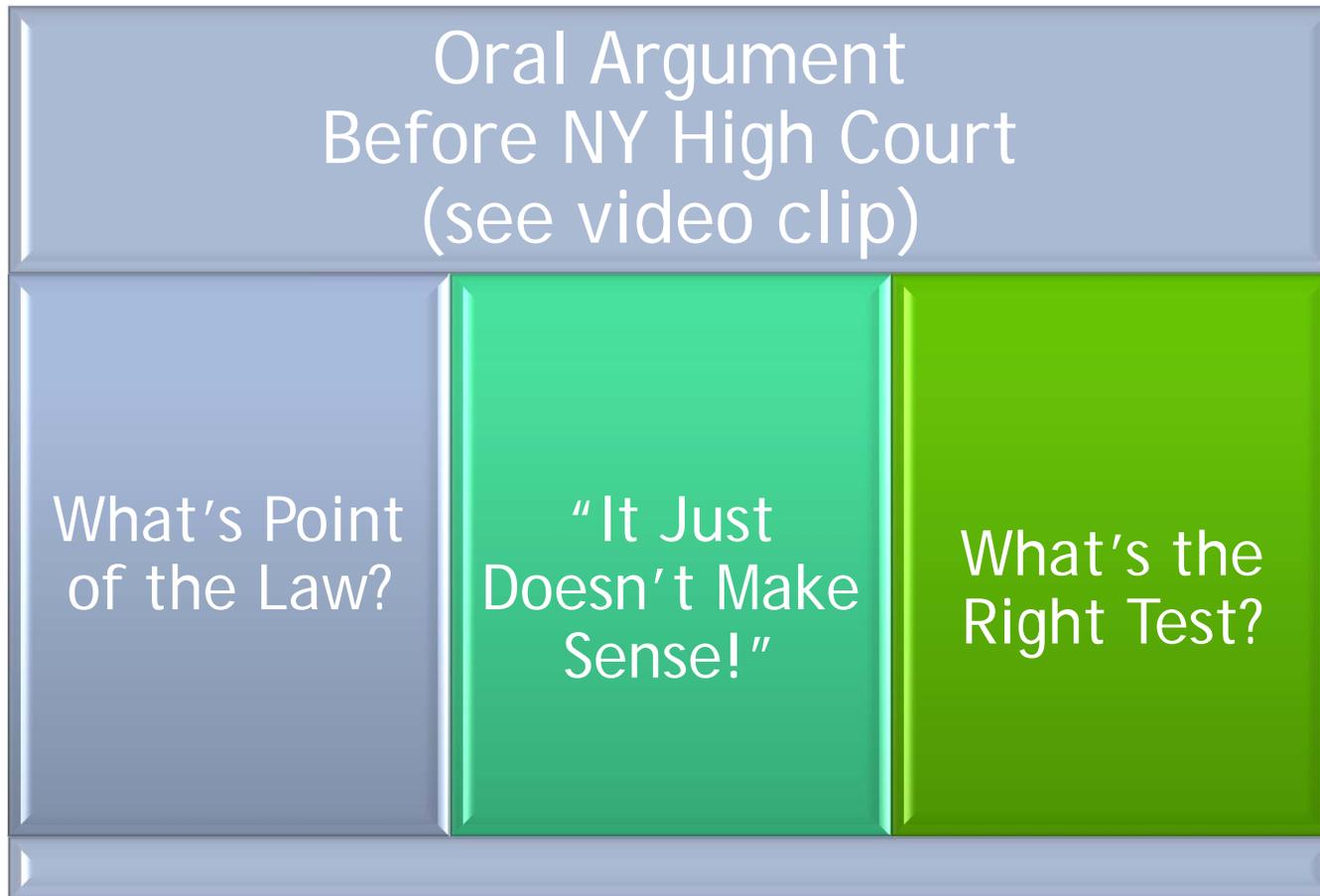
February 2014 *Gaied* Case

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*



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



Keep this form handy!
We'll have one more attendance validation item for you to write down later in today's webinar.

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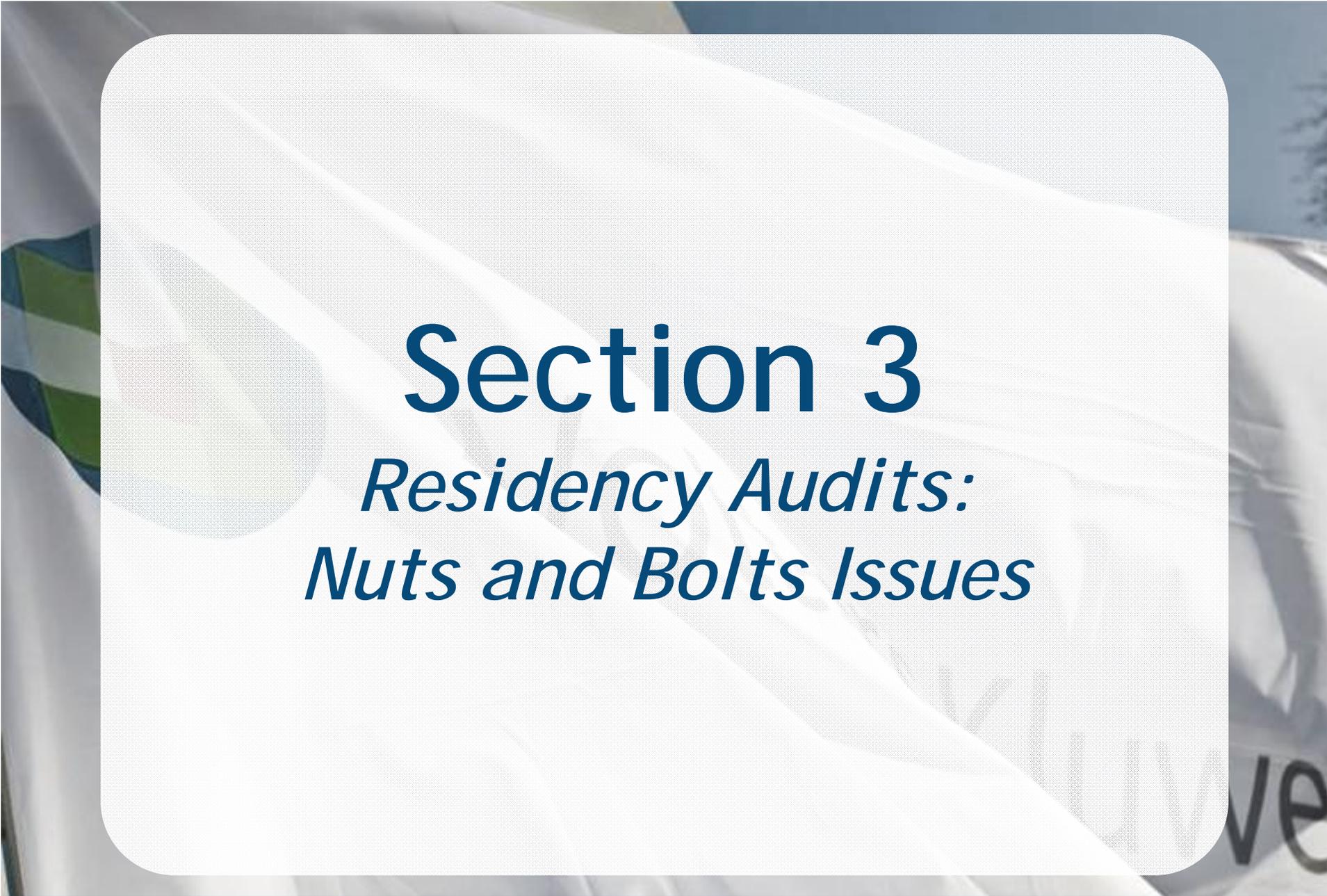
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Take a Break!

Return in 5 Minutes



The program will resume promptly after 5 minutes.



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.

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FIFTH EDITION

New York Residency and Allocation Audit Handbook

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



Pub. Dec 2013. 472 pages.

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.

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 co-authored *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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Question and Answer Session

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Please limit your questions to only topics discussed during today's presentation.

CONCLUSION

**Thank you for
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Featured Upcoming Program

Fundamentals of State Income Tax Apportionment



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

Thursday, October 30, 2014