

A New Day Dawns for Determining What Constitutes a New York Day

by Timothy P. Noonan



If you've handled New York residency cases on behalf of a client, you've been there. You've sat across the table from a New York state auditor and argued that your client didn't make that phone call from the apartment. Or that your client couldn't have been in New York City on that Saturday because his pattern was to return home on Friday night. Or that your

client went to his non-New York home after a long flight since that too was his pattern.

Certainly, these aren't the kinds of arguments you dreamed about making when trudging through your first year of law school. Or at least I didn't have such lofty goals. But alas, for the New York tax practitioner, these arguments are a fact of life. And generally, given the high burden of proof in the law and the general difficulty of these residency audits, arguments like that are tough to make. Every once in a while, though, some common sense emerges, giving hope to folks like me. A little over two years ago, for instance, I wrote an article for this column about day counts, highlighting some helpful but not well-known cases involving the importance of testimony in statutory residency audits.¹ I've received great feedback on that article from clients and practitioners. Not so much from auditors though, who basically respond with a "yeah, right." But just last month, the Tax Appeals Tribunal issued its decision in *Matter of Julian H. and Josephine Robertson*, one of the most important and significant residency

cases in recent memory.² And what we see in that decision is the reaffirmation of the principle addressed in my previous article on day count issues, requiring a fair application of the burden of proof standard and instituting some common sense in the day count process.

In this article, I will discuss New York's residency rules for personal income tax, the recent *Robertson* decision, and that decision's importance to New York state tax practitioners.

Background on Residency Rules

Before touching on *Robertson*, some background on statutory residency might be helpful. In New York a person can be taxed as a resident by either being domiciled in New York or by meeting the statutory residency requirements. Classification as a resident carries with it significant consequences, because residents of New York are taxed on their income from all sources, while nonresidents are taxed only on their New York-source income.

In determining residency, auditors will first look to domicile. Domicile refers to the location of one's true, fixed, and permanent home. In other words, it is the place to which a person intends to return whenever absent. However, non-New York domiciliaries can still be taxed as New York residents if they meet the test for statutory residence. To be a statutory resident, one must maintain a permanent place of abode and spend more than 183 days in the state during the tax year. In many cases, whether a taxpayer meets the definition of a statutory resident can turn on how *one or two* days in a tax year are counted.

For those who maintain a residence in New York City, day count can become even more important,

¹Timothy P. Noonan, "Day Counts and the Importance of Testimony in Statutory Residency Audits," *State Tax Notes*, Apr. 28, 2008, p. 317, *Doc 2008-8845*, or *2008 STT 83-26*.

²*Matter of Robertson*, New York Tax Appeals Tribunal (Sept. 23, 2010). (For the decision, see *Doc 2010-23153* or *2010 STT 207-25*.)

because a count over 183 days might subject them to both state and city tax on all income.³ Add in the well-established rule that presence in New York for a minute constitutes a day spent for statutory residency purposes,⁴ and it becomes clear why day counts and the evidence used to establish them are so important.

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Taxpayers who maintain a residence and spend a good deal of time in New York face a tough road in fighting the statutory residency label. New York places the burden on the taxpayers to prove, by clear and convincing evidence, that they were not present in the state for more than 183 days.⁵ Since the burden of proof rests on the taxpayer, tax auditors often start with the premise that, absent other evidence, the taxpayer spent 365 days in New York, and undocumented or unidentified days can quickly become New York days. Therefore, the more tools available to the taxpayer in proving that a day was not a "New York day" the better.

In previous rulings, the New York State Tax Appeals Tribunal has held that credible testimony alone can be enough to prove that days were spent outside New York state, even if they are not otherwise substantiated with documentary evidence.⁶ But to the everyday practitioner, that concept never has seemed to work its way down to the audit level, where issues like this come up everyday. And nowhere was that more evident than in *Robertson*, in which despite significant testimonial evidence, the Department of Taxation and Finance still took issue with the taxpayer's day count.

Robertson

In *Robertson*, the taxpayer was the chair of Tiger Management and a successful hedge fund manager based in Manhattan. Since 1986 the Robertson family had lived in their Locust Valley home on Long Island. However, the Robertsons also maintained an apartment on Central Park South in New York City

and rented a house in Southampton for approximately six weeks each summer.

In September 2007 the Division of Taxation began an audit of the Robertsons' personal income tax returns for 1995 through 2001, but ultimately the 2000 tax year became the focus. Following the audit, the division concluded that Robertson had not satisfied his burden and issued a notice of deficiency, asserting additional New York City personal income tax due for the 2000 tax year in an amount over \$26 million. That's right: \$26 million . . . in New York City personal income tax only. The notice was premised solely on the division's conclusion that the taxpayer was a statutory resident of New York during 2000. Robertson acknowledged that he maintained a permanent place of abode in New York during 2000, and the parties stipulated that Robertson was present in New York for 183 days and absent from New York for 179 days during the relevant tax year. So the taxpayer was faced with the burden of proving that he was not physically present in New York on any of the *four* disputed days.

To meet his burden of proof on those four days, the taxpayer presented an exhaustive amount of evidence over the course of a *four-day hearing!* That's right: The taxpayer spent four days at a hearing trying to prove his location on four total days in the 2000 tax year. Following the hearing, an administrative law judge found that the taxpayer had met his burden of proving that he was not present in New York City on any of the four days in issue. The division appealed, but only regarding two of the four days. Accordingly, the issue on appeal became whether the taxpayer had satisfied his burden of proving he was not physically present in New York City on two days: April 15 and July 23. The tribunal affirmed the ALJ's ruling on all counts and canceled the deficiency, holding that the finding of the ALJ, regarding the two days at issue, was based on credible testimonial evidence backed up by other documentation.

In laying out the facts of the *Robertson* case, the tribunal stressed a number of critical factors that were important to its finding that the taxpayer had met his burden of proof. First, the taxpayer specifically intended to spend 183 days or less in New York City and took a number of steps to effectuate that plan in 2000.⁷ Second, the taxpayer had his assistants keep a contemporaneous account of his whereabouts and periodically advise him of his day count.

⁷For instance, Robertson refrained from going into New York City when he was not required to be there, and he made a habit of leaving the city before midnight on Friday night.

³20 NYCRR section 105.20(c). New York City's definition of a resident mirrors New York state's, substituting only the word "city" for the word "state."

⁴*Id.*

⁵See *Matter of Holt*, New York Tax Appeals Tribunal (July 17, 2008).

⁶See *Matter of Avildsen*, New York Tax Appeals Tribunal (May 19, 1994); *Matter of Armel*, New York Tax Appeals Tribunal (Aug. 17, 2005); *Matter of Reid*, New York Tax Appeals Tribunal (Oct. 5, 1995).

Third, the taxpayer had a reputation for both honesty and integrity. During her testimony, Robertson's secretary said that over the years, Robertson had told her that a day was a "New York City day" (even if he was present in the city for only 15 minutes) when she would not otherwise have known about his presence in the city.

Regarding the two days at issue, the tribunal was presented the following evidence:

- April 15. The taxpayer's calendar noted that he was in Locust Valley (outside New York City). Also, when examining the pattern of how the taxpayer spent his days, it was discovered that every Saturday that fell before a non-New York Sunday was also a non-New York day. The taxpayer also testified that he spent the night of April 14 in Locust Valley — testimony that was backed up by telephone records showing that there was a call from Locust Valley to the New York City apartment (where his wife was staying) at 6:00 p.m. on April 14. The taxpayer's wife also testified that Mr. Robertson did not stay at the New York City apartment with her on the night of April 14, testimony which was bolstered by Mrs. Robertson's memory of a telephone conversation on the morning of April 15, during which she and Mr. Robertson's sister made plans regarding a surprise party. Also, Mrs. Robertson testified that she met Mr. Robertson on Long Island to play golf on April 15 (her trip home evidenced by a car receipt that she signed) and that the couple spent the night of April 15 at their Locust Valley home. The tribunal determined that, on balance, that was enough evidence to support the taxpayer's presence outside New York City on April 15.
- July 23. The taxpayer's calendar noted that he was playing golf in Ireland and returning to LaGuardia that night. The flight records originally showed that Robertson's flight landed at 1:15 a.m.; however, it was later discovered that the arrival was stated in Coordinated Universal Time and that the flight actually landed at 9:15 p.m. in New York. The taxpayer presented receipts from the car service that took him back to his Locust Valley home after the flight landed. Also, the other people who were on the flight with the taxpayer testified that Robertson returned to Locust Valley that night. The taxpayer's wife also testified that her husband did not stay in the New York City apartment with her that night and that she made phone calls from the New York City apartment to the Locust Valley home to find out if her husband had arrived yet. Finally, the taxpayer returned to work at his New York City office the following Monday. The taxpayer's driver testified that, after Mr. Robertson had spent a Sunday night in Locust Valley, it was customary for him to drive Robertson into the city early on Mon-

day morning. Evidence of a telephone call from the New York City apartment to the car phone was introduced, and Mrs. Robertson testified that it was probably her calling to talk to her husband on the car phone. Again, all that detail was sufficient for the tribunal to find that the taxpayer was not in New York City on July 23.

What Does *Robertson* Mean?

The tribunal's decision in *Robertson* obviously was a significant victory for the taxpayer, but it also solves a big piece of the day-count puzzle for practitioners. Even in the absence of specific documentary evidence linking the taxpayer to a location outside New York City, the ALJ found that Robertson had satisfied his burden of proving that the two days at issue were not New York City days. The tribunal affirmed the ALJ's decision, finding that despite the lack of specific documentary proof, the taxpayer still met the standard to prove his non-New York City location with clear and convincing evidence. And here are some of the important takeaways, and the things practitioners should be able to use the next time they are sitting across the table from their friendly neighborhood residency auditor:

- The Standard. The tribunal made it clear that the standard for counting days is "not that there must be an objectively verifiable piece of documentary evidence establishing an individual's whereabouts on every day in question."⁸ The tribunal acknowledged that the gold standard of proof would obviously be a document that definitively and objectively verified a taxpayer's presence in a place outside New York. However, in the real world, such documentary proof rarely exists. If such proof was required (as some auditors like to argue), the taxpayer's burden of proof would no longer be merely "clear and convincing," but would be raised to the unattainable level of "beyond all doubt" — a standard of proof that the tribunal said was higher than that required for criminal convictions and certainly higher than the proper standard for statutory residency cases.⁹
- Documents for Every Day? Another thing we can take away from *Robertson* is that the department's regulations on the day count standard cannot be viewed as the only authority on what evidence is required to satisfy a relevant burden of proof. In *Robertson*, the tribunal recognized that although the department's regulations can be read as requiring documentary proof to establish a taxpayer's physical

⁸*Supra* note 1.

⁹*Id.*

presence for every day of a tax year,¹⁰ even the department's own audit guidelines do not go that far. Rather, the guidelines recognize that it would be "abnormal for people to document their presence in a particular location on every day of the year."¹¹ Thus, there will be days (that is, days spent at home watching TV or gardening) for which documentary evidence of one's physical presence will not be available. Because of that reality, the guidelines (and many other tribunal cases) affirm that the "taxpayer does not necessarily need additional documentation, beyond his or her own statements, as to the amount of time spent in New York."¹² This is an important point, because I have seen auditors use the language from the regulation — and language from the tribunal's decision in *Matter of Holt*, which, read in isolation, seems to require the same standard¹³ — to support an unfairly high level of proof.

- **Counting the Days.** One of the important aspects of *Robertson* was the taxpayer's awareness of the day count rules. Because he knew that "a minute was a day" and was aware of the need to spend less than 184 days in New York City, he was careful not to "waste a day" in the city. Indeed, on the two days in question, under the department's theory the taxpayer would have clearly "wasted" a day (on April 15, by leaving for home on a Saturday morning; and on July 23, by coming into the city at 10 p.m. after a transcontinental flight). If you have a taxpayer who is watching days like Mr. Robertson was, you should use that fact to your advantage.
- **A Good Diary.** In many cases, taxpayers have a diary that they use to document their day-to-day location. And in many audits, auditors fail to rely on or accept the diary as adequate proof. The tribunal, however, repeats its belief that "a contemporaneously maintained calendar or

diary together with supporting and consistent foundational testimony has met the applicable standard of proof."¹⁴

- **Phone Calls.** I can't tell you how many times I've battled it out with auditors about phone calls from a New York City apartment. Those calls create so many "false positives" and often are too easily used by auditors to reject a claimed non-New York day. That said, I've had luck getting the department to take a more reasonable look at "phone call days" — particularly with conciliation conferees or department lawyers, when a case reaches the appeals level. Whatever the case, the tribunal makes it clear that testimony, evidence of patterns, and plain old common sense should prevail when analyzing records of phone calls.
- **Testimony in General.** Finally, *Robertson* tells us that in determining whether testimonial evidence is credible, the tribunal should evaluate that evidence in light of other testimony and all of the surrounding events and other evidence. When definitive documentary evidence establishing the taxpayer's whereabouts at a given moment in time does not exist, the burden of clear and convincing evidence *can still be satisfied* with a combination of testimonies to be evaluated in light of each other, the surrounding events that aided the witness's testimony, and any additional evidence relied on by the witness. For example, credible testimony unaccompanied by other substantiating evidence but remembered by the significance of a date or event (that is, September 11, 2001, or a spouse's surprise party) would suffice to meet the burden of establishing one's whereabouts on a particular day. This is exactly the type of evidence that the ALJ and the tribunal held to be clear and convincing in *Robertson* — the testimony of Robertson evaluated in light of the testimony of others, the surrounding events, and the Robertsons' customary practices.

Dissenting Opinion

It is very rare that we see a dissenting opinion in a Tax Appeals Tribunal case, but *Robertson* apparently struck a chord with Commissioner Carroll R. Jenkins, who issued a dissenting opinion. And interestingly, his dissent seems to imply that there was much more going on behind the scenes and not addressed even in the 62-page decision. For instance, Jenkins's dissent argues that the majority improperly relies on *Colorado v. New Mexico*, but that case was cited nowhere in the majority's opinion. The dissent also quotes the majority as saying that the division "produced little evidence in support

¹⁰See 20 NYCRR section 105.20 (stating that "Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Department of Taxation and Finance adequate records to substantiate the fact that such person did not spend more than 183 days of the taxable year within New York State").

¹¹N.Y. Nonresident Audit Guidelines, p. 28 (updated Mar. 31, 2009).

¹²*Id.*

¹³See *Matter of Holt*, New York Tax Appeals Tribunal (July 17, 2008) (stating that "Statutory residency cases . . . are very fact intensive and require specific evidence through substantiating contemporaneous records to show a taxpayer's whereabouts on a day-to-day basis during each year in question"). (For the decision, see *Doc 2008-16343* or *2008 STT 148-8*.)

¹⁴Citing *Matter of Moss* and *Matter of Reid* (*supra* note 1).

of its contention of a New York City presence on either of the two days at issue.” But again, that isn’t something that the majority ever said in its opinion. Indeed, if it did, I’d have to agree with Jenkins that this would have been an incorrect standard.

Conclusion

Although the tribunal had previously touched on the importance of testimony in domicile cases,¹⁵ in

¹⁵See *Matter of Craig F. Knight*, New York Tax Appeals Tribunal (Nov. 9, 2006). (For the decision, see *Doc 2006-24114* or *2006 STT 235-13*.)

Robertson the tribunal unequivocally stated that, for statutory residency purposes, day count can be proved by credible testimonial evidence. I hope this ruling will force auditors to play by the rules and abide by the department’s own guidelines when examining a taxpayer’s day count, while at the same time alleviate the frustrations of state tax practitioners trying to solve that 365-piece puzzle. ☆

Noonan’s Notes on Tax Practice is a column by Timothy P. Noonan, a partner in the Buffalo and New York offices of Hodgson Russ LLP.