

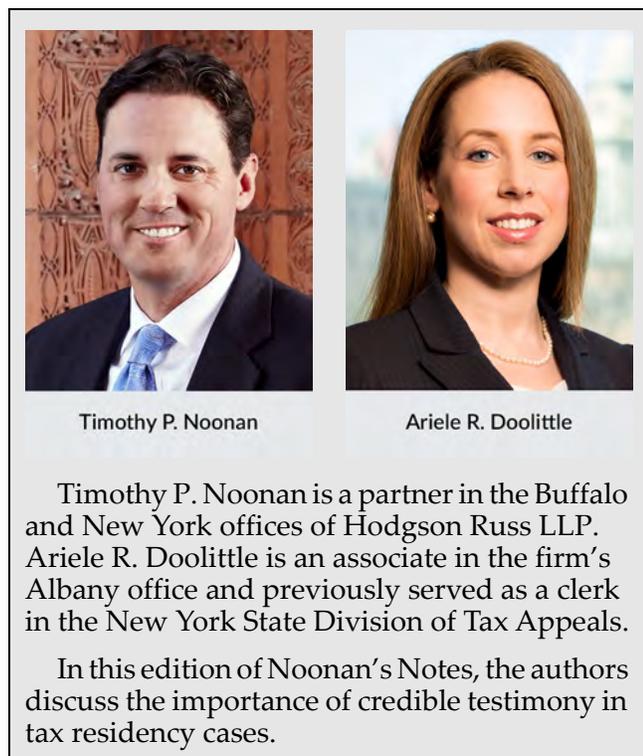
The Power of Testimony in New York Domicile Cases

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In this edition of Noonan's Notes, the authors discuss the importance of credible testimony in tax residency cases.

Many years ago, and several Noonan children ago, an article appeared in this column about cases in the New York statutory residency area and the "power of testimony" in those cases.¹ The idea was that in these statutory residency cases, when a taxpayer's day-to-day location is a key factor, sometimes testimony can make all the difference. Really, though, that piece just scratched the surface on the importance of testimony generally in the residency area, particularly in New York.

As regular readers of this column know, this continues to be an area of heavy audit enforcement for the New York tax department. In particular, in cases involving New York's "other" residency test

¹ Timothy P. Noonan and Joshua K. Lawrence, "Day Counts and the Importance of Testimony in Statutory Residency Audits," *State Tax Notes*, Apr. 28, 2008, p. 317. This was four Noonan kids ago, if you are keeping track.

— the domicile test — a taxpayer's testimony can rule the day. It can be the most important consideration, above all other facts, factors, and evidence. And this exact point has been driven home by a few recent residency cases that have come out of New York's Division of Tax Appeals.² The fact that these cases are non-precedential is of no matter.³ The reason they are important is because they underscore how the tide can turn in a taxpayer's direction even in the most difficult of cases if he or she can establish one all-important goal: credibility. In cases that hinge on a taxpayer's intent and actions, a taxpayer's honest testimony about motives, beliefs, and actions is the ultimate difference-maker. In this article, we'll discuss a few of these recent cases.

Background: Proving Intent in Domicile Cases

A person is generally taxable as a resident in New York under either of two tests. The first test, statutory residency, asks whether the person maintained a permanent place of abode and spent more than 183 days in New York during the year at issue.⁴ But we're focused on the domicile test here, which can be a more difficult inquiry. The test looks to where the taxpayer maintains their permanent, primary home, and requires a subjective inquiry based on long-standing common law principles that can be arduous to apply in practice.⁵

A person can have only one domicile.⁶ The regulations generally define "domicile" as "the place which an individual intends to be such individual's permanent home — the place to which

² See *Matter of Patrick*, DTA Nos. 826838 and 826839 (N.Y. Div. Tax App. 2017); *Matter of Blatt*, DTA No. 826504 (N.Y. Div. Tax App. 2017); and *Matter of May*, DTA No. 825173 (N.Y. Div. Tax App. 2015).

³ N.Y. Tax Law section 2010(5).

⁴ N.Y. Tax Law section 605(b)(1)(B).

⁵ N.Y. Tax Law section 605(b)(1)(A).

⁶ 20 NYCRR 105.20(d)(4).

such individual intends to return whenever such individual may be absent.”⁷ To effect a change in domicile, there must be an actual change in residence, coupled with an intention to abandon the former domicile and to acquire another.⁸

Questions about a taxpayer’s domicile typically arise when a taxpayer moves into or out of New York state, though it’s typically the move “out” that triggers the audit. This makes sense, since the party claiming a domicile change bears the burden of proving the change, through clear and convincing evidence.⁹ So when a taxpayer claims to have left New York, the taxpayer has the burden of proving it. And when the tax department claims that a taxpayer moved into New York (state or City), the department bears the burden of proving it.

What does this all mean? What exactly has to be proven? Overall, the domicile inquiry has to do with a taxpayer’s feelings and intentions, which can be difficult to quantify. The nonresident audit guidelines that the tax department has put together are of great value in assisting auditors (and practitioners) in working through the issues that come up during a residency audit.¹⁰ Under the guidelines, the auditor is instructed to analyze the taxpayer’s lifestyle, using five primary factors (home, business, time, “near and dear” items, and family) to determine where the taxpayer’s domicile — his one true home — is actually located. The tax department uses a comparison of those five factors, and a series of less significant “other factors” if necessary, as objective means to a subjective end: On balance, the place the factors most heavily favor is likely the taxpayer’s domicile.

In practice, though, these factors aren’t always easy to apply. Auditors can spin the facts one way; practitioners can spin them another. And because of the whole burden-of-proof issue, all an auditor has to do is find some gray areas to exploit in order to find a basis to reject a claimed change in domicile. And the auditors love to cite language from an old tax appeals tribunal case, in which the tribunal noted that “the mere fact that persuasive arguments can be made from the facts in support of

both Florida and New York as petitioners’ domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile.”¹¹

But the analysis that takes place in these audits often doesn’t take into account what really matters: what was in the taxpayer’s mind and, don’t roll your eyes, heart. Sometimes, that’s where the good stuff is. The problem is that audits aren’t designed to get this deep into the details, often for good reason, since these audits are already burdensome and invasive to the taxpayer’s privacy. And even in those cases when the taxpayer meets with an auditor or is deposed, it’s not always productive, as the auditor’s view of what matters most in these cases can differ from the taxpayer’s and practitioner’s view.

So . . . enter the Division of Tax Appeals. As noted above, some recent cases have delved deep into the domicile inquiry, and, almost without exception, these cases underscore the power of credible testimony. Credible, heartfelt, and honest testimony can turn a dog of a case into a winner.¹²

Matter of Patrick

This is perhaps best illustrated in an administrative law judge’s recent determination in *Matter of Patrick*,¹³ possibly the most interesting case we’ve seen from the Division of Tax Appeals since some case called *Gaied*.¹⁴ And what a page turner! The taxpayer in *Patrick* attended high school in New York, where he met his current wife, Clara, at a school dance. He joined the Army after high school while Clara was sent to school in Italy. The two kept in touch until Clara informed the taxpayer that she was getting married, at which point their communications ceased. The taxpayer was so heartbroken he destroyed all the mementos he had from Clara except for a photo of her that he kept for the next 40 years. Clara saved various mementos of their time together, including a gold-plated, heart-shaped necklace. Just a reminder: This was a tax case! Who said the tax law was boring?

⁷ 20 NYCRR 105.20(d)(1).

⁸ *Matter of Newcomb*, 192 N.Y. 238 (1908).

⁹ 20 NYCRR 105.20(d)(2).

¹⁰ See “Nonresident Audit Guidelines,” Department of Taxation and Finance (June 2014) (the Guidelines).

¹¹ *Matter of Zapka*, DTA No. 804111 (N.Y. Tax App. Trib. 1989).

¹² Pun intended, see below.

¹³ *Matter of Patrick*, DTA Nos. 826838 and 826839.

¹⁴ Obligatory mention of *Gaied* accomplished!

Four decades later, the taxpayer and his first wife were living in Connecticut and he was working in New York City at a demanding position that entailed working long hours with little vacation time. In 2007 the taxpayer experienced serious heart trouble and underwent surgery, which caused him to reevaluate his life, including an unhappy marriage. In January 2008 he separated from his first wife and began renting an apartment in New York City. But his thoughts soon turned to Clara, and in March 2008 the taxpayer began searching for her. They connected by telephone in early April 2008 and made plans to meet in New York City at the end of the month. On the night of their reunion, the taxpayer proposed to Clara and she accepted and informed her then-husband a few days later upon her return to Paris. Again, a reminder, this is a tax case.

In October 2008 the taxpayer purchased an apartment in New York City intending to use it while working in the city until his planned retirement in February 2012. In early 2009 the taxpayer's and Clara's divorces were finalized, and they married later that year. Despite his plans to continue working into February 2012, the taxpayer received a serious medical diagnosis in 2010, and more than anything, he found it difficult to be apart from Clara, who was dealing with her own medical issues and needed to be in Paris for her children. Because of his medical issues and desire to be closer to Clara, the taxpayer decided to retire early and resign from his CFO position at the end of 2010. But he remained with the company until March 1, 2011, to facilitate a transition.

On March 1, 2011, the taxpayer retired and immediately went to Paris to join Clara. His early retirement meant losing out on a potential \$3 million had he retired when planned. Once in Paris, the taxpayer sought permanent residency, obtained a French driver's license, and went from being a workaholic to a world traveler with Clara. He purchased and extensively renovated a Paris home (with a view of the Eiffel Tower) shortly after purchasing the New York City place. His lifestyle in Paris could not have been more different from his former life in New York. Even so, he ended up spending roughly *twice as many days* in New York versus Paris in both 2011 and 2012. Part of this had

to do with medical treatment he received in New York after the move, which required several visits and invasive surgeries that couldn't be done in Paris.

Following an audit, the tax department determined that the taxpayer remained domiciled in New York throughout the 2011-2012 audit period. In support of this conclusion, the auditor pointed to various facts such as the taxpayer's high number of New York days and low number of Paris days; his retention of a New York City apartment; and the fact that many of his formalities (bills, W-2s, 1099s, voter registration, etc.) were addressed to his New York City address. The auditor's tax field audit record memorialized his conclusion that all five of the primary domicile factors set out in the nonresident audit guidelines (that is, home, active business, family, time, and items "near and dear") "appear[ed] to be in our favor." So the department assessed the taxpayer as resident in 2011 and 2012, and the case was appealed to the Division of Tax Appeals. A hearing was held, at which time the taxpayer testified that he never considered New York his true home but that it was simply a place to sleep near work, especially during the divorce, and that his true home was in Paris, despite spending twice as much time in New York during the audit years. Thus, the issue in the case was whether the taxpayer changed his domicile from New York City to Paris upon his retirement on March 1, 2011.

The ALJ found that the taxpayer changed his domicile from Connecticut to New York City in 2008, when he separated from and eventually divorced his first wife, and also found that he became domiciled in Paris as of March 2, 2011, after he retired and immediately left for Paris to be with Clara. The ALJ found that the taxpayer's "credible testimony in this regard was unequivocal" and that he "considered Paris his home."

So *Patrick* joins the ranks of the cases we've seen in the last few years in which credible testimony by the taxpayer played a major factor in successfully proving a domicile change outside New York.¹⁵ And this one may be the most noteworthy, given that, at least on a basic five-factor analysis, it would seem the taxpayer

¹⁵ See also *Matter of Cooke*, DTA No. 823591 (N.Y. Div. Tax App. 2012); *Matter of Knight*, DTA No. 819485 (N.Y. Tax App. Trib. 2006); *Matter of Bostwick*, DTA No. 820637 (N.Y. Div. Tax App. 2007); and *Matter of Kaltenbacher-Ross*, DTA No. 818499 (N.Y. Div. Tax App. 2003).

had a really tough case. But the case confirms that in domicile cases, the tax department sometimes misses the forest for the trees in its application of the five primary domicile factors from its nonresident audit guidelines.¹⁶ Also, the taxpayer wasn't claiming a move across the river or down to Florida. He was moving to a foreign country. And at least according to the tax department, more is required to establish a domicile change to a foreign country than, say, Florida.¹⁷ Consequently, these cases are often suspect in the department's eyes.

Other Cases: *Blatt* and *May*

Two other recent cases follow a similar framework. The first one is *May*.¹⁸ There, the taxpayer's testimony again played a critical role in successfully proving a domicile change. In finding for the taxpayer, the ALJ observed that the taxpayer "credibly and unequivocally testified about his intent" and used adjectives such as "convincingly," "compellingly," and "emotionally" to describe the testimony before concluding that "undoubtedly, petitioner's testimony persuasively demonstrated his absolute and fixed intention in 2005, and through the years at issue, to abandon one domicile and acquire another."

Not unlike *Patrick*, *May* involved some particularly challenging facts. This included claiming a domicile change to a foreign country (as noted above, the tax department applies a different standard in those cases); maintaining his historical home in New York while overseas; not bringing his family (including minor children) over to the U.K.; having temporary immigration status; not filing U.K. taxes as a resident; and ultimately returning to New York after a few years.

So how does a taxpayer like that win a case like this? You know the answer by now. The judge was convinced by the taxpayer's sincere testimony that he and his family really did intend to move permanently to the U.K. It also helped that his wife, from whom he separated during the audit years (a

fact that admittedly helped his cause greatly), also credibly testified about the breakdown in their relationship and the different states of mind each spouse had about their living situation. *May* again shows how powerful testimony can be used to overcome a parade of difficult domicile facts that could otherwise sink a taxpayer.

The other illustrative case that, like *Patrick*, just came out this year is *Blatt*.¹⁹ There, the taxpayer claimed a move to Texas in 2009, but ultimately ended up returning to New York after a change in life circumstances. The issue was whether he was able to prove a change of domicile to Texas despite keeping his living quarters in New York, spending a lot of time in New York, and moving back to New York later. But the ALJ in *Blatt* concluded that "based upon the documentation and credible testimony," the taxpayer demonstrated a change in domicile to Dallas in November 2009, and on that basis, the ALJ found in favor of the taxpayer. And one of the factors relied on by the judge: The taxpayer moved his dog to Texas with him. What's the old saying: Home is where the dog is? Nevermind.

Conclusion

These aren't the first domicile cases in which testimony carried the day. Footnote 15 above contains several other cases from the past decade or so in which we've seen this happen. But these recent examples, to us, strike a loud and powerful chord. They show that the five-factor domicile analysis isn't always enough. They show that domicile cases can't be won or lost (much less decided) on paper. And they show that, above all, credible testimony will always carry the day in domicile cases. ■

¹⁶ See the Guidelines at 14-34. According to the Guidelines, the five primary domicile factors are home, time, active business, family, and items "near and dear."

¹⁷ See the Guidelines at 45-46; and 20 NYCRR 105.20(d)(3).

¹⁸ *Matter of May*, DTA No. 825173.

¹⁹ *Matter of Blatt*, DTA No. 826504.