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Are You a Resident of New York State or New York City for Income Tax Purposes?

Even if you believe you reside elsewhere, if you are domiciled in or a statutory resident of New York State or city, the New York State Department of Taxation and Finance (the "Department") may claim you are a resident of the city or state for income tax purposes. If the Department claims you are a resident you may be subject to state and city income tax if you fail to provide adequate documentation of where you spend your time. New York resident income taxes are typically higher than New York nonresident income tax. This is especially true for nonresidents that work in New York City because New York City does not impose an income tax on nonresidents.

An individual is a New York resident if one (1) of two (2) conditions is met:

- 1) If an individual is "domiciled" (see below for the definition of domicile) in New York, such individual is a New York resident.
- 2) If an individual is not "domiciled" in New York, such individual is a New York resident if s/he both "maintains a permanent place of abode for substantially all of the taxable year" and spends in the aggregate more than 183 days of the taxable year in New York. New York Tax Law § 605(b)(1)(B), New York City Admin Code Section 11-705(b)(1).

New York State and City Residency

The provisions governing New York State and City Residency for personal income taxes are essentially identical. The Department administers both the state and city personal income tax. For purposes of the following discussion references to New York apply equally to the state and the city unless otherwise specified.

Domicile

Statutory & Regulatory Authority:

The relevant state regulation states that "Domicile in general, is the place an individual intends to be his permanent home – the place to which he intends to return whenever he may be absent NYCRR 105.20(d).

A husband and wife are generally presumed to have the same domicile but can have separate domiciles. In addition, if a husband and wife are both residents and they file a joint federal return, their New York State taxable income is determined jointly. New York Tax Law § 611(b)(4).

Case Law:

Under the case law (interpreting the statutes and regulations) the general rule is that a change in domicile requires **intent** to establish a new permanent location of residence and additionally the acquisition of a new residence in the new domicile. An existing domicile continues until a new one is acquired, and the burden of proof to show change in domicile rests upon the party alleging the change (see, *Matter of Newcomb's Estate*, 192 NY 238). Where an individual has two homes in different localities the presumption is that the first one acquired remains his legal domicile. (see, *Matter of Estate of Gadway*, 123 AD2d 83, 85). Generally, a new domicile is acquired when there is a trigger or life changing event (e.g., a new job, retirement, marriage, illness etc.). The mere abandonment of a former residence does not result in a change of domicile. A person can have more than one residence but he can only have one domicile. The New York Court of Appeals measures an individual's intent to create a new domicile by considering "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (*Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343, *affd* 267 AD 876, 47 NYS2d 134, *affd* 293 NY 785). With regard to an alleged change of domicile, formal declarations have been held to be less persuasive than the informal acts of an individual's "general habit of life" (*Matter of Doman*, April 9, 1992 quoting *Matter of Trowbridge*, 266 NY 283, 289; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989).

Audit Guidelines:

The analysis of domicile is bifurcated between the Guidelines and the *bona fide* authorities (i.e. statutes, case law and regulations). The auditors tend to apply the audit guidelines as if they were the actual law.

The statutes, regulations and case law indicate that an individual's domicile is a matter of intent. A person's intent is subjective and not easily determined by others. The Guidelines attempt to simplify the domicile analysis by using objective factors to evaluate an individual's intent. The Guidelines are based upon the statutes, regulations and case law.

The Guidelines list five (5) primary factors to be considered by auditors when evaluating the location of a taxpayer's domicile. The five (5) factors are:

1. **Home:** This factor is analyzed in terms of size, value, purpose (e.g. primary home, vacation home, overnight stays, etc.). The surrender of a residence in one location that coincides with the acquisition of a residence in another location is only an "important indicator" of a change in domicile. Such an occurrence is not by itself determinative of the issue of a change in domicile.
2. **Time spent in various locations:** This factor is the most objective of the factors as it is simply a measure of time.

3. **Location of “near and dear” items:** This factor refers to property that is of special value to the taxpayer. Near and dear items need not be of great monetary value (e.g., report cards from school, pen pal letters, award certificates, diplomas, family pets). However some near and dear items may possess great economic value (e.g., art collections, wine collections, cars and boats, etc.).
4. **Location of active business involvement:** The key to this factor is the word “active”. Passive activity is not the main focus of this factor. An individual may be actively involved in a New York business even if they are not physically located in New York.
5. **Location of family:** This factor focuses on spouses and non-adult children. It is clear from the regulations that spouses may have different domiciles although the presumption is that they have the same domicile. The Guidelines instruct the auditors to refrain from examining the fifth (5th) factor if the taxpayer’s domicile can be determined based on the first (1st) four (4) factors.

The Guidelines also mention “other factors” that are considered if it is not possible to determine domicile based upon the five (5) primary factors. The Guidelines indicate that in “virtually all” cases the “other factors” need not be reviewed by the auditor to determine domicile. These factors are:

- The address at which bank statements, bills, financial data and correspondence concerning other family members is primarily received.
- The physical location of the safe deposit boxes used for family records and valuables.
- Location of auto, boat, and airplane registration as well as the individual’s personal driver’s or operator’s license.
- The location of where the taxpayer is registered to vote and actually votes.
- Possession of a New York City parking tax exemption.
- Telephone service type and activity at various residences.
- The citation in wills, testaments and other legal documents that a particular location is to be considered the individuals place of domicile.

Statutory Residency

A taxpayer who is not domiciled in New York State or City but maintains a permanent place of abode in New York State or City (e.g., an apartment) and spends more than 183 days in New York State or City will be a resident for New York State or City income tax purposes. The most important exception is time spent in New York City or State **solely** for transportation purposes (e.g., passing through New York City in a car or bus or utilizing airports and bus and train terminals etc.)

Documentation Related to Statutory Residency Audits:

If you maintain a permanent place of abode in New York State or City you should proactively organize information that you plan to use if and when you are subjected to a

statutory residency audit by the Department. **Start organizing now.** Make certain to keep a daily diary of your whereabouts. In the event of an audit, the Department will evaluate whether your documentation supports the entries in your diary. The items on Exhibit A (below) may be helpful in documenting your daily presence or absence from New York City or State. There may be documents that are not listed on Exhibit A that would also be helpful. It could be worthwhile for you to consider whether there are any additional documents available to you that would be helpful.

Exhibit A

Credit card receipts and statements.

Telephone bills

Personal diary

EZ Pass records

Expense account records

Travel itineraries

ATM receipts (or bank statements)

Passports

Frequent flier club statements

Car service receipts

Utility bills

Office logs

Corporate jet or helicopter log

Conclusion

The rules used to determine the location of a person's domicile are quite subjective. While the rules related to statutory residency are more objective, they are highly dependent upon the quality and quantity of documentation maintained by a taxpayer. A good tax advisor should be able to help a taxpayer understand the strengths and weaknesses of their claimed residency status. Finally, if a taxpayer is being audited, a good taxpayer representative should be able to help ensure the best possible outcome.