SHOULD I STAY OR SHOULD I GO?

One of the most perplexing questions taxpayers deal with when owning more than one residence is, “Which state or locality am I a resident of?”

There has been a migration of taxpayers from northeastern states to the south and southwestern states. This flight has only increased, mainly for the two following reasons: higher tax rates in the northeastern states and the limitation on the state tax deduction. In 2020, when the Covid-19 pandemic hit, many found themselves working from and their respective localities issuing a state of emergency. Many businesses required employees to work-from-home in response to government orders and public health recommendations. Because of technology, these employees have been able to work remotely and efficiently. As a result, it appears that telecommuting will become the norm in the current work environment and more employees are contemplating a change in residency.

The majority of states apply a two-prong conditional test in determining residency. An individual can be a resident of a state if they are either:

1) “domiciled” in that state or 2) maintain a permanent place of abode in the state and spend more than 183 days during a calendar year in that state. This test is applied specifically in both New York State and New York City, as well as the state of New Jersey. These three jurisdictions are among the most aggressive in examining and enforcing taxpayer residency rules. The three reoccurring terms and phrases used in residency determinations are 1) domicile; 2) maintaining a permanent place of abode; and the 3) 183-day/“day-count” test. An individual is determined to be a “resident” for state tax purposes if:

- Domiciled in the jurisdiction, or
- Not domiciled in the jurisdiction, but who maintains a permanent place of abode for substantially all of the taxable year in the jurisdiction, and spends in the aggregate more than 183 days of the taxable year in that jurisdiction.

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However, any person domiciled in a jurisdiction may avoid being taxed as a resident if they fulfill the three requirements below:

- Such person maintains no permanent place of abode in the jurisdiction during the taxable year
- Such person maintains a permanent place of abode outside the jurisdiction during the entire year
- Such person spends in the aggregate not more than 30 days of the taxable year in the jurisdiction

**DOMICILE**

The definition of “domicile” has legally evolved to be the place where the taxpayer has his “true, fixed, permanent home.” One’s “domicile” is the principal establishment to which he intends to return whenever absent. Domicile is viewed by jurisdictions as “a state of mind” and the questions that need to be answered by an individual are:

- Where do you really want to live?
- Where do you want to spend most of your time?
- Where are your most precious possessions kept?
- Where are your business interests located?
- Where does your family live?

**MAINTAINING A PERMANENT PLACE OF ABODE**

In general, a permanent place of abode is a residence [a building or structure where a person can live] that:

- you maintain, whether you own it or not; and
- that is suitable for year-round use.

A taxpayer can have more than one permanent place of abode.

A structure that is not suitable for year-round use is not a permanent place of abode. Also, any structure that does not contain facilities ordinarily found in a dwelling [e.g., kitchen, bathroom] is not generally considered to be a permanent place of abode. Further, a taxpayer “maintains” this abode:

- by doing what is necessary to continue living arrangements in that place, via ownership (outright or through lease), or;
- alternatively by making contributions to the household, in the form of money, services, or other contributions; and,
- maintaining it for substantially all of the tax year (typically in excess of 11 months of the year).

**THE 183-DAY TEST**

For the 183-day test, any part of a day spent in New York is counted as a day towards establishing residency. However, there are several exceptions to this rule, including presence solely for the purpose of boarding a plane, ship, train or bus for a destination outside New York, travel within New York that is a continuation of travel begun outside New York to a destination outside New York, and confinement to a medical institution for any reason in New York.
NESTOA FACTORS

New Jersey and New York are also among the states comprising the North Eastern States Tax Officials Association [i.e., “NESTOA”], which has established a cooperative agreement on domicile and residency determinations. Under the terms of this agreement, residency is determined by concentrating on the following primary factors:

- Home
- Time
- Items considered near and dear
- Active business involvement
- Family connections, if the other criteria are not conclusive

CASE LAW APPLICATIONS

The tax courts provide further interpretation of the above definitions in determining residency. The New Jersey tax court case of Samuelsson v. Director\(^2\) illustrates the concept of domicile as a state of mind. Despite the taxpayers at issue living in Florida for less than one year and their subsequent return to New Jersey, the court found the taxpayers were not domiciled in New Jersey for the period at issue because they intended to abandon their domicile and establish a new domicile in Florida, evidenced by moving their furnishings to Florida, listing their New Jersey home for sale, enrolling their children in Florida schools, and closing their New Jersey bank accounts.

Gaied v. N.Y. State Tax App. Trib.\(^3\) is a 2014 New York case which exemplifies the State’s determination of what constitutes a permanent place of abode. Despite factors such as owning property in-state, utilities for that property in the taxpayer’s name and the taxpayer’s in-state voter registration, the state determined the taxpayer had no residential relationship with the property and therefore no permanent place of abode in New York. Rather, it was determined to be maintained for and used by the taxpayer’s parents and for the taxpayer’s investment purposes.

\(^3\) 2014 BL 43395 (N.Y. Court of App. 2014)
RESIDENCY CHANGE CHECKLIST

Taxpayers intending to change their residency should satisfy the below list of items to support their new tax home:

| ✓ Change car registration |
| ✓ Change driver’s license |
| ✓ Change voter registration |
| ✓ Register their religious affiliation |
| ✓ Move personal items |
| ✓ Revise insurance policies |
| ✓ File for homestead exemption, if applicable |
| ✓ Register for social affiliations such as country clubs, dining clubs, etc. |
| ✓ Execute a new will and any applicable trusts |
| ✓ Open new bank accounts and brokerage accounts |

Failure to implement the listed items above will cause the jurisdiction to question whether a taxpayer has in fact changed their domicile. However, be aware that each residency determination has its own distinct facts and circumstances and the above list is not exhaustive. Every taxpayer’s situation is unique.

Assuming the jurisdiction agrees that a taxpayer has changed a domicile, the state’s statutory 183-day test provides an alternative for taxing authorities to establish the taxpayer residency. The jurisdiction’s position is that every day has to be accounted for. Taxpayers should keep contemporaneous diaries or detailed schedules, including handwritten diaries or computer calendars. Third party documents such as cell phone records, credit cards, bills, passports, and airline ticket stubs may also be kept in order to verify the taxpayer’s record of days. The burden of proof is on the taxpayer to prove the number of days present in-state, and any part of a day in a jurisdiction counts as a day for residency purposes.

Though this appears to be a substantive amount of recordkeeping, the consequences for not doing so can be significant. For those states that have the same or similar resident rules as that of New York and New Jersey, an individual could be deemed a resident of more than one state or jurisdiction if they maintain homes in both jurisdictions. Taxpayers encountering this situation need to be aware of their need to properly prepare and comply with these residency requirements. Taxpayers should further be prepared for their returns to be reviewed and/or audited during years where a change of residence is reported. Much planning and compliance is necessary in order to change residency. Estate planning is a key component of any resident change.

The complexity and constant changes of state and local laws and regulations can create confusion and difficult for your business. Withum’s SALT group is committed to remaining informed of these changes as they happen. You will benefit from this knowledge through the constant communication between our experts and you. We are relentlessly looking beyond to provide you with new opportunities before they may turn into a challenge. This is part of our commitment to remaining proactive rather than reactive.