2009

Nonresident Audit Guidelines

State of New York - Department of Taxation and Finance

Income Franchise Field Audit Bureau

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Table of Contents

Table of Contents

I. INTRODUCTION

These guidelines explain the tax law and regulations concerning residency, discuss audit policies and procedures regarding the subject, and address various technical and complex issues through examples and explanations.

They have been established to ensure uniformity and consistency in the examination of nonresident returns. The procedures and techniques apply to Articles 22, 30 (New York City), and 30-A (Yonkers) of the New York State Tax Law and Chapter 17 of Title 11 of the New York City Administrative Code.

Guidelines are issued primarily to provide guidance to audit staff. According to Regulation 2375.12, they have no legal force or effect nor do they establish precedent in the particular subject matter. They are generally binding on audit staff who are expected to follow the rules and procedures outlined in the guidelines when conducting an audit.

That being said, the Department recognizes that there may be situations encountered on audit where such rules and procedures may not be appropriate. In these situations, it is up to the supervisor and auditor to work together to ensure that the spirit of the guidelines is carried out when interacting with taxpayers and their representatives. This requires flexibility in applying the guidelines coupled with a commonsense, practical approach in auditing nonresident cases.

Note: These guidelines do not replace existing law, regulations, case law or informational materials issued by the Department.

Throughout the guidelines, references are made to the following sources:

- The Internal Revenue Code (IRC) and related regulations;
- Articles 22, 30 and 30-A of the New York State Tax Law;
- Title 20 of the Personal Income Tax Regulations (NYCRR);
- New York State court cases;
- Administrative Decisions of the Division of Tax Appeals (DTA);
- New York State Tax Commission decisions (STC);

- Advice of Counsel issued by the Office of Counsel (LBW);
- Advisory Opinions (A Memos) and TSB Memoranda (M Memos) issued by the Department.

The above sources should be referred to when researching a particular issue. References to tax law in these guidelines are meant to highlight general points of law and are not meant to be an authority on interpreting the tax law.

II. OVERVIEW OF THE NONRESIDENT AUDIT

A New York State resident taxpayer is responsible for reporting and paying New York State personal income tax on income from ALL sources regardless of where the income is generated, or the nature of the income. A nonresident taxpayer is given the opportunity to allocate income, reporting to New York State only that income actually generated in New York. In addition, the nonresident need only report to New York income from intangibles which are attributable to a business, trade or profession carried on in the State. Thus, significant benefits may be derived from filing as a nonresident.

A. NEW YORK STATE PERSONAL INCOME TAX LAW

Section 605(b) of Article 22 of the Tax Law defines a resident of New York State as one who:

1. is domiciled in New York State (with two important exceptions which will be discussed in detail in Chapter V.); *OR*
2. is NOT domiciled in New York State but who maintains a permanent place of abode in this state and spends more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

B. NEW YORK STATE PERSONAL INCOME TAX REGULATIONS

Although one of the definitions of a New York resident in the tax law is someone domiciled in the state, the law does not define the term domicile. For that we have to look to the personal income tax regulations.

In NYCRR 105.20(d), domicile is defined as *"the place which an individual intends to be such individual's permanent home- the place to which such individual intends to return whenever such individual may be absent."*

This definition, such as it is, has been fleshed out over the years in numerous court cases and Tax Appeals Tribunal decisions. These guidelines will reference some of the more significant of them in its discussion of domicile.

III. SCOPE OF THE NONRESIDENT AUDIT

There are three separate and distinct areas to be examined during the audit of a nonresident individual: Domicile, Statutory Residency and Income Allocation. These guidelines address only the first two areas; there is a separate guideline that explains how a nonresident individual allocates income. The specific circumstances will determine the depth and scope of the audit. For example, a non-domiciliary with no permanent place of abode in New York but working within the state might only be asked to verify the allocation of income to New York, while individuals who reside at several locations during the year and have a long established pattern of maintaining a "home" in New York would be questioned concerning their resident status. In any case, where the taxpayer and/or the representative has submitted information to assist the auditor in identifying the scope of the audit, the taxpayer and/or the representative is entitled to a prompt response (usually within 30 days) as to the relevance of the material submitted and whether additional information is required. Certainly for situations in which the auditor identifies that more than one of the three areas must be examined, he will attempt to identify and request all pertinent additional information to cover all areas of the examination rather than making these requests piecemeal. This will save the taxpayer time and effort in complying with a documentation request.

As in any audit, returns selected in the nonresident program may have other issues in which verification is appropriate. Documentation should be requested for items which appear to be unusual or suspicious. In addition, areas such as the New York State addition and subtraction modifications, income and losses from flow through entities such as partnerships, limited liability companies, and S corporations, and the appropriateness of city taxes (New York City and Yonkers) are examples of secondary issues to review on the New York State Personal Income Tax return.

As mentioned above, the nonresident case encompasses three separate audit issues: Domicile, Statutory Residence and Income Allocation. The various aspects of a case however, are intermingled. For example, a similar aspect in either the potential domicile or statutory residence case is to determine if the taxpayer maintains a permanent place of abode in New York State. After this, however, the approach of the two audits differs dramatically.

The domicile audit continues to determine if the taxpayer has demonstrated with clear and convincing evidence that he has effected a genuine change of domicile or was never domiciled in New York State. The statutory resident audit explores the taxpayer's records to determine the total number of days present in New York State.

The nonresident audit could place a heavy burden on the taxpayer due to the subjective nature of the areas reviewed. Throughout these guidelines, the Department recognizes and has attempted to reduce this burden. The auditor, team leader and section head should attempt to streamline the audit where possible, identifying the scope of the audit in the early stages and pinpointing the specific records needed to accomplish the task. As mentioned earlier in this section, timely responses to the taxpayer and/or the representative can relieve much of the burden placed on the taxpayer during a nonresident audit. Keeping the taxpayer and the representative informed as to the progress of the case, the importance of certain documentation, and the relationship of the data to the audit conclusions can move the case along for the benefit of both the taxpayer and the Department. In the textual discussion of nonresident audit areas, various cases are cited to demonstrate a point or better explain a position on a particular issue. The reader should note that only cases resolved by the New York State Tax Tribunal or the New York State Courts establish precedent in an area. Certain Administrative Law Judge decisions, although not precedential, are cited throughout these guidelines in instances where they thoroughly explain an audit issue and are in accordance with current audit policy.

IV. DOMICILE

A. DEFINITION

The word "domicile" is derived from the Latin "domus" meaning a home or dwelling place. Throughout time, however, domicile has evolved in the legal sense to be the place where the taxpayer has his true, fixed, permanent home. The domicile is the principal establishment to which he intends to return whenever absent. The term domicile should not be limited to refer to a specific structure but rather a place/area to which the taxpayer expects to return.

The term "domicile" and "residence" are often used synonymously in our everyday discussions, but for New York State Income tax purposes, the two terms have distinctly different meanings. Residence in a strict legal sense means merely a "place of abode." An individual may have many residences, or physical dwellings in which he resides, but can have only one domicile, or that permanent residence to which he intends to return.

B. INTENTION AND MOTIVE

As stated previously, domicile is defined in the income tax regulations as the place an individual *intends* to be his permanent home, the place he *intends* to return to whenever he may be absent. Throughout the guidelines you will see frequent references to intent in the discussion of domicile. Intention is a decisive factor in the determination of whether any particular residence which a person may occupy is his domicile. Its importance in understanding the difference between domicile and residence was highlighted in the Court of Appeals case, ***Matter of Newcomb, 192 NY 238:***

> ***"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile."***

The actual process of ascertaining an individual's intentions regarding domicile- the crucial question in a residency audit- is a subjective inquiry for the auditor, and often a difficult one. How does one determine what was in a taxpayer's mind? To the courts, it is

deeds and not words that generally matter. In ***Matter of the Estate of James A. Trowbridge, 266 NY 283,*** the Court of Appeals was confronted with the question of whether a taxpayer was domiciled in Connecticut or New York at the time of death. The facts favoring New York were essentially declarations made by the taxpayer in various documents, including his will and voter registration, that he was a resident of New York. Of more importance to the Court, however, was that the taxpayer's life was centered around his mansion in Connecticut where he lived with his family. Thus, it was these actions that pointed to Connecticut as his permanent home "no matter what he may say to the contrary" in "the declarations made to tax authorities."

That actions speak louder than words was further underscored in ***Matter of Jack Silverman (Deceased) & Frances Silverman (deceased), DTA No. 802313.*** In that case, the taxpayers had taken a number of steps to show a change of domicile to Florida such as filing a declaration of domicile, registering to vote and obtaining a driver's license. Citing *Trowbridge*, the Tax Appeals Tribunal stated that "(t)hese formal declarations are less persuasive than the informal acts of an individual's 'general habit of life'" in concluding that the taxpayers had not changed their domicile.

To assist auditors in determining whether the taxpayer's intentions are supported by his acts, the guidelines have identified certain factors which should be analyzed in any evaluation of domicile. By identifying what we believe to be the most important factors affecting domicile, we hope to have satisfied the test posed by the Court in *Trowbridge* that,

> ***"...such an analysis of the evidence is a comparison of one combination of facts with another, and the significance of some of the factors involved is as a matter of law greater than that of others."***

C. CONTINUATION AND CHANGE

Once established, a domicile continues until the person in question abandons the old and moves to a new location with the bona fide intention of making his fixed and permanent home at the new location. There are two crucial elements to prove a change of domicile: (1) an actual change of residence and (2) abandonment of the former domicile and acquisition of another. See ***Aetna National Bank v. Kramer, 142 AD 444.*** To effect a change of domicile, there must be not only an intent to make such change but also actual

residence in the new location. No definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient. On the other hand, residence without intention to remain does not effect a change of domicile no matter how long the residence is continued.

Since a domicile continues until superseded by another, a change of residence without the intention of creating a new domicile leaves the last established domicile unaffected. In ***Matter of Bodfish v. Gallman, 50 AD2d 457***, the court stated,

> ***"The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it.'"***

Change of domicile may be made on a whim, or fancy, for business, health, or pleasure, to secure a change of climate, or for any other reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person confirm the intentions. The fact that a person is motivated by self-interest does not prevent a change of domicile. Nearly everyone who changes domicile does so because they believe it to be to their advantage in one way or another. Therefore, the fact that a change of domicile was motivated primarily by a desire to gain a tax advantage is immaterial, if the intention of the individual to acquire a new domicile is absolute and fixed and his acts confirm that intention. The point that an individual may desire to "avoid" New York taxes and carefully craft his or her affairs so as to accomplish this purpose was addressed in ***Newcomb,*** wherein the Court states that the "motives" for one's change of domicile are "immaterial except to the extent that motives may show intention."

The conclusion as to whether or not one domicile has been replaced by another depends on an appraisal of the circumstances and conditions surrounding the person whose domicile is in question. The determination in each case must be decided upon the particular circumstances of each case. The auditor must draw his conclusion from all the circumstances with no single factor controlling.

Throughout these guidelines, reference is made to a change of domicile scenario which involves a move out of New York State (New York City or Yonkers) to another state. The auditor should also be concerned with individuals moving into New York State (New York City or Yonkers) and those who have changed their domicile in the past to another state but elect to return to New York State. The domicile and change of domicile rules cited in the guidelines apply equally to any change of residence scenario.

D. BURDEN AND DEGREE OF PROOF

The burden of proof as to a change of domicile is upon the party asserting the change. The evidence to establish both a change of residence and the required intention to effect a change of domicile must be "clear and convincing" as noted in ***Bodfish vs. Gallman***. The intent to change a domicile must be manifested by unequivocal acts. In some instances, this is a very easy burden to support, while in others it is, in varying degrees, more difficult.

An individual who moves into New York is subject to the same rules concerning burden and "clear and convincing" evidence as someone moving out of New York.

If the weight of the factors does not present a "clear and convincing" body of evidence that the taxpayer has changed his or her domicile to New York, for situations in which the taxpayer was previously a non-domiciliary of New York, then the individual is to be treated as a nonresident. For example, if an individual gradually increases involvement in New York and gradually decreases ties to another state, the change of domicile to New York will not take place until the weight of the activity and involvement in New York presents a "clear and convincing" argument for New York domicile.

The fact that a New York domiciliary may have established significant ties in a new location may not be enough to show a change of domicile if he continues to maintain significant ties to New York. In ***Matter of Rudolph (dec'd) & Loretta Zapka, DTA No. 804111,*** New York domiciliaries who had strong ties to both New York and Florida were unable to show a change of domicile. According to the Tribunal,

> ***"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."***

V. FACTORS TO BE CONSIDERED IN DETERMINING DOMICILE

The factors used to determine domicile are divided into two general categories, primary factors and other factors. An analysis of the five primary factors (Home, Active Business Involvement, Time, Items Near & Dear and Family Connections) should generally provide a basis for New York domicile before documentation concerning the "other" factors is requested from the taxpayer. The analysis of the primary factors should look at the New York ties for the specific factor in relation to the ties for the factor that exist in other locations. For example, an analysis of the "Home" factor would look at all the residences the taxpayer resides in each year during the years under audit in relation to each other. A decision concerning domicile cannot be made by looking at only one side of the factor; nor can a decision be made by examining only one factor. It is very possible that the decisions reached concerning an individual's domicile in one year will not be the same as the conclusions reached in another.

A. **PRIMARY FACTORS**

Webster's New World Dictionary defines Primary as: *1. first in line or order; 2. from which others are derived; fundamental; 3. first in importance.*

All three meanings describe the importance of the primary factors in determining domicile. The primary factors are fundamental and first in line toward developing a case for New York domicile. The auditor is advised that information concerning the "other" factors should only be requested when a basis for New York domicile, using the primary factors, is found to exist or where primary factors are at least equal in weight for New York and another location. In virtually all cases the review of primary factors will result in a decision on domicile. There will be very few cases in which the examination of the "other" factors is needed to reach a conclusion on domicile. The development of a domicile case involves more than a mere listing of the factors that exist in one location versus those in other locations; the analysis must demonstrate a positive link or bond to New York or the other locations. The auditor should remember that a taxpayer's domicile is the place "to which the individual intends to return whenever absent."

The auditor must analyze the factors to determine if each factor points toward a decision favoring New York domicile or domicile in another location.

When conducting the analysis, the auditor should explore the New York ties in relationship to the taxpayer's connection to the other locations. The auditor needs to weigh each primary factor, individually and then collectively.

For example, the fact that a taxpayer maintains a "home" in New York State is a feature that is present in most domicile cases. The mere fact that the taxpayer maintains a New York "home" however is not sufficient, in itself, to establish a case for domicile or that this particular primary factor points toward a New York domicile. The auditor must explore the characteristics of the New York residence in comparison to the characteristics of the homes maintained in other locations.

Without first establishing a basis from an analysis of the primary factors *pointing toward a definite tie to New York, or where the primary factors are at least equal in weight for New York and another location, the auditor need not explore the other factors with relationship to domicile. <u>The primary factors are as follows:</u>*

1. ***<u>Primary Factors: Home</u>***

   - ***The individual's use and maintenance of a New York residence, compared to the nature and use patterns of a non- New York residence.***

   The first factor that an auditor usually will review and discuss with the taxpayer is the homes maintained and used by the individual during each of the years under audit. What does an individual consider to be his home? Is it the actual dwelling (the building) in which he lives, or is it the area (the community) that he considers home? For the purposes of determining an individual's domicile, home can be either, or both, depending upon the circumstances. It also matters little if the dwelling is owned or rented but must represent a "residence" in the eyes of the taxpayer. Therefore, "home" refers not only to that family residence, which over the years has been clearly established and accepted by everyone as "home" to the taxpayer and/or their immediate family but also the community to which the individual has established strong and endearing ties.

   An individual may give up or dispose of his traditional family home (a building) for a variety of reasons. The change in a neighborhood configuration, zoning law changes, loss of a lease, the conversion of a building to another form of ownership, encroaching

business or commercial areas, increase or decrease in family size, or simply the desire to change homes are examples of why an individual might give up one home and acquire a new residence. An individual, who is a long time resident of a particular area of New York, usually has developed a range of sentiment for that area as well as the dwelling in which he resides. Selling or disposing of that dwelling, for whatever reason, does not change the attraction the individual has for the area when a new residence is acquired within the area. The newly purchased or rented residence will carry with it that range of sentiment the individual has for his former "home."

For example, if a couple resides in a particular community while raising their children and sells their residence to purchase or rent a smaller residence in the same community after their children are grown, that new residence, regardless of the length of time spent there, takes on the full range of sentiment the couple has for the community in which they reside. Likewise, if an individual who is domiciled outside New York downsizes his residence for any reason, the new residence in that community will take on the range of sentiment the individual had for the prior residence at the location outside New York.

It must be emphasized that retention of a residence in New York is not, by itself, sufficient evidence to negate a change of domicile. The mere location of a home in New York does not establish a case for domicile. The New York residence must be compared with the residences located in other areas to determine if the circumstances support a determination of New York domicile. The individual needs to use the residence as his home and this use pattern must outweigh the patterns established at other locations.

a. **Where "One Home" is Maintained**

When an individual has only one home, decisions concerning domicile are more straightforward than when an individual maintains two or more residences at various locations. When a taxpayer sells or ends the lease on his or her New York residence and acquires living space in another state, coincidental with each other, it is an important indicator that a change in domicile has occurred at the time of actual residence in the new location. The taxpayer, in giving up the only residence which is located in New York and acquiring another outside New York, is giving an important signal of intent to change domicile.

b. **Where "Two Or More Homes" are Maintained**

Attempting to sell:

In other cases a taxpayer may claim a change of domicile while attempting to sell his only residence in New York. The auditor must look at the facts and make a decision on the taxpayer's intent. The auditor should give appropriate weight to facts such as whether the taxpayer has sold or moved possessions from the location, contracted with a real estate firm to sell the property, etc. If the auditor determines that the taxpayer's intent was not to abandon the New York domicile and begin a new one outside New York, there should be some basis that the auditor can point to sustain that determination, e.g., the taxpayer may not be "actively" trying to sell the property, or the taxpayer has not moved family heirlooms, treasured possessions, etc, to the new location.

In ***Matter of Jack Silverman (deceased) and Frances Silverman (deceased), DTA No. 802313***, that was discussed earlier, the Tax Appeals Tribunal emphasized the degree of effort made to sell one's home as an "important factor" in determining domicile "because it concerns the issue of intention." In that case the taxpayers originally placed their New York home on the market in 1975 but it was not actually sold until 1983. In rejecting the taxpayers' change of domicile, the Tribunal noted that it was not clear how actively they were attempting to sell their home and it was this "uncertainty that...clearly undermines the petitioners' claim that they acquired a new domicile and abandoned the old."

Acquire another home, or change homes during the audit period:

A much more difficult decision concerning an individual's intent occurs when the circumstances are such that he does not give up his New York residence. Such is the case when a taxpayer continues maintaining the New York property and acquires a new permanent place of abode outside New York, or claims to change domicile to an existing residence outside New York State. Taxpayers can keep their original New York residence and change their domicile. Although this can happen, it is important for the auditor to keep in mind that the courts have consistently held that:

"In order to change domicile, both the intent to abandon the former domicile and to take up the new and an actual residence at the new location must be present (*Matter of Minsky v. Tully*, 78 AD2d 955,433 NYS2d 276). The test of intent with respect to a purported new domicile has been stated as "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 Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138, 140, quoting *Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343, affd 267 App Div 876, 47 NYS2d 134, lv denied 267AD 961, 48NYS2d 439). Requisite intent must be established by "clear and convincing evidence" (*Matter of Newcomb*, 192 NY 238, 251), and the person asserting the change of domicile must show the necessary intention existed (see 20NYCRR 105.20(d)(2)."

The auditor needs to carefully examine the ingredients of the "Home" factor before making a decision concerning its relationship to domicile. The auditor must also keep in mind that the "Home" factor is only one of the primary factors to be considered when arriving at a decision concerning an individual's domicile. Some of the elements the auditor must consider in determining a taxpayer's intent are as follows:

c. **Aspects of the Home Factor**

i. *Size of the Residence*

While size is an important item to be considered, it is not determinative in and of itself. A comparison of the size of the residences at the various locations must be made. This analysis should be as specific as possible, contrasting the size of one residence against another. For example, if an individual owns a residence along the New Jersey shore and an apartment in Manhattan, the auditor should request information which will describe the size of the two dwellings. Once this is done, the auditor can use this information along with other aspects of the "Home" factor to arrive at a determination as to which home reflects the taxpayer's domicile. In evaluating the importance of the size of the respective residences, however, it is necessary to consider it in the context of the geographic area in which each residence is located. For example, while a 3,000 square foot apartment in Manhattan may pale in comparison to a

palatial home in Florida, it nevertheless may still be spacious by New York City standards. If all aspects of the "Home" factor are equal in weight, the residence that the taxpayer has historically maintained as their home may be of more import.

ii. *Value of the Residence*

The value of the various residences owned or leased by the taxpayer during the audit period is as important as the size of the residences when analyzing information to determine domicile. When comparing the value of the various residences, the dwelling with the greatest value is not, by itself determinative. The information gathered must be weighed with other information concerning the "Home" factor to determine which home reflects the individual's domicile.

The value of the various residences is more difficult to determine than the size of the dwellings. The difficulty arises out of the fact that equal size dwellings could have significantly different values based upon the location of the property and the dwelling. In some cases, comparable homes in a retirement community may be substantially different in value than a home located in New York. Even within New York State, the value of a dwelling may differ dramatically depending upon the location. For example, the value of property, including a residence, may be considerably less in an upstate community where space is abundant while the value of property located in the New York City Metropolitan area would be notably higher because of the limited space available. The auditor should discuss the value of the residences with the taxpayer or the representative. In evaluating the "Home" factor, the value of the dwellings is one aspect of the decision.

iii. *Nature of Use*

How a taxpayer views a particular dwelling is another aspect of the "Home" factor. Often, as an individual becomes more successful in his or her career, the need to dispose of one residence before acquiring another is diminished. Mere retention of the residence may be an insignificant indicator, especially where the taxpayer owns several properties.

An individual may prefer to use a former principal residence as a seasonal home or hotel substitute after moving from New York. Affluent nonresidents may have no economic need to sell a particular residence. Auditors should question the individual concerning the use of the residence and weigh this aspect as part of the factors which are used to determine the "Home" factor.

It matters little, when analyzing the "Home" factor, whether the individual owns or rents a particular dwelling. The type of lease however, could shed light on how an individual views a particular piece of property. For example, a taxpayer who rents a residence on a year-to-year basis may not show the same intent as a taxpayer who purchases or enters into a long-term lease. There are, however, situations in which an individual signs a year- to-year lease because of the rental conditions of the unit in which he resides. When this rental takes place every year over a long period of time, the individual, in effect, is in a long term leasing situation. The auditor should review each residence to determine how the property is held (either rented or owned) as well as the length of time the property has been held.

iv. *Other Aspects of a Home*

There are other aspects of the "Home" factor which can be analyzed to assist in making a decision concerning domicile. Individuals selected for audit may have various employees associated with their different residences. For example, an individual may employ domestic help, grounds keepers, chauffeurs, etc. to help in the maintenance of the various dwellings or a particular lifestyle. In such instances, the auditor should question the taxpayer concerning the various employees and compare the number and types of employees at the different locations.

d. **Conclusion of the "HOME" Factor**

After gathering the data necessary for the analysis of the "Home" factor, the auditor must weigh the various aspects, size, value, nature, use, and other aspects concerning each of the residences owned or leased by the individual taxpayer. A determination must be made concerning this one factor as to whether the elements tend to reflect a New York domicile or domicile at another location. The auditor must keep in mind that this "Home" factor represents only one of five primary factors. The same process of analyzing the aspects of the remaining factors must be applied in order to arrive at a conclusion.

e. **Tax Consequences for Some Changes in Domicile**

During an audit of an individual who historically maintains a home in New York, yet claims to be a resident of another state, the auditor may find that there are tax consequences of claiming an out-of-state residence. When a taxpayer spends several months visiting friends and family in New York, they may find it economically beneficial to maintain the New York property rather than rent or stay in a hotel during their visit. For taxpayers who fall into this category, there may be a tax effect of claiming a primary residence or domicile outside New York resulting in a taxable capital gain when the New York property is eventually sold.

For example, a husband & wife purchased a home in New York for $150,000 in 1965 and established New York as their domicile. In 1985 the taxpayers purchased a home in Florida and changed their domicile. Although they now consider themselves nonresidents of New York, they retained the New York residence until 2004 when it was sold for $600,000. According to IRC Section 121, taxpayers can exclude the gain on the sale of a principal residence occurring on or after May 7, 1997 not exceeding $250,000 ($500,000 if married filing jointly). Since the taxpayers in the example indicated that they changed their domicile in 1985, the New York property ceased being their principal residence long before it was sold in 2004. The taxpayers would owe tax for federal and New York State purposes on the full $450,000 gain in the year of the sale.

In addition, the taxpayers as nonresidents would be required to pay estimated taxes on the gain at the time of sale. As a result of the enactment of new Tax Law Section 663, nonresidents are required to pay estimated taxes on gains from sales of real property occurring on or after September 1, 2003. See TSB-M-03(04)I and M-03(4.1)I for more details.

The auditor should be aware that the sale of a primary residence does not always correspond to a change of domicile. According IRS Regulation 1.121-1, the IRS generally considers a principal residence as the one “the taxpayer uses a majority of time during the year.” As you can see this differs dramatically from "domicile," which has intent as the key element. It should be noted, however, that the IRS will consider other factors some of which are similar to the ones discussed in these guidelines.

Finally, it is possible for a taxpayer to be a nonresident and yet still exclude the gain from the sale of a New York property as a principal residence. Even though the taxpayer is a New York nonresident in the year of sale, Federal law allows the gain to be excluded subject to the limitation amounts discussed above as long as the property was used as a principal residence in two of the five years ending with the date of sale.

2. Primary Factors: Active Business Involvement

- ***The individual's pattern of employment, as it relates to compensation derived by the taxpayer in the particular year being reviewed.***

- ***Business involvement also includes active participation in a New York trade, business, occupation or profession and/or substantial investment in, and management of, any New York closely held business such as a sole proprietorship, partnership, limited liability company and corporation.***

The taxpayer's continued employment, or active participation in New York State sole proprietorships and partnerships, or the substantial investment in, and management of New York corporations or limited liability companies, is a primary factor in determining domicile. If a taxpayer continues active involvement in New York business entities, by managing a New York corporation or actively participating in New York partnerships or sole proprietorships, such actions must be weighed against the individual's involvement in businesses at other locations when determining domicile. The degree of active involvement in New York businesses in comparison to involvement in businesses located outside New York is an essential element to be determined during the audit.

In today's world of electronic gadgetry and instant communications, involvement with New York businesses can takes place from afar or while physically present in New York State. The degree and dimension of a taxpayer's involvement in the day-to-day operation, or in a policy making position, must be analyzed during the audit.

An otherwise absent person whose primary factors other than Active Business Involvement point toward non-New York domiciliary status should not be treated as a New York domiciliary simply by reason of long distance contacts with business activities in New York. Likewise, a person present in New York should not be able to assert domicile like contacts with another state based solely on long-distance business activities involving that other state. Put differently, even though operation of a New York business from outside New York may contribute to a finding of a Active Business Interest in New York, the fact that the taxpayer seldom comes to New York, maintains no home, family or objects near and dear in New York should generally assure that the individual will not be treated as a New York domiciliary.

The extent of an individual's control and supervision over his New York business interest was one factor, among others, that was discussed by the Appellate Division, in ***Matter of Herbert L. Kartiganer, 194 AD2d 879, 599 NYS2d 312***, where it states:

> ***"The record further indicates, however, that Kartiganer retained a significant proprietary interest in his engineering firm and continued to play an active role in its day-to-day operation. Indeed, Kartiganer testified that he remained in constant communication with the Orange County office by telephone and courier service."***

In his determination, the ALJ had similarly stressed the importance of the taxpayer's New York business ties. In dismissing the taxpayers' formal declarations that they had changed their domicile to Florida, the ALJ noted,

> ***"But of greater significance is the crucial fact that, throughout the period at issue, Mr. Kartiganer maintained an active involvement in his New York business interests…"***

And despite other factors pointing to a continued New York domicile such as the historical home and substantial time, it was these business interests that proved to be "the most persuasive indicia that petitioners did not change their domicile to Florida…"

Passive investment in a New York business is not indicative of domicile whereas a taxpayer actively participating in the management of a business may be. Activities such as operating a business must be given greater weight than the mere investment in a business venture. The fact that funds are left on deposit with a New York bank must not enter into a determination on domicile.

Employment and business connections in New York must be closely scrutinized to determine the degree of involvement. Active participation in the day to day operation of a New York business, such as those referred to in the Kartiganer decision weigh heavily in deciding an individual's business involvement. Another good example of active business involvement was ***Matter of Richard E. & Jean M. Gray*, 235 AD2d 641**. The Court cited Mr. Gray as being the controlling shareholder and chairperson of the board of Gray-Syracuse Inc., a New York based Manufacturing Corporation. In their review of the Tribunal decision, the Court used Mr. Gray's own words to document his New York business ties. Mr. Gray was quoted as being, "deeply, deeply involved" in the operation of Gray-Syracuse and felt his involvement was "vital to the health of the company."

The auditor must be aware that the "Active Business Involvement" factor, like the home factor, is only one factor leading to a decision concerning the individual's domicile. If the facts clearly show that the business is being run from an out-of-state location, the control that the individual asserts over the business is one factor in favor of a New York domicile while the individual's out-of-state presence is a factor in favor of domicile outside New York. The actual location of the business is one element to be examined during the audit. The degree of involvement by the individual in the day-by-day operation of the business is another. Each element of the "Active Business Involvement" factor must be compared between New York involvement and involvement in businesses at other locations. A good example of where the taxpayer was determined not to be actively involved in the business is the Tax Appeals Tribunal decision in Matter ***of Paul and Ellen Burke*, DTA No. 810631.**

In that case, Mr. Burke owned a construction company in New York which required his active management, testifying that “without my presence, there wasn’t any construction company.” At some point the nature of the business changed from building homes to owning and renting properties with a concomitant fall off in the taxpayer’s level of involvement in the business.

The Department pointed to phone calls made by Mr. Burke from his home in Florida to the New York office as well as visits to the office when the Burkes were in New York as evidence of his continued involvement in the business. The ALJ, however, did not consider this to be sufficient evidence of active involvement, noting that the calls and visits were limited both in amount and duration. The ALJ stated further,

> ***"While it is reasonable to expect that Mr. Burke would take some interest in a business he had built and which supplied a stream of income in retirement …the same does not, given all of the circumstances and credible testimony, compel a conclusion that Mr. Burke was actively involved in the business. Further, it is not implausible to accept and expect, after 30 years of full-scale construction and development with its attendant stress and long workdays, that the Burkes would be more than ready for a change to a hands-off, relaxed and recreation/social oriented lifestyle. To this end, the Burkes configured their business to be managed by others, and made their home where people of like circumstances, aims and means were situated (i.e., in Florida)."***

The adoption of the passive activity loss rules of the Tax Reform Act of 1986 increases the importance of analyzing the individual's business ties. For example, a taxpayer may have provided documentation, with his federal return, to substantiate that he materially participates in a New York activity. This material participation may permit the individual to exclude the loss from the passive activity loss limitations. However, this same activity can also be used to show that the taxpayer has significant New York business connections.

In a family owned business, if a parent passes the daily operation of the New York business to the children but remains active in the decision making process, this active involvement could demonstrate the taxpayer's continued connection to New York. As persons become older and accumulate wealth, they may choose to devote less time to the business and bring in younger individuals who will eventually succeed them, ever reducing their status and compensation. This alone does not demonstrate a change of domicile. This diminished involvement in a New York business is one element of the "Active Business Involvement" factor which becomes less important as the taxpayer phases out of the operation. In the end, the auditor must weigh this item against

others, such as the individual's involvement in any business ventures located outside New York, before reaching a conclusion. The conclusion reached on the basis of the "Active Business Involvement" factor is only one component of the five primary factors.

When examining the primary factors, the auditor must concentrate on the analysis of the primary factors, of which Active Business Involvement is one. When analyzing the implication of a taxpayer's business contacts in determining domicile, the questioning must center around the underlying issue of domicile. For example, a taxpayer whose claimed domicile is some distance from the place at which he or she works and whose work patterns therefore entails frequent overnight stays in a more convenient place from which he or she commutes to work, presents a different picture from the suburban commuter who has a New York home, but regularly commutes to, and stays overnight in, the jurisdiction of the claimed domicile.

3. Primary Factors: Time

- ***An analysis of where the individual spends time during the year.***

Another one of the primary factors is a quantitative analysis of where the individual spends his time during the tax year. The auditor should compare the time spent in New York in relationship to the time spent at the other locations. The "Time" factor is only one of the factors. A decision concerning domicile cannot be made based only upon the analysis of where the individual spends his time. The results of this comparison must be weighed with the results from the other primary factors to reach a decision.

That being said, the location where an individual spends his time is often an important consideration in ascertaining his intentions with regard to domicile. Taxpayers' declarations of a change of domicile are often belied by the fact that they spend considerably more time during the year in New York than their claimed place of domicile. For example, in ***Matter of Donald C. Smith & Carol A. Groh, DTA Nos. 810532 & 813342,*** the ALJ noted that during the audit period the taxpayers spent at least twice as much time and, in some years, three times as many days in New York than in either of the two locations where they were claiming to be domiciled.

In confirming the ALJ, the Tax Appeals Tribunal stated that the "importance" of time as a factor "was underscored by the recent Appellate Division case of ***Matter of Buzzard v. Tax Appeals Tribunal, 205 AD2d 852***," involving a married couple who claimed a change of domicile to Florida. Enumerating the continued ties the taxpayers retained with New York, the Court concluded that they had not changed their domicile, stating,

> ***"Most significantly, in the years in question petitioners spent more time in New York than in Florida."***

On the other hand, the fact that a taxpayer spends more time in New York than in the state where he claims to be domiciled may not in and of itself be necessarily indicative of one's intentions. For example, a taxpayer who works in New York City may routinely stay overnight in his city apartment when working late rather than return to his home in New Jersey where he claims to be domiciled and where his family resides. The taxpayer spends most weekends in New Jersey with his family. Thus, the taxpayer spends more time in New York because he has to, but weekends in New Jersey because he wants to. In this situation New Jersey would likely be the place which the taxpayer intends to be his permanent home despite the fact that more time was spent in New York.

A diary, appointment log, or calendar maintained by the individual can be used to support this analysis. Some of the individuals who are audited, however, do not keep extensive diaries or logs. It would not be expected that an individual who has retired from active employment would keep a detailed diary or log as to where he was every day of the year. A personal conversation with the taxpayer and the representative may help to clarify the situation and provide the auditor with the patterns of travel for the years under audit. The auditor should explain the importance of determining where the taxpayer actually spends his time and show the relationship to the audit conclusions.

During this analysis, the auditor should focus on the overall living pattern of the taxpayer, asking whether the patterns present strong evidence that the new location has become the taxpayer's domicile. For example, if an individual formerly lived and worked in New York during the entire year but has retired and moved south, seasonal visits to New York, such as an annual summer visit, should not be viewed negatively. This visit to New York is entirely consistent with the taxpayer's new pattern of living and purported change of domicile. An illustration of this is the comments of the ALJ in ***Matter of Henry and Betty Karlin*, DTA No. 807996:**

> ***"It is clear that they (the Karlins) had significant and long-term as opposed to only recently acquired ties to Florida, and that by the years in question they had shifted their focus so as to make their permanent home (in retirement) and domicile in Florida. In sum, petitioners were "summering" in New York, but lived in Florida. Hence, petitioners were properly considered domiciliaries of Florida during the years 1986 and 1987."***

By contrast, if the taxpayer merely changes from spending six months per year in the southern home to spending seven months per year, this minimal alteration, by itself, should not constitute strong evidence of a change of domicile.

At this point, if the audit is focused on domicile, the auditor need not account individually for every single day as long as patterns are established. The auditor should seek out credible testimony from the taxpayer and attempt to recreate the locations where the taxpayer spent time during the audit period. The information that the auditor receives as testimony or declarations from the taxpayer should be weighed along with the other factors relating to any of the locations where the taxpayer resided during the audit period. If the individual provides diaries or logs, they should be randomly checked for their validity.

A good example where the taxpayers' credible testimony was instrumental in demonstrating an overall living pattern is ***Matter of Jack & Helen Armel, DTA No. 811255***. The taxpayers were unable to provide documentation to substantiate their whereabouts during one month of the audit period that was vital in determining if they were statutory residents. The Tax Appeals Tribunal concluded, however, that the taxpayers' credible testimony, as corroborated by affidavits from friends and associates,

was acceptable in lieu of documentation to show that they were not present in New York during the month in question. Although the issue in this case was statutory residency, the same reasoning would apply equally to matters of domicile.

As you can see, a taxpayer does not necessarily need additional documentation, beyond his or her own statements, as to the amount of time spent in New York. Since it is normal for people to display certain predictable and repetitive migratory patterns, and it is abnormal for people to document their presence in a particular location on every day of the year, an auditor should measure the credibility of a personal account in the context of an audit. The auditor should accept a taxpayer's credible and consistent account of routine travel.

In order to substantiate the entries in a diary, or if no diary exists, a taxpayer may be asked to provide other information such as credit card receipts, phone bills, or other information to identify where the taxpayer was during a specific period.(A complete list is contained in Chapter VII). For example, a taxpayer might be asked to submit expense accounts or credit card receipts to demonstrate a presence IN or OUT of New York. In addition, telephone bills may be requested to show the activity at a particular location. This activity could also be used to demonstrate a presence either in or out of New York. Testimony should also be sought from the taxpayer which would substantiate the entries in the diary or log. Random sampling and test checking of the entries in a diary and/or other testimony submitted by the taxpayer will reduce the burdens placed upon the taxpayer to produce records and documentation.

The auditor should use all of this information to determine the pattern of activity both in and out of New York State. The information provided by the taxpayer will usually represent time spent at the New York location as well as the location of the claimed domicile. The auditor will analyze information pertaining to the time spent factor for the purpose of comparing time spent at the claimed domicile to the time spent in New York. Time spent in places other than these is not considered in this analysis. The auditor should review this material from both the New York perspective and that of the other location. The review of diaries and logs should be handled in an objective manner. The auditor should not concentrate only on conducting an exhaustive review of third party records focusing on ***NON-NEW YORK*** days but should equally review information submitted by the taxpayer concerning out-of-state documentation of what appears to be a New York day.

"False" indicators that can mistakenly turn a non-New York day into a New York day include credit card purchases in New York by children, phone calls by housekeepers, and children or relatives staying at the New York address as a guest of the taxpayer when he may not be in New York. The auditor should carefully examine this type of documentation. When appropriate, an affidavit from a third party individual may clarify the situation. In addition, auditors should be alert for the same "false indicators" which might be used to verify a day spent out of the state.

When analyzing the time spent at the various locations, the auditor can ease the burden placed upon the taxpayer by being reasonable in the determination of the undocumented days. For example, if an individual has provided documentation for a Friday and Monday that they were vacationing out west, it is logical to assume that the individual spent Saturday and Sunday there also. If the taxpayer cannot provide specific documentation for the Saturday and Sunday, the auditor should not consider these days as New York days without evidence that the individual returned to New York for the weekend.

4. ***Primary Factors: Items "Near and Dear"***

- ***The location of items which the individual holds "near and dear" to his or her heart, or those items which have significant sentimental value, such as: family heirlooms, works of art, collections of books, stamps and coins, and those personal items which enhance the quality of lifestyle.***

Another primary factor is the location of pets, personal items or other sentimental possessions which the taxpayer holds "Near & Dear to their heart." These include specific items of value, such as a rare book, art or antique collection, or those of little monetary value such as a family photo album, which enhance and add quality to the individual's lifestyle. In some cases it may be appropriate to review insurance policies which could disclose the actual location of such items, particularly if moved to a new location. As part of the opening interview with the taxpayer the auditor should discuss the location of the items he places value on. This analysis of "Near and Dear" items can help to solidify the intent of the taxpayer concerning the location of his domicile. For example, a collector of rare books could show his intention to change domicile if a new residence is modified to accommodate the large collection and the collection is actually moved to the new location. However, if the same collector does not move the

books, this, coupled with the results of the analysis of the other primary factors, may indicate that the taxpayer is not showing intent to give up and abandon the former domicile. In the following ALJ Determination, ***Matter of James K. & Helen C. Dittrich*, DTA No. 811479**, the taxpayers' failure to remove near and dear items from their upstate New York home was one of several factors cited by the ALJ in holding that they had not changed their domicile:

> ***"As noted by the Division, petitioners did not remove special near and dear items from their home in Vestal. Although such failure is seemingly innocuous, one must remember that in domicile matters informal acts can be persuasive in determining a person's general habit of life."***

The items "Near & Dear" at all locations must be reviewed and a comparison made. The mere location of items "Near & Dear" is not conclusive in determining the location of one's domicile, but is one factor which helps to give a picture of how the taxpayer views his domicile. The auditor must look not only at the items which remain in New York but must look at all items considered to be "Near & Dear" to the individual. The auditor should not ignore or dismiss the transfer of "Near & Dear" items to a non-New York location. Even though the transfer of these possessions to a non-New York location could be viewed by some as a mechanical or a self-serving act, consideration must be given for those items located outside New York. An example of this is included in the comments made by an Administrative Law Judge in ***Matter of William and Marion Langfan, DTA No. 808823***. The ALJ wrote:

> ***"Although the Division contended that petitioners left many important personal items in their New York residence, like crystal and furniture, it was established that the Langfans moved valuable artwork and sculptures created by Mrs. Langfan's father and her jewelry, which was kept in a safety deposit box in Florida, to Florida in 1985. These valuables and sentimental items represent a clear emotional tie to New York which was severed by petitioners when they removed them from the State of New York to the State of Florida."***

If an item is valuable, we would expect the item to be moved by a first rate carrier. For example, one would not expect an individual to move antique furniture in a U-Haul, but rather by a bonded and insured professional carrier. This type of move might be documented with "bills of lading" or insurance statements.

In assessing the nature of "near and dear" items, auditors must be sensitive to the unique circumstances of the individual being audited. Obviously, that which is "near and dear" to any individual will sometimes be highly subjective. Individuals with several residences usually have items enhancing the quality of their lifestyle in every residence that they maintain. For example, when a taxpayer is maintaining more than one residence, furniture appropriate to each residence will also be maintained. Antique furniture may stay in the New York residence because it is geographically inappropriate for the Florida home, and not because the taxpayer remains domiciled in New York. Similarly, one would not be expected to transfer furs or clothing suitable for a colder environment to a warm weather location.

Auditors should not assume that because a person has the wherewithal to own expensive possessions that such expensive items are "near and dear" to an individual in the sense of making a house a home. The appraised value of possessions, insurance bills, or the lack of moving bills therefore should not automatically lead to the conclusion that the taxpayer's domicile follows the location of such belongings. Auditors should consider the possibility that a taxpayer maintains such items in one location because they are not "near and dear" enough to move to the taxpayer's "home." Similarly, items with significant intrinsic value may be located in one location for reason of preservation or safe-keeping, in which case the locus of the item is more an investment decision than a reflection on domicile.

Lastly, when developing the "near and dear" factor, the auditor is reminded to recognize that sentimental significance is different from monetary value, and the mere fact that valuable possessions are in one location or the other (or both) may not, in some cases, shed light on domicile.

5. ***Primary Factors: Family Connections***

While analysis of the "time" factor presents us with the most quantitative factor in determining an individual's domicile, analysis of "family" is a much more subjective factor. Throughout the discussion of the primary factors it has been stressed that no single factor can be considered a "stand alone" indicator of domicile. This statement certainly holds true for the analysis of "family connections" as a factor in determining domicile.

The Department recognizes that the analysis of an individual's familial connections could be intrusive into one's private and personal lifestyle. The auditor should not request information regarding the family factor until the auditor has evaluated the initial residency questionnaire. To minimize the invasive nature of any audit, an analysis of family connections should generally be limited to the taxpayer's immediate family when necessary to reach a decision on domicile. The basic question of what constitutes an individual's immediate family is an area that could vary from individual to individual. Family, however, for the purposes of this analysis, will normally consist of the individual, the spouse or partner (in recognition of modern lifestyles and living arrangements), and any minor children.

The location where minor children attend school can be an important factor in determining where someone is domiciled. This is because in deciding where to live an important consideration for taxpayers with minor children is frequently the quality of the schools. This is true whether the schools are public or private. For example, if minor children are attending a non-boarding school within reasonable commuting distance from the taxpayer's Connecticut residence, then it may be concluded, if supported by other factors, that the taxpayer intends this Connecticut residence to be his or her domicile. However, if minor children attend a boarding school located near a Connecticut residence, but rarely return to the Connecticut residence, and do return to New York on the weekends, this, if supported by other factors, could indicate that the individual is domiciled in New York.

In the **Smith/Groh** Tribunal decision that was referenced earlier in the discussion of time, the location where minor children attended school was another factor cited in concluding that the taxpayers remained domiciled in New York State and City for the years 1986 to 1991:

> ***"Petitioners'' children, ages five and nine in 1986, attended school in New York City during the entire audit period when they were allegedly domiciled in New Jersey and St. Croix, but school records indicate a New York City address for 1986 through 1991."***

Thus, when auditing taxpayers with children of school age, it is appropriate for auditors to ask where the children attended school during the audit period and the dates of attendance and, if necessary, request documentation. This would apply equally to children who are attending preschool.

As mentioned in the discussion of the time factor, the focus of the analysis should be on the living patterns established by the taxpayer. For example, if an individual formerly lived and worked in New York during the entire year, but has retired and moved south, seasonal visits to New York to visit family members, such as an annual summer visit, should not be viewed as indicative of domicile. This visit to New York is entirely consistent with the taxpayer's new pattern of living and purported changes of domicile.

The family connection can help determine the domicile of an individual when it is the bond that draws an individual back to a location whenever absent and encompasses his habit of life.

As stated earlier, family is generally defined as the spouse or partner, and minor children. It should be stressed that this definition is not exclusive. There may be situations where the family may consist of other individuals such as adult children or aging parents. For example, in the Buzzard decision that was cited previously in connection with the time factor, the Tribunal also listed the taxpayers' relationship with their grandchildren as an important tie to New York:

> ***"... critical to our decision that there has been no change of domicile is the petitioners' relationship with their family, an intangible factor which permeates the record. ... The petitioners have expressed their commitment to spending as much time as possible with their children and grandchildren ... returning to Buffalo to spend the warmer months and the Christmas holidays with them during the years at issue."***

Although this decision illustrates that there may be situations where the inquiry into family may be expanded to include members other than the spouse/partner or minor children, we expect that these situations should be limited, and initiated only after consultation with the team leader and Field Audit Management.

B. EVALUATION OF THE FACTORS

After the primary factors are analyzed, and sufficient information is gathered upon which a conclusion can be based, the auditor, possibly in conjunction with his team leader, must look at the information and formulate an opinion as to the domicile of the individual. This determination of an individual's domicile can often be facilitated by applying the accounting principle of a "T" account to the factors. By aligning the factors favoring a New York domicile on one side of the account and the factors favoring a domicile outside New York on the other side, the auditor and the taxpayer are provided with a visual summary of the reasons for a specific determination. Several principles should be kept in mind during this decision making process. They are as follows:

- Evaluate the primary factors objectively. Look at the patterns that are established by the individual.
- Be open minded and fair in evaluating all factors in a balanced and reasonable manner.
- Be cognizant of the fact that individuals go through evolutionary changes during their lifetime.

Each primary factor must be analyzed and a determination reached upon the conclusion of the analysis. In some instances, the analysis of the primary factors will present "clear and convincing" evidence relating to the individual's domicile. In other cases, the analysis of the primary factors may fail to provide convincing evidence, or point equally to a domicile in more than one location. In these situations, the auditor must examine the "other" factors in an attempt to clarify the individual's domicile. Particular attention should be drawn to the concluding comments of the *Buzzard* decision. In this decision the Tribunal analyzed each of the factors and reached a conclusion based upon the facts. The Tax Appeals Tribunal stated that:

> ***"It may be argued that petitioners' life did not continue to focus exclusively on the Buffalo area to the extent it had prior to 1981; indeed there is ample evidence that petitioner Clay Buzzard did move about extensively both for personal reasons as well as for the benefit of MAWDI. Further, it is acknowledged that petitioners also owned a home in Florida, belonged to two country clubs in Florida, developed social ties in their Florida neighborhood, demonstrated various formal connections to the State of Florida (e.g., driver's licenses, voter registration, etc), and, because of Mr. Buzzard's health concerns, were constrained as to where they could spend the winter months.***

> ***However, critical to our decision that there has been no change of domicile is petitioners' relationship with their family, an intangible factor which permeates the records. ...The petitioners have expressed their commitment to spending as much time as possible with their children and grandchildren ... returning to Buffalo to spend the warmer months and the Christmas holidays with them during the years at issue.***
>
> ***This, combined with their continued business and social activity in Buffalo, goes against petitioners' assertion of a change in domicile. ... It appears that but for Mr. Buzzard's medical condition petitioners would have spent an even greater amount of time in the Buffalo area. ... We determine that petitioners have not shown, in a clear and convincing manner, an intent to change their domicile to Florida."***

A major change in the patterns surrounding the primary factors can signal a change in domicile. The auditor should never trivialize steps taken in the new location (such as the purchase of a new home, community activity, or business involvement) while magnifying the importance of the remaining New York connections. A lack of balance would create a heavy burden of proof for taxpayers, one which they feel they may not be able to overcome simply with statements of intent, or the existence of certain ties in the new location. As a result, some individuals may be given wrong advice that they can only accomplish the change with the severance of almost all ties to New York.

The auditor should recognize differences in use, including the possible conversion of a full-time principal home into a vacation residence, used only during the summer or during periodic visits to the state. The auditor should determine whether the taxpayer has acquired a permanent place of abode in the new location and is actually living in the location. With respect to the retained New York property, the focus should shift to the purported change of use, a change which converts the residence from a year-round home, the principal place of domicile, to a vacation property or hotel substitute. If the taxpayer says that he intended a permanent move to another state, the auditor should focus on the use of the former New York home to confirm or discredit the taxpayer's stated intent. A dramatic change in use of the New York living quarters, such as a change from full-time to seasonal use, or a change from full-time use to use (e.g., by a cross border commuter) one or two nights per week would tend to confirm the stated intent. Mere retention of the residence may be an insignificant incident, especially where the taxpayer owns several properties in and out of New York.

The auditor must ask if the individual's business or work patterns have changed, and whether the individual has significantly altered their work habits by reducing their duties, or transferring day-to-day responsibilities to others. Occasional use of the New York office and telephone, courier or fax communication with a New York business are not appropriately viewed as strong indicators of New York domicile if the individual's work pattern and responsibilities have significantly changed.

The auditor should concentrate on the overall living pattern, asking whether the pattern of time spent in various locations presents a body of evidence that supports the new location as the taxpayer's domicile. If the taxpayer formerly lived and worked in New York during the entire year, but has retired and moved to Florida, seasonal visits to New York, such as annual summer visits, should not be viewed negatively. They are entirely consistent with the taxpayer's new pattern of living and purported change of domicile.

Occasionally, the occurrence of an event forces a drastic change in lifestyle. Retirement, loss of employment, the death of a spouse, a divorce and re-marriage, or even the growing up of one's children can trigger a desire to change a lifestyle. The awareness of the auditor to the circumstances surrounding a dramatic change could explain a move to another location and ease the burden placed upon the individual to produce documentation of the change. By contrast, if the taxpayer merely changes from spending six months per year in Florida to spending seven months per year, this minimal alteration, by itself, would not constitute strong evidence of a change in lifestyle when determining domicile.

When the evidence supports a significant change in lifestyle, the change of domicile must be recognized. In the case of an individual who retires and moves out of New York, if the primary factors support a change, the change should be recognized and the individual notified to that effect. Taxpayers who claim a change of domicile during the audit period should provide information to support the change of lifestyle. If the taxpayer or representative is not forthcoming with the information, the auditor should request this information to support the alleged change. This supports the Department's position concerning the benefit of an opening interview or conversation with the taxpayer. Much of this information concerning changes in lifestyle can be determined through careful questioning of the taxpayer and/or the representative early in the audit process.

When the fact patterns do not present a change in lifestyle, a conclusion similar to that reached by the Tax Appeals Tribunal in the ***Matter of Colin & Delma Getz, DTA No. 809134***, is appropriate. The Tribunal concluded:

> ***"Although the petitioners made certain formal declarations that they changed their domicile (e.g., voter registration and car registrations), such declarations are less persuasive than informal acts which demonstrate an individual's general habit of life. ... Other informal conduct by the petitioners such as maintaining a checking account in Florida and a savings account in New York was, by itself, not sufficient to contradict the formal declarations of a change of domicile; however, given the aggregate of all these factors and the standard of proof that petitioners must sustain to show a change in domicile, it could not be concluded that the petitioners effected a permanent change in domicile from New York to Florida. Further, while the petitioners may have very well intended Florida to be their permanent domicile, their "general habit of life" indicated, at best, an equal commitment to both locations."***

Thus the Tax Appeals Tribunal concluded that the petitioners had not established by "clear and convincing" evidence that they effected a change in domicile to Florida for the years in question.

C. OTHER FACTORS AFFECTING DOMICILE

Apart from the primary factors, there are other factors which can provide some insight into a domicile determination. These factors however, are subordinate to the primary factors. In most cases it is usually not necessary to review the "other" factors as part of the decision making process on domicile. In order to underscore the ancillary nature of these factors, and to stress their lesser importance in a domicile decision, they have been grouped together as "other" factors.

An individual may continue to have ties to New York while being a nonresident. It is very possible that a nonresident could have many "other" factors linking them to New York but not have sufficient primary factors to conclude that the taxpayer is a resident. These "other" factors, by themselves, cannot be the basis for a residency determination. Thus individuals need not worry about maintaining these "other" ties with New York while taking full advantage of what New York offers in business, financial, cultural, medical treatment facilities, social, and entertainment avenues.

An auditor need not be concerned with these "other" factors without first establishing a basis for consideration of New York as the individual's domicile from an analysis of the primary factors or where the primary factors are at least equal in weight for New York and another location. Where the primary factors indicate a New York domicile, these other factors should be reviewed, but are not considered to carry the weight and significance of the primary factors. For situations in which it remains unclear as to the strength of a domicile determination by an analysis of the primary factors, an analysis of these *"other"* factors is warranted and takes on a greater significance.

The "Other "Factors are:

1. The address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received.

2. The physical location of the safe deposit boxes used for family records and valuables.

3. Location of auto, boat, and airplane registrations as well as the individual's personal driver's or operator's license.

4. Indication as to where the taxpayer is registered to vote and an analysis of the exercise of said privilege. The auditor should not limit the review to the general elections in November, but also question the taxpayer's participation in primary or other off-season elections, including school board and budget elections.

5. Possession of a Manhattan Parking Tax exemption.

6. An analysis of telephone services at each residence including the nature of the listing, the type of service features, and the activity at the location

7. The citation in legal documents that a particular location is to be considered the individual's place of domicile or that a particular residence is considered to be a primary residence. Examples would include, but are not limited to, wills; divorce decrees or separation agreements; applications for school tax relief exemption (STAR); leases for rent-controlled or rent-stabilized apartments.

8. Green cards indicating that an immigrant can legally reside in the United States on a permanent basis.

The above lists of "other" factors, as we have indicated, are subordinate to the primary factors. The auditor's reliance on this information in determining domicile should be with the awareness that the individual has the ability to easily control and regulate many of these factors. For example, a taxpayer, because of varying residency rules, may be able to change his voter registration, auto registration, or driver's license to another state for convenience purposes, while never intending to change domicile. Other factors, not included on this list are considered incidental, with little bearing on determining one's domicile. All of the factors listed above may not be present in each situation. The existence of a factor when determining the domicile of an individual depends upon the specific circumstances of the situation.

After a review of the primary factors the auditor should determine if the factors point to a case of New York domicile. If the conclusion of the auditor, based on primary factors, is that there is not a case to support New York domicile, there is no need to review the "other" factors. Even the diligent auditor who has first developed a basis for New York domicile from an analysis of the five primary factors, and now needs to examine these "other" factors in relationship to domicile, may still encounter a situation where the individual has taken several secondary steps to demonstrate a change of domicile while doing little to change the primary factors which reflect significant ties to New York.

For example, John and Sarah were domiciled in New York when John retired in 2000. They have a large home in New York and a condominium in Florida. Prior to 2000, John and Sarah spent approximately 4 months in Florida and the remaining 8 months in New York State. John was president of a corporation when he retired and was retained as a consultant and Chief Executive Officer of the Corporate Board after retirement. They have many family and friends in both the New York and Florida area and are involved in the activities of the local country club, as well as other civic and service organizations at both locations. When John retired in 2000, he and his wife decided to spend more time in Florida, especially during the winter months. John & Sarah usually leave for Florida in the later part of October and return during the first part of April each year. During their first prolonged stay in Florida, they transferred their auto registrations to Florida, as well as acquiring new driver's licenses from Florida. They registered to vote in Florida and have voted there each year since retirement. They visit doctors and dentists in both locations as the need arises. They maintain bank accounts in both locations and have the mail sent to whichever location they are at. John & Sarah usually return to New York for the Thanksgiving and Christmas holidays and John returns about once a month to attend the corporate board meetings.

We can see that John & Sarah took many "other" factor steps in an effort to effectuate a change of domicile but did little to change the primary ties. The auditor must develop an analysis of the primary factors, those which were retained in New York and those that are in existence at the other location. This analysis is more than just a listing of the ties at one location versus the ties at another location. The analysis is a comparison of the activities associated with New York, versus the activities associated with the ties in the other location.

Other aspects of the taxpayer's lifestyle may emerge during the audit. It is one of the aims of these guidelines to identify what Audit believes to be the most important considerations in determining one's domicile, which we have grouped into primary and other factors depending on their level of importance. Having said that, however, we do recognize that in certain limited situations there could be other factors not specifically identified in these guidelines that may be more appropriate. For example, one taxpayer may have a passion for cultural activities which only New York with its abundance of museums, theaters, and concert venues could satisfy. On the other hand, another taxpayer may be more interested in outdoor activities such as boating or golf that are more suitable to a warm weather location. *In those situations where other aspects of the taxpayer's lifestyle not specifically enumerated as "primary" or "other factors" in the guidelines appear to be relevant, the auditor should first discuss this with his team leader and Field Audit Management before informing the taxpayer.*

D. NONFACTORS OF DOMICILE

It is necessary to distinguish between factors not covered by the guidelines which may be appropriate and those factors which are irrelevant in determining one's domicile. The auditor should not request documentation concerning these "non-factors" nor should the auditor invest time in exploring their impact on the domicile issue. Should the taxpayer or the representative raise these factors during the course of the audit, the auditor should explain that these are "non-factors" that are not considered in the determination of domicile either for New York or elsewhere. These "non-factors" include but are not limited to:

- the place of interment;
- the location where the taxpayer's will is probated;
- passive interest in partnerships or small corporations;
- the mere location of bank accounts;
- contributions made to political candidates, or causes;
- the location where the taxpayer's individual income tax returns are prepared and filed.

Two specific "non-factors" which are not part of any decision of domicile are charitable contributions and volunteering for nonprofit organizations.

It has long been the policy of the Department that charitable contributions in and of themselves are not considered in determining domicile. See TSB-M-84(17)I.

As a non-factor, there is no need for auditors to review, transcribe, or in any way cite contributions as a factor in a domicile case. In cases where the taxpayer cites contributions as a factor, the auditor should advise the taxpayer or representative that the Department's position is that charitable contributions are neither a factor to support residency nor to support nonresidency.

The status of charitable contributions was further clarified when Section 605 of the Tax Law was amended in 1994 by adding a new subsection (c). This new subsection prohibits not only the use of monetary contributions in determining an individual's domicile but donations of uncompensated time as well. Subsection (c) does not distinguish between tax deductible and non-tax deductible charitable contributions. Therefore, whether or not a charitable contribution is tax deductible makes no difference in domicile cases. The definition of a charitable contribution contained in subsection (c) also includes the "volunteering, giving, or donation of uncompensated time." Thus, the fact that a taxpayer volunteers as a deacon in his New York church is precluded by Tax Law Section 605(c) from being used to show continuing ties to New York for the purpose of determining domicile. Any days spent in New York in connection with this role, however, can be counted for purposes of statutory residency, a subject that will be discussed further in chapter VI.

Taxpayers who do volunteer work for New York charities or nonprofits may claim that the sole reason for their presence in New York on a given day is in connection with their volunteer work. It is Audit's position, however, that the performance of any other activities unrelated to charitable work would allow these days to be considered in the analysis of the time factor for domicile. Thus, if the taxpayer spends part of the day engaged in fundraising and the remainder of the day at work, we would consider this to be a New York day. Similarly, if the taxpayer spends a week in New York and does volunteer work only on Monday and Friday, we would consider the intervening days to be New York days in evaluating time spent in New York for domicile.

Section 605(c) applies to contributions made in taxable years beginning on or after January 1, 1994.

E. TAX RELIEF FOR A DOMICILIARY

Tax Law Section 605(b)(1)(A) and the related regulations in NYCRR 105.20(b)provide tax relief for certain individuals who are New York State domiciliaries. A domiciliary who meets the criteria of either provision explained below would not be deemed a resident.

- THIRTY DAY RULE

To qualify under this provision, the taxpayer has to meet the following three conditions:

1. he maintains no permanent place of abode in New York State during the year;
2. he maintains a permanent place of abode outside New York State during the entire year; ***and***
3. he spends not more than 30 days of the taxable year in New York State.

Regarding the first condition, the PPA in New York does not have to be maintained for the entire year. Thus, in ***Matter of Patrick Regan, DTA No. 816588,*** the ALJ concluded that the taxpayer did not satisfy all three conditions because he maintained an apartment in New York for part of the year.

- 548 DAY RULE

To qualify under this provision, the taxpayer has to meet the following three conditions:

1. within any period of 548 consecutive days such person is present in a foreign country or countries for at least 450 days;

2. during such period of 548 consecutive days such person is not present in New York State for more than 90 days and does not maintain a permanent place of abode in New York State at which such person's spouse (unless such spouse is legally separated) or minor children are present for more than 90 days; ***and***

3. during the nonresident portion of the taxable year with or within which such period of 548 consecutive days begins and the nonresident portion of the taxable year with or within which such period of 548 consecutive days ends, such person is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such portion of the taxable year bears to 548.

As long as an individual who is domiciled in New York State continues to meet the requirements of either the 30-day rule or the 548-day rule, the individual will be considered a nonresident of New York State for personal income tax purposes. But if the individual fails to meet these conditions, the individual will be subject to New York State personal income tax as a resident.

Where an individual domiciled in New York State claims to be a nonresident for any taxable year, or portion thereof, the burden is upon the individual to show that they satisfy the requirements set forth in either the 30-day rule or the 548-day rule.

Example:
A single individual who is domiciled in New York State was present in a foreign country or countries 463 days during the period July 2, 1998, through December 31, 1999. During this period, the individual was present in New York State a total of 50 days, 15 during the period July 2, 1988, through December 31, 1988, and 35 days during 1989. During this period of time, the individual did not maintain a permanent place of abode in this state at which his minor children were present for more than 90 days.

- Since the individual was present in a foreign country for 463 days, he meets requirement number 1 of the 548-day rule.
- The individual also meets requirement number 2 because the total of 50 days present in this State during the 548 consecutive day period is less than the maximum of 90 days allowed.
- To determine if the individual meets requirement number 3, the individual must determine if the number of days present in New York State during the period July 2, 1988, to December 31, 1988, (the short period) exceeds the maximum allowed for the nonresident portion of the taxable year within which the 548-day period began.

The maximum number of days the individual may be present in New York State during the short period is determined as follows:

183 days in short period ***548***	***X 90 = 30***	***Maximum number of days allowed in New York during the short period***

Since the individual was present in New York State 15 days during the period July 2, 1998, through December 31, 1998, the individual did not exceed the maximum of 30 days allowed for the period. Therefore the individual also meets requirement number 3.

Based on the information contained in the example, this individual meets all the requirements of the 548-day rule and would be considered a nonresident of New York State for income tax purposes during the period July 2, 1998, through December 31, 1999. Therefore this individual would be required to file as a part year resident of New York State for the taxable year 1998 and as a nonresident of New York State for the taxable year 1999.

Of particular interest to the auditor is the fact that the taxpayer may claim any period of 548 consecutive days in order to seek treatment as a nonresident under this rule. This election permits the taxpayer to have multiple periods as well as overlapping periods during the audit.

Since many of the individuals selected for audit are involved in international travel as well as being assigned to foreign offices for periods of time, the auditor should be aware of the possibility of nonresident treatment based upon the 548-day rule.

If confronted with a claim of treatment as a nonresident based upon the 548-day rule, the auditor must examine each of the three requirements and determine if the taxpayer meets all three conditions. Failure to meet any one of the conditions can prevent the taxpayer from being treated as a nonresident and therefore taxed as a resident. The one condition, where an individual is often vulnerable, is the third requirement which is used to determine the maximum number of days one may spend in New York State during the short periods. The location of the taxpayer should be carefully examined during these periods. Remember, when claiming this treatment, the burden rests with the taxpayer to show that they satisfy the requirements set forth in this regulation.

For more information see also advisory opinion **TSB-A-90(11)I.**

VI. STATUTORY RESIDENCE

A. DEFINITION

A statutory resident is an individual who "is not domiciled in this state but maintains a permanent place of abode in New York State and spends in the aggregate more than one hundred and eighty-three days of the taxable year in this state, unless such individual is in the active service of the armed forces of the United States," (Tax Law section 605(b)(1)(B)). This provision is commonly known as the 183-day rule.

B. PERMANENT PLACE OF ABODE

1. General Rule

A permanent place of abode (PPA) can be a house, co-op, apartment, condo, or other dwelling. New York State Income Tax Regulation Section 105.20(e) defines a permanent place of abode as a

"dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage which is suitable and used only for vacations is not a permanent place of abode. A dwelling which only contains bachelor quarters and does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc, will generally not be deemed a permanent place of abode."

These criteria for permanent place of abode apply to places both within and without New York State.

Despite the absence of cooking facilities, however, a hotel room and an apartment were both deemed to be permanent places of abode in an advisory opinion, ***Paul Gajkowski, TSB-A-02(7)I***. The opinion based its conclusion in both instances on the fact that “the living arrangements will be maintained on a permanent basis.”

Two important aspects of the definition of a "Permanent Place of Abode" were examined in the ***Matter of John M. Evans, 199 AD2d 840***. In this decision, the Tax Appeals Tribunal discussed the meaning of the terms *"maintains"* and *"permanent"* in its decision. The Tax Appeals Tribunal stated, in part,

> ***"Given the various meanings of the word "maintains" and the lack of definitional specificity on the part of the Legislature, we presume that Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the "variety of circumstances" inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise.***
>
> ***We reject the petitioner's assertion that since he did not pay for many of the operating expenses of the dwelling (such as the utilities or major repairs, or any costs of ownership such as mortgage payments), he was not "maintaining" the living quarters as required by the statute. We find no support for the conclusion that the Legislature intended to define a resident individual solely by the types of expenses incurred by the individual and to limit the definition only to individuals who incur the types of expenses suggested by the petitioner. As there can be many financial or other arrangements that determine how the costs of a dwelling are paid for (such as where expenses are shared or provided by another, or where an individual's contribution to the household is not in the form of money), the nature of the expenses incurred in and of themselves cannot determine whether an individual is maintaining a place of abode in the city.***
>
> ***With regard to whether a place of abode is "permanent" within the meaning of the statute, we do not agree with petitioner that the statute requires that the place of abode be owned, leased, or otherwise based upon some legal right in order for it to be permanent. ... In our view, the permanence of a dwelling place for the purpose of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place.***

> ***Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place. For example, its seems clear that an apartment leased by one individual and shared with other unrelated individuals may be the permanent place of abode of those who are not named on the lease, given the appropriate facts."***

The Appellate Division of the State Supreme Court determined in *Evans* that the taxpayer maintained a permanent place of abode in New York. The Court stated that

> ***"the permanence of a dwelling place ... cannot be limited to circumstances which establish a property right in the dwelling place."***

The court also held that the Tribunal was correct in concluding that Evans maintained a permanent place of abode in New York City.

A second home which contains all the amenities found in a primary residence does not constitute a mere camp or cottage even if it is located in a vacation area. Therefore, a second home that contains cooking and bathing facilities and is suitable for year-round living would constitute a permanent place of abode even if it is used primarily for vacations or on weekends. For example, the regular weekend use of a second home in a vacation area differs from the occasional use of a cottage which is not equipped to accommodate year-round use.

2. Residence Not Used or Used by Others

Generally, residential property (house, condo, apartment, etc.) will not be considered a permanent place of abode if the individual never uses the property as a residence. For example, if the taxpayer acquires residential property for investment purposes or as the result of an estate settlement or as part of a settlement in a divorce proceeding, etc, and never uses the property as a residence or as living quarters for himself or his family, the property will not be considered a permanent place of abode for the individual. An example can be found in the ALJ Determination, ***Matter of Martin & Cindy Jo Stein, DTA No. 812631***, which dealt with the status of a New York City apartment acquired by a husband pursuant to a divorce settlement. Although it was solely owned by the husband and available for his use throughout the audit period, he was able to establish

that it was originally purchased for his wife and never used by him either during or after their marriage. According to the ALJ, the taxpayer

> ***"...had no living arrangement with the apartment, during the audit period or previous thereto. Mr. Stein maintained no clothing or personal effects at the cooperative apartment. He did not sleep there, or utilize it for business, personal or social purposes. His relationship with the apartment vis-a-vis the spirit of statutory residence was nonexistent."***

Whereas the *Evans* case established that the *absence* of a property right did not preclude a residence from constituting a PPA, the ALJ in *Stein* found that neither did the *presence* of a property interest guarantee that it was a PPA if it can be shown that the residence was not used by the taxpayer.

The individual should be able to show through documentation or affidavit that the property has not been used as his personal residence. In addition, documentation such as a settlement agreement or report showing the distribution of an estate could be used to support the acquisition of the property.

A residence that is maintained by one individual but used exclusively by another should not be deemed a permanent place of abode for the individual who maintains it. This situation may arise where parents acquire and maintain a residence solely for use by a child who is attending college in New York. A similar application of this concept would be where spouses are divorced, or separated, even without a legal separation order, and one spouse is providing a permanent place of abode for the other spouse in New York and the spouse providing the residence did not have use of the residence.

In the ALJ Determination, ***Matter of Louis A. & Amelia (Deceased) Panico*, DTA *No. 805810***, a Long Island home was not the permanent place of abode of the taxpayers despite the fact they maintained it through payment of the mortgage and phone bills. The ALJ reasoned that the taxpayers

> ***"...could not have been expected to rent out the Medford house when it was, of necessity, occupied by their daughter and grandchild. Accordingly, the Medford house was the permanent place of abode of petitioner's daughter and grandchild during 1981, not that of petitioners..."***

It is important to distinguish the above cases where clearly the taxpayer in question was not using the living quarters from those situations where the taxpayer does use the residence, however infrequently. This was the scenario presented in an advisory opinion, ***Freundlich & Company, TSB-A-94(14)I***. The taxpayer was a domiciliary of Florida who was planning to purchase a cooperative apartment in New York City where he would stay from June to September. The apartment would be vacant the rest of the year except for "an occasional gratuitous use by friends or family." The opinion concluded that the taxpayer would be maintaining a PPA in New York State, stating that "it is immaterial that it will vacant a portion of the taxable year."

3. Residence Not Habitable

Occasionally a taxpayer will claim that a New York residence is uninhabitable because it is undergoing extensive renovations either because of property damage or personal choice of the taxpayer. In these situations it is necessary to distinguish between major renovations which render a residence unlivable such as inadequate plumbing or a lack of sleeping quarters, and minor repairs which merely make it inconvenient but still possible for the taxpayer to use.

Regulation Section 105.20(e) states, in part, that a place of abode will generally not be deemed permanent if it "...does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc." It is audit policy that a residence lacking basic necessities (but see the exception explained earlier in TSB-A-02(7)I) will ordinarily not be deemed a permanent place of abode. An Advisory Opinion, ***Marano Distante Crombie LLC, TSB-A-04(2)I,*** addressed the issue of an apartment that was uninhabitable and required extensive renovations. The opinion concluded that it was a PPA once the work was completed.

Of course, the burden of proof is on the taxpayer to provide adequate documentation such as repair bills, certificates of occupancy, or homeowner's insurance claims detailing the extent of the renovation to be performed in order to substantiate his claim that the residence was not in habitable condition.

4. Corporate Apartments

Living quarters suitable for permanent year-round use are permanent places of abode even if used only for shopping trips, visits, etc. These living quarters would include a house, apartment, co-op, or any other living quarters maintained or paid for by the taxpayer or his spouse, or any New York State living quarters maintained for the taxpayer's primary use by another person, family member or employer.

For example, if a company was to lease an apartment for the use of the company's president or chief executive officer, and the dwelling was principally available to that individual, the individual would be considered as maintaining a permanent place of abode in New York even though others might use the apartment on an occasional basis.

A corporate apartment would not be considered a permanent place of abode for the taxpayer if the primary purpose and use of the corporate apartment is for reasons other than as living quarters for the taxpayer or the taxpayer's family.

For example, it is common for corporations to maintain a corporate apartment for the use of its top executives, salesmen, or important clients when they are visiting the corporate headquarters. In this situation, if the taxpayers use of the corporate apartment is determined on a first come, first serve basis or other similar arrangement, or if other users of the apartment (such as important clients) have priority over the taxpayer's use of the apartment, and the taxpayer is but one of many people using the apartment, then the corporate apartment will not be treated as a permanent place of abode for the taxpayer.

In ***Matter of Craig F. Knight, DTA No. 819485,*** the Tax Appeals Tribunal reversed the ALJ in finding that a New York City apartment that was leased to a partnership was not the taxpayer's PPA. In its decision the Tribunal enumerated the following factors as significant in determining whether a so-called corporate apartment rises to the level of a permanent place of abode:

1. whether the taxpayer shares in the expenses;
2. whether the taxpayer maintains clothing or personal effects;
3. whether there is a dedicated room for one's own use with free and continuous access;
4. whether it is used for daily attendance in connection with employment.

Of the four factors, the only one that was present in the case in the Tribunal's opinion was the first as the taxpayer, as a 40% partner, "bore a proportionate share of the expenses by reason of being a part owner of the business." Nevertheless, the Tribunal concluded that the apartment was not maintained solely for the taxpayer's use but rather for the partnership's clients.

5. Change of Ownership

In the *Evans* case discussed earlier, the Court stated that "the permanence of a dwelling place ... cannot be limited to circumstances which establish a property right in the dwelling place." This is also true when ownership of a residence that is occupied by taxpayers is transferred to another entity controlled by the same taxpayers. In Audit's view, the residence is still used and maintained by the taxpayer and constitutes a permanent place of abode.

In ***Matter of Sidney & Helen Esikoff, DTA Nos. 815861 & 815862***, the taxpayers transferred ownership of a condominium they owned in New York to a family trust. For the years in question they took the position that they were not maintaining a PPA in New York. The ALJ rejected this argument as "completely specious" noting that,

> ***"Mr. Esikoff provided funds to a trust which used the money to maintain a residence which he and his wife utilized when they were in New York."***

In sustaining the ALJ determination, the Tax Appeals Tribunal also sustained the imposition of negligence and substantial understatement penalties under Tax Law Sections 685(b) and (p), respectively.

The same reasoning would apply to taxpayers who transfer ownership of a dwelling place to other entities, such as limited liability companies, and continue to use the dwelling place as a residence.

C. SUBSTANTIAL PART OF THE YEAR

For statutory resident purposes, an individual who maintains a permanent place of abode in New York State, must maintain such abode "for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year)" according to Regulation 105.20(a)(2). Audit policy defines substantial to mean a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, he too, would not be a statutory resident despite spending over 183 days in New York. Since the individual in each of the above examples did not maintain their permanent place of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year.

Audit Division policy considers the "substantial part of a year" rule to be a *general* rule rather than an *absolute* rule. For example, suppose a couple rents an apartment in New York year after year, but each year they sublet the apartment to their son for the month of December. Under the absolute rule, this couple would not be maintaining a permanent place of abode in New York since they do not maintain it for more than 11 months of any particular year. However, the Division's position is that this couple should properly be covered by the 183 day rule since they are maintaining the abode on a regular basis.

In an advisory opinion, ***Marcum & Kliegman,* TSB-A-04(4)I**, the taxpayer asked whether he would be maintaining a PPA for substantially the entire year if he donated use of his New York home to a charity for three months pursuant to a written lease. The opinion concluded that he would not. At the same time, however, it reaffirmed Audit policy that the 11 month rule is a general and not an absolute rule. Moreover, it said that the taxpayer may be deemed to maintain a PPA if this arrangement continued in the future.

Because of the potential for abuse that this opinion presents, the 11-month rule will generally be applied by Audit in those years where a taxpayer either acquires or disposes of a residence. For example, a taxpayer who works in New York City throughout the year and begins renting an apartment in September need not fear that she will be deemed a statutory resident on account of spending more than 183 days in New York. Conversely, a taxpayer who rents out his Saratoga Springs home for six weeks each summer during racing season will be determined to be maintaining a PPA in New York. Under this clarification of audit policy, a taxpayer will be deemed to be maintaining a permanent place of abode if it is available for use on a regular, continuing basis but for occasional or brief absences including short term rentals.

In ***Matter of Michael Brodman & Karen Grimm, DTA No. 818594,*** the ALJ ruled that the taxpayers' maintenance of a New York City apartment for 10 ½ months during the year was "substantial" in holding that they were statutory residents. In so concluding, the ALJ accepted Audit's characterization of the 11 month rule as a general rather than an absolute rule. In footnote #3 of his determination, the ALJ stated,

> ***"Defining 'substantially' by the implementation of an absolute '11 month rule' in every instance, as petitioners urge, would allow the statutory resident provisions of the Administrative Code and the implementing regulations to be easily circumvented by the simple expedient of giving exclusive use of one's place of abode to another person for a period in excess of one month for any reason (e.g., while on vacation)."***

D. WHEN DOMICILE CHANGES

The issue of "substantial part of the year" applies only to statutory resident cases. However, as shown below, the test for statutory residency may apply even in a situation where an individual changes domicile during the tax year.

The statutory residence test is applied to a taxable year during which a taxpayer has changed domicile from or to New York State.

The statutory residence test requires that a permanent place of abode be maintained "for substantially all of the taxable year," which is generally interpreted to mean a period exceeding 11 months.

This test is applied if the taxpayer spent more than 183 days in the State and maintained a permanent place of abode for more than 11 months. If the taxpayer is determined to be a statutory resident, he will be taxed for the entire year even though his domicile may have changed during the year.

In ***Smith v STC, 68 AD2d 993***, the taxpayers moved from New York to Florida in July of 1970, but were unable to sell their home until 1971 leaving their furniture there, maintaining the home, and continuing the telephone and utility service. In September 1970 the taxpayer sold a large amount of corporate stock. Initially, the stock was taxed on the grounds that there was no change of domicile in 1970 and, therefore, the taxpayers were New York residents for the entire year. After a hearing held on June 24, 1977, the Tax Commission held that although a change of domicile did occur in July, 1970, the taxpayers were taxable as residents for the entire year under Tax Law section 605(a)(2) since they maintained a permanent place of abode in New York for the entire year and spent more than 183 days in New York State. The Appellate Division affirmed the Commission decision stating:

> ***"Furthermore, a fair reading of section 605(a)(1) reveals that if the taxpayer could not establish domicile in Florida they would at least in part have to establish that they did not maintain a 'permanent place of abode' in New York and did not spend more than 30 days of the taxable year here. On the other hand, if domicile was not in issue, then they would have had to show that no permanent place of abode was maintained in this State and no more than 183 days of the taxable year were spent here (Tax Law, section 605(a)(2).")***

This question was posed in an Advisory Opinion, ***David & Leslee Rogath*, TSB-A-94(9)I**, which concerned taxpayers who alleged a change of domicile from New York in the middle of the year but retained their New York home. The opinion concluded that

> ***"...it is unnecessary to resolve the question of Petitioners' domicile because regardless of their domicile, they maintained a permanent place of abode in New York State for the entire taxable year 1989, and they spent in the aggregate more than 183 days of the taxable year 1989 in New York State."***

E. A DAY SPENT IN NEW YORK

The description of a day in New York is not defined by statute. Section 105.20 of the New York Personal Income Tax regulations, however, states that "presence within New York State for any part of a calendar day constitutes a day spent within New York State." This regulation was challenged in ***Leach v Chu, 150 AD2d 842, 540 NYS2d 596*** and upheld by the Appellate Division. Thus, any part of a day spent in New York State, for whatever reason (business or pleasure), would count as a day toward the 183-day rule, even if the taxpayer comes into New York and leaves on the same day. The literal interpretation of "any part of a day" could mean stepping over the state line for one second; however, no audit is ever expected to be based on such a minimal amount of time spent in New York. Common sense must prevail.

That being said, presence in New York for brief periods of time would normally constitute days in the state. In ***Matter of John & Patricia D. Klingenstein, DTA No. 815156***, taxpayers who lived in Connecticut on the border with New York came into New York on 21 and 22 days in 1989 and 1990, respectively, for shopping and dining. In ruling that these days were days spent in New York, (and that the taxpayers were consequently statutory residents) the ALJ stated,

> ***"There is, unfortunately, no shopping or dining exception in the statute, regulation, or case law. In fact, the recognized exceptions stand in contrast to purposeful presence in the State. Here, petitioners' presence in New York on the border days was not an in-transit presence, and was not unintended, unavoidable, unplanned, inadvertent or involuntary. Rather, petitioners' presence was purposeful and voluntary."***

The statutory residency rules do not require that the taxpayer utilize the New York place of abode on every day that New York presence is demonstrated. The 183-day rule and the permanent place of abode test are separate and distinct factors in determining statutory residence.

There are two instances where presence in New York State does not count as a day:

1. ***Travel – NYCRR 105.20(c)***
   Presence in New York is disregarded if it is solely for:

   - boarding a "plane, ship, train or bus for a destination outside New York State." For example, if a Connecticut resident travels to JFK airport to board a plane to Europe, the day is not counted toward presence in New York State.

   - continuing travel, begun outside the state, by "automobile, plane or train" to a point outside the state.

   In deciding what level of extraneous activity makes presence in New York not incidental to the travel, the relevant criteria are (1) whether the traveler's activity is incidental to his presence for travel purposes and (2) the degree of control the taxpayer exercises over his travel arrangements. For example, someone who arrives a day early for a cruise, in order to attend a business meeting, would be present for that day, whereas time spent by someone who visits a friend during an unavoidable delay or stopover would not count as a day present in New York. Quite often, activity incidental to travel takes place on route to, or at a transportation terminal. Such activity as the purchase of meals or other items at a terminal, access to an automatic teller machine (ATM), stopping for gas or a meal while driving through New York, stopping to pick up a traveling companion on route to the terminal, parking the car in New York in order to meet a limousine or other conveyance that takes the individual to the airport or terminal should not change the treatment of this day as a travel day for the purpose of the 183-day count.

2. ***Medical Days***

Stranahan v State Tax Commission, 68 AD2d 250,416 NYS2d 836 (3d Dept 1979) addresses the issue of time spent in New York by a non-domiciliary for medical treatment. The Appellate Division of the State Supreme Court ruled that "when a non-domiciliary seeks treatment for a serious illness, the time spent in a medical facility for the treatment of that illness should not be counted" toward the number of days the taxpayer is determined to be in New York for statutory residency purposes. As a result of that decision, it is Audit policy that confinement to a medical institution for any reason in New York (serious or otherwise), does not constitute a day spent in New York. This would include situations where an incompetent person is placed in a facility in New York, situations where the individual suffers a medical emergency while present in the state for other purposes and the patient cannot realistically be removed from the state, or a situation where an individual is confined to an institution as a result of seeking treatment in New York. For example, if an individual suffers a heart attack while in the state on business and cannot be removed, the time spent confined to a New York medical institution would not count toward the 183-day rule.

It should be noted that the above exclusion does not extend to outpatient care. In ***Matter of Ralph and Leona Kern*, 240 AD2d 969**, the Appellate Division sustained the decisions of the Tribunal and the ALJ that the taxpayers were statutory residents of New York City. Among the issues in dispute in that case was the status of days Mr. Kern spent in New York City as an outpatient or visiting doctors. The Court found the taxpayers' contention that these days were covered by *Stranahan* to be "lacking in merit."

The issue in another New York City residency case was whether to count days a husband spent in New York City visiting his wife who was hospitalized. Although neither taxpayer was determined to be a statutory resident of the city in ***Matter of Dr. Charles F. Brush III & The Estate of Ellen S. Brush*, DTA No. 817204**, the ALJ concluded *Stranahan* did not apply to the husband's days. According to the ALJ,

> ***"...there appears to be no basis upon which to treat Mrs. Brush's hospital days as non-New York City days for petitioner, and petitioner has not pointed to any such clear basis for doing so."***

Audit recognizes that the issue of medical days spent in New York whether to receive inpatient or outpatient care is a sensitive one for the taxpayer and should be handled accordingly by the auditor in consultation with his team leader.

F. TEMPORARY STAY

Note: ***The rules contained in this section are applicable for tax years prior to January 1, 2008 only. Effective January 1, 2008, the temporary stay provision has been eliminated from the regulations. See TSB-M-09(2)I.***

By now it is clear that a taxpayer who maintains a permanent place of abode for a substantial part of the year and spends more than 183 days in New York State and/or City would be taxable as a statutory resident. The regulations contain an exception to this general rule. A place of abode, whether in New York or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.

The question of a temporary stay is addressed in Section 105.20(e)(1) of the Personal Income Tax Regulations which reads, in pertinent part:

"A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse... (A) place of abode is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State..."

It is the Department's position that for a place of abode not to be permanent, both of the above regulatory conditions must be met. That is, (1) the stay in New York must be temporary (i.e., for a fixed and limited period) and (2) the stay must be for the accomplishment of a particular purpose.

1. ***Fixed and Limited Period***

The term "fixed and limited period" is not defined in the regulations. However, it is clear that the regulation contemplates that the term applies to a temporary stay as opposed to a stay of indefinite duration. Accordingly, it is the Department's position that an employee will be presumed present in New York State for a fixed and limited period (i.e., the stay in New York is temporary) if the duration of the stay in New York is reasonably expected to last for three years of less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years. The employee must determine if the stay will be temporary or indefinite at the time the employee starts work in New York.

2. ***Particular Purpose***

It is the Department's position that the term "particular purpose" means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions. For example, an individual working in California is assigned to New York to install a piece of equipment. Once the equipment is installed, the individual returns to California. That assignment would be for a particular purpose.

In general, an assignment to New York for general duties, such as to be an executive of the company, a sales manager or a production line worker, would not constitute a particular purpose since these positions involve more generalized goals. This would be true even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess.

For example, a salesman with years of experience in a particular product line of the company is assigned to New York as the sales manager because New York sales are weak with regard to that product. It is expected that the individual will devote substantial efforts towards improving those sales. However, work performed as a sales manager still constitutes general duties as opposed to a particular purpose, since it is the general goal of every company to sell its products.

In two related advisory opinions, *Banca Nazionale Del Lavoro*,TSB-A-98(10)I and *Roberto Mancone*, TSB-A-98(11)I, the issue concerned employees of an Italian bank who are transferred to the New York branch under an exchange program "to enlarge the employee's knowledge of multinational banking." In both instances the goal was determined to be general in nature with general goals and conclusions.

An employer who may be assigning employees to what might be considered temporary duties in New York could supply the employee with written documentation concerning the exact duties to be performed in New York and the duration of the stay. This documentation will be helpful to the employee should the department question the employee's resident status.

It is preferable that the documentation be contemporaneous with the onset of the employee's duties in New York. This could include an employment agreement or any internal memoranda informing staff of the nature of the employee's role and anticipated duties.

Often an employee in New York on a foreign work assignment will argue that a visa is evidence of its temporary nature since it is issued for a limited time. While it is true that a visa is issued for a limited duration it may be renewed periodically and generally will not suffice as proof that a work assignment is temporary.

For example, in ***Matter of Laurent A. Sebah, DTA No. 819888,*** the taxpayer's argument that his H-1B visa was proof that his employment in New York was for a fixed and limited period was rejected by the ALJ who stated that,

> ***"the fact that petitioner was able to renew his visa on several occasions evidences the fact that it was not a fixed constraint on the length of the term of his employment."***

The following situations are intended to illustrate how the Audit Division would apply the temporary stay provision to a variety of job assignments.

Situation 1

Employees for key positions such as the Deputy Manager, General Manager and Controller are sent to the New York office from an out of state office. It is important to the Employer that individuals in these positions understand the philosophy of the Employer and have the necessary contacts with the home office. These are rotational positions. The individuals who staff these jobs remain in New York for only a temporary period.

These employees might be present in New York for a fixed and limited period, provided their stay is reasonably expected to be for three years or less. However, even if that were the case, their presence here is not to accomplish a particular purpose. The duties of being a manager or controller, even in a rotational capacity, do not fit the definition of specific duties to accomplish a particular purpose as previously discussed. Therefore, these individuals will be maintaining a permanent pace of abode in New York.

Situation 2

Employer sends a systems analyst from the home office to implement a new computer system in the New York office. The employee will return to the home office upon completion of the implementation project.

In this situation, the employee would be present in New York for a fixed and limited period if the stay in New York is reasonably expected to last three years or less. In addition, the person would be present for the accomplishment of a particular purpose since the implementation of a particular system would have a readily ascertainable and specific conclusion. Accordingly, if this person is deemed to be here for a fixed and limited period, the person would be maintaining a temporary place of abode in New York.

Situation 3

Employer sends an attorney from an out of state office to the New York office to handle litigation involving a class action law suit. The litigation is expected to last three years at which time the attorney will return to the out of state office.

The person would be in New York for a fixed and limited period if the assignment was reasonably expected to last three years or less. In addition, if his **sole** purpose for coming to New York was to work on the class action suit it would also qualify as a particular

purpose since it has a measurable level of achievement- the resolution of the suit- that would trigger the individual's return to the former work location. Therefore, the person would be deemed to be in New York for a temporary stay for the accomplishment of a particular purpose.

Note: If the attorney worked on other legal matters in addition to the class action suit during his time in New York, it would be Audit's position that this would not qualify as a particular purpose. This is because he would be mixing general assignments with a specific assignment and when viewed in totality the combined activities would not constitute a particular purpose.

Situation 4

The same facts as in Situation 3 except that after the law suit is resolved, the attorney is asked to stay on in the New York office for an additional period of time to provide technical assistance on another law suit which is also anticipated to last no more than three years.

It is the Department's position that an individual cannot have multiple or consecutive fixed and limited periods nor multiple or consecutive particular purposes. Therefore, a change in duties would indicate that the individual is no longer here for a fixed and limited period nor for the accomplishment of a particular purpose. However, the fact that the person would be maintaining a permanent place of abode after the duty changes does not negate the fact that the person had a temporary place of abode for the initial duty period. Accordingly, in this situation, and assuming that the individual met the two conditions for the initial period, the individual would not be maintaining a permanent place of place of abode up to the time the first function is completed, and *would* be maintaining a permanent place of abode from that point forward.

Situation 5

The parent corporation sends an employee to its subsidiary located in New York to develop a particular segment of the market. It is estimated that the employee will remain in New York for 15 months.

Since the employer realistically expects that the employee will be present in New York for three years or less, the employee would be here for a fixed and limited period. The question then becomes whether or not the nature of the employee's duties constitutes a particular

purpose. Whether or not the employee is here to accomplish a particular purpose would be dependent upon what is involved in developing the market. As previously related, sales and market development, even if it involves a specific area of the market, constitutes general duties which do not qualify as a particular purpose. However, if for example, development meant that the individual's duties would be limited to hiring and training the staff needed to develop the market segment, and after the completion of that phase the general duties of directing the sales effort would be left to others, then the hiring and training function would constitute a particular purpose. Accordingly, based upon the actual nature of the duties, the person in this situation may or may not be maintaining a permanent place of abode.

It should be pointed out that even where one of the preceding individuals is maintaining a permanent place of abode in New York, such abode pursuant to section 105.20(a)(2) of the personal income tax regulations must be maintained for substantially all the year for the person to be held a resident of New York State. Based on this provision, it is possible that the individuals who are held to be maintaining permanent places of abode in their particular situations would not be residents of New York for the years in which they enter or leave the state.

Admittedly, there will be few situations where a taxpayer will qualify for relief under the temporary stay provision for employment-related reasons. This is because it is often difficult for employees to meet both prongs of the test for a temporary stay, i.e., limited duration *and* particular purpose. That both conditions have to be satisfied was addressed in ***Matter of Pablo Goldberg, DTA No. 820248,*** where the ALJ concluded "that, if the place of abode is to be deemed not permanent, it must be maintained during a temporary stay *and* the stay must be for the accomplishment of a particular purpose." In the same case the ALJ strongly implied that the Department's interpretation of the temporary stay provision was neither "irrational or unreasonable." (Conclusion of Law D).

An area where the taxpayer is more likely to be successful involves education. Taxpayers who are matriculated full-time in an educational institution in New York for a course of study leading to a degree will generally be found to be in New York for a temporary stay for the accomplishment of a particular purpose.

G. TAXPAYER ADVISORY

As soon as it appears a case is heading toward holding the taxpayer a resident of New York based on domicile or statutory residence, the taxpayer and their representative should be advised to consider filing a protective claim with his claimed state of domicile before the statute of limitations expires, in order to recover any taxes he may be entitled to. This becomes necessary since the New York State waiver to extend the statute of limitations does not extend the period of limitation for returns filed in other states.

H. AUDITOR ADVISORY

The fact that a taxpayer states a certain number of New York days on a nonresident return for allocation purposes does not mean that the taxpayer was physically present in New York on those days. Different rules (e.g. employee convenience rule) apply for the purpose of computing days for allocation purposes. For example, a New Jersey resident who works at home for his own convenience 20 days during the tax year would be required to include these days in the allocation formula for employee compensation. These 20 days would not be counted in the 183-day computation unless the taxpayer was present in New York for another purpose.

VII. AUDIT TECHNIQUES

A. PRE-AUDIT ANALYSIS

1. Prior Audits

The auditor should review the file as well as all other available information during the pre-audit analysis to determine if a prior audit was conducted. The focus of the audit can be directly affected by the results of a prior audit. If the taxpayer was determined to be a domiciliary of New York in a prior audit, then it becomes the taxpayer's burden to demonstrate by clear and convincing evidence that his domicile changed in a subsequent audit period. Conversely, if the taxpayer was determined to be domiciled outside New York, then that should be accepted unless there is evidence to suggest the possibility of a change back to New York.

For statutory residence and the allocation of New York income, each year stands on its own, and the auditor should not be unduly influenced by prior audit results. Statutory residence and allocation issues, in particular, change from year to year and the days allocated to New York in one year may have little bearing on the allocation of days in a subsequent period. However, if the work pattern and/or lifestyle of the taxpayer is consistent with the results of the previous audit, then the auditor should exercise good judgment when determining the scope of the audit. For example, if the day count determined per an analysis of prior years on audit was determined to be substantially below the 183-day count and the work patterns and lifestyle of the individual remain consistent in the reaudit years, the auditor may decide to drop the statutory resident aspect of the audit and proceed with a review of the allocation of income to New York. The auditor must be aware of the heavy burden placed upon the taxpayer to produce documentation to substantiate a position and therefore should be practical when requesting these records. Changes in work patterns or employment responsibilities should be explored, rather than a verification of days or income.

For example, if a taxpayer has successfully verified days worked in New York for several years with a diary and supporting documentation, and the current year is consistent with the previous years, then the auditor could test check entries in the diary rather than requesting full substantiation. In another example, if a taxpayer changes employment responsibilities from that of an Outside Salesman covering several

Northeast states to the District Sales Manager, with an office in Manhattan, then the auditor would be correct in requesting more detailed documentation or substantiation of the diary entries.

Note: *The fact that a taxpayer filed nonresident returns for many years without having being audited should not be construed to imply acceptance by the Department of the taxpayer's nonresident status.*

2. *New York Address*

The auditor should review the entire return paying particular attention to the New York addresses identified on the tax return. For example, the W-2 or IT-2 form may reveal that it was sent to the taxpayer's New York address. At the same time, attention should be paid as well to a non-street or an unusual address from a state other than New York. For example, a c/o address or post office box number located outside New York would not tell you where the taxpayer actually resides.

The IT-203 return (New York State Nonresident Return) starting with the 1988 tax year requires the taxpayer to identify any living quarters maintained in New York State. Starting in 2002, a similar question relating to living quarters in New York City appears on the IT-201 Resident return. This question was modified starting in 2006 to require an affirmative or negative answer from the taxpayer rather than merely marking an "X" if he maintained living quarters in New York City.

One of the most effective ways to uncover a New York address is through the use of Lexis Nexus which is available in every office. A Lexis search should be routinely done especially in cases with high dollar potential.

In addition, the Real Estate Transfer Tax (RETT) file should be checked to determine if the taxpayer or spouse was a purchaser (grantee) or seller (grantor) of New York property.

The auditor should make note of any New York address identified during the pre-audit analysis and explore the taxpayer's connection to these addresses during the audit. The auditor should be aware of both the City of New York and Yonkers city income taxes which would be due as a result of either residency or, in the case of Yonkers, earnings in these communities.

3. Business Relations

An analysis of the supporting schedules attached to the New York return (Schedule C, Schedule E, and the partnership or S Corporation K-1's) can provide an insight into the taxpayer's business involvement within New York. Significant active involvement with New York partnerships or other business entities will support a position that the taxpayer is domiciled in New York. In addition, the W-2 or IT-2 form may reveal a relationship between the employer and the employee. The inclusion of the taxpayer's surname or initials as part of the employer's name implies closely held ownership which may be found to include a degree of active participation which would have to be explored during the audit.

Use of the internet is encouraged to determine the extent of the taxpayer's business involvement and nature of business activities.

4. Capital Gains

Past audit experience has identified many taxpayers who have claimed a change in domicile immediately prior to the occurrence of a large capital gain. As a nonresident, a taxpayer generally avoids paying New York State income tax on capital gains. Large capital gains are uncommon, and often the only change in lifestyle demonstrated by the individual is the fact that a substantial gain was realized in the year of, or immediately after, the alleged change of domicile.

B. COMMUNICATING WITH THE TAXPAYER

The auditor is responsible for scheduling an initial appointment for a newly assigned case, and being at the appointed place on time. In order to efficiently utilize the available time and to reduce the inconvenience and disruption caused to the taxpayer's schedule, auditors are encouraged to arrange their schedules with the taxpayer, or his representative, in such a manner as to spend a sufficient number of consecutive days at the audit site to complete the audit without having to make return visits. Additional information clarifying an issue or substantiating a diary entry can be sent through the mail, if necessary.

Appointments should be arranged to ensure that the auditor, as well as the taxpayer, have sufficient lead time to adequately address the issues. In most cases, the first communication a taxpayer receives from the Department is a cover letter with the residency questionnaire requesting information on domicile and the number of days spent in New York. If after the commencement of the audit it appears that the audit cannot be completed before the statute of limitations expires, the auditor must request a waiver extending the statute.

This orderly procedure is to be followed in all cases. An audit is not to be commenced near the end of a statute of limitation period when an insufficient period of time remains to adequately address the issues of the audit. The first communication with the taxpayer should never be a request for voluminous documentation and a statement that the taxpayer will be assessed as a resident unless all the material is produced in an unreasonably short period of time or the taxpayer agrees to extend the statute. Such requests are unreasonable, and assessing additional taxes automatically unless the taxpayer agrees to extend the period is contrary to Audit Division policies and procedures.

The auditor, as well as the Team Leader and Section Head, must review the audit period on new cases in order to be sure to provide the taxpayer and the auditor with a reasonable period of time to conduct the audit**.**

As a general rule, nonresident audits should not be started unless the auditor and the taxpayer have at least 120 days (without extending the assessment limitation period) to present and review material. Note that this rule will normally not apply in situations where an audit has been ongoing and the auditor is merely updating the audit period. Nevertheless, the auditor should give the taxpayer sufficient notice that the audit period is being extended.

The residency questionnaire provided in the Appendix has been designed to request a minimal amount of information from an individual during the initial review of the return. The answering of a few general questions may permit the auditor to determine whether an audit is actually necessary or to narrow the focus of the audit. Although the questions relate specifically to nonresidents of New York State, they can be modified in situations where New York State residents are being audited and the audit issue is New York City residency only.

Subsequent requests of the individual should be modified and streamlined to fit the specific needs of the case at hand. This modification will ease the heavy burden placed upon the taxpayer to produce records and documentation which are not essential to the audit. The questionnaire has been developed to enhance the gathering of information in order to facilitate the audit of a nonresident return.

The auditor must exercise judgment when sending a letter to a taxpayer. The letter should be molded to the audit issues identified for the particular taxpayer. The taxpayer should not be asked to produce unnecessary documentation, nor should he be asked to answer irrelevant questions. For example, a non-domiciliary who does not maintain a permanent place of abode in New York should not be asked to provide information concerning their domicile. The auditor should, however, question the allocation method selected as well as the actual computation.

C. ACCUMULATION AND ANALYSIS OF DATA

1. *Analysis of the Federal Return*

If the taxpayer has not attached the appropriate and required Federal schedules to the State return, the auditor should request a copy of the complete Federal return including all schedules, attachments and W-2s. A close review of the schedules may provide information that will support your position.

Scrutiny of Schedule A (Itemized Deductions) can reveal information concerning the location of a New York residence from the real estate taxes claimed, the mortgage interest paid or a casualty loss suffered. Presence in New York can be documented by expenditures for New York medical practitioners, and business & educational involvement in New York can be verified by amounts deducted as Miscellaneous deductions. Travel and entertainment expenses reported on Form 2106, which are also a component of itemized deductions, could be used to verify days spent either in or outside New York while in travel status.

2. *Analysis of Records*

Income tax regulation 158.1 contains a general recordkeeping requirement applying to every person subject to income tax under Article 22. More relevant for our purposes here is NYCRR 105.20(c) which requires that any person domiciled outside New York who maintains a PPA in New York to have available "adequate" records to prove that he did not spend more than 183 days in the state. The importance of maintaining adequate records was emphasized in the Tax Appeals Tribunal decision, ***Matter of R. Michael Holt, DTA No. 821018***, which involved statutory residency. The Tribunal stated that such audits,

> ***"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. Such records could include not only day calendars but airline tickets, restaurant and hotel receipts and credit card statements."***

When analyzing records, either business or personal, the auditor must keep the audit's objective in mind. Unlike a substantiation audit, the objective of a residency case is not the verification of each deductible item on the tax return but, if the issue is domicile, the depth of ties to New York or, if statutory residency, presence in New York. An auditor may, however, request verification of items that appear to be excessive or unreasonable.

The following are examples of personal and business records that are typically requested during the course of a residency audit. The list is intended to be a general guide and not meant to suggest that every item need be requested; the exact records needed will be determined by the particular facts and circumstances of each audit.

a. **Personal Records**

- Personal diaries and calendars;
- Credit card statements and receipts;
- Bank records including monthly statements, canceled checks and ATM receipts. Bank statements should be reviewed for the address to which they are sent. An analysis of canceled checks may provide clues to the taxpayer's presence in New York, as well as revealing the existence of other credit cards not mentioned by the taxpayer. ATM receipts would indicate the location of withdrawals;

- Telephone records for both the New York and non-New York residences;
- Utility bills for both New York and non-New York residences that may reflect regular or seasonal use;
- Homeowner's insurance policies to show the location where valuable items are kept;
- Itineraries for commercial flights or flight logs for private carriers;
- Hotel receipts;
- EZ Pass records for automobile usage;
- Moving bills to show that furniture and other items have been transferred to a new residence.

b. **Business Records:**

- Business logs or diaries;
- Corporate credit card statements and receipts;
- Corporate minutes;
- Employment contracts;
- Expense vouchers.

3. Personal Observations

The auditor should make every attempt to visit the New York place of abode. The location of the neighborhood, the facility itself, and the relationship to the lifestyle of the taxpayer are important to the establishment of residency in New York. This personal observation should include checking the names on the mailbox, checking the license numbers of any vehicles on the premises, interviewing the doorman, building superintendent and mailman, if necessary. The auditor should make notes of his observations and, if possible, take pictures of the residence.

It is also recommended that the auditor or investigative aide make arrangements with the representative to visit the taxpayer's residence(s) outside New York as well for purposes of comparison, especially if the residence is located within the metropolitan area. This would also be true if the issue is city residency only and the taxpayer is claiming to be domiciled in Westchester or on Long Island.

4. ***Credible Testimony***

Up to this point the discussion of what constitutes sufficient evidence to prove whether a taxpayer is either a domiciliary or statutory resident of New York State or City has focused on documentary proof. The Tax Appeals Tribunal in ***Matter of John G. Avildsen, DTA No. 809722***, expanded the scope of what is acceptable proof in holding that credible testimony by itself may be sufficient. In that case, it was not the testimony of the taxpayer himself but rather that of a personal secretary who tracked his whereabouts which was determined to be credible. The secretary testified that she maintained the taxpayer's business diaries which were not produced at the hearing for a variety of personal reasons. Although the ALJ found her to be credible, he ruled that credible testimony alone was insufficient to meet the taxpayer's burden of proof that he was not a statutory resident of New York City absent corroborating documentary evidence.

In reversing the ALJ, the Tribunal held that,

> ***"we find no support in the statute or regulation for the Administrative Law Judge's conclusion that testimony alone was insufficient as a matter of law to prove that the petitioner did not spend more than 183 days in New York."***

The Tribunal explained that there are two components to credibility: *Competency* and *veracity*. *Competency* is the ability to be in a position to know what the facts are while *veracity* is the ability to accurately remember them. In the ***Avildsen*** case, the secretary was deemed to be a competent witness because she maintained the taxpayer's diaries and therefore was able to testify as to their contents. Moreover, she was found to be truthful and, in the Tribunal's words, it is "the truthfulness of the witness" which "determines his veracity."

The ruling in ***Avildsen*** highlights the importance of conducting a personal interview with taxpayers in residency cases whenever possible. In audits involving domicile, questioning by the auditor should focus on the taxpayer's intentions regarding a claimed change of domicile and actions taken by the taxpayer to support those intentions. Where the issue is statutory residency, the objective might be whether there is an overall living pattern that could explain undocumented days. In all cases, the auditor should evaluate the credibility

of the responses and record his observations on the DO-220.5. Depending on the responses, an interview done at the outset of the audit may even shorten the audit process by reducing the amount of additional documentation necessary.

While an interview is strongly encouraged, we recognize that it may not always be possible since representatives may bar access to the taxpayer. This poses a particular challenge to auditors who must be cognizant of credible testimony as a result of ***Avildsen*** yet are denied the opportunity to interview taxpayers or witnesses to determine their credibility. The decision does provide some helpful guidance for the auditor, however. Taxpayers who rely solely on credible testimony to make their case run the risk that they will not be found to be credible. The Tribunal noted that,

> ***"the Division can utilize information gathered during the audit process to controvert the facts as stated by the taxpayer"***

Such is what happened in ***Matter of Charles J. Hull Jr. and Mary Hull, DTA No. 810833,*** where information obtained on audit was used successfully to discredit statements made by taxpayers regarding a claimed change of domicile**.** Based on third party confirmation, it was shown that the taxpayers continued to maintain memberships in New York organizations which they asserted they had resigned from upon changing their domicile to Florida. Moreover, they did not surrender their New York drivers' licenses when they said they did, and continued to register motor vehicles in the state after their purported change of domicile. Finally, the auditor's analysis of checking account activity revealed that both the Florida and New York accounts were used equally, contrary to the taxpayers' claim that a majority of checks were drawn on the Florida bank. Largely as a result of these inconsistencies, the Tax Appeals Tribunal confirmed the ALJ determination that the taxpayers did not abandon their New York domicile.

The Tax Appeals Tribunal in ***Avildsen*** cited one further tool available to the auditor:

> ***"…if the Division wishes to obtain documents in the possession of the taxpayer that the taxpayer refuses to introduce into evidence, the Division can use its subpoena power to obtain these documents."***

Use of the subpoena is authorized by Article 8, Section 174 of the Tax Law. It generally should be used as a last resort when taxpayers have been uncooperative in providing information despite multiple requests, and then only after notice has been given to the taxpayer. In the context of credible testimony, there are situations when it may even be advisable to use the subpoena power to interview[1] a taxpayer to allow the auditor to assess his credibility. *When considering the use of a subpoena for this purpose, it is mandatory that the audit staff contact Field Audit Management for guidance.*

D. CONCLUDING THE AUDIT

1. *Making a Determination*

After the auditor has accumulated sufficient information to reach a conclusion, he should prepare a summary of the facts developed during the audit and compare these facts with Department policy and established case law. The auditor should discuss the findings with the team leader and, if necessary, request assistance from Field Audit Management. After reaching a preliminary decision, the auditor should determine if a secondary position exists. For example, if the preliminary decision holds the taxpayer to be a domiciliary of New York, is there sufficient information to hold the taxpayer as a statutory resident or does the wage allocation change if both positions are successfully defeated by the taxpayer. The auditor must cite not only the primary position, but also any alternative positions on the "Proposed Statement of Audit Changes" when prepared. Failure to do so could prevent these issues from being addressed during the appeals process.

When all three issues have been addressed during the audit and changes are appropriate in each area, *the following wording is suggested*:

- **"As you have not established by clear and convincing evidence that you intended to change your domicile from New York State, you are considered New York State residents for income tax purposes. As residents you are subject to tax on all income regardless of the source.**

- **Alternatively, if it is decided that you are not domiciled in New York State, you are being held as statutory residents of New York State because you maintained a permanent place of abode and spent more than 183 days of the tax year in New York State.**

[1] Revised May 11, 2010

- **Alternatively, if it is decided that you are not residents of New York State for income tax purposes, your income is subject to taxation as a nonresident."**

Keep in mind that the above wording represents suggested phrasing. The actual wording on the "Statement of Audit Changes" should be modified to reflect the actual facts and circumstances.

2. ***Penalty Considerations***

If it is determined that the taxpayer is a domiciliary and/or statutory resident, the auditor and the team leader next need to address whether it is appropriate to impose penalties. Particular attention should be paid to Negligence penalty, Section 685(b), and the penalty for Substantial Understatement, Section 685(p). The auditor, when asserting these penalties, must bear the burden in justifying the appropriateness of the penalty assessed. Entries concerning the imposition of penalty should appear in the DO-220.5 or be noted in a separate memorandum attached to the case outlining the reasons for imposing the penalty. The mere size of an assessment, or the lack of specific records, does not in itself constitute negligence or substantial understatement, but combined with other factors may warrant the imposition of one or both of these penalties.

For example, if an individual with a permanent place of abode in New York State files an IT-203 Nonresident return and answers "NO" to question 74 concerning the maintenance of living quarters in the State, then the auditor might be justified in asserting a negligence penalty if it is determined that the taxpayer is actually a resident. A good example of this is the ***Matter of Corley R. Barnes, DTA No. 809496***, in which the taxpayer claimed that a computerized tax service had inadvertently checked the "NO" box in answer to the question on the former NYC-203 about maintaining living quarters in New York City. The Administrative Law Judge upheld the imposition of the 685(B) penalty for negligence because,

> ***"the petitioner signed the return and must take responsibility for its contents, especially since the information on the return was obviously wrong and not technical in nature."***

In the nonresident program, as with any case, when the taxpayer demonstrates a flagrant and intentional disregard for New York State Tax Law, consideration must be made for the imposition of fraud penalties or referral to the Special Investigations Unit (SIU) for possible criminal prosecution. Team leaders need to keep a watchful eye for cases with fraud indicators. For these cases, referral for criminal action or civil fraud penalties may be appropriate.

3. ***Communicating the Results***

The auditor must present the examination results to the taxpayer and/or the representative at the conclusion of the audit. During the concluding phase of the audit, the auditor should present to the taxpayer and the representatives copies of work papers and schedules, and explain the methodology of the audit as well as Department procedures in plain and simple, nontechnical terms. The findings can also include recommended changes in record keeping practices to correct accounting errors found during the audit, as well as an explanation of the proper interpretation of the tax law in areas where errors were made.

There are occasions, however, when the preliminary audit results should be communicated to the taxpayer and the representative as soon as it appears that a case is developing in a particular direction. One important example of this is in regard to the resident credit. As soon as it appears that a case is heading toward holding the taxpayer a resident of New York by virtue of domicile or statutory resident rules, the taxpayer should be advised to consider filing a protective claim with his claimed state of domicile before a statute of limitations expires, in order to recover any credits to which he may be entitled.

Upon the conclusion of an audit, the taxpayer and the representative must be notified of the results of the audit, regardless of the outcome. If the audit results in the acceptance of the return filed, the taxpayer should be notified of that fact. If the taxpayer is being held as a resident, either a domiciliary or a statutory resident, the taxpayer should be notified of that fact. This notification will protect the individual from subsequent audits covering the same issue for the same period and relieve the burden of producing documentation for a period for which a resolution was reached.

Auditors should attempt to be as accurate as possible in determining the date of a change in domicile. The taxpayer and the auditor may agree on a date part way through a year, so that the taxpayer would be taxable as a resident for part of that year and as a nonresident for the remainder of the year. If a date for a change of domicile is determined as a result of an audit, the date and specifics on the reasoning for the allowance for the change must be noted in the audit report. In addition, the taxpayer should be notified of this conclusion.

Once the decision has been communicated to the taxpayer, he should be given sufficient time to review the audit results and present additional information, if possible. The auditor must carefully consider any additional explanations offered by the taxpayer and evaluate any new documentation submitted.

If changes are warranted, the auditor should recompute the additional tax and present a revised statement of audit changes to the taxpayer as soon as possible.

4. ***Closing Conference***

Developing and maintaining a good dialogue with the taxpayer and/or the representative is essential for the successful conclusion of the case. The taxpayer and the representative must be given the opportunity to fully understand and refute the findings developed during the audit without the necessity of a BCMS conference. A closing conference at the district level with the team leader and section head, program manager or district audit manager, who are prepared to explain the findings and present favorable hearing decisions which parallel the taxpayer's situation, could result in the successful resolution of the case. This is beneficial to both the taxpayer and the Department as well in that collections will be enhanced and litigation costs kept to a minimum. If an issue can be resolved at the audit level, we should strive to do so. Even if the case remains disagreed, the auditor will be in a better position to defend the audit during the appeals process.

5. ***Work Papers***

Throughout the audit, the auditor should have prepared work papers which adequately support the conclusions drawn upon the completion of the audit. These work papers will become an integral part of the case file and will be used to resolve any questions the taxpayer has. The work papers take on a greater significance in a disagreed case, when the auditor or team leader will be called upon to defend the Department's position throughout the appeals process.

In developing the case, as part of the objective decision making process the auditor should develop the "T" account analysis as described earlier, to arrive at an informed conclusion. The analysis must reflect the factors favorable to a New York domicile as well as those factors which endorse a domicile outside New York. It is also recommended that the auditor prepare a clear and concise explanation of the factors considered in arriving at the decision. The analysis of the factors should be presented in the work paper summary. The comparison of the New York factors to those existing in other locations should be clearly outlined with the conclusion evident from the facts presented. This brief, or position paper should be prepared regardless of whether the case is agreed or disagreed. This work paper will provide the basis of the appeals presentation as well as establish the focus of any future audits.

6. ***The Income Tax Report***

The "Income Tax Audit Report," AU-241.26, was designed to explain the assertion of penalty, the results of an informal closing conference and to identify specific areas of disagreement. The narrative should include a summary of the Department's position, a listing of areas of disagreement and finally a listing of any rebuttal evidence which will refute the taxpayer's position. The auditor should prepare this report, especially for disagreed cases, as if he were preparing a brief of the Department's position. Very often, the Administrative Law Judge or the Department's attorney will use the Audit report in conjunction with the DO-220.5 for a picture of what occurred during the audit.

The auditor can enhance the defense of the case throughout the appeals process if reference is made to hearing decisions and court rulings which resemble or parallel the case at hand. Reference to these decisions should be cited in the audit report in order to illustrate their application to the case at hand. In the Appendix is a synopsis of cases involving various aspects of the residency issue.

APPENDIX - RESIDENCY QUESTIONNAIRE

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

NONRESIDENT AUDIT QUESTIONNAIRE

Name(s): _____ Audit Period:_____

Case #: _____ Phone #:_____

1. What was the last year a New York State Resident Personal Income Tax Return was filed by you?

   _____

2. If you were at any time a domiciliary of New York State, what was done to change your status from a resident to a nonresident? Please provide detailed information relative to your intentions. Attach additional sheets, if necessary.

   _____
   _____
   _____
   _____
   _____

3. For the audit period indicated above, give your employer's name and address, or if self-employed, the name and address where you carry on your business, trade, profession or occupation.

   Name: _____

   Address: _____

   City:_____State:_____Zip:_____

   Employer ID (EIN):_____

4. Were you associated with any other business activities conducted in New York State (Partnerships, LLCs, S Corps, etc) during the audit period? Attach additional sheets, if necessary.
   Yes ( ) No ( )

   Name:_____

   Address:_____

   City: _____State: _____Zip:_____

   Nature of the Activity:_____

   Employer ID (EIN):_____

5. For the above audit period, did you maintain living quarters in New York State (owned or rented) or otherwise had living quarters provided for you by another individual or your employer?
   Yes ( ) No ( )

   If yes, please supply the following:

   Address:_____

   City: _____ Zip:_____

   Telephone Number:_____

   Provide inclusive dates that such living quarters were maintained.
   _____

6. If you answered yes to question 5, please check any of the following that applied to your living quarters:

Rent Controlled	Yes ( ) No ( )
Rent Stabilized	Yes ( ) No ( )
STAR Exemption	Yes ( ) No ( )
Manhattan Parking Exemption	Yes ( ) No ( )

7. If you do not maintain living quarters in New York State, where do you regularly stay while in New York State?

_____

8. For each year of the audit period, how many days or part days were you physically present in New York State for work purposes?

_____

_____

9. For each year of the audit period, how many days or part days were you physically present in New York State for nonworking days such as weekends, vacations, holidays, illness and any other nonworking days during each year.

_____

_____

10. Use this space for any additional information you may wish to provide.

_____

_____

_____

TAXPAYER(S):

I DECLARE THAT THE ABOVE STATEMENTS ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

_____ _____ _____

Your Signature Date Date of Birth

_____ _____ _____

Spouse's Signature Date Date of Birth
(If filed jointly)

APPENDIX
CITATION OF DOMICILE AND STATUTORY RESIDENCY CASES

The cases listed below represent cases which have been resolved by the New York State Tax Appeals Tribunal or the New York State Courts. While Administrative Law Judge (ALJ) determinations occasionally are referred to in the guidelines, they are not included here due to the non-precedential nature of the determination. Note that the Department as of September 2004 stopped assigning TSB-D numbers to Tribunal decisions. Therefore, all D numbers have been deleted and replaced by the DTA numbers assigned by the Division of Tax Appeals.

AETNA NATIONL BANK V. CATHERINE A. KRAMER AS EXECUTRIX, ETC. OF ETTA M. BROWER, DECEASED

A decedent was deemed to have changed her domicile to New York even though she lived in the new location only one week before she died. What was significant in the court's view was the decedent's intention to abandon her former domicile in New Jersey and to reside in Brooklyn with the intention of acquiring a domicile there. As the court said *"...there was both a change of residence and an intention to acquire another domicile."*

ALLEN, SAMUEL G., DTA NO. 808589

The Tax Appeals Tribunal determined that the petitioner had to prove that he was not a resident of New York, either domiciled or not domiciled. Petitioner had testified that he was domiciled in the State of Connecticut and therefore not a resident of New York. However he and his mother were co-tenants on a lease of a New York City apartment during one of the years in question. He also acknowledged that he spent more than thirty days in New York in 1982, eating and sleeping at his mother's apartment, and keeping clothing and other personal effects there while not proving that he spent less than thirty days there during each of the other audit years. Petitioner testified that he occupied the apartment only to provide supervision for his mother, that it was never his intention to make New York his permanent home and that he was domiciled in the State of Connecticut during the years in question. The Tribunal stated that the "mere allegation that he never intended New York to be his permanent home" was inadequate and agreed that his only tie to Connecticut appeared to be his maintenance of a Connecticut post office box. In view of that, petitioner was deemed a resident of New York.

ANDREWS V. GRAVES, 263 AD 188

While acknowledging that tax avoidance may be valid motivation for a change of domicile, the State Supreme Court asserted that "there must be a fixed intention to abandon one domicile and acquire another" which was clearly lacking in the taxpayer's alleged change of domicile to Bermuda. The taxpayer continued to divide time between her homes in New York and Bermuda. Although she sold the New York home, she retained the right to occupy it during her lifetime and similarly transferred title to her home in Bermuda. Moreover, she kept her American citizenship and never applied to become a citizen of Great Britain. Noting that there had been no change in the taxpayer's lifestyle, the court concluded that she had not demonstrated a "clear intent" to change her domicile. Affirmed on appeal 288 NY 660.

ANGELICO, SEBASTIAN AND FLORENCE, DTA NO. 807985

The Tax Appeals Tribunal found that:

1. The husband changed his domicile even though he maintained a home in New York, and;
2. The Division did not assert the issue of statutory residency in the Statement of Audit Changes.

In January, 1984 the taxpayer moved out of his New York home with the intention of obtaining a divorce in the future and permanently making his home in a New Jersey condominium he owned. Although the taxpayer continued to maintain a home in New York for his family and there was no formal separation agreement, he stated that from January, 1984 to the middle of 1985 he did not enter the New York house. Under Title 20 of the former regulation section 102.2(d) a husband and wife who are separated "may each," "acquire their own separate domiciles, even though there be no judgment or decree of separation." The taxpayer proved that the separation was not merely temporary by submitting an affidavit from his attorney corroborating his plans to get a divorce.

As importantly, the Tribunal emphasized that the statutory residency issue was not clearly raised in the Statement of Audit Changes, which said that "Sebastian Angelico had not changed his domicile from New York to New Jersey during January 1, 1984 through June 30, 1985 and was a resident of New York." This gave the impression that the Division was asserting residency based on domicile alone and did not give petitioner sufficient notice that he had to prove he was not a statutory resident.

ARMEL, JACK & HELEN, DTA NO. 811255

This is an example of the credible testimony of the taxpayer being accepted.

The ALJ determined that petitioners had changed their domicile to Florida by 1987 but sustained the deficiency based upon statutory residency. However, the Tribunal found that petitioners "through their testimonial and documentary evidence, have clearly and convincingly proven that they were in New York for less than 184 days in 1988." The Tribunal continued that, "in this case, it is important to stress that, according to the findings of fact, the only days in issue are the 25 days from December 7 through December 31, 1988." For this time period petitioners lacked both phone bills and Visa statements to substantiate their whereabouts. "Second, the issue of petitioners' location on these days arises in the context that they claimed they spent the entire winter in Florida in 1988, as was their custom since 1984." The Tribunal held that petitioners, "need not establish their whereabouts each specific day." The Tribunal stated that "Mr. Armel's credible testimony, corroborated by affidavits and letters submitted by petitioners' friends and neighbors support a finding that petitioners were in Florida for the month of December." Thus the Tribunal reversed the ALJ on the statutory residency issue.

AUSNIT, PETER C., DTA NO. 808144

The Tax Appeals Tribunal determined that the petitioner had failed to present sufficient evidence to prove that he had changed his domicile to Connecticut and that he had spent less than 184 days in New York in 1985. Mr. Ausnit had filed personal income tax returns as a resident of New York City in the years before and after 1985. However in 1985 he filed as a nonresident listing a newly purchased Connecticut house as his address on his tax returns. During that year, he continued to maintain strong ties to New York, including the presence of his former spouse and children, who were living in New York, six partnerships, rental properties, and an apartment, which he never proved he vacated. The Tax Appeals Tribunal found that the petitioner, having introduced only minimal documentary evidence and no testimonial evidence failed to prove that he had changed his domicile or that any of his New York residential properties were not a permanent place of abode.

AVILDSEN, JOHN G., DTA NO. 809722

The Tribunal reversed the determination of the ALJ in finding that petitioner was a resident of NYC by virtue of the petitioner maintaining a permanent place of abode and failing to substantiate that he spent less than 183 days in NYC. The Tribunal found that, "the ALJ erred in concluding that documentary evidence was required, as a matter of law, and that credible testimony was necessarily insufficient to satisfy petitioner's burden with respect to the 183 day issue.

The ALJ found petitioner's secretary's testimony credible because her testimony was based on her examination of diaries that she maintained with respect to petitioner's activities and the diaries were created at the time the activities were scheduled. The Tribunal concluded that had the secretary's testimony simply been a general statement that petitioner was not present in New York for more than 183 days each year and was based simply on her recollections of events occurring five years ago, rather than on records she had made of these events, it is doubtful that the ALJ would have found the testimony credible."

BODFISH V. GALLMAN, 50 AD2D 457

Stating that the presumption against a foreign domicile is stronger than the general presumption against a change of domicile, the State Supreme Court rejected the taxpayer's claim that he changed domicile when he was relocated to Pakistan on business. Citing Matter of Newcomb, the Court said "less evidence is required to establish a change of domicile from one State to another than from one nation to another." The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person with the range of sentiment, feeling and permanent association with it."

BUZZARD, CLAY E. & RITA M., 205 AD2D 852

The Appellate Division confirmed the decision of the Tax Appeals Tribunal and held that petitioners, who retained substantial ties to the Buffalo area, did not provide clear and convincing evidence that they had intended to make their Florida residence a fixed and permanent home. Petitioners upon retirement in 1981 bought a house in Florida and sold their only New York residence. However after renting residences during the summers of 1982 and 1983, they had a house constructed in the Buffalo area. "In addition, they continued to maintain their memberships in two Buffalo area country clubs, continued to maintain charge accounts in Buffalo stores and had their primary bank accounts in Buffalo banks. They also continued to engage the services of Buffalo attorneys and accountants. Further, their primary physician is located in Buffalo. Most significantly, in the years in question petitioners spent more time in New York than in Florida."

The Appellate Division continued that, "Although petitioners have established strong contacts with Florida, we are not at liberty to substitute our judgment for a reasonable determination by the Tribunal which is supported by substantial evidence merely because it is possible to reasonably reach a different conclusion... Therefore, we shall confirm the Tribunal's determination because, in view of the above noted New York contacts, it is a reasonable determination supported by substantial evidence."

CHRISMAN, GEORGE F., SR., 43 AD2D 771

The Appellate Division was asked to decide the domicile of a decedent in order to determine where his will would be probated. The taxpayer had lived with his wife in their New York home for many years until July 1967, when they sold it and rented an apartment elsewhere in the state. A year later they moved to Florida where they lived the rest of their lives, mostly in a friend's house. Despite these two moves, the taxpayer maintained ties to his original New York domicile. These ties included rental property, an active checking account, and the use of a New York post office box for his tax return and the mailing of dividend checks. The taxpayer had declared in his will, however, that he was a domiciliary of Cortland County, New York, where he lived briefly between the time he sold his New York home and moved to Florida. The court, in dismissing his subsequent moves to Cortland and Florida, declared that they "were merely changes of residence" and that the taxpayer "never had the intention necessary to acquire a new domicile." Citing prior

Appellate Division decisions, the Court said that to effectuate a change of domicile there must not only be a change of residence but also "an intention to abandon the former domicile and to acquire another" (Matter of Ratkowsky v. Browne), and that one without the other "leaves the last established domicile unaffected." (Clapp v. Clapp).

CLUTE V. CHU, 106 AD2D 841

Conceding that "there was substantial evidence which supported both the position of petitioner and that of the Tax Commission," the Appellate Division let stand as reasonable the latter's decision that the taxpayer remained a New York domiciliary. The taxpayer had claimed a change of domicile to Florida in October 1976 when he negotiated the sale of his family business which was completed by the end of the year. The State Tax Commission cited the retention of the New York home which the taxpayer used more than his Florida residence and continuing business ties as director in two New York banks, as evidence that he had not abandoned his New York domicile.

DOMAN, NICHOLAS R. & KATHERINE B., DTA NOS. 805521 AND 805520

The ALJ had determined that the taxpayers had changed their domicile from New York City to Suffolk County during the years in question. At the same time, she denied a motion by the Tax Department to amend the pleading to include the issue of statutory residency since it was not specifically referred to on the Statement of Audit Changes or the Notice of Deficiency, having been raised for the first time at the hearing. While agreeing that the taxpayers had changed their domicile, the Tax Appeals Tribunal reversed the ALJ's denial of the motion to amend the proceedings and remanded the case back to the ALJ to consider the issue of statutory residency. Upon remand it was determined that the taxpayers were not statutory residents of New York City.

DONOVAN, WILLIAM M. & JUNKO G., DTA NO. 818803

An apartment that was owned by the taxpayer’s husband prior to their marriage was deemed to be a permanent place of abode for the wife. The wife had a key and unfettered access, had in fact stayed overnight a total of 28 nights, and maintained it together with her husband, each of whom contributing to the monthly expenses.

ERDMAN, MARTIN & KEYLOUN, JOAN, DTA NO. 810741

The Tribunal affirmed the determination of the ALJ that Mr. Erdman failed to demonstrate by clear and convincing evidence a change of domicile. In reaching this conclusion the Tribunal stressed the importance of Mr. Erdman's continued active business interests and substantial time spent in New York.

EVANS, JOHN M. EVANS, 199 AD2D 840, DTA NO. 806515

The Appellate Division upheld the decision of the Tax Appeals Tribunal concerning what constitutes maintenance of a permanent place of abode. Petitioner shared a Manhattan apartment with a friend during his work week and paid for his share of household expenses for approximately seven years prior to the years in issue. Petitioner typically stayed at the dwelling place from Sunday or Monday night to Friday. A separate bedroom, bath and furnishings were available for petitioner's use. Additionally, petitioner provided other furnishings for use in the entire household.

The petitioner defined maintaining a permanent place of abode as owning or leasing a dwelling, or occupying a dwelling to which the taxpayer has some legal right (such as a dwelling furnished as part of one's employment). The petitioner argued that without such a clear and unambiguous standard, a taxpayer would not know how to determine when a temporary living arrangement, such as being a guest, rose to the level of permanency for which the filing of a resident return would be required. Petitioner asserted that his living quarters were neither "maintained" by him, nor were they "permanent." The Appellate Division decided that one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money, or otherwise. It rejected the petitioner's assertion that since he did not pay for many of the operating expenses of the dwelling, he was not "maintaining" the living quarters as required by the statute. As there can be many financial or other arrangements that determine how the costs of a dwelling are paid for (such as where expenses are shared or provided by another, or where an individual's contribution to the household is not in the form of money), the nature of the expenses incurred in and of themselves cannot determine whether an individual is maintaining a place of abode.

With regard to whether a place of abode is "permanent" within the meaning of the statute, the Appellate Division disagreed with the petitioner that the statute requires that the place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent and rejected petitioner's argument that he could have been asked to leave at anytime. In the Appellate Division's view, the permanence of a dwelling place for purpose of personal income tax depends on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place. It cited an opinion by the Attorney General (March 28, 1940) which states in summary that the word "permanent" when describing a place of abode is intended to mean an abiding place, having a fixed or established character as distinguished from intermittent or transitory.

FELDMAN, SOL & LILLIAN, DTA NO. 802955

The Tax Appeals Tribunal found that the taxpayers were still domiciled in New York based on the retention of their two-family home which was used both as a residence and office for the husband's limited medical practice. The taxpayers alleged a change of domicile in November 1979 with the purchase of a condominium in Florida despite maintaining two residences in New York, a two-family home in Brooklyn and a summer home upstate. The Tribunal agreed that the summer home was not a permanent place of abode within the meaning of Section 102.2(e)(1) of the regulations as it was not suitable for year-round use. The Tribunal likewise agreed, however, that the Brooklyn home was still being "permanently maintained" as a place of abode through continued ownership of the house and continued maintenance of the lower floor. The Tribunal also determined that the taxpayers were statutory residents. Citing the Matter of Smith, the Tribunal stated that it was the obligation of the taxpayers to keep adequate records of their days in and out of New York. Oral testimony was deemed insufficient to meet their burden of proof.

GETZ, COLIN W. & DELMA K., DTA NO. 809134

The Tax Appeals Tribunal determined that "while the petitioners may have very well intended Florida to be their permanent domicile, their general habit of life indicated, at best, an equal commitment to both locations." Thus, they did not establish by clear and convincing evidence that there was a change in domicile to Florida. Further, the taxpayers failed to submit adequate documentation, such as credit card slips to support the claim that they did not spend more than 183 days in New York. Petitioners upon retirement continued to maintain their house and country club membership in New York after they purchased a

Florida condominium. They also made numerous trips to New York in order for the petitioner to serve as a bank director and to spend time with their son.

GRAY, RICHARD E. & JEAN M., 235 AD2D 641, DTA NO. 808982

The Appellate Division, Third Department, by Memorandum and Judgment dated January 9, 1997 unanimously confirmed the Tax Appeals Tribunal decision holding that petitioners were domiciled in New York until the sale of their Syracuse business in September, 1987. Mr. Gray was the controlling shareholder and chairman of the board of Gray-Syracuse Inc. and believed that his involvement was "vital to the health of the company". In the Court's view, "the evidence indicating that petitioners retained their New York domicile until Gray's primary business interest had been sold provided substantial evidence for the conclusion that petitioners had not abandoned their New York domicile until September 15, 1987." In addition, the Court also stated that, "Although petitioners were renting residential property in Florida, they continued to maintain their home...in [New York] and spent considerable time there."

GREEN, JAMES A. & JOYCE, DTA NO. 808436

The Tax Appeals Tribunal determined that the petitioners had not changed their domicile and should be taxed as residents of New York until October, 1983. The petitioners claimed that they had permanently left the state and should only be taxed until April, 1983. At that time the petitioner lost his job and moved with his family to four other states to obtain employment, using his parents' address in Newburgh, New York, for mailing purposes. The last move to Indiana in October, 1983 resulted in permanent employment and the subsequent purchase of a home the following month. During 1983 the petitioners filed a New York State Resident Return (IT201), but did not indicate the number of months they were in New York as part year residents.

The Tax Appeals Tribunal affirms that the petitioners were residents of New York until October, 1983 because the temporary work assignments do not show a clear intent to permanently change domicile.

HANEY, WALTER G. & MADGE K., DTA NO. 806889

The Tax Appeals Tribunal canceled a Notice and Demand on the grounds that it was invalid due to the fact that the Division failed to properly inquire about petitioners' claim that they were nonresidents prior to issuing a tax assessment. Petitioners' claim for refund of taxes withheld, however, was denied.

The Tribunal found that petitioners were domiciled in New York for the tax year at issue because they did not establish a new domicile elsewhere during this period and that they maintained a permanent place of abode in New York in 1985. The petitioners stated that they never intended to return to New York to live and, thus, were no longer domiciliaries of New York State. Petitioners had moved to Florida in 1984 on a temporary job assignment. They were not certain at that time whether they would return to New York or not. They resided in a motor home in Florida and spent only two weeks in New York while on vacation. They sold their New York home in June, 1987. When Mr. Haney retired from his Florida position in October, 1987, the petitioners subsequently moved to Texas.

HOLT, R. MICHAEL, DTA NO. 821018

The Tax Appeals Tribunal sustained the ALJ that the taxpayer was a statutory resident of New York State and City for 2000 and 2001. The ALJ had concluded that photocopies of pocket calendars for both years were of poor quality and frequently illegible. She also noted that the taxpayer’s testimony was vague and not supported by corroborating records.

HULL, CHARLES J., JR. & MARY, DTA NO. 810833

This decision is a good example of how third party information obtained by an auditor can be used to refute a taxpayer's testimony. The Tribunal found several inconsistencies in the petitioners' statements. They cited the determination of the ALJ, who "found that many of the organizations that the petitioners asserted they resigned from upon changing their domicile to Florida in 1988 did, in fact, show activity or membership well after that date." Among the other findings which the Tribunal cited in the determination of the ALJ was that petitioners did not surrender their New York drivers' licenses when they said they did, continued to register motor vehicles in New York State after their purported change of domicile and did not use their Florida checking account more than their New York checking account as they had asserted.

This is also a good example of how the fact that taxpayers were "less than candid with the auditor's direct requests for information" can be used to refute alleged reasonable cause arguments for abatement of penalties.

KARTIGANER, HERBERT L., 194 AD2D 879, DTA NOS. 805836 AND 807026

The Appellate Division determined that the petitioners had not proven a change of domicile from New York to Florida.

Although the Appellate Division gave consideration to the petitioners' "formal" Florida residence declarations such as voter registration, address on will, licenses, etc., petitioners' informal acts, namely, petitioner husband's active involvement in his New York engineering business and the maintenance of their New York home, contradicted their declarations. Many factors indicated that they failed to abandon their New York domicile and sever their ties to New York. The most significant factor was the petitioner's constant supervision and review of his business interest in New York. He testified that he reviewed contracts and gave advice on personal liability and past and future projects. Internal controls required his approval of all projects, his supervision of progress, check points of on-going projects and his final review before submission to clients. The evidence in the record clearly showed the petitioner retained overall control of his New York business interest.

KNIGHT, CRAIG F., DTA NO. 819485

The Tax Appeals Tribunal reversed the ALJ in finding that the taxpayer was not a domiciliary of New York State and City in 1996 and 1997 and did not maintain a PPA to be taxable as a statutory resident in 1997. In March 1996 the taxpayer moved out of his marital home and back with his parents, both of which were in New Jersey. That same month he formed an LLC with an office in New York City. In April 1996 he entered into a lease on behalf of the LLC for a two-bedroom apartment nearby his office. According to the lease, the sole occupants of the apartment were to be Mr. Knight and two other people associated with the LLC.

In finding that the taxpayer had not changed his domicile from New Jersey, the Tribunal characterized him as a “mere sojourner” whose home was elsewhere despite the frequency of his visits to New York. As for the apartment maintained by the LLC, the Tribunal ruled that it was not for the taxpayer’s exclusive use and therefore not a PPA.

KORNBLUM, ELI & BEATRICE, 194 AD2D 882, DTA NOS. 807810 AND 807811

The Appellate Division determined that the petitioners' ties to both New York and Florida were equally strong and the fact that the petitioners had not "clearly and convincingly proven a change of domicile" to Florida. Alternatively, petitioners failed to prove they spent less than 184 days in New York State.

Petitioners maintained a Brooklyn residence since 1949. Mr. Kornblum retired in July 1983 with a continued salary from his company, of which he was president of two subsidiaries, through December 1983. Petitioner closed title to a Florida condominium on October 29, 1983 and subsequently accomplished all indicators of Florida residence such as driver's license and voter registration. Bank accounts were maintained in both states with monthly statements mailed to Florida. Petitioners used their Florida residence from early October to early May returning to Brooklyn for the remainder of the year. The unoccupied residences were not rented out during the duration of the respective absences nor was any furniture moved from their Brooklyn residence.

At the hearing, the petitioners' representative submitted schedules prepared from utility bills, credit card summaries and conversations with the petitioners showing more than 183 days in Florida for each year under audit. The Audit Division presented audit worksheets which listed telephone bills provided for only part of the audit period. Although petitioner wife's testimony corroborated the schedule of days submitted by their representative, petitioner husbands did not.

The court upheld the Tribunal's modification that the petitioner's telephone use was generally consistent with testimony offered and the petitioners' schedule submitted. It went on to say that whether or not the bills submitted are generally consistent with the time schedules is rendered meaningless when the gaps between bills are sufficient to place the petitioners' ultimate claim in doubt. Even had there been no gaps between the telephone bills submitted, they were too imprecise in and of themselves to constitute clear and convincing evidence on the number of days spent in each state during the audit period. Additionally, even if the telephone bills were more precise and complete, they did not cure the fact that some bills did not corroborate petitioners' time schedules submitted nor did Mr. Kornblum's testimony.

Lastly, the court emphasized the point that petitioners' reliance on another Administrative Law Judge determination was improper. Administrative Law Judge determinations do not set precedent.

LEACH, ET. AL. AS EXECUTORS OF ESTATE OF SIGMAN V. CHU, 150 AD2D 842

The Appellate Division reversed the decision of a lower court and upheld the determination of the State Tax Commission that the decedent was a statutory resident of New York State. In controversy was the Tax Commission's regulation interpreting the statute which defined a day for the purpose of calculating the 183 day requirement as "presence within New York State for any part of a calendar day."

The decedent had worked five days a week in New York City as a stockbroker from approximately 10:00 a.m. to 4:00 p.m. While he was domiciled in Connecticut and usually returned to his home after the work day, he also maintained a studio apartment in New York City. The apartment was used approximately one night per week except in the summer. On his tax returns, decedent stated that he worked 200, 192 and 192 days in New York for years 1979, 1980 and 1981 respectively.

Petitioners had argued that while the legislature could enact a statute defining a day to include a fraction of a 24-hour period, here it did not do so; and, therefore, the Tax Commission usurped the Legislature's power by expanding the term day to consist of a period of time to less than 24 hours. The Appellate Division held, however, that the Tax Commission properly elaborated on the word "days" in the statute by defining a day as "any part" of a day and it cannot be said that its regulation was irrational or unreasonable.

Next, they turned to the issue of whether the decedent was entitled to a resident tax credit for taxes paid to other jurisdictions under Tax Law Section 620(a) which provides for a credit upon income both derived from another state and subject to tax under Article 22. In this case, the taxes paid to Connecticut were on income from intangibles in the form of dividends and gains from securities, none of which was employed in a business carried on in Connecticut.

The Court held that Section 620(a) specifically applies only to income not derived in New York and no proof was offered to controvert the Tax Commission's finding that the income was not derived in Connecticut. It also rejected petitioner's argument that the imposition of tax violates the privileges and immunities clause of the U.S. Constitution on the claim that New York domiciliaries are granted a credit for income tax paid to another state but nondomiciliaries are denied such a credit. The court held that the requirement of the income being derived in the other state applies equally to those in decedent's position as well as New York domiciliaries. The decedent was, therefore, not being denied any benefits granted to New York domiciliaries; and the tax did not violate decedent's equal protection rights since he was not being treated less favorably than others under similar circumstances.

MARX V. GOODRICH ET AL. 286 AD 913

The Appellate Division rejected the taxpayer's argument that the Tax Commission is barred from holding her as a resident for later years after having previously determined that she was a nonresident for an earlier period. The court declared that each year stands on its own and "may be decided differently than previous years." This is because from one year to the next the taxpayer's status may change or because the tax officials obtain information which they did not have in prior years."

MCKONE V. STATE TAX COMMISSION, 111 AD2D 1051

The Court of Appeals determined that petitioners were not domiciled in New York from 1973 to 1976. The Court agreed with the petitioners that they had changed their domicile from New York to Canada in 1973 and did not become New York domiciliaries again until returning in 1976.

The Court found that petitioners, who had originally moved to New York as a result of a corporate promotion, had changed his domicile when he moved to Canada as 1973 and did not become New York domiciliaries again until returning in 1976.

The Court found that petitioners, who had originally moved to New York as a result of a corporate promotion, had changed their domicile when they moved to Canada as the result of another corporate promotion. The fact that the petitioners had sold their New York home, severed all ties with New York and had no foreseeable plans to return was proof of change of domicile. Petitioners entered Canada with permanent visas, enrolled their children in local schools and paid Canadian income taxes. Despite the usual foreign assignment being of a fixed temporary period, the petitioner's assignment to the position in Quebec was indefinite. It was this intention to remain for an indefinite period which was considered sufficient to prove change of domicile.

Two justices dissented and would have held the petitioner domiciled in New York. They cited Matter of Bodfish v. Gallman, "The presumption against a foreign domicile is stronger than the general presumption against a change of domicile." They also stated that the taxpayers' move to Canada was based on his employer's wishes and not on a true intent to change domicile.

MILLER, RHODA, DTA NO. 812849

The Tribunal affirmed the finding of the ALJ that petitioner, while not a domiciliary of NY, was a statutory resident of NY state and city. Petitioner failed to meet her burden of proof in documenting that she spent fewer than 183 days in New York. The ALJ found that the testimony presented in support of this issue: "did not purport to establish petitioner's whereabouts on any specific days during the year at issue, but rather sought to establish a general pattern of activity. Given the lack of documentation in the record, as noted, the testimony presented is clearly insufficient to meet petitioner's burden of proof on this issue." The ALJ agreed with the Division that petitioner "never gave specific details on her presence in or out of NY." Although her accountant testified about his recollection of what he had seen in petitioner's social diary, it was never produced at the hearing, nor was any summary of it provided. The Tribunal stated that, "The ALJ herein properly found that general testimony about a diary, without more information, was not credible."

The Tribunal also held that the negligence penalty should be sustained because petitioner had indicated on her returns that neither she nor her husband maintained an apartment in New York City.

MINSKY V. TULLY, 78 AD2D 955

In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and the actual residence at that location must be present. Thus, the Appellate Division said that the evidence was not clear and convincing that the taxpayer intended to change his domicile to Canada despite renting an apartment there. The Court noted that the taxpayer still returned to New York to tend to his substantial business interests and eventually returned there to live. Moreover, he testified that neither he nor his wife ever considered giving up their U.S. citizenship. While acknowledging that domicile is not dependent on citizenship, the Court stated that becoming a citizen of the new country "is relevant on the issue of intent."

MOED, LEON, DTA NO. 810997

A husband was not deemed to be maintaining a permanent place of abode in New York City that was rented by his wife, from whom he was separated in fact (but not legally). The Tribunal distinguished this case from Evans by saying that there was no evidence of a shared rental nor did the husband have free and continuous access to the apartment.

MOSS, RONALD J., DTA NO. 806280

The Tax Appeals Tribunal determined that the petitioner, whose employer maintained an apartment for him in Manhattan, was not a domiciliary of New York. Although the apartment was considered a permanent place of abode, the petitioner offered clear, convincing and credible evidence that he had changed his domicile from Manhattan to the Suffolk County Town of Quoque. To prove a change of domicile, the petitioner showed that he and one of his daughters kept their personal belongings, clothes and artwork in the Quoque house and retained the services of a live-in housekeeper. In addition, occasional business meetings were held in the house and there was evidence of extensive political and social ties to the town.

The Division of Taxation did not challenge that the petitioner was not a New York City domiciliary. Instead, it asserted that the taxpayer did not adequately substantiate being in the City less than 184 days. According to the Division, taxpayer's diaries were not clear as to the location of appointments, had entries that were made at the end of the year and lacked verifiable evidence. However the Tribunal found that the taxpayer was not a resident because his testimony and company travel reports were judged sufficient evidence of his days.

NASK, FRANK P. & FRANCES T., DTA NOS. 802736 & 803414

The Tax Appeals Tribunal had to decide whether leaving New York for work related reasons constitutes a change of domicile. In this case, the taxpayer, a lifelong New York resident and domiciliary, signed a three-year employment contract in December 1982 to work in Pennsylvania. During 1983 the taxpayer was promoted and relocated from Pennsylvania where he rented a one bedroom apartment, to Maryland where he purchased a condominium. His family remained in their New York home throughout 1983. Although the taxpayer never returned to New York to reside and in fact was subsequently divorced, the Tribunal found that he never intended to change his domicile from New York to either Pennsylvania or Maryland. Citing Minsky, the Tribunal declared that both intention and actual residence must be present to effect a change of domicile.

NEWCOMB, ESTATE OF JOSEPHINE L., 192 NY 238

The New York Court of Appeals enunciated basic concepts of residency which have been restated and refined in numerous cases ever since. Distinguishing between residency and domicile, the Court said that the former "means living in a particular locality" while the latter "means living in that locality with intent to make it a fixed and permanent home."

Once established, domicile "continues until a new one is acquired" and that to change domicile "there must be a union of residence and intention." A temporary change of residence for the accomplishment of a particular purpose is not a change of domicile. The motives behind a change of domicile are irrelevant "except as they indicate intention" confirmed through acts of the individual.

ROTH, ROBERT & JUDITH, DTA NO. 802212

In rejecting the taxpayer's alleged change of domicile, the Tax Appeals Tribunal declared that his home in Connecticut was never intended to be other than a "temporary gathering place" for the taxpayer and his children while his New York co-op was being renovated. Noting that the taxpayer resumed living at the New York co-op upon completion of the renovations, the Tribunal cited Matter of Newcomb for the proposition that "a temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged." The Tribunal also dismissed the issue of statutory residency in finding that the taxpayer's diaries were "illegible" and "meaningless" in determining the days in and out of the New York.

SHAPIRO, DANIEL & OLGA W., DTA NOS. 802925 & 802926

The Tax Appeals Tribunal determined that a New York residence was a place of abode within the meaning of Section 605 of the Tax Law. The taxpayers alleged a change of domicile with the purchase of a home in Pennsylvania, relegating the New York residence to an office and occasional place to stay overnight. While not specifically addressing the issue of domicile, the Tribunal nevertheless found that the taxpayers were residents as they maintained a permanent place of abode and could not prove that they spent less than 184 days in New York.

SILVERMAN, JACK & FRANCES, DTA NO. 802313

The Tax Appeals Tribunal decided that the taxpayers were still domiciliaries of New York for 1978 through 1982. The taxpayers maintained their historical New York home as well as extensive business and social ties to New York throughout this period. Although efforts were made to sell the New York home, it was not clear how serious these efforts were, calling into question the taxpayers' intention to abandon their New York domicile.

SIMON, JAMES E., DTA NO. 801309

In his appeal of an Administrative Law Judge's determination denying his change of domicile, the taxpayer raised an additional argument: that in his attempt to change domicile, he relied detrimentally on official New York State publications which failed to provide him with the necessary assistance. The taxpayer was a Buffalo native who came full circle: in September of 1978 he moved to Florida where he lived three years, then moved to Pennsylvania where he lived until January 1988 when he returned to Buffalo. The taxpayer maintained that he changed domicile first, when he moved to Florida and, then again, in September 1981 when he moved to Pennsylvania. The Tax Appeals Tribunal noted that throughout this period the taxpayer maintained his home in Buffalo where his wife and son lived. Moreover, he made frequent and extended visits to Buffalo and ultimately returned there to live. As for his reliance on New York State publications, the Tribunal stated that "change in domicile is not a form of chess where a given set of maneuvers, or themselves, will carry the day for a taxpayer claiming to have changed his domicile. Instead, the taxpayer must prove his subjective intent displayed through his conduct.

SMITH, DONALD C. & GROH, CAROL A., DTA NOS. 810532 & 813342

The taxpayers' lack of credibility was key in the Tax Appeals Tribunal's decision reaffirming the ALJ that they remained domiciliaries of New York State and City**.** The Tribunal noted that the ALJ had found that the taxpayers' oral testimony was contradicted by the evidence, "including their own audit questionnaire." Family ties and time were two important factors. The taxpayer's' children attended school in New York City during the audit period "when they were allegedly domiciled in New Jersey and St. Croix." Moreover, the ALJ "found that petitioners spent at least twice as much time in New York City than they did in either" location.

SMITH, EDWARD L., 68 AD2D 993

The Appellate Division agreed with the decision of the Tax Commission that the taxpayer had not changed his domicile in mid-1970 when he put his New York residence on the market nor did he prove that he spent less than 184 days in the state during the year. Regarding the former, the court noted that the New York home was not actually sold until 1971 and was still being maintained, as evidenced by the continuation of phone and utility services and the fact that the furniture remained. As for the latter, the court emphasized the

taxpayer's "obligation to keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the State."

STRANAHAN V. STATE TAX COMMISSION, 68 AD2D 250

The Appellate Division in a 3-2 decision annulled the State Tax Commission decision that the decedent was a statutory resident of New York City by virtue of the fact that more than 183 days were spent there during the year at issue. The taxpayer (deceased) maintained a two and one-half room apartment in the City which was normally used for brief shopping trips, as a stopover place on trips to Europe and to attend dances sponsored by a social group.

The taxpayer became ill during the year in issue and came to New York for treatment of her cancer and was immediately hospitalized. When discharged on a strict regimen of medication and treatment she was advised to remain in New York. She was readmitted two more times and ultimately died in the hospital. Consequently, a total of 215 days were spent in New York of which 148 days were spent in the hospital and 67 days were spent in her New York apartment.

The arguments made were that the apartment in New York was similar to a vacation cottage and should not be considered a permanent place of abode under the Tax Law. Further, it was asserted that the exemption for members of the armed forces living in New York and the exemption of a place of abode maintained only during a temporary stay for the accomplishment of a particular purpose evidences legislative and regulatory intent to avoid taxing foreign domiciliaries whose presence in New York is involuntary.

The court held that the concept of involuntary presence in the State, as distinguished from a voluntary presence, has no express statutory or regulatory basis. However, it noted that no rational basis existed for distinction between an employee domiciled elsewhere who comes in for a fixed and limited period for the accomplishment of a particular purpose and a foreign domiciliary who comes into the State for a limited purpose of obtaining medical treatment and is prevented from leaving the State before the expiration of 183 days by reason of physical condition and inability to leave. Therefore, the time spent in a medical facility for the treatment of that illness should not be counted in determining residency during such confinement.

The decedent's apartment was determined to be a permanent place of abode since it was suitable for other uses than vacations although it might be used by a person of considerable means only for activities which might be considered vacation purposes.

It should be noted that one of the judges concurred for annulment for the reason that the statute was never intended to extend to a non-domiciliary forced to remain within this jurisdiction. The essential difference seen was the fact that the petitioner was unable to remove herself from this jurisdiction following her release from the hospital despite her wish to do so.

SUTTON, ELLIOTT & GHISLANE, DTA NO. 802019

The Tax Appeals Tribunal determined that the petitioner (husband) changed his domicile to Florida before the audit years, 1981 and 1982 and did not spend more than 183 days in New York during the years at issue.

Petitioner was born and raised in Brooklyn, New York and lived there until his divorce from his first wife in 1974. Upon divorce, petitioner's former wife retained ownership and possession of their Brooklyn home while petitioner obtained a one bedroom rent stabilized 700 square foot apartment in Manhattan. Shortly after the divorce, petitioner started spending time in Florida during most of the winter months, staying at the Jockey Club in Miami Beach from 1974 through 1977. In 1977, petitioner and his brother jointly purchased, through their corporation, a condominium in Miami which consisted of about 6500 square feet of living space which included two separate suites, and common living areas of the kitchen, living room and roof deck. The actual closing took place on April 27, 1981. Petitioner had filed a declaration of domicile and registered to vote in Florida on June 9, 1980.

Sometime during 1980, petitioner undertook negotiations to obtain Florida franchise rights to a well-known restaurant chain with the intent to establish the restaurants throughout Florida. This never materialized after a year of negotiations; however, litigation remained ongoing at least through 1989. Petitioner belonged to a number of social clubs and actively pursued the sport of racing power boats in Florida. Petitioner's minor son visited him in Florida nearly every holiday as well as extensively during the summers. Petitioner had New York income from businesses owned in New York for approximately 20 years. Petitioner was essentially uninvolved in their ongoing operations, each business being operated by an independent manager making all business decisions. Petitioner described himself as a "silent partner."

Petitioner testified that he maintained his New York rent stabilized apartment because it provided relatively inexpensive accommodations when he came back to New York 60 to 75 days per year. In December 1985, petitioner was served with a notice of eviction from the apartment because he was not occupying it as his primary or principal place of residence. He subsequently purchased a condominium in Manhattan for use and investment purposes. Petitioner submitted telephone bills showing outgoing calls from his Florida home on 164 days during 11 months in 1981 and 187 days over 10 ½ months in 1982.

The Tribunal found that the petitioner's testimony was credible coupled with the weight of documentary evidence submitted. The Tribunal found nothing in the record before them to support a different conclusion. It further found no reason in the record to overturn the ALJ's determination that petitioner's business interests in New York were merely passive and the rent controlled apartment an inexpensive convenience.

TAMAGNI, JOHN S. & JANET B., 230 AD2D 417, DTA NO. 811237

The Court of Appeals ruled that it was not unconstitutional for New York State to tax the intangible income of taxpayers who were determined to be statutory residents of the state even though it resulted in double taxation since the income was also taxed by their state of domicile.

TROWBRIDGE, ESTATE OF JAMES A, 266 NY 283

An individual's "general habit of life" is more indicative of his intention regarding domicile than formal declarations. Thus, in an estate tax proceeding involving the states of Connecticut and New York, the New York Court of Appeals stressed that actions of the taxpayer prior to his death should be given more weight than declarations of domicile he made in his will and to tax authorities in both states. Deciding in favor of Connecticut where the taxpayer lived with his wife and son during his final several years, the Court concluded that "if at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary." During the same period the New York residence was boarded up, telephone service discontinued and furnishings and silver transferred to Connecticut.

VEEDER, HAROLD M. & PEARL M., DTA NO. 809846

The Tax Appeals Tribunal determined that petitioners are residents by virtue of their maintaining a permanent place of abode in the state and not providing evidence that they did not spend more than 183 days in New York. The taxpayers had asserted that the majority of their days were spent in Florida but provided no substantiation of this. Instead they said the audit guidelines permit taxpayers to use secondary evidence where no diary is available. Their secondary evidence consisted of a log of days for the audit period which was referred to in testimony but never produced. The Tribunal stated that "if no diary or log is available, a taxpayer may be asked to provide credit card receipts, utility usage, an ATM access record, or other bank information to identify where the taxpayer was on a specific day." The taxpayers' records did not contain sufficient evidence that would demonstrate a presence in and out of New York. For this reason, the Tribunal found that they did not sustain their burden of proof with respect to their change of domicile.

The importance of this decision is that the Tribunal quoted the guidelines and deemed the conduct of the audit consistent with the guidelines.

WACHSMAN, HARVEY & KATHRYN, DTA NOS. 806930 & 806931

The main issue facing the Tribunal was whether the ALJ erred in finding petitioner's testimony credible and adequate to establish that petitioners spent less than 184 days in New York.

The Tribunal reversed the determination of the ALJ and found that the ALJ erred in finding petitioners spent less than 184 days in New York. Petitioners had relied upon a diary to show their daily activities. The Tribunal found the diary to be unreliable largely because it was the source of three inconsistent accounts of petitioners' days in New York. The Tribunal then concluded that, "Dr. Wachsman's testimony is similarly unreliable and that the ALJ erred in finding the testimony credible."

WECHSLER, HERMAN & ROSALIND, DTA NO. 806431

The Tax Appeals Tribunal emphasized the taxpayers' retention of their New York home and the husband's limited medical consulting as evidence that they were still domiciled in New York for 1985. The taxpayers had contended that they maintained their New York home until October 1985 at which time it became the principal residence of their son who was having marital problems. Noting the extensive use the taxpayers made of their New York home during the first ten months of 1985, the Tribunal concluded that they had not established by clear and convincing evidence their intention to change their domicile in December of 1984.

ZAPKA, RUDOLPH (DEC'D) & LORETTA, DTA NO. 804111

The taxpayers had significant ties to both Florida and New York allowing for persuasive arguments to be made in support of either state as their domicile. This very fact, concluded the Tribunal, indicated that they had not clearly and convincingly evidenced an intent to change their New York domicile. The Tribunal compared the taxpayer's retention of their New York home where they spent three months compared with their leasing of a furnished condominium in Florida.

ZINN V. TULLY, 54 NY2D 713, REV. 77 AD2D 725

The New York Court of Appeals determined taxpayers to be domiciled in New York based upon the retention of their New York house and businesses. Their business interests were substantial and required frequent trips to New York to manage them.