

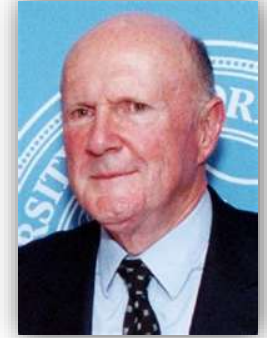
**BLOOMBERG BNA
JULY 27, 2017
NEW YORK STATE AND CITY RESIDENCY AUDITS**

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WHAT DO THESE PEOPLE HAVE IN COMMON?



1. All have great hair
2. All are/were Tim's clients
3. All have been audited by New York State

RESIDENCY – FACTS AND FIGURES

- **2016 NYC Comptroller Report: *The Increasing Concentration of High Income Taxpayers in the New York Economy***
 - 43% of US Taxpayers with income > \$10MM reported some NY source income
 - In 2014, *half* of NY taxpayers with > \$720K income were (or claimed to be) nonresidents!
 - Nonresidents earned more than \$90B in NY income in 2014 (\$68B in NYC alone)!
- **What could this mean?**
 - More audits? Are these folks really nonresidents?
 - Even more taxpayers? How many other non-filing nonresidents are there?
 - Re-birth of NYC nonresident tax?

RESIDENCY BASICS

➤ Importance of Residency Status

- Residents: The One Thing
- Nonresidents: NY source income
- NYC tax: All or nothing

➤ The Two Residency Tests

- Domicile
- “Statutory” Residency

DOMICILE TEST

Domicile: What is it?



DOMICILE – GENERAL PRINCIPLES

- Leave and Land” – you have to stick the landing
- Burden of Proof: “Clear and Convincing Evidence”
- Looking for a “Lifestyle Change”
- Examples:
 1. Huge Change in Time Patterns
 2. Retirement
 3. Upsizing and Downsizing
 4. Health Issues

DOMICILE – THE FACTORS

➤ The 5 Primary Domicile Factors

1. Home
2. Business
3. Time
4. Near and Dear
5. Family



DOMICILE – THE “OTHER” FACTORS

- The OTHER Factors: Best Offense is a Good Defense
 - Mailing address for bills, financial records, etc.; Safe deposit box; Vehicle registrations; Registering to vote, driver’s license; Citations in legal documents (wills, contracts, etc.)
- KEY: Focus on change in lifestyle, and tell a compelling story. See *Blatt* (ALJ, Feb 2016); *Patrick* (ALJ, July 2017)
- Foreign domicile changes could be tougher?
- And if you can’t do it, look to 30-day rule or 548-day rule!

STATUTORY RESIDENCY - OVERVIEW

➤ The Statutory Residency Test: 2 Components

1. 183 days

AND

2. A Permanent Place of Abode (“PPA”)



+



STATUTORY RESIDENCY – DAY COUNT

➤ Factor #1: Day Count

1. A “day” in New York: a minute is a day

-- Part day = full day: *Zanetti v. NYS Tax Appeals Tribunal*, 8 NYS3d 733 (3d Dept. 2015)

2. Only two exceptions: travel & medical

3. Burden of Proof: the importance of record keeping (see next slide)

4. Use of testimony/statements

➤ The *Julian Robertson* Case: 8-years to fight about 4 days!

STATUTORY RESIDENCY DAY COUNT RECORDS

Credit card
statements

ATM usage

Personal diary

Outlook
calendar

Flight records
(frequent
flyer reports)

EZ Pass

Limo logs

Landline
phone

**Cell phone
logs!!**

Special
Software
(MONAEO)

Travel
itineraries

Swipe Card
records

STATUTORY RESIDENCY – PERMANENT PLACE OF ABODE (PPA)

- Factor #2: A “Permanent Place of Abode”
 1. Any type of dwelling
 2. The “11-month” rule
 3. “Unfettered” access: habitability issues; no key?
- Checking the “living quarters” box
 - Be super careful
- Recent Cases/Rulings
 - *Knight*: girlfriend’s place/corporate apartment
 - *Barker*: vacation cottage = PPA
- *Gaied v. NY*
 - High court hears residency case

GAIED FACTS

- New Jersey domiciled; More than 183 days in NY due to work
- Owned three-bedroom apartment complex
 1. Two units rented out, most of the time
 2. One unit maintained for parents, who relied on him for support
- Parent's Place
 1. Gaied paid all expenses; everything in his name
 2. But didn't use for himself; only stayed overnight at parents' request; and even then, slept on couch
 3. Overnight stays about once a month

STATUTORY RESIDENCY: WHAT IS THE PURPOSE OF THIS TEST?

- Our Strategy: get the Court to focus on the intent of the statute
- Should the test be objective, where ownership of a place is all that counts?
- Or do we have to look at whether the taxpayer really is “residing” there, in order to tax him as a “resident?”

GAIED RULING: NY COURT OF APPEALS

- **Held**: In order to be subject to NY's statutory residency test, there must be some evidence to conclude the taxpayer *used their abode in NY as a residence*
 1. Merely owning or maintaining a place and having access to it is not enough to create statutory residency

- **BUT**: Tax Department has taken narrow view of this case
 1. Place will be a PPA unless taxpayer doesn't use it AND somebody else is living there

DAVID AND KAREN SOBOTKA (ALJ, 8/20/15)

- Statutory residency does not trump domicile!
- Taxpayer moved into NYC in August 2008, but also (allegedly) maintained a PPA for the whole year and spent more than 183 days here.
 - Is he a stat res?
 - ALJ holds that the “statutory” resident provision in the Tax Law (Tax Law § 605[b][1][B]) only applies to taxpayers who are “not domiciled in New York,” and since it is undisputed that Mr. Sobotka was domiciled in New York during part of 2008, one of the three requirements of the statutory resident test is not met.
 - Only days in the nonresident period of the year can be “counted” towards the 183 day rule.
- Tax Department did not appeal; taking contrary position in current audits.

WYNNE V. MARYLAND, 2015 US SUPREME COURT DECISION

- **Facts**: Taxpayer lived in MD, had S corp income from lots of states; MD allowed credit for tax paid to other states against STATE tax, but not against LOCAL tax
- **Held**: The double tax arising from Maryland's resident credit scheme was unconstitutional, in violation of US Commerce Clause; first time Court applied Commerce Clause to pure income tax scheme
- **NY Implications?**
 1. Double taxation of NYC stat residents? (*See Chamberlain v. NYS and Edelman v. NYS*)

RESIDENCY AUDITS

HOW THEY FIND YOU!

Year of residency change — almost automatic

Substantial difference between federal and state income

Answer to “living quarters” question

Number of days in NY on return

Past audit history

Cross-check with real property records

Any STAR or NYC parking exemptions

NY addresses reported on a Form 1099 or K-1

All press is not good press

Unhappy ex-spouse

Audits of related parties, partners, etc.

Whistleblower





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