More than Just Day Counts: Changing Your Domicile Means Changing Your Life, Not Just Your Physical Location

The income tax savings realized by moving to a state that does not impose an individual income tax can be substantial. But these tax savings often don’t come easy.

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It's a fact pattern seen all-too-often in the offices of tax practitioners around the country. A successful couple living in a high-tax jurisdiction such as New York or Minnesota is facing retirement and purchases a vacation home in Florida (or a similarly sunny jurisdiction without a state income tax). The couple spends nearly the entire winter in Florida, but the remainder of the year stays at their city condo close to their adult children and grandchildren.

After a particularly bad winter stranding them in Florida for an additional month, the couple realizes that they have spent just over 183 days away from their condo in the city and believe that they are now qualified to be Florida residents for income tax purposes. They call their accountant, declare themselves Florida residents and open a bottle of champagne to celebrate all the income taxes they will save.

Not surprisingly, the couple was perhaps a little premature in cracking that bottle of champagne. Becoming a resident of another state for income tax purposes often involves more than just spending the requisite 183 days outside of your prior state of residence. Although the taxpayer's physical presence is very important, the close cases often turn on the nitty-gritty details of a person's life.
Faced with widespread budget deficits, state income tax authorities have become increasingly more reluctant to accept that one of their taxpayers has moved to another state, especially when the taxpayer retains substantial property in their jurisdiction. These taxing authorities can be quick to audit such taxpayers. Taxpayers should be prepared for questions on audit such as: How has your lifestyle changed since you moved out of state? What country clubs do you frequent? Where do your kids go to school? Where are your most prized possessions?

Forty-three states and the District of Columbia impose a state income tax on individuals. Hawaii, New York and California have some of the highest rates nationally, with top marginal rates of 11% for Hawaii, 12.696% for New York City (8.82% for New York residents living outside New York City) and a whopping 13.30% for California.

If an individual is a resident of a particular state, he is subject to that state's income tax on his worldwide income, whereas if an individual is not a resident of a particular state, he will be subject to that state's income tax only on income that has its source in that state. Given these high rates, the income tax savings realized by moving to a state that does not impose an individual income tax can be substantial. But these tax savings often don't come easy.

It is imperative that individuals seeking to change their residence for income tax purposes do more than merely track their daily location on their smartphones. A successful change in residence involves affirmatively cutting or loosening many of one's ties with a former home state and centering many of the important elements of one's life in a new state.

An individual may be a resident of more than one state for income tax purposes. For example, he could have his domicile in one state but be what is known as a "statutory resident" of another state. Under New York law, a taxpayer is a resident if he is domiciled in New York, or if he is a statutory resident, such that he spends more than 183 days of the taxable year in the state, and he maintains a permanent place of abode in the state for substantially all of the year.

For a taxpayer changing his state of residence to a new state, even if he spent more than 183 days in his new state, the taxpayer may still have the connections to his old state to lead to a determination that he has not changed his domicile and continues to be subject to the income tax of the old state as a resident.

Clearly, domicile is a critical concept to understand when advising on state income taxation. This article will focus on the common threads seen when taxing authorities in the fifty states and the District of Columbia define and interpret domicile and, as such, will not address the concept of statutory residency.
Defining Domicile

Each state has its own definition of who is a "resident" of its state for income tax purposes. The terms "domicile" and "residence" are often used interchangeably, but for income tax purposes, the two terms have different meanings. Residence is generally thought of as a place to live and may have a temporary connotation. Domicile, however, has a much more specific definition than "residence" and the defining characteristic of domicile is permanency or at least the thought of permanency. 6

Highlighting the durational difference between these two terms, a recent Alabama case explains that "[a] person's residence is where the person currently resides. A person's domicile, however, is the person's true, fixed home to which he intends to eventually return when absent." 7

The majority of states include the concept of domicile to define who is a resident for purposes of their state income tax laws. Many of the definitions are similar and derive from common law.

A recent Massachusetts case defined domicile as "the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode . . . the place where a person dwells and which is the center of his domestic, social and civil life." 8 Several cases have defined domicile more succinctly as the place where one has his true, fixed, permanent home and to which, whenever he is absent, he has the intention of returning. 9

A large component of domicile is state of mind, which invariably leads to subjective inquiries such as: Where do you intend to remain? What is your purpose for being in a particular place? What activities constitute the "center" of your life? To answer these questions successfully, objective factual data is needed.

Unanimously, a state taxing authority contesting a taxpayer's change in domicile will look to objective facts, rather than merely assertions or affidavits of intent, to prove the taxpayer's state of mind. The best indicator of a person's intent to establish domicile is his actions and the location of his activities and social affairs.

Heightened Standard of Proof to Change Domicile

Making the determination of residency even more onerous on the taxpayer is the fact that it is the taxpayer's burden to prove that he or she has established a new state of domicile. 10 A person generally retains his or her domicile until a new one is established. There are generally four elements to changing domicile: (i) physical abandonment of the first domicile, (ii) intent not to return to the first domicile, (iii) physical presence in the new domicile, and (iv) intent to make that one's domicile. 11
As with the definition of domicile, states vary on the exact elements required for changing domicile. In Virginia, changing domicile is considered a two-step process: (i) intent to permanently move away from one domicile, and (ii) acquiring a new domicile where the taxpayer intends to remain permanently or indefinitely.

**Facts Needed to Prove Domicile**

The types of objective data needed to evidence a change in domicile vary based on the state the taxpayer is seeking to leave and the particular lifestyle of the taxpayer. Given the high burden of proof needed to change domicile, it would behoove the taxpayer to gather as much objective evidence of his move as possible.

Although states have different criteria for demonstrating domicile, states share many factors in their analysis of an individual's domicile. Incidentally, the first five factors discussed below comprise the primary factors for determining residency as detailed in the New York State Department of Taxation and Finance's Nonresident Audit Guidelines (2014).

**Physical presence/time spent.** Although this article has stressed the importance of factors other than physical presence in determining domicile, the importance of physical presence cannot be denied. Although physical presence alone is insufficient, it is hard to argue that it is not important to spend as much time in the new state as possible.

A taxpayer may be away from his old domicile for much of the year, and not necessarily spending time in his new domicile. This may be an issue especially for taxpayers who travel frequently for vacation or business. The taxpayer seeking to establish a change of domicile should plan to be in the new domicile significantly more than in the old state.

Keeping track of one's days in both the old and new locations is critical, especially during the first year or two after the change in domicile. The years immediately following the change in domicile are much more likely to be subject to audit than subsequent years, largely because a part-year resident or non-resident state income tax return will often need to be prepared.

Many years after the change in domicile, it is possible that no state income tax returns will need to be prepared, reducing the risk of audit. The message to taxpayers considering a change in domicile should be to spend as much time as possible in the new state in the year the change in residence takes place, and the following year.
For example, in *Matter of Ingle*, the taxpayer's delay in waiting for her boyfriend to help move her furniture to her new home in Tennessee and lingering around her New York City apartment immediately after her alleged move cost her over $250,000 in tax. There was no dispute that Ms. Ingle changed her domicile to Tennessee in 2004. The issue was whether her domicile changed at the end of March or in early July. The date was critical, because the taxpayer received approximately $2 million in late April which would be subject to New York State and New York City tax if she were a New York City resident during that time.

The Tribunal held that she did not meet her burden of proof to change her domicile. By keeping her furnishings in her New York City apartment, extending her lease for a short while and returning to her New York City apartment rather than her purported new home in Tennessee following work travel, Ms. Ingle was deemed to be a New York domiciliary until her furnishings were later moved in July. One lesson to be learned from Ingle is to enhance your presence in your new state in the months immediately following your change of domicile.

**Home.** A man's home is his castle, and if he has two castles, the state residency audit may go more favorably for him if his bigger and better castle is in his new state of residence or, better yet, the castle in his state of former residence is on the market for sale.

Auditors often look at the degree of effort made by the taxpayer to abandon his house in the former state of residence. If there is no abandonment of the home in the former state of residence and, especially, if a child of the taxpayer also continues to live in that residence, the taxpayer will have a tough time convincing auditors that his domicile has been changed, even if the taxpayer has a residence in another country and works in that country.  

Ways that taxpayers can abandon their homes in a prior state of residence include putting the home on the market for sale, renting the home out to another person, or buying a much nicer, better home in the new jurisdiction.

Many people need no justification for spending lavishly to furnish a home, but potential tax savings could convince an otherwise frugal decorator to up the decorating budget. For example, in *Matter of Cooke*, a couple's investment of "large sums of money and time in building and furnishing . . . a home to their exact specifications and desires . . . mov[ing] most of their artwork, family heirlooms and treasured keepsakes" proved helpful in a challenge to their residency by New York City.

The court determined that the taxpayers were residents of the Hamptons, not New York City, because, among other facts, their Hamptons residence was much larger, more nicely furnished, more expensive to maintain and more customized than their New York City apartment. The taxpayers were deemed to be
domiciliaries of the Hamptons, despite Mr. Cooke spending more days in some years in New York City than
the Hamptons.

It is also important that benefits related to the taxpayer’s state of residence are claimed consistent with the
taxpayer’s income tax filings. Many states provide a reduction in real property taxes for the real estate that
the taxpayer designates as his primary residence (often called a "homestead" or "homeowners" property
tax exemption; the New York equivalent is the "STAR" or school tax relief exemption).

It is essential that the taxpayer remove the homestead exemption on the property located in his former state
of residence and, if applicable, obtain the homestead exemption in his new state of residence. Having the
homestead exemption in the taxpayer’s new state of residence, and/or not claiming a homestead
exemption in the old state, has been noted by courts in ruling that a successful change of residence has
taken place. 20

Inconsistent treatment among income and property taxes might raise the burden of proof in a residency
audit and could even be criteria for audit selection. For example, an individual who receives a homestead
exemption for Illinois property tax purposes is presumed to be a resident of Illinois for Illinois income tax
purposes. 21 Although this presumption can be overcome by clear and convincing evidence to the contrary,
it does increase the proof needed to establish a change of residence, thereby making a change of
residence much more difficult for the taxpayer.

Other benefits such as rent-controls, residential reduced parking rates and the exclusion of gain for federal
income tax purposes on the sale of a principal residence should all be claimed consistent with the
taxpayer’s state income tax filings. Increasingly, state taxing authorities have the ability to match other
databases against nonresident tax returns both for audit selection and to challenge the taxpayers’ positions
during examination.

**Family activities.** Home and family are two words that seem to go hand-in-hand. Although it is not always
possible to force your family to move to a new state along with you, you can invite them to visit on important
occasions. The taxpayer should bring his family in on as much of his life in the new jurisdiction as possible.

The more family activities in the new state and residents of the new state in the family, the stronger the
indicator that the new state is the person’s domicile. Baptize your kids in your new state of residence (a fact
noted in Cooke, supra, that was likely helpful to the taxpayer). Throw your son or grandson’s bar mitzvah in
your new state of residence. 22

Minnesota courts seem to focus on the location of the taxpayer’s family in litigation on state residency. For
example, in Larson v. Comm’r of Revenue, 23 the taxpayer, Mr. Larson, purchased a Nevada condo and
moved his clothes, wine collection and possessions to Nevada. He obtained a Nevada driver's license, registered to vote in Nevada, homesteaded his Nevada residence, set-up a home office in Nevada, hired a Nevada assistant, opened a Nevada bank account and registered two cars in Nevada.

Mr. Larson took many of the steps that one can take to effectively change residence, but he fell short in a few key areas. He owned more property in Minnesota, spent more time in Minnesota, registered more cars in Minnesota and maintained bank accounts and mail delivery in Minnesota. The court also noted the location of his family: "Larson had no family living in Nevada . . . his sister, his three children, and his four grandchildren live in Minnesota and his youngest son attended school in Minnesota during the tax years."

Similarly, in *Manthey v. Comm'r of Revenue*, the taxpayer, Mr. Manthey, registered to vote and actually voted, obtained a driver's license, performed jury duty, joined a fraternal organization, registered and licensed his car and trailer, purchased resident hunting and fishing licenses and purchased real estate all in Alaska. The taxpayer worked in Alaska on an Alaskan resident preference program and spent most of his time in Alaska.

However, the court saw the move to Alaska as temporary. Mr. Manthey provided total financial support for his wife and two children in Minnesota. "When work ran out . . . Manthey returned to Minnesota." The court acknowledged it was a "close case" but ultimately viewed his years in Alaska as a temporary move for work, with a plan to return to his life and family in Minnesota when the work ran out.

Commuter marriages are becoming more commonplace. But if significant tax dollars are at stake, it might make financial sense for your spouse to resign from his or her job in the state of former residence and join you in the state of new residence.

**Items near and dear.** Taxpayers seeking to change residency should move items that are of particular sentimental or financial value to their new state of residency. For example, in *Matter of Cooke*, the taxpayers showed their deep connection to the Hamptons, where they were seeking to establish residence, by noting that they "moved an abundance of their valuable and cherished possessions out of the New York City apartment and into the Merchants Path [(Hamptons)] House. These included their deceased parents' papers, petitioner's family bible and extensive stamp collection, valuable Curtis Indian prints, Greg Perillo pen and ink drawings, and their children's artwork, photographs, awards, trophies, and yearbooks. Also included in the move was Jennifer Cooke's sterling silver set obtained from her mother." When Mr. Cooke purchased a valuable original Miro painting for Mrs. Cooke in 2002, it was displayed in the Hamptons home.

In another residency audit by the New York State Tax Appeals Tribunal, it was noted that the taxpayer's most treasured possession, her grandmother's ring, was kept in London, although the Tribunal did not find that the taxpayer had successfully shown that she had abandoned New York domicile.
Arguably nothing could be more near and dear that the location of your mortal remains. Making your funeral and burial arrangements in the state of new residence can show a significant connection to your new state of residence. Purchasing a burial plot in the new state of residence has been mentioned by many courts as a fact showing a strong connection with the new state.  

**Business activities.** Maintaining active business involvement in the old state of domicile can contribute significantly to a finding that the taxpayer's domicile did not change. This was highlighted recently in *Matter of Lieberman*, where the taxpayers retired and claimed that their domicile was in Florida, not New York. Nevertheless, Mr. Lieberman regularly visited his rental investment properties on trips to New York, and also negotiated leases and handled tenancy renewals. The business activities in New York, combined with a lack of evidence of attachments or lifestyle in Florida, led to a determination that the taxpayers continued to be domiciled in New York.

If the taxpayer is still actively working, the taxpayer should work as much time as possible in the new state. The taxpayer should set up an office in the new state, preferably not simply a home office. If the taxpayer owns a business, he should move the principal place of business to the new state, if possible, and withdraw any business registrations in the old state, or at least minimize business activities in the old state.

The taxpayer should consider re-organizing the LLC or other business entity in the new state, and revising the business registration in his old state to be a foreign business entity. If the client's business is organized as a Delaware entity, it may not be as crucial to change the business' state of incorporation, as Delaware has often been a jurisdiction of choice for business registrations no matter what the business owner's residency.

Even moving the business registration to a state other than the new state has been effective in significantly reducing the taxpayer's connections to the old jurisdiction. For example, in *Evans v. Comm'r*, the taxpayers, a married couple, began spending more time in Florida following the wife's diagnosis of multiple sclerosis and successfully claimed Florida residency following litigation.

The husband moved his business out of Danvers, Massachusetts (where it had an office with one employee) to New Hampshire. The husband also withdrew the company's registration in Massachusetts and had previously registered his company to do business in Florida. Although the husband did not move his business to Florida, moving the business outside of Massachusetts seems to have been beneficial to the taxpayers in establishing Florida residency.

**Documentary evidence.** Although documentary evidence is not often enough to prove a person's domicile, certain documents can help to prove the taxpayer's intent and are recommended as the starting
point for proving domicile. A good place to begin is to change the address of record on all of the taxpayer's commercial relationships and records. The change of address should be noted with the U.S. Postal Service, social security, federal and state taxing authorities, credit card companies, phone companies, Medicare, insurance companies, banks and financial institutions, physicians, social, civic and religious organizations. Tax advisors should impress upon those seeking to change residence the importance of listing their new address on all documentation-no matter how seemingly insignificant the purpose for which the documentation is intended.

Insufficient documentary evidence showing a change in domicile has led several taxing authorities to deny a change in domicile and residence for state income tax purposes. For example, the Illinois Department of Revenue denied a change in domicile from Illinois to Florida when there was conflicting documentary evidence on the taxpayer's residency. In Doe, the taxpayer claimed to have moved to Florida in 2002 and obtained a Florida driver's license and registered to vote, opened bank accounts and obtained a condo in Florida. He also used a Florida address on a Form W-2.

However, the taxpayer used his Illinois address on his federal tax returns. Importantly, the taxpayer did not file the one Florida state tax form that would have been applicable at the time for the Florida intangibles tax. The taxpayer also could not produce any documentary evidence that would have linked him to his Florida condo such as a utility, telephone or cable bill.

Insufficient documentary evidence was also an obstacle to a taxpayer in proving she had abandoned her Oregon domicile in favor of California in Hillenga v. Dept of Revenue, State of Oregon. The taxpayer's showed a strong intent to change her domicile, but this intent was overcome by the documentary evidence listing Oregon (her allegedly former state of residence) as her home. The taxpayer listed the Oregon address on her tax forms, obtained an Oregon driver's license (cancelling her California driver's license), registered and voted in Oregon and registered various cars in Oregon.

Although noted by some jurisdictions as self-serving, it certainly can't hurt to sign and file in the local court of the new residence a declaration of domicile. A declaration of domicile is an affidavit stating that one's new domicile is the new state. Usually, this document states the person's intent to make the new state his or her domicile of permanent residence to the exclusion of any other state where the person has a home.

In at least one very close case that ruled for the taxpayer, the declaration of domicile was noted by the court as evidence of the taxpayers' intent to make Florida their new domicile and to abandon their Illinois domicile.

Obtaining a driver's license and voter's registration in the new state is another important detail that, while noted by some states as too easily obtained to be of much significance, could make all the difference in a
close case. For example, Maryland considers where one is registered to vote as one of the most important criteria for determining domicile. 34 Virginia views obtaining or renewing a driver's license as a strong indication of intent of domicile. 35

Conclusion

Changes of residence for state income tax purposes require careful planning. It will be nearly impossible for many taxpayers to sever all ties with their former state of residence, but most taxpayers can plant roots in and establish significant connections with their new states of residence sufficient to effect a change in status for income tax purposes.

Those changing residence seeking tax savings would be wise to spend as much time in their new state as they can, obtain substantial documentary evidence of their change in residency, move the items near and dear to them to their new state, move their family and business activities to their new state and make their new residence feel like their one true home.


3 Form IT-201-I, NYS tax rate schedule (2013); Form IT-201-I, NYC tax rate schedule (2013).

4 Cal. Rev. & Tax Code §§ 17041(a)(1), 17041(e), 17041(h), 17043(a); Cal. Const. Art XIII, § 36(f)(2).

5 See New York Tax Law §605(b)(1)(A) and (B); N.Y. Comp. Codes R. & Regs. tit. 20, Sec. 105.20. The same qualifications apply when considering whether or not an individual is a New York City resident, substituting "City" for "State" as appropriate. See New York City Administrative Code § 11-1705(b)(1)(A) and (B).

6 See Matter of Newcomb, 84 NE 950 (1908): "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."


9 D.C. v. Murphy, 314 US 441, 86 L Ed 329 (1941); Davis v. Guthrie, Civil Action No. 3:13-CV-1704-O (N.D. Texas 2013); Mas v. Perry, 489 F2d 1396, 1399 (5th Cir. 1974) (quoting Stine v. Moore, 213 F2d 446, 448 (5th Cir. 1954)). See also Kevoloh v. Carter, 699 So 2d 285 (Fla. Dist. Ct. App. 1997) (domicile is the place where a person has fixed an abode with the present intention of making it his or her permanent home); Cain v. Hamer, No. 1-11-2833 (Ill. App. Ct. July 16, 2012) (the place where an individual has his true, fixed, permanent home and . . . intends to return when he is absent); Hillenga v. Dep’t of Revenue, No. TC-MD 110073D, 2012 WL 858581 (Oregon Tax Court March 9, 2012) (a fixed habitation or abode in a particular place . . . [and] an intention to remain there permanently).

10 In New York, the burden is on the party asserting that the domicile has changed, typically the taxpayer. The burden must be met by clear and convincing evidence. See Matter of Bodfish v. Gallman, 50 App Div 2d 457, 378 NYS2d 138 (N.Y. App. Div. 1976).


13 Although state income tax returns do not need to be prepared if the taxpayer does not have any source income in that state, and is neither a resident nor a part-year resident of that state, it can nevertheless be important to continue to file state income tax returns to initiate the statute of limitations on a state income tax audit.


17 See, e.g., 18 Cal. Code Reg. §17014(b) (Example 3).


21 86 Ill. Admin. Code §100.3020.

22 See, e.g., Evans v. Comm'r, Mass. App. Tax Bd., Nos. C298827 & C310439 (Jan. 28, 2013) (the taxpayer's participation in her dear Florida friend's son's bar mitzvah, an honor usually reserved for family, was noted as a fact showing her connection with Florida).

23 824 NW2d 329 (Minn. 2013).

24 468 NW2d 548 (Minn, 1991).


instructed not to consider location of interment in evaluating a change of domicile. Nonresident Audit Guidelines, p. 40 (June 2014).


30 Dept of Revenue of Ill. v. John Doe, IT 10-02 (Ill. Dept. of Rev. Feb. 25, 2010).

31 No. TC-MD 110073D, 2012 WL 858581 (Oregon Tax Court March 9, 2012).


