There’s No Place Like Home, Says the Taxman: A Residency Primer
By Yvonne R. Cort

In 2004, Robin Ingle\(^1\) decided that the time had come to leave her home in New York City and move back to her childhood state of Tennessee, not far from where her parents lived. The move was motivated by the almost two million dollars she would receive on April 30, 2004 from the sale of her stock in TripAdvisor, where she was employed. In the first few days of April, she registered to vote in Tennessee, obtained a Tennessee driver’s license, and signed a lease for an apartment in Tennessee.

Unfortunately for Robin Ingle, it was determined at audit and recently affirmed by the Appellate Division that despite these actions in early April, she did not show a change of domicile prior to receiving the funds. According to the court, she remained a resident of New York until July, 2004, when she and her boyfriend finally had time to paint, pack and move her belongings out of her New York apartment. Until that time, her lifestyle had not changed, as she continued to travel often for work and return to her New York apartment. The result was a tax bill of over $250,000 plus interest.

Two Tests for Residency

As the Ingle case shows, failing to prove residency can be costly. New York law has two tests for determining when a taxpayer is a resident of New York: either the taxpayer is domiciled in the state; or the taxpayer is a statutory resident, defined as maintaining a permanent place of abode in the state and spending more than 183 days of the taxable year in the state.\(^2\) The determination is significant because residents of the state may be subject to New York state tax on their worldwide income. The same tests apply when determining New York City residency, with the law relating to New York City substituting the word “City” for “State” where appropriate.\(^3\)

The New York State Department of Taxation and Finance continually reviews filed tax returns and uses sophisticated data mining techniques to select taxpayers for audit who may have erroneously relied on nonresidency status. Here are a few important points to consider in anticipation of and during a possible residency audit.

Business Ties and Other Domicile Factors

As detailed in the Nonresident Audit Guidelines,\(^4\) the Department compares the old and the asserted new domicile, examining five primary factors: the nature and use of the taxpayer’s dwellings; active business involvement; family ties; the time spent in each place; and where items are kept that are important to the taxpayer.

All of these factors are weighed to determine whether the taxpayer has weakened or abandoned ties to the old domicile, and established strong connections to the new place. The party asserting the change, typically the taxpayer, bears the burden of proving the domicile change with clear and convincing evidence.

Business owners who have difficulty “letting go” of their companies could run into problems with changing domicile. The Liebermans\(^5\) learned this the hard way. For many years, Rose and Donald Lieberman were snowbirds, spending winters in Florida, and they finally decided to file as nonresidents of New York.

While in Florida, Mr. Lieberman continued to operate and manage his real estate business through frequent contact with an employee in New York; he negotiated directly with tenants, and he regularly visited his investment properties on his trips to New York. Mr. Lieberman’s strong continued business ties to New York figured heavily in the Administrative Law Judge’s determination that the taxpayers were still domiciled in New York.

Taxpayers sometimes mistakenly believe that obtaining a driver’s license in the new domicile and similar administrative steps are critical to nonresident status. These may shift the balance when the five primary factors are inconclusive. Nevertheless, as the Administrative Law Judge stated in Ingle, referring to the taxpayer’s Tennessee driving license and voter registration, “such formal declarations are less significant than informal acts demonstrating an individual’s general habit of life.”\(^6\)

Establish a Local Pattern of Life

The central issue is whether the asserted new place is truly “home” with the feeling and sentiment generally associated with that word. It’s hard, if not impossible, to measure intangible emotions, yet that is what the Department is ultimately seeking to do when evaluating domicile.

In Lieberman, the Administrative Law Judge noted sharply that the taxpayers did not demonstrate that they had a daily routine or social life in their claimed Florida domicile, or any evidence of sentiment or association with the Florida location.

In Matter of Cooke,\(^7\) however, it was determined that the taxpayers had moved from New York City to the Hamptons, where the taxpayers showed that their lives were centered in the asserted domicile. Among other elements, they were able to prove that they celebrated family events and milestones in the Hamptons including...
a baptism and a wedding, and they described an active network of friends, social activities and local hobbies.

The lesson to be drawn is that regular activity at the new place and involvement in local life can be significant indicators of the taxpayer’s ties to the new domicile. Absence of such evidence may be critical.

**Changing Definitions Regarding a Permanent Place of Abode**

Once a taxpayer has established a non-New York domicile, the Department will consider statutory residency, determining whether the taxpayer maintained a permanent place of abode in New York and spent more than 183 days in New York during the year being audited.

Case law and the Department’s 2014 Nonresident Audit Guidelines have recently addressed the definition of “maintaining a permanent place of abode.” In the closely observed *Gaied* case, the taxpayer’s elderly parents lived in an apartment owned by the taxpayer. The taxpayer had a key and occasionally stayed overnight on the couch when his parents needed his assistance.

In 2011, the Tax Appeals Tribunal, affirmed by the Appellate Division, concluded that the taxpayer’s ownership of the property was sufficient to establish that it was the taxpayer’s permanent place of abode; there was no need to consider the taxpayer’s subjective use of the property, or to determine that he lived there.

This extreme view was overturned by the Court of Appeals in 2014, stating that there was “no rational basis” for the interpretation of the lower court. The Court of Appeals noted that the intent of the law was to prevent tax evasion by individuals who actually dwelled in New York yet claimed to be nonresidents. The Court of Appeals held that “there must be some basis to conclude that the dwelling was utilized as the taxpayer’s residence” in order to be the taxpayer’s permanent place of abode for statutory residency purposes.

It is unclear how aggressive the Department will be in future audits regarding permanent place of abode issues. Taxpayers who purchase a place for their elderly parents or adult children should remain alert to the risk of unintentionally creating their own residential interest in the property.

Factors to consider, as outlined in the Guidelines, include the taxpayer’s actual use of the property, unfettered access, size of the dwelling, and whether the taxpayer keeps personal belongings there. A two bedroom apartment may be viewed differently from a studio apartment, for example.

**Selling Your House? Pack Up and Move Out**

Selling a house is not always easy, and extra time needed to find a buyer may result in additional tax owed. After changing domicile, a taxpayer may continue to have a residential interest in her former New York home, even if the property is listed for sale. She could be a statutory resident if she also spent more than 183 days in New York during the taxable year.

Hiring a moving van may make a big difference. The taxpayer’s residential interest could be extinguished if the house contents are transferred to the new domicile. The Guidelines sensibly acknowledge that the taxpayer is not expected to live in a vacant house, even with unfettered access.

**Keep Track and Document the Days**

To meet the second prong of the statutory resident test, the taxpayer must prove, by clear and convincing evidence, that she did not spend more than 183 days in New York during the taxable year. It has been repeatedly held that any part of a day in New York will be counted as a day for these purposes, with limited exceptions such as traveling through the state and inpatient medical treatment.

Documentation is crucial. Telephone records, calendars, EZ-Pass records, credit card receipts, ATM withdrawals—all of these can show the location of the taxpayer.

The taxpayer in *Robertson* was meticulous about contemporaneously counting his days in and out of New York City, recording a New York City day when he unexpectedly visited the city and left later the same day, or when he arrived in New York City at a quarter to midnight. His detailed electronic diary kept by his assistant, combined with credible testimony, helped to prove his whereabouts on each day, saving him $27 million in New York City tax.

Sometimes documentation can be misleading. The Knoebels encountered difficulties when the landline phone records from their New York City apartment did not reflect what they knew to be true: calls were made from the New York City apartment on days when the Knoebels were certain they were not in New York City.

In *Knoebel*, the taxpayers were able to show, with credible testimony, that the calls were made by friends or by the taxpayers’ adult children who used the apartment on the days in question. If the taxpayers had produced additional receipts or other documents showing their location outside of New York on the questioned days, it might have been easier to prove their points.

**Conclusion: Preparation Is Key**

Preparation and knowledge can have far-reaching effects in a residency audit. The difference between prevailing at an audit, or paying additional tax, interest and penalties, may come down to keeping receipts or showing
that the taxpayer has become part of the new community. Professionals and taxpayers need to be aware of the tax pitfalls affecting residency and the steps that can be taken to avoid these complications.

**Endnotes**


2. New York Tax Law § 605(b)(1)(A) and (B).

3. *See New York Tax Law § 605(b)(1)(A) and (B); New York City Administrative Code § 11-1705(b)(1)(A) and (B).*


5. *In re Lieberman*, ALJ DTA No. 824101 (N.Y. Div. of Tax App., July 11, 2013). Determinations issued by administrative law judges are not precedent.


7. *In re Cooke*, ALJ DTA No. 823591 (N.Y. Div. of Tax App., Nov. 15, 2012). Determinations issued by administrative law judges are not precedent.


12. Nonresident Audit Guidelines, supra fn. 4 at 56.

13. Nonresident Audit Guidelines, supra fn. 4 at 54.


Yvonne R. Cort, Esq., is a past Chair of the Nassau County Bar Association Tax Law Committee and a past Chair of the IRS Long Island Tax Practitioner Liaison Group. She has contributed to policy papers on New York state issues for the Tax Section of the Bar Association, and she lectures and publishes frequently on tax topics. Yvonne is counsel with the Melville, N.Y. tax law firm of Tenenbaum Law, P.C., www.litaxattorney.com, where her practice focuses on New York state and IRS tax controversies. She can be reached at ycort@litaxattorney.com or 631-465-5000.