



The Latest on Residency Audits: Challenging Cell Phone Records

By Karen Tenenbaum, Esq., LL.M. (Tax), CPA, Tenenbaum Law P.C.

At a recent speaking engagement, we addressed New York's aggressive residency audit program which targets taxpayers with dual residences. Under New York law, a resident is required to pay tax on all worldwide income; while nonresidents are subject to tax only on income allocable to New York. Accordingly, a determination that a taxpayer is a New York resident can result in significant tax liability for the taxpayer and substantial revenue to the State.

In New York, there are two general tests for residency. The domicile test looks at where is the one place the individual intends to have as a permanent home. Relevant factors include where the individual's family resides, where he/she conducts business activities, and the relative use and size of each home.

The statutory residency test provides that where an individual is domiciled outside of New York, he/she may still be taxed as a "statutory resident" if he/she maintains a permanent place of abode in New York and spends, in the aggregate, more than 183 days of the year in New York.

Residency audits are very fact-intensive requiring a detailed review of records to determine the taxpayer's intentions, whereabouts, and movements. Auditors may examine appointment calendars, credit cards, passports, phone bills, EZ-pass records and other documents. They can also look at cell site location data and smartphone applications that track and record location. Unfortunately, what many people don't realize is that cell phone records pose unique concerns when used to (dis)prove location.

Some of the key issues raised by cell phone data include the following:

- **Accuracy:** Cell site location data records may be unreliable because they can indicate the phone is connected to a tower that is not the closest due to factors such as:
 - Signal strength and speed
 - Inactivity of the phone
 - Use of Wi-Fi
 - Type of carrier/network

This issue is particularly important in the New York metropolitan area because many audit cases involve time spent in the border areas of New York, New Jersey and Connecticut.

- **Accessibility:** All cell phone carriers do not provide the same type of data and level of detail. As a result, they vary in usefulness in proving location. They also have different rules and procedures for requesting records and varying data retention policies.
- **Consent:** Although New York may look to subpoena the records, they may also ask for the taxpayer's consent and refusal may result in a negative inference against the taxpayer.

It should be noted that cell site records have been successfully challenged as unreliable in individual criminal cases. As a result, the takeaway for tax professionals is to advise clients to seek legal guidance regarding the use of cell phone records in a residency audit case. The taxpayer typically has the burden of proof in these cases so the data must be used carefully and legally challenged as appropriate.

In addition, tax professionals should suggest to clients that they use a location-based mobile app such as TaxDay, Monaeo, TaxBird and others designed specifically to keep track of when they are in a particular state or city for residency audit purposes.

Karen Tenenbaum, Esq., LL.M. (Tax), CPA is Founder and Managing Partner of Tenenbaum Law, P.C. (www.litaxattorney.com), a tax law firm in Melville, N.Y., which focuses its practice on the resolution of IRS and New York State tax controversies. Karen can be reached at ktenenbaum@litaxattorney.com and at 631-465-5000.