

Taxation of Nonresidents
Including Consideration of a Change in Domicile

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In November 1990, Arthur Gelber began his own consulting/litigation support practice in the highly specialized field of State and Local Taxation, including the multi-state areas of corporate franchise and income taxes, sales and use taxes, unemployment and personal income taxes. In August 2008, his firm (The Gelber Organization) was acquired by Jefferson Wells, a global provider of tax, finance and accounting, and other business related consulting services with offices worldwide.

Previously, Arthur was the National Director of the State and Local Tax Practice at Laventhol & Horwath, providing consulting services to national and international clients in all phases of state and local taxation. The practice covered all fifty states and included tax planning, research, representation on audits, tax litigation, ruling requests and review of relevant tax issues.

With more than 45 years of experience in this field, Arthur has lectured before many professional groups, including New York University School of Continuing Education in Law and Taxation, and trade associations. He has written extensively on state personal and business tax issues and is currently a member of the Advisory Board of *Tax Hotline*, chairing its section on State & Local Taxes. Through the landmark decision *In The Matter of Bausch & Lomb, Inc. and Affiliates*, NYS Tax Tribunal, DTA No. 819883, December 20, 2007, Arthur Gelber and his firm overturned more than 60 years of New York State tax law.

His client list includes individuals and companies recognized in financial, brokerage and professional services, advertising, publishing, entertainment, sports, light and heavy manufacturing, aviation, retailing, real estate, hotels, restaurants, mail order, leasing, electronics, and others. These companies vary from small, closely-held corporations to Fortune 500 companies; many of his individual clients are among the wealthiest in the country.

PROFESSIONAL MEMBERSHIPS

Professional memberships have included: Pennsylvania Modular Home Manufacturers Division of The Mid-Atlantic Building Systems Council; Sub-Committee on Relations with State Societies of the American Institute of Certified Public Accountants; various Tax Committees of the New York State Society of Certified Public Accountants; Tax Committee, New York Chamber of Commerce; Advisory Boards of the Institute of State and Local Taxation and *The Journal of New York State Taxation*; Northeastern States Tax Officials Association; Federation of Tax Administrators; NY Government Affairs Committee; the Association of the Graphic Arts; and Print New Jersey, Inc.

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Introduction

In our modern mobile society individuals often change where they live and work. When a person moves there may be a change of residence or legal domicile. These changes can have a significant impact on liability for or computation of state or local personal income taxes. Keeping these liabilities to their lowest allowable amounts involves consideration of the effects of residence or domicile changes before making a move and retaining the proof required to show such a change. If the individual did not consider these questions in advance, state and local taxing authorities may question whether a change removed the individual from liability to the previous jurisdiction or subjects the individual to liability in the new jurisdiction. If both jurisdictions assert their income tax against the individual, to avoid double taxation there should be an offset between the jurisdictions. The timing of a change of residence or domicile may determine whether or not the gain on sale of stock or an interest in a partnership or LLC will be subject to tax. The number of days spent in a particular jurisdiction may determine how much income must be allocated to that jurisdiction.

Each person's situation is unique and must be considered based on that unique information. Determination of the tax status of an individual often requires an extensive review of the facts and circumstance of where they live and work and how a change of residence or domicile was made.

This Outline addresses New Jersey and New York issues of establishing and demonstrating a taxpayer's place of domicile and places of residence. The general principles here are likely applicable in other jurisdiction based on the statutes, regulations, cases and administrative rulings of a particular jurisdiction. In New York decisions of the courts and the Tax Appeals Tribunal are binding precedents. A New York Division of Tax Appeals Administrative Law Judge determination is not a binding precedent, but these rulings can often provide useful instruction on the fact intensive questions of what a taxpayer can provide to show residence or domicile for particular tax years.

I. Residence and Domicile: Similarities between New Jersey and New York

The proper application of the personal income tax to an individual requires the consideration of two facts, the domicile of the individual and whether the individual is a resident of the State.

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N.J.S.A. Sec. 54A:2

New Jersey was the taxpayer's domicile for the entire tax year; or

New Jersey was not the taxpayer's domicile, but the taxpayer maintained a permanent home in New Jersey for the entire year and spent more than 183 days in the state, unless such individual is in the Armed Forces of the United States

A nonresident taxpayer is one who is not a resident. A taxpayer who was domiciled in New Jersey may also be considered a nonresident for New Jersey income tax purposes if all three of the following conditions existed for the entire year:

-- The taxpayer did not maintain a permanent home in New Jersey;

-- The taxpayer maintained a permanent home outside of New Jersey; and

-- The taxpayer did not spend more than 30 days in New Jersey.

New York Tax Law § 605[b]

A "resident individual" is defined as:

(1) Any person domiciled in New York (subject to the exceptions listed below); or

(2) Any individual (other than an individual in active service in the U.S. Armed Forces) who is not domiciled in New York, but who maintains a permanent place of abode in New York and spends in the aggregate more than 183 days of the taxable year in New York.

Exceptions:

In the case of domiciliaries, there are two exceptions.

The first is for an individual who during the tax year: (1) maintains no permanent place of abode in New York; (2) maintains a permanent place of abode outside New York; and (3) is present no more than 30 days of the taxable year in New York.

The second applies to a domiciliary who: (1) is present in one or more foreign countries for a least 450 of 548 consecutive days; (2) has not been present in NY for more than 90 days during that 548-day period; and (3) does not maintain a permanent place of abode in NY where the spouse (unless legally separated) or minor children are present for more than 90 days in the 548-day period

II. Concepts of domicile and residence are related, but not the same. These two concepts have long been distinguished by the courts.

A. Cases:

a. New Jersey—*Lyon v. Glaser*, 60 N.J. 259 (1972)

Domicile is very much a matter of the mind—of intention. One may be acquired, or changed to a new one, when there is a concurrence of certain elements; i.e. an actual and physical taking up of an abode in a particular

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State, accompanied by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicile.

Any disputed issue on the subject requires an evaluation of all the facts and circumstances of the case

- b. New Jersey—*Malcolm W. Mc Donald and Mary P. Mc Donald* (10 N.J. Tax 556)

Based on the totality of the evidence presented the taxpayer who was domiciled in Florida and spent less than 183 days in New Jersey was a nonresident taxpayer in New Jersey. Although the individual maintained a house in New Jersey, the taxpayer presented clear and convincing evidence of an intention to be domiciled in Florida by a number of factors including: purchasing a Florida house, registering to vote in Florida, obtaining a Florida driver's license, maintaining Florida bank accounts, etc. The taxpayers had the necessary physical presence and intent to remain in Florida indefinitely prior to the tax year at issue. The New Jersey house was retained for convenience only no homestead rebate was claimed for this house in the tax year at issue.

- c. New Jersey—*Vincent and Bernadine Quick v. Director*, 9 N.J. Tax 288, (1987)

A taxpayer assigned to Saudi Arabia by his employer did not end his domicile in New Jersey. The taxpayer's joint ownership of a home in New Jersey, and the continued use and occupancy of that home by his wife and children, constituted physical contact with the state. There was no intent to create a new domicile in Saudi Arabia, since he intended to remain only for the duration of his employment. Moreover, the execution of a homestead rebate form by the taxpayer's wife under a power of attorney evidenced that a permanent place of abode was maintained in New Jersey.

- d. New York State--*Matter of Newcomb's Estate* (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 burden of proof to show a change in domicile rests upon the party alleging the change. Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals."

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- e. New Jersey—*Samuelsson v. Director, New Jersey Division of Taxation*, 2005 N.J. Tax LEXIS 9, May 10, 2005

The fact that the taxpayers did nor did not change their New Jersey voter registration, auto registration, or driver’s licenses was attributable to attention or inattention to the requirements of motor vehicle laws and motivation to vote, rather than to a reflection of whether it was their intention to abandon their New Jersey domicile.

- f. New York State—Additional factors that have been considered as continuing ties to New York:
 - i. retention of a permanent place of abode in New York (*Gray v. Tax Appeals Tribunal*, 235 AD2d 641, confirming *Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989);
 - ii. continued business activity in New York: *Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994)
 - iii. family ties in New York (*Gray v Tax Appeals Tribunal, supra*; confirmed *Buzzard v. Tax Appeals Tribunal*, 205 AD2d 852, confirming *Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993)
 - iv. continuing social and community ties in New York (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993). However, an individual may change his or her domicile without severing all ties with New York State (*Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990).

III. The Day Count

- A. Statutory resident—the 183 day rule
- B. An individual must “keep and have available for examination” adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State” (NYS Reg. 105.20[c]).
- C. Presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that presence within New York State may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State.

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D. Audit Issues

- a. Diary
- b. Credit Card Statements
- c. Telephone Bills
- d. Husband and Wife have separate lives

IV. Some Other Interesting New York Cases

A. A day in Tennessee can be a day in New York. New York applies the “convenience of the employee” standard to telecommuters, insisting that days worked at home in another State must be treated as days in New York. The “convenience of the employee” test is used to determine New York working days to allocate a non-resident’s New York source income. It counts as a New York day all days the employee of a New York employer was actually in New York plus any day out of the State for the individual’s convenience and not as a necessity of the requirements of the employer. If the employee comes into New York at any time during the tax year the “convenience of the employee” test will be applied for any day in that year that individual was not in New York. Under this standard days in Tennessee, well beyond daily commuting distance to New York, were ruled to be New York days. (*Huckaby v. New York State Div. of Tax Appeals* 4 N.Y.3d 427 [2005], cert. den. 546 U.S. 976)

B. Terminating a New York employment may not shield from New York tax subsequent payments made to a non-resident by the New York employer. If the payments are grounded in the prior employment, such as annual incentive payments and a payout for unused vacation time, they will be treated as New York source income, even if the individual resides in another State. In contrast, a \$180,000 lump-sum payment resolving a claim of discrimination and outplacement assistance for the terminated employee are not grounded in the prior employment. *Clapes v Tax Appeals Tribunal*, 34 A.D.3d 1092, app. dis. 8 NY3d 975

C. Sometimes the taxpayer succeeds in having the Tax Appeals Tribunal overturn the application of a regulation by the Department. Indeed, in one relatively recent case the Department turned a partial victory into a complete defeat by obtaining reconsideration by the Tax Appeals Tribunal of a decision which confirmed a significant portion of an assessment. The taxpayer was a New York resident, moved out of the State for almost two years and then returned to New York. During the non-resident period the individual exercised incentive stock options received from the employer when the individual was a New York resident. The State claimed the increase in the value of the options during the non-resident period was partially subject to New York tax, because the options related to his previous New York residence and employment. The Tribunal initially agreed with the Department’s position, but when the Department requested and received reconsideration the Tribunal held that the Department was applying the wrong part of the regulation and under the proper part of the regulation the income from options exercised while the taxpayer was a non-resident was not subject to New York income tax because there is no such allocation when there are no New York work days in a

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period. (*Matter of Stuckless*, NYS Tax Appeals Tribunal, August 17, 2006) The New York statutory provisions regarding stock options, restricted stock, or stock appreciation rights were amended effective for tax years beginning January 1, 2006 and the Department has subsequently promulgated new regulations with respect to those provisions. (See, TSB-M-07[7]I, October 4, 2007)

D. Rich people are different. They can, and often do, have multiple residences. The burden of proof to show a change in domicile rests upon the party alleging the change, so when the Department asserts that a person has made a change of domicile from another State to New York, the Department has the burden of proof to show the change. The fact that an individual after completing her college education set up a place of residence in New York City does not standing alone establish that she took up domicile in New York. The taxpayer grew up in a family which had homes in Bernardsville, New Jersey, and had homes in Newport, Rhode Island, and Palm Beach, Florida. She went to high school at an exclusive boarding school in Massachusetts and went to college in North Carolina. She had college internships at Sotheby's in New York City, and the National Gallery in Washington, DC, took summer classes at the University of California at Berkeley and spent the fall semester of her junior year abroad studying in Rome, Italy. The taxpayer shared a sublet apartment in New York City with her sister, but was frequently traveling to other cities and to other countries. During college the taxpayer received \$1,500 per month from family trust funds, and after graduation the allowance was increased to \$5,000 per month. Her sister enjoyed similar financial support. The Administrative Law Judge concluded that the Department did not prove a change of domicile because the New York City apartment did not provide the central focus of the taxpayer's life: "Her life was going to be the same whether she sublet that apartment or not, and if she decided to leave it at anytime, her sister would assume petitioner's share, since both received wire transfers from family funds to pay their living expenses. She contributed to the sublease of the apartment, not to begin the next chapter in her life, but because she could." (*Matter of Bostwick*, New York Division of Tax Appeals, Administrative Law Judge Unit, April 12, 2007)

E. A star athlete with the New York Yankees did not necessarily change his domicile when he joined the team. The Department asserted that the athlete changed his domicile from Tampa, Florida to New York City. In response to the taxpayer's demand for a bill of particulars the Department stated that the change to a New York City domicile was show by several factors including his "community involvement in jurisdictions other than Florida" and his "public statements regarding his desire to be in New York". The Administrative Law Judge directed the Department to furnish a further bill of particulars providing specifics as to "community involvement in jurisdictions other than Florida," his "public statements regarding his desire to be in New York," and the vague claim that taxpayer became "immersed in the New York community." (*Matter of Jeter*, New York Division of Tax Appeals, Administrative Law Judge Unit, November 8, 2007)

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V. NESTOA AGREEMENT—October 1, 1996

- A. North Eastern State Tax Officials Association (NESTOA) Agreement concerning the determination of an individual's domicile, and the multiple taxation of income that can result from conflicting determination by the member states.
 - 1. Individuals should only be deemed to be domiciliary of one state for any given period
 - 2. Criteria used by the state in determining an individual's domicile should be as uniform as possible
 - 3. Uniform sourcing rules should be applied by the jurisdictions to reduce or eliminate multiple state taxation of the same income.
- B. Participants: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and the District of Columbia.
- C. Incorporates the following concepts in applying tax policy to affected individuals:
 - 1. Apply uniform primary criteria for determining taxpayer's domicile. Primary indicia: Home, time, items considered "near and dear," active business involvement, and, if the other criteria are not conclusive, family connections. Additional secondary criteria could be used to determine intent.
 - 2. Implement an informal appeals process which would be available to taxpayers involved in a domicile disputer with multiple members.
 - 3. Apply uniform rules in the sourcing of income and the calculation of credits for taxes paid to other states.
 - 4. Establish a system of interstate sharing of data and compliance techniques in the area of domicile and statutory residencies.