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NEW YORK STATE RESIDENCY AUDITS

A VIEW FROM THE INSIDE OUT

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NEW YORK STATE RESIDENCY AUDITS
December 3, 2014

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Brian Gordon, CPA

DISAGREED PROCESS:

BCMS → ALJ Proceedings → Tax Appeals Tribunal → Article 78

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Ms. Helm has held a number of positions in the Tax Department over the past 25 years, initially in taxpayer guidance, then several years in the Tax Compliance Division and Sales Tax Audit. Ms. Helm attended Law School full time while working in the Audit Division and the Office of Counsel, earning her Law Degree from Albany Law School in 1999.

What is reviewable/appealable?

- Any “statutory notice” has appeal rights.

A statutory notice is ...“any written notice of the commissioner of taxation and finance which advises a person of a tax deficiency, determination of tax due, assessment, or denial of a refund, credit or reimbursement application, or of cancellation, revocation, suspension or denial of an application for a license, permit or registration, or of the denial or revocation of an exempt status, or any other notice which gives the person a right to a hearing in the division of tax appeals”.

OPTIONS FOR REVIEW:

1) Bureau of Conciliation and Mediation Services (“BCMS”)

- Independent Bureau within the Department.
- Created by law to assist taxpayers who disagree with a statutory notice.
- Must timely protest Statutory Notice by filing “Request for Conference” within 90 days from Notice issuance. (Tax Law § 170(3-a)(a))

BCMS Conference:

- Usually first step in appeals process.
- Informal proceeding.
- Held in person, by teleconference, or by mail.
- Conducted by impartial conferee.

- Taxpayer represented by: self, parent/child, CPA, attorney, enrolled agent, or public accountant.
- Department represented by an “advocate” (usually the auditor).
- Conferee attempts to mediate dispute. If mediation unsuccessful, conferee renders decision- “Conciliation Order”. Order is issued within 30 days of proceeding conclusion.

Conciliation Order:

- Binding on Department – no appeal for Department- only taxpayer can appeal.
- Binding on taxpayer UNLESS a Petition is filed with Division of Tax Appeals within 90 days from the date of Conciliation Order.

2) Division of Tax Appeals – Administrative Law Judge (“ALJ”) Proceeding

Division of Tax Appeals

- Separate/ independent division within Department of Tax & Finance.
- Separate/ independent of authority of the Commissioner of Taxation and Finance.
- Operated/administered by Tax Appeals Tribunal.

“Responsible for providing the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies.”

- Governed by Tax Appeals Tribunal Rules of Practice and Procedure: 20 NYCRR 3000.

Petition to the Division of Tax Appeals:

- Taxpayer must Petition to Tax Appeals within 90 Days from BCMS Conciliation Order
- or–
- Bypass BCMS and go directly to Tax Appeals by filing Petition within 90 days of issuance of Statutory Notice.
- Administrative Hearing Process is commenced by timely filing Petition protesting statutory notice.
- Petition should contain:
signature, allegation of errors, POA, Statutory Notice being contested, and Conciliation Order (if case went to BCMS first).

Department’s Answer to the Taxpayer’s Petition:

- Once Petition is filed, Office of Counsel has 75 days to Answer.
- Once the Answer is filed, the issue is joined.

- Answer should contain: admissions, denials, and Division's position.

After issue is joined:

- Motion Practice allowed/encouraged: 20 NYCRR §3000.9 (Motion for Summary Determination, Motion to Dismiss, etc.)
- Discovery is very limited (occasionally use: Bills of Particular, Notices to Admit)
- Settlement Discussions take place anytime during process, even after hearing held or briefs submitted.
- If agreement reached, the parties must still file a Stipulation for Discontinuance with Tax Appeals.

Two types of hearings are available before the Division of Tax Appeals:

(A) ALJ Hearing Process:

- Conference calls w/ ALJ to narrow issues, discuss witnesses, schedule hearing, etc.
- Prehearing memo due 10 days prior to hearing- list witnesses, exhibits, etc. (usually sent with Exhibits).

Hearings:

- Formal setting, stenographer creates transcript.
- Witnesses sworn in under oath.
- Rules of Evidence apply but very relaxed – hearsay allowed.
- Governed by State Administrative Procedures Act (“SAPA”) –
 - In audit file & relevant – admissible
 - ALJ usually asks Division to go first – not always
 - Opening statements, admission of exhibits, direct-exam, cross-exam, re-direct/re-cross, closing statements, etc.
 - Briefing schedule set by ALJ at conclusion of hearing

Submission (In-lieu of formal hearing):

- If no facts in dispute, only legal issue: parties can agree to handle matter on papers without formal hearing.
- Still submit evidence (documents, affidavits, etc.).
- Still submit brief.

Determinations:

- ALJ Determination issued w/in 6 months of last brief.
- ALJ Determinations are instructive but NOT precedential.
- ALJ Determination binding on both parties, but APPEALABLE BY EITHER PARTY-must file “Notice of Exception” w/in 30 days of ALJ Determination.

(B) Small Claims Unit:

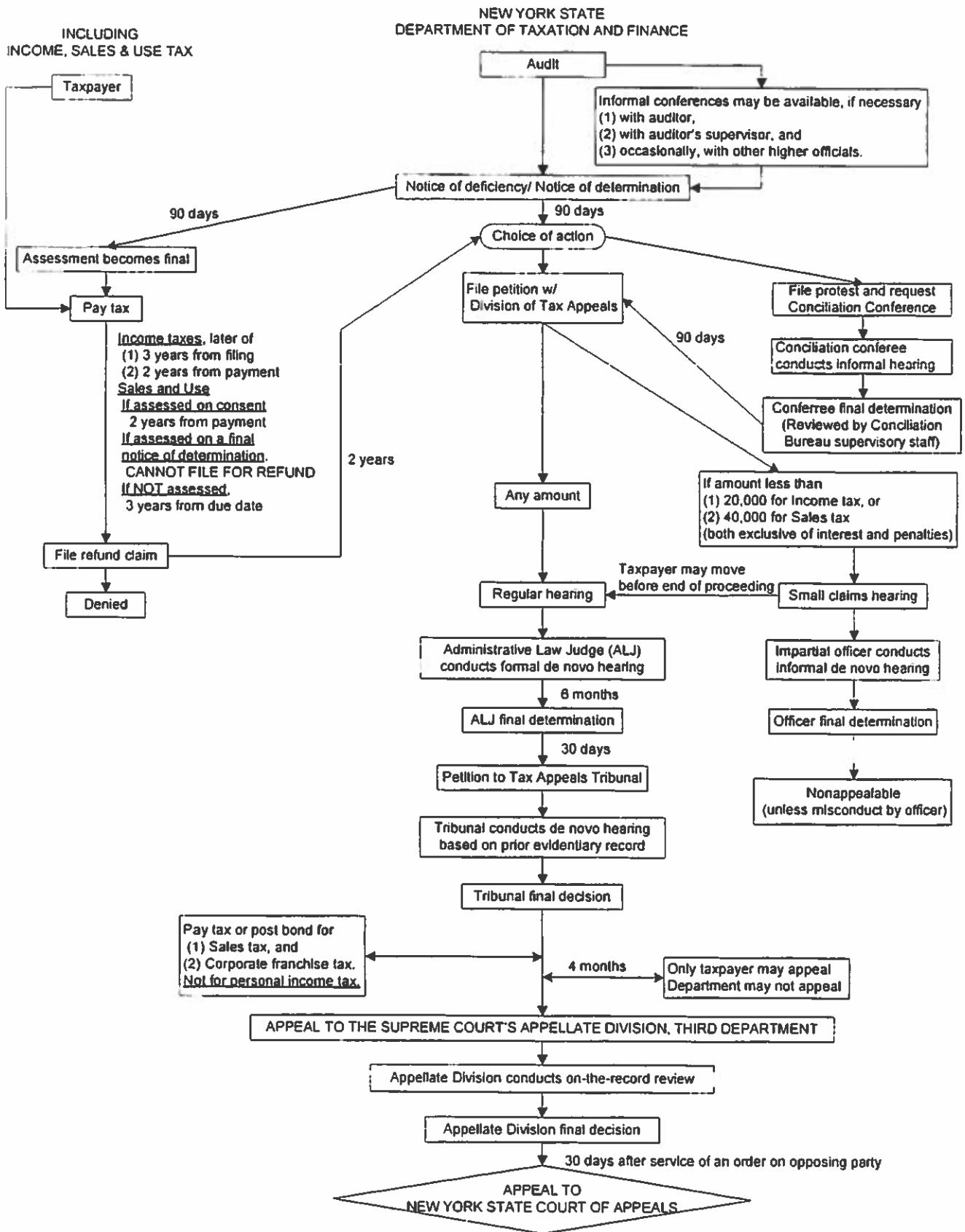
- Part of Division of Tax Appeals (20 NYCRR 3000.13).
- Tax cannot exceed \$20,000 per tax year (income tax) or \$40,000 per year (sales tax)
- No limits on penalty/interest
- Taxpayer can elect small claims treatment any time prior to close of formal hearing
- Informal hearing-but testimony given under oath/affirmation
- “Equitable” proceeding – not reviewable
- No motion practice
- Conducted by hearing officer
- Determination issued by presiding officer within 90 days of the later of the hearing or brief submissions.
- **Not Appealable** by either party (unless misconduct by officer)

3) Tax Appeals Tribunal

- Appeal from ALJ determinations (20 NYCRR § 3000.17)
- Tax Appeals Tribunal -3 commissioners (1 President, 2 Commissioners-all appointed by the governor).
- Either party (or both) can take exception to certain Findings of Fact and/or Conclusions of Law.
- Briefing schedule set by Secretary to Tribunal.
- Oral Argument can be requested (usually granted – not as of right).
- Tribunal Decisions are precedential.

4) Article 78 Proceedings

- Only Petitioner can appeal a Tribunal Decision.
- Must commence action under Article 78 of CPLR- in Appellate Division, Supreme Court of the State of NY- Third Dept. – **within 4 months** of Tribunal Decision (Tax Law §2016).
- Department represented by the Attorney General’s Office.
- Appeal from Appellate Division is to NYS Court of Appeals



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NYS Residency

- Resident: Law and Regulations

Two ways you can be considered a resident.

- Domicile: Your Primary Home
- Statutory Resident:

Domiciled in another state but maintain a permanent place of abode (residence) in NY and is present in NY for more than 183 days.

(A Permanent Place of Abode is any suitable living quarters to which you have unrestricted access)

- Statutory Resident

Statutory Resident:

Maintain a Permanent Place of Abode in NY and present more than 183 days.

- Any part of a day = 1 day.
 - Except when traveling through New York (or airport).
 - Except when confined to inpatient care. (Stranahan case)

What is a Permanent Place of Abode? Tax Bulletin IT-690:

Physical Attributes

- Is it suitable for year round use (heated)?
- Does it have cooking and bathing facilities?
 - Hotel?
- Permanent Place of Abode
- **What does maintaining a permanent place of abode mean?**
- You maintain a place of abode by doing whatever is necessary to continue your living arrangements in that place.
- If you do not own or lease the place where you live, you are considered to be maintaining it if you are making contributions to the household, in the form of money, services, or other contributions.

Nature of the Relationship to the residence

- Whether the taxpayer owns or rents the property. (Includes owned by spouse)
- Whether the taxpayer uses the dwelling or has unfettered access. Use is not required.*
- The taxpayer's relationship to the co-habitants of the dwelling
- Whether the taxpayer has his own room or keeps personal items at the dwelling
- Registration for Mail Delivery

(See Matters of: Gaied*, Barker, Evans, Knight)

Matter of Gaied

- ALJ Hearing: Lost
- Tribunal Won/Lost (split 2-1)
 - Property right is enough – use not needed.

- Also said Gaied did use it occasionally.
- Appellate Division Lost (split 3-2)
 - Not enough to overturn the tribunal.
 - Tribunal’s determination was amply supported by the record.

Matter of Gaied

Court of Appeals Addresses

Permanent Place of Abode:

- Legislative History
 - Tax people that are “really” residents.
 - (Gave example of living in NYC 10 months)
- Court’s Review is limited: to whether the tribunal’s interpretation corresponds with the intent of the statute.
 - **No Rational Basis** for Tribunal’s conclusion that Ownership is enough. Taxpayer must have a “residential interest”.

NYS Residency – Gaied wins at Court of Appeals (Why this time?)

<http://www.st-cpas.com/blog/>

March 1, 2014

By Brian Gordon, CPA

After losing at other levels with dissenting opinions, Gaied finally wins at the New York Court of Appeals. This is a very important case involving statutory residency that many professionals have been following through the various levels of the New York State court system. What was different this time? The key issue came down to the meaning of “maintaining” a permanent place of abode.

Quick background of the case: (For details, see archived article from January 25, 2013)

For the years under audit, Mr. Gaied was domiciled in New Jersey. He operated a business in Staten Island, NY, so for statutory residence purposes he exceeded the

threshold of 183 days in New York. He also owned a three unit residential property in Staten Island. Of these three apartments, two were rented to tenants. Mr. Gaied's parents lived in the other. Mr. Gaied paid all expenses for his parents. Mr. Gaied was also an occasional overnight guest at his parents' apartment. In those instances, he slept on their couch. New York State's position was that Mr. Gaied was a statutory resident because he maintained a permanent place of abode – his parents' apartment – and was present in New York for more than 183 days.

In one of the prior decisions on this case The Tax Tribunal found that use of the abode isn't necessary – ownership is sufficient. ("Where a taxpayer has a property right to the subject premises, it is neither necessary nor appropriate to look beyond the physical aspects of the dwelling to inquire into the taxpayers' subjective use of the premises.") While that statement is technically true, where they erred and were overruled by the court of appeals is that the abode must be maintained to "continue one's living arrangements". In other words, ownership is not enough if you are maintaining the abode for someone else's living arrangements. This was not Mr. Gaied's residence. He was an occasional guest in his parent's home. The fact that he paid the bills doesn't change that.

If you are a guest in another's home, you do have to be cautious however. If you are a frequent guest to the extent that the abode can be viewed as your residence (e.g., you have a key, have your own space, keep personal items there, and contribute to the maintenance of the residence), you could be found to be maintaining a permanent place of abode. The NYS Tax Tribunal case "Matter of Evans" has long been the standard in this area.

- Matter of Gaied

Ramifications:

What is the effect of comment (10 mos. In NYC)?

What does Residential Interest mean?

What if it is not used, but suitable, available, and you control access?

How does Gaied affect the Barker case?

In the Matter of the Petition of JOHN J. AND LAURA BARKER

Summary by Brian Gordon

ISSUE:

Whether petitioners were New York State (Statutory Residents) during the years in issue:

1. who maintained a permanent place of abode in this state and

2. spent in the aggregate more than 183 days in this state in each of the taxable years in issue.

Facts of the Case

Petitioners were Connecticut domiciliaries during the years **2002, 2003 and 2004 (the years in issue or the audit period)**. They also had an abode near Montauk, NY on the east end of Long Island. They conceded that Mr. Barker spent more than the requisite 183 days in New York to establish residency as a result of his working days in New York City (the Barkers only spent some summer weekends at the Long Island abode totaling about 18 days), however the focus of this case is whether the Long Island abode qualifies as a “permanent place of abode” under NYS regulations for purposes of determining residency.

Mr. Barker was an investment manager for Neuberger Berman in New York City, working five long days a week, leaving the house around 6:00 A.M. and returning at approximately 7:00 P.M. In addition to his work schedule, he volunteered at a children's hospital three or four nights a month. His evenings and weekends were primarily devoted to coaching soccer and basketball and serving as a commissioner of his son's basketball league. Mr. Barker spent more than 183 days in New York State during the years in issue. Of those days only about 18 were spent in Napeague, New York, their vacation home.

In *Matter of Stranahan v. New York State Tax Commission* (68 AD2d 250, 416 NYS2d 836 [1979]) Even though the taxpayer was domiciled in Florida and owned an expensive home there, the Appellate Division found that she maintained a permanent place of abode in New York, to wit: a two and a half room apartment leased for \$402.50 a month, used only occasionally for a few days at a time for shopping trips, layovers on trips to Europe and dances. The taxpayer maintained the apartment because she disliked staying in hotels. Petitioner had argued that the apartment was similar to a vacation cottage under the Tax Law and did not constitute a permanent place of abode, but the Appellate Division rejected the contention.

The petition of John J. and Laura Barker is denied and the Notice of Deficiency, dated May 8, 2008, is sustained.

- Revised Audit Guidelines

Example 1: Moved, house for sale, but still furnished.

Example 2: Moved, house for sale, took furniture.

Example 3: Apt. in NYC. Used occasionally when going for entertainment in NYC.

Periodically loaned to friends.

- Permanent Place of Abode
-other issues
- You must maintain a permanent place of abode for substantially all of the tax year.

- General meaning- If you maintain it for more than eleven months during the year. *
- You are NOT maintaining a place for more than eleven months if:
- Your first or last year is a partial year.

*Recurring issue – tax avoidance.

- Permanent Place of Abode

Corporate apartments

- If your employer maintains an apartment (or other living quarters) that is suitable for year-round use, and it is maintained primarily for your or your family's use, then it is considered your permanent place of abode.
- Permanent Place of Abode
- A corporate apartment will not be considered as your permanent place of abode if:
- You are one of many people using the apartment (Knight), and:
- use of the corporate apartment is determined by your employer on a first-come, first-served basis,
- other users have priority (for example, important clients).
 - What if you share a 2 bedroom apt. and have unlimited access (roommate)?
- Permanent Place of Abode

Exception for a residence maintained by certain college students

- A residence maintained by a full-time student enrolled in an undergraduate degree program leading to a bachelors degree is not a permanent place of abode with respect to that student. TSB-M-09(15)I,
- Could this be a PPA for the parent?
- Permanent Place of Abode
- *Example 1:*
- *Pat lives in an apartment with Alex during the work week. Pat's name is not on the lease, but he regularly gives Alex money to pay for his share of the household expenses. Pat has lived in the apartment for four years.*
- *Is this a PPA for Pat?*

- *What changes in fact pattern might change the answer?*
- Permanent Place of Abode
- *Example 2:*
- *Sarah owns a home located on a lake. The home includes a kitchen and bathroom and is suitable for year-round use. Sarah rents out the home for 6 months during the year to a tenant, and during the rental period Sarah cannot use the home for her or her family's use.*
- *Is this a PPA for Sarah?*
- *What changes in fact pattern might change the answer?*
- **Recordkeeping**

Burden is on Taxpayer to prove he was not in New York for more than 183 days.

How do you prove?

- Diary
- Corroborating documents (Credit Cards, etc.)
- Credible Oral testimony
- **Recordkeeping**

It is important that you keep records of the time you spend inside and outside the state if you have residences in more than one state.

- New Audit Guidelines issue.
 - Absent a pattern of being in New York on weekends, presumption is that taxpayer spends weekends at their domicile.
 - What about weekdays? Telecommuting?
- Statutory Residence
Recordkeeping Cases
- Avildsen: Credible Oral Testimony - Won
- Armel: Pattern (Snowbird) - Won
- Kern: Pattern - Lost

- Holt: Poor copy of diary - Lost
- Robertson: Secretary kept diary - Won
- Puccio: Insufficient records - Lost
- Statutory Residence

COUNTING THE DAYS (Help for NYS Residency Audits)

November 30, 2012

By Brian Gordon, CPA

I will be discussing the confusion and complications involved in recordkeeping to meet your burden of clear and convincing evidence in a NYS or NYC residency tax audit, as well as a promising solution.

State Residency has been a hot topic for some time now, and whether the issue is domicile or statutory residence, the amount of time spent in New York vs. another state is a prime concern.

Domicile may be described as your primary residence – the place that you feel in your heart is your home.

Statutory Residence is defined in NYS and/or NYC as being domiciled in another state, having a permanent place of abode in NY and being present in NY for more than 183 days, or partial days. A permanent place of abode is any suitable living quarters to which you have unrestricted access. You may own it, rent it, or have some other arrangement.

Let's focus on a particular case that is often discussed with regard to statutory residency. The case is Matter of Avildsen.⁽¹⁾ Avildsen is thought of as an important case because at the NYS Tax Appeals Tribunal, the point was made that credible oral testimony regarding the number of days spent in NY is sufficient to meet the burden of clear and convincing evidence. This appears to contradict the regulations, which indicates the need for "adequate records to substantiate".

The substance of NYS regulations 20 NYCRR Appendix 20, § 1-2(c) states:

Any person claiming to be a nonresident must have adequate records to substantiate the fact that he did not spend more than 183 days within New York.

The standard is clear and convincing evidence. Understanding and satisfying the requirements of clear and convincing evidence has been quite challenging.

Avildsen was a NYC case. Taxpayers claimed that they were domiciled on Long Island. NYC Audit Division determined that the taxpayers were domiciled in NYC and/or were statutory residents of NYC.

At the Administrative Law Judge hearing Mr. Avildsen's secretary **testified** that she kept a contemporaneous diary of petitioner's days in and out of NYC. A schedule of the days in and out was submitted, **but not the diary itself** due to the sensitive nature of its contents. The schedule showed that Mr. Avildsen was not in NYC for more than 183 days. Some airline tickets were submitted as corroboration for his travel days.

The ALJ found this and other testimony to be credible, and found that taxpayers were not domiciled in NYC, however, the ALJ found that the taxpayers were statutory residents of NYC, because the regulation requires that adequate records must be submitted for substantiation of the 183 day rule. The ALJ stated:

*The evidence presented by petitioner is not sufficient to sustain his burden. There is no question that a business diary bolstered by credible testimony and other documents may be sufficient to substantiate the number of days spent in New York (see, Matter of Moss, Tax Appeals Tribunal, November 25, 1992). However, in this instance, in order to accept petitioner's argument, one is forced to accept testimony as to what those diaries show. **Such testimony, although credible** (emphasis added), is not sufficient to meet the "adequate records" requirement of 20 NYCRR Appendix 20, § 1-2(c) (see, Matter of Feldman, *supra*).*

The taxpayer took the case to the Tax Appeals Tribunal. The Tribunal reversed the decision of the ALJ and determined that the Avildsens were not statutory residents.

Why did the Tribunal reverse? Don't the regulations require "adequate records"?

Look at the ALJ's comments very carefully.

*Such testimony, **although credible** (emphasis added), is not sufficient to meet the "adequate records" requirement...*

What does this mean? "Such testimony, although credible"...

It appears that the ALJ believed the testimony to be truthful.

The **crux of the matter** is, that according to the Tribunal, since the ALJ stated that the testimony for the taxpayer was credible (truthful), then the taxpayer should prevail. The law does not require records at hearing. This is what leads to confusion or

misinterpretation of this case. The Tribunal did not say the testimony was credible. The Tribunal said that the ALJ found it to be credible.

The Tribunal went on to further state:

“Obviously, any taxpayer who attempts to sustain his burden of proof solely on testimonial evidence runs a very great risk that he will not prevail at the hearing because the Administrative Law Judge will determine that the testimony is not credible to establish the necessary facts.”

Did the ALJ really believe the testimony to be truthful? I don't know. He found against the taxpayer. Wasn't he really saying in his commentary above that he didn't accept petitioner's argument?

“However, in this instance, in order to accept petitioner's argument, one is forced to accept testimony as to what those diaries show.”

If the ALJ did not state “although credible...”, but stated it differently such as:

“Without the actual diary, testimony wasn't sufficient to be credible”, we would have had a different Tribunal result.

So what can we learn from this? Should someone as a result of this case expect to prevail on oral testimony alone? No! How should someone prepare to file as a nonresident of NY and expect to be successful on audit?

In order to be clear and convincing, we should be better prepared than to go in with oral testimony and a few documents. A detailed contemporaneously kept diary should be the starting point. This should be bolstered by documents such as credit card receipts, travel records, and any other document which indicates someone's location on a particular date which support the entries in the diary. Once documentary evidence is found to be credible, oral testimony is more likely to also be found credible if there is a question on some undocumented days. See Matter of Robertson. (2)

Unfortunately, many taxpayers have failed to adequately maintain their diary. See Matter of Holt (3) where the diary was a poor photocopy.

Solution for the 21st century:

Have you heard of a company called MONAEO? (4)

MONAEO is software that is installed on your smartphone, which tracks your whereabouts like an electronic diary. It keeps track of your days in a potential tax jurisdiction, and even warns you when you are getting close to the residency limit such as the 183 days in New York.

Really? Yes!

Too often, people go into court rolling the dice hoping their documents will be accepted. I was involved with residency cases for over 20 years for the NYS Tax Department. I've seen diaries in a wide range of quality and accuracy. I've seen this new product and was so impressed that I agreed to become a special advisor to the company. If used properly it is 100% accurate and not subject to human error. You don't have to remember to make entries. It does that automatically based on your location. You will know exactly how many days you were present in New York or other taxing jurisdictions. Based on my years of experience with NYS Audit Division I know the State will look at it with the proper amount of skepticism, but it will prove to be reliable.

If you've been involved in a State residency audit, you know that this could make your life a lot easier. This will save you time, energy, and maybe a lot of tax money. Stay Tuned.

1 Matter of Avildsen, N.Y. Tax Appeals Tribunal (May 19, 1994) DTA No. 809722

2 Matter of Robertson, N.Y. Tax Appeals Tribunal (September 23, 2010) DTA No. 822004

3 Matter of Holt, N.Y. Tax Appeals Tribunal (July 17, 2008) DTA NO. 821018

4 Visit www.monaeo.com for more information.

Solution to Recordkeeping Problem:

MONAEO.com

- NYS Nonresident Guidelines

Domicile:

- A conscious decision where you intend to make your permanent home.
- You may change your mind, but it must be an honest intention.
- The facts must support your stated intention.
- Clear and convincing.
- NYS Nonresident Guidelines
- Domicile:

Five Primary Factors

- Home (Comparison of Residences)
- Days (Time spent at each location)
- Business Involvement
- Near and Dear Items
- Family Connections
(See Matter of Buzzard)
- NYS Nonresident Guidelines

Secondary Factors

- Drivers License
- Voting Registration

Not determinative for change of domicile, but very damaging to case without these.

Non-factors:

- Charitable Contributions
- Place of interment
- NYS Nonresident Guidelines

Miscellaneous - Term used in many court cases:

- “Habit of Life” (Lifestyle)

What do you do while you are at each location?

Hobbies, Social, etc.

Cases: Matter of Cooke - Won

Lieberman, Varzar - Lost

NYS Residency: New Domicile Case: Matter of Cooke

February 15, 2013

The Cooke Case
by Brian Gordon, CPA

"This article originally appeared in the February 2013 TaxStringer and is reprinted with permission from the New York State Society of Certified Public Accountants."

In June 2012, the New York State Department of Taxation and Finance issued new Nonresident Audit Guidelines, which it posted on its site. As noted in earlier articles, these guidelines seemed to indicate a new perspective on how the department would be approaching the complex and controversial issue of state residency for income tax purposes. A new case, decided late in 2012, gives some additional insight into the department's current approach toward residency.

In the Matter of the Petition of Gordon R. and Jennifer L. Cooke, issued November 15, 2012, an administrative law judge (ALJ) found that the petitioner (Gordon Cooke) changed his domicile from New York City to the Hamptons on the east end of Long Island, N.Y. This is a very interesting case because a residence used primarily on weekends and holidays was found to be the domicile. Of special interest to CPAs and the clients they serve are the factors outlined in the Audit Guidelines and the facts in this case which led to findings in favor of the taxpayer.

Background: Residency and Domicile Definitions

To understand *Cooke*, there's a need to know the basic New York residency rules: People are residents of New York if they are domiciled there. "Domicile" in simple terms is a person's primary residence.

Someone would also be a resident, commonly referred to as a Statutory Resident, if he or she maintains a permanent place of abode (residence) in New York state or New York City and they are present in the jurisdiction for more than 183 days. The focus of *Cooke* is on domicile.

It's not a cut-and-dried decision: Domicile is an issue of *intent*. That is, people can choose where they want to live, but they must choose, and actually make a change. They must have the feeling that the new place is their "home"—a place that they will return to when they are absent. The burden is upon any person asserting a change of domicile to show that the necessary intention existed.

According to the 2012 NYS Nonresident Audit Guidelines, there are five primary factors the state will consider in analyzing whether a house is a "domicile." None of them stand alone.

They all must be analyzed to reach a proper conclusion.

The five primary factors are:

Home: This is a comparison of the residences. The state compares the (1) size, (2) value and (3) nature of use (lifestyle). The most important of these three is “nature of use.” In a case such as *Cooke*, where the issue was between one residence in the city and one in the suburbs, the state looks at what type of life the resident was leading. Is the focus of the resident’s life family, friends, holidays, social engagements, sports? Where do those activities take place?

Business Connection: Where you work is important in determining domicile. However, those with resources may decide to keep an apartment near their job and use it like a hotel, while being domiciled in the suburbs where the focus of their life is.

Near and Dear Items: This refers to important tangible items that most people would want to keep with them in their home. They include family photos, collectible items, family keepsakes, documents, trophies and awards, valuable artwork and other valuable items. It is not necessarily the monetary value of these items that will be considered as there are many people that can afford to decorate their homes with very expensive items, but it is the sentiment attached to these items that make them part of one’s primary home. (This has particular meaning in *Cooke*, noted below, as children’s artwork was limited to one of the family’s homes, as discussed below.)

Time: This is a calculation of the time spent at each location. This could be a major factor if it is heavily skewed in one location; however, if there is only a small difference, then the other primary factors will be more heavily evaluated.

Family: The state elevated this in the 2012 guidelines to be a primary factor analysis. Family has played such an important role in domicile cases that it could not be overlooked. See *Matter of Buzzard* (Tax Appeals Tribunal, February 18, 1993, confirmed 205 AD2d 852, 613 NYS2d 294 [3d Dept 1994]). The family factor also played an important role in *Cooke*. Finally, “Lifestyle,” or “habit of life,” while not specifically enumerated as a primary factor, is interwoven throughout the factors.

The Cooke Case: How the Factors Were Applied

Gordon Cooke conceded that he was domiciled in New York City from 1975 through 1984. In late 1984, the family completed construction of a home at Merchants Path, Bridgehampton, New York—the Hamptons region (the “Merchants Path House”). The Cookes completely furnished the entire home with new items, spending more money than they had ever spent furnishing their New York City apartment. This is part of the home factor analysis, including nature of use.

The Cookes also moved an abundance of their valuable and cherished possessions out of the New York City apartment and into the Bridgehampton house. These included their deceased parents’ papers, a 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. This is included in the analysis of near and dear items and shows a shift to the Hamptons.

In 1983, the family joined St. Ann's Episcopal Church in Bridgehampton and both of the children were baptized there two years later. Since then, the family has been very involved in activities at the church and regularly attends Sunday services. Both daughters served as acolytes at St. Ann's when they were younger. The Cookes did not belong to any church in New York City. This evidences the family's lifestyle.

Between late 1984 through 1995, the family's weekly routine typically commenced with a drive to New York City from Sagaponack with his family on Sunday evenings. The family spent Monday through Friday residing in the New York City apartment. During the workweek, Gordon Cooke spent the great majority of his daytime hours working in New York City. Meanwhile, Jennifer Cooke (wife and mother) took care of the children and began taking classes in the city. Once they attained the proper age, the children attended private schools in New York City during this period. The children were very active in scholastic athletics, but did not entertain many friends or socialize while in New York City. On Fridays, the Cookes would drive back out to their Merchants Path House, where they would spend the weekend.

During this nine-year period, the Cookes spent the majority of their free time at their Merchants Path House. Besides spending weekends, they celebrated most holidays there. Additionally, the family hosted many parties for family and friends at the Merchants Path House. They also enjoyed many birthdays and other major family occasions there, such as a tenth wedding anniversary and Jennifer Cooke's 40th birthday. During this period, such occasions were seldom, if ever held in the New York City apartment. The children participated in extracurricular activities in the Bridgehampton area and later obtained summer jobs there. These are primarily home and lifestyle issues, and show a strong attachment to the Hamptons home and area.

The Cookes filed New York City resident personal income tax returns through 1995. Although Gordon Cooke claims to have been domiciled outside of New York City since 1985, he was required to file as a "Statutory Resident" because he maintained a residence in the city and was present there for more than 183 days. (The facts state that he spent Sunday night through Friday in New York City. Six days per week totals 312 days for a year. Even considering holidays, vacations and business trips, he obviously conceded that it was more than 183 days.)

Business Factor Changes—and an Audit

There was a change in the "Business Factor" near the end of 1995. At that time Gordon Cooke became president and CEO of J.Jill Group/D.M. Management (J.Jill), which is headquartered in Quincy, Massachusetts. Upon joining J.Jill, his primary business activity was no longer in New York City. He remained as president and CEO of J.Jill through May 2006.

In order to accommodate his new work venue, Gordon Cooke rented an apartment in Boston, and stayed there during the workweek. After discussion with his wife, Gordon Cooke chose not to relocate his family to Boston with him because the children were already established in their schools in New York City.

In 2002 (the beginning of the audit period), the Cookes decided to sell the Merchants Path House and buy a new house on Parsonage Pond Road, Sagaponack, New York (Parsonage Pond House)—also in the Hamptons. The Parsonage Pond House was much larger than the Merchants Path House, being approximately 5,500 square feet in size, and cost \$3.6 million. Although their children were grown by that time (aged 24 and 19), the Cookes wanted to purchase a larger Hamptons house because, as they testified, they envisioned growing old there together and hosting their children’s families. Lauren Cooke, one of the daughters, described the Parsonage Pond House as her parents’ “dream home.” This is an obvious boost to the home factor in the Hamptons.

During the audit period, daughter Lauren was also working at J.Jill and living in Boston, and daughter Erica was at Brown University in Rhode Island. Jennifer continued her weekday classes in the city, but their daughters’ bedrooms in the city were converted for other functions after their departures. Lauren and Erica Cooke each have a bedroom at the Parsonage Pond House, containing all of their treasured personal memorabilia from their childhood. Lauren explained that she still stays in that room when she visits her parents. Gordon Cooke testified that since his retirement from J.Jill in May 2006, he has spent more time than ever at the Parsonage Pond House. In addition, he and his wife continue to host parties and holidays there. They stated that they plan to remain in the Hamptons for the remainder of their lives. This is proof that they had the required intent to make this their home.

Despite this summary, the New York City Audit Division argued that the Cookes’ claimed Hampton’s home was nothing more than a “weekend/vacations Hamptons lifestyle.” The government’s position may have had more strength prior to the audit period—that is, when Gordon Cooke was still working in New York City, rather than Massachusetts.

However, the ALJ didn’t differentiate, citing the Tribunal case Matter of Craig F. Knight (Tax Appeals Tribunal, November 9, 2006), indicating that someone can maintain a residence and work in the city while being domiciled in the suburbs. As noted in *Knight*: *The presence of a suburban commuter at work or play in New York on most days, without more, does not create a New York domicile and the frequency of theater attendance or restaurant meals seems to have little probative value on the issue of whether his or her home continues to be in the suburbs. If other factors indicate that an individual is a mere sojourner whose home is elsewhere, that status will not be elevated to domicile by the frequency of visits.*

The Cooke ALJ further stated that the audit position had ignored the evidence in this case of the “overwhelming amount of family activities and general habit of life that took place in the Hamptons throughout the calendar year.” Regardless of whether he was working in New York City or Boston, the Hamptons was the place to which Gordon Cooke intended to return whenever he was absent.

During years in question, 2002 to 2004, while it was true that Gordon Cooke’s time in the Hamptons was primarily on weekends, he was spending most of his weekdays in Massachusetts because his job was there. Since he had severed his main business tie with

New York, and his daughters had moved out of the city apartment, home base for the family was the Hamptons.

Also according to the ALJ: Both Gordon and Jennifer Cooke and their daughter, Lauren, “testified credibly at the hearing. Each declared their unbridled affection for the Hamptons and stated that it was their home prior to, during, and after the years at issue.”

The Cookes did not consider the New York City apartment their home. When asked to compare his feelings for New York City with those for the Hamptons, Gordon described the city apartment as “utilitarian,” whereas “the Hamptons was for life and remembrance.” Lauren [daughter] candidly testified that she did not think of the city apartment as her home, but stated that she “had a specific purpose for being in New York City” and likened her time there to being at a job.

While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer’s general habits of living demonstrate a change of domicile.

In this case, the ALJ stated: Examination of Gordon Cooke’s “general habit of life” during the years prior to and including 2002 through 2004 further substantiated the claimed domicile change. In essence, Gordon was an “extremely busy executive who traveled extensively and returned to the Hamptons whenever he did not have somewhere he had to be.”

Based on the ALJ’s analysis of the case, it is clear that the family factor, which the state Nonresident Audit Guidelines elevated in importance in 2012, played a significant part in this decision. This decision also showed the importance of not only school-aged children, but of the role of the children as adults, and how that is part of one’s lifestyle.

It may be difficult to make a clear and convincing case for a change of domicile to a home used primarily on weekends, holidays and vacations. Nevertheless, Cooke shows it can be done when residents can prove that the new claimed domicile is the focus of life with regard to family friends, leisure activities—lifestyle—and that the residents intend that home to be a permanent home, with the range of sentiment, feeling and permanent association with it.

A New Trend in New York State Residency Cases

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By Brian Gordon, CPA

For former New Yorkers, convincing New York state that a change of domicile occurred is still very difficult. Several recent residency cases have resulted in a loss for taxpayers and a win for New York state. The most recent case, the *Matter of Tatiana Varzar* (formal hearing held before Administrative Law Judge Donna M. Gardiner), addressed the issues of domicile, statutory residence, and penalty. The decision came a few months after the *Matter of Donald and Rose Liberman* (also a loss), which this author summarized in a [previous Tax Stringer article](#).

Background

To quickly recap, domicile is the place that an individual intends to be a permanent home; however, the person's actions must support that claim. In addition, if that person claims to have changed his domicile, clear and convincing evidence must show that he did indeed make the change. This is no easy task; it requires a plan, as well as documentary evidence.

A "statutory resident" is an individual who has a permanent place of abode (i.e., a residence) in New York and is present in New York for more than 183 days (any part of a day equals a day). In recent cases, complications arose due to a failure to understand what may be considered a qualifying residence (a permanent place of abode) and what constitutes a day in New York. With proper planning, these issues could have been avoided.

It is always important to engage a qualified representative if one is contacted for a New York state residency audit; however, the situation could be greatly improved if that engagement started prior to filing a return as a nonresident or, even better, when the individual first considered a change of domicile.

Individuals who acquire a residence in New York state—or even those who have access to the residence of a relative or friend—should contact a New York state residency specialist in order to determine if they could be considered a statutory resident. In both *Matter of Barker* and *Matter of Gaied*, the taxpayers' position as nonresidents could have been greatly enhanced with a good understanding of statutory resident rules and proper planning.

In the former case, Barker was a Connecticut domiciliary who worked in Manhattan and owned a co-op on Long Island that was used just a few weeks per year for vacations. Under New York law, if an abode is suitable for year-round use (Barker's was) and you spend more than 183 days in New York, you are considered a statutory resident. Even though Barker spent most of his New York time in Manhattan, about 100 miles from his summer co-op, that time still counted as days spent in New York, and he was found to be a resident of New York.

In the latter case, Gaied was domiciled in New Jersey, worked on Staten Island, and owned a multifamily property on Staten Island. His elderly parents lived in one of the apartments, and Gaied paid all expenses. The main issue in this case was whether his parents' apartment qualified as a permanent place of abode for Gaied, who slept there occasionally (on the couch) at his parents' request. The state's position was that because he had paid all expenses and sometimes used the apartment, it qualified as a residence. Gaied lost three times before the case was finally overturned in the Court of Appeals, which held that the apartment was not a residence for Gaied because it was not maintained for his use.

Matter of Knoebel

In another recent case, *Matter of Knoebel*, the taxpayers lost their case on the issue of New York state statutory residency, but won the lesser issue of New York City residency. The key issue focused on eight days that the taxpayers spent in Utica, New York, to care for Mrs. Knoebel's ailing mother. The Knoebels relied on the decision in *Stranahan v. NYS Tax Commission* to claim that these days should not be counted in the statutory resident day count. It was found in *Stranahan* that days spent in New York by a nondomiciliary during confinement in a hospital would not be counted toward the day count for purposes of statutory residency.

In the current case, the Knoebels were not ill, and they were not confined; they were visiting her mother in the mother's own home. The days spent in Utica visiting her ill mother were found to be New York days. This position was confirmed in the *Matter of Kern* in 1997 (where the taxpayer was allowed to exclude inpatient visits at New York City hospitals, but not outpatient hospital or doctor visits) and *Matter of Brush* in 2001 (where the taxpayer tried unsuccessfully to exclude days spent visiting his wife in a New York hospital). If the Knoebels had engaged in proper planning, they would have known that the days spent in Utica would most likely be counted as New York days—and for example, they could have kept a contemporaneous day-count diary and could have made sure they kept the count below 184 days. In fact, available technology can make this task easier than it would have once been.

The Knoebels also claimed that, due to the distance between Utica and New York City, the days spent in Utica were unrelated to the apartment they maintained in New York City. This issue was present in *Barker*, where the taxpayer spent the majority of days working in

New York City, while his New York residence (vacation home) was about 100 miles away on the eastern end of Long Island.

Matter of Tatiana Varzar

Varzar involved audit years 2004 through 2006, during which Tatiana Varzar (head of her household) had a residence in Brooklyn, New York, and two residences in Florida. She also had a business in Brooklyn and a business in Florida. She filed as a nonresident of New York, claiming she had changed her domicile to Florida.

On the surface, it looks like Varzar might be able to support a claim of change in domicile, but many things must first be considered. A comprehensive analysis of her lifestyle should have taken place prior to filing, as well as a determination as to whether a clear and convincing case can be made for a change of domicile to Florida. Varzar was apparently still very involved in her business in Brooklyn and she spent a lot of time there. In addition, her testimony about her Florida business was vague and unconvincing.

The next matter is one of recordkeeping and documentation. Taxpayers changing their domicile must keep records that will support the position that they are taking. Without corroborating documentation, they will appear to lack credibility. Part of a taxpayer's planning should include deciding what form of recordkeeping should be maintained and which documents should be kept. This author's analysis of *Varzar* indicates that planning was insufficient and the necessary records were not available or did not support the case for change of domicile.

According to the administrative law judge, "Her general testimony was so vague and is found to be unreliable given the lack of documentation used to provide a frame of reference for her conclusory statements as to her whereabouts." Varzar was found to be a statutory resident.

The Importance of Planning

If you or your clients purchase a home in a new state and file as a nonresident of New York without actually making it a new permanent home, you will be an easy target for the New York State Department of Taxation. If you did actually intend to make the home your new permanent residence, you must maintain the documentary evidence to prove it. Proper planning can help considerably—in fact, with such planning; some of the cases discussed above could very likely have been decided in favor of the taxpayer.

- **Military personnel and their spouses**

Special rules apply to active duty military personnel and their spouses; see Publication 361, *New York State Income Tax Information for Military Personnel and Veterans*.

- **Military assignment does not affect your domicile.**
- If your domicile is not NY you will not be a resident:
 - even if you establish a permanent place of abode here.
- **Military personnel and their spouses**
- **Nonresident:** your **military compensation is not subject to New York State income tax.** However, other income that you receive from New York State sources may be subject to tax.
- **NYS Residents** are subject to tax except for combat zone pay.
- **Military personnel and their spouses**

Nonresident servicemember spouse

- will not be considered a resident of New York State for income tax purposes even if you establish a permanent place of abode here.
- Income earned in New York State not subject to New York State income tax.
- **Residency and Estates**

New York Resident Estate

Estate Tax:

- The estate of an individual who was a New York State resident* at the time of death is a Resident Estate.

Why is this important?

- Resident Estate pays Estate Tax on all assets.
- Nonresident Estate pays tax only on NY assets.
- *Resident is intended to mean domiciliary.
- **Residency and Estates**

Statutory Resident Estate? NO:

- A person who dies while domiciled in Florida would have a NY nonresident estate, even if they died in a year that they were a NY statutory resident.

If you achieve a change of domicile to Florida:

- You can have a home in New York, spend more than 183 days and it will not affect your ultimate Estate Tax residency.
- Note: If you spend too much time in NY, and for successive years, the audit division could argue that you changed your domicile back to NY – but in that situation the burden is on New York to prove you changed domicile from Fla. to NY.
- **Residency and Estates**
- If my nonresident client is moved to a NY nursing facility could they be considered a resident of New York?
- NO
 - Taxpayer did not make a conscious decision to change their domicile.
 - Days confined to inpatient care cannot be counted for statutory residence. (Stranahan case)
- **Residency and Estates**

Ancillary Administration:

- Real estate owned by the decedent in another state will often require some form of ancillary administration. This usually involves probating the decedent's will in the other jurisdiction to establish the beneficiaries' title to the property.
- **Residency and Estates**

Income Tax on Estates

- A resident estate pays income tax on all income like a resident individual.
- A nonresident estate pays tax only on New York source income, like a nonresident individual.
- **New York Source Income**

Nonresident:

- Robert Redford case:
- Gain on Sale of intangible (p'ship interest).
 - Not Taxable to nonresident.
 - What happens if there is an S Corporation between the nonresident and the p'ship interest?

Forbes

Peter J Reilly Contributor

Taxes 8/19/2014 (Excerpt)

Robert Redford's New York Tax Trouble Provides Lessons For Planners

Some of the coverage indicated that Redford was being taxed by New York on the gain from the sale of a partnership interest in the Sundance Channel.

Similar But Not the Same

Robert Redford did not directly own an interest in Sundance Channel LLC (Channel). He owned a 100% interest in Sundance TV Inc (INC) (an S Corporation) which owned an 85.5% interest in Sundance Television Limited (Limited) which owned a 20% interest in Channel. I had a sneaking suspicion that having that S corporation in the chain of ownership might have been what created the problem, which sent me seeking some expert help.

Brian Gordon

Brian Gordon, CPA is the Director of State and Local Taxes at Sanders, Thaler Viola & Katz LLP. Like many SALT experts, he has quite a bit of experience on the other side – 30 years with the New York State Department of Taxation and Finance. He supports my theory that the S corporation in the chain is likely the source of Redford's problem.

There is more to this case than meets the eye. Obviously New York did not all of a sudden make all gains on the sale of intangibles taxable to nonresidents – especially not retroactive to 2005. So what is going on? One possibility is this:

Keep in mind that there are two layers of entities between Sundance Channel and Mr. Redford the New York nonresident.

Sundance Television LTD. (Television) a limited partnership, sold the interest in The Sundance Channel (Channel), also a partnership. Television passes the gain to Sundance TV Inc (Inc) an S Corp. Since Inc. is an S Corporation, and Channel is a partnership, then the gain on the sale of the partnership interest is business income to the S Corporation (Inc). This is a significant point. Inc. would then compute a Business Allocation Percentage using the aggregate method and pass on the New York Source income to Mr. Redford.

Redford Is Really Getting Hosed

In 2005, there was not much of a spread between New York and Utah's rates, so it is unlikely that anybody was really trying to get away with anything here. Utah would tax Redford on his world-wide income and give him a credit for most of the tax that he paid New York (It is possible that his income might have been otherwise sheltered, in which case he might not qualify for a credit, but I suspect that is unlikely.) Now it appears that it is too late for him to amend his Utah return, so he may end up paying both states on the same income. That is the first lesson. You dodge non-resident state taxes, either on purpose or by accident, at the peril of missing out on a credit against the tax of your home state.