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## **NYS RESIDENCY & TAX ISSUES FOR SNOWBIRDS**

### **FACULTY**

**Karen J. Tenenbaum, Esq.**  
**Leo Gabovich, Esq.**

**May 22, 2019**  
**Suffolk County Bar Association, New York**

# Tenenbaum Law, P.C.

*Tax Attorneys*



## BIOGRAPHY

**LEO GABOVICH, ESQ.**

Tax Attorney – Tax Dispute Resolution

Leo Gabovich is an associate attorney at Tenenbaum Law, P.C., concentrating in the resolution of Federal and New York State tax controversies, including Offers in Compromise, Installment Agreements, Liens, Levies and Warrants.

Prior to joining Tenenbaum Law, P.C., Mr. Gabovich worked for the New York State Department of Taxation and Finance as a litigator in the Office of Counsel. His work included representing New York State at hearings before the Division of Tax Appeals and the Tax Appeals Tribunal.

Mr. Gabovich had also worked for an International Tax boutique law firm and a public accounting firm where he focused in foreign information reporting and tax compliance. His experience includes resolving complex tax compliance issues for high net-worth clients through the Streamlined Filing Compliance Procedures and the Offshore Voluntary Disclosure Program.

He graduated with CUNY Honors from Baruch College with his Bachelor's in Finance and Investments in 2010. In 2013, he obtained his Juris Doctor from Fordham University School of Law, where he was recognized for the Archibald R. Murray Public Service Award and his *Summa Cum Laude* efforts. Additionally, Leo was the Associate Editor of the Media and Entertainment Law Journal.

Mr. Gabovich is admitted to practice in New York State, Southern District of New York, and the Eastern District of New York.

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**KAREN J. TENENBAUM, ESQ., LL.M. (TAXATION), CPA**  
Tax Attorney – Tax Dispute Resolution

An attorney for 35 years, Karen founded Tenenbaum Law, P.C., which helps individuals and businesses facing IRS and New York State tax problems. Karen and her team have successfully represented clients in matters including:

- Federal & State Audits
- IRS Appeals & NY State Conciliation Conferences
- Federal & NYS Collection Issues, including Liens, Levies, Warrants & Seizures
- Offers in Compromise and Installment Agreements
- Responsible Officer Assessments
- NYS Residency Audits
- NYS Sales Tax Audits
- NYS Voluntary Disclosure

Karen is a frequent speaker on IRS and NYS tax issues for numerous professional groups on topics such as New York State residency, IRS and NYS collections, and more. She speaks at the **NYU Tax Controversy Forum**, **Long Island Tax Symposium**, **LIU Post Civil and Criminal Tax Controversy** and **NYSSCPA, Nassau and Suffolk All Day Tax Conferences**. Karen's knowledge and leadership have established her as a leading tax attorney in the NY area. Karen was selected as a **New York Super Lawyer** as a practitioner in Tax Law. Karen has been quoted in numerous articles in **Bloomberg Business News**, **Money Magazine**, **Long Island Business News**, **The Daily News**, and more on the topics of NYS Residency and NYS Tax Collection issues.

- Past Chair, Nassau County Bar Association Tax Law Committee • Past Executive Board Member, New York State Society of Certified Public Accountants, Nassau Chapter • Long Island Center for Business & Professional Women, Achievers' Award recipient • New York State Society of Certified Public Accountants, Nassau Chapter, Samuel B. Traum Achievement Award recipient • Long Island Pulse Magazine "Top Ten Legal Eagle," Most Impressive Case Victory: Residency Matter • Named by Long Island Business News as among the **Top 50 Most Influential Women in Business** • One of Legal Leaders' Long Island **Top Rated Lawyers** • One of Super Lawyers' **Top Women Attorneys** in the New York Metro • **SmartCEO's CPA & ESQ Award** finalist • **Leadership in Law Award** presented by Long Island Business News • Selected as a New York Metro **Super Lawyer** • **SmartCEO's Future 50 Award** recipient • Named a **Long Island Power Women in Business** by Long Island Press • Judge Gail Prudenti **Outstanding Women in Law Award**
- Rated a **Top Tax Law Firm** by Long Island Business News • Rated a **Top Women-Owned Law Firm** in NY by the New York Law Journal

Karen received her LL.M. (Taxation) from New York University School of Law and her J.D. from Brooklyn Law School. Karen is admitted to the State Bar of New York and to the U.S. Tax Court. Karen is also a Certified Public Accountant.

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Suffolk Academy of Law  
May 22, 2019

## NYS Residency and Tax Issues for Snowbirds

Presented by:  
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- Federal and State Audits
- Responsible Person Assessments
- NYS Conciliation Conferences
- Federal and NYS Collection Issues
- Liens, Levies and Seizures
- Offers in Compromise
- Installment Agreements
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- IRS Appeals
- NYS Residency Audits
- Sales and Use Taxes
- Non-Filers
- Trust Fund Recovery Penalties

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## New York State Residency

- Taxpayer is a resident for NYS/NYC Income Tax if either test is met:

### 1. Domicile Test

- Determined by several factors
- The place to which the taxpayer intends to return
- Burden of proof is clear and convincing evidence

### 2. Statutory Residency Test

- Maintain a Permanent Place of Abode
- Spend more than 183 days in New York
- Starting in 2019, whether or not they are domiciled in the state

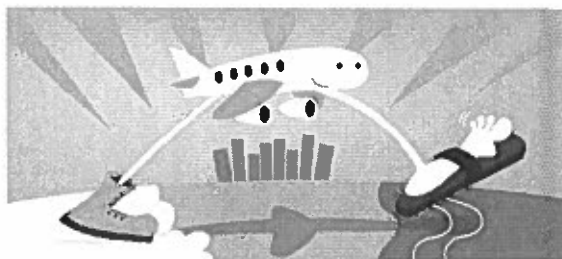


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## Nonresident Audit Guidelines

- NYS Department of Taxation and Finance publishes guidance for auditors on how to conduct a Nonresident Audit
- Available online at [www.nystax.gov](http://www.nystax.gov)
- Updated June 2014



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## Domicile Test

- Intent is key
  - The place to which the taxpayer intends to return
- Determined by several factors
- Only test for New York Estate Tax
  - No statutory residency test



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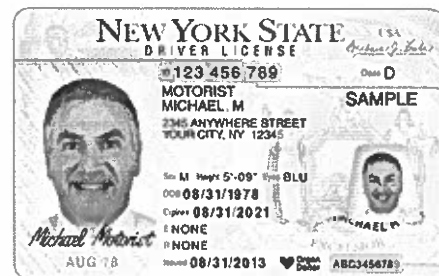
## Primary Factors for Domicile

- Home
- Business Activities
- Time Spent
- Items Near & Dear
- Family Connections

Compare each factor in old domicile to new domicile

## Other Factors

- Driver License
- Voter Registration
- Auto Registration
- Estate planning documents
- Declaration of domicile
- AAA (American Automobile Association) card



## Non-Factors for Domicile Test

- Burial Plot
- Probate or execution of will
- Passive interests in partnerships or small corporations
- Political or charitable contributions
- Location of Tax Preparer
- Location of Tax Filings



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## Home

- A person can only have one true home, but can have more than one house or residence
- New York Residence vs. Out-of-State Residence:
  - Relative Size
  - Relative Value
  - Nature of Use



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## Active Business Involvement

- Active Participation
  - Day-to-day operations
  
- Substantial Investment and Management
  - Passive Investment might not affect domicile
  
- As compared to active business involvement outside of New York



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## Time Spent

- Overall living pattern
- Taxpayer's diary, appointment log, or calendar used as evidence
- Bills and statements can be potentially misleading
- Audit guidelines highlight: differentiate how the time was spent
  - At work, on vacation, with family, etc.



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## Time Spent – Comparison Test

- Compare time spent in NY and time spent in purported domicile
- Even if taxpayer is spending 183 days or less in New York, there could be more days in New York than in purported domicile



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## Items Near and Dear

- Sentimental significance is different from monetary value
- Items may be kept in certain places strictly for safe-keeping or for a particular use



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## Family Connections

- NY will consider family connections as a primary factor
- NY considers minor children attending school in NY as strongly indicative of the taxpayer's domicile
- Presence of adult and college-aged children in NY for work or school does not necessarily imply that the parents are domiciled in NY



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## Changing Domicile

- Any party asserting a change in domicile has the burden to prove the change by clear and convincing evidence
- Abandon old and establish new
  - Updated guidelines highlight: not sufficient to simply establish home elsewhere; must decrease ties to New York
  - Must also establish ties to the new place
- Establishing the taxpayer's intent is difficult and subjective



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## Domicile Cases

### ***Matter of Blatt, Tax Appeals Tribunal, 826504 (Feb. 2014)***

- The “Dog Decision”
- Greg Blatt: CEO of Match.com - 2009 and 2010
  - Rented home in Texas
  - Owned an apartment in NYC
  - Owned boats in NYS
  - Vacationed in the Hamptons
  - Moved back to NYS in 2011
  - But, took dog with him to Texas
- Court:
  - Changed domicile to Texas
  - Credible testimony and contemporaneous email were key to decision



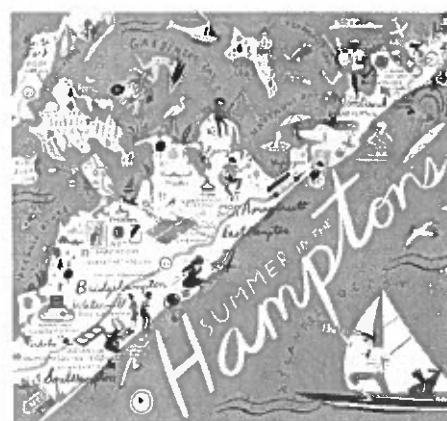
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## Domicile Cases

### ***Gordon R. & Jennifer L. Cooke, ALJ DTA 823591 (2012)***

- Taxpayers maintained apartment in NYC since 1975
- In 1984, they built home in the Hamptons and began spending their weekends there
- Gordon began working in Boston in 1996 and returning to the Hamptons home for the weekends
- They slowly shifted their social life and personal network to the Hamptons while maintaining the NYC apartment
- Audit period was for years 2002 – 2004 and Gordon retired by 2006
- Judge ultimately focused on how the factors and evidence supported the taxpayers’ intent to change their domicile



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## Domicile Cases

### ***Matter of Patrick, Tax Appeals Tribunal, 826838 & 826839 (June 2017)***

- Stephen Patrick, CFO of Colgate Palmolive – 2011 and 2012
  - Moved to Paris in March 2011 to be with his high school sweetheart
  - Maintained penthouse apartment in NYC: not insured
  - Four children living in US, but not in NY
  - Spent significant time in NYS and NYC
  - Purchased and renovated penthouse apartment in Paris with his new wife: insured
  - Trips to NYC for medical reasons
- Court:
  - Changed domicile to Paris
  - No single fact determinative



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## Recent Domicile Cases

### ***Matter of McManus, ALJ DTA 827116 (2019)***

- Taxpayer had 3 residences during 2009:
  - Ridgefield, CT; Bronxville, NY; and St. Louis, MO
- In 2009, Taxpayer worked in MO, Family lived in NY; Weekends spent in CT
- Taxpayer claimed domicile change when starting work in MO in 2009
- Taxpayer held close ties in NY, did not establish new ties in CT; Fridays spent in NY residence
- Judge ultimately decided taxpayer did not show a change in domicile
- Compare to ***Goode*** where taxpayer established they were part of the community in the Hamptons



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## Recent Domicile Cases

### ***Matter of Biggar, ALJ DTA 827817 (2019)***

- Taxpayer born and educated in New Zealand as Chartered Accountant
- Taxpayer worked for Deloitte worldwide, eventually came to NY on L1 temporary Visa
- Taxpayer bought \$2.9m loft in NYC in 2009 and renovated in 2010; Taxpayer invested in real property in NYC and California
- Taxpayer cared for dying mother in childhood home in New Zealand for most of 2014 and received mail there, claiming childhood home was always permanent domicile
- Petitioner filed IT-203 and IT-360.1 in 2010
  - “At the time of your move, you definitely intended to permanently leave your home and residence; and you definitely intended to establish a permanent home (‘domicile’) someplace else.” *Form IT-360.1 Instructions*
- Judge ruled that balance of evidence showed petitioner intended to reside in NY indefinitely since domicile change in 2010



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## Recent Domicile Cases

### ***NYS ex rel. Light v. Melamed et al. (Sup. Ct. NY Cnty. 2018)***

- First unsealed whistleblower estate tax case
- False Claims Act action brought by a former employee of Dr. Melamed
- Dr. Melamed had home in New York and Florida but maintained he was a Florida resident
- He continued to work and seek medical treatment in New York until the time of his death
- He sold his New York home in 2013, the year of his death, and maintained a Connecticut residence
- Employee alleges Dr. Melamed and his sons falsified records to appear as if he were domiciled in Boca Raton, Florida
- His estate did not pay NY Estate Tax claiming he was a Florida domiciliary at the time of death



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## Recent Domicile Cases

### ***Campaniello v. N.Y.S. Dep't of Taxation & Fin., No. 17-2500-cv (2d Cir., Sept. 20, 2018)***

In a domicile dispute, a taxpayer must clearly demonstrate both that he has abandoned his old domicile and established a new one

- Campaniello historically lived in the Bronx and operated a furniture business in Manhattan. In 1981, he expanded his business into Florida, where overtime he slowly began to increase his investments, time, and footprint.
- By 2006, he claimed to have changed his tax domicile from New York to Florida for himself, while his spouse continued to live in New York.
- The audit centered around 2007; the year in which the taxpayer sold an office building located in Florida for a large gain.
- Where a taxpayer's lifestyle straddles two states, the taxpayer will need to demonstrate some type of a change in pattern favoring the new domicile.
- Campaniello appealed and lost before the Appellate Division, and penalties were upheld!
- Campaniello then appealed that decision before the Court of Appeals for the Second Circuit, a federal appellate court. He lost on appeal due to lack of jurisdiction as the Tax Injunction Act bars challenges to state tax determinations as long as there is a "plain, speedy and efficient remedy in state court."
- See our blog "[Think You've Moved to Florida? Better Think Again!](#)" on our website

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## Recent Domicile Cases

### ***Matter of Mays, DTA No. 826546 (N.Y. Tax App. Trib. 2017)***

New York Tax Appeals Tribunal examined what it means to maintain an abode in New York for purposes of statutory residency.

- In 2014, New York's highest court decided the *Gaied* case and concluded that a taxpayer must have a "residential interest" in an abode before it can be counted against him.
- Mays was domiciled outside of New York City, and she argued that a temporary, corporate apartment available to her in Manhattan did not qualify as her abode for purposes of statutory residency.
- Tribunal walked through the proper analysis to be used to make these determinations:
  - Does the dwelling exhibit physical characteristics for year-round habitation?
  - Does the taxpayer have a legal right to occupy the dwelling?
  - If the taxpayer does not, does she nevertheless have access to and use of the dwelling?
  - If she has a legal right, has she exercised that right by enjoying her residential interest in it?
- Mays lost her appeal
- See our article in Law 360: [NY, I Can't Seem To Quit You \(As My Tax Domicile\)](#) for more details

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## Domicile Exceptions from Income Tax Residency

- **30 Day Rule** - §605(b)(1)(A)(i)
  - No permanent place of abode in New York
  - Permanent place of abode elsewhere
  - 30 days or fewer spent in New York
  
- **548 Day Rule** - §605(b)(1)(A)(ii)
  - In foreign country for at least 450 of 548 days
  - Taxpayer and taxpayer's family not in New York for more than 90 days



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## Statutory Residency

### New York Tax Law §605(b)(1)(B)

Even if the taxpayer is not domiciled in New York, the taxpayer is a resident for Income Tax purposes if he or she:

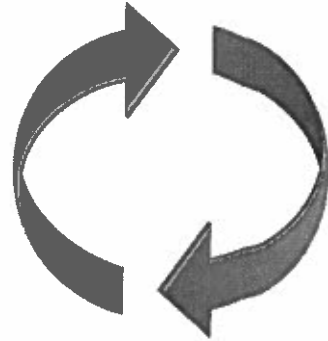
- Maintains a Permanent Place of Abode in New York for substantially all of the year
- **AND**
- Spends more than 183 days in New York during the year and starting in 2019, whether or not they are domiciled in the state
- The definition of resident individual for New York State income tax purposes has been clarified for tax years 2019 and after to state that an individual who maintains a permanent place of abode in New York State and spends more than 183 days of the tax year in New York State, whether or not they are domiciled in this state, is a resident unless they were in active service in the military

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## Recent Legislative Development

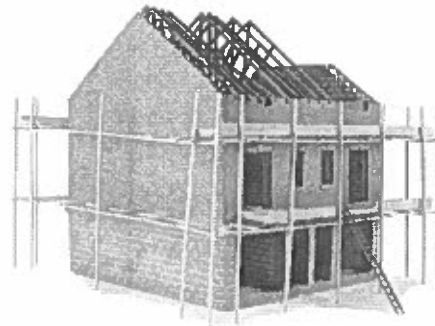
- In *Matter of Sobotka*, ALJ DTA 826286 (2015), ALJ had previously ruled for taxpayer in year of domicile change, statutory residency day-count only during period of non-domicile
- Just overturned by the New York State Budget Bill, effective January 1, 2019, by adding the words “whether or not domiciled in this state for any portion of the taxable year” to the definition of a NYS resident. TSB-M-18(4)
- Therefore, the day-count is done across the **entire year**, regardless of whether the taxpayer was a part-year domiciliary



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## Is It a Permanent Place of Abode?

- Vacation homes
- Unused residences
- Unfurnished residences
- Homes kept for a relative
- Uninhabitable residences
  - Renovations and repairs
  - Lack of access
- Residences held in trust or by a relative



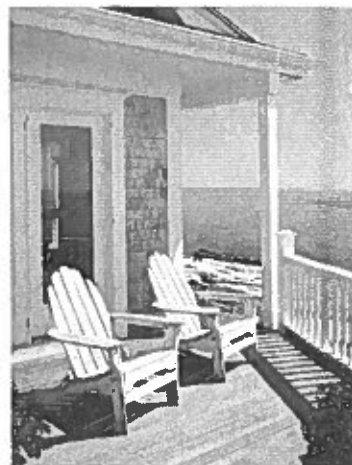
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## Permanent Place of Abode

- Any property maintained by the taxpayer, whether leased or owned, for substantially all of the taxable year
- Dwelling place, habitable for year-round use, and generally with cooking and bathing facilities
  - Vacation homes typically meet the PPA requirement (excluding mere camp or cottage)
  - Whether an abode is suitable for year-round use is based on the physical attributes of the property



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## Substantially All of the Year

- NYS audit policy is the taxpayer must have a PPA for a period exceeding 11 months
  - Not an absolute rule
  - Generally only applied when taxpayer acquires or disposes of the abode
- An abode that is not habitable for substantially all of the year might not satisfy the test
  - Compare major renovation to minor repair

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## Maintaining Living Quarters

- Check-the-box question on the NYS Personal Income Tax Return
  - Resident Return: Living quarters in NYC?
  - Nonresident return: Living quarters in the State?
- Follow-up question for number of days spent in NYS or NYS
- Potential for penalties if not answered correctly



## Residences for Family Members

- Taxpayer owns the residence, but keeps it for someone else, such as child attending college
- ***Matter of Gaied v New York State Tax Appeals Trib.*** 2014 NY Slip Op 01101
  - Controversial case involving a residence kept for elderly parents
  - Taxpayer prevailed at Court of Appeals (2014)
  - Court determined that the residence must actually relate to the taxpayer and that a residential interest in the property means the taxpayer must actually live in the property and by extension in NYS and not merely own and maintain the property

## Relationship to the Dwelling Factors in Updated Audit Guidelines

- Contribution to household
- Ownership or property rights
- Unfettered access
- Relationship to the habitants
- Dedicated room and space to keep clothes or personal items
- Registration for governmental or business services, including mail service



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## Day Count: Whether Time is Spent at PPA is Not Relevant

- The test is whether the taxpayer spends more than 183 days in NYS or NYC
  - Many taxpayers will not count days at the PPA
  - Days in NY not spent at the PPA still count
- Examples:
  - Long Island domiciled taxpayer with apartment in NYC for occasional use and full time job in NYC
  - Connecticut domiciled taxpayer with vacation home in NYS and full time job in NYC (*Matter of Barker*, Tax Appeals Tribunal, 822324 (June 23, 2011))

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## Case Re: Permanent Place of Abode

### ***Matter of Stewart, ALJ DTA 816263 (2000)***

- Martha Stewart was domiciled in Connecticut but maintained apartment in NYC and home in East Hampton.
- Initially claimed she did not spend more than 183 days in NY and argued there was no PPA.
- TP's position was that both residences were under renovation and uninhabitable, therefore, could not have maintained PPA.
- ALJ determined that Hamptons home became habitable halfway through renovations when a certificate of occupancy was issued.
- ALJ also questioned credibility of testimony due to conflicting statements made on audit questionnaire, as well as photos of the home from one of the years at issue appearing in a popular magazine and showing the home in a habitable state.



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## What Is a Day?

- Any time spent in NY during the day counts for that day
- No exception for shopping or dining
- Limited exception for travel through the State
- Limited exception for inpatient medical treatment
- No exception for routine medical care or as an outpatient



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## Travel Through New York

- If a taxpayer drives through NY to conduct business in a different state, does that day count?
  - Travel exception
- If a taxpayer flies from FL to JFK Airport, and stays that night in NY, does this day count as a day in NY?
- What if he leaves immediately from the airport to spend the night in Connecticut?



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## Case Re: Travel Through New York

***Matter of Zanetti***, ALJ DTA 824337 (2013), aff'd TAT (2014)

- Taxpayers in NY for 167 full days and claimed 26 days traveling in or out of NY
- Taxpayers contested that the 26 days were 'partial days' and therefore shouldn't count as an entire day for residency purposes
- Presence within New York State for any part of a calendar day constitutes a day spent in New York State. 20 CRR-NY 105.20



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## Medical Treatment in New York

- Taxpayer comes to New York for an appointment with his physician → no exception for routine medical or dental care
- Taxpayer has an out-patient surgical procedure in New York → no exception for care as an out-patient



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## Medical Treatment in New York

- Taxpayer is admitted as an in-patient at a hospital in NY, and he is kept in hospital for a week
  - Exception for in-patient medical care
  - These days DO NOT count as days in NY
- Taxpayer visits a spouse when the spouse is in the hospital
  - No exception for visiting an in-patient
  - **Matter of Knoebel**, ALJ DTA 824117 (2013)

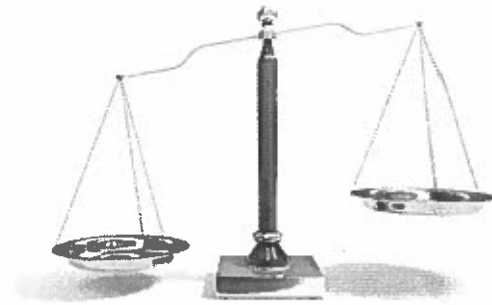


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## Burden of Proof for Day Count

- Taxpayer must prove whereabouts by clear and convincing evidence
- NYS treats any “unknown” days as days spent in New York
- How can the taxpayer prove an absence from New York?
  - In *Matter of Knoebel*, the taxpayer proved whereabouts with a combination of credible testimony and documentary evidence, despite false indicators of presence in New York City



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## Types of Evidence

- Taxpayer’s calendar
  - Contemporaneous is more reliable
  - Day count based on recollection
- Pattern of life
- Credible Testimony
- Records to Substantiate Day Count
  - Cellphone and landline call logs
  - Credit card transactions
  - E-ZPass records
  - Data from security or swipe cards



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## Cell Phone Records – Type and Accessibility

- Type and Accessibility of data depends on carrier:
  - **Verizon**: Voice only; City, State location; CDMA system may cause false positives; DTF can get logs without taxpayer notification
  - **AT&T**: Voice, SMS and Data; Highly specific location; GSM system, less false positives than Verizon; need taxpayer authorization to obtain records
  - **Others**: Usually only keep records for two years; requires court-ordered subpoena

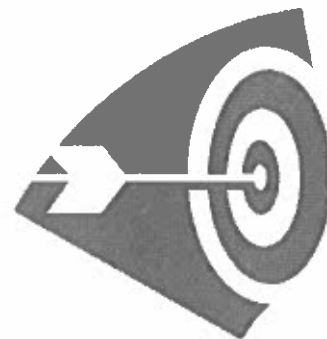


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## Cell Phone Records – Reliability

- Multiple Connectivity Factors
  - Tower Height
  - Tower Location
  - Time of Day
  - User's Location
  - Physical Obstructions
- Cell phones connect to the **strongest** tower not the **closest** tower; this can result in false positives
  - Be particularly wary of false positives in NJ/NY and CT/NY border cases



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## Credible Testimony

- Credible testimony of assistant coupled with contemporaneously-kept calendar sufficient to support taxpayer's whereabouts
  - *Matter of Avildsen*, Tax Appeals Tribunal (May 19, 1994)
- Credible testimony of taxpayer's whereabouts from family and friends
  - *Matter of Robertson*, Tax Appeals Tribunal, 822004 (Sept 23, 2010)
- Testimony was "forthright and honest," but lacked specificity; Court ruled it was not sufficient to overcome taxpayer's burden of proof
  - *Ruderman v. Tax Appeals Tribunal*, 2019 N.Y., slip op. 02392 (N.Y. App. Div. Mar. 28, 2019)



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## Questions?



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