ESCAPE FROM NEW YORK?: RESIDENCY FOR NEW YORK STATE AND CITY PERSONAL INCOME TAX PURPOSES -- DEVELOPMENTS AND OBSERVATIONS

THE TAX CLUB

October 21, 2020

Mark E. Berg
Feingold & Alpert, L.L.P.

ESCAPE FROM NEW YORK?: RESIDENCY FOR NEW YORK STATE AND CITY PERSONAL INCOME TAX PURPOSES -- DEVELOPMENTS AND OBSERVATIONS

Mark E. Berg

Introduction

Whether an individual is considered a "resident" of New York State or City can have a significant impact on the individual's income tax liability. A New York State ("NYS") resident individual is generally subject to NYS personal income tax on his or her worldwide income,[1] whereas a nonresident is subject to NYS personal income tax only on income from NYS sources.[2] The contrast between residents and nonresidents is even more stark for New York City ("NYC") personal income tax purposes: A NYC resident individual is generally subject to NYC personal income tax on his or her worldwide income,[3] whereas a nonresident is not subject to NYC personal income tax at all.[4] When state and local taxes were fully deductible for federal income tax purposes (albeit not for federal alternative minimum tax purposes), the cost of an adverse New York residency determination was often mitigated by the benefit of the federal deduction. Now that the deduction for state and local income taxes for federal income tax

---

1 N.Y. Tax Law §601(a)-(d-1); *see* N.Y. Tax Law §611(a). The NYS personal income tax is currently imposed at graduated rates up to a maximum rate of 8.82%. N.Y. Tax Law §601(a)-(c). Certain income of a New York resident that is not included in gross income for federal purposes, such as the non-U.S. source, non-effectively connected income of an individual who is a nonresident of the United States and treaty-exempt income, is not subject to NYS or NYC tax. *See* N.Y. Tax Law §612(a); TSB-A-10(7)I (Sept. 7, 2010).

2 N.Y. Tax Law §601(e); *see* N.Y. Tax Law §631(a).

3 N.Y.C. Admin. Code §11-1701; *see* N.Y.C. Admin Code §11-1711(a). The NYC personal income tax is currently imposed at graduated rates up to a maximum rate of 3.876%. N.Y.C. Admin. Code §11-1701

4 N.Y.C. Admin. Code § 11-1902(a), *held unconstitutional in City of New York v. State of New York*, 94 N.Y.2d 577 (2000).

purposes has been all but eliminated,[5] the after-tax cost of an adverse New York residency determination has been increased dramatically.

Presumably driven by revenue concerns, the New York State Department of Taxation and Finance (the "Department"), which administers both the NYS and NYC personal income taxes, has devoted significant resources to auditing the residency status of individuals who have some connection to New York, such as a house or apartment owned or rented in New York, and who filed either a nonresident tax return or no tax return in New York. The number of recent published decisions that address the different aspects of New York residency is a testament to the extent to which the Department is focused on these issues. Taxpayers, too, are more focused on these issues now that state and local income taxes have become largely nondeductible for federal income tax purposes, as witnessed by the growing number of news reports of wealthy individuals (including at least one high-profile political figure) moving themselves and in some cases their businesses from New York or other high-tax states to more "tax-enlightened" jurisdictions such as Florida.[6] For these reasons, it seems to be a good time to revisit the New York residency rules and the numerous recent developments in this area and to take stock, with a particular focus on the current state of the law regarding individuals who wish to leave New York and cease being considered New York residents.

---

5 IRC §164(b)(6)(B) (limiting the deduction for certain state and local taxes to $10,000 ($5,000 if married filing separately) for years 2018 through 2025).

6 *See, e.g.*, Katherine Burton & Hema Parmar, *Hedge Funds Head for Florida With Taxes on Rich Rising Elsewhere*, Bloomberg.com (Sept. 23, 2020); Oshrat Carmiel, *NYC's Wealthiest Flocking to Florida Even While Covid Rages*, Bloomberg.com (July 31, 2020); Juliet Chung & Joseph De Avila, *Florida's Sunshine and Tax Benefits Beckon Billionaires*, Wall St. J. (Nov. 19, 2019); Maggie Haberman, *Trump, Lifelong New Yorker, Declares Himself a Resident of Florida*, N.Y. Times (Oct. 31, 2019).

New York Residency Principles

1. **The New York tax appeals process.** By way of background, a taxpayer's challenge to a deficiency notice issued by the Department is heard in the first instance by an Administrative Law Judge ("ALJ") in the NYS Division of Tax Appeals ("DTA"), an administrative body within the Department but independent of the Commissioner of Taxation and Finance that was created by the NYS legislature in 1986 as the exclusive forum for the resolution of tax disputes.[7] Determinations issued by DTA ALJs, while published on the website of the DTA, are not precedential.[8] Either party may take exception to the ALJ's determination and seek review by the NYS Tax Appeals Tribunal (the "Tribunal"), an administrative tribunal that is part of the DTA the decisions of which are precedential.[9] A decision by the Tribunal in favor of the taxpayer is final and non-appealable. The taxpayer may seek judicial review of a decision of the Tribunal in favor of the Department by commencing an "Article 78" proceeding before the Supreme Court, Appellate Division, Third Judicial Department.[10] In such a proceeding, a fairly deferential standard of review applies, such that the Appellate Division "will not overturn [the Tribunal's] determination so long as it is supported by substantial evidence in the record."[11] While the NYC Department of Finance has its own tax appeals process, including

---

7 N.Y. Tax Law §2002; 20 N.Y.C.R.R. §3000.3.

8 N.Y. Tax Law §2010(5) (ALJ determinations "shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the [DTA] or in any judicial proceedings conducted in this state"); *see Matter of Campaniello*, DTA No. 825354 (Tax App. Trib., July 21, 2016), *confirmed*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019).

9 N.Y. Tax Law §2006(7); 20 N.Y.C.R.R. §3000.17.

10 N.Y. Tax Law §2016; 20 N.Y.C.R.R. §3000.20; *see* N.Y. CPLR Art. 78.

11 *Campaniello v. NYS Division of Tax Appeals Tribunal*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019).

ALJs and a NYC Tax Appeals Tribunal, all NYC personal income tax matters are resolved in the DTA and the Tribunal since the Department administers the NYC personal income tax.

2. **Resident -- the statutory definition.** For purposes of the personal income taxes imposed by NYS and NYC on their residents,[12] the term "resident individual" is defined as "an individual:

> (A) who is domiciled in this [state/city], unless
>
> (i) the taxpayer maintains no permanent place of abode in this [state/city], maintains a permanent place of abode elsewhere, and spends in the aggregate not more than [30] days of the taxable year in this [state/city], or
>
> (ii) (I) within any period of [548] consecutive days the taxpayer is present in a foreign country or countries for at least [450] days, and (II) during the period of [548] consecutive days the taxpayer, the taxpayer's spouse (unless the spouse is legally separated) and the taxpayer's minor children are not present in this [state/city] for more than [90] days, and (III) during the nonresident portion of the taxable year with or within which the period of [548] consecutive days begins and the nonresident portion of the taxable year with or within which the period ends, the taxpayer is present in this [state/city] for a number of days which does not exceed an amount which bears the same ratio to [90] as the number of days contained in that portion of the taxable year bears to [548], or
>
> (B) who maintains a permanent place of abode in this [state/city] and spends in the aggregate more than [183] days of the taxable year in this [state/city], whether or not domiciled in this [state/city] for any portion of the taxable year, unless such individual is in active service in the armed forces of the United States.[13]

---

12 N.Y. Tax Law §601; N.Y.C. Admin. Code §11-1701.

13 N.Y. Tax Law §605(b)(1); N.Y.C. Administrative Code §11-1705(b)(1); *see* N.Y. Tax Law §1305(b). Anyone familiar with reading New York statutes knows that reading them is made much more difficult by the legislature's practice of spelling out in words, rather than rendering with numerals, all numerical references, including references to sections of statutes and, worse still, years. In an attempt to make it easier to read the statutes, all such references herein have been replaced by the corresponding numerals in brackets.

Thus, an individual is considered a New York[14] resident for a year in *either* of the following two situations: (i) he or she is "domiciled" in New York (unless either of two very limited exceptions applies) *or* (ii) her or she maintains a "permanent place of abode" in New York *and* spends in the aggregate more than 183 days in New York in that year.[15] An individual who is considered a New York resident under the second of these two tests (*i.e.*, who maintains a permanent place of abode and spends more than 183 days in New York) is generally referred to as a "statutory resident." Each of the two ways an individual can be considered a New York resident will be discussed below in turn.

3. **Statutory residence.** As noted, in order to be a statutory resident for a year, an individual must (a) spend more than 183 days[16] in New York in that year *and* (b) maintain a

---

[14] The applicable principles being the same for purposes of the NYS and NYC personal income taxes, for ease of discussion the term "New York" will be used herein to mean NYS and/or NYC.

[15] Because numerous other states also consider their domiciliaries to be residents, an individual who is domiciled in one state and a statutory resident of New York could end up being considered a resident of each of two different states. The United States Supreme Court in 2015 held an aspect of the Maryland personal income tax to be violative of the so-called "dormant Commerce Clause" on the ground that such tax did not meet the "internal consistency" test because if every state had the same tax system as Maryland, the tax on interstate commerce would be higher than the tax on intrastate commerce. *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). This caused many observers to wonder whether the New York residency rules were also vulnerable to constitutional challenge on internal consistency grounds. The Appellate Division, however, recently rejected two such challenges to the New York residency rules, and both the New York Court of Appeals and the United States Supreme Court have declined to review such rejections. *Chamberlain v. NYS Department of Taxation and Finance*, 166 A.D.3d 1112 (3d Dept. 2018), *leave denied*, 32 N.Y.3d 1216, *cert. denied*, 140 S. Ct. 133 (2019); *Edelman v. NYS Department of Taxation and Finance*, 162 A.D.3d 574 (1st Dept. 2018), *leave denied*, 32 N.Y.3d 1216, *cert. denied*, 140 S. Ct. 134 (2019); *see Tamagni v. Tax Appeals Tribunal of the State of New York*, 91 N.Y.2d 530, *cert. denied*, 525 U.S. 931 (1998).

[16] For a case in which the taxpayer acknowledged that he was present in NYC on *exactly* 183 days and was able to meet his burden of proving that he did not have a single

permanent place of abode in New York in that year. Thus, for example, a commuter to NYC from Long Island, Westchester, New Jersey or Connecticut who spends 250 days a year at work in NYC but does not maintain a permanent place of abode in NYC will not be considered a statutory resident of NYC.

a. **Days spent in New York**

(i) **Day counting rules.** The regulations provide as follows regarding counting days for this purpose:

> In counting the number of days spent within and without New York State, ***presence within New York State for any part of a calendar day constitutes a day spent within New York State***, except that such presence within New York State may be disregarded if such presence 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."[17]

Thus, the Department treats an individual who spends, say, half of each of 184 days in New York as meeting the statutory test of "spend[ing] in the aggregate more than [183] days of the taxable year in [New York]." While there are certainly other plausible readings of the statutory language (*e.g.*, one that counts a half-day a taxpayer spends in New York as only a half-day for purposes of determining whether the taxpayer spent more than 183 days in New York), the courts have upheld the Department's interpretation as consistent with the statutory language and the legislative purpose.[18] Although read literally, the regulation would count as a New York

---

additional NYC day, see *Matter of Robertson*, DTA No. 822004 (Tax App. Trib., Sept. 23, 2010).

[17] 20 N.Y.C.R.R 105.20(c) (emphasis added). Under an additional judicially created exception, days spent in New York for in-patient medical treatment are not counted as New York days for this purpose. *Stranahan v. New York State Tax Commission*, 68 A.D.2d 250 (3d Dept. 1979).

[18] *Matter of Zanetti v. New York State Tax Appeals Tribunal*, 128 A.D.3d 1131, 1132-33 (3d Dept.) (rejecting the taxpayer's argument that "days" for this purpose should be

day a day on which the taxpayer crossed the state or city line for as little as a second, the Department has acknowledged that "no audit is ever expected to be based on such a minimal amount of time spent in New York" and that "[c]ommon sense must prevail."[19]

(ii) **Burden and standard of proof.** The taxpayer has the burden of proving, by clear and convincing evidence, that the taxpayer did not spend more than 183 days in New York, which burden can be met with documentary evidence (such as a contemporaneously maintained diary or calendar and credit card statements), testimony regarding the taxpayer's whereabouts on specific memorable days, more general testimony regarding the patterns and habits of the taxpayer's life or a combination of these.[20] Significantly, the Tribunal has explicitly rejected as inconsistent with the applicable standard of proof the Department's tactic of suggesting that in order to meet their burden of proof, taxpayers must submit "an objectively verifiable piece of documentary evidence establishing an individual's whereabouts on every day

---

interpreted to mean 24-hour periods from midnight to midnight and holding the regulation to be consistent with the legislative intent "to address perceived tax evasion by individuals with means to attempt to manipulate their residency status"), *leave denied*, 25 N.Y.3d 1189 (2015), *citing Matter of Leach v Chu*, 150 A.D.2d 842, 844 (3d Dept.), *leave denied*, 74 N.Y.2d 839 (1989); *see also Hamadeh v. Spaulding*, 2015 N.Y. Misc. LEXIS 72, 2015 N.Y. Slip Op. 30027(U) (Sup. Ct., New York Co. 2015) (taxpayer's accountant held liable for malpractice for advising the taxpayer, who had an apartment in NYC, that a day does not count as a New York day unless the taxpayer stays overnight).

[19] NYS Department of Taxation and Finance, Income Franchise Field Audit Bureau, Nonresident Audit Guidelines, at 67 (June 2014) (the "Audit Guidelines"). While the Audit Guidelines are not binding on the DTA, the Tribunal has suggested that the Department is required to follow them. *See Matter of Knight*, DTA No. 819485 (Tax App. Trib., Nov. 9, 2006) (dismissing an argument made by the Department in part on the basis that it "seems inconsistent with its audit guidelines"); *see also Matter of Veeder*, DTA No. 809846 (Tax App. Trib., Jan. 20, 1994) (examining whether the Department's position was inconsistent with the audit guidelines in effect at the time of the audit).

[20] *See, e.g.*, *Matter of Robertson*, DTA No. 822004 (Tax App. Trib., Sept. 23, 2010); *see also* 20 N.Y.C.R.R. 3000.15(d)(5).

in question" or "a document, definitively and objectively verifying a taxpayer's presence in a particular place outside of New York City (or State), to the exclusion of any other place, on a particular day (*e.g.*, a jailer's record of incarceration)," and held that:

> Where there is no definitive document establishing or locking down one's whereabouts on a given date, the evidence of date, time, place and event becomes, as here, a combination of testimony or testimonies to be evaluated in light of each other, in light of the surrounding events which aid the person or persons testifying in recalling the event, date, time and place concerning which the testimony is given, and in light of any additional evidence relied upon by a witness in conjunction with providing his testimony, so as to accrue ultimately in a determination of whether such testimony, as a whole, constitutes credible testimony.[21]

b. **Permanent place of abode ("PPA").** While the statute does not define PPA or prescribe in what manner or for what portion of the year a PPA must be maintained, the regulations define PPA as follows:

> A permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.[22]

---

[21] *Id.* (criticizing the Department's approach as elevating the taxpayer's burden of proof to a standard of "'beyond all doubt,' higher even than the criminal conviction standard of 'beyond a reasonable doubt' and far above the standard of 'clear and convincing' proof as is required in matters of statutory residence"). For a recent example of a failure of proof in terms of vague and contradictory testimony that was held nor to establish patterns of travel, see *Matter of Ruderman*, DTA No. 826242 (Tax App. Trib., June 15, 2017), *confirmed*, 170 A.D.3d 1442 (3d Dept. 2019).

[22] 20 N.Y.C.R.R. §105.20(e)(1).

The regulations also provide that the PPA must be maintained "for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year),"[23] which under the Department's audit policy generally means a period exceeding 11 months, at least where the taxpayer acquires or disposes of the abode in question during the taxable year in issue.[24]

In the seminal case of *Matter of Evans*,[25] the Tribunal considered separately whether the abode in question (a room the taxpayer exclusively occupied at a church rectory at the invitation of a friend, who was a priest at the church) was *maintained* by the taxpayer and, if so, whether the abode maintained by the taxpayer was *permanent*. The Tribunal held that "one *maintains* a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place," including "making contributions to the household, in money or

---

23 20 N.Y.C.R.R. §105.20(a)(2).

24 *See* Audit Guidelines, at 60-61; Tax Bulletin IT-690 (Dec. 15, 2011); TSB-A-04(4)I (July 6, 2004) (taxpayer who leases East Hampton house to a charity for a 3-month period, during which period the taxpayer has no access to or personal belongings in the house, does not have a PPA there for substantially all of the year); *see also* Audit Guidelines, at 63-64 ("For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, he too, would not be a statutory resident despite spending over 183 days in New York. Since the individual in each of the above examples did not maintain their permanent place of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year."). The 11-month rule was found by an ALJ not to be binding on the DTA in *Matter of Brodman & Grimm*, DTA No. 818594 (Div. Tax App., Nov. 7, 2002), but was mentioned and applied by the Tribunal in *Matter of Mays*, DTA No. 826546 (Tax App. Trib., Dec. 21, 2017) (finding sufficient the taxpayer's residency periods at 2 different NYC apartments aggregating to 11 months and 3 days).

25 DTA No. 806515 (Tax App. Trib., June 18, 1992), *confirmed*, 199 A.D.2d 840 (3d Dept. 1993).

otherwise."[26] Although neither the taxpayer nor the priest was required to pay rent or expenses such as utilities or repairs, the Tribunal held that the taxpayer's sharing of all household expenses that were not paid by the church, including food, cleaning supplies and the cost of a weekly housekeeper, constituted maintenance of the abode by the taxpayer. As to *permanence*, the Tribunal in *Evans* held that the relevant inquiry encompasses both (1) the physical aspects of the abode, such as whether it is suitable for year-round use and whether it has cooking and bathing facilities, and (2) the taxpayer's relationship to and use of the abode, regarding which relevant factors include whether the taxpayer owns or leases the abode, has free and continuous access to the abode, keeps clothing and other personal effects there, has a dedicated room there and uses the abode to maintain convenient daily access to a full-time job.[27] On appeal, the Appellate Division confirmed the Tribunal's determination that the taxpayer's sharing of household expenses together with his free and continuous access to the rectory and his keeping clothing and

---

[26] *Id*. (emphasis added). The Appellate Division quoted this formulation of the maintenance standard with approval in *El-Tersli v. Commissioner of Taxation and Finance*, 14 A.D.3d 808, 810 (3d Dept. 2005). Notwithstanding that the regulations provide that the abode must be permanently maintained *by the taxpayer*, the Department takes the view that "living quarters maintained for the taxpayer's primary use by another person, family member or employer" can be considered the taxpayer's PPA. *See* Audit Guidelines, at 57-58. The only case cited by the Department in this regard is *Matter of Knight*, DTA No. 819485 (Tax App. Trib., Nov. 9, 2006), in which the taxpayer was a 40% member of the LLC that owned the apartment, and thus "bore a proportionate part of the expenses" thereof, and even then was held not to have a PPA there.

[27] *Matter of Evans*, DTA No. 806515 (Tax App. Trib., June 18, 1992), *confirmed*, 199 A.D.2d 840 (3d Dept. 1993); *see, e.g., Matter of Knight,* DTA No. 819485 (Tax App. Trib., Nov. 9, 2006) (neither a girlfriend's apartment nor an apartment maintained by a company of which the taxpayer was a 40% owner was a PPA where the taxpayer did not have free and continuous access to or a dedicated room at either apartment and did not keep clothing or other personal effects there).

other personal items there were sufficient for the rectory to be considered a PPA maintained by the taxpayer, but did not discuss maintenance and permanence as separate requirements.[28]

Until relatively recently, the Department,[29] with the approval of the Tribunal[30] and the Appellate Division,[31] had taken the view that an abode maintained by the taxpayer that has facilities ordinarily found in a year-round dwelling (*e.g.*, cooking and bathing facilities and heat) to which the taxpayer has unfettered access for use as a dwelling for substantially all of the year constitutes a PPA of the taxpayer regardless of the amount of time the taxpayer spends there. Indeed, the conventional wisdom has been that none of the taxpayer's New York days need be

---

28 *Evans*, 199 A.D.2d at 842.

29 *See, e.g.*, Tax Bulletin IT-690 (Dec. 15, 2011); N.Y.S. Department of Taxation and Finance, Income Franchise Field Audit Bureau, Nonresident Audit Guidelines, at 50-58 (June 2012).

30 *See, e.g.*, *Matter of Barker*, DTA No. 822324 (Tax App. Trib., Jan. 13, 2011) (beach house on Long Island where the taxpayers spent 16-19 days per year and where their parents spent a considerable amount of time held to be a PPA maintained by the taxpayers on the ground that "[i]t is well settled that a dwelling is a permanent place of abode where, as it is here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling"); *Matter of Roth*, DTA No. 802212 (Tax App. Trib., Mar. 2, 1989) ("There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."); *Matter of Boyd*, DTA No. 808599 (Tax App. Trib., July 7, 1994) (taxpayer who contributed more than 50% of the expenses of an abode that his mother owned and lived in held to have maintained the abode as a PPA).

31 *See Smith v. State Tax Commission*, 68 A.D.2d 993 (3d Dept. 1979) (abode owned by the taxpayer remained his PPA after the taxpayer moved out where it remained furnished and telephone and utility services were continued); *Stranahan v. State Tax Commission*, 68 A.D.2d 250 (3d Dept. 1979) (apartment leased by the taxpayer for occasional use when visiting NYC and at which the taxpayer spent 67 days in the year in issue, a year in which she spent 148 days at Sloan Kettering and ultimately died of cancer, held to be a PPA because it was suitable for uses other than vacations); *People ex rel. Mackall v. Bates*, 278 A.D. 724 (3d Dept. 1951) (taxpayer who moved away to take a government position for 3 years and whose wife continued to occupy their New York City apartment, to which the taxpayer had continued access and moved back after the 3 years, held to continue maintain a PPA at the apartment while he was away).

spent at the abode in order for the taxpayer to be considered a New York resident. This has meant that a taxpayer who spends more than 183 days at work in New York and who has, say, a beach house in the Hamptons or a *pied à terre* in New York City would be considered a New York resident even if the taxpayer chose to spend little or no time at such place.

In its 2014 decision in *Gaied v. Tax Appeals Tribunal*,[32] however, the New York Court of Appeals held that in order for a dwelling to be considered a PPA maintained by the taxpayer, "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence" and "the taxpayer must, himself, have a residential interest in the property." In *Gaied*, the taxpayer, a New Jersey domiciliary, worked in NYC and owned an apartment there in which his chronically ill parents lived. The taxpayer paid for the utilities and had a telephone number in his name at the apartment, and would occasionally (once every month or two) spend the night there (on the couch) with his parents when they asked him to do so. There was no bedroom or bed for the taxpayer at the apartment, and he kept no clothing or personal possessions there. The DTA agreed with the Department that the apartment was a PPA maintained by the taxpayer, largely on the basis that he had unfettered access to the apartment.[33] The Tribunal initially reversed,[34] but then on reconsideration held for the Department in a 2-1 decision, holding that "where a taxpayer has a property right to the subject premises, it is neither necessary nor

---

[32] *Gaied v. Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014), *rev'g and remitting* 101 A.D.3d 1492 (3d Dept. 2012), *confirming Matter of Gaied*, DTA No. 821727 (Tax App. Trib., June 16, 2011), *withdrawing Matter of Gaied*, DTA No. 821727 (Tax App. Trib., July 8, 2010), *rev'g Matter of Gaied*, DTA No. 821727 (Div. Tax App., Aug. 6, 2009). For a discussion of the Court of Appeals decision in *Gaied* and its implications, see Mark E. Berg, *New York's High Court Eases Residency Trap*, 72 State Tax Notes 335 (May 12, 2014).

[33] *Matter of Gaied*, DTA No. 821727 (Div. Tax App., Aug. 6, 2009).

[34] *Matter of Gaied*, DTA No. 821727 (Tax App. Trib., July 8, 2010).

appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer's subjective use of the premises."[35] The Appellate Division affirmed in a 3:2 decision.[36]

In a unanimous opinion, the Court of Appeals reversed, holding that in order for a dwelling to be considered a PPA maintained by the taxpayer, "there must be some basis to conclude that the dwelling was ***utilized as the taxpayer's residence***."[37] Noting that the scope of its review is limited to whether the Tribunal's interpretation of the provision to mean that a taxpayer need not reside in a dwelling, but only maintain it, in order for the dwelling to be a PPA "comports with the meaning and intent of the statutes involved," the Court concluded that there is "no rational basis" for the Tribunal's interpretation, providing the following explanation for its conclusion:

> Notably, nowhere in the statute does it provide anything other than the "permanent place of abode" must relate to the taxpayer. The legislative history of the statute, to prevent tax evasion by New York *residents*, as well as the regulations, support the view that in order for a taxpayer to have maintained a permanent place of abode in New York, ***the taxpayer must, himself, have a residential interest in the property***.[38]

The Department revised the Audit Guidelines in 2014 to refer to the holdings in *Gaied* that in order to be considered as maintaining a PPA the taxpayer must have a "residential interest" in the dwelling and the dwelling must be "utilized as the taxpayer's residence."[39] In an

---

35 *Matter of Gaied*, DTA No. 821727 (Tax App. Trib., June 16, 2011).

36 *Gaied v. Tax Appeals Tribunal*, 101 A.D.3d 1492 (3d Dept. 2012).

37 *Gaied v. Tax Appeals Tribunal*, 22 N.Y.3d 592, 594 (2014) (emphasis added).

38 *Id*. at 598 (first emphasis in original; second emphasis added).

39 Audit Guidelines, at 54.

example intended to clarify when a taxpayer is to be considered as having the residential interest required under *Gaied*, however, the Department, citing an Advisory Opinion issued by the Department some 20 years before *Gaied*,[40] asserts that "[a] residence that is owned and maintained by a taxpayer with unfettered access will generally be deemed to be a [PPA] *regardless of how often the taxpayer actually uses it*."[41] In the example, a couple domiciled in New Jersey rents an apartment in New York City that they use when they attend cultural events in the evening rather than driving home. Friends and relatives use the apartment occasionally but no one else lives there on a regular basis. The Department concludes that the apartment constitutes a PPA maintained by the couple on the basis of their unfettered access. Similarly, among the factors auditors are instructed to use in applying *Gaied*'s residential interest requirement is "whether the taxpayer uses the dwelling or has unfettered access."[42]

4. **Domicile**

a. **Intention.** While the statute does not define the term "domicile" for tax purposes, the applicable regulations describe one's domicile as "the place which an individual intends to be such individual's permanent home -- the place to which such individual intends to return whenever such individual may be absent."[43] The regulations go on to provide that "[a]

---

40 *Freundlich & Company*, TSB-A-94(14)I.

41 Audit Guidelines, at 54, Example 1 (emphasis added).

42 Audit Guidelines, at 56, 58; *see also id.* at 54-55, Example 2. For a critique of this aspect of the Audit Guidelines, see Mark E. Berg, *Tax Department Reads Taxpayer Residency Victory Narrowly*, N.Y.L.J. (Aug. 11, 2014).

43 20 N.Y.C.R.R 105.20(d)(1); 20 N.Y.C.R.R 295.3(a) (the same regulations apply for NYC purposes); *see also Matter of Newcomb's Estate*, 192 N.Y. 238, 250-251 (1908) (an individual's domicile is the locality in which the individual is "living . . . with intent to make it a fixed and permanent home").

person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive."[44]

Thus, "domicile is established by [a combination of] physical presence and intent" to remain permanently or for an indefinite time.[45] Courts have phrased the subjective question of whether an individual has the requisite intention with respect to a purported domicile as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it."[46] While this is a *subjective* standard, the courts and the Tribunal tend to look to a number of *objective* criteria to determine a taxpayer's subjective intent as manifested by his or her conduct,[47] no one of which is controlling,[48] all with an eye toward ascertaining the taxpayer's "general habit of life."[49] Among the factors the Tribunal has found to be of significance in this regard are "(1) the retention and use of a permanent place of abode in

---

44 20 N.Y.C.R.R. 105.20(d)(4).

45 *Matter of Biggar*, DTA No. 827817 (Tax App. Trib., Dec. 24, 2019), *citing Matter of McKone v State Tax Commission*, 111 A.D.2d 1051 (3d Dep't 1985), *aff'd*, 68 N.Y.2d 638 (1986).

46 *Matter of Bourne*, 181 Misc. 238, 246 (Surr. Ct., Westchester Co. 1943), *aff'd*, 267 A.D. 876 (2d Dept.), *aff'd*, 293 N.Y. 785 (1944), *quoted in Bodfish v. Gallman*, 50 A.D.2d 457, 458 (3d Dept. 1976).

47 *See, e.g.*, *Matter of Ingle*, DTA No. 822545 (Tax App. Trib., Dec. 1, 2011), *confirmed* 110 A.D.3d 1392 (3d Dept. 2013); *Matter of Simon*, DTA No. 801309 (Tax App. Trib., Mar. 2, 1989).

48 *Matter of Gadway*, 123 A.D.2d 83, 85 (3d Dept. 1987).

49 *Matter of Trowbridge*, 266 N.Y. 283, 289 (1935), *quoted in Matter of Silverman*, DTA No. 802313 (Tax App. Trib., June 8, 1989).

New York; (2) the location of business activity; (3) the location of family ties; and (4) the location of social and community ties."[50] The Department's nonresident audit guidelines instruct auditors to make domicile determinations on the basis of a somewhat different set of objective "primary factors" -- the location of the taxpayer's home, the location of the taxpayer's active business involvement, the amount of time the taxpayer spent in the locations in question, the location of the taxpayer's "items near and dear" and the location of the taxpayer's family connections -- as well as several "other factors" of less significance (*e.g.*, formal declarations of domicile, voting registration and patterns, automobile registration and mailing address), and without regard to "non-factors" such as "passive interest[s] in partnerships and small corporations," the place of internment, the location where the taxpayer's will is probated and the location of bank accounts.[51]

b. **Continuity of domicile once established and burden of proof.** The regulations provide as follows in this regard:

> A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily

---

50 *See, e.g.*, *Matter of Wiesen*, DTA No. 826284 (Tax App. Trib., Sept. 13, 2018) (citations omitted).

51 Audit Guidelines, at 14-41. The statute provides that charitable contributions, including donations of uncompensated time, are not to be taken into account in determining a taxpayer's domicile. N.Y. Tax Law §605(c).

> conclusive, especially if the facts indicate that such individual did this merely to escape taxation."[52]

The regulations reflect the longstanding view of the courts that "[t]he existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration [and] an absolute and fixed intention to abandon one [domicile] and acquire another . . . ."[53] Put differently, "[d]omicile . . . is established by physical presence coupled with an intent to establish a permanent home. . . . Once established, an individual's original or selected domicile continues until there is a clear manifestation of an intent to acquire a new one, and the taxpayer bears the burden of proving a change of domicile by clear and convincing evidence."[54] The Tribunal has colorfully made the point that one's domicile continues until the party asserting a change of domicile establishes both abandonment of the

---

[52] 20 N.Y.C.R.R 105.20(d)(2); *see Matter of Feldman*, DTA No. 802955 (Tax App. Trib., Dec. 15, 1988) ("To effect a change of domicile, there must be an actual change in residence, coupled with an intention to abandon the former domicile and to acquire another. . . . Such an absolute and fixed intention to abandon one domicile and acquire another must, however, be provided [*sic*] by clear and convincing evidence."); Audit Guidelines, at 10-11 ("Once established, a domicile continues until the person in question abandons the old and moves to a new location with the bona fide intention of making his fixed and permanent home at the new location. There are two crucial elements to prove a change of domicile: (1) an actual change of residence and (2) abandonment of the former domicile and acquisition of another. . . . Since a domicile continues until superseded by another, a change of residence without the intention of creating a new domicile leaves the last established domicile unaffected.).

[53] *Matter of Newcomb's Estate*, 192 N.Y. 238, 250-51 (1908).

[54] *El-Tersli v. Commissioner of Taxation and Finance*, 14 A.D.3d 808, 809 (3d Dept. 2005) (citations and internal quotation marks omitted).

existing domicile and acquisition of another, and that temporary visits to or stays in a location do not establish a change of domicile, as follows:

> [I]f a domiciliary of New York terminated his residence in New York with the intention of never returning and spent the following several years traveling among the capitals of Europe, residing for a few months in each, and finally returned to the United States to make a home in Florida, he would remain a domiciliary of New York until his new home in Florida was established.[55]

While as noted a change of domicile requires "abandonment of the former domicile and acquisition of another,"[56] it is well established that "abandonment" for this purpose does not require the taxpayer to sever all of his or her ties to New York.[57] Moreover, it is Department policy not to require the taxpayer to sell, move his or her belongings out of or otherwise completely physically abandon his or her former principal residence in order to be able to demonstrate the requisite abandonment of the former domicile.[58] Rather, even in the case of a

---

55 *Matter of Knight*, DTA No. 819485 (Tax App. Trib., Nov. 9, 2006).

56 *See* Audit Guidelines, at 10.

57 *See, e.g.*, *Matter of Burke*, DTA No. 810631 (Div. Tax App., Aug. 5, 1993) ("one need not abandon New York entirely but rather only need abandon New York as his or her domicile or 'home' in order to effect a change of domicile"), *aff'd* (Tax App. Trib., June 2, 1994); *Matter of Sutton*, DTA No. 802019 (Tax App. Trib., Oct. 11, 1990); *Matter of Patrick*, DTA No. 826838 & 826839 (Div. Tax App., June 15, 2017) ("It is well established . . . that a taxpayer may change his domicile without severing all ties with the prior domicile").

58 *See, e.g.*, Audit Guidelines, at 17 ("Taxpayers can keep their original New York residence and change their domicile."). For further indications of the Department's policy in this regard, see Audit Guidelines, at 15 ("The mere fact that the taxpayer maintains a New York 'home' however is not sufficient, in itself, to establish a case for domicile or that this particular primary factor points toward a New York domicile."), 16 ("It must be emphasized that retention of a residence in New York is not, by itself, sufficient evidence to negate a change of domicile. The mere location of a home in New York does not establish a case for domicile.") and 19 ("Often, as an individual becomes more successful in his or her career, the need to dispose of one residence before acquiring another is diminished. Mere retention of the residence may be an insignificant indicator, especially where the taxpayer owns several properties. An individual may prefer to use a

taxpayer who retains a home in New York, "the key is whether a person views [the purported domicile] with a range of sentiment that denotes a permanent association to that home."[59]

The burden of proof is on the party claiming a change of domicile, whether that party is the taxpayer or the Department, and in either case such party must establish the change of domicile by clear and convincing evidence of unequivocal acts by the taxpayer that demonstrate the requisite intention on the part of the taxpayer to change his or her domicile.[60] Generally, it is necessary for the taxpayer to "show a change in lifestyle" in order to meet the burden of proof in this regard.[61] In essence, the inquiry is whether the party asserting a change of domicile has proven by clear and convincing evidence that the facts and circumstances regarding the taxpayer support the conclusion that the center of his or her life has shifted to the purported new location, such that the new location has become the place the taxpayer intends to be the taxpayer's permanent home, to which the taxpayer intends to return whenever absent.

---

former principal residence as a seasonal home or hotel substitute after moving from New York. Affluent nonresidents may have no economic need to sell a particular residence.").

[59] *Matter of Blumberg*, DTA No. 813014 (Div. Tax App., Apr. 11, 1996); *see* 20 N.Y.C.R.R. 105.20(d)(4) and 295.3(a) (a person having two or more homes is domiciled in "the one which such person regards and uses as such person's permanent home").

[60] *See, e.g.*, *Campaniello v. New York State Division of Tax Appeals Tribunal*, 161 A.D.3d 1320 (3d Dept. 2018) (even though it would not have been unreasonable to conclude that the taxpayers changed their domicile, their continuing business and personal ties to their prior domicile and their continued use of their home there were sufficient to justify the conclusion that they retained their prior domicile), *leave denied*, 32 N.Y.3d 913 (2019); *Matter of Zapka*, DTA No. 804111 (Tax App. Trib., June 22, 1989) ("The mere fact that persuasive arguments can be made from the facts in support of both Florida and New York as petitioners' domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile."); Audit Guidelines, at 12 (the party claiming a change of domicile must be able to support that claim with evidence of "unequivocal acts").

[61] *See, e.g.*, *Matter of Ingle*, DTA No. 822545 (Tax App. Trib., Dec. 1, 2011).

Certain Recent Developments

1. **PPA cases post-*Gaied*.**

a. ***Matter of Mays*.**[62] This 2017 decision by the Tribunal marks the first time the Tribunal applied the "residential interest" standard established by the Court of Appeals in *Gaied*. In *Mays*, the taxpayer got a job with Avon Products, Inc. in NYC that started in early January 2011, and pursuant to Avon's relocation program Avon provided her with a fully furnished apartment at an apartment building in Manhattan called the Marc for a 90-day period beginning January 29, 2011 and ending April 30, 2011, which period was later extended at the taxpayer's request through May 31, 2011. The apartment had a kitchen and was otherwise suitable for year-round habitation, and notwithstanding that the taxpayer and Avon did not enter into a lease, the taxpayer had exclusive and unfettered access to the apartment and in fact stayed there on roughly two-thirds of the nights during the period the apartment was available to her. On June 1, 2011, the taxpayer moved into an apartment in Manhattan that her then fiancé had rented for a period beginning May 16, 2011 and running through May 2012, and lived there for the balance of 2011.

The auditor determined that the taxpayer was a NYC resident for 2009, 2010 and 2011 on the basis of both domicile and statutory residence, but after a conciliation conference the Department's Bureau of Conciliation and Mediation Services cancelled the deficiencies for 2009 and 2010, and the Department later conceded that the taxpayer was not domiciled in NYC in 2011. Because the taxpayer was concededly present in NYC on more than 183 days in 2011, the only issue was whether the taxpayer maintained a PPA in NYC for substantially all of 2011.

---

62 DTA No. 826546 (Tax App. Trib., Dec. 1, 2017).

The Tribunal, affirming the ALJ's determination in favor of the Department, found the *Evans* framework for determining whether a dwelling constitutes a PPA maintained by the taxpayer to be in accord with *Gaied*'s "residential interest" standard, and incorporated the latter standard into both prongs of the *Evans* framework -- permanency and maintenance -- as follows:

> The threshold question when examining whether a taxpayer maintained a [PPA] is whether the dwelling exhibits the physical characteristics ordinarily found in a dwelling suitable for year-round habitation. If answered in the negative, the dwelling is not a [PPA]. If answered in the affirmative, the question then becomes whether the taxpayer has a legal right to occupy that dwelling as a residence. If this question is answered in the affirmative, ***and if the taxpayer exercised that right by enjoying his or her residential interest in that dwelling***, it can be concluded that the taxpayer maintained a [PPA]. If the taxpayer has no legal right to occupy the dwelling, the analysis turns to factors indicating the taxpayer's relationship to the place. Having established the permanency of the place of abode, the second part of the analysis examines whether the taxpayer can be said to have "maintained" the dwelling. If the taxpayer did what was necessary to continue his or her living arrangements in a [PPA] ***or otherwise had a residential interest therein***, it may be concluded that the taxpayer maintained a [PPA] notwithstanding his or her lack of a legal right to occupy such a dwelling.[63]

The Tribunal held (i) that the apartment at the Marc was suitable for year-round habitation; (ii) that notwithstanding that the taxpayer did not have a legal right to occupy the apartment at the Marc in the form of a lease, the apartment met the permanency standard because the taxpayer's "relationship to the apartment at the Marc was as a residence" given her unfettered and exclusive access to the apartment, her extensive use of the apartment and her ability to extend the period of use of the apartment as needed; and (iii) that the taxpayer maintained such place of abode by doing what was necessary to continue her living arrangements there, *i.e.*, by continuing being employed by Avon. Rejecting the taxpayer's argument that her stays at the apartment at the Marc for 4 months and 3 days in 2011 and at her fiancé's apartment for the

---

[63] *Matter of Mays*, DTA No. 826546 (Tax App. Trib., Dec. 1, 2017) (citations omitted).

remaining 7 months of 2011 did not amount to maintaining a PPA "for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year),"[64] the Tribunal aggregated the two and determined that the 11 months and 3 days that the taxpayer stayed at the two apartments were sufficient to support a determination that the taxpayer maintained a PPA for substantially all of the year.

While given the facts in *Mays* this result is not particularly surprising, *Mays* may be more interesting for the manner in which the Tribunal described the Court of Appeals' holding in *Gaied*, citing the case with the following explanatory parenthetical: "even though the taxpayer owned a dwelling, ***he did not use it as such***, and thus it did not qualify as his residence."[65] This language appears to raise squarely the question whether the *Gaied* residential interest standard is met when the taxpayer has the unfettered right to use the dwelling in question as a residence but in fact spends little or no time at the dwelling, *i.e.*, whether *Gaied* is limited to situations where someone other than the taxpayer is living full time in the dwelling or instead applies where no one else is living at the dwelling and the taxpayer for whatever reason spends little or no time there.[66]

b. ***Matter of Obus & Coulson*.**[67] As it happens, the Tribunal appears to be in the process of addressing this issue as we speak. In *Obus & Coulson*, the taxpayers were New Jersey domiciliaries one of whom worked in NYC and thus spent more than 183 days in NYC, but did not have a place of abode in NYC. The taxpayers owned a 5-bedroom, 3-bathroom home

---

64 20 N.Y.C.R.R. §105.20(a)(2).

65 *Matter of Mays*, DTA No. 826546 (Tax App. Trib., Dec. 1, 2017) (emphasis added).

66 *See* Berg, *supra* note 32.

67 DTA No. 827736 (Div. Tax App., Aug. 22, 2019), *exception filed* September 23, 2019; *motion to file amicus curiae brief granted* (Tax App. Trib., June 8, 2020).

with year-round climate control in Northville, New York, which is more than 200 miles from NYC (roughly a 3-1/2 hour drive), at which the taxpayers spent no more than 2-3 weeks a year. The house had an attached apartment with a separate entrance and key that a tenant rented for $200/month and lived in year round. The taxpayer, citing the requirement under *Gaied* of a "residential interest" in the property, argued that given the distance from NYC, the small amount of time the taxpayers spent at the Northville house and the full-time tenant, that house did not constitute a PPA maintained by the taxpayer.

The ALJ distinguished *Gaied* on the ground that unlike in *Gaied*, where the taxpayer's parents lived full-time in the entire one-bedroom apartment in question, the tenant's use of the separate attached apartment with a separate entrance in this case did not in any way interfere with the taxpayers' use of the house or the unfettered availability of the house to the taxpayers for their use, and determined on the basis of such unfettered availability that the taxpayers had the requisite residential interest in the Northville house.[68]

Obus & Coulson is interesting because it appears to mark the first time that a taxpayer advanced the argument in a reported case that the "residential interest" requirement in *Gaied* requires that the taxpayer not only have the unfettered ability to use the dwelling in question but also actually use the dwelling more than a *de minimis* amount in order for the dwelling to qualify as a PPA maintained by the taxpayer. Consistent with the Audit Guidelines, the ALJ in *Obus & Coulson* held that mere availability is sufficient, and that renting out a separate portion of the property with a separate entrance and key does not render the abode unavailable to the

---

[68] The ALJ also rejected the taxpayers' characterization of the Northville house as a "mere camp or cottage, which is suitable and used only for vacations" on the ground that the house, while in fact used by the taxpayers only for vacations, was equipped and suitable for year-round use (as it had heating, air conditioning, a kitchen and bathrooms).

taxpayer. It appears to the author that a better reading of *Gaied* would be that where a taxpayer is domiciled outside New York and spends more than 183 days in New York because he or she works in New York, the taxpayer does not have the requisite residential interest in a dwelling that he or she in fact uses only sparingly (here, 2-3 weeks a year) as a vacation place and that is sufficiently distant from the taxpayer's workplace in New York (here, a 3-1/2 hour drive) that it would be impossible for the taxpayer to use the abode for anything other than a vacation place.

2. **Domicile cases.**

a. ***Campaniello v. NYS Division of Tax Appeals Tribunal*.**[69] In this case, the taxpayer, an Italian native who had moved to New York in the late 1950s or early 1960s, was in the retail furniture business, with showrooms in NYC and Florida (and, for a time, in Chicago) and a warehouse in Long Island City. He and his wife lived in an apartment he owned in the Bronx since 1979, and his corporation bought an apartment in Florida in 1981 which it later conveyed to the taxpayer.

For many years prior to the year in issue (2007), and continuing through the year in issue and thereafter, the taxpayer's general travel pattern was as follows: (i) he flew from NYC to Florida each Friday (his wife did not accompany him but rather stayed at the Bronx apartment and managed the NYC showroom when she was not traveling on her own), (ii) he spent each Friday and Monday working at his four Florida showrooms (and each weekend at the Florida apartment), (iii) he flew from Florida to NYC each Tuesday, (iv) he spent each Tuesday, Wednesday and Thursday working at his NYC office and showroom, and (v) while in NYC he stayed at the Bronx apartment with his wife. The taxpayer also spent as many as 11 consecutive

---

[69] 161 A.D.3d 1320 (3d Dept. 2018), *confirming* DTA No. 825354 (Tax App. Trib., July 21, 2016), *leave denied*, 32 N.Y.3d 913 (2019).

days in NYC in each of July, August and September 2007. The taxpayer's only child and grandchild also lived in NYC. The taxpayer acknowledged that he was present in New York on roughly 170 days or partial days in 2007, of which 150 days were working days, but he apparently spent more time in Florida than in New York in 2007.[70] The taxpayer purchased space in NYC for a second NYC showroom in August 2006, which showroom opened in June 2008. The taxpayer also made significant real estate investments in New York and Florida, and by the year in issue owned eight rental properties in Florida and five in New York..

In 2007, the taxpayer received an unsolicited offer to sell an office building in Florida, on which sale he realized a substantial capital gain. The taxpayer claimed that he had changed his domicile to Florida by some time in 2006, prior to the year in issue. On his nonresident returns for 2006 and 2007, the taxpayer erroneously checked the "no" box for the question whether he or his spouse maintained living quarters in NYS.

The Tribunal affirmed the ALJ's determination that the taxpayer did not meet his burden of proof of a change of domicile prior to 2007, essentially on the grounds that (i) the taxpayer continued to manage his furniture business (including the Florida business) and real estate investments from New York, having worked 150 days in New York in 2007, and indeed expanded his New York business by acquiring and opening a second NYC showroom during the

---

[70] According to the Tribunal's decision, the taxpayer submitted day counts showing that in 2007, he was in Florida on 191 full days and in New York on 93 full days, and traveled between New York and Florida on 76 days. *Matter of Campaniello*, DTA No. 825354 (Tax App. Trib., July 21, 2016), *confirmed*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019). From this, the Tribunal concluded that the taxpayer "spent more time in Florida than in New York in in 2007" and the Appellate Division concluded that "the record establishes that [the taxpayer] spent the majority of 2007 in Florida." *Campaniello v. NYS Division of Tax Appeals Tribunal*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019).

period 2006-08; (ii) since the taxpayer's travel patterns had remained unchanged for many years prior to 2006, there was no evidence of the kind of change in the taxpayer's lifestyle that would support a change in domicile in 2006; (iii) the taxpayer retained his apartment in the Bronx, kept personal belongings, clothing and a car for his use there, received bills there and spent a significant amount of time there in 2007; (iv) the taxpayer had no family ties in Florida and had a wife, child and grandchild in New York; and (v) the taxpayer did not demonstrate that he had moved significant near and dear items form NYC to Florida. The Tribunal also called into question the taxpayer's credibility based on the incorrect answer given on his tax return regarding whether he had a place of accommodation available to him in New York.[71]

The Appellate Division, as did the Tribunal, noted that the taxpayer also had significant, longstanding ties to Florida that are supportive of his claim that he changed his domicile to Florida, including the gradual shift of his furniture business from New York to Florida and the

---

[71] *Matter of Campaniello*, DTA No. 825354 (Tax App. Trib., July 21, 2016), *confirmed*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019). The Tribunal's decision mentions that the taxpayer cited several ALJ determinations as precedent in support of his position, which determinations the Tribunal refused to consider on the ground that, as noted above, ALJ determinations are not precedential by reason of N.Y. Tax Law §2010(5). Given that the taxpayer in *Campaniello* was arguing that he changed his domicile to Florida gradually over a number of years, it is very possible that the ALJ determinations cited by the taxpayer were those that found that the taxpayer had established a "creeping change of domicile." *See, e.g.*, *Matter of Gardiner*, DTA No. 811947 (Div. Tax App., June 29, 1995) ("Petitioners' representatives describe what happened to the Gardiners as a "creeping change of domicile." The point is that an emotional commitment to a new home can develop over time, so that the decision to declare a change of domicile is finally made long after the habits of life have changed. The Gardiners claim that this is what happened to them, and the evidence supports their claim."); *see also Matter of Reichstetter*, DTA No. 818356 (Div. Tax App., Oct. 31, 2002) ("changing one's domicile is a process that occurs over a period of time"); *Matter of Blumberg*, DTA No. 813014 (Div. Tax App., Apr. 11, 1996) (acknowledging that a change of domicile can be "a several year transition" and "a process of transferring and changing a life pattern, not evidenced merely by a single event or a frozen moment in time").

increasing amounts of time he spent in Florida, and that as a result it would not have been unreasonable for the Tribunal to have determined that the taxpayer had changed his domicile to Florida prior to 2006. However, given the extent to which the taxpayer "continued to maintain substantial and significant business and personal contacts in New York," the Appellate Division, applying the deferential standard applicable to agency determinations in an Article 78 proceeding, upheld the Tribunal's decision to the contrary on the ground that such decision also was not irrational or unreasonable.[72]

b. ***Matter of Biggar***.[73] The taxpayer was born and raised in New Zealand. After starting his career in New Zealand, he had various jobs in Canada, the United Kingdom (where he obtained U.K. citizenship in addition to his New Zealand citizenship) and the United States. In 2008, Creditrex, a company for which the taxpayer was working in London, was sold, and in 2010, the taxpayer moved to NYC to become President of Creditrex with the task of integrating the company into the buyer's operations, having purchased an apartment in NYC in December 2009. The taxpayer came to NYC under an "L1" ("management transfer") visa, which was in effect for only so long as the taxpayer was an employee of Creditrex, and obtained a green card in 2012. The taxpayer filed a New York tax return for 2010 that included a statement that he was a NYC resident from June 14, 2010 through the end of 2010, and also filed tax returns as a resident of NYC for 2011-2013. The taxpayer's employment with Creditrex was terminated on October 19, 2012, after which he remained in NYC and became an independent investor looking to invest in start-up businesses.

---

72 *Campaniello v. NYS Division of Tax Appeals Tribunal*, 161 A.D.3d 1320 (3d Dept.), *leave denied*, 32 N.Y.3d 913 (2019).

73 *Matter of Biggar*, DTA No. 827817 (Tax App. Trib., Dec. 24, 2019).

In 2012 and 2013, the taxpayer purchased two apartments in NYC which he rented out, and in 2013 he made a down payment on an apartment to be constructed in NYC, which he purchased when it was completed in 2015. The taxpayer spent a significant amount of time in New Zealand in the first quarter of 2014, when his mother was diagnosed with cancer and then died, and he purchased an apartment in New Zealand in March 2014, where he kept numerous items of sentimental value including the paintings his mother had made. While in years prior to and after 2014 the taxpayer spent far more time in NYC than in New Zealand (*e.g.*, from 2010-13, the taxpayer spent between 262-302 days per year in NYC and between 8-18 days per year in New Zealand, and in 2015 the taxpayer spent 227 days in NYC and 94 days in New Zealand), in 2014 the taxpayer spent 102 days in NYC and 130 days in New Zealand and tended to return to NYC rather than to New Zealand after his trips elsewhere.

At issue was whether the taxpayer was domiciled in NYC in 2014. The ALJ held that the Department met its burden of proving by clear and convincing evidence that the taxpayer had changed his domicile from New Zealand to NYC in 2010, largely by treating as an admission against interest the change of NYC residence status form the taxpayer filed with his 2010 NYS tax return declaring that he became a NYC resident in June 2010,[74] and held that the taxpayer did not meet his burden of proving by clear and convincing evidence that he had changed his domicile back to New Zealand before 2014. In the latter connection, the ALJ treated as continued "business connections" in NYC the taxpayer's investment activity, and also pointed to

[74] *Matter of Biggar*, DTA No. 827817 (Div. Tax App., Jan. 10, 2019) (citing *Vogt v Tully*, 53 N.Y.2d 580, 588-89 (1981); *Matter of Heffron v Chu*, 144 A.D.2d 729, 730 (3d Dept. 1988); *Zinn v Tully*, 77 A.D.2d 725, 726 (3d Dept. 1980) (dissenting opinion), *rev'd on grounds cited by dissenting opinion below*, 54 N.Y.2d 713 (1981)), *affirmed on other grounds* (Tax App. Trib., Dec. 19, 2019).

the taxpayer's pattern in years other than 2014, which the ALJ treated as aberrational, of spending much more time in NYC than in New Zealand.

The Tribunal affirmed, but on different grounds. Rejecting the ALJ's determination that the taxpayer, by filing a change of residence form in 2010, admitted that he changed his domicile to New York in 2010 on the ground that such filing is at best ambiguous on the question of domicile, the Tribunal held that the Department had met its burden of proving that the taxpayer changed his domicile to New York in 2013 by virtue of the vastly higher amount of time the taxpayer spent in NYC than in New Zealand in the years 2010-13, that the taxpayer acquired a green card in 2012 and the "commencement of [the taxpayer's] new career as a private investor in New York" after leaving the employment of Creditrex in 2012. The Tribunal than affirmed the ALJ's determination that the taxpayer did not meet his burden of proving by clear and convincing evidence that he changed his domicile back to New Zealand, pointing again to the vastly greater amount of time the taxpayer spent at his home in NYC than in New Zealand each year and, noting that the taxpayer spent slightly more time in New Zealand than in NYC in 2014 (130 days vs. 102 days), held that "[s]uch a relatively close day count does not support a finding that petitioner abandoned his New York domicile."

Thus, the linchpin of the Tribunal's decision in *Biggar* appears to be the treatment by the Tribunal of the taxpayer's activities as a private investor as the kind of active business involvement that is taken into account as an objective factor in determining whether the taxpayer had the requisite intention to change his or her domicile. This is curious given that the authorities regarding this factor, and even the Department's Audit Guidelines, make it clear that

it is only active participation in the management of a business, rather than passive investment in a business, that is relevant for this purpose.[75]

c. **Interesting (but non-precedential) recent ALJ determinations**

(i) ***Matter of McManus***.[76] The taxpayer had homes in Bronxville, New York and Ridgefield, Connecticut and took a job in St. Louis, Missouri. His wife and minor children lived at the Bronxville home. The taxpayer argued that he was domiciled at the Connecticut home, in part on the basis that he spent the night at the Connecticut home more often than at the Bronxville home during the year in issue (108 nights vs. 86 nights). Although it seems logical to analyze time spent by the taxpayer for purposes of determining his or her domicile on a different, more qualitative basis than the mechanical day-counting rules for

---

75 *See, e.g.*, *Matter of Kartiganer v. Koenig*, 194 A.D.2d 879 (3d Dept. 1993) (emphasizing that the taxpayer "retained a significant proprietary interest in his engineering firm [in New York] and continued to play an active role in its day-to-day operations . . ., remain[ing] in constant communication with the [New York] office by telephone and courier service"); Audit Guidelines, at 22-25 ("The taxpayer's continued employment, or *active participation in* New York State sole proprietorships and partnerships, or the *substantial investment in, and management of* New York corporations or limited liability companies, is a primary factor in determining domicile. . . . The degree of *active involvement* in New York businesses in comparison to involvement in businesses located outside New York is an essential element to be determined during the audit. . . . *Passive investment in a New York business is not indicative of domicile whereas a taxpayer actively participating in the management of a business may be.* Activities such as operating a business must be given greater weight than the mere investment in a business venture."); Audit Guidelines, at 41 (a taxpayer's "passive interest[s] in partnerships or small corporations" are "irrelevant in determining one's domicile"); *cf. Matter of Wiesen*, DTA No. 826284 (Tax App. Trib., Sept. 13, 2018) (disagreeing with the ALJ and holding that the taxpayer's "presence in New York to seek employment after the years at issue" is not the kind of active business involvement in New York during the years in issue that is indicative of being a New York domiciliary); *Matter of Patrick*, DTA No. 826838 & 826839 (Div. Tax App., June 15, 2017) (attending board of directors meetings in NYC is not active business involvement for this purpose where the corporation also holds board of directors meetings outside NYC).

76 DTA No. 827116 (Div. Tax App., Feb. 7, 2019).

statutory residence purposes, and although where the taxpayer spent the night would appear to capture the essence of the domicile determination better than on how many days or partial days the taxpayer was present in New York, the ALJ rejected the taxpayer's approach, stating: "As the [Department] correctly points out in its brief, the domicile time factor contemplates an accounting of an individual's cumulative presence in a given locality, not such an unconventional accounting approach."

(ii) ***Matter of Patrick***.[77] The taxpayer lived in Connecticut, raised his family there and commuted to NYC in various capacities at Colgate for many years. After his marital separation, he moved to NYC in January 2008 to be closer to his office. Soon thereafter, he reconnected with his high school sweetheart, who by then lived in France with her husband and son. They each got divorced and married one another in July 2009, and the couple started to look for a place to live in Paris. The taxpayer purchased an apartment in Paris in October 2010 and retired from Colgate (a year earlier than anticipated) and moved to Paris in March 2011. By both the taxpayer's day count and the Department's day count, the taxpayer spent more time in NYC than in Paris in each of 2011 and 2012, and the taxpayer retained his apartment in NYC. The taxpayer acquired full-time resident status in France in July 2011 and began paying French taxes as a resident. The ALJ determined that notwithstanding that the taxpayer retained certain ties to NYC, he changed his domicile to France in March 2011 when he retired from Colgate and moved to Paris. In this connection, although the taxpayer spent a considerable amount of time in NYC during the years in question, the ALJ discounted that time by pointing out that the taxpayer had specific reasons for being in NYC that did not indicate that NYC was his domicile: "First, petitioner was seeking medical treatment for a serious medical problem that he could not receive

[77] DTA No. 826838 & 826839 (Div. Tax App., June 15, 2017).

elsewhere and required his presence in New York. In addition, petitioner credibly testified that he utilized New York City as a stopping off point when he was traveling elsewhere, including visiting his children and attending board meetings . . . in Colorado."[78]

(iii) ***Matter of Blatt.***[79] The taxpayer was born and raised in Boston, came to NYC (where he had no family) in 1992 to attend law school and worked in NYC since 2003 as general counsel to a corporation headquartered in NYC. The taxpayer acknowledged that he was domiciled in NYC prior to July 2009. In early 2009, after the corporation restructured and downsized, the taxpayer became CEO of an affiliated company in Dallas, Texas while retaining his role as general counsel to the NYC company. The arrangements were such that although the company of which he became CEO was located in Dallas, the taxpayer would split his time between NYC and Dallas while he got to know Dallas and decided whether to move there. A close childhood friend of the taxpayer's and his family (including the taxpayer's godchild) lived in Dallas.

By May 2009 the taxpayer had decided that he wanted to live in Dallas and agreed to relinquish his day-to-day role at the NYC company, with the new arrangements being formalized in an agreement effective in November 2009. He signed a one-year lease in Dallas in March

---

78 *See also Matter of Cooke*, DTA No. 823591 (Div. Tax App., Nov. 15, 2002) ("The Division's auditors determined that petitioner spent 69 days in New York City in 2002, 71 days in New York City in 2003, and 66 days in New York City in 2004. At hearing, petitioner approximated that 95% of that time was either related to business activities or specific commitments with his wife, such as dinner engagements or the theater. . . . Here, even under the Division's computations, the amount of time petitioner spent in New York City when compared with the Hamptons during the years at issue was approximately even. Moreover, petitioner's presence in New York City, especially after 1996, was largely related to business and business travel . . . . Accordingly, while important, petitioner's time spent in New York City during the years at issue is not determinative of his domicile when meshed with the record as a whole.")

79 DTA No. 826504 (Div. Tax App., Feb. 2, 2017).

2009, started seeing doctors and dating women there in the spring of 2009, listed his NYC apartment for sale in the fall of 2009 and moved his elderly dog to Dallas in November 2009, after which he started telling people that Dallas was his home. In early 2010, he entered into a lease on a larger apartment in Dallas and got a driver's license and registered to vote in Texas. During 2009-2010, he spent a few more days in Dallas than in NYC. He sold the NYC apartment in October 2010. But in the fall of 2010, the CEO of the parent company surprised everyone by announcing that he would be stepping down. Ultimately, the taxpayer was chosen to run the parent company, at first from Dallas, where he continued to be the CEO of the affiliated company, but by mid-2011 the taxpayer realized that he could not run the parent company from Dallas and moved back to NYC. In May 2011, the taxpayer bought a house in the Hamptons, where he had always rented a house for the summer.

The ALJ held that the taxpayer had established that he changed his domicile to Dallas in November 2009. It appears from the ALJ's determination that the taxpayer's job change (as well as some affidavits from work colleagues, including the CEO of the parent company, to the effect that the taxpayer had really moved to and set up shop in Dallas), and particularly that he moved his dog to Dallas, were found to outweigh the taxpayer's retention of his apartment in NYC and the amount of time he continued to spend there. That the taxpayer bought a house in the Hamptons, where he had spent summers before and after moving to Dallas, was found to be irrelevant to whether he had changed his domicile from NYC. And without much if any discussion, the ALJ appears to have concluded that the taxpayer's move back to NYC in mid-2011 was for reasons that were so unanticipated that was not inconsistent with the taxpayer's changed of domicile to Dallas in late 2009.

Escape From New York -- Certain Relevant Considerations

As noted, the combination of the high combined New York State and City income tax rates imposed on residents and the non-deductibility of state and local income taxes for federal income tax purposes has caused more than a few high-income taxpayers to consider moving, and in some cases moving their businesses, to lower-tax jurisdictions such as Florida. An individual taking this tack to avoid being treated as a New York resident would need to be mindful both of the statutory residence rules and the domicile rules. The relevant considerations for such an individual differ depending on whether he or she is a New York domiciliary.

1. **New York non-domiciliaries.** For an individual who is not domiciled in New York State or City, *e.g.*, a domiciliary of Long Island, Westchester, New Jersey or Connecticut, and whose job or business is in New York:

a. Under the mechanical day-counting rules for statutory residence, such an individual can avoid being considered a resident for a calendar year, without regard to whether the individual maintains a PPA for substantially all of such year, simply by keeping his or her presence in New York during such year to 183 days (or partial days) or fewer and by keeping detailed contemporaneous records of his or her daily whereabouts.

b. If the individual is present in New York on more than 183 days (or partial days) during the year (or cannot prove by clear and convincing evidence that this was not the case), whether the individual is considered a resident will depend on whether the individual maintains a PPA in New York for substantially all of the year (generally more than 11 months). An individual who owns or rents an apartment in NYC throughout the year, which apartment has a kitchen and is suitable for year-round use and at which he or she spends a not insignificant amount of time during the year will be considered to maintain a PPA and thus will be considered

a NYC resident for that year if he or she spends more than 183 days in NYC in that year. By contrast, it is not entirely clear whether a non-domiciliary who works in NYC and has, say, a beach or lake house located many miles from NYC, or perhaps even an apartment in NYC, at which the individual spends little or no time during the year will be considered as having the requisite "residential interest" in that house. The holding of the Court of Appeals in *Gaied* that in order for a dwelling to be considered a PPA maintained by the taxpayer, "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence" and the taxpayer himself must have a "residential interest" in the dwelling suggests that a dwelling that is not in fact used by the taxpayer as a residence, whether because it is too far away to be used as such or for some other reason, is not a PPA maintained by the taxpayer. The Tribunal in *Matter of Mays* appears to be in accord with this view, describing *Gaied* as holding that "even though the taxpayer owned a dwelling, he did not use it as such, and thus it did not qualify as his residence." Whether this is so may become clearer when the Tribunal issues its now-pending decision in *Obus & Carlson*, in which the ALJ, like the Department in its Audit Guidelines, took the view that a taxpayer has the requisite residential interest in a dwelling to which the taxpayer has unfettered access, irrespective of its distance from the taxpayer's domicile or workplace and irrespective of how much the taxpayer actually uses the dwelling as a residence.

2. **New York domiciliaries.** For an individual who is domiciled in New York (and who does not meet one of the two very limited exceptions to being treated as a resident), the question of whether the individual has successfully become a non-resident of New York is much less mechanical and much more subjective. As noted above, an individual who asserts a change of domicile from New York has the burden of proving by clear and convincing evidence that he or she both (i) abandoned the New York domicile and (ii) acquired a new domicile somewhere

else (rather than "traveling among the capitals of Europe"), one's domicile being "the place which an individual intends to be such individual's permanent home -- the place to which such individual intends to return whenever such individual may be absent."[80] In other words, the individual is required to prove that the center of his or her life has shifted from New York to some other place. This subjective, intent-based analysis is performed, by the Department, the Tribunal and the courts, using a number of objective factors, including the taxpayer's active business involvement, the location and comparison of the taxpayer's homes and the taxpayer's use of such homes, the amount of time spent by the taxpayer in New York vs. the purported domicile, the location of the taxpayer's family connections and social connections and the location of the taxpayer's items near and dear, and to a lesser extent the taxpayer's formal acts such as registering automobiles, registering to vote, voting and obtaining a driver's license. Each of these factors should be considered carefully by an individual attempting to change his or her domicile from New York. Certain relevant considerations in respect of certain of these factors are summarized below.

a. **Active business involvement.** As noted, when an individual who ran a business in New York prior to his or her purported change of domicile continues to be actively involved in the day-to-day management of the business afterwards, even if that involvement takes the form of "remain[ing] in constant communication with the [New York] office by telephone and courier service,"[81] such active involvement is viewed as an important factor militating against a change of domicile. Given that an individual can clearly commute to work from, say, New Jersey to NYC without being considered a domiciliary of NYC, it is not clear

---

80 20 N.Y.C.R.R 105.20(d)(1).

81 *Matter of Kartiganer v. Koenig*, 194 A.D.2d 879 (3d Dept. 1993).

why an individual who moves from NYC to Florida and continues to be actively involved in the management of his or her New York-based business, either by making trips from Florida to NYC or remotely from Florida, would be treated differently. But there has always been a dichotomy in the New York domicile rules between the commuter paradigm and the individual who purports to move from New York to a place that is farther away than a normal commuting distance while maintaining New York business ties. It is for this reason that several of the high-profile individuals who have moved to Florida recently have moved all or part of their hedge funds and other businesses to Florida as well. While the law in this area will no doubt develop further as these individuals are audited, at this point the questions for such individuals in terms of heading off these types of issues would appear to include to what extent they are able to move the business itself (central management, headquarters, senior executives, etc.) to Florida.

Separately, while as noted above the cases and Audit Guidelines make it clear that it is the location of businesses in which the taxpayer is actively involved in management, and not the location of businesses in which the taxpayer passively invests, that is considered relevant in determining an individual's domicile, it should be noted that the Tribunal in *Biggar* treated the taxpayer's "new career as a private investor in New York" as an important factor indicating that he did not change his domicile from New York.

b. **Time.** While there are no hard and fast rules in this respect, and although as a theoretical matter one can change one's domicile without in fact spending a significant amount of time in the purported new domicile, as a practical matter it is extremely helpful for the individual to be able to demonstrate (i) that he or she is spending significantly more time at the purported new domicile than at the old domicile in New York and (ii) that there has been a significant change in the relative amounts of time spent in the two places in the year of the

purported change of domicile. In the latter connection, while as noted there are ALJ determinations in which taxpayers were found to have effected a "creeping change of domicile" over a long period of years, the Tribunal and Appellate Division in *Campaniello* appear to have rejected this concept in favor of a requirement that there be a dramatic shift in the taxpayer's patterns of life and whereabouts at the time of the purported change.

Among the unresolved questions in this regard is how time is measured for this purpose as opposed to for statutory residence purposes. Although a strong argument can be made that time for purposes of determining domicile should be measured not by on how many days or partial days the taxpayer is present in New York but rather by how many nights the taxpayer spent in New York (again, consider the commuter paradigm and that the objective of the inquiry is to locate the center of the taxpayer's life), and although auditors seem to be comfortable with such an approach so long as it is consistently applied, it is difficult to find authority for that proposition and the ALJ in *McManus* appears to have rejected it. Finally, although every day of presence in New York (other than in-transit days and in-patient medical days) counts for statutory residence purposes, there are indications in the ALJ determinations in *Cooke* and *Patrick* that days spent in New York for specific purposes such as medical appointments, theater or dinner plans or using New York as a stopping-off point are given less weight than other days spent in New York for purposes of determining an individual's domicile, again presumably because the object of the domicile inquiry is to determine the location of the center of the taxpayer's life.