

New York's Statutory Residence Rule Should Be Repealed

by Peter L. Faber

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New York state taxes residents on all their worldwide income, regardless of whether it has any connection to New York. Nonresidents are taxed only on income from New York sources.

A person who is legally domiciled in the state is treated as a resident for this purpose. A person who is not legally domiciled in the state is treated as a resident for income tax purposes if he maintains a permanent place of abode in the state and is present in the state for more than 183 days during the tax year. People in this category are generally referred to as statutory residents. Statutory residence applies only for the purpose of personal income taxes. It does not apply, for example, for purposes of probate administration.

A person's legal domicile is generally defined as the place that a person regards as his real and permanent home. It is the place one returns to after absences.¹ Determining domicile involves examining every aspect of a person's life, including time spent in the state, the size and nature of residential properties, involvement in civic activities, proximity of friends and family, club memberships, religious affiliations, presence of favorite paintings and collections, presence of pets, and everything that makes up one's life. It is a subjective inquiry. I have always said that the ultimate test is the answer one gives without thinking when asked where he lives.

The statutory residence test was conceived of as an objective surrogate for the domicile test. It was intended to avoid the complex inquiry that goes into determining a person's domicile and to ensure that a person who really lived in New York could not

avoid resident status by arguing that his state of mind placed primary loyalty elsewhere.

The statutory residence test has caused more trouble than it is worth and should be repealed. If that proves to be impossible, it should at least be narrowed in scope.

Unfortunately, it has not achieved its objective. In my experience the application of the statutory residence test, which involves the taxpayer having to prove where he was every day of the year, has proved to be much more complicated and expensive to administer for both the State Department of Taxation and Finance and taxpayers than has the domicile test. Part of that is a result of the aggressive approach that the department has taken to administering the test, but part of it is inherent in the test's nature. It has caused more trouble than it is worth and should be repealed. If that proves to be impossible, it should at least be narrowed in scope so that it applies only to people whose "permanent places of abode" are real residences. Vacation homes that are used sporadically should not be treated as permanent places of abode.

Legislative History

The statutory residence concept was added to the law in 1922. Under former section 350(7) of the Tax Law, a person was treated as a resident if he maintained a permanent place of abode in the state and was present in the state for seven months or more during the year. It is clear from the legislative history that the provision's purpose was to treat as residents people who really were full-time residents but who were taking the position that they were domiciled outside the state. The Income Tax Bureau's memorandum in support of the legislation

¹*Matter of Newcomb's Estate*, 192 N.Y. 238 (1908).

noted that “we have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but they . . . claim to be nonresidents.”² The new provision was intended to tax as residents people “who, while really and [for] all intent and purposes [are] residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents.”³ As the New York State Court of Appeals has noted, “The statute is intended to discourage tax evasion by New York residents.”⁴

Thus, the statutory residence test was conceived of as a measure to prevent tax evasion by people who really were New York residents but were taking the position that they should be treated as nonresidents because of some contacts outside the state. When the current rule that requires presence in the state for more than 183 days during a tax year was enacted in 1954, the department in its memorandum of support said the change was necessary to address “many cases of avoidance and evasion” of income taxes by people who really were New York residents.⁵

The statutory residence test applies year by year. Thus, a person maintaining a permanent place of abode in the state would be treated as a resident in a year in which he was present in the state for 190 days but not in the next year if in that year he was present in the state for only 160 days.

Administration of Statute

The department has generally taken an expansive view of the statutory language.

The department views the word “permanent” as relating to the nature of the residence and not the taxpayer’s use of it. The only structural exclusion is for “a mere camp or cottage, which is suitable and used only for vacations.”⁶ A house or apartment that is not a camp or cottage is treated as a permanent place of abode even if it is in fact used only for vacations. Moreover, an apartment occupied by a student is excluded from the definition only if the student is enrolled full time in an undergraduate degree program. The department inexplicably has excluded from the exception apartments occupied by students attending graduate or professional schools.

²Bill Jacket, L 1922, ch. 425.

³*Id.*

⁴*Tamagni v. Tax Appeals Tribunal*, 91 NY 2d 530, 673 NYS 2d 44, 695 NE 2d 1125 (1998) *cert. denied*, 525 U.S. 931 (1998). (For the decision, see *Doc 98-15815* or *98 STN 99-22*.)

⁵Memorandum of Department of Taxation and Finance, Bill Jacket, L 1954, ch. 99.

⁶20 NYCRR section 105.20(e)(1).

A house or apartment that is not a camp or cottage is treated as a permanent place of abode even if it is in fact used only for vacations.

In counting days within and outside New York, a day is treated as a New York day if any part of the day is spent in New York.⁷ Thus, if a person living in Sharon, Conn., drives across the state line to Millerton, N.Y., for a cup of coffee and spends a total of 30 minutes in New York, that day will be treated as a New York day for day-count purposes. There is a limited exception for travel through New York to a New York airport.⁸ Issues have come up regarding casual activities in the state that occur in transit to an airport. The department’s nonresident audit guidelines that have been issued to its auditors and published on the department’s website provide that stopping for gas or a meal or to pick up a traveling companion en route to the airport will not prevent a day from being a travel day. However, activities in transit that are unrelated to the transportation can cause a problem. For example, if a taxpayer stops at his apartment and makes several business phone calls while there, the day can no longer be considered a travel day, according to auditors.

Definition of Permanent Place of Abode

The regulations provide that a permanent place of abode is “a dwelling place of a permanent nature maintained by the taxpayer.”⁹ Thus, in the department’s view, the word “permanent” relates to the nature of the dwelling place and not the taxpayer’s use of it. A house obviously qualifies. So does an apartment or a condominium. It can also refer to rooms or a part of a house. Further, it is not necessary that the taxpayer own or rent it. In *The Matter of John N. Evans*, rooms in a rectory that the taxpayer occupied under a consensual arrangement with the church were held to be a permanent place of abode where he contributed to the cost of maintenance, provided furniture, kept his belongings, and basically lived.¹⁰

An implication of the department’s position about the nature of the permanence requirement is that

⁷20 NYCRR section 105.20(c).

⁸*Id.*

⁹20 NYCRR section 105.20(e).

¹⁰199 A.D. 2d 840 (3d Dep’t 1993).

any solid structure of a residential nature can qualify as a permanent place of abode even if it clearly is not a significant residence of the taxpayer. The problem is highlighted in connection with vacation homes. The department has drawn a line in the sand here and indicated that a vacation home is a permanent place of abode and therefore can result in a nonresident being taxed as a resident even though his use of the home is sporadic. The problem can be illustrated by the example of a commuter who lives in Connecticut, commutes to New York City every day for work, goes home at night, and has a summer home over the border in New York state. Even if the summer home is used only sporadically and is by no stretch of the imagination the taxpayer's real residence, in the department's view it will qualify as a permanent place of abode. The result is that the taxpayer will be a New York resident if his job involves presence in New York City for more than 183 days during the year, which most jobs do. In other words, there is no requirement that the presence in New York for purposes of the 183-day test has anything to do with the permanent place of abode that is located in New York.

The recent case of *John J. and Laura Barker* is a poster child for the absurdity of this result.¹¹ Mr. and Mrs. Barker lived in Connecticut. Mr. Barker commuted to New York City, where he worked as an investment manager for a financial services firm. After failing to find an adequate rental for a place to spend the summers, they bought a summer vacation home in Napeague, N.Y., on Long Island.

The tax years at issue were 2002, 2003, and 2004. In 2002 the taxpayers spent 18 days at the house; in 2003, they spent 16 days at the house; and in 2004, they spent 18 days at the house. Almost all that time was during the summer. Thus, the house was clearly not their principal residence or even a significant residence. It would be absurd to suggest that they really lived there or that their Connecticut home was not their real residence. Nevertheless, the Napeague house was a decent-size house and was clearly permanent. One could have lived there full time if one had wanted to, although the Tax Appeals Tribunal noted that Napeague is a summer community and that not much goes on there during the off-season.

Mrs. Barker's parents lived nearby and used the house several days a week during the summer and on many weekends during the rest of the year. Her father operated a small fishing charter business that listed the house as its address.

It was agreed that Mr. Barker had spent more than 183 days in New York state and city in each of the tax years, and it was also clear that the Barkers

were domiciled in Connecticut, so the only issue in the case was whether the Napeague house was a "permanent place of abode" within the meaning of the statute. The tribunal said that it was well established that a dwelling was a permanent place of abode when "the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling." It did not qualify as a "camp or cottage" because it was suitable for year-round living. Accordingly, the Napeague house was held to be a permanent place of abode, and the Barkers were held to be New York residents.

The result in *Barker* illustrates the extent to which the department and the tribunal have lost sight of the reason for the statutory residence requirement. Mr. Barker was in New York state for more than 183 days because of his job, not because he owned residential property in the state. The residential property was in no sense his real home. If the Barkers had rented a hotel room for the isolated weekends that they spent in Napeague, an issue would never have been raised. To say that a commuter becomes a resident of the state because he spends a few isolated weekends at a vacation home in the state is absurd.

More recently, the Tax Appeals Tribunal granted the department's motion for reargument of its decision in *John Gaied*.¹² That highly unusual action was taken because the tribunal concluded that it failed to address precedents establishing the principle that the taxpayer need not occupy the place of abode as long as he maintains it.

I am working on a case in which the permanent place of abode concept is being pushed to extreme limits. The taxpayer was domiciled outside New York state. He commuted to a job in New York City, and as a result was in the city for more than 183 days during each of the tax years at issue. He owned an apartment in New York City that his son lived in full time. The taxpayer never set foot in the apartment during the tax years at issue, did not keep any personal effects there, and did not have a key to the apartment. He paid some, but not all, expenses related to the apartment as a gift to his son. Although he has not been in the apartment in five years (including the two years at issue), he is in the midst of a detailed audit in which he is being asked to produce voluminous information at considerable cost of both time and money. Although there is case law establishing that a residence that is occupied full time by a relative is not a permanent place of abode within the meaning of the statute, the auditors are persisting. I am confident that this matter

¹¹NYS Tax Appeals Tribunal, DTA No. 822324 (2011).

¹²NYS Tax Appeals Tribunal, DTA No. 821727 (2011).

will be resolved favorably, but it should not have come up in the first place.

The department's focus on the permanence of the structure rather than on the permanence of the taxpayer's use of the structure is misguided and totally ignores the reason why the statutory residence test was adopted by the State Legislature. Even if the statutory residence test is not repealed, as I recommend in this article, the department should abandon its interpretation and, consistent with legislative intent, should exclude vacation homes from the definition.

183-Day Test

In my experience, most of the time spent on statutory residence audits has been devoted to counting days. It is clear that the taxpayer has the burden of proof. It is also clear that most taxpayers don't keep track of and document their whereabouts every day of their lives. The result is that invariably taxpayers have trouble proving that they were not in New York state for more than 183 days during a tax year. Proving a negative is always hard, and proving that a person wasn't in New York state for any part of a given day can be extremely difficult unless one can establish that he was clearly out of the country on that day. Even then, difficulties have come up. I had one case in which we clearly showed through airplane tickets and hotel bills that the taxpayer flew to London on a Tuesday and flew back on the Friday of that week. Unfortunately, someone (we think his son) made a phone call from his New York apartment on Wednesday of that week. The auditor vigorously contended that Wednesday should be treated as a New York day. Although we were eventually able to get to the auditor's supervisor and common sense prevailed, it shouldn't have been necessary for me to spend an hour of my time (charged to the client at New York partner billable rates) to set the matter straight.

We advise clients to keep a contemporaneous diary recording of where they were every day and specifically noting days any part of which was spent in New York. Also, we recommend that they try to keep out-of-state receipts for every out-of-state day for gasoline purchases, drugstore purchases, baseball tickets, or anything else. The problem, of course, is that normal people don't do that. Someone who has already been audited is likely to keep track of every day, but someone who has never been audited and is unaware of New York's rules would be unlikely to keep these kinds of records. As a result, most audits involve significant gaps in evidence. The department will consider affidavits attesting to the fact that the taxpayer typically left New York City on Friday, spent every weekend at his home in Connecticut, and didn't return until Monday morning as proof that Saturdays and Sundays, even if

undocumented, should be treated as Connecticut days, but the practice in audits isn't uniform.

The problem has been aggravated by the aggressive approaches of many department auditors. Although a taxpayer is not supposed to have to prove his whereabouts beyond a reasonable doubt, some auditors seem to believe that that is the standard. I had one instance recently in which the taxpayer's contemporaneous diary showed that he was in Connecticut on a specific day. His cellphone records showed that he placed eight telephone calls from Connecticut during that day between 8 a.m. and 4:30 p.m., but the auditor has said that this is an "uncertain" day because he might have driven to New York City that night, even though there was no evidence indicating that he did so.

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In another case, the taxpayer presented 16 affidavits from individuals at his place of business in New York City and at his home in Connecticut saying that he rarely came to the office in New York City (he worked at home for the most part), and that he and his wife stayed at their Connecticut home year-round and it was not merely a summer residence. The auditors have refused to consider the affidavits, even though we made it clear to the affiants that they might have to testify in court about the issues under penalty of perjury.

Even when taxpayers have produced receipts on a given day showing purchases made out of state, the auditors are likely to challenge their probative value, arguing that one purchase in Connecticut does not indicate that the person did not later drive into New York state for some purpose, or that the receipt does not show whether the taxpayer or the taxpayer's spouse made the purchase. Unfortunately, it is almost impossible to prove that a person who spent some time in New Jersey or Connecticut on a given day did not also spend some time in New York. If the department established a rule that evidence of one activity out of state on a given day created a presumption that the taxpayer spent no part of that day in New York, that would help, but problems would still persist.

Another problem is the occasional use of a taxpayer's New York home by a relative. Tax department auditors typically ask for telephone records, and if calls were made from a taxpayer's New York apartment they will assume that the calls were made by the taxpayer, even if the taxpayer shows that the apartment was often used by children or

other relatives and that they used the telephone. The telephone records don't always indicate the numbers called, so it's not always possible to identify the caller by determining the person or business that was called.

Record-Keeping Problems

Well-advised taxpayers who are willing to make the effort must keep voluminous records to substantiate a claim that they weren't in New York for more than 183 days during a tax year. I recommend that clients keep a separate folder for each day and insert in the folder copies of any documentation that they have showing their whereabouts on that day. I also recommend that they keep a contemporaneous diary showing where they were on every day and specifically noting when they were in New York. Some people do that and some don't.

I had one client who seemed to enjoy making a game of it. Her husband was an executive who worked in New York. They lived in Pennsylvania and she seemed to positively enjoy the exercise of keeping track of where they were every day and of insisting that they have documentation for every day. However, I had another client who was able to develop a very credible case for not being in New York more than 183 days but who decided not to do so. As he explained to me, "I have too many other things going on in my life and I don't want to spend my time keeping track of gasoline purchases. If that means they will tax me twice, let them do so."

In the recent case of *Julian H. and Josephine Robertson*, the taxpayer was an extremely wealthy individual who could afford to have an employee who kept track of his whereabouts every day of the year and ensure that there was adequate documentation.¹³ He came very close to the line, but was able to prove that he hadn't been in New York for more than 183 days and he won. Most people aren't in a position to have full-time employees who keep track of their activities.

¹³NYS Tax Appeals Tribunal, DTA No. 822004 (2010).

The audit process is time-consuming and expensive. I have had audits that have gone on for years with nothing at issue other than the day count. Litigating those cases is also time-consuming and expensive. The taxpayer has the burden of proving that he wasn't in New York for more than 183 days during the year, and that can mean extended interrogations of taxpayers, relatives, doormen, and business associates. A hearing can last several days.

Conclusion

The statutory residence test was intended to augment and support the legal domicile test. It was intended to be an objective measure of where a person really lived, obviating in some cases the need to make a subjective determination of the taxpayer's state of mind, which is what is involved in domicile determinations. It was not intended to apply to vacation homes and other temporary residences. The expansion of the concept by the department and the courts is not justified by legislative history or tax policy. If a person meets the 183-day test because of his job and has a vacation home that he spends a few weeks at every year, he should not be taxed as a resident. To ask that question is to answer it.

Furthermore, the 183-day test has proved to be extremely difficult to administer. It places on taxpayers what is in many cases an impossible burden of proof. As one who handles numerous audits on these issues, I can testify that 10 hours or more of auditor and taxpayer representative time are spent on statutory residence day-count issues for every hour that is spent on domicile issues. In most cases that I've seen, the person's domicile is fairly clear and all the effort is spent on proving days.

The best approach would be to repeal the statutory residence test in its entirety and make domicile the only test for income tax residence. If that can't be done, the permanent place of abode concept should be narrowed, by legislation or regulation, to exclude vacation homes and other temporary residences that are clearly not where the taxpayer really lives. ☆

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