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To Pay or Not to Pay Resident and Non- Resident Status

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A. **OVERVIEW**¹

1. A New York State resident taxpayer is responsible for reporting and paying New York State personal income tax from ALL sources regardless of where the income is generated, or the nature of the income. A nonresident taxpayer is given the opportunity to allocate income, reporting to New York only that income actually generated in New York. In addition, the Non resident need only report to New York income from intangibles which are attributable to a business, trade or profession carried on in the State.

(1) This outline is based upon the June, 2014 Non-resident Audit Outline Guidelines prepared by the State of New York – Department of Taxation and Finance, Income Franchise Field Audit Bureau.

2. Domicile vs. Residence

A resident of New York State is one who:

a. Is domiciled in New York State

b. Is NOT domiciled in New York but who maintains a permanent place of abode in this state and spends more than one hundred eighty-three days of the taxable year in this state.

Domicile is defined 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.

The terms “domicile” and “Residence” are often used synonymously in our everyday discussions, but for New York State Income tax purposes, the two terms have distinctly different meanings. Residence in a strict legal sense means merely a “place of abode.” An individual may have many residences, or physical dwellings in which he resides, but can have only one domicile, or that permanent residence to which he intends to return.

Intention is a decisive factor in the determination of whether any particular residence which a person may occupy is his domicile.

Important. Please note the following:

If the Taxpayer is **domiciled** in New York, has a **place of abode** in New York and spends **more than 30 days** in New York, the Taxpayer will be a resident for New York State income tax purposes,

Permanent place of adode

In general, a permanent place of abode is a residence (a building or structure where a person can live) that you permanently maintain, whether you own it or not, that is suitable for year-round use. A permanent place of abode usually includes a residence your spouse owns or leases.

Domicile

In general, your *domicile* is the place you intend to have as your permanent home. Your domicile is, in effect, where your permanent home is located. It is the place you intend to return to after being away (as on vacation abroad, business assignment, educational leave, or military assignment). You can have only one domicile. Your New York domicile does not change until you can demonstrate that you have abandoned your New York domicile and established a new permanent domicile outside New York State. A change of domicile must be *clear* and *convincing*. Easily controlled factors such as where you vote, where your driver's license and registration are issued, or where your will is located are **not** primary factors in establishing domicile. To determine whether you have in fact, changed your domicile, you should compare (1) the size, value and nature of use of your first residence to the size, value and nature of use of your newly acquired residence; (2) your employment and/or business connections in both locations;

(3) the amount of time spent in both locations; (4) the physical location of items that have significant sentimental value to you in both locations; and (5) your close family ties in both locations. A change of domicile is *clear and convincingly* only when your primary ties are clearly **greater** in the new location. When weighing your primary ties, keep in mind that some may weigh more heavily than others, depending upon your overall lifestyle. If required by the Tax Department, it is the taxpayer's responsibility to produce documentation showing the necessary intention to effect a change in domicile.

Matter of Newcomb, 192 NY238: “Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one’s domicile”

That action speak louder than words was further underscored in *Matter of Jack Silverman (Deceased) & Frances Silverman (Deceased), DTA No. 802313*. In that case, the taxpayers had taken a number of steps to show a change of domicile to Florida such as filing a declaration of domicile, registering to vote and obtaining a driver's license. Citing *Trowbridge*, the Tax Appeals Tribunal stated that "these formal declarations after less persuasive than the informal acts of an individual's "general habit of life" in concluding that the taxpayers had not changed their domicile.

To effect a change of domicile, there must be not only an intent to make such change but also actual residence in the new location. No definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient. On the other hand, residence without intention to remain does not effect a change of domicile no matter how long the residence is continued.

Change of domicile may be made on a whim, or fancy, for business, health, or pleasure, to secure a change of climate, or for any other reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person confirm the intentions. The fact that a person is motivated by self-interest does not prevent a change of domicile. Nearly everyone who changes domicile does so because they believe it to be their advantage in one way or another. Therefore, the fact that a change of domicile was motivated primarily by a desire to gain a tax advantage is immaterial if the intention of the individual to acquire a new domicile is absolute and fixed and his acts confirm that intention. The point that an individual may desire to “avoid” New York taxes and carefully craft his or her affairs so as to accomplish this purpose was addressed in *Newcomb*, wherein the Court states that the “Motives” for one’s change of domiciled are “immaterial, except as they indicate intention.”

3. **Burden And Degree Of Proof**

The burden of providing a change of domicile is upon the party asserting the change. The evidence to effect a change of domicile must be “Clear and convincing”.

Similarly, the government bears the burden of proof to show that an individual who was previously a non-domiciliary of New York changed his domicile to New York. If the weight of the factors does not present a “clear and convincing” body of evidence that the taxpayer has changed his or her domicile to New York, then the individual is to be treated as a nonresident.

“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.”

“.....the mere fact that his filings as a nonresident were not questioned (through an audit) does not satisfy his burden of proving that a change of domicile occurred and, in addition, when that change took place.”

4. **Factors To Be Considered In Determining Domicile**

The factors used to determine domicile are divided into two general categories, primary factors and other factors. An analysis of the five primary factors (Home, Active Business Involvement, Time, Items Near & Dear and Family Connections) should generally provide a basis for New York domicile before documentation concerning the “other” factors.

B. PRIMARY FACTORS

Webster’s New Work Dictionary defines Primary as: 1. first in line or order, from which others are derived; fundamental; 3. first in importance.

All three meanings describe the importance of the primary factors in determining domicile. The primary factors are fundamental and first in line toward developing a case for New York domicile.

For example, the fact that taxpayer maintains a “home in New York State is a feature that is present in most domicile cases. 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.

1. **Primary Factors: Home**

The individual's use and maintenance of a New York residence, compared to the nature and use patterns of a non-New York residence.

The first factor is the homes maintained and used by the individual. What does an individual consider to be his home? Is it the actual dwelling (the building) in which he lives, or is it the area (the community) that he considers home? For the purposes of determining an individual's domicile, home can be either, or both, depending upon the circumstances. It also matters little if the dwelling is owned or rented but must represent a "residence" in the eyes of the taxpayer. Therefore "home" refers not only to that family residence, which over the years has been clearly established and accepted by everyone as "home" to the taxpayer and/or their immediate family but also the community to which the individual has established strong and endearing ties.

An individual may give up or dispose of his traditional family home (a building) for a variety of reasons. The change in a neighborhood configuration, zoning law changes, loss of a lease, the conversion of a building to another form of ownership, encroaching business or commercial areas, increase or decrease in family size, or simply the desire to change homes are examples of why an individual might give up one home and acquire a new residence. An individual, who is a long time resident of a particular area of New York, usually has developed a range of sentiment for that area as well as the dwelling in which resides. Selling or disposing of that dwelling, for whatever reason, may not change the attraction the individual has for the area when a new residence is acquired within the area. The newly purchased or rented residence will carry with it that range of sentiment the individual has for his former “home.”

a. Where “One Home” is Maintained:

When an individual has only one home, decisions concerning domicile are more straightforward than when an individual maintains two or more residences at various locations. When a taxpayer sells or ends the lease on his or her New York residence and acquires living space in another state, coincidental with each other, it is an important indicator that a change in domicile has occurred at the time of actual residence in the new location. The taxpayer, in giving up the only residence which is located in New York and acquiring another outside New York, giving an important signal of intent to change domicile.

b. Where “Two Or More Homes” are Maintained:

1) **Attempting to sell**

In other cases a taxpayer may claim a change of domicile while attempting to sell his only residence in New York.

2) **Acquiring another home, or change homes during the audit period**

A much more difficult decision concerning an individual's intent occurs when the circumstances are such that he does not give up his New York residence. Such is the case when a taxpayer continues maintaining the New York property and acquires a new permanent place of abode outside New York, or claims to change domicile to an existing residence outside New York State. Taxpayers can keep their original New York residence and change their domicile.

3) **Size of the Residence**

While size is an important item to be considered, it is not determinative in and of itself.

4) **Value of the Residence**

The value of the various residences owned or leased by the taxpayer is as important as the size of the residences when analyzing information to determine domicile. When comparing the value of the various residences, the dwelling with the greatest value is not, by itself determinative. The value of the various residences is more difficult to determine than the size of the dwellings. The difficulty arises out of the fact that equal size dwellings could have significantly different values based upon the location of the property and the dwelling.

5. Nature of Use

How a taxpayer views a particular dwelling is another aspect of the “Home” factor. 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 taxpayers owns several properties.

It matters little, when analyzing the “Home” factor, whether the individual owns or rents a particular dwelling. The type of lease however, could shed light on how an individual views a particular piece of property.

6. Other Aspects of a Home

There are other aspects of the “Home” factor which can be analyzed to assist in making a decision concerning domicile. For example, an individual may employ domestic help, grounds keepers, chauffeurs, etc. to help in the maintenance of the various dwellings or a particular lifestyle.

For example, a husband and wife purchased a home in New York for \$150,000 in 1965 and established New York as their domicile. In 1985 the taxpayers purchased a home in Florida and changed their domicile. Although they now consider themselves nonresidents of New York, they retained the New York residence until 2004 it was sold for \$600,000. According to IRC Section 121, taxpayers can exclude the gain on the sale of a principal residence occurring on or after May 7, 1997 not exceeding \$250,000 (\$500,000 if married filing joint). Since the taxpayers in the example indicated that they changed their domicile in 1985, the New York property ceased being their principal residence long before it was sold in 2004. The taxpayers would owe tax for federal and New York State purpose on the full \$450,000 gain in the year of the sale.

Finally, it is possible for a taxpayer to be a nonresident and yet still exclude the gain from the sale of a New York property as a principal residence. Even though the taxpayer is a New York nonresident in the year of sale, Federal law allows the gain to be excluded subject to the limitation amounts discussed above as long as the property was used as a principal residence in two of the five years ending with the date of sale.

C. **PRIMARY FACTORS: ACTIVE BUSINESS INVOLVEMENT**

The individual's pattern of employment, as it relates to compensation derived by the taxpayer in the particular year being reviewed.

Business involvement also includes active participation in a New York trade, business, occupation or profession and/or substantial investment in, and management of, any New York closely held business such as a sole proprietorship, partnership, limited liability company and corporation.

The taxpayer's continued employment, or active participation in New York State sole proprietorships and partnership, or the substantial investment in, and management of New York corporations or limited liability companies, is a primary factor in determining domicile. If a taxpayer continues active involvement in New York business entities, by managing a New York corporation or actively participating in New York partnerships or sole proprietorship, such actions must be weighed against the individual's involvement in business at other locations when

determining domicile. The degree of active involvement in New York businesses in comparison to involvement in business 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 participation in the management of a business may be.

In a family owned business, if a parent passes the daily operation of the New York business to the children but remains active in the decision making process, this active involvement could demonstrate the taxpayer's continued connection to New York. As persons become older and accumulate wealth, they may choose to devote less time to the business and bring in younger individuals who will eventually succeed them, ever reducing their status and compensation. This alone does not demonstrate a change of domicile. This diminished involvement in a New York business is one element of the "Active Business Involvement" factor which becomes less important as the taxpayer phases out the operation.

D. **PRIMARY FACTORS: TIME**

An analysis of where the individual spends time during the year.

Another one of the primary factors is a quantitative analysis of where the individual spends his time during the tax year. The “Time” factor is only one of the factors. A decision concerning domicile cannot be made based only upon the analysis of where the individual spends his time. The results of this comparison must be weighed with the results from the other primary factors to reach a decision. The location where an individual spends his time is often an important consideration in ascertaining his intentions with regard to domicile.

For example, in *Matter of Craig F. Knight, DTA No. 819485*, the Tax Appeals Tribunal reversed the AJL in finding that a New Jersey domiciliary had not changed his domicile despite spending significant time in New York in connection with his partnership and visits to his girlfriend. According to the Tribunal,

“The presence of a suburban commuter at work or play in New York on most days, without more, does not create a New York domicile and the frequency of theatre attendance or restaurant meals seems to have little probative value on the issue of whether his or her home continues to be in the suburbs. The number of days spent in New York might well be one of the factors to be considered in a case where the taxpayer had substantial residences in New York and a distant city and the issue was which of the two was the taxpayers domicile. If other factors indicate that an individual is a mere sojourner whose home is elsewhere, that status will not be elevated to domicile by the frequency of visits.”

By contrast, if the taxpayer merely changes from spending six months per year in the southern home to spending seven months per year, this minimal alteration, by itself, should not constitute strong evidence of a change of domicile.

E. PRIMARY FACTORS: ITEMS “NEAR AND DEAR”

The location of items which the individual holds “near and dear” to his or her heart, or those items which have significant sentimental value, such as: family heirlooms, works of art, collection of books, stamps and coins, and those personal items which enhance the quality of lifestyle.

Another primary factor is the location of pets, personal items or other sentimental possessions which the taxpayer holds “Near & Dear to their heart.” These include specific items of value, such as a rare book, art or antique collection, or those of little monetary value such as a family photo album, which enhance and add quality to the individual’s lifestyle. This analysis of “near and Dear” items can help to solidify the intent of the taxpayer concerning the location of his domicile.

F. PRIMARY FACTORS: FAMILY CONNECTIONS

While analysis of the “time” factor presents us with the most quantitative factor in determining an individual’s domicile, analysis of “family” is a much more subjective factor. Throughout the discussion of the primary factors it has been stressed that no single factor can be considered a “stand alone” indicator of domicile. This statement certainly holds true for the analysis of “family connections” as a factor in determining domicile.

Having stressed the importance of family in the evaluation of domicile, it needs to be pointed out that spouses can have different domiciles.

G. **EVALUATION OF THE FACTORS:**

- Evaluate the primary factors objectively. Look at the patterns that are established by the individual
- Be open minded and fair in evaluating all factors in a balanced and reasonable manner.
- Be cognizant of the fact that individuals go through evolutionary changes during their lifetime

1. **Other Factors Affecting Domicile**

Apart from the primary factors, there are other factors which can provide some insight into a domicile determination. These factors however, are subordinate to the primary factors.

The “Other” factors are:

- a. The address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received.
- b. The physical location of the safe deposit boxes used for family records and valuable
- c. Location of auto, boat, and airplane registrations as well as the individual’s personal driver’s or operator’s license.
- d. Where the taxpayer is registered to vote and an analysis of the exercise of said privilege. The auditor should not limit the review to the general elections in November, but also question the taxpayer’s participation in primary or other off-season elections, including school board and budget elections.

- e. Possession of a Manhattan Parking Tax exemption.
- f. Analysis of telephone services at each residence including the nature of the listing, the type of service features, and all activity at the location.
- g. The citation in legal documents that a particular location is to be considered the individual's place of domicile or that a particular residence is considered to be a primary residence. Examples would include, but are not limited to, wills, divorce decrees or separation agreements, applications for school tax relief exemption (STAR); leases for rent-controlled or rent-stabilized apartments.
- h. Green cards indicating that an immigrant can legally reside in the United States on a permanent basis.

For example: John and Sarah were domiciled in New York when John retires in 2000. They have a large home in New York and a condominium in Florida. Prior to 2000, John and Sarah spent approximately four months in Florida and the remaining eight months in New York State. John was president of a corporation when he retires and was retained as a consultant and Chief Executive Officer of the Corporate Board after retirement. They have many family and friends in both the New York and Florida area and are involved in the activities of the local country club, as well as other civic and service organizations at both locations. When John retired in 2000, he and his wife decided to spend more time in Florida, especially during the winter months. John and Sarah usually leave for Florida in the later part of October and return during the first part of April each year. During the first prolonged stay in Florida, they transferred their auto registrations to Florida, as well as acquiring new driver's licenses from Florida. They registered to vote in Florida and have voted there each year since retirement. They visit doctors and dentists in both locations as the need arises. They maintain bank accounts in both locations and have the mail sent to whichever location they are at. John & Sarah usually return to New York for the Thanksgiving and Christmas holidays and John returns about once a month to attend the corporate board meetings.

2. **Nonfactors Of Domicile**

- The location where the taxpayer's will is probated;
- Passive interest in partnerships or small corporations;
- The mere location of bank accounts;
- Contributions made to political candidates, or causes;
- The location where the taxpayer's individual income tax returns are prepared and filed.

Two specific "non-factors" which are not part of any decision of domicile are charitable contributions and volunteering for nonprofit organizations.

3. **Tax Relief For A Domiciliary**

Tax law provides tax relief for certain individuals who are New York domicilliaries. A domiciliary who meets the criteria of either provision would not be deemed a resident.

- **Thirty Day Rule:**

To qualify under this provision, the taxpayer has to meet the following three conditions:

- a. He maintains no permanent place of abode in New York State during the year;
- b. He maintains a permanent place of abode outside New York State during the entire year; and
- c. He spends not more than 30 days of the taxable year in New York State.

- **548 Day Rule**

To qualify under this provision, the taxpayer has to meet the following three conditions:

a. Within any period of 548 consecutive days, the taxpayer is present in a foreign country or countries for at least 450 days;

b. During such period of 548 consecutive days the taxpayer, the taxpayer's spouse (unless legally separated) and the taxpayer's minor children are not present in New York State for more than 90 day; and

c. During the nonresident portion of the taxable year with or within which such period of 548 consecutive days begins and the nonresident portion of the taxable year with or within which such period of 548 consecutive days ends, the taxpayer is present in New York State 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 such portion of the taxable year bears to 548.

As long as an individual who is domiciled in New York State constitutes to meet the requirements of either the 30 day rule or the 548 day rule, the individual will be considered a nonresident of New York for personal income tax purposes. But if the individual fails to meet these conditions, the individual will be subject to New York State personal income tax as a resident.

4. **Foreign Domicile**

a. **Intent:**

“....a United States citizen will not ordinarily be deemed to have changed such citizen’s domicile by going to a foreign country unless it is clearly shown that such citizen intends to remain there permanently. For example, a United States citizen domiciled in New York State who goes abroad because of an assignment by employer or for study, research or recreation does not lose such citizen’s New York State domicile unless it is clearly shown that such citizen intends to remain abroad permanently and to return.”

b. **Factors:**

- i. Whether the taxpayer has been admitted for permanent residence in the foreign country.
- ii. Retention of the New York residence and/or periodic return visits.
- iii. Retention of New York business interests
- iv. The filing of tax returns as a resident of the foreign country

5. **Citizenship**

Finally, it should be noted that whether or not the taxpayer acquires citizenship in the foreign country is generally of little consequence in and of itself.

6. **Statutory Residence**

Definition

A statutory resident is an individual who “is not domiciled in this state but maintains a permanent place of abode in New York State and spends in the aggregate more than one hundred and eight-three days of the taxable year in this state.

Permanent Place of Abode - The Basics

A permanent of abode can be a house, co-op apartment, condo, or other dwelling.

“dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse”

1. Physical Attributes

For a dwelling to be permanent, it must be suitable for year-round use. The fact that a taxpayer's use of a dwelling was limited, for example, to the summer months, does not mean that the dwelling was not suitable for year-round use. Suitability for year-round use turns on the physical attributes of the dwelling, that is, whatever its construction and other features make it suitable for year-round use.

2. **The Nature of the Relationship**

“....the permanence of the dwelling place for purposes of the personal income tax can depend on a variety of facts and cannot be limited to circumstances which establish a property right in the dwelling.”

“...doing whatever is necessary to continue one’s living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise.”

a. **Whether the taxpayer has ownership or property rights in the dwelling:**

The fact that the taxpayer owns the dwelling or otherwise has a legal right to occupy it, as with a lease, is a key factor in determining whether the requisite relationship exists.

b. **Whether the taxpayer uses the dwelling or has unfettered access:**

Conversely, taxpayer would not have the requisite relationship to a dwelling that is used exclusively by others despite having ownership rights.

c. **The taxpayer's relationship to the co-habitants of the dwelling:**

A taxpayer may have the requisite relationship to a dwelling in which he has no ownership or property rights.

d. **Whether the taxpayer has his own room or keeps personal items at the dwelling:**

A taxpayer with an ownership or property right in a dwelling would normally be considered to have the requisite relationship to that dwelling if he has access to his own living quarters where personal items are kept.

e. **Registration for Governmental/Business services:**

Another indication that the taxpayer has established a relationship to a dwelling is if the address is used for various government and business purposes.

In determining whether the taxpayer has the requisite relationship to a dwelling, the guidelines have identified certain factors that should be considered in such an analysis; whether the taxpayer maintains the dwelling either in money or in kind; whether he has a legal right to the dwelling; whether he uses the dwelling or otherwise has access to it; his relationship to other occupants of the dwelling; whether he has separate living quarters or keeps personal items as the dwelling; and whether he uses the address of the dwelling for government or business purposes.

7. **Permanent Place Of Abode**

1. Residence Not Habitable

Occasionally a taxpayer will claim that a New York residence is uninhabitable because it is undergoing extensive renovations either because of property damage or personal choice of the taxpayer. In these situations, it is necessary to distinguish between major renovations which render a residence unlivable such as inadequate plumbing or lack of sleeping quarters, and minor repairs which merely make it inconvenient but still possible for the taxpayer to use.

2. **Corporate Apartments**

Living quarters suitable for permanent year round use are permanent places of abode even if used for shopping trips, visits, etc. These living quarters would include a house, apartment, co-op, or any other living quarters maintained or paid for by the taxpayer or his spouse, or any New York State living quarters maintained for the taxpayer's primary use by another person, family member or employer.

For example, if a company was to lease an apartment for the use of the company's president or chief executive officer, and the dwelling was principally available to that individual, the individual would be considered as maintaining a permanent place of abode in New York even though others might use the apartment on an occasional basis.

A corporate apartment would not be considered a permanent place of abode for the taxpayer if the primary purpose and use of the corporate apartment is for reasons other than as living quarters for the taxpayers or the taxpayer's family.

The following factors are significant in determining whether a so-called corporate apartment rises to the level of a permanent place of abode:

- a. Whether the taxpayer shares in the expenses;
- b. Whether the taxpayer maintains clothing or personal effects;
- c. Whether there is a dedicated room for one's own use with free and continuous access; and
- d. Whether it is used for daily attendance in connection with employment.

3. **Change of Ownership:**

Taxpayers who transfer ownership of a dwelling place to other entities, such as limited liability companies, and continue to use the dwelling place as a residence.

4. **Life Estate Interests:**

A taxpayer who held a life estate interest in a New York home was found to be maintaining a permanent place of abode.

5. **Minor Children:**

A minor child can maintain a permanent place of abode and thus be taxable as a statutory resident.

6. **College Students**

“A dwelling place maintained by a fulltime student enrolled in an institution of higher education, as defined in section 606(t)(3) of the Tax Law, in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent place of abode with respect to that student.”

8. **Substantial Part Of The Year**

For statutory resident purposes, an individual who maintains a permanent place of abode in New York State, must maintain such abode, “for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year).

For example, an individual who acquires a permanent place of abode on March 15th of the taxable year spends 184 days 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.

9. **When Domicile Changes**

a. This issue of “substantial part of the year” applies only to statutory resident cases. However, as shown below, the test for statutory residency may apply even in a situation where an individual changes domicile during the tax year.

The statutory residence test is applied to a taxable year during which a taxpayer has changed domicile from or to New York State.

The statutory residence test requires that a permanent place of abode be maintained “for substantially all of the taxable year,” which is generally interpreted to mean a period exceeding 11 months.

This test is applied if the taxpayer spent more than 183 days in the State and maintained a permanent place of abode for more than 11 months. If the taxpayer is determined to be a statutory resident, he will be taxed for the entire year even though his domicile may have changed during the year.

In *Smith v STC, 68 AD2d 993i*, the taxpayers moved from New York to Florida in July of 1970, but were unable to sell their home until 1971 leaving their furniture there, maintaining the home, and continuing the telephone and utility service. In September 1970 the taxpayer sold a large amount of corporate stock. Initially, the stock was taxed on the grounds that there was no change of domicile in 1970 and, therefore, the taxpayers were New York residents for the entire year. After a hearing on June 24, 1977, the Tax Commission held that although a change of domicile did occur in July, 1970, the taxpayers were taxable as residents for the entire year under Tax Law section 605(a)(2) since they maintained a permanent place of abode in New York for the entire year and spent more than 183 days in New York State.

10. **A Day Spent In New York**

A taxpayer who is maintaining a permanent place of abode bears the burden of proving that he spent less than 183 days in New York State or City for each year.

“Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Department of Taxation and Finance adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State.”

The description of a day in New York is not defined by statute. Section 105.20 of the New York Personal Income Tax regulations, however, states that “presence within New York State for any part of a calendar day constitutes a day spent within New York State.

a. Travel

Presence in New York is disregarded if it is solely for:

- “boarding a plane, ship, train or bus for a destination outside New York State.” For example, if a Connecticut resident travels to JFK airports to board a plane to Europe, the day is not counted toward presence in New York State.

b. Medical Days

The Appellate Division of the State Supreme Court ruled that “When a non-domiciliary seeks treatment for a serious illness, the time spent in the medical facility for the treatment of that illness should not be counted toward the number of days the taxpayer is determined to be in New York for statutory residency purposes.

11. **Resident Credit**

a. **General**

A taxpayer who has been determined to be a resident of New York State, either because of domicile or statutory residency, may be entitled to a resident credit for taxes paid to other states, localities within states, the District of Columbia or a province of Canada. The purpose of the credit is to alleviate the impact of double taxation on the same income by New York and other jurisdictions. The resident credit reduces New York State taxes only, it may not be claimed against New York City resident taxes.

The rules governing the applications of the resident credit are found in Tax Law 620 and the regulations thereunder.

b. **Requirements**

The Tax Law 620(a) requires that three elements must be proved to get the credit:

- i. That the income was subject to tax by the other state or political subdivision;
- ii. That the income was derived from the other state ; and
- iii. That the income was subject to tax under Article 22.

c. **Limitations**

Once it has been determined that the income being taxed by another jurisdiction qualifies for the resident credit, the amount allowable is subject to the following limitations:

- i. The credit for the taxable year cannot exceed the total of income taxes payable to the other jurisdictions.
- ii. The credit for the taxable year cannot exceed the amount obtained by multiplying the New York State tax payable by the percentage determined (numerator) by the taxpayer's total New York income (the denominator).
- iii. The credit for the taxable year cannot reduce the New York State tax payable to an amount less than would have been due if the income subject to taxation by the other jurisdiction was excluded from the taxpayer's New York income.

d. **Dual Residents**

Taxpayers who are determined to be residents of New York, either because of domicile or statutory residency, and are residents of another state as well, are subject to an additional limitation. This typically occurs where a taxpayer who is domiciled in a neighboring state regularly works in New York and is determined to be a statutory resident. These so-called dual residents are taxable on all their income, regardless of source, by both states.

Since the income includes items for which a resident credit would normally not be allowed, such as interest and dividends, the tax paid to the other state must be prorated by the following formula:

[Other State Income Subject to the Resident Credit X Total Tax Due to Other State/Total Income Taxable by the Other State]

e. **Other Considerations**

i. When the Credit can be Claimed:

The credit may be claimed “for any income tax imposed for the taxable year” by another jurisdiction. Thus, the credit can only be claimed on the New York return for the same year in which the tax is imposed by the other jurisdiction.

ii. Accrual

iii. S Corporation Shareholders