

Akerman Practice Update

TAXATION

June 2011

Avoiding the New York Residency Tax Trap

Eric W. Olson
eric.olson@akerman.com

Richard Bowers
richard.bowers@akerman.com

Warning: A finding of New York State or New York City residency against any individual living outside of New York but owning or leasing residential property in New York may result in severe tax consequences.

The New York State (NYS) and New York City (NYC) tax regimes are fraught with traps for unwary nonresidents and part-year residents. In order to avoid significant tax consequences, it is essential for any non-resident with a dwelling in New York to be aware of the applicable residency tests and to prepare properly tax returns and to maintain appropriate records and other legal documents in order to avoid the New York residency tax trap. Please keep in mind that while nonresidents are taxed by NYS only on their NYS income, NYS residents are taxed on their income from all sources. While NYC nonresidents are not taxed by NYC, NYC residents are taxed by NYC on all their income from all sources. The maximum individual tax rates are 8.97% for NYS and 3.876% for NYC; thus, leaving no doubt that a high-income earner will be loathe to fall into the residency tax trap.

Under NYS and NYC law, determination of residency is made by either the Domiciliary or Statutory Residency Test as explained below.

The Domiciliary Test includes any individual who maintains his domicile in New York which is the place the individual intends to be his permanent residence and



Akerman Senterfitt • Akerman Senterfitt LLP • Attorneys at Law

BOCA RATON DALLAS DENVER FORT LAUDERDALE JACKSONVILLE LAS VEGAS LOS ANGELES MADISON MIAMI NAPLES NEW YORK ORLANDO
PALM BEACH TALLAHASSEE TAMPA TYSONS CORNER WASHINGTON, D.C. WEST PALM BEACH

akerman.com

“The New York State (NYS) and New York City (NYC) tax regimes are fraught with traps for unwary nonresidents and part-year residents.”

the place he intends to return from absence. An individual can have only one domicile. Once established a domicile continues until the individual moves to a new location with the affirmative intention of changing his permanent residence. Thus, if one changes his domicile from New York, it is essential to substantiate that the new non-New York location is the individual's new permanent residence.

The Statutory Residency Test includes any individual who is **not domiciled** in NYS/NYC but who: (i) maintains a permanent place of abode in NYS/NYC, and (ii) is physically present in NYS/NYC for more than 183 days in any taxable year. Thus, one can be domiciled in another state but still be considered a New York resident for tax purposes by meeting both elements of this Statutory Residency Test.

A taxpayer seeking to establish that he is not a domiciliary of NYS/NYC bears the burden of proof under a subjective facts and circumstances test that weighs relevant facts. Factors considered include the individual's voter registration, driver's license, vehicle registration, location of safe deposit box, location of furniture and possessions, and location of personal items such as photos, collections, and heirlooms. Proper planning is essential to establish an individual's intention to establish a permanent home outside of NYS/NYC.

It is the two-part Statutory Residency Test, however, that New York taxing authorities most often use to categorize as residents well-to-do individuals who own multiple homes including one in New York. An individual who permanently maintains a dwelling place in New York satisfies the permanent place of abode requirement. Legal ownership of the dwelling by the individual is not required as ownership or lease by a trust or spouse may satisfy this element. Mere camps or cottages suitable only for vacation use are not permanent places of abode. But, in a recent case, a vacation home that lacked insulation was determined to be a residence after taxing authorities noted regular heating oil deliveries and year-round access by the taxpayer. Moreover, nonresident individuals who own New York rental or investment property must ensure that recorded real estate documents accurately demonstrate that the property owner does not reside at the address. A nonresident who buys a NYS/NYS home for a family member should not have keys to the dwelling, should enter into a written lease agreement with the family member, and should not pay residence-related bills.

Notwithstanding the possession of a permanent place of abode requirement of the two-pronged Statutory Residency Test, an individual may still be considered a nonresident if it can be demonstrated that he was not physically present in

“The maximum individual tax rates are 8.97% for NYS and 3.876% for NYC; thus, leaving no doubt that a high-income earner will be loathe to fall into the residency tax trap.”

NYS/NYC for more than 183 days in the taxable year. Physical presence means being physically present in New York for at least one moment during the day. Physical presence does not include travel through NYS/NYC or travel into NYS/NYC solely for transportation connections. The individual bears the burden of proving that he was not in NYS/NYC for not more than 183 days. Nonresidents who own a property in NYS/NYC but have a primary residence elsewhere have to document their whereabouts if audited. Auditors and tax tribunals will consider diaries, credit card slips, E-ZPass statements, email, ATM receipts, and phone records to establish an individual's whereabouts. In a recent decision, a hedge fund billionaire employed an assistant to document his whereabouts each day, including car service trips from his NYC office to his suburban home showing that he was out of NYC before midnight (to avoid a finding that he was in NYC the following day). When completing NYS/NYC nonresident and part-year resident tax return (Form IT-203), NYC part-year residents must disclose the number of months they lived in NYC. Although this form's instructions claims this information is needed for tax credit verification purposes, a part-year resident who acknowledges spending close to 183 days in NYC will unwarily increase the likelihood of a residency audit.

In closing, nonresidents who own NYS/NYC residential property should insure that they do not unwittingly trigger either of the residency tests resulting in significant state and local income tax consequences.

For more information please contact a member of our Taxation and Real Estate practice groups.

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2011) in number of lawyers and is the leading Florida firm. With 500 lawyers and government affairs professionals, Akerman serves clients throughout the U.S. and overseas from Florida, New York, Washington, D.C., California, Virginia, Colorado, Nevada, and Texas.

