



Originally published in the:
New York Law Journal

June 8, 2021

Recent Case Demonstrates Difficulties in Changing Domicile

Due to the pandemic, many New Yorkers are moving out of the city. Citing the recent decision in ‘Boniface,’ Joseph Lipari and Ellen Brody, in their Tax Appeals Tribunal column, discuss the difficulties most individuals will face in carrying out this change of residency.

By: Joseph Lipari and Ellen S. Brody

The COVID-19 pandemic disrupted the lives of millions of individuals. Forced to work remotely, many people decided the time was finally right to move out of New York state to environments that friendlier to their new lifestyles. The New York State Department of Taxation and Finance has indicated that it intends to audit those people who change their filing status starting with 2020 or 2021, whether due to a change in domicile or a reallocation of their days worked in New York state. The department has already begun issuing letters questioning nonresidents that changed their 2020 allocation of days worked inside New York—the letters questioning change of domicile cannot be far behind.

The difficulties most individuals will have in carrying out a change of residency are reflected in the recent determination of an administrative law judge in *Boniface*, DTA 829018 (N.Y. Div. Tax App., April 29, 2021). The Bonifaces had filed a 2013 Form IT-203 (New York State Nonresident and Part-Year Resident Income Tax Return) claiming a change in domicile from New York to Florida as of June 11, 2013.

New York, like many states, imposes a personal income tax on its residents’ worldwide income and on nonresidents that have New York source income, generally under N.Y. Tax Law §§601, 611 and 631. The tax law defines a New York state resident individual generally as: “an individual: (A) who is domiciled in this state, ... or ... (B) [who is not domiciled in this state but] who maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state.” N.Y. Tax Law §605.

Like many residency cases where the taxpayers maintain a permanent place of abode in New York state, the Bonifaces were careful to make sure they did not spend in the aggregate more than 183 days in New York state so they could not be deemed to be statutory residents under the law. Thus, they had only to prove that they changed their domicile from New York to Florida. The tax law regulations at 20 N.Y.C.R.R. 105.20(d) define domicile generally as “the place an individual intends to be such individual’s permanent home,” i.e., “the place to which such individual intends to return whenever such individual may be absent.” Once an individual establishes a domicile, such domicile “continues until the individual moves to a new location with the bona fide intention of establishing a fixed and permanent home there.” *Id.*

If an individual moves with the intention to remain in the new location for only a limited amount of time, a change in domicile will not be deemed to have occurred, “even though the individual sold or otherwise disposed of [his or her] former home.” *Id.* The taxpayer asserting a change in domicile has the burden of proof to establish by clear and convincing evidence such change actually occurred. Proving a change in domicile is a question “of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals.” *Matter of Newcomb*, 192 N.Y. 238, 250 (1908).

Through a long judicial history, a set of five factors has emerged as the dominant focus by Department’s audit division and the courts in determining whether there was a change in domicile: (1) time, (2) home, (3) active business, (4) near and dear items, and (5) family. 2014 Nonresident Audit Guidelines, State of New York, Department of Taxation and Finance, Income Franchise Field Audit Bureau, June 2014.

The time factor looks at how many days the individual spends in New York during the calendar year as compared with the number of days spent in the location that the individual claims to be his or her new domicile. The home factor compares the size and value of the homes that the taxpayer owns or rents in New York versus the size and value of the home in the claimed domicile. With respect to active business involvement, if the taxpayer has retired or taken a new job outside of New York, those facts will assist in establishing a change of domicile.

Courts have taken a negative view of taxpayers that continue to maintain a management or ownership interest in a business or occupation based in New York even if the taxpayer is able to do much of his or her work remotely. The near and dear factor examines the extent to which the taxpayer has moved near and dear items from New York to the new home. Near and dear items generally refer to heirlooms, collections, art or antiques, and family photos. The family inquiry focuses on whether the taxpayer has a spouse and minor children that live with them in the new domicile or if they stayed behind in New York. Family can also include aging parents that the taxpayer has to take care of or grandchildren that the taxpayer babysits.

Possibly the most significant factor in this case is that the taxpayers chose not to have an in-person hearing before the Administrative Law judge but instead chose to have the case decided on the written evidence submitted. The taxpayers submitted documentation that they took several steps to establish a change of domicile—such as getting Florida drivers’ licenses, applying for the Florida homestead exemption as Florida domiciliaries, and switching to doctors and dentists in Florida. However, by not testifying they could not adequately demonstrate their intent to change their domicile.

In addition, although their house in Florida was larger and more expensive than their home in New York, the evidence submitted by the state, including credit card records and cellphone statements, showed that they continued to spend more than five months a year at their home in New York. Mr. Boniface claimed to have retired several years prior to the move so he had no business ties anywhere. All of their children and grandchildren lived in New York. Mrs. Boniface claimed that her sister and other family members lived in Florida, but this evidence was not submitted through testimony or other documents but rather in a letter from their representative after the record had already been sealed by the administrative law judge. This letter from the representative also contained allegations regarding an antique car collection owned by Mr. Boniface that he moved to Florida as an example of the location of their near and dear items.

The ALJ's opinion gave little credence to the representative's letter, noting that "[a]side from the few documents included in the audit file showing the formal declarations identified above, petitioners' evidence consisted primarily of unsworn statements made in correspondence by petitioners' representative. While hearsay testimony is admissible, unsworn, unsubstantiated statements are not sufficient to meet petitioners' burden of proof" (internal citations omitted). The ALJ went on to say that the pictures and calendar submitted by the petitioners were not credible without sworn testimony as to what they depicted and how the inconsistencies in the calendar could be reconciled with the calendar submitted by the Department. Petitioners had the burden of overcoming the fact that they retained their New York permanent place of abode and spent significant time there each year and the record they provided simply did not contain sufficient evidence to meet their burden of proving that they had established a new domicile in Florida.

There is no indication in the determination as to the reason for the lack of testimony although the amounts at issue were relatively small and it could simply be a decision that the additional costs of a trial could not be justified. Even if the petitioners were able to testify, however, taxpayers who claim a change of domicile but continue to reside for almost one half of the year in New York rarely are able to satisfy the burden of proof necessary to prevail.

There is one other important point that individuals who have relocated outside New York due to the pandemic should keep in mind. An audit of a change of residency usually occurs 2-3 years after the year in question and a hearing before the administrative law judge can often be five or more years after the year of claimed change of domicile. Both the auditors and the judges have the benefit of 20/20 hindsight. In particular, if the taxpayers have moved back to New York by the time of the hearing, that factor might persuade a judge that the move out of New York was only temporary and that no change of domicile ever occurred.

Joseph Lipari and Ellen S. Brody are partners at the law firm of *Roberts & Holland*.

Reprinted with permission from the June 8, 2021 edition of the *New York Law Journal* © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. ALMReprints.com 877-257-3382 – reprints@alm.com.
