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Recent Domicile Determination Gives Taxpayers Reason for Optimism

By: Joseph Lipari and Jason K. Binder

In a famous opening line, Leo Tolstoy wrote "Happy families are all alike; every unhappy family is unhappy in its own way."[1] It might also be said that all taxpayers who are unsuccessful in claiming a change of domicile are alike, while every successful claim of a change of domicile is unique.

Two year ago, this column[2] criticized the determination of the Administrative Law Judge ("ALJ") in the case of taxpayer Eileen Taylor,[3] a woman who moved from New York City to London in 1999, and who, it was found, remained a New York State and New York City domiciliary through at least the year 2004, the latest of the years at issue. That determination was later affirmed by the Tax Appeals Tribunal (the "Tribunal"). Even though Ms. Taylor's situation differed in many respects from the fact patterns typically seen in change of domicile cases (many of which involve individuals who are in the process of retiring to Florida or some similar location), both the ALJ's and the Tribunal's opinions in *Taylor* were indistinguishable in tone from most of the Florida retiree cases. The *Taylor* opinions primarily focus on the presumption against a change in domicile, proceed to list Ms. Taylor's continuing ties to New York, and end by concluding that she had not proven by "clear and convincing evidence" that she had abandoned her New York domicile and had adopted a new one in London. While the *Taylor* opinions reminded tax professionals handling residency cases of the difficulties involved in successfully establishing a change of domicile, a more recent ALJ determination in *Matter of Cooke*[4] should give taxpayers reason for optimism. A comparison of the facts of the *Cooke* and *Taylor* cases, however, may leave some wondering why the Cooke family walked out of the proverbial courthouse happy while Ms. Taylor walked out unhappy.

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Residency Overview

A brief rundown of the residency rules will help frame the domicile issue at the heart of the *Taylor* and *Cooke* cases. Individuals who are residents of New York State are subject to the New York State Personal Income Tax ("PIT"), in general, on their worldwide income.[5] Nonresidents of the State, on the other hand, are taxed only on certain categories of income sourced in New York.[6]

The State and City define the term "resident" similarly, by reference to two alternative tests. An individual is a "resident of the State (or City) if either (i) the individual is "domiciled" in the State (or City) (the "Domicile Test"), or (ii) the individual both (a) maintains a permanent place of abode in the State (or City), and spends all or part of more than 183 days in the State (or City) (the "Statutory Residency Test").[7] In both *Taylor* and *Cooke*, the taxpayers were not present in New York (State and City, in Ms. Taylor's case, and City, in Mr. Cooke's) for more than 183 days, and, as a result, did not satisfy the Statutory Residency Test. Accordingly, the only issue was whether they were domiciled in New York.

State Regulations define "domicile," for purposes of the State, as well as the City,[8] income tax, as "the place which an individual intends to be such individual's permanent[9] home—the place to which such individual intends to return whenever such individual may be absent."[10] One's domicile remains fixed in a place unless and until one moves to a different place with the intention of permanently or indefinitely making one's home in that different place.[11] The burden is upon any person asserting a change of domicile to show that the necessary intention existed.[12] While a person can have more than one home, a person can have only one domicile.[13]

The courts have focused on facts indicating that the taxpayer has established a "home" in the claimed domicile as well as the location where the taxpayer's business activities are centered and the circumstances thereof; the location of the taxpayer's family ties; the location of social and community ties; and formal declarations of domicile (*e.g.*, driver's licenses, voting, citizenship, etc.).[14]

The Facts in *Taylor*

Ms. Taylor is a banker who, until 1999, was employed in New York City. That year she was promoted and relocated to London (with occasional business trips to New York). Ms. Taylor originally thought she would remain in London for only the three years of her contract. She testified that, by 2002, she had come to enjoy living in the UK and wanted to remain there permanently. She was again promoted, and thereafter she entered into a series of one-year contract extensions. Ms. Taylor has lived in London since that time. In 2004, after she had satisfied the UK's five-year physical presence requirement, Ms. Taylor applied for and was granted UK citizenship. She was entitled to and did retain her U.S. citizenship. She pays taxes to the United Kingdom as a resident.

The Facts in *Cooke*

Until 1984, the Cookes had undisputedly been New York City residents for about 20 years. That year, they finished construction on a house in the Hamptons and moved to such house. They continued also to own and live in an apartment in the City because Mr. Cooke's job was there and the Cookes' daughters were attending school there. But every weekend, as well as holidays and other special occasions, were spent in the Hamptons.[15]

In 1996, Mr. Cooke started working for a different company in Boston.[16] He rented an apartment there where he stayed during the workweek and, on the weekends, he returned to the Hamptons. Mrs. Cooke and the Cookes' daughters (until such time as they each in turn went off to college) continued to spend Mondays to Fridays in New York City. In 2002, the Cookes bought a more substantial home in the Hamptons, and Mr. Cooke continued to spend the workweek in Boston until 2006 when he retired.

The Courts' Analyses

Coincidentally, the audits in both *Taylor* and *Cooke* covered the years 2002-2004. In both cases, the Department argued that the taxpayers remained domiciliaries of New York (State and City, in Ms. Taylor's case, and City, in the Cookes'[17]). Ms. Taylor, the Department argued, had moved to London simply due to the exigencies of her career. The Cookes, the Department argued, were City dwellers who simply maintained the "proverbial second home Hamptons' lifestyle."

Ms. Taylor owns two residences in New York, an apartment in Manhattan and a house in Columbia County. She was present in New York less than 100 days each year at issue. Nevertheless, the Tribunal affirmed the ALJ's finding that Ms. Taylor did not prove a change of domicile during the years at issue. The Tribunal concluded that "at some point beyond the period at issue, what started out as a temporary requirement of her employer became her personal choice of commitment." The ALJ had emphasized that "there was no strong personal, as opposed to business and career driven, sense conveyed or apparent" that demonstrated Ms. Taylor's intent to remain abroad permanently and not to return to New York. The ALJ had stated in this regard, and the Tribunal agreed therewith, that since Ms. Taylor's non-work activities, consisting of attending church, patronizing the theater, and joining a health club, are consistent with activities one might ordinarily take up in any locale, Ms. Taylor had not, only by undertaking these activities, abandoned her New York domicile.

In contrast to the dismissive treatment of Ms. Taylor's ties to London, the ALJ determination in *Cooke* went into considerable detail regarding the description of items near and dear to the Cooke's situated in the Hamptons, the family's religious and social activities in the Hamptons, the daughters' extracurricular activities in the Hamptons, and even the fact that the daughters' bedrooms in the City apartment were converted to other uses once they went off to college but their bedrooms in the Hamptons homes were left undisturbed.

Perhaps the key ground for the ALJ's having found a change of domicile was the testimony that, regardless of where each of them spent the workweek, the family always gathered together on the weekends in the Hamptons. Almost as important seems to be the extent of the Cookes' social life out in the Hamptons, compared to their life in New York City, which the Court described as "utilitarian," and the extent and detail the taxpayers provided regarding the items kept in the Hamptons and the almost total lack thereof in the City. The one consistency between the *Taylor* and *Cooke* opinions is that if the court finds the reason for a taxpayer's being in a place was primarily "utilitarian," as London was for Ms. Taylor and New York City was for the Cooke's, the court will conclude that such place was not the taxpayer's domicile.

Conclusion

While we started off saying that every successful claim of a change in domicile is unique, nevertheless tax professionals handling residency audits involving a change of domicile issue can and should benefit from a careful review of the *Cooke* opinion. What was perhaps the decisive factor in the Cookes' having won their change of domicile claim is their advisors' ability to have turned a proceeding ostensibly about dry statutory requirements into a glimpse of a family's life together. In this regard, the *Cooke* opinion goes above and beyond a mere cataloguing of the "objective manifestations of subjective intent" supporting a change of domicile claim. Instead, the ALJ offers a sometimes poignant recounting of a family's history, their hopes and dreams, and most important, their love for each other, manifested by their commitment to year in and year out endeavor to be together at the same place, the Hamptons, at the same time.

Ms. Taylor, on the other hand, did not go out of her way to share the same sort of touchy-feely story with the court. There is little, if any, information regarding Ms. Taylor's personal life in her case's opinions. Rather, we are treated to a summary of what would otherwise be the bullet points in her resume, pages and pages of terms from her employment agreements quoted verbatim, and a detailed treatment of the improvements she made to the "ter-

race house" she purchased in London, among other relevant but arid findings of fact. The one fact that Ms. Taylor could have gotten more mileage out of was that she was godmother to not one but three children, all of whom lived in London and with whom she spent a considerable amount of time. To be named a child's godparent usually means the person is very close to the child's parents. Ms. Taylor, accordingly, had made time to develop close relationships with one or more families in London, and emphasizing her desire to participate in her godchildren's (London) lives would have helped her cause. So, too, apparently, would entering into evidence photo albums full of pictures of her with these godchildren.

While the Cookes seem to be a very happy family, which Tolstoy tells us makes their story none too different from any others, they and their advisors were able to personalize their claim of a change of domicile in such a fashion as to cause it to be successful. Ms. Taylor, on the other hand, provided the requisite level of factual detail, but was not able to turn her impressive life into a compelling story. Accordingly, like countless snowbirds the stories of whom with which she may share little in common, Ms. Taylor failed to make a successful claim of change of domicile. Happy families may all be alike, but that may be a small price to pay to be spared State and/or City tax.

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1 Anna Karenina (1877).

2 *See* Joseph Lipari and Debra S. Herman, *Recent New York Residency Cases Reveal Difficulties*, Vol. 245 N.Y. Law J. No. 47, at 3, Mar. 11, 2011.

3 *Matter of Taylor*, DTA No. 822824, ALJ Unit, July 8, 2010, *aff'd*, Tax App. Trib., Dec. 8, 2011.

4 DTA No. 823591, ALJ Unit, Nov. 15, 2012.

5 N.Y. Tax Laws § 612(a).

6 N.Y. Tax Laws § 631. Likewise, individuals who are residents of New York City are subject to the City PIT on their world wide income. N.Y.C. Admin. Code §§ 11-1701, 11-1711, and 11-1712. The City does not tax the income of nonresidents.

7 N.Y. Tax Laws § 605; N.Y.C. Admin. Code Sec. 11-1705(b).

8 *See* N.Y.C.R.R. § 290.2.

9 Case law has settled that the requisite intention need not be to permanently live somewhere else but only to live there indefinitely. *Matter of McKone v. State Tax Commn.*, 111 AD2d 1051 (1985), aff'd 68 NY2d 638 (1986) (*citing* 25 Am. Jur. 2d Domicil, § 25, at 19 (1966)).

10 N.Y.C.R.R. § 105.20(d)(1).

11 N.Y.C.R.R. § 105.20(d)(2).

12 *Id*.

13 N.Y.C.R.R. § 105.20(d)(4).

14 Coincidentally, the Department, in its examination of domicile during residency audits, also focuses on *five* primary "factors," albeit ones not entirely overlapping those of the courts': (1) home, (2) time, (3) items "near and dear," (4) active business involvement, and (5) family connections. *See* N.Y.S. Dep't of Tax'n & Fin., Income/Franchise Field Audit Bureau, *Nonresident Audit Guidelines* (June 2012).

15 Whether or not the Cooke's changed their domicile in 1984 was irrelevant because they continued to satisfy the Statutory Residency Test from that year until 1996.

16 As a result, for years after 1996 Mr. Cooke was not present in New York City for a sufficient number of days to be a Statutory Resident.

17 Although the court in *Matter of Cooke* up front frames the issue as whether the petitioners were domiciliaries of New York City, in its the analysis of the domicile issue, the court's emphasis focuses squarely on determining the domicile of Mr. Cooke. The court mainly glossed over the issue of determining the domicile of Mrs. Cooke. This is problematic because the State domicile regulation provides, in effect, for a presumption that "the domicile of a husband and wife are the same." *See* N.Y.C.R.R. § 105.20(d)(5)(i). The net effect of this regulatory presumption is that it must be proven that each of a husband and wife changed their domicile in order for a married couple's change of domicile argument to succeed. In other words, had the court analyzed the issue of Mrs. Cooke's domicile and found that she was domiciled in New York City, the regulatory presumption would have been implicated, and Mr. Cooke would also have been found to be a New York City domiciliary. The *Cooke* opinion would certainly have been bolstered by additional findings of fact specific to Mrs. Cooke and the objective manifestations of her intent to make the Hamptons her home.