March 11, 2011

Recent New York Residency Cases Reveal Difficulties

By: Joseph Lipari and Debra Silverman Herman

A few months ago, Julian Robertson won a significant victory in the Tax Appeals Tribunal by proving that he spent exactly 183 days during a taxable year in New York City and was not, accordingly, a statutory resident of the City.[1] That case warmed the hearts of many tax professionals who hoped that the case represented a loosening of the standards previously applied to residency cases. Three recent New York tax cases, however, throw cold water on these hopes and underscore the difficulties of contesting residency audits.[2] Conveniently for the writers of this article, each of the three cases focuses on a different one of the three major issues underlying residency cases: domicile, maintenance of a permanent place of abode, and calculation of day counts.

For those who have been lucky enough to avoid these issues until now, a very brief explanation of the rules is helpful. New York State and City tax resident individuals on their worldwide income.[3]

Nonresidents are taxed only on certain categories of income sourced in New York.[4] The State and City define the term "resident" similarly, with two alternative tests. An individual is a "resident" of New York if either (i) the individual is "domiciled" in New York, or (ii) the individual both (a) maintains a "permanent place of abode" in New York and (b) spends all or part of *more than* 183 days in New York (which is why Mr. Robertson was able to avoid New York City tax).

Domicile

Most domicile cases involve individuals who retire and move to Florida or some similar locale. Last year's Administrative Law Judge ("ALJ") determination in *Eileen J. Taylor* is notable in that it involves someone who moved for business. Ms. Taylor is a banker who, until 1999, was employed by Bankers Trust Company primarily in New York. Following the completion of the acquisition of Bankers Trust by Deutsche Bank, Ms. Taylor relocated to London and was designated the Chief Operating Officer ("COO") for global foreign exchange operations. This position required Ms. Taylor to be in London (with occasional business trips to New York).

Ms. Taylor originally thought she would remain in London for the three-year term of her agreement with the bank, which expired in the middle of 2002. She testified that, by 2002, she had come to enjoy living in the UK and wanted to remain there permanently. She was promoted to COO of the institutional client group, and 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 five-year physical presence requirement, Ms. Taylor applied for and was granted United Kingdom citizenship. She was entitled to and did retain her U.S. citizenship. She pays taxes to the United Kingdom as a resident.

The audit covered the years 2002-2004. The Tax Division argued that Ms. Taylor was taxable as a resident of New York State and City during those years on the basis that she remained a domiciliary of New York. She 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, although the ALJ indicated that it was reasonable to believe that she changed her domicile to London during some subsequent year, he held that Ms. Taylor did not prove a change of domicile during the years at issue.

The ALJ concluded that "the overriding sense is that Petitioner's presence in any particular locale turned, at least for years prior to, as well as during, those in issue, upon the basis of whatever was the most advantageous position with respect to the advancement of her career." The ALJ emphasized that "there was no strong personal, as opposed to business and career driven, sense conveyed or apparent" that demonstrated her intent to remain abroad permanently and not to return to

Joseph Lipari *and* ***Debra Silverman Herman*** *are partners in the law firm of Roberts & Holland LLP.*

New York. The ALJ stated, in this regard, 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, by undertaking only these activities, abandoned her New York domicile.

New York State has promulgated Nonresident Audit Guidelines relating to a variety of issues encountered in these kind of fact patterns.[5] In the examination of domicile, the Nonresident Audit Guidelines discuss five "primary" factors that are evaluated, with the objective of ascertaining whether these factors clearly establish domicile. The five factors are: (1) home, (2) time, (3) items "near and dear," (4) active business involvement, and (5) family connections. In *Matter of Taylor*, all but one of the primary domicile factors - family, point to London. Even though Ms. Taylor retained her historic New York home, there was no ongoing pattern of presence nor active business and social contacts in New York, other than with her immediate family whom she saw for approximately a month during each of the years at issue.

Although it may be unfair to second guess a subjective determination by an ALJ, we suspect Ms. Taylor would have succeeded in proving a change of domicile if she had attributed her decision to remain in London to falling in love and wanting to start a family there.[6] We also suspect that a decision by a man to change his domicile to London for business reasons would have been given more credence than the decision of a woman.

Permanent Place of Abode

A recent decision by the New York State Tax Appeals Tribunal, in *Matter of Barker*,[7] has received considerable press over the past several weeks.[8] The case demonstrates that a residence will be characterized as a "permanent place of abode" even though the house is rarely used.

The taxpayers, Mr. and Mrs. Barker, were domiciled in Connecticut where they lived with their three young children. Mr. Barker, an investment manager, commuted every day from his home in Connecticut to his office in New York City, thus spending in excess of 183 days in New York. The Barkers purchased a home in Napeague, New York, a town in East Hampton, as a summer beach vacation home. During the three years at issue, 2003-2005, the Barkers were present in Napeague for just 19, 16, and 18 days, respectively.[9] The Napeague home had year-round heat, electric and telephone service, hot water, and cable television and Internet service. In addition, Mrs. Barker's parents stayed at the home several days a week during the summer months, as well as numerous weekends throughout the year.

The Tax Law does not define the term "permanent place of abode," but the regulations provide the following:

> [a] dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. . . . However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent placeof abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.[10]

The taxpayers argued that they were not residents of New York because the Napeague home "is not *their* permanent place of abode and is unsuitable to be used as such," primarily due to the size of the residence (*i.e.*, "cramped eating quarters") and based on Mrs. Barker's parents' liberal use of the residence.

The Tribunal rejected the taxpayers' argument that the taxpayer's subjective use of a dwelling is the proper standard for determining the permanent place of abode question. Specifically, the Tribunal held that "it is well settled that a dwelling is a permanent place of abode where, as here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling. There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."

The Tribunal's casual dismissal of the argument that the use of the residence by Mrs. Barker's parents meant that it was not the taxpayers' permanent place of abode, and the Tribunal's statement that there is no requirement that the taxpayers actually dwell in the abode, is troubling. For example, the out-of-state parents of a young adult in or out of school may obtain housing for their child by purchasing an apartment for the child's use or by co-signing a lease. In many cases, the parents have no intention of ever staying in the apartment and may not even have a key. Real estate investors often own apartment buildings or individual apartment units that are held for rental to third parties. It is difficult to conclude that these units are "permanent places of abode" for the out-of state owners. The concept of maintaining a permanent place of abode must include, as a prerequisite, some basis for concluding that the house or apartment is a "residence" of the taxpayer.

More seriously, whether or not the decision in *Barker* is justified under the language of the statute, treating a vacation home as a permanent place of abode substantially expands the definition of residency beyond its intended reach. Historically, defining "resident" to include someone who maintains a permanent place of abode and spends more than 183 days during the year was designed to minimize disputes with individuals who claimed to be nonresidents but who lived in New York a substantial part of the year.[11]

Applying this language to individuals who maintain apartments near where they work is arguably consistent with the historic approach, at least as a matter of administrative convenience, since otherwise there would be continuous litigation over how much use of the New York City apartment would be enough to cause it to be a residence. In cases like *Barker*, however, no one could reasonably claim that they "reside" in New York in any ordinary sense of the word. Such a definition is

constitutionally suspect and is unjustifiable as a matter of tax policy.

The New York Court of Appeals previously reviewed the background of these provisions in *Tamagni v. Tax Appeals Tribunal*.[12] In that case which involved a New Jersey domiciliary who commuted into New York City where he had an apartment he used periodically, the court noted that the original aim of the "statutory residency" provisions was not to expand the reach of New York's personal income tax to draw in the worldwide income of nondomiciliaries who only had transitory, non-abiding connections with the State. The Legislature, instead, had amended the definition of "resident" in 1922, to include a person maintaining a permanent place of abode and spending a sufficient number of days in New York, in order to "discourage tax evasion by *New York residents*."[13] The purpose underlying the State's statutory residency rules was:

> "[to] serve the important function of taxing those 'who while really and [for] all intents and purposes are residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents.'"[14]

Even if one accepts the decision in *Tamagni*, New York should not be given unlimited discretion in defining who is or is not a resident and the characterization of the Barkers as residents is difficult to accept.

The 183 Day-Count Test

A recent Administrative Law Judge decision, *Matter of Puccio*,[15] illustrates the difficulties of the 183 day-count part of the statutory residency test. Mr. Puccio, and his wife were domiciled in Connecticut and maintained a cooperative apartment in New York City during 2003, the tax year at issue. Mr. Puccio maintained law offices in New York and Connecticut. Under the statute and regulations, if an individual maintains a permanent place of abode in New York, the taxpayer is required to maintain very careful documentation of the individual's whereabouts at all times, and to retain such records for several years, in order to demonstrate that the individual was not present in New York more than 183 days in any year.

Since Mr. Puccio did not keep a contemporaneous calendar as to his whereabouts, the ALJ considered testimonial evidence and documentary evidence. With respect to documentary evidence, the ALJ rejected transcripts of criminal proceedings outside New York, which failed to list Mr. Puccio as present, as sufficient evidence of his whereabouts outside New York. In addition, the ALJ afforded little weight to affidavits from third party vendors that failed to specifically attest to Mr. Puccio's presence at their retail location on given dates.

The regulations make clear that any part of a calendar day is counted as a New York day.[16] Due to the proximity of Mr. Puccio's office and home in Connecticut to his New York office, and the documents in the record, it was not unusual for the taxpayer to be in Connecticut for part of a day and New York for the other part. This points out the enormous challenge of complying with these requirements. In some sense, it is almost impossible.

Evidence that the individual is in Connecticut at various points during the day and night does not eliminate the possibility that the individual drove across the border at some point. It becomes critical that the individual both maintain a contemporaneous diary and detailed corroborating records as to his whereabouts (such as credit card and ATM charges) so that he can credibly testify on the stand that he knows where he was on any particular date because he knows that the diary is accurate. Even in the best case, day count audits and litigations are grueling and incredibly expensive if the individual is in New York anywhere close to 183 days.[17]

Conclusion

Residency audits continue to represent the largest category of audits by the State and City tax departments. The three cases described above illustrate the difficulties taxpayers and their representatives have in responding to residency audits. Two of the determinations may be hard to dispute. The taxpayer in *Puccio* was a victim of his own failure to maintain records, and the taxpayers in *Barker* were victimized by language in the statute that should be changed but may be difficult for a court to ignore. However, we don't have a good explanation for the determination in *Taylor* and believe the case should have gone the other way.

---

1 *Matter of Robertson*, DTA No. 822004, N.Y.S. Tax App. Trib., Sept. 23, 2010, aff'g N.Y.S. Tax App. Trib., ALJ Unit, Oct. 15, 2009.

2 *Matter of Taylor*, DTA No. 822824, N.Y.S. Div. of Tax App., ALJ Unit, July 8, 2010; *Matter of Puccio*, DTA No. 822476, N.Y.S. Div. of Tax App., ALJ Unit, Jan. 27, 2011; *Matter of Barker*, DTA No. 822324, N.Y.S. Tax App. Trib., Jan. 13, 2011, aff'g N.Y.S. Div. of Tax App., ALJ Unit, Nov. 19, 2009.

3 N.Y. Tax Laws § 611, N.Y.C. Admin. Code § 11-711.

4 N.Y. Tax Laws § 631. New York City does not tax the income of nonresidents.

5 N.Y.S. Dep't of Tax'n & Fin., Income Franchise Field Audit Bureau, *Nonresident Audit Guidelines* (2009).

6 It is also possible that Ms. Taylor did have close personal and romantic relationships in London during the years at issue, but that she naively concluded that her love life was none of the Court's business.

7 DTA No. 822324, N.Y.S. Tax App. Trib., Jan. 13, 2011.

[8] Cara Buckley, *In City Often? Tax Man Asks Some for Tally*, N. Y. Times, Feb. 24, 2011, at A-1; Craig Karmin, *Second Homes May Be Costly At Tax Time*, Wall St. J., Feb. 17, 2011, at A-21; Craig Karmin, *Out-of-State Owners Could Face Tax Bill*, Wall St. J., Feb. 11, 2011, at A-15.

[9] DTA No. 822324, N.Y.S. Tax App. Trib., Jan. 13, 2011.

[10] N.Y.C.R.R. §105.20(e).

[11] *See* Memorandum of N.Y.S. Dept. of Taxation & Finance, 1954 N.Y. Legis. Ann., at 296 (noting, in support of the 1954 amendment to the statutory residence provision, which established the 183 Day-Count part thereof, that it was necessary to deal with "many cases of avoidance and … evasion" of income tax by New York residents).

[12] 91 N.Y.2d 530 (1998), *cert. denied*, 525 U.S. 931.

[13] 91 N.Y.2d at 535 (emphasis added).

[14] *Id*. (quoting Memorandum of N.Y.S. Tax Department, Bill Jacket L., 1922, ch. 425).

[15] *Matter of Puccio*, DTA No. 822476, N.Y.S. Div. of Tax App., ALJ Unit, Jan. 27, 2011.

[16] N.Y.C.R.R. 105.20(c). There is an exception for days spent in New York solely for purposes of travelling (e.g., driving from Connecticut to JFK Airport and boarding a plane). Rarely is this exception a determinative factor in a case.

[17] The ALJ Determination in *Robertson* notes that the trial took four full days.

Reprinted with permission from the March 11, 2011 edition of the *New York Law Journal*
© 2017 ALM Media Properties, LLC,
All rights reserved.
Further duplication without permission is prohibited.
ALMReprints.com – 877-257-3382 – reprints@alm.com.