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THINKING OF MOVING OUT OF STATE? MAYBE YOU WANT TO REDUCE YOUR TAXES. PERHAPS YOU ARE NOW WORKING REMOTELY (AND MAY BE FOR SOME TIME). MAYBE IT'S JUST TIME FOR A CHANGE? CHANGING YOUR DOMICILE TO A STATE WITH A LOWER TAX ENVIRONMENT MAY BE ATTRACTIVE. HOWEVER, THE STATE YOU LEAVE MAY NOT LET YOU GO SO EASILY.

State of change

Changing your domicile to another state may cut your taxes, but the state you leave may not let it go so easily.

By Nicholas J. Bertha, JD, *Director of Wealth and Trust Planning*

Just ask Derek Jeter, Madonna, or Martha Stewart.

With income tax rates topping 50% (for Manhattan residents), some of the highest real property tax rates in the U.S., a death tax that can reach 16%, New Yorkers have long had plenty of reasons to head for more tax-friendly states.

Now, add to that the COVID-19 era and the phenomenon of professionals contemplating working remotely, on a permanent basis, from what were once second homes. New Yorkers may think their biggest challenge is competing for moving vans, but they would be wrong.

It's the taxing authority that they thought they were leaving behind.

You can check out any time you like, but...

Derek, Madonna and Martha are just three high-profile cases that represent the lengths the state of New York will go to in order to retain the tax revenue of people who try to leave. They are but a tiny fraction of the 5,000 income tax audits a year and about 300 field auditors dedicated to residency audits – a gauntlet that requires advance preparation and constant diligence.

For those who prepare, the rewards are great. But the rules are fuzzy, voluminous, and require careful recordkeeping.

Salt on the wound

In 2017 alone, according to U.S. census data, over 63,000 New Yorkers moved to Florida alone, with more leaving for other low-tax states. It would seem the out-migration had reached a tipping point, but then came the 2018 American Tax Cuts and Jobs Act (ACTJA). Under ATCJA, as most know, the state and local tax (SALT) deduction is limited to $10,000. This is a fraction of what the deduction had been for many taxpayers in high-local-tax state environments. Then add to this, driven by the COVID-19 pandemic, the newly evolving culture of working remotely and you have a prescription for new highs in emigration to lower tax states.

So, off you go. But not so fast! It might not be a bad idea to first go over some of the rules of the road when it comes to changing states. Let's get started.

The basics

It all begins with domicile. Domicile is an old English common law concept that at its most basic level simply means home. And for many legal purposes, including where you owe taxes, you can have just one. New York State defines it as "The place you intend to have as your permanent home. Where your permanent home is located, and where you intend to return to after being away." And it tells us, "You can only have one domicile." Moreover, your New York domicile does not change until you can demonstrate not only that you have abandoned it, but that you also have established a new domicile outside New York State.[1]

1. This is known as "Leave & Land"

However, it goes on to say that, even if you are not domiciled in New York, you will nonetheless be considered a resident for income (although not estate) tax purposes if you maintain a permanent "place of abode" there for more than 11 months of the year and spend 184 or more days (and any part of a day counts as a full day) in the state during the tax year. This is known as being a statutory resident,[2] which for tax purposes is the same as a domicile.

The Reality

So then, you might ask, how does one effectively escape the orbit of the Empire State? The first thing is to do everything you can to establish domicile in another state. You might think that owning a home, registering to vote, obtaining a driver's license, registering your automobiles, drafting local estate planning documents, club memberships etc. would be enough (in Florida, for instance, you would also file for a Florida Declaration of Domicile and a homestead exemption for your Florida residence). These are necessary, but they are not sufficient.

It all really boils down to the much-feared New York Residency Audit, which for NYS is famously widespread, and aggressive. And, it is far more subjective than you might imagine.

It focuses on five primary factors:

1. *Home:* If there are residences in two states, which is the bigger or more expensive, in which have you invested more in refurbishing and upkeep? Which is owned versus rented? And importantly, to what degree to you maintain strong and enduring ties to your former community?
2. *Active Business Involvement:* An individual's continued employment in New York State, or active participation in businesses located in the state can also point to domicile.
3. *Time:* It is important to realize that while spending 183 days or less in New York will save you from being considered a "statutory resident" for income tax purposes, it not necessarily determinative of non-New York domicile. For example if a person has homes in New York and Texas and begins spending seven months in Texas, instead of their previous six months, if other factors suggest otherwise they could still be considered to be domiciled in New York.

Unfortunately, the burden of proof is on you, the taxpayer, to establish your days absent from the state

4. *Items Near and Dear to Heart:* An interesting category! Here the auditor will look to see where items of significant sentimental value are kept. For example, family heirlooms, works of art, collections of books, stamps and coins, family photo albums, pets, etc. To the degree possible, their situs should be documented by moving bills, insurance records, video recordings, etc.
5. *Family Connections:* This is generally limited to your spouse and minor children (although it can be expanded, for example, to grandchildren.) Often the audit will examine where children are enrolled in school, or where they return when on break.

Only when these primary factors do not produce "clear and convincing" evidence will the state look at "secondary factors," such as voter registration; registration of motor vehicles; an analysis of telephone, cable and utility bills; drivers' licenses, etc. Again, factors that you very well might have considered primary.

So let's say, after all of that, the auditor is convinced you are not domiciled in New York. Not to worry. They will pivot effortlessly toward determining if they can classify you as a "statutory resident." Again, a statutory resident is anyone who maintains a "permanent place of abode" in the state for more than 11 months of the year and spends 184 or more days there. A permanent place of abode is described as a "dwelling 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."

It also requires that the taxpayer have a "residential interest" in that property. For example, if a son buys his mother an apartment and on occasion spends the night there on the couch, he does not necessarily have a residential interest in the dwelling.

Of course, the part that causes sleepless nights is the 184-day rule. Unfortunately, the burden of proof is on you, the taxpayer, to establish your days absent from the state. You can do this any number of ways including credit card receipts, cell phone records, ATM withdrawals, Uber and

2. New York City's rules are identical on all counts.

Yellow Cab receipts, EZ Pass records and even security swipe cards that provide access to office buildings, as well as maintaining a daily diary of where you are physically present.

Yes, it's as easy as that!

And again, any portion of a day counts as a whole day. Mitigating this, to some degree, are exceptions for medical and travel days (e.g. changing planes at LGA), as well as the fact that auditors are instructed to be reasonable and apply common sense in this area. If someone has a record of a round-trip ticket from NYC to West Palm Beach over a two week period, it is reasonable to assume they did not otherwise return to New York during that timeframe.

Pop Quiz

A prominent family (who will remain anonymous), long-time New York City residents, moved to Washington D.C. a few years ago, where the patriarch had taken a new job which he, at that time, hoped to hold for a period of up to eight years. A medium-sized Washington mansion comes as a perk of that job. Yet, they continue to own a large, expensive apartment in a luxury high-rise on Fifth Avenue in Manhattan, which they do not have plans to sell, and to which they intended to return after his stint in the nation's capital. They have other residences too, including frequently used ones in Palm Beach, Florida and Bedminster, New Jersey.

They keep some of their personal possessions in their Washington home, but probably more still in the Fifth Avenue apartment and other residences. The patriarch, while working full time in Washington, does have many other business interests including some in New York. Also, many of his children, their spouses, and his grandchildren live in NYC as well. Yet, he travels extensively, and spends most nights in his D.C. residence. And having said all of that, neither of the couple spend anywhere near 184 days in New York State and they have meticulous records to prove it.

So, must the family file a New York State income tax return? Should the patriarch, God forbid, pass away while in his current job in Washington, be subject to New York estate tax?

You probably got it right. The answer is likely yes on both scores. Remember how New York defines domicile? "The place you intend to have as your permanent home. Where your permanent home is located, and where you intend to return to after being away."

Moreover, a person can have only one domicile, though they may have many other places to live. Were a Residency Audit to occur, an application of the five "primary factors" would almost certainly reach the same conclusion. Inasmuch as that is the case, an auditor would not bother to try to establish statutory residency (an attempt would certainly fail). Even though the family does have a permanent abode in New York, they would clearly not fall prey to the 184-day rule.

Conclusion

Unfortunately, there are now more reasons than ever to consider bailing out of states with high-tax environments, not the least of which is the new federal tax law severely limiting the deductibility of those taxes on your Federal income tax return, and now the recent dramatic shift to working remotely, be it from your second home, or even your parents home, which may well not be in a high-tax state.

If you are going to make a run for the border, take pains to look (and plan) first. While you may feel that you know which boxes must be checked in the process of changing states (or if you have already moved, and already checked them), the tax authorities in your former home state may, in all their wisdom, see it very differently.

We have focused here on New York because its audit pattern is the most frequent and aggressive. As in many things, if you can make it there, you'll make it anywhere. If you have left another high-tax state, or are planning to do so, meeting New York's requirements will position you well for anything your own ex-state might throw at you.

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