State Tax Observations

New York Residency Audits: Keys to Preventing a Nightmare

By Sandy Weinberg, Principal, Alan S. Kufeld, Partner and Jill Cantor, Manager

"Taxpayer Hell!" screamed a headline in a *New York Magazine* article addressing New York State residency audits. That was more than twenty years ago. Some things never change. Or they get worse. These days, residency audits can be invasive, long, arduous, and document-intensive. Auditors are now more sophisticated and readily use subpoena power to obtain information. And, they ask sensitive personal questions, while delving into your lifestyle.

Seems daunting. Nevertheless, knowledge is power. Understanding where auditors focus, knowing your burden and being aware of the evidence needed can mitigate your pain, and most importantly, improve your chances of success. It helps also to know your facts, plan ahead, know the pitfalls and to push back at the right times too.

Why the Worry?

Nonresidents are taxed only on the portion of income sourced to New York State. (In New York City, nonresidents do not pay New York City personal income tax.) Residents are taxed on all income. The difference can be great for anyone with significant investment income. Residency audits have reportedly generated more than $1 billion for New York State.

And, the burden of proof in a residency audit is on you. The evidence must be "clear and convincing." A taxpayer must present a compelling case, supported by careful recordkeeping and documentary evidence. Otherwise, with the wrong facts or presentation, you can be deemed, for example, a resident in two states.

Domicile and Statutory Residency Tests

Auditors determine residency if either of two tests — domicile or statutory residency — is met.

For the domicile test, despite common perception, where a taxpayer is registered to vote and licensed to drive are not generally significant. Instead, there are five critical factors:

1. **Home** – When comparing homes look to size, value and use of the residences.
2. **Active Business Involvement –** Is the taxpayer controlling a New York business from afar?
3. **Time** – Look to the percentage of time spent respectively in the old vs. new locations.
4. **Near and Dear Items** – Where is the wine cellar, the artwork, the auto collection, other valuables?
5. **Family Connections** – Where do minor children attend school? Where is the spouse/partner located?

Further, it's important that you "leave" the old home behind and "land" in and establish a new one.

For the second test, a statutory resident is one not domiciled in New York but who maintains a "permanent place of abode" in New York AND spends more than 183 days of the year in New York. A permanent place of abode is a dwelling place with running water, heat, etc. throughout the year.

For the 183 day test, any part of a day in which you set foot in New York is a New York “day,” except for a presence in New York just for travel (i.e., simply flying in or out of a New York airport) and days spent in New York for in-patient medical treatment. A nonresident taxpayer who maintains a personal place of abode in New York must closely track his or her time spent in New York vs. elsewhere. The taxpayer should be able to document the days outside of New York via journals, credit card receipts, EZ Pass records, utility statements, bank records, limo vouchers, country club bills and phone records. In recent years, auditors rely on cell phone tracking, attendance swipe card logs and even flight occupancy records to demonstrate that a taxpayer was present in New York.

Avoid Pitfalls and Find Opportunities

Here are just a few planning tips and opportunities:

- Statutory residency may be avoided if you sell your New York place of abode before the 11th month mark in the year – even if you were in the state for more than 183 days.
- Don’t claim a credit paid for taxes paid in other states; this is an indication you are a New York resident.
- Don’t claim a STAR credit or exemption; this is only for New York residents.
- If you sell your New York home and take an IRC Section 121 home sale exemption, note this is only available for your primary residence – an indicator of where you are domiciled.
- Don’t claim you changed domiciles on January 1 of the year. This is a red flag. No one moves on January 1.
- Monitor your days. If your New York day count gets close to 183 in the middle of December, then for the remainder of the year work or vacation outside of New York if possible.

Be Mindful

It is imperative that taxpayers be wary of the numerous traps and tips before being contacted for an audit. Once an audit begins, knowing how to manage it is critical.

Contact Us

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