



On the Subject

New York's Revised Nonresident Audit Guidelines: A Tool for Taxpayers?

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On June 18, 2014, the New York State Department of Taxation and Finance (Department) published a revised version of its Nonresident Audit Guidelines (Audit Guidelines).² The Audit Guidelines are (and have been) issued by the Department to provide guidance and advice to Department audit staff in connection with examinations involving whether certain individuals are residents of New York State and/or New York City for purposes of New York's personal income tax³ and to ensure uniformity and consistency in these examinations.⁴ These Audit Guidelines, while nonbinding,⁵ represent the Department's views on various issues that arise in New York residency audits and can be—and have often

proven to be—a helpful resource to those engaged in contentious residency disputes.⁶

The June 2014 version of the Audit Guidelines primarily incorporates the Department's views on the New York State Court of Appeals (the state's highest court) decision in *Matter of Gaied v. New York State Tax Appeals Tribunal*.⁷ However, other less obvious but still important revisions to the prior guidelines were made—many of which are taxpayer friendly and should be explored by those engaged in ongoing audits and litigation. This article discusses the most significant of the

⁶ The 2014 Audit Guidelines, as was the case with prior versions, cover both (1) domicile audits, in which auditors examine whether an individual is domiciled in New York by looking at the individual's home, active business involvement, time spent in New York, items near and dear, and family connections and (2) statutory residency audits, in which auditors examine whether an individual maintains a permanent place of abode in New York and is physically present in New York for more than 183 days.

⁷ 22 N.Y.3d 592 (Feb. 18, 2014). Two basic elements characterize whether a dwelling is an individual's permanent place of abode: the permanence of the dwelling (*i.e.*, it must be suitable for year-round living) and the nature of the individual's relationship to the dwelling. See 20 NYCRR 105.20(e) ("A permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer ... a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."); *Matter of Evans v. Tax Appeals Tribunal*, DTA No. 806515 (N.Y. Tax App. Trib. 1992), *aff'd*, 199 A.D.2d 840 (N.Y. App. Div. 3d Dep't 1993) (stating that "the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence in this context must encompass the physical aspects of a dwelling place as well as the individual's relationship to the place."). *Gaied* addresses the "nature of the relationship" piece of the permanent place of abode analysis. Mr. Gaied was domiciled in New Jersey and owned a multi-apartment house in New York City. Mr. Gaied's parents lived in the first-floor apartment and unrelated tenants occupied the rest. Mr. Gaied's parents had no income and each suffered from a chronic illness, and Mr. Gaied paid all the expenses related to the first-floor apartment. Mr. Gaied had no bed or bedroom at his parents' apartment and did not keep clothing or personal effects there. He occasionally spent nights there at his parents' request because of their health concerns. He slept on a couch whenever he did so. The Court of Appeals overturned the decision of the Third Department (which, along with the Tax Appeals Tribunal, had decided that the apartment was Mr. Gaied's permanent place of abode) holding that Mr. Gaied lacked the requisite residential interest in the apartment to characterize it as his permanent place of abode.

¹ *The authors would like to thank Arthur R. Rosen for his contributions to this article.

² The revised guidelines update the Department's prior Nonresident Audit Guidelines, which had been in place since June 2012.

³ Under both the New York State and the New York City personal income taxes, a resident individual is defined generally as a person who is either (1) domiciled in the state/city or (2) maintains a permanent place of abode in the state/city and spends in the aggregate more than 183 days of the taxable year in the state/city (statutory residency). N.Y. Tax Law § 605(b)(1); N.Y.C. Admin Code § 11-1705(b).

⁴ 2014 Audit Guidelines, p. 4.

⁵ The Audit Guidelines specifically provide that they "have no legal force or effect nor do they establish precedent in the particular subject matter. They are generally binding on audit staff who are expected to follow the rules and procedures outlined in the guidelines when conducting an audit."

Department's revisions, including changes to its views on both domicile and residency audits.⁸

Changes to the Department's Views on Domicile Audits⁹

The Audit Guidelines contain two noteworthy changes to the instructions provided to Department auditors when conducting domicile audits. The first change is primarily procedural, and advises auditors that they should not request information regarding the family connections factor until the auditor has evaluated the residency questionnaire sent by the auditor in his or her initial communication with the individual (due to privacy concerns). The second change is more substantive, and concerns the analysis of whether an individual has acquired a foreign domicile.

With respect to the privacy concern and the family connections factor, this revised policy addresses the pleas of many individuals and practitioners regarding the heavily intrusive nature of New York domicile audits; "[t]he Department recognizes that the analysis of an individual's familial connections could be intrusive into one's private and personal lifestyle."¹⁰ To address this, the Department instructs its auditors that "an analysis of family connections should generally be limited to the taxpayer's immediate family when necessary to reach a decision on domicile." This statement

suggests that, while "family connections" is still regarded as one of the five primary factors, it may be the least important of the five—the examination of which will generally be limited to those situations where an analysis of the first four factors (home, active business involvement, time spent, and items near and dear) leads to an inconclusive result.

With respect to foreign domicile, the Department changed the title of the Audit Guidelines section discussing the application of the active business involvement factor in foreign domicile cases from "Retention of New York business interests"¹¹ to "The nature of the taxpayer's business ties."¹² This change appears to be in response to a 2011 New York State Tax Appeals Tribunal decision in which an individual was found to be a New York domiciliary despite her relocation to London, England. In *Matter of Eileen J. Taylor*,¹³ the Tribunal held that the individual remained domiciled in New York City from 2002 to 2004 because her presence in London was contingent upon her employer's desire to keep her there. In the new "Nature of taxpayer's business ties" section, the Department cites *Taylor* and provides that "a comparison of active business ties in foreign domicile cases would not necessarily be an accurate measure of one's intention to change domicile if the foreign assignment is of a temporary nature. This is true whether the individual is an employee or a business owner."¹⁴ While *Taylor* has been used by Department auditors to argue that individuals have not established a change in domicile from New York to a different location, it is important for taxpayers and practitioners to recognize that this rationale cuts both ways; both the case and the Department's view of that case can support an argument that a temporary New York employment opportunity does not necessarily establish a New York domicile.

⁸ The 2014 Audit Guidelines also provide a more detailed explanation on how to compute the New York resident credit for taxes paid to another state for individuals who are dual residents (e.g., an individual who is domiciled in Connecticut and is a statutory resident of New York). In a change from the 2012 Audit Guidelines, the 2014 Audit Guidelines expressly provide that dual residents calculate their resident credit based on the total amount of tax due to another state *before any credit previously claimed for taxes paid to New York*. 2014 Audit Guidelines, p. 79. The 2014 Audit Guidelines also include a detailed, step-by-step example that should help dual residents calculate their New York resident credit. 2014 Audit Guidelines, p. 80.

⁹ A domicile audit will involve a review of what the Department refers to in the Guidelines as the "five primary factors." The five primary factors are: (1) home, (2) active business involvement, (3) time, (4) items near and dear, and (5) family connections. 2014 Audit Guidelines, p. 14. In analyzing the primary factors, auditors are advised to "look at the New York ties for the specific factor in relation to the ties for the factor that exist in other locations." For example, an analysis of the "home" factor will involve comparing an individual's residence in New York to any residence that he may own or occupy outside of New York, looking at specific factors such as size, value and nature of use. See 2014 Audit Guidelines, pp. 18-20. Similar analyses are performed on each of the five primary factors. Certain "other" factors (e.g., state of driver's license, state of voter registration, location of bank accounts) may be considered *only if* a basis has been established for considering New York as the individual's domicile from an analysis of the primary factors or where the primary factors are at least equal in weight for New York and another location. 2014 Audit Guidelines, p. 38.

¹⁰ 2014 Audit Guidelines, p. 32.

¹¹ 2012 Audit Guidelines, p. 48.

¹² 2014 Audit Guidelines, p. 48.

¹³ DTA No. 822824 (N.Y. Tax App. Trib. Dec. 8, 2011).

¹⁴ 2014 Audit Guidelines, p. 48.

Changes to the Department's Views on Statutory Residency Audits

IEWS ON “PERMANENT PLACE OF ABODE”

With respect to statutory residency audits, the majority of the changes in the 2014 Audit Guidelines reflect the Department's views on the Court of Appeals decision in *Gaied*. Interestingly, the Department states that the *Gaied* decision “is consistent with current Audit policy that the taxpayer must have a relationship to the dwelling for it to constitute a permanent place of abode.”¹⁵ This statement appears contradictory to the experiences of many practitioners and individuals involved in residency audits, who have found that Department auditors often assert that merely owning a dwelling in New York—regardless of the individual's actual, residential use of the apartment—is a sufficient basis on which to conclude that the dwelling constitutes the individual's permanent place of abode.

Although it is debatable whether “current” audit policy requires Department auditors to examine an individual's actual relationship to a purported permanent place of abode, the 2014 Audit Guidelines establish clear factors that auditors are to consider, namely, whether the individual: (1) has property rights to the dwelling; (2) maintains the dwelling either in money or in kind; (3) uses the dwelling or otherwise has access to it; (4) has a relationship to other occupants of the dwelling (and the nature of that relationship); (5) has separate living quarters or keeps personal items at the dwelling; and (6) uses the address of the dwelling for government or business purposes. The Guidelines now also make it clear that “[w]hile the possession of property rights and the making of contributions either in cash or in kind are two important aspects to be considered in evaluating a taxpayer's relationship to a residence, by themselves they would not necessarily make a dwelling a PPA, *without more*.”¹⁶ Likely to this point, the Guidelines no longer include a discussion of *Matter of John & Gail Boyd*,¹⁷ (a case in which a taxpayer who was contributing more than 50 percent toward his mother's household expenses was found to be maintaining a permanent place of abode).

To illustrate the Department's views on *Gaied*, the 2014 Audit Guidelines provide a number of examples. Example 4 closely tracks the fact pattern that was present in *Gaied*—a fact pattern that is common to many individuals who claim that they are not statutory residents of New York. This example provides that an individual who (1) buys an apartment for his family member who uses the apartment, (2) is the legal owner paying all of the expenses, (3) has a key to the apartment and (4) occasionally sleeps on the couch when visiting his family member *does not* have a residential interest in the property because the “overriding point” is that the residence is primarily used by the family member and the individual's “occasional use” should not change its character.¹⁸ Individuals, especially those who hold legal title to a residence in New York but that residence is used by the individual's children or other family members, should point to this example when confronted by an auditor who insists that “mere ownership” is enough to classify that residence as the individual's permanent place of abode.

However, as the Department's other examples make clear, its views on *Gaied* are that the individual must have *the ability to use* the dwelling as his or her residence; a demonstration of *actual use* in a residential manner may not be required. Example 2 of the 2014 Audit Guidelines illustrates this point. In it the Department provides that a taxpayer, in connection with her change of domicile to Florida, listed her New York home for sale. The home remained fully furnished, and the taxpayer had unfettered access to the dwelling although she no longer resided there. On those facts, the Department concludes that the situation evidences a residential interest between the taxpayer and her New York home “because the taxpayer continues to have unfettered access to the home which had been her primary residence in the past and *no one else is using it as a residence currently*.”¹⁹ The Department then contrasts this situation with new facts in Example 3, where the individual demonstrated that the contents of the home were moved to her Florida residence and the New York home was vacant. On these new facts, the Department concludes that the individual would not have a residential interest in the property, as it “would not be reasonable to

¹⁵ 2014 Audit Guidelines, p. 54.

¹⁶ 2014 Audit Guidelines, p. 56 (emphasis in original).

¹⁷ DTA No. 808599 (N.Y. Tax App. Trib. July 7, 1994).

¹⁸ 2014 Audit Guidelines, p. 55.

¹⁹ *Id.* (emphasis in original).

expect her to use a vacant home despite having unfettered access.”²⁰

The Department’s apparent view that the ability to use a residence as a dwelling (as opposed to actual use as a dwelling) is sufficient to conclude that the dwelling is a “permanent place of abode” may not be entirely consistent with the legislative intent of the statutory residency provision. The legislative histories of both the 1922 and 1954 amendments to the tax law (adding the current statutory residency test)²¹ make it clear that the statutory residency test was designed to tax those people whose connection to the state was equivalent to that of a domiciliary.²² Indeed, the Court of Appeals in *Gaied* recognized this, stating that “the statutory residence provision fulfills the significant function of taxing individuals who are ‘really and [for] all intents and purposes ... residents of the state.’”²³ If an individual retains unfettered access to a dwelling in New York, thus having the ability to use the dwelling, but never actually uses the dwelling, is this individual really and for all intents and purposes a resident of the state? While this argument can be made, due to the Department’s traditional intransience in this area, it may take another Court of Appeals decision to force the Department to implement the law in a manner consistent with legislative intent.

Views on Day Count

Outside of the permanent place of abode context, the 2014 Audit Guidelines articulate taxpayer-friendly views regarding an individual’s burden of proof with respect to counting days spent in New York. In statutory residency audits, if it is conceded or determined that an individual maintains a permanent place of abode in New York, the dispute generally centers on the individual’s daycount, *i.e.*, the number of days that he or she was physically present in New York

during the year. (Of course, the Department’s view that any part of day in New York “counts” is strikingly contrary to the statute’s use of the phrase “*days spent* in New York.”) In cases where such a daycount is close to the 183-day mark, countless hours may be spent disputing available documentation or lack thereof on several days during the year at issue. More often than not, individuals do not have conclusive third-party documentary evidence establishing their whereabouts on each day of the calendar year, particularly on weekends. In those situations, we often advise individuals to look to established patterns of behavior. Indeed, the Department’s 2012 Audit Guidelines advised auditors that overall living patterns should be taken into account.²⁴ For example, if an individual can establish that he or she spends every weekend in New Jersey beginning with a train ride there on Thursday evenings and ending with a train ride to New York City on Monday mornings, practitioners have often presented this pattern to the Department auditors when no documentary evidence of that individual’s whereabouts on weekends exists. This tactic has been successful but, generally, only after initial rejection by Department auditors. While Department auditors have been known to initially conclude that days are “New York days” absent affirmative evidence demonstrating otherwise (even despite established patterns of behavior), the 2014 Audit Guidelines recognize that individuals “may not always leave a paper trail” to substantiate that they were outside of New York.²⁵ The Department therefore advises auditors to “generally accept the taxpayer’s allegations absent evidence to the contrary such as a clear pattern of regularly being in New York on weekends.”²⁶ This advice will hopefully eliminate some of the needless efforts that had been expended in recent residency audits debating established patterns of behavior.

Conclusion

The 2014 Audit Guidelines represent another demonstrable improvement to the Department’s Nonresident Audit Guidelines in the context of domicile and permanent place of abode analyses and with respect to addressing burden of proof issues in the context of statutory residency daycounts. Practitioners and individuals that may become subject to New

²⁰ *Id.*

²¹ See Arthur R. Rosen and Jeffrey Gotlinger, “New York Should Reconsider its Policies on Temporary Residents,” (State Tax Notes, Oct. 31, 2005); Peter L. Faber “New York’s Statutory Residency Rule Should be Repealed” (State Tax Notes, April 4, 2011); Maria Eberle, “New York Residency: Does Any Part of a Day Really Count?” (Bloomberg BNA Tax Management Weekly State Tax Report, Mar. 7, 2014).

²² See Arthur R. Rosen and Jeffrey Gotlinger, “New York Should Reconsider its Policies on Temporary Residents,” (State Tax Notes, October 31, 2005); Peter L. Faber “New York’s Statutory Residency Rule Should be Repealed” (State Tax Notes, April 4, 2011).

²³ *Matter of Gaied*, No. 26 (N.Y. Feb. 18, 2014).

²⁴ 2012 Audit Guidelines, p. 63.

²⁵ 2014 Audit Guidelines, p. 66.

²⁶ *Id.*

York's residency provisions should be aware that many of the provisions in these newly issued guidelines can be employed favorably in current and future audits and litigation.

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