On the Road To Florida

A Practical Guide for Changing Your Residence from New Jersey or New York

Cole Schotz P.C.

Your How-To Guide for Saving Significant Taxes by Moving from New Jersey or New York to Florida

By the Cole Schotz Tax, Trusts & Estates Attorneys

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Table of Contents

Introduction 2

Chapter 1 Overview of New Jersey and New York Tax Rates 5

Chapter 2 Definition of Resident Taxpayer for Tax Purposes 8

Chapter 3 Considerations for Principal Residences 30

Chapter 4 Special Situations 33

Chapter 5 New Jersey and New York State Income Tax for Nonresidents 38

Chapter 6 Homestead Exemption 45

Chapter 7 What to Do When You Arrive in Florida 47

Introduction

Most of us who have visited the Sunshine State from the Northeast have from time to time been tempted to move there for a variety of reasons. Its warm climate is inviting and offers proven health benefits: physically – a greater opportunity for outdoor activities like tennis and golf; and mentally – greater exposure to natural light that wards off the "winter blues."

There are also substantial tax advantages to be gained from permanently relocating to Florida from the Northeast, which are explored in this Florida guidebook. This guidebook addresses the often asked questions: Can I maintain a residence or conduct business in New Jersey or New York, but still be treated as a Florida resident for income tax purposes? Assuming I become a Florida resident, will I necessarily save money on state income taxes? The answers to these questions are fact-sensitive and often depend on the connections with, and how much time one spends in, the Northeast versus Florida and the sources from which the income is earned or derived.

Our guidebook, now in its 3rd edition, was first introduced in April of 2010, and many changes have happened since then. New legislation passed at the end of 2017 doubling the federal estate tax exemption, which had been $5.49 million, to $11.4 million as of 2019, with a scheduled reversion to $5.6 million in 2026.

In addition, New Jersey repealed its estate tax as of 2018, though the inheritance tax is still imposed in New Jersey on transfers to individuals other than bloodline decedents. In July 2018, New Jersey also passed a millionaire's tax of 10.75% on income over $5 million. As of January 2019, the New York estate tax exemption is $5.74 million, but is not currently aligned with the doubled federal exemption amount. Despite the increased exemption amount in New York and elimination of estate tax in New Jersey, each state levies individual income taxes, at rates that are among the highest in the United States. These high tax rates in the Northeast, including local property taxes, are causing people to consider whether a move to Florida could substantially lower their overall tax bill.

The Tax Cuts and Jobs Act (P.L. 115-97) ("TCJA") represents the most significant overhaul of the federal tax system in decades and this legistlation has disadvantaged Northeast states with high income and property taxes over those states with lower state taxes. Namely, TCJA limits the State and Local Tax ("SALT") deduction to $10,000 for state and local income, sales, and property taxes paid, applying to tax years beginning after December 31, 2017, and scheduled to sunset after December 31, 2025. The TCJA has had a major impact by increasing federal tax bills of those living in states like New Jersey and New York where taxpayers have significant amounts of state and local taxes beyond the $10,000 cap, which cannot be deducted on the federal return. States with no income taxes, such as Florida, will be less affected, since taxpayers can elect to deduct the sales or property tax they paid during the year in lieu of state and local income taxes. As a result, without the subsidy of a significant reduction in federal taxes resulting from the payment of

state and local taxes, there is an increasing number of relocations out of New Jersey and New York to Florida by individuals hoping to escape some of the highest property and state income taxes in the country, as well as estate tax in New York.

The purpose of this guidebook is to provide a practical road map of the issues that need to be considered to effectively change a taxpayer's residence from New Jersey or New York to Florida for income and estate tax purposes. Many factors make perfect sense such as the relative sizes of each residence, while others such as where your pets live or where your professionals reside may seem trivial or obscure, but are based on statutes and case law established in New Jersey or New York. We will review many of them in hopes of providing you with a better understanding of whether a move to Florida will accomplish complete relief or at least partially mitigate the high tax burdens levied upon New Jersey, New York and New York City residents.

We hope that this guidebook will give you a clearer understanding of what can be done within your control to successfully change your residence from New Jersey or New York to Florida and to avoid common pitfalls. However, each situation requires an individual tax analysis as to whether a change of domicile has occurred and to what extent a change of residency will ultimately reduce state and local taxes. This guidebook is not intended to nor should be a substitute for competent legal advice from an experienced state and local tax attorney.

With our new office in Boca Raton, Florida, our experienced tax professionals in New Jersey, New York and now Florida, including our dedicated Snowbird Counsel team, are ready to assist you with your deliberations about changing your residency and implementing the strategies you need to minimize your exposure in a residency exam. In addition, we offer comprehensive estate planning to ensure that you minimize your estate taxes and achieve your wealth transfer goals. Finally, we conduct business planning, nexus studies and tax controversy resolution with the IRS and State taxing authorities for individuals and closely-held operating businesses.

Based on our collective tax and estate planning experience, we strongly recommend meeting with our clients to make sure they are in compliance with their federal and state personal and business tax reporting obligations to prevent amassing years of tax debt and, in many cases, personal liability that is not dischargeable in bankruptcy.

Your road map to
effectively changing
your domicile from NJ
or NY to Florida

Overview of Income and Estate Tax Rates

Income Taxes

Moving to Florida and becoming a Florida resident could potentially eliminate or significantly reduce New Jersey and New York State/City income taxes because Florida has no state income tax.

Below is a comparison table of the effective federal and state taxes, as of 2019, for Florida, New Jersey and New York (and New York City) residents, earning the same taxable income of $650,000 (single or combined married) and taking into account the State and Local Tax ("SALT") maximum deduction of $10,000 under the 2017 TCJA. Assume for this example $20,000 of property taxes in each of Florida, New Jersey and New York. This table assumes ordinary income and does not take into account the impact of municipal tax, sales tax or alternative minimum income tax. Finally, note that $650,000 of income (either single or combined married) is in the second-highest income tax bracket in New Jersey and New York, and not the highest brackets (see footnotes following the chart).

Jurisdiction	SALT Deduction	Federal and State Tax Rates	Combined Federal and State Income Tax + Property Tax (taking into account SALT deduction)	Annual Tax Savings from Moving to Florida
Florida	$10,000 (offsets property or sales taxes)	0% FL + 37% Federal*	$236,800	–
New Jersey**	$10,000 (offsets income or property taxes)	8.97% NJ + 37% Federal	$ 295,105	$58,305
New York State and City***	$10,000 (offsets income or property taxes)	6.85% NYS + 3.876% NYC + 37% Federal	$306,519	$69,719

* **Federal tax rates**: The highest federal income tax rate is 37% on over $510,301 of taxable income for a single taxpayer and $612,351 of combined income for married taxpayers filing jointly.
** **NJ tax rates**: New Jersey has not published rate tables for 2018 or 2019. As of 2017, New Jersey's income tax rate is 8.97% over $500,000 of taxable income for a single taxpayer and $500,000 of combined taxable income for married taxpayers filing jointly. With the enactment of new legislation in July 2018, New Jersey's highest income tax rate is 10.75% on over $5 million of taxable income for a single taxpayer and $5 million of combined taxable income for married taxpayers filing jointly.
*** **NYS/NYC tax rates:** For single taxpayers earning between $215,400 and $1.077 million, New York State income tax rate is 6.85%. For married taxpayers filing jointly and earning between $323,200 and $2.155 million, New York State income tax rate is 6.85%. The highest income tax rate is 8.82% on over $1.077 million of taxable income for a single taxpayer and $2.155 million of combined taxable income for married taxpayers filing jointly. New York City's highest income tax rate is 3.876% on over $50,000 of taxable income for a single taxpayer and $90,000 of combined taxable income for married taxpayers filing jointly.

New York Estate Tax

New York imposes estate tax on its residents. Under New York law, there is a state estate tax imposed on assets in excess of $5.74 million (as of 2019) passing to someone other than a spouse or charity. This means that if the value of your estate exceeds the $5.74 million state exclusion amount by more than 5% (as discussed below), the entire value of your estate is subject to state estate tax, not just the amount of your estate that exceeds the state exclusion amount. The New York exclusion amount will be adjusted for inflation every year.

For decedents dying after January 1, 2019 with an estate valued in excess of $5.74 million, the estate will be subject to estate tax at the following rates:

New York Estate Tax Rates

Taxable Estate	Tax
$5,740,000 or less	No tax
$5,740,001 up to $6,100,000	$402,800 plus 12% of excess over $5,740,000
$6,100,001 up to $7,100,000	$522,800 plus 12.8% of excess over $6,100,000
$7,100,001 up to $8,100,000	$650,800 plus 13.6% of excess over $7,100,000
$8,100,001 up to $9,100,000	$786,800 plus 14.4% of excess over $8,100,000
$9,100,001 up to $10,100,000	$930,800 plus 15.2% of excess over $9,100,000
Over $10,100,000	$1,082,800 plus 16% of excess over $10,100,000

It should be noted that estates with a value between 0% - 5% greater than the New York estate tax exclusion amount have a reduced estate tax rate compared to estates in excess of 5% of the estate tax exclusion amount, which causes such large estates to “fall off the estate tax cliff,” or have the entire value of such estate (without any reduction for the exemption) be subject to New York estate tax.

Because the New York estate tax threshold is less than the federal applicable exclusion amount (the amount of assets one can pass to any beneficiary other than a spouse or charity without triggering a federal estate tax), a New York estate tax could be triggered at the death of the first spouse if the first spouse took advantage of the full amount of the federal applicable exclusion available to him or her.

For example, if a spouse dies with $11.4 million in 2019 and bequeaths all assets to a trust for his or her spouse and children using all of his or her applicable exclusion, no federal estate tax liability would be incurred (assuming that the deceased spouse had not used any of his or her applicable lifetime exclusion). However, there would be New York estate tax imposed on the difference between $11.4 million and the $5.74 million New York estate tax exclusion.

Therefore, if relocating to Florida is not a viable option to escape a New York estate tax, planning opportunities, such as taking advantage of portability of the first-to-die spouse's exemption, remain for those persons who intend to remain in New York to minimize the impact of state estate tax.

New Jersey Inheritance Tax

New Jersey has repealed its estate tax and there is no indication that is changing anytime soon, but the state continues to impose a significant inheritance tax on property transferred at death by resident decedents, and on real or tangible personal property located in New Jersey and transferred by nonresidents. Transfers to the decedent's parents, grandparents, spouse, children and other issue are exempt from inheritance tax. Transfers to brothers, sisters, sons-in-law and daughters-in-law are subject to inheritance tax at graduated rates from 11% to 16%, and to nieces, nephews, cousins, friends and all other beneficiaries (other than charities) at 15-16% inheritance tax rates.

No Florida Estate or Inheritance Taxes

Florida has no gift, estate or inheritance tax, which makes moving to Florida after retirement particularly attractive to high net worth individuals who can achieve significant tax savings on transfers to the next generation while at the same time still being able to travel back and forth to the Northeast to visit family and friends.

Definition Of Resident Taxpayer for Tax Purposes - The Key Is Domicile -

This chapter examines the tests employed in New Jersey and New York to determine who is a "resident" for estate and income tax purposes.

Estate Tax Considerations

Although New Jersey has repealed its estate tax, the New York exemption ($5.74 million) continues to be below the federal exemption ($11.4 million). In addition, New York has not adopted the concept of the portability election and if a deceased spouse has not completely used his or her New York exclusion amount, the amount not used is lost and may not be used by the surviving spouse. Therefore, although the New York estate tax exclusion is now at its highest amount ever, the inability to use the portability election presents a potential issue for New York residents with taxable estates.

New Jersey's inheritance tax is imposed on real property and tangible personal property within the state, and intangible property wherever situated on beneficiaries other than the decedent's parents, grandparents, spouse, children, and other issue. The tax is imposed at a graduated rate of 11-16% on transfers to brothers, sisters, sons-in-law and daughters-in-law, and at 15-16% on transfers to nieces, nephews, cousins, friends and all other beneficiaries other than charities. The inheritance tax also applies to nonresident decedents who own real estate or tangible personal property within New Jersey and who transfer this property to a non-exempt beneficiary.

For the above reasons, the New York estate, and, in New Jersey inheritance tax, savings to be achieved by becoming a Florida domiciliary creates another incentive to move out of New York or New Jersey to Florida. Note, however, that those taxpayers who successfully change their domicile to Florida may still be subject to a New York estate tax or a New Jersey inheritance tax if they own real or personal property located within said state.

ILLUSTRATION 1: Mom and Dad never move to Florida and stay in New York. At the second death, in January 2019, when the New York estate tax exclusion is $5.74 million, Mom has total assets of $11 million. Assuming no gift tax exemption was used during life, there will be no federal estate tax due, but a New York estate tax of approximately $1.2 million would be imposed.

ILLUSTRATION 2: Mom and Dad have effectively changed their domicile from New York to Florida. Again, at the second death, the surviving spouse has total assets of $11 million. None of the assets are located in New York. There will be no federal or New York estate tax due (assuming no gift tax exemption was used during life).

ILLUSTRATION 3: Same facts as in Example 2, except Mom and Dad still own a home in New York valued at $7 million. Again, assuming there was no gift tax exemption used during life, at the second death, there would be no federal estate tax due, but there would be a New York estate tax of approximately $638,000.

ILLUSTRATION 4: Same facts as in Example 2, except now the home is valued at $1 million, and Mom's and Dad's other assets are worth $10 million and located outside of New York. Assuming no gift tax exemption was used during life, there will be no federal or New York estate tax due.

What Is "Tangible Personal Property" and What Is Its "Situs"?

Nonresident ownership of real property in New Jersey or New York could subject your estate to a nonresident transfer tax. But the transfer tax can also be triggered if you own tangible personal property with a New Jersey or New York situs. Situs refers to where the tangible personal property is located for legal purposes.

Both New Jersey and New York tax only the tangible personal property of nonresidents located within the state. The tax law defines tangible personal property in the negative. That is, it lists items that are considered intangible personal property. For example, tangible personal property is not deposits in the bank, shares of stock, bonds, mortgages, debts, and receivables.

Tangible personal property includes assets that are movable, have physical characteristics and are capable of being possessed, such as boats, cars, artwork, jewelry, antiques, and other collectibles.

Tangible personal property will be subject to New Jersey or New York estate taxes only if it has actual or "permanent" situs in New Jersey or New York. If tangible personal property is permanently located in New Jersey or New York, the state has taxing power over the property. However, if the property is capable of being transported back and forth, it may not be "permanently" located in New Jersey or New York. If you own valuable pieces of artwork, jewelry, antiques, cars, collectibles or other valuable tangible personal property, you should consider taking these items with you to Florida if you intend to change your residency.

Note that in New York, a condominium is considered real property within the state, but a cooperative apartment is not (it is considered intangible personal property and not subject to New York estate tax, but it is subject to income tax, as discussed in Chapter 5). Florida residents who own real property in New York may want to consider transferring such property into a limited liability company or a Qualified Personal Residence Interest Trust ("QPRIT"). Transferring real estate to either of these entities may not only be beneficial for federal estate tax purposes, but would also convert real property to intangible property for New York estate tax purposes, although it could jeopardize the availability of the $250,000 ($500,000 for a married couple filing jointly) exclusion of gain on the sale of a principal residence, as discussed in Chapter 3, and may also trigger realty transfer taxes. Therefore, before making such a decision to transfer real estate into an entity it is important to weigh the potential estate tax savings against the potential realty transfer taxes and increase in income tax if the property is later sold during one's lifetime.

Income Tax Considerations

Florida does not levy a personal tax on income, including on capital gains. For example, an individual who sells shares in a business will pay state income tax on the gain if he or she is a New Jersey or New York resident, but will pay no state income tax on the gain if he or she is a Florida resident, which lends itself to planning opportunities if you are able to effectively change residency before entering into certain transactions. However, the Case Study below warns of the potential exposure if you fail to properly establish your Florida Residency.

Case Study - The Wise Brother

Three brothers, John, Paul and George reside in New York State. Paul lives in Manhattan, and John and George live in Nassau County. The brothers started a business ten years ago and have built it up from almost nothing. The business is now largely self-sufficient and requires little involvement by the brothers that cannot be accomplished remotely. It is now valued at $30,000,000 (for purposes of this example, all company assets are either intangible or if tangible located outside of New York). Each brother makes $2,000,000 of income annually. During a recent snow storm, John and Paul were snowed-in at Paul's home. Looking out the window, John and Paul vowed to each other that this was going to be their last winter season, each deciding to move to sunny Florida. After all, their children have gone off to college in upstate New York and their wives have urged them in the past to consider joining their snowbird friends who come back with a glowing tan after each winter. They call George and urge him to come with them, but George refused - George had just purchased a large New York home.

John and Paul are thrilled. Not only are they excited to get out of the cold, they are also motivated by the anticipated tax savings by not being taxed as residents of New York. They each begin looking at Florida homes and love what they see. They even hear that unlike New York, their new homes in Florida will be afforded creditor protection under Florida law.

John decides it would be best for him to engage tax counsel to assist him in planning the move. While John is meeting with his new attorney, the "Taxman," Paul heads out to the golf course. Paul is not going to miss the first day of sunshine in quite some time. As Paul heads to the ninth hole, he mentions his plan to move to Florida to a well-respected financial advisor and gets some golf course advice. "That's a great idea Paul!," exclaims the financial advisor, "You are going to save so much money in taxes that you'll be able to invest some of the savings under our new platinum-platform. All you really need to do is buy a Florida home, file for the homestead exemption and register to vote. Oh, and make sure you don't spend more than 183 days in New York…see, I know my stuff!" Paul was unenthusiastic about the new platinum-platform, so after finishing up the round, he excused himself. Paul did, however, remember what the financial advisor had told him and starts making calls to put himself in that new Florida home.

With the advice of the Taxman, John proceeds to break ties to New York—he sells his large New York home and purchases a New Jersey beach condo. John stays in the condo when visiting his family in New York, and rents it out to tenants when he is away. John also purchases a large home as his new Florida homestead, registers to vote in Florida

and files for Florida's homestead tax exemption. Additionally, he meets with and engages a Florida licensed attorney to execute new Florida estate planning documents, a new Florida financial advisor and a new Florida primary care physician, and establishes a place of worship in Florida. John also joins social organizations in Florida and regularly attends events and starts to become part of the community in which he lives.

On the other hand, Paul heads off to Florida and buys a nice condo as his new Florida homestead, registers to vote in Florida and files for Florida's homestead tax exemption. With a sigh of relief, he heads to the beach to catch some long awaited sunshine. Paul also keeps his New York home because it is his pride and joy, containing all of Paul's near and dear personal items, and is valued at over $6,000,000; and besides, he needs a place to stay when visiting George. Paul takes no significant steps toward abandoning his New York ties – most of his mail and tax returns still bear his New York address, he maintains his full membership privileges with his New York Country Club and he does not change any of his New York professionals. He does however maintain a precise calendar and makes sure not to spend more than 183 days in New York. He spends approximately 120 days per year in Florida and the rest traveling.

A year has gone by since John and Paul moved into their new Florida homes. They cannot believe that they are no longer paying New York State income taxes. While each of John, Paul and George are making $2,000,000 of pass-through income from the business, John and Paul are not paying any state income taxes, while George continued to pay $135,350 in New York State income taxes (George is in the 6.85% income tax bracket for income over $323,200). Paul was living in New York City, so he was paying even more tax than George before the move (additional 3.876% for income over $90,000).

Just when John and Paul think life cannot get any better, the brothers get an offer for all of the stock in the business for $30,000,000. The brothers accept the offer, each brother receiving a cool $10,000,000; however, because they started the business from nothing, they have minimal tax basis in the business and will each report $10,000,000 in capital gains. When tax day rolls around, they each cut a check to Uncle Sam for $2,000,000 (20% capital gains tax). However, George must also cut a check to New York State for approximately $880,000 (George has now been pushed into New York's maximum income tax bracket of 8.82%). When he asks his accountant why he is paying so much in taxes to New York State, his accountant regretfully informs him that New York taxes capital gains just like they do ordinary income.

George is a bit salty to say the least. Not to be confused with the SALT deduction for state and local property taxes that was eliminated on January 1, 2018 (above $10,000). George is also a bit salty about this—the poor guy can't even deduct the property taxes he paid on that large home that forced him to stay in New York! George now thinks of himself as the slow brother. They say misery loves company…

Paul, returning from the beach, is glowing with excitement from the business sale, or maybe that's just his beautiful tan. He's been getting fan mail from envious New Yorkers congratulating him on his move, but today when he opens his mail, he is surprised to find a letter addressed to him from the State of New York, Department of Taxation and Finance. He opens the letter and is dismayed that he is the subject of a residency audit. "They must be mistaken," says Paul confidently, "I'm a Florida resident now. I own a Florida home and I just voted as a Florida resident. I definitely didn't spend more than 183

days in New York. I even made sure to file for Florida's homestead tax exemption. I checked all bases; I'm in the clear."

John receives a similar letter from the Department of Taxation and Finance and sends it to the Taxman as previously planned. John has already discussed that he would likely receive such a letter with the Taxman, who has assisted John in compiling a pre-audit response package. The pre-audit response already contains all evidence necessary to demonstrate his change in domicile and substantiates his day count. John is relieved that he is not caught off guard and has a predetermined plan of action to respond to his residency audit.

Paul calls John and asks to be put in touch with the Taxman. The Taxman tries to hide his excitement when he hears of the residency audit and explains, "Paul, the residency audit is designed to determine whether you correctly filed your New York State personal income tax return as a nonresident because its residents are subject to tax on their worldwide income. The first way residence is determined is based on whether you are still domiciled in New York."

Paul is informed that the domicile inquiry is not really focused on where he is registered to vote, maintains a driver's license or registers his cars. Rather, it is a subjective inquiry, based on long-standing common law principals that are often difficult to apply, the general standard being "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" and cites an old case that stands for that proposition for Paul to read. Matter of Bodfish v. Gallman, 50 A.D.2d 457 (1976) (quoting Matter of Bourne, 181 Misc. 238, 246, aff'd, 267 App. Div. 876, aff'd, 293 N.Y. 785 (1943)). Paul says, "There is no way New York can prove that Florida is not my permanent home!" but Paul finds out that he has the burden of proof, by clear and convincing evidence, to show that not only that he permanently moved to Florida, but more importantly that he cut ties and abandoned his New York domicile. The Taxman tells Paul, "Under the audit guidelines, the auditor is instructed to analyze your lifestyle, using five primary factors to determine where your domicile (your one, true home) is actually located. The tax department uses a comparison of the five factors, and a series of less significant other factors if necessary. Once these factors are compared, the place the factors most heavily favor is likely your domicile." Paul finds out the five factors are his home, active business involvement, time spent in each place, near and dear (location of items that are of sentimental value), and family connections.

Now Paul is getting worried - he had only bought a small condo in Florida while looking for a larger home (not even close to the value of his beautiful $6,000,000 home in New York) and has not done any business in Florida, while he continued to have active involvement in the New York business before it was sold, both remotely and on his frequent trips to New York. While he has made sure not to spend more than 183 days in New York, he also has not spent that much time in Florida, as he has gone on several lavish trips outside of the U.S. (which he justified with all the taxes he thought he was saving). Paul also realizes that all of his sentimental items are in his New York home and his children, George, his two sisters, parents, and most of his friends are still living in New York.

Needless to say, even with the help of the Taxman, Paul now realizes he is not likely able to prove by clear and convincing evidence that he moved to Florida with the intent to remain there permanently. Rather than go through a lengthy audit and lose, or worse yet, then proceed to trial with an experienced government New York tax attorney and

have the adverse audit determination sustained, Paul quickly throws in the towel. Not only is Paul required to pay about $1,500,000 in collective taxes on his annual $2,000,000 in income and the $10,000,000 in income from the sale of the business (most of the income being taxed at 12.696% New York City's combined city and state maximum personal income tax rate), he is also subject to interest and penalties.

On the other hand, John's residency audit goes smoothly. With the assistance of the Taxman, John's pre-audit package easily proves that he has changed his domicile from New York to Florida. John is promptly issued a no change letter by the State of New York and is not required to pay any additional tax.

The important lesson to be learned from the Wise Brother is that changing one's domicile particularly when the intent is to also maintain a residence(s) in the Northeast is a serious undertaking and the plan for such a move must be thoroughly reviewed by an experienced tax professional to avoid the not so uncommon position that Paul found himself in. As discussed in more detail below, changing domicile is only one of several issues that need to be reviewed, including income allocation that is discussed in more detail in Chapter 5.

Domicile and "Statutory Residence" - It Is Not Just Six Months in Florida

The tests for determining residency in both New Jersey and New York are virtually identical. Both states equate residency with domicile, but technically they have different meanings. Domicile is a legal term of art and most often refers to the place someone intends to be their permanent home. While residence simply requires physical presence in a state, domicile requires physical presence in the state and the intent to make that state your fixed or permanent home. It refers to any place you regard as your permanent home – the place to which you intend to return after a period of absence (as on vacation, business assignment, educational leave, etc.).

A person can have only one domicile, although he or she may have more than one place to live. Once established, your domicile continues until you move to a new location with the intent to establish your permanent home there and to abandon your original domicile. Moving to a new location, even for a long time, does not change your domicile if you intend to return to your original domicile. Thus, if you are domiciled in New Jersey or New York, you are a resident for tax purposes, and all of your income, regardless of its source, will be taxable. There is an exception – if an individual does not maintain a permanent home within the state and spends less than 30 days within the state, then he or she will not be deemed a resident for tax purposes. There is also another exception for persons living abroad that is discussed in more detail in Chapter 5.

The Key Test – Statutory Residency

Even if you are successful in changing your domicile to Florida, if you return to New Jersey or New York for more than 183 days during the calendar year and maintain a home, you will be classified as a "statutory resident" under each state's tax law. Just like resident taxpayers, statutory residents are subject to state tax on all of their income, regardless of its source. Your return to New Jersey or New York after changing domicile and spending more than 183 days in the state

could also call into question whether you truly changed your domicile in the prior years or re-established domicile in your former state or residency.

Primary Factor to Establish a New Domicile

Maintaining a Permanent Residence

The 183-day rule applies only if you "maintain" a "permanent place of abode" within the state for "substantially all of the taxable year." A permanent place of abode is a residence that you permanently maintain whether you own it or not, and can include a residence owned or leased by your spouse. This can simply be a place where you have unfettered access and spend the night whenever you choose. A place of abode is not permanent if you maintain it only during a temporary or limited period of time for a particular purpose. For example, suppose you are domiciled in Florida and are assigned to your employer's New Jersey office for a fixed and limited period, after which you return to Florida. If you maintain an apartment in New Jersey for this purpose, it will not likely be deemed permanent. In addition, a permanent place of abode must be habitable during the period in question. The permanent place of abode must also be maintained for substantially all of the taxable year (typically a period exceeding 11 months).

ILLUSTRATION: To illustrate, assume an affluent taxpayer is domiciled in Connecticut and maintains an apartment in New York City and a home in East Hampton. It is conceded that the taxpayer spent more than 183 days within New York. However, the taxpayer argued that both her New York City apartment and Hamptons home were under significant renovation and uninhabitable, thus she could not have maintained a permanent place of abode for the year in question. If the residences were actually under renovation, and as a result the taxpayer was unable to reside in either of the homes, then the taxpayer could not have "maintained" a permanent place of abode. In an interesting twist, however, photographs of the Hamptons residence surfaced in a popular magazine, revealing that the home was in fine condition, and the taxpayer lost the case. These facts are loosely based on a tax dispute between the New York Department of Finance and Martha Stewart.

It should be noted that New York removed what was known as the temporary stay exception from its definition of a permanent place of abode. Under the exception, even if you were in New York for more than 183 days, but were there to accomplish a particular purpose, any home you maintained during that time would not be deemed to be permanent, and thus you would not be considered a New York statutory resident. The change in New York law means that all non-New York residents will be treated equally, regardless of their reason for being within New York. However, maintaining a permanent place of abode remains part of the definition.

New York's highest court, the Court of Appeals, ruled on a case that has set the current standard for determining an individual's permanent place of abode. The ruling provided that if a nonresident who is in New York for greater than 183 days purchases an investment rental property in New York, rents one of the apartments to his dependent parents, pays all of the rental costs for his parents, and stays with his parents on occasion to help care for them, but does not maintain a living quarters in the apartment, the nonresident will not be considered to maintain a permanent place of abode in

New York. However, since that ruling, the Tax Department has taken a very narrow view of that case. The Department generally considers someone that has unfettered access to a dwelling maintains a permanent place of abode. With that said, this case can still be used as guidance for those nonresident taxpayers who purchase apartments in New York City for their children or other family members, pay all the expenses associated with the apartment, but do not maintain separate living quarters in the apartment. Under such circumstances, the taxpayer should not be deemed to have a permanent place of abode and, thus, should not be deemed to be a statutory resident of New York or New York City. The Department will likely consider the number of bedrooms in an apartment that is used by your children to be an important factor as to whether that apartment is considered your permanent place of abode. Each case requires a detailed analysis and you should not assume that similar situations will yield the same result.

Day Count

It is recommended that if you maintain a permanent place of abode in New Jersey or New York, but report that you are a nonresident for tax purposes, you maintain a log of the dates that you are visiting the state in question. During an audit, you may be asked to produce records to show the specific days that you are in and/or out of the state. Auditors may request cell phone bills, credit card statements, bank statements, airline tickets, travel itineraries and E-Z Pass records to confirm the number of days. The burden always rests with the taxpayer to prove days within and without New Jersey or New York.

Partial days count as full days for tax purposes. For example, if you leave Florida for New York on a Friday and arrive at 9:00 P.M. and return at 11:00 P.M. on Sunday, you are in New York for a total of three days for tax purposes. Similarly, if you leave New York at 8:00 A.M. on a Friday to travel out of the state, and you return on Monday at 8:00 P.M., you are out of the state only two days for tax purposes as only Saturday and Sunday count as days not in New York.

The burden of proof is on you to show that you were not in New York or New Jersey on a specific day in that tax year that is subject to the audit. It should be noted that when an auditor requests your cell phone bills, he or she will be conducting a detailed review of the incoming and outgoing calls. Many cell phone providers will include the location where the call is made and received. The Department may also seek to obtain GPS records to show the location of where the calls were placed and received. It is important to show additional documentation that can either support or refute the location of a call. For example, if you were traveling through New York State for the purpose of getting to an airport, airline tickets or travel itineraries will provide support for claiming that this day is not a New York day because it falls under the travel exception, as described below.

Unidentified or undocumented days are counted as New York or New Jersey days unless you are able to provide documentation showing you were outside the state for the days in question. For example, if your cell phone records show that you were in New York on Monday and Wednesday, but there is no documentation showing your location on Tuesday, the auditor assumes you were in New York State for purposes of assembling a day count. Therefore, it is important you keep thorough records of any travel to and from New York or New Jersey.

Interestingly, certain medical and travel days do not count toward days spent in New Jersey or New York. Medical days are discussed in more detail in Chapter 4. Presence in the state will be disregarded if it is solely for boarding a plane, ship, train or bus for a destination outside the state. For example, if you, as a Florida resident, fly to Newark Airport to board a plane to Europe, the time you spend in New Jersey does not count toward the 183 days. The travel exception may also include activities that were incidental to the travel. However, attending a business function in New York or New Jersey the day before a travel day would be considered a New York or New Jersey day. Time spent by a nonresident confined to a New Jersey or New York hospital or other medical facility for an illness generally does not count toward days spent within the state. For example, if you have a medical emergency while in New York visiting your grandchildren, the time spent confined to a New York medical institution would not count toward the 183-day rule. However, outpatient care or time spent visiting a spouse in a hospital are considered New York days. Military service is also excluded.

Maintaining a detailed calendar for the few years immediately following a change in domicile is recommended. Documenting the days that you are traveling to and from New York and New Jersey is particularly important and will provide a more detailed record if you are subsequently faced with a New York or New Jersey audit. This can take the form of a work or personal calendar that shows your daily activities if it is recorded contemporaneously. A calendar will be particularly useful if you are unable to provide substantiation for your location on a number of days in a given year.

Applying the Domicile Test

If you are selected for audit, the burden of proof will also be on you to show that you intended to change your domicile. Do not think your case is too small to avoid detection. New Jersey and New York devote substantial resources to their residency audit programs, and a number of reported decisions involve relatively small amounts of tax. Longtime residents who move to Florida should anticipate their first nonresident return (or failure to file a return after the move) to be closely scrutinized, which may take up to two or more years to occur, especially if they have substantial federal taxable income.

Auditors are generally looking to examine the following four types of nonresident taxpayers:

1. Taxpayers who have filed a nonresident return in the current year, but who have filed a resident return in a prior year. These taxpayers are more likely to be selected for domicile audits.

2. Taxpayers who have filed a nonresident return in the current year as well as in prior years, but who have been identified as having a permanent place of abode located within the state. Taxpayers identified in this way are more likely to be selected for domicile and statutory residence audits. On New York non-resident tax returns the question is asked if the taxpayer maintains living quarters in New York and if a taxpayer misrepresents or even unintentionally fails to tick the box yes when they do, they can expect penalties that will be difficult to abate during an exam.

3. Taxpayers who have filed nonresident returns in the current year and in prior years and do not maintain a permanent place of abode within the state, but who allocate a portion of their income to New Jersey or New York. These taxpayers are more likely to be selected for income allocation audits.

4. Taxpayers who have not filed returns, who previously filed a resident or nonresident return, or who were identified as having some connection (business or personal) to the state in the current year. These taxpayers are more likely to be selected for either a domicile, statutory residency or income allocation audit.

Thus, if you fit within one of the above categories, you may have a greater exposure to audit risk. Consequently, it is important that you keep accurate records documenting your intent to permanently relocate to Florida. If you receive correspondence from a taxing authority asking questions about your recent move, it is highly recommended that you consult with tax counsel before responding. It is a major taxpayer misconception that quickly responding or ignoring the state tax authorities will cause them to go away. Taxpayers who fall into either of these categories can cause irreparable harm to their audit case. Therefore, the best thing to do upon receiving an audit notice is to retain competent tax counsel before responding.

The tests that state taxing authorities use in determining domicile are largely based on the taxpayer's specific facts and circumstances. There is no bright line test that adds any degree of certainty to the process, but maintaining a residence in the former domicile will without a doubt create reasons to question whether a change in domicile has occurred.

What the taxing authorities are really looking at is whether a person has shown a bona fide intention to change his or her domicile. For this purpose, your motive for changing domicile is immaterial (that is, it is acceptable that the primary reason for moving to Florida is for tax purposes). With domicile disputes, actions speak louder than words. A judge in one domicile dispute case said it best: "General habit of life is more indicative of your intentions than formal declarations."

A person's declarations are given due weight (e.g., declaration of Florida Domicile), but they will not be conclusive or even persuasive if contradicted by his or her conduct. This means that the authorities are looking for inconsistencies – to see if you still maintain substantial ties to New Jersey or New York while claiming to have permanently relocated to Florida.

A common question clients ask is whether they can still keep a residence in New Jersey or New York. The answer is that maintaining a second home should not by itself cause you to retain your New Jersey or New York domicile, but it will increase the likelihood of being audited. It also makes it easier for the state to assert the argument that you have not permanently relocated. In fact, retaining a home in either New Jersey or New York is one of the primary factors state auditors will look at in determining whether the tax return you filed correctly reflects your resident status. The other primary factors that are part of the domicile analysis, in addition to home, are: (1) active business involvement, (2) time spent at each location, (3) location of items "near and dear to the heart," and (4) family connections. The significance of each of these factors will be discussed in turn.

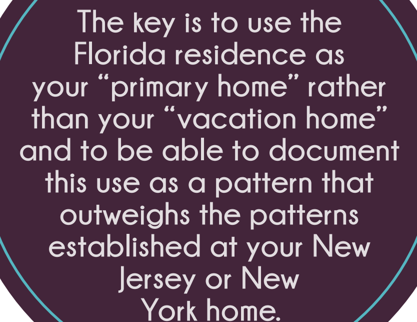
Maintaining a Home in New Jersey or New York

Simply maintaining a second home in New Jersey or New York will not automatically classify you as a resident taxpayer. There have been several cases, actually litigated, where the taxpayers still maintained their New Jersey or New York residence and were deemed as nonresidents. What the taxing authorities look for is the individual's use and maintenance of the New Jersey or New York residence compared to the nature and use patterns of the Florida residence.

Some people think that by selling the family home and renting a townhouse, condominium, apartment or home, they have escaped the domicile issue. Changing the form of your residence, including transferring the residence to a trust in New Jersey or New York may be helpful to show that you are taking steps to change domicile, but it is not dispositive of a change in domicile. The taxing authorities will examine the actions you engaged in to demonstrate your intent to abandon your formal domicile – in other words, whether you still maintain strong and endearing ties to your former community.

With multiple residences, the size and value of the Florida home compared to the size and value of the New Jersey or New York home are also significant. Further, auditors will consider the nature of use of each residence (e.g., vacation home, rental property, etc.). Ideally, the Florida residence will be a larger, permanent home, whereas the New Jersey or New York residence will be a smaller vacation home, perhaps a shore house. If the value of your residence in New Jersey or New York is greater than that of your Florida residence, it may be merely because of the location of the property (e.g., a New York City apartment) and not due to the actual size of the property.

TIPS: As a taxpayer who retains a home in New Jersey or New York, it is important to: (1) take all affirmative steps to establish your new domicile, (2) not claim a homestead rebate for your New Jersey residence after moving (New Jersey only), and (3) keep records of days spent in each state. It is recommended that the residence in New Jersey or New York, to the extent possible, be smaller and require less maintenance. As discussed more fully below, be sure to move items "near and dear" such as furnishings, heirlooms or objects of sentimental value to the Florida home.



Transferring the home to a revocable trust or limited liability company should be considered to avoid an ancillary probate proceeding. One could argue that a transfer to a limited liability company demonstrates an intention to not use the property as a principal residence. Note that a property held in a limited liability company may be treated as a separate taxpayer for federal tax purposes and is ineligible for the Internal Revenue Code Section 121 exclusion of gain on the sale of a principal residence, but a single-member limited liability company that is a disregarded entity for federal tax purposes can still qualify. Gifting fractional shares of the home or transferring the home to a Qualified Personal Residence Interest Trust ("QPRIT") and then paying rent when "visiting" may also be helpful options. These gifting techniques that transfer property out of your name to someone else are not evidence nor necessarily support that you are no longer maintaining a permanent place of abode in New Jersey or

New York so making such transfers solely for that purpose is generally not recommended.

REMEMBER: Keep the concepts of domicile and statutory residence separate. There are two separate tests auditors will use to determine if the resident status under which you filed is accurate. As detailed above, when you maintain a second home in New Jersey or New York, there are two tests that you have the burden of satisfying in order to prove your nonresident status. First, you have to demonstrate that you are not domiciled in New Jersey or New York, and second, if you are not domiciled in New Jersey or New York, that you did not permanently maintain a home there and spend more than 183 days there.

Business Activities

You may find yourself subject to an income tax audit if you play an active role in the daily operations of a New Jersey or New York business and continue to maintain a degree of control over the business interests. However, it is not required that you give up all of your business interests. As you approach retirement and are financially secure, with proper business succession planning, you may start to devote less time to the business and bring in younger individuals who will eventually succeed you, reducing your status and compensation. Minimizing your involvement in the business to a passive/investment role will weigh in your favor if there is an audit.

Time Spent in Former Domicile

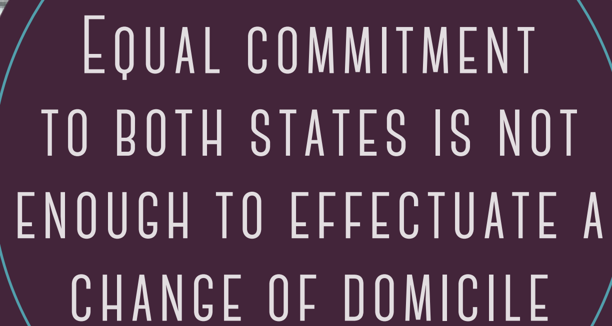
While spending 183 or fewer days in New Jersey or New York will prevent you from paying income tax as a statutory resident (assuming you are not domiciled in New Jersey or New York), the amount of time you actually spend in Florida is also important. It is desirable to make sure you actually spend more time in Florida than you do in New Jersey or New York. Many people think that as long as they do not spend 183 days in New Jersey or New York, it is not important how many days they spend in Florida. This is generally not accurate.

For example, if you spend five months in New Jersey, but only three months in Florida, and the remaining four months either traveling or perhaps at home in a third jurisdiction, an auditor could argue that you never abandoned your domicile in New Jersey and merely use your Florida home as a vacation home.

Items Near and Dear to the Heart

It will be helpful in the audit process if you can demonstrate that you have moved sentimental items, such as family heirlooms, works of art, collections of books, stamps and coins, family photo albums and even pets, to Florida. Often these items will be valuable. Thus, you may have records from the freight company you hired to transport the items to Florida as well as insurance records to verify the location of these items.

Of all the primary factors, this one is the easiest to control. If you are going to keep a home in New Jersey or New York, it is imperative, to the extent it is practicable, to move household furnishings, heirlooms or objects of sentimental value with you to the Florida home.


Equal commitment
to both states is not
enough to effectuate a
change of domicile

Family Connections

This is a very limited factor and includes only your spouse and minor children. A situation in which two spouses are maintaining separate domiciles will be discussed in Chapter 4. If you do have minor children and are filing as a nonresident, expect the taxing authorities to examine where the children are enrolled in school.

Secondary Factors

Aside from the primary factors, there are a number of secondary factors that are also relevant in determining domicile. However, these factors are secondary for a reason: they are completely subject to your control. These secondary factors are subordinate to the primary factors and are to be considered only if, after weighing the primary factors, it is still unclear whether you have changed your domicile. At times, auditors will make their determination based only on the primary factors and never even look to the secondary factors. Nevertheless, since most people who are audited either have a second home in New Jersey or New York or have some sort of business involvement in a New Jersey or New York business, it is very important that these secondary factors, which are easier for you to control, are satisfied.

They include the following:

1. The address at which you receive bank statements, bills, financial data and correspondence concerning other family business.
2. The physical location of the safe deposit boxes used for family records and valuables.
3. Location of auto, boat and airplane registrations as well as your personal driver's or operator's license.
4. Where you are registered to vote and an analysis of the exercise of the privilege. This includes your participation in primary or other off-season elections, including school board and budget elections.
5. In which state or states you file for homestead exemptions.
6. Country club memberships. While you cannot actually play golf during the winter months in New Jersey or New York, you should check to see if your club offers a seasonal membership. Such classification will only help.
7. An analysis of telephone, cable and utility services at each residence including the nature of the listing, the type of service features and the activity at the location. Many utility companies offer seasonal disconnects that can provide further documentation.
8. The citation in wills, trusts and other legal documents that a particular location is to be considered your place of domicile.
9. The active involvement in an organization, particularly where physical presence is involved. This includes the holding of office, regular attendance at meetings, and the volunteering of services which demonstrates an act of presence at the particular location.

There are also activities deemed nonfactors, such as the location of certain charities to which you contribute as well as your religious organization membership. Membership or donations to such organizations, even if located in New Jersey

or New York, does not equate to active participation. Nevertheless, it will only help your case if, upon moving to Florida, you join local social and/or religious organizations.

In addition, an individual's overall lifestyle during the time in which he or she is changing his or her domicile may also be considered. A recent New York case on this issue established that although ownership of a home in New York is an important factor to consider, it is necessary to review the factors as a whole, which included the circumstances surrounding the petitioner's lifestyle during the audit period. Therefore, your social interactions and hobbies in Florida may be equally as important to establishing a change in your domicile as having a permanent home in Florida.

The Year You Change Your Domicile

Assume that taxpayers, a husband and wife domiciled in New York, are semi-retired and rent a beachfront condominium in Florida. They spend January 1 to May 1 in Florida and May 1 to September 30 in New York. In the fall, they meet with their estate planning attorney and are advised of the steps necessary to effectively change their domicile to Florida. They move to Florida, with the intent of making Florida their domicile on October 1. Do they file resident or nonresident income tax returns?

If you change your domicile to Florida in the middle of the year, in New York you need to file a part-year resident tax return. In New Jersey, you file both nonresident and resident tax returns for the appropriate periods, allocating income attributable to the "source" states.

New Jersey (Part-Year Resident)

When you change your domicile from New Jersey during the year, you are a resident of New Jersey for part of the year and a nonresident of New Jersey for part of the year. New Jersey does not have separate tax returns for part-year residents or part-year nonresidents. Part-year residents use the same form as full-year residents and indicate the period of their New Jersey residency. The return should show only the income received during that period. Likewise, part-year nonresidents use the same form as full-year nonresidents and indicate the period of time they were New Jersey residents. Thus, if you file a part-year nonresident return, you will also file a part-year resident return, unless you had no income during the part of the year you were a resident.

You must allocate your income between the resident and nonresident returns as appropriate. That is, report the income you received during the time you were a resident on your part-year resident return, and report the income you received from New Jersey sources during the part of the year you were a nonresident on your part-year nonresident return.

New York (Part-Year Resident)

New York imposes personal income tax for a part-year resident based on the individual's taxable income that is derived from New York sources. Thus, for the part of the year that you were a resident, all income is taxable. For the part of the year you were a nonresident, only New York source income is taxable. The significance here is that intangible income, including interest, dividends, and gains from the sale or exchange of intangible personal property (stocks, bonds, interest income on bank accounts, etc.), will not be subject to state income tax for the part of the year you are a nonresident.

Audit Considerations

If you have received a notice that you are being audited, you should be prepared for the auditor to look into the following:

PRIOR AUDITS: A prior audit as to your residency will be considered. If it was previously determined that you were domiciled in New York or New Jersey, you must produce clear and convincing evidence that you changed your domicile. Conversely, if the prior audit showed that you were not domiciled New York, then it should be accepted unless there is evidence that suggests otherwise.

FEDERAL AND RESIDENT RETURNS: The auditor will request these as a preliminary step to assist in determining if additional documentation is needed.

FORMER ADDRESS: An auditor will review prior returns and may request documentation that pertains to a prior New York or New Jersey address. He or she may also do an independent search of property records to determine the ownership of a specific residence. Therefore, you should try to maintain records of purchase and sale documents, transfers of ownership, deeds, leases and moving documentation for any property where you may have resided while in New York.

BUSINESS RELATIONS: The auditor will review any attached schedules on your New York or New Jersey return to determine how actively involved you were in a New York or New Jersey business or partnership. The auditor will be looking for the inclusion of the taxpayer's surname or initials as part of the employer's name. He or she may interpret this to mean that the ownership of the business is closely held and that there is a degree of active participation. This would be explored in more detail during the audit.

CAPITAL GAINS: Auditors will look for whether you claimed a change in domicile immediately before the occurrence of a large capital gain.

Filing Protective Claims

If faced with a New York or New Jersey audit, you should consider filing a protective refund claim with your home state to keep the statute of limitations open until the New York or New Jersey audit has concluded. Any additional tax paid to either state may be used to obtain a credit from your home state for the taxes paid, provided the statute of limitations remains open. You should speak with a tax professional in New York and New Jersey to determine when and how this claim should be filed.

New York City Tax

New York City does not tax nonresidents on income derived from sources within New York City with certain exceptions related to specific business taxes. Instead, New York City's personal income tax applies only to residents of New York City. The same statutory residency test is applied in a New York City audit as is applied in a New York State audit. The focus is instead on/whether the individual was present in one of the five boroughs that comprise New York City. A resident of Florida who sells New York City real estate will be taxed by New York State on any gain but will not owe any tax to New York City. Similarly, New York City residents who establish residency in another state may owe New York State tax on subsequently received deferred compensation, but no tax will be owed to New York City.

REMEMBER: If your employer is based in New York City and you relocate to Florida and begin telecommuting, your income will be taxed by New York State under the convenience of the employer rule discussed more fully below, but will not be taxed by New York City because New York City only taxes the residents of New York City on their personal income and not on any wages earned.

Resident Credit

New Jersey imposes a tax on a resident's wages without regard to the state where the taxpayer is employed. However, New Jersey provides a tax credit against the tax that is otherwise due for the amount of any income or wage tax imposed by another state. For example, assume a New Jersey resident earns $500,000 a year working for a company in State X. New Jersey allows a $30,000 deduction for the employee's 401(k) contributions, but State X does not, so that net wages taxed in New Jersey are 94% of the wages taxed by State X. Assuming State X wages taxes of $19,000, New Jersey will limit its credit to 94% of $19,000. Since New Jersey is only taxing $470,000, it does not need to provide credit on the remaining $30,000 taxed only once by the other jurisdiction.

Similarly, New York provides that a New York resident is allowed a credit for any income tax imposed by another state. The Taxpayer must prove that the other state imposed a tax, that the income was derived from the other state and that the income was subject to tax under New York law. This includes compensation for personal services performed in such other state, income from a business, trade, or profession carried on in such other state and income from real or tangible personal property situated in such other state.

Summary and Helpful Illustrations

As you can see, changing one's domicile is not as simple as spending half of the year in Florida. A good candidate for a change of domicile will prepare in advance for the transition and when the time comes, will keep records of his or her adherence to all the relevant factors discussed above. A good candidate will also complete all documentation around the same time (to the best he or she can). The state taxing authorities are likely to discount more of the secondary factors in favor of primary factors in considering whether one changed his / her domicile. While there is no clear-cut formula to changing your domicile, certain factors, such as maintaining a home in New Jersey or New York, and actively

participating in a business in New Jersey or New York, are particularly risky. The following illustrations provide a spectrum of hypotheticals, based on actual domicile disputes, ranging from a taxpayer likely to win a domicile dispute to another taxpayer likely to be unsuccessful in a domicile dispute:

ILLUSTRATION 1: Husband and wife sell their family residence in New York and move all of their household furniture and furnishings, personal belongings, and other items of sentimental value with them to their new home in Florida. They cut all their ties with New York, and when visiting, they stay with their children or at a hotel. This is an easy case because there is no second home.

ILLUSTRATION 2: Husband and wife move to Florida and downsize their New Jersey home to a townhouse, condominium or apartment. They spend summers in New Jersey where they can be closer to their children, but otherwise have cut all other ties to New Jersey and have implemented all of the secondary factors. On its face, this is an effective change of domicile.

ILLUSTRATION 3: Husband and wife move to a townhouse in a retirement community in Florida, but maintain the family home in New York. The husband had started a successful family business, but has since turned over control to the children. He maintains a consulting role. They never moved the household furnishings from the family home because they would not be an appropriate fit. However, they did move some expensive artwork down to Florida with them. They spend less than 183 days in New York, but also travel extensively around the world. They spend 148 days in Florida and 35 days elsewhere. They have satisfied all of the secondary factors, except the husband is still active in his New York country club and the wife is still active in several civic organizations. This is the type of case where it is unclear whether the taxpayers have effectively changed their domicile and can anticipate that their domicile will be challenged.

ILLUSTRATION 4: Husband and wife are domiciled in New Jersey while owning homes in New Jersey and Pennsylvania. They are employed and spend the majority of time for the years in question in Pennsylvania. The taxpayers engage in business, civic and personal activities in Pennsylvania, but they retain their New Jersey home, their three daughters continue to reside there for different periods, they use their New Jersey address on federal and New Jersey tax returns, they retain New Jersey driver's licenses and automobile registrations, they retain a bank account in New Jersey and file for New Jersey homestead rebate applications. These facts fail to support that they have overcome the "presumption of continued domicile" and, if audited, they would likely be deemed New Jersey residents.

ILLUSTRATION 5: Husband and wife retain their New York home and keep all of their personal belongings in New York. They rent or buy a Florida condominium in a retirement community and spend approximately 4 months a year in Florida where they have no close acquaintances other than their 'snow bird' friends who do the same and no active involvement in the community. The husband is actively involved in the family business with his children who live in New York. They file a declaration of domicile, change their voting registration and obtain Florida driver's licenses. Notwithstanding the couple's satisfaction of the secondary factors, this couple will likely lose a residency audit because they did not satisfy the primary factors listed above.

Should you sell your NJ/NY residence and does timing matter?

Considerations for Principal Residences

You have decided to make the move to Florida. In the previous chapter, we outlined the tests for determining residency in New Jersey and New York for state income tax purposes. As we discussed, retaining a home in New Jersey or New York is one of the primary factors state auditors will look at in determining your resident status. In this chapter, we will examine important federal income tax issues relating to your residence that may affect your decision to sell your residence and the timing of such sale.

Subject to federal tax law discussed below, a married couple filing jointly can exclude $500,000 of gain on the sale of a principal residence ($250,000 for single filers) if the couple uses the home as their principal residence for two of the five years prior to the sale. This means that if you are moving to Florida and you intend to sell your New Jersey or New York residence, you should do so within three years of moving to Florida to be within the rule.

Example: The Smiths, a married couple, purchased a New Jersey residence for $500,000 on January 1, 2012 and used it as their principal residence until January 1, 2016, when they purchased a new home in Florida as their principal residence. The New Jersey home was subsequently sold for $900,000 on December 31, 2018, one day less than three years after the couple moved to Florida. The realized gain was $400,000 (sales price of $900,000 - $500,000 basis), however, because the Smiths used the New Jersey home as their principal residence for at least two of the five years prior to the sale (from January 1, 2014 to January 1, 2016), the Smiths are able to utilize the capital gain exclusion available to them and report no gain. Assuming that capital gain would be subject to approximately 30% of federal and state income tax in the aggregate, this exclusion would save the Smiths $120,000.

If the Smiths had waited until January 2, 2019 to sell their New Jersey residence, they would not have satisfied the two-year test and the entire $400,000 gain would have been recognized, resulting in $120,000 of capital gains tax being due (note, however, that their $500,000 joint exclusion could still be used on a prorated basis if the reason for the move from New Jersey to Florida was necessitated by unforeseen circumstances, such as change in place of employment).

If the Smiths tried to argue that the New Jersey residence remained their principal residence even after they moved to Florida, this would create a direct conflict with trying to establish Florida residency for state tax purposes. Thus, it is important to consider the ancillary tax costs associated with the change of domicile to Florida in relation to the tax savings achieved.

Bear in mind that if you are a Florida domiciliary and capital gains tax is triggered as a result of a sale of your New Jersey or New York home, you will pay state tax as a nonresident because the gain was generated from the sale of real property, which is considered source income from the state where the property was located.

Note, however, that under federal law, sales are subject to tax on gain attributable to periods when the home was not used as a principal residence. In other words, the exclusion of gain rule will not apply to the extent gain from the sale of a principal residence is allocated to periods of "non-qualified use," which is generally defined as any period during which the property is not used as the principal residence. For example, use of a residence as rental property or as a vacation home is non-qualified use.

Gain will be allocated to periods of non-qualified use based on the ratio between the aggregate periods of non-qualified use and the period the property was owned by the taxpayer. Generally, the applicable fraction is the period of non-qualified use/period of ownership.

Example: The Jones, a married couple living in New Jersey, purchase a Florida vacation home in 2011 for $400,000. In 2016, the Jones sell their New Jersey residence and utilize their capital gain exclusion, thereby reporting no gain on the sale of the New Jersey residence. At the same time, the Jones move into the Florida residence as their principal residence. Two years later, in 2018, the Jones sell the Florida residence for $900,000. The period of non-qualified use (the numerator of the applicable fraction) is 5 years (2011 to 2016, which is the time the residence was used as a vacation home). The period of ownership is 7 years (2011 to 2018). Accordingly, 5/7 of the $500,000 gain, or $357,000, is allocated to non-qualified use and will be subject to capital gains tax. Only 2/7 of the $500,000 gain, or $143,000, will qualify for the exclusion. If the $357,000 of reportable gain is taxed at a maximum federal rate of 20% (there is no state tax in Florida), costing the Jones $71,400.

It is important to note that non-qualified use does not include any portion of the five-year period that is after the last date that the property is used as the principal residence. Accordingly, if a married couple moves out of a principal residence, the period after the move is not counted toward non-qualified use, and the old two-out-of-five-year rule applies.

In other words, federal law is not aimed at taxpayers who move out of their primary residence and subsequently sell it, but instead targets taxpayers who have bought a vacation home with the intention of later converting the vacation home into their principal residence.

Example: The Millers, a married couple, buy a New Jersey residence on January 1, 2014 for $400,000. They treat the residence as their primary residence until January 2, 2016, at which time they move to Florida and decide to rent out their New Jersey residence. The Millers then sell their New Jersey residence on December 31, 2018 for $800,000. The rental period will not be treated as a period of non-qualified use, since the former principal residence was rented after it was last used as their principal residence during the five-year testing period. As a result, the old two-out-of-five-year rule applies and the Millers do not recognize the $400,000 gain from the sale.

SPECIAL SITUATIONS

Different Domiciles For Spouses

It is not uncommon for a couple to enjoy a lifestyle that could support the argument that one spouse is domiciled in New Jersey or New York and the other in Florida. Assume that the Wilsons have two homes, one in New York and the other in Florida.

The Wilsons travel to Florida together beginning October 1, and while Mrs. Wilson stays in Florida from October 1 through May 15, Mr. Wilson commutes between Florida and New York on the weekends. Can Mrs. Wilson become a Florida domiciliary, be the sole owner of the couple's Florida home and enjoy the tax benefits associated with being a Florida domiciliary while Mr. Wilson remains a New York domiciliary?

While there is a New York tax regulation that states that generally the domicile of a husband and a wife are the same unless they are in fact separated, both New Jersey and New York specifically permit a husband and wife to file separate state tax returns if one is a resident and one is a nonresident. The practical effect of filing separate returns is that the nonresident spouse's non-New Jersey/New York source income (e.g., pension income, capital gains) will not be taxed in New Jersey or New York. As a result, in the above example, the Wilsons could consider transferring their entire intangible investment portfolio to Mrs. Wilson and not pay state income tax on the portfolio or gains from sale, and shelter the portfolio from estate tax. There are other considerations, however: if Mr. Wilson predeceases Mrs. Wilson, Mrs. Wilson will not get a step up in basis for the portfolio, because she inherited nothing from Mr. Wilson.

Different domiciles for spouses impact the amount of capital gain that can be excluded from the sale of a principal residence.

In order to exclude $500,000 of gain, while either spouse may be the owner of the primary residence, both spouses must meet the test of using the home as a primary residence for two of the past five years. Thus, in the example above, if Mrs. Wilson becomes a Florida domiciliary on October 1, 2018, and Mr. Wilson remains a New York domiciliary until October 1, 2020, and as owner then sells the home on January 1, 2022, $250,000 (and not $500,000) of gain may be excluded because Mrs. Wilson did not satisfy the use test.

A word of caution – the Florida spouse must be able to win the domicile argument if challenged. If Mrs. Wilson returns to New York for holidays, or if valuables in the home remain in New York, was the New York home really abandoned and did she have a bona fide intention to leave? If not, Mrs. Wilson may not have in fact changed her domicile.

Moving Back to New Jersey or New York for Health Reasons

We have outlined in the prior chapters that the time spent involuntarily in New Jersey or New York for health reasons should not be counted toward the 183-day requirement. What about an individual who is diagnosed with a serious or terminal illness and moves to New Jersey or New York to be near family and/or doctors? Does that move trigger a domicile change and have adverse tax consequences? The answer is that it depends on the individual situation.

In New York, “medical days” are specifically disregarded as days spent in New York. As such, confinement to a medical facility for any reason does not constitute a day spent in New York. Outpatient care, however, is not included in the “medical day” exception and days spent by one spouse visiting the other in the facility are New York days. New Jersey is a bit less clear because there is no specific medical exception. New Jersey looks at whether residence in the state is permanent by evaluating whether time spent there is for a temporary purpose and for the accomplishment of a particular purpose like a temporary job assignment. As such, if a nondomiciliary seeks treatment for a serious illness and is confined to the hospital under doctors’ orders in New Jersey, arguably the time spent in the medical facility for treatment of that illness may not be counted in determining whether such a nondomiciliary was a resident of the state for income tax purposes during such confinement.

It becomes less clear whether presence in New Jersey or New York constitutes a “day” for income tax purposes when the individual moves not only for health reasons but also to be closer to his or her family. If the reason for the move is primarily motivated by a concern to seek the best medical treatment available, and doctors warn against traveling back to Florida, then the individual has a better argument that the time spent in New Jersey or New York should not be considered a “day” for income tax purposes because the move is for a specific purpose. On the other hand, if the move was primarily motivated by the individual’s need to be closer to his or her family and his or her treatment did not absolutely require him or her to remain in New Jersey or New York, then it is likely that each day the individual spends in the state will count toward the 183-day requirement.

The 183-day test applies only for purposes of determining whether you are a statutory resident, and is relevant only if you maintained a home in New Jersey or New York. Thus, if you do not maintain a home in New Jersey or New York, the number of days spent in the state for medical reasons do not count toward statutory residency, but a significant number of days in New Jersey or New York could impact domicile.

With regard to the domicile test, changing your domicile requires (1) physical presence and (2) intent to remain indefinitely. Since a change of domicile requires intent, it would appear that an individual without the mental capacity to form such intent would be incapable of effectuating a change of domicile. However, there is a difference between New York and New Jersey law when it comes to a guardian’s ability to change an incompetent individual’s domicile. In New Jersey, case law suggests that although an individual may not possess the requisite mental state to make a domicile change by choice, that individual may be deemed to have acquired domicile in New Jersey by operation of law. In one case, the Court found that the decedent was in such an advanced state of senility when she moved from New York to New Jersey that she could not change her domicile by her own choosing but that she had acquired a domicile in

New Jersey by operation of law because her brother, a New Jersey resident, was appointed as her guardian and thus her estate was subject to tax in New Jersey. In re Gillmore's Estate, 101 N.J. Super. 77, 84 (App. Div. 1968). In New York, however, a guardian does not have the power to change an incompetent's domicile. Case law indicates that the appointment of a guardian with the authority to choose a decedent's "place of abode" did not warrant the conclusion that the guardian had the authority to change the incompetent's domicile. In re Bonora, 998 N.Y.S.2d 400, 404 (2014).

Thus, if a loved one suffers from a mentally debilitating condition such as a stroke, dementia or Alzheimer's, or is otherwise unable to handle his or her own affairs, a move back to New Jersey or New York to be cared for by family or to be placed in a nursing home may result in a change of domicile for income and estate tax purposes and this issue needs to reviewed carefully by competent tax counsel. This is because important decisions, including whether to sell a parent's home in another state, could impact a residency determination for income and estate tax purposes. It could be even more important if the move is from New York to New Jersey and the estate tax in New Jersey stays repealed.

Effect on State Residency/Domicile of Working Abroad

A taxpayer who fails to properly terminate state residency in New Jersey and New York can unknowingly incur thousands of dollars in income tax, penalties and interest years while living abroad. Even if a taxpayer believes he or she terminated his or her tax residency, the state may not agree and he or she may find a large tax bill waiting for him or her upon return.

Maintaining a State Domicile

While living abroad, if you continue to maintain domicile in New York or New Jersey it means that the taxpayer will generally be responsible for fulfilling any and all tax filing obligations imposed by his or her state of domicile on its residents, which includes the declaration of worldwide income on the taxpayer's state tax return. In addition to income tax, a person's estate may fall under the state estate tax in New York and/or inheritance tax in New Jersey should they die while a domiciliary. The best scenario for the taxpayer who may be planning to spend substantial time abroad is to first change domicile to a state like Florida with no income or estate tax.

If you work outside the U.S., you may be able to claim a Foreign Income Exclusion from federal income tax for all or a portion of your foreign income by filing Form 2555. New York allows you to also exclude foreign income from New York tax. By contrast, New Jersey does not allow you to claim this exclusion. New Jersey and New York do not provide a credit for taxes paid to a foreign country.

New Jersey / New York State Tax Treatment if Living Abroad

New York has a "safe harbor rule" for people who are domiciled in-state, but are outside the U.S. for employment or other reasons for at least 450 days during an uninterrupted period of at least 548 days and who also meet other criteria. Under this safe harbor rule, these taxpayers will be treated as nonresidents. New York has not issued any guidelines relating to how to file tax returns prior to completion of the 548 day period, which will span multiple tax years. As a result, taxpayers should request a six-month extension to file their New York tax returns to ensure they meet this test at the time of

filing. As a protective matter, estimated taxes should be paid based on residence status just in case unforeseen circumstances prevent them from meeting this test. By contrast, New Jersey has no similar "safe harbor rule."

For example, Jane is a domiciliary resident of New York and accepts an assignment in France that is expected to last two years. She packs up and moves on Dec. 31, 2018. If she requests a six-month extension to file her 2019 tax return, then she has until Oct. 15, 2020 to file her return. By that time, the 548 day period is over and she can safely file as a nonresident for 2019 and only be subject to New York tax on New York source income. If she earlier filed as a 2019 non-resident but had to return home prematurely to care for an ill relative that caused her to not meet this test, Jane should promptly amend her 2019 tax return to a resident return and include her worldwide income (subject to claiming the foreign earned income exclusion available in New York). In that case, Jane may be subject to interest and penalties so waiting to file as late as possible is preferable.

New Jersey has a separate rule that allows a New Jersey domiciliary to not be treated as a resident if he or she obtains a permanent place of abode outside of New Jersey (which can be in or outside the country), and does not spend more than 30 days in the state. New York has a similar rule, but the New York rule adds an additional requirement that you have no New York permanent place of abode.

Credit for Taxes Paid to Foreign Countries

First, credit for taxes paid to another state allows an offset or reduction of taxes imposed in the taxpayer's state of residency by the amount of taxes imposed by the state of source. As a general ordering rule when it comes to figuring out credits for taxes paid to another taxing jurisdiction, the jurisdiction of source has the right of first taxation, followed by the jurisdiction of residency. This is the same principle that is applied when calculating the foreign tax credit when a person is considered a resident for U.S. tax purposes, and lives or works in a foreign country. Some states allow a credit for taxes paid to other countries or foreign provinces. Other states allow a credit just to certain specific foreign countries. For example, New York has Form IT-112-C, Credit for Taxes Paid to a Province of Canada, which computes a credit against New York state tax. Both New Jersey and New York do not allow a credit for taxes paid to a foreign country.

Both New Jersey and New York do not allow a credit for taxes paid to a foreign country.

Advising Clients on State Tax Ramifications of Foreign Moves

When a taxpayer who is a resident of New Jersey or New York begins to prepare for an overseas assignment, he or she should speak with a tax professional about the state domicile rules and the impact on income and estate tax. A decision may need to be made as to whether to terminate domicile. This means effectively cutting ties to New Jersey or New York in a real and substantive way. A common mistake many people make is that they try to garner the best overall deal they can from their old and new domiciles by keeping what is beneficial as a resident from each place – a state or county golf card, a property tax exemption on a former personal residence, or keeping in-state tuition options open for a child who is matriculating into college. These types of actions can give a state reason to reject claims of non-residency and impose state taxation on worldwide income.

Terminating Domicile Prior to Moving Abroad

Terminating domicile means cutting relationships in the original state and creating new ones at the taxpayer's new home. This includes selling the old home and buying a new one in the new country, or, at a minimum, renting it to tenants who are not related for full rental value, closing old bank accounts, and moving investment accounts to a broker who can work with the client in a foreign location. Other recommendations for those who intend to establish domicile abroad are: Relinquish old driver license for a new one in foreign jurisdiction. Bring pets along or give them away. Do not hire a friend to watch them until the assignment ends. Go to doctors, dentists and other professionals in your new location. Send notifications of change in address to family, friends, business associates and others. Remove your name from local voter registration lists. Establish in the new town new club memberships and professional organizations. Finally, spend as little time as possible in the old state, maintain records showing what has been done to terminate domicile and keep a calendar to show where you are every day.

New Jersey and New York State Income Tax for Nonresidents

Taxpayers who have income sourced to New York or New Jersey may be obligated to file a resident return, nonresident return, or a part-year resident return without regard to residency. If a taxpayer is domiciled in New Jersey / New York, he or she would file a resident return in that jurisdiction. A resident return is appropriate in situations where the taxpayer was a resident in New York / New Jersey during the entire tax year, or if the taxpayer spent more than 183 days in New York / New Jersey and maintained a home in either of those states. Alternatively, if a nonresident earns income that is derived from New York / New Jersey, he or she would file a nonresident return and allocate his or her New York / New Jersey sourced income accordingly.

In situations where a taxpayer changes his or her domicile during the year (i.e., moving to or from New York / New Jersey), he or she would file as a part-year resident, in which the taxpayer would be taxed on the portion of income (from all sources) that he or she received while he or she was a resident of the jurisdiction, and on any New York / New Jersey sourced income he or she received while he or she was a nonresident. New York and New Jersey do not have a separate form for part-year residents. As such, the taxpayer would file using Form NJ-1040NR (for nonresidents) for New Jersey or Form IT-203 for New York.

Sourcing Rules

The determination of whether income is sourced to New York / New Jersey turns on the classification of the asset that generates the income. In general, nonresidents will be taxed on the following sourced income:

- Compensation, gains, dividends, and interest earned, received or acquired from sources within New York / New Jersey;
- Income received from the ownership or disposition of real estate or tangible personal property in New York / New Jersey (including certain gains or losses from the sale or exchange of an interest in an entity that owns real property in those states);
- Income received in connection with a trade or profession carried on in New York / New Jersey, including personal services performed in New York / New Jersey;
- Income received from business activities connected in New York / New Jersey;
- Distributive share of New York / New Jersey partnership income or gain;
- New York / New Jersey estate or trust income or gain;

- New York / New Jersey lottery winnings if the total proceeds of the prize are more than $5,000 / $10,000; and
- Gain from the sale, transfer, or other disposition of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold, when the real property comprising the units of the cooperative housing corporation is located in New York State. (New York has a form for non-residents to report income from sale of co-op: Form IT-2664, Nonresident Cooperative Unit Estimated Income Tax Payment Form.) New Jersey, however, treats this type of sale as sale of intangible personal property that is not income sourced to New Jersey.

As such, it is important to inventory your assets and identify all sources of income, as the nonresident tax rules present nuanced distinctions between taxable and nontaxable income-generating assets.

For example, if you sell real estate or tangible personal property located in New York, the income from such sale may be subject to New York State tax because such income is specifically sourced to New York under the nonresident tax rules. Compare this to income generated from the sale of intangible assets, such as stock, which does not generally trigger state tax for nonresidents. However, an otherwise nontaxable sale of stock may become taxable in New York State if the entity is an S corporation that made a 338(h)(10) election. The deemed asset sale converts what would otherwise be intangible personal property, sourced based on the nonresident's domicile, to New York source income.

Additionally, income from the sale of intangible property employed in a business will be sourced to New York. However, income from the sale of a New York partnership interest may not necessarily be subject to tax in New York State, but rather sourced based on your domicile, as a partnership interest is usually not property employed in a business from which the business generates income.

Furthermore, the structure of the sale contract may also impact whether income from the sale is taxable. For example, structuring the sale of your interest in an S corporation as an installment contract may trigger taxable income in New York State. A taxpayer who successfully changes his or her domicile to Florida may be subject to tax on unrealized income from an installment sale that he or she entered into while he or she was a resident of New York / New Jersey.

With that said, there are planning opportunities available for nonresidents who wish to sell intangible personal property. For example, for purposes of selling intangible personal property, the determination of where the property is employed refers to the taxpayer's property, not the employer's. As a result, the sale of intangible personal property, such as shares in a company or partnership, is not inherently New York / New Jersey sourced, and, therefore, the gain on the sale of such interests may not trigger New York / New Jersey tax if the taxpayer sells such interest after he or she becomes domiciled in Florida.

It is important to note that New York has special accrual rules for taxpayers who become nonresidents, or a nonresident who becomes a New York resident, during the tax year. In effect, the accrual rules require that any income that is accrued up to the change in domicile will be included in the resident period. If the taxpayer had the right to receive such income before the change of domicile, the income is considered accruable at the time of domicile change regardless of when such income is received. Examples of such income include unrealized income from an installment sale, lottery winnings, bonuses and severance pay. Taxpayers who become nonresidents of New York will have accrued

income for all income earned while they were New York residents regardless of when they receive such income. Taxpayers who become residents of New York will have accrued income for all non-New York sourced income that is earned before and received after the taxpayers become residents.

Allocation of Income

Wages

Non-residents are required to allocate wages to New York or New Jersey based upon the time they are working in those respective states and deriving income from those services. The more complicated issues involve allocating income from deferred compensation arrangements.

Even after you become a Florida resident, income that was deferred while you were in New Jersey or New York and received while living in Florida may be considered to be fully or partially sourced from your time in New York or New Jersey and thus taxable in those states.

New Jersey and New York require nonresidents to report income they receive while they are nonresidents if the income was earned within that state. This applies even though an individual taxpayer will generally report his or her income on a cash method, which means that the income is reported only when it is received. In other words, if you received deferred compensation that was earned at the time you were a New York or New Jersey resident, but did not cash out until you were a nonresident, the New York and New Jersey tax authorities will examine whether you properly paid tax on amounts that were earned during your employment in those states.

Even if you are deemed to be a Florida domiciliary, if you continue to perform services in Florida for a New York business, this income may be taxable to New York if the move is determined to be for the convenience of the employer. This "convenience-of-the-employer" test provides that an allocation of compensation based on the days worked in New Jersey or New York turns on whether such days were worked outside of New York due to necessity of the service rather than for your own convenience if the company maintains a bona fide business location in New York. Any allowance claimed for days worked outside New York must be based upon the performance of services that of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his or her employer. In making the allocation, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay. New York strictly enforces this rule, which was recently upheld against constitutional challenge by the state's highest court, the New York Court of Appeals.

It is the New York Tax Department's position that in the case of a taxpayer whose assigned or primary office is in New York, any normal workday spent at the home office will be treated as a day worked outside the state if the taxpayer's home office is a bona fide employer office. The Department has published detailed rules on what constitutes a bona fide office only for purposes of applying the convenience of the employer test. These rules expanded the scope of work that could be performed outside of New York for a New York employer, but treated as non-New York working days by

meeting a specific set of factors. Under the rules, satisfying the "primary" factor is a direct way to prove that a New York employer sent an employee to work in another jurisdiction out of the employer's necessity, thus causing income from such work to be allocated not to New York but to the other jurisdiction. The primary factor asks whether special facilities or equipment are available at or near the employee's home that are required for the employee's work and that are not available at the New York employer's place of business.

New Jersey statutes and regulations do not currently provide for a convenience of the employer test. As New Jersey tax rates continue to rise, it is possible that the Division will publish additional guidance on this issue and may become more aggressive in auditing taxpayers who work out of state for New Jersey-based companies.

Even though New Jersey does not apply a convenience-of-the-employer test, a nonresident's wages may be subject to New Jersey income tax if earned, received, or acquired from sources within New Jersey by carrying on a trade or business in New Jersey. For example, a retiree divests his ownership interest in his former company and moves to Florida. Shortly thereafter, the taxpayer becomes a consultant for his former company and is paid a monthly consulting fee. If the taxpayer maintains a New Jersey office and travels to New Jersey to meet with the company's clients/customers, it is possible that the Division could take the position that the taxpayer is carrying on a trade or business in New Jersey. This in effect would have a result similar to an application of the convenience-of-the-employer test.

Bonus

Both states require that if you receive a bonus when you are a nonresident, it is taxable by New York and New Jersey if the bonus relates to the work that you performed in New York and New Jersey. If it is attributed to work both in and out of the state, you must prorate the bonus based on this allocation.

Stock Options and Related Restricted Stock Rights

If you exercise stock options, stock appreciation rights, or restricted stock rights that were granted to you when you were working in New York, New York will require you to allocate the income once the stock options have vested. New York has detailed regulations to address these scenarios and also stipulates that both the state and the taxpayer can propose an alternative allocation method if the regulatory method is not fair and equitable.

Treatment will depend on whether the options were granted under an employee stock purchase plan or an incentive stock option (ISO) plan. For those options that were granted under such a plan, New York requires that the income be reported to New York in the tax year that the income is included in the individual's federal adjusted gross income. The regulations specify the applicable allocation periods for various scenarios, illustrate the allocation with several examples, and discuss allocation in the case of part-year residents.

For former New York residents, the regulations and guidance is more defined than in New Jersey. However, both states will seek to tax an appropriate portion of deferred compensation when the compensation is from work performed in those states.

If your compensation plan includes investment income, which is earned once you left New York and New Jersey, the income will likely be outside the reach of those jurisdictions.

New Jersey does not have specific rules and regulations that address these forms of deferred compensation in the same detail as New York. Nonetheless, the general scheme is similar. New Jersey can tax nonresidents on compensation income related to employment in the state even if it is earned once you are already a resident in another state. Thus, New Jersey taxes a profit sharing plan distribution received by a nonresident from plan assets built up during employment within the state, as well as other types of deferred compensation including the exercise of stock options.

Retirement Benefits

Pursuant to Federal law, once you establish residency outside New Jersey and New York, your former state cannot tax pension and qualified annuity income received from sources in the state.

New York Resident

Under New York law, pension income from federal, state, and local governments, as well as certain public authorities, is not taxable. Social security benefits are also not taxable. For other types of retirement benefits and private pension plans, New York provides for an exclusion from income of up to $20,000 if you are above the age of 59½. If you became age 59½ during the tax year, the exclusion is allowed only for the amount of pension and annuity income received on or after you became 59½, but not more than $20,000. The deduction is not dependent on a taxpayer's overall income for the year.

New Jersey Resident

Under recent changes to New Jersey law, the exclusion of qualified retirement benefits in 2018 is $60,000, and will increase by an additional $20,000 per year until 2020 when the full exclusion amount applies. By 2020, a couple, who are 62 or older, filing jointly with a total income of $100,000 or less, will be able to exclude up to $100,000 of retirement income on their New Jersey income tax return.

Retirement income includes pension payouts, annuity income and 401(k), 403(b) or Individual Retirement Account withdrawals. Social Security income is not taxable in New Jersey. The exclusion, however, is all or nothing. Once a couple's income is over $100,000, they lose the exclusion and their entire income is subject to state income tax.

ILLUSTRATION: Taxpayer, a New Jersey resident, was employed by ABC Industries and participated in his company's 401(k) plan. Taxpayer retired at age 65 and his 401(k) account amassed $3,000,000. After retirement, Taxpayer began withdrawing $200,000 a year from his retirement account and Taxpayer is married. Taxpayer's retirement withdrawals are $100,000 above the New Jersey's retirement exclusion amount, so the income is subject to New Jersey income tax. Based on the applicable tax rate, Taxpayer pays income tax to New Jersey. Taxpayer and spouse thereafter move to Florida, which does not have an income tax. Taxpayer saves the annual income tax as a Florida resident.

Former New Jersey and New York Residents

Payments received by a participant from a retirement account, pension or non-qualified deferred compensation arrangement are generally subject to income taxes assessed by the state in which the participant is a resident at the time of receipt.

As mentioned above, under federal law, a state may not impose an income tax on the retirement income received by a nonresident individual even if the income was earned while the individual was a resident of the state assessing the tax. Retirement income includes payments from a tax qualified retirement plan, such as a 401(k) plan, 403(b) plan, profit sharing plan or defined benefit pension plan and payments received after termination of employment from a deferred compensation arrangement, which is typically a tax-deferred, employer-sponsored retirement plan.

Non-qualified deferred compensation may not be taxed if the benefits are payable in any form after termination of employment under a "mirror" plan maintained solely to provide benefits in excess of the limits on a qualified plan imposed by law, or payments pursuant to any other non-qualified deferred compensation plan only if payments are made either over the life expectancy of the recipient (or the joint lives of the recipient and a beneficiary) or over a period of time of not less than 10 years.

The exclusion applies to any type of payment, whether lump sum or installments, under a tax-qualified retirement plan or a "mirror" plan.

Bottom Line

If you accomplish a change of residency, income allocation is an important aspect in preparing a non-resident return. You must determine what is or is not New York and/or New Jersey source income. By not properly allocating income on a non-resident return, you will risk greater exposure to an audit. Allocation considerations should be discussed with competent tax counsel.

INCOME ALLOCATION IS AN IMPORTANT CONSIDERATION IN ANY CHANGE OF DOMICILE ANALYSIS, AND SHOULD BE DISCUSSED WITH COMPETENT TAX COUNSEL

Homestead Exemption

In addition to income tax savings, there is a further advantage to moving to Florida: enhanced creditor protection, including against tax collection and judgment.

Most prominently, the Florida Constitution, Article X, Section 4 provides an exemption against a forced sale or lien on a "homestead" in Florida. This means that a residence of any value cannot be levied upon or seized from the homeowner (with limited exceptions for the IRS). Three requirements must be satisfied for real property to qualify as a homestead under the Florida Constitution: (1) it must be owned by a "natural person"; (2) the owner must make, or intend to make, the real property his or her permanent residence or that of his family; and (3) it must occupy no more than 0.5 acre within a municipality, or 160 acres outside of a municipality. At the owner's death, the exemption extends to the surviving spouse or other heirs.

Because of the specific ownership and transfer requirements imposed on the homestead, when undertaking estate planning involving a Florida residence, including through the common use of revocable trusts to avoid burdensome probate, careful drafting of documents will help preserve the homestead status of the property for both the owner and his or her heirs.

In addition to the homestead protection, other forms of property ownership that help protect against liens in Florida include real estate held in a tenancy by the entirety by spouses, which can enhance homestead protection, and spendthrift trusts where the beneficiary has no control over the distribution of the assets.

Filing for Homestead Exemption

An important technique to assert Florida as your domicile is to apply for and qualify for Florida Homestead. All legal Florida residents are eligible for a Homestead Exemption on their homes, condominiums, co-op apartments, and certain mobile home lots if they qualify.

The homestead exemption has two important components. First, the exemption shields $25,000 on the assessed value of your qualified residential property from all property taxes (with an additional $25,000 applying on the assessed value between $50,000 and $75,000 and only to non-school taxes). In addition, it limits the increase in assessed values to the lower of (1) 3% of the assessed value of the property in the prior year, or (2) the percentage change in the consumer price index. In light of appreciating real estate markets, this limitation can be very valuable. Applications generally are filed with the property appraiser's office in the county in which you reside, although some counties allow online applications. To be eligible to apply for the homestead exemption, you must be a resident of Florida as of January 1 in

the year in which you intend to apply and the application must be filed on or before March 1. Generally, you will need a Florida driver's license or Florida ID, Florida Vehicle Registration, Voter ID and a copy of your recorded deed. Florida statutes require disclosing your social security number as well. Note that if you are denied, you can appeal by filing a petition with the county's Value Adjustment Board.

You may file for 2019 Homestead online. The timely filing period for Homestead Exemption is March 1 of the year for which you are claiming the exemption. The absolute deadline to late file for the 2019 exemption is in mid-September (i.e., the 25th day following the mailing of the Notices of Proposed Property Taxes which occurs in mid-August). Fla. Stat. Sec. 196.011(8).

What to Do When You Arrive in Florida

We have outlined the steps in the preceding chapters to establish Florida domicile, but there are a few Florida-specific actions that should be taken to augment your position that you are a Florida domiciliary.

The first item is recording a Florida Declaration of Domicile in the official records of the clerk of the circuit court for the county in which you reside. Many counties provide a sample form of Declaration on the clerk's website. The Declaration provides evidence of the creation of your Florida domicile. It is a sworn statement declaring that you reside and maintain a place of abode in that county, which you recognize and intend to maintain as your permanent home. In the event you maintain a home in New Jersey or New York, the sworn statement indicates that your Florida home is your principal and predominant home, and that you intend to continue it permanently as such. A sample Florida Declaration of Domicile is included in this reference guide in Appendix A.

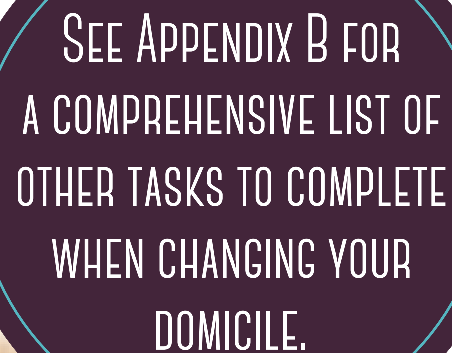
If you continue to own a home in New Jersey, New York, or another state, you should notify the tax assessor/collector in your prior state of residence that you have moved and relinquish any homestead or other exemption in that state. If you do not relinquish your former domicile's homestead or other tax rebate, you run the risk that Florida will not recognize your homestead exemption and could find yourself facing substantial liabilities for back taxes.

The second item is filing an application for homestead exemption on your Florida residence, which is discussed in Chapter 6.

The third item is executing new estate planning documents to reflect Florida as your place of residence. It is important to note that unlike in New Jersey and New York, there are limitations on who can serve as executors (known as personal representatives in Florida) for Florida decedents. Specifically, any person who is not domiciled in Florida cannot qualify as a personal representative unless the person is (1) a legally adopted child or adoptive parent of the decedent; (2) related by lineal consanguinity to the decedent; (3) a spouse or a brother, sister, uncle, aunt, nephew or niece of the decedent, or someone related by lineal consanguinity to any such person; or (4) the spouse of a person otherwise qualified based on the requirements above.

As a result of this restriction, if, for example, both husband and wife appointed the husband of the wife's sister (i.e., wife's brother-in-law) as their successor executor in their New York estate planning documents and they moved to Florida, assuming the appointee husband is not domiciled in Florida, the husband would be unable to appoint the husband of the wife's sister (or his wife's sister, for that matter) as his successor personal representative, while his wife would be able to appoint such individual. Close friends not domiciled in Florida are also ineligible to serve.

A comprehensive list of other tasks to complete, including transferring title to your automobiles, obtaining a Florida driver's license, changing your passport address and registering to vote, is set forth in Appendix B. While some items on the list may not apply, doing as much as you can on this list can only enhance your position that you have changed your domicile from New Jersey or New York to Florida.



APPENDIX A - DECLARATION OF DOMICILE

After Recording Return to: ______________________________

To the Clerk of the Circuit Court [County Comptroller] ______________________________ County, Florida.

This is my declaration of domicile in the State of Florida that I , ______________________________,
am filing this day in accordance and in conformity with Section 222.17, Florida Statutes.

FOR DOMICILIARIES OF THE STATE OF FLORIDA:

I , ____________________, hereby declare that I reside in and maintain a place of abode at:

____
Street and number

______________________________, Florida
City and County

which place of abode I recognize and intend to maintain as my permanent home and, if I maintain another place or places of abode in some other state or states, I hereby declare that my above-described residence and abode in the State of Florida constitutes my predominant and principal home, and I intend to continue it permanently as such. I am, at the time of making this declaration, a bona fide resident of the State of Florida residing at:

____
Street and number

______________________________, Florida
City and County

and have been a permanent resident since ______________________________
(Month/Day/Year)

I formerly resided at:

____
Street and number

____
City, County and State

and the place or places where I maintain another or other place or places of abode are as follows: (Here list street address, city, county and state of any other place or places of abode.)

____

I understand that the penalty for perjury is up to five (5) years in State Prison (Section 837.02, Florida Statutes).

State of Florida, County of ______________________________

____
Signature

Sworn to (or affirmed) and subscribed before me this __________ of __________ , by ______________________________

____
(Signature of Notary Public)

personally known ________ or produced identification ________ Type of identification produced ______________________________

APPENDIX B
DOMICILE CHECKLIST

Name:

____

Date:

____

Where is your domicile?

____

How many days of each year do you spend in:

_____ Florida _____ Other

A. Official Records	Florida	Other	N/A
Adoption records			
Aircraft registration			
Auto registrations			
Baptismal records			
Birth certificates			
Boat registration			
Census records			
Children's adoption records			
Children's baptismal records			
Children's birth records			
Jury commissioner's records			
Copyright applications			
County clerk's records			
Death certificate			
Domicile declaration			
Driver's license			
Gun permits			
Gun registrations			
Homestead applications			
Marriage records			
Medicare records			
Military and National Guard records			

A. Official Records *(continued)*	Florida	Other	N/A
Naturalization papers			
Passport			
Patent applications			
Pilot's license			
Post office change of address			
Professional licenses			
Professional registrations			
Recreational vehicle registrations			
Sales tax resale permits			
Social Security records			
State licenses			
Trademark applications			
Unemployment compensation records			
Veteran's Administration records			
Voting registration			

B. Financial Records	Florida	Other	N/A
Certificates of deposit			
Charge accounts			
Checking account records			
Credit cards			
Custody management accounts			

B. Financial Records *(continued)*	Florida	Other	N/A
Estate records			
Investment management accounts			
Loan applications			
Loans payable			
Loans receivable			
Money market funds			
Mutual funds			
Partnership records			
Registered security records			
Royalty payments			
Safe deposit box leases			
Savings account records			
Stockbroker's records			
Trust records			

C. Business and Legal	Florida	Other	N/A
Auto leases			
Business leases			
Certificates of doing business			
Closing statements			
Corporate records			
Current Will			
Deeds			

C. Business and Legal *(continued)*	**Florida**	**Other**	**N/A**
Divorce records			
Easements			
Equipment leases			
Fiduciary appointments			
Incompetency proceedings			
Judgments			
Limited partnership certificates			
Living Will			
Mortgages			
Notary identifications card			
Office leases			
Options to buy real estate			
Options to sell real estate			
Partnership records			
Past litigation			
Pending litigation			
Powers of attorney			
Prior Will			
Real estate appraisals			
Real estate contracts			
Real estate tax valuations			
Residential leases			
Tax assessment records			
Tax liens			
Trust agreements			

D. Utility Records	Florida	Other	N/A
Cable television			
Electricity			
Garbage collection			
Internet service provider			
Sewer rents			
Telephone/cell phone			
Water			
Long distance telephone bills			

E. Insurance Records	Florida	Other	N/A
Premium Notices			
Accident			
Annuity payments			
Auto			
Casualty			
Disability			
Health			
Life			
Malpractice			
Title			
Umbrella coverage			

E. Insurance Records *(continued)*	Florida	Other	N/A
Policy Applications			
Accident			
Annuity			
Auto			
Casualty			
Disability			
Health			
Life			
Malpractice			
Title			
Umbrella coverage			

F. Membership Records	Florida	Other	N/A
Airline travel club rewards			
Alumni directory listings			
Boards of directors			
Charitable organizations			
Fraternal organizations			
Health clubs			
Homeowner's association			
Lodges			

F. Membership Records *(continued)*	**Florida**	**Other**	**N/A**
Political party			
Private clubs (nonresident)			
Private clubs (resident)			
Recipients of charitable gifts			
Religious affiliation			
Social register listing			

G. Employment Records	**Florida**	**Other**	**N/A**
Business cards			
Commission statements			
Employment contracts			
Employment identification cards			
Expense account records			
Group disability records			
Group health records			
Group life insurance records			
Local withholding taxes			
Payroll records			
Pension plan records			
Profit sharing plan records			
State disability records			
Stock bonus plan records			
Union records			
Worker's compensation records			

H. Medical records	Florida	Other	N/A
Dentists			
Hospital admission records			
Nursing home records			
Pharmacy records			
Physicians			
Psychotherapists			

I. Tax Records	Florida	Other	N/A
Where tax returns filed			
Estimated tax payments			
Federal gift			
Federal income			
Local income			
Personal property			
Real estate tax			
School tax			
State income			
Resident tax filing status			
Local income			
Personal property			
State income			

I. Tax Records *(continued)*	Florida	Other	N/A
Nonresident tax filing status			
Local income			
Personal property			
State income			

J. Miscellaneous Records	Florida	Other	N/A
Answering service			
Auto rental records			
Auto violations			
Boating permits			
Burglar alarm/guard service			
Business correspondence			
City directory listings			
Community activities			
Continuing education courses			
Credit cards charges			
Diaries			
Dry cleaning records			
Fishing permits			
Garage records			
Gardener building maintenance			
Golf permits			

J. Miscellaneous Records *(continued)*	**Florida**	**Other**	**N/A**
Hotel registers			
Hunting permits			
Library cards			
Liquor store records			
Listings in directories			
Listings in *Who's Who*			
Magazine subscriptions			
Newspaper delivery			
Obituary notices			
Organ donor cards			
Parking violations			
Personal correspondence			
Personal flight log			
Resume			
State and local recreational permits			
Telephone directory listings			
Tennis permits			

K. Other Important Data	Florida	Other	N/A
Location of:			
Aircraft			
Autos			
Boats			
Casualty insurance adviser			
Cemetery plots			
Close friends			
Collections			
Condominium			
Cooperative apartment			
Heirlooms and mementos			
Investment adviser			
Kennel			
Life insurance adviser			
Personal accountant			
Personal attorney			
Pets			
Real estate			
Relatives			
Retirement home			
Securities			
Stockbroker			
Tangible personal property			
Veterinarian			

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