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HOME IS WHERE YOUR HOUSE IS, OR IS IT
PERSONAL INCOME TAX ISSUES RELATED TO RESIDENCY & DOMICILE

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I. Domicile

Generally, a state may tax the worldwide income of a person who is domiciled there. Although defined by statute or administrative rule in some states, domicile is a common-law term meaning a person’s fixed and permanent place of abode in which the person intends to remain indefinitely or to which the person intends to return. See Dep’t of Rev. v. Glass, 15 Or. Tax 117 (2000). See also Black’s Law Dictionary 558-59 (9th ed. 2009).

Domicile differs from residency. Although a person may have multiple residences, a person can have only one domicile. See de la Rosa v. Dep’t of Rev., 313 Or. 284, 832 P.2d 1228 (1992). A person may be considered a resident of the state in which he or she currently lives but still be considered domiciled in another state to which the person intends to return.

Once domicile is established in a particular state, it can be difficult to lose. Part I of this outline reviews the key factors that courts and administrative agencies consider in determining domicile and whether the taxpayer has changed his or her domicile as well as the evidentiary standards applied.

Part II of the outline examines the tests to determine residency and the definition of a permanent place of abode, residency issues that arise in particular situations, and recent residency cases. Part III examines dual residency, tax credits available to taxpayers subject to income tax in more than one state, and state legislative efforts and multistate agreements to address double taxation.

A. Tax Significance of Domicile – Linchpin for State Taxation of a Person’s Worldwide Income.

A state may constitutionally tax the worldwide income of a state resident. As a federal constitutional matter, the fact that a person is domiciled in a state is sufficient basis for the state to tax the person’s worldwide income regardless of where earned. Cohn v. Graves, 300 U.S. 308 (1937).

State income tax statutes usually provide a number of grounds on which a person can be classified and taxed as a state resident. However, being domiciled in the state is typically sufficient by itself for the person to be taxed as a resident without regard to any other test.

States are generally not bound by income tax treaties entered into by the United States with other countries. See Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983). Therefore, a person domiciled in the state may be subject to state income taxation even if the person is exempt from federal income taxation under a tax treaty. See Appeal of M. T. de Mey van Streefkerk, No. 85-SBE-135 (Cal. State Bd. of Equaliz. Nov. 6, 1985).
B. Tests to Determine Domicile.

1. Evidentiary Standard.

Domicile is a question of fact based on the person’s intent to remain in, or to return to, a particular state. *Hudspeth v. Dep’t of Rev.*, 4 Or. Tax 296 (1971). Because a taxpayer’s own testimony on the matter is considered self-serving, a person’s subjective intent is typically inferred from objective indicia. *Id. See also Ott v. Dep’t of Rev.*, 16 Or. Tax 102 (2002). The analysis tends to be very fact-specific.

Although a person may have only one domicile, because the determination is a question of fact and the rules and caselaw in each state may differ, more than one state may assert that an individual has his/her domicile in that state. *See Dorrance’s Estate*, 309 Pa. 151, 163 A. 303 (1932), *cert. denied*, 287 U.S. 660 (1932), 288 U.S. 617 (1933) and *In re Estate of Dorrance*, 115 N.J. Eq. 268, 178 A. 601 (1934), *aff’d*, 116 N.J.L. 362, 184 A. 743 (1936), *cert. denied*, 298 U.S. 678 (1936) (Campbell’s Soup magnate held by a Pennsylvania court to be a Pennsylvania resident and by a New Jersey court to be a New Jersey resident for state estate tax purposes.)

There is no federal constitutional bar to two or more states each classifying a person as a domiciliary for state tax purposes. *See Cory v. White*, 457 U.S. 85 (1982); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). (*Cory* and *Worcester County Trust* were both estate tax cases, but the reasoning of the cases would appear to be equally applicable to state income tax cases. The cases also presented Eleventh Amendment jurisdictional issues. *Cf. Texas v. Florida*, 306 U.S. 398 (1938) (Dispute between four states, all claiming the decedent as a domiciliary for estate tax purposes. As the case was a dispute between the states themselves and because the estate had insufficient assets to satisfy the claims of all four states, the Supreme Court heard the case as a matter of original jurisdiction.)

Typically, the issue arises in court or in administrative cases where the state Department of Revenue/Taxation has made a determination that the person is domiciled in the state. Therefore, the taxpayer typically bears the burden of proof of establishing that he or she is not domiciled in the state.

2. Factors.

Courts have looked to the following factors, among others, in determining whether a person is domiciled in the state. Generally, no one factor is
determinative. Rather, the courts generally look to the totality of circumstances in determining whether a person is domiciled in the state:

a. Physical presence (amount of time spent in the state);
b. Residence (whether taxpayer owns or rents a residence in the state);
c. Employment;
d. Business connections and relationships;
e. Family location;
f. Real property;
g. Bank accounts;
h. Voter registration and voting;
i. Public library card;
j. Social clubs;
k. Motor vehicle registration; and
l. Professional services (lawyers, doctors, dentists, etc.).

C. Change in Domicile.

Generally, once domicile has been established in a particular state, it remains there until the person establishes a new domicile elsewhere.

Cases involving a change in domicile are frequently litigated. These cases typically involve a taxpayer who has moved (or allegedly moved) from a high income tax jurisdiction to a low or no tax jurisdiction. Typically, the high tax jurisdiction claims that the taxpayer has not changed his or her domicile and assesses taxes based on the person’s continued status as a state resident.

Due to the way in which these cases typically arise (an assessment or determination by a state in which the taxpayer was concededly previously domiciled), the taxpayer typically bears the burden of proof to establish that his or her domicile has changed.

1. Test.

In order to establish a change in domicile a taxpayer must generally establish:

a. A fixed residence in a new place;
b. intent to abandon his/her old domicile; and
c. intent to acquire a new one.

See, e.g., Ott v. Dep’t of Rev., 16 Or. Tax 102 (2002); Appeal of Tarring, No. 87-SBE-075 (Cal. State Bd. of Equaliz. 1987).
It is not sufficient for the taxpayer to simply establish that he or she has moved out of state. The taxpayer must establish that he or she has a fixed place of abode in the new jurisdiction (state or country) and that he or she intends to remain there permanently or indefinitely.

In many jurisdictions, the taxpayer must specifically establish that he or she has abandoned his/her prior domicile (i.e., that he or she has left the prior state with no intent to return). See, e.g., Ott v. Dep’t of Rev., 16 Or. Tax 102 (2002). Even in states where this is not prescribed as a separate element of proof, as a practical matter the facts required to demonstrate the taxpayer has established a new domicile may also establish that he or she has abandoned the old one. Similarly, facts supporting the conclusion that the taxpayer has not abandoned his or her prior domicile may also lead the court to conclude that the taxpayer has not established a new one in another state.

As in the case of the initial determination of domicile, the question of whether the taxpayer has changed his or her domicile is a question of fact that is generally determined based on objective indicia and is very fact specific.

Particularly where the taxpayer retains some connection with the state, such as a residence or business connection or a spouse or other family members remaining in the original state, the courts tend to examine a taxpayer’s claims of a change of domicile to a low or no tax jurisdiction extremely closely and often with a somewhat jaundiced eye. Particular scrutiny may also be given to individuals who winter in low or no income tax states, such as Florida or Nevada, and maintain residences in high tax states where they had previously lived on a full-time basis.

Finally, taxpayers who move to contiguous states close to their prior place of domicile may be closely scrutinized, particularly if that move occurred just before a major transaction, such as the sale of a closely held business. (An example would be a person who moves from Portland, Oregon to Vancouver, Washington, which is 10 miles away, where Oregon has a top marginal personal income tax rate of 11% and Washington has no personal income tax.)

2. Factors.

The factors are generally similar to the ones used to establish domicile in the first place although the focus is often on a comparison of the level and types of activities engaged in by the taxpayer in the two jurisdictions and on the connections the taxpayer retains with the original state in particular.
a. Physical presence. (The more time a taxpayer spends in the state and the more frequent his/her visits, the more likely the taxpayer is to be found to have retained his or her domicile in the state.)
b. Residence. (Whether the taxpayer owns or rents a residence in the state.)
c. Employment. (Is the taxpayer still employed in the state? If the taxpayer is now employed out of state, is his/her position temporary or permanent?)
d. Business connections and relationships. (Does the taxpayer maintain a business location or key business relationships in the state?)
e. Family location. (Have the taxpayer’s spouse or other family members remained in the state? This is a particularly bad fact if the taxpayer’s family members remain in the taxpayer’s former residence.)
f. Bank accounts. (Has the taxpayer retained bank accounts in the originating state?)
g. Voter registration and voting. (Has the taxpayer changed his or her voter registration to the new state? It is a particularly bad fact if the taxpayer has continued to vote in the old state.)
h. Driver’s license and motor vehicle registration.
i. Public library card.
j. Social and athletic club memberships.
k. Real and personal property.
l. Professional services (lawyers, doctors, dentists, etc.). (Is the taxpayer continuing to use professionals located in the old state?)
m. Unemployment benefits.

The cases are decided based on the totality of the circumstances and generally no one factor is determinative.

3. **Proof of Change in Domicile.**

For the reasons stated above, the burden of proof is generally on the taxpayer to establish that his or her domicile has changed. In certain states, a taxpayer must prove a change in domicile by clear and convincing evidence or “clear proof.” See *Bodfish v. Gallman*, 50 A.D. 2d 457, 378 N.Y.S. 2d 138 (N.Y. App. Div. 1976) (clear and convincing evidence); *Appeal of Tarring*, No. 87-SBE-075 (Cal. State Bd. of Equaliz. 1987) (clear proof). Further, a greater quantum of evidence may be required to establish a change of domicile to a foreign country than to another state. See *Bodfish*, 50 A.D. 2d at 458, 378 N.Y.S. 2d at 140-41.

The taxpayer should seek to sever as many connections with the prior state and create as many connections with the new state as possible. Factors that are often cited are whether the person is registered to vote, obtained a
driver’s license and registered his/her motor vehicles in the new state. The permanent addresses listed on the bank and brokerage accounts should also be changed.

Furthermore, careful consideration should be given in deciding whether to maintain any memberships or other privileges (such as a library card or parking or beach privileges) in the old state that require “residency.” Although residency is different than domicile, claiming privileges based on residency may be considered evidence that the taxpayer has not abandoned his or her domicile. Any privilege based on “permanent residency” in the state would be particularly problematic.

D. Abandonment of Domicile.

Generally once a person has established domicile in a particular state, that domicile cannot be lost or abandoned until the person has established domicile in a new state. As domicile requires a permanent and fixed place of abode, a person can still be considered to be domiciled in the state the person has long left if the person has not yet established a new permanent residence elsewhere. Thus, a long-haul truck driver who left Oregon and then lived in his tractor trailer without establishing a fixed residence elsewhere was still considered to be domiciled in Oregon. *Dep’t of Rev. v. Glass*, 15 Or. Tax 117 (2000) (A truck does not constitute a permanent place of abode outside of Oregon because it is not a fixed location.) *Accord Caton v. Dep’t of Rev.*, No. TC-MD 040044F, 2004 WL 2212147 (Or. Tax Mag. Div. Sept. 8, 2004) (Self-propelled motor home in which taxpayer lived did not constitute a permanent place of abode outside of Oregon because it is not a fixed location.)

Similarly, a person who sells his or her residence in a state to accept an assignment abroad but who does not become a permanent resident of a foreign country may still be considered to be domiciled in the state that he or she left and therefore still subject to tax there on his or her worldwide income.

E. Special Cases.

1. Military Personnel.

Under Section 514 of the Soldiers and Sailors Relief Act of 1940, 50 U.S.C. App. § 574, a person is not deemed to have lost his/her domicile or residence in any state solely by reason of his/her absence therefrom in compliance with military orders or to have acquired domicile or residence in any state solely as a result of such orders. Further, for purposes of state income taxation, the income military personnel stationed in a state pursuant to military orders receive for military service is not considered income from a source or services within the state.
Thus, military personnel who are stationed in a state but are not otherwise residents thereof are generally subject to the income taxation in that state solely on non-military income derived from sources within the state.

2. Students.

Dormitories, fraternities or sororities do not constitute permanent places of abode and therefore cannot serve as a basis for a change in a student’s domicile.

Under the general rule that a person retains his or her state domicile until a new domicile is established in a different location, students generally retain the domicile of the state in which they lived prior to entering college.

Many, if not most, states have a very specific definition of residency for in-state tuition purposes. A student who claims eligibility for in-state tuition but fails to file state income tax returns as a resident may be subject to close scrutiny.

3. Domiciliaries With Very Limited Contact With State.

Although most states treat domiciliaries as state residents for income tax purposes regardless of how little contact they have with the state, certain states, such as New Jersey, New York, and Oregon, exclude domiciliaries who (a) maintain no permanent place of abode in the state, (b) maintain a permanent place of abode elsewhere, and (c) spend no more than 30 days during the tax year in the state. N.J. Rev. Stat. § 54A:1-2.m.; N.Y. Tax Law § 605(b)(1)(A)(i); Or. Rev. Stat. § 316.027(1). New Jersey, New York and Oregon treat such individuals as nonresidents for state income tax purposes; i.e., they may still be subject to state tax on income earned from sources within the state.

Certain states, such as New York, also excludes from the definition of a resident domiciliaries who live outside the United States for an extended period of time and who are present in the state for only limited periods. N.Y. Tax Law § 605(b)(1)(A)(ii).

II. Residency

Individuals who are domiciled outside a state may be characterized and taxed as in-state residents if they qualify as "statutory residents." Additionally, individuals who are residents of a State (e.g. New York State) but not a locality (e.g. New York City) may also be residents of the locality if they satisfy the locality's statutory residence requirements. Accordingly, individuals who regularly commute into a State (or City) for business must generally avoid owning or
renting a house or apartment in the State (or City) in order to avoid being classified as a resident for tax purposes.

A. Tests to Determine Residency

1. Permanent Place of Abode (PPA) & Day Test - The Bright Line Test?

   a. **183 Day Test:** In most states, you are a statutory resident if you maintain a PPA and spend more than 183 days within the state.
      ■ More Than 183 Days: Connecticut, Delaware, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Washington DC
      ■ "More Than 6 Months": Arkansas, Colorado, Maryland, Nebraska
      ■ "185 Days": New Mexico
      ■ 183 Contact Periods: Ohio

   b. **200 Day Test:** In Oregon, you are a statutory resident if you maintain a PPA and spend more than 200 days within the state. See Oregon Rev. Stat. §316.027(1)(B).

2. Other Than a Temporary or Transitory Purpose.

   Even if one establishes a domicile outside of California or Illinois, resident income tax will be due from one who is in California or Illinois for more than a temporary or transitory purpose. See Cal. Rev. & Tax Code §17014; IL Tax Act §1501(a)(20). This means than one who is in California or Illinois for more than a vacation, social endeavor, business assignment or transaction of limited time duration is subject to the resident income tax. In each of these states, a presumption of residency occurs if an individual spends more than nine months in the state. The presumption may be overcome by satisfactory evidence that presence in the state is for a temporary or transitory purpose. However, there is no presumption that one in the state for less than nine months is not a resident. See Cal. Rev. & Tax Code §17106 & Cal. Tax Code §17016; Ill. Admin. Code §100.3020. There is no bright line test to determine whether an individual is inside California or Illinois for a "temporary or transitory purpose." The individual's purpose for being inside the state is determined based upon all the facts and circumstances of each particular case. For example, in determining whether an individual has established residency in California, courts look primarily to the following factors:

   1. The amount of time you spend in California versus amount of time you spend outside California;
   2. The location(s) of your spouse and children;
   3. The location of your principal residence;
4. Where you were issued your driver's license;
5. Where your vehicles are registered;
6. Where you maintain your professional licenses;
7. Where you are registered to vote;
8. The location of banks where you maintain accounts;
9. The locations of your doctors, dentists, accountants, and attorneys;
10. The locations of the church or temple, professional associations, and social and country clubs of which you are a member;
11. The locations of your real property and investments;
12. The permanence of your work assignments in state; and,
13. The location of your social ties.

See generally California, Franchise Tax Board, FTB Publication 1031, Guidelines for Determining Resident Status - 2010.

B. Definition of Permanent Place of Abode

1. What is a "Permanent Place of Abode"? In most states, the definition encompasses two separate and distinct concepts. First, the property typically must itself constitute a permanent place of abode. Second, the property must be maintained by the taxpayer.

   a. Physical Characteristics. Typically, the property must be capable of being used as a residence throughout the year.

      1. Camps, Cottages. Typically not included as PPA

         ■ New York: "a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. 20 NYCRR §105.20(e)."

         ■ Connecticut: "a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. CT Agencies Regs. §12-701(a)(1)-1(e)."

         ■ Pennsylvania: "[a] mere camp or cottage, which is used only for vacations, is not a permanent place of abode." PA Code §101.1.
2. Properties Under Construction. Typically not included as PPA

- New York: "barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode." 20 NYCRR §105.20(e)

- Massachusetts: A PPA generally will not include "a dwelling place lacking both kitchen and bathing facilities." MA Dep't of Rev., MA Technical Information Release No. 95-7, Jan. 10, 1996 ("MA TIR 95-7").

3. Hotel or Motel Room.

- Connecticut: "a barracks, motel room or any construction that does not contain facilities ordinarily found in such a dwelling, such as facilities for cooking, bathing, etc., shall generally not be deemed a permanent place of abode. CT Agencies Regs. §12-701(a)(1)-1(e)

- Massachusetts: A PPA generally will not include "a hotel or motel room, but a determination will be made based on the facts and circumstances of each individual's situation." MA TIR 95-7, supra.

b. Permanence.

1. Frequency and Length of Time.

- "Continually Maintained": In Massachusetts, the Department of Revenue interprets a PPA to mean a dwelling place continually maintained by a person. MA TIR 95-7, supra.

- "Substantially All of a Year": In New York, a PPA must be maintained for "substantially all of the year," which is interpreted to mean for 11 months. N.Y. Dept of Tax'n & Fin., Nonresident Audit Guidelines, Income Franchise Field Audit Bureau, Mar. 31, 2009.

- "More Than Six Months": Maryland, Nebraska

2. Temporary Stay Exemption.
In some states, a dwelling space that is maintained only during a temporary stay (fixed period of time) for the accomplishment of a particular purpose, is not a PPA.

- Massachusetts: A temporary stay is defined as a period of time not to exceed one year. MA TIR 95-7, supra.

- Connecticut: "However, if his assignment to his employer's Connecticut office is for an indefinite period, his Connecticut apartment shall be deemed a permanent place of abode." CT Agencies Regs. §12-701(a)(1)-1(e).

c. Maintenance.

1. Own/Lease/Occupy. In most states, a PPA is a dwelling place that is either owned, leased to, or occupied by the taxpayer.

   - Connecticut. "[a] dwelling place permanently maintained by an individual, whether or not owned by or leased to such individual, and generally including a dwelling place owned by or leased to his or her spouse. CT Agencies Regs. §12-701(a)(1)-1(e)

   - Taxpayer need not own or otherwise have a legal right to the dwelling for it to constitute a PPA, nor pay any maintenance costs relating to the dwelling. New York: Matter of Evans, DTA No. 806515 (N.Y.S. Tax App. Trib., June 18, 1992), confirmed, Matter of Evans v. Tax Appeals Tribunal, 199 A.D.2d 840 (3d Dept. 1993).

2. Properties Leased to Unrelated Parties

   - Connecticut. A "permanent place of abode" shall generally not include, during the term of a lease, a dwelling place owned by an individual who leases it to others, not related to the owner or his or her spouse by blood or marriage, for a period of at least one year, where the individual has no right to occupy any portion of the premises and does not use such premises as his or her mailing address during the term of the lease. CT Agencies Regs. §12-701(a)(1)-1(e).

C. Special Cases - Recent Cases.

1. Vacationers.

involved a Connecticut resident who regularly commuted to a job in Manhattan and owned a house in the Hamptons. The house was rarely used by the Barkers and was not located near Mr. Barker's place of employment. Nevertheless, since the house was usable during the year (and was used many weekends during the year by Mrs. Barker's parents), it qualified as a permanent place of abode and Mr. Barker was found to be a resident of New York State. (Since they did not have a residence in New York City, Mr. Barker was not a City resident.)

Cf. S3998A. Under this proposed legislation, the usage or ownership of a vacation home will not be sufficient to establish residency so long as the taxpayer spends less than 90 days per year at the vacation home and the home is located more than 50 miles from the taxpayer's primary place of employment in New York.

b. **Exemption for Vacation Homes - - New Jersey.**

c. **Maryland.** "If a residence is used for the purpose of a vacation home or for the purpose of returning to Maryland to visit family and friends, then the individual cannot be considered a resident of this state unless they are physically present in the state for 183 days or more of the taxable year. Comptroller of MD, MD Admin. Release No. 37, Subject: Domicile and Residency, Sept. 2009.

2. **Parents/Students/Real Estate Investors**

a. **Property Rights = PPA.** Under New York's new PPA interpretation, if a taxpayer has any property rights in a dwelling place in New York, it may not matter that the taxpayer actually reside (or even step foot) in the dwelling.

Matter of Gaied, DTA No. 821727, N.Y. Tax App. Trib., July 8, 2010 (Trib. Opinion), Order & Opinion to reargue, Feb. 24, 2011, reversed, June 16, 2011. Mr. Gaied owned a home in New York that was occupied by his elderly parents. The New York State Tax Appeals Tribunal found Mr. Gaied to be a nonresident of New York on the basis that he had restricted access to the home, lack of personal items there and lack of use of the home as a residence. However, the Tribunal granted the Tax Division's motion to reargue to provide clarity in terms of defining statutory residency - - in particular, whether a taxpayer must actually dwell in an abode for such abode to be considered a "permanent place of abode." On June 16, 2011, the Tribunal reversed its own decision, holding that property rights are all that matter when determining whether a taxpayer has a PPA: "[w]here a taxpayer has a property right to the subject premises, it is neither necessary nor appropriate to look beyond the physical attributes of the dwelling place to inquire into the taxpayer's
subjective use of the premises . . . As we have stated previously, 'there is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it'."

The Tax Appeals Tribunal's Gaied decision raises concerns for out-of-state parents that own New York apartments that are used exclusively by children in or out of school, landlords, and real estate investors that own New York apartment buildings or units.

b. **Students - Non-University Housing and PPAs**

Massachusetts: a university owned studio apartment available only to a university affiliated student, faculty and staff, or dormitory room, will not constitute a PPA. However, off-campus apartment rented by university students will constitute a PPA. See MA TIR 95-7, supra, and MA Dept. of Revenue, Residency Status, http://www.mass.gov.

New York: Section 105.20(e)(1) of the Personal Income Tax Regulations excludes dwelling places maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of PPA for purposes of determining whether an individual is a resident for personal income tax purposes. 20 NYCRR section 105.20(e)(1).

3. **Corporate Apartments.** In most jurisdictions, if a company leases an apartment for the use of the company's president or chief executive officer, and the dwelling was principally available to that individual, the individual would be considered maintaining a PPA. However, if a company leases a corporate apartment for use by its top executives, salesman, or important clients when they are visiting the company, and the use of the apartment is determined on a first come, first serve basis, or if other users of the apartment have priority over the taxpayer's use of the apartment, and the taxpayer is but one of many people using the apartment, then the corporate apartment would not typically be treated as the taxpayer's PPA. See N.Y. Dept of Tax'n & Fin., Nonresident Audit Guidelines, Income Franchise Field Audit Bureau, Mar. 31, 2009, p. 50.

Pennsylvania: "Barracks, bachelor officer's quarters, quarters on ships and other living accommodations provided by an employer for a definite period of time do not qualify as permanent abodes." PA Dept. of Revenue, Determining Residency For PA Personal Income Tax Purposes, Rev.- 611 PO (05-10).

D. **What is a Day Within a Jurisdiction?**

1. Any Part of Day Counts & Any Day (Non-working days, holidays)
In most states, any part of a calendar day spent in the state will count as a day toward the bright line day count test, even stepping over the state line for ten minutes to purchase gas. There is typically no shopping or dining exception.

2. Exemption for In Transit Presence.

Typically travel in the state is disregarded if it is solely to (i) board a train, plane, ship, or bus for a destination outside the state; or, (ii) continuing travel, begun outside the state, by automobile, plane, train or bus, to a point outside the state.

3. Burden of Proof/Record Keeping Obligations

An individual must maintain adequate documentation to support the contention that he/she is not a resident of a particular state (documentation of the individual's whereabouts at all times), and to retain such documents for several years. The taxpayer typically bears the burden of proof. It is critical for the taxpayer to maintain contemporaneous diaries and detailed corroborating records as to his/her whereabouts.

E. State Laws and Agreements Regarding Commuters

Some states have reciprocal agreements with neighboring states, which allow residents of one state to work in a neighboring state while only paying income taxes on their wages to their state of residency. Employees typically submit an exemption form to their employer to avoid the withholding of income tax on their wages to the neighboring state. Since the employer is withholding income taxes for the state of residency there is no available credit for taxes paid to another jurisdiction. If a taxpayer has non-wage income, the taxpayer should expect to file a nonresident return with the neighboring state and pay income tax on the state sourced income.

1. Examples of jurisdictions that have reciprocal agreements include:

   a. District of Columbia: If you work in the District of Columbia and are a resident of any other state you do not have to pay District of Columbia income tax on your wages. See District of Columbia, Office of Tax and Rev., Form D-4A (Certificate of Nonresidence).

   b. Illinois: If you work in Illinois and are a resident of Iowa, Kentucky, Michigan or Wisconsin you are not subject to Illinois income tax withholding for wages earned in Illinois if an Employee's Statement of Non-Residence in Illinois is filed with the employer. (The reciprocal agreement with Indiana expired at the end of 1997).

   c. Pennsylvania: If you work in Pennsylvania and are a resident of Indiana, Maryland, New Jersey, Ohio, Virginia, and West Virginia, your employer
will withhold and remit the income tax to your resident state, provided that you submit Form Rev-240 to your employer.


III. Dual Residency

If two states each determine that an individual is a “resident” subject to tax, that individual may be subject to double taxation of her income. This situation can occur when an individual attempts to change his domicile unsuccessfully, or when an individual’s contacts with a second, non-domiciliary, state grow over time and subject that individual to tax as a statutory resident. When an individual is treated as a resident of more than one state, double taxation is a real threat that may occur notwithstanding multi-state agreements or credits.

A. Is it Possible to be a Resident of More than One State?

1. General Rule:

   While a person can have many residences, he or she can have only one domicile. See generally, Estate of Newcomb, 192 NY 238 (1908); Smith v. Smith, 174 Conn. 434, 389 A.2d 756 (1978); Whittell v. Franchise Tax Board, 231 Cal. App. 2d 278, 41 Cal. Rptr. 673 (1964).

2. Cold Comfort

   Notwithstanding the general rule above, there is nothing to prevent two states from each independently determining that a taxpayer is domiciled in the respective state. See Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932), cert. denied, 287 US 660, 53 S. Ct. 222 (1932), 288 US 617, 53 S. Ct. 507 (1933); In re Estate of Dorrance, 115 NJ Eq. 268, 170 A. 601 (1934), aff’d, 116 NJL 362, 184 A. 743 (1936), cert. denied, 298 U.S. 678, 56 S. Ct. 949 (1936).

3. Double Taxation Is Constitutionally Permissible.

   The constitution does not prohibit double taxation based on two states each reaching the conclusion that it is the taxpayer’s state of residence.

   a. Due Process and Full Faith and Credit.

      The Supreme Court has held that “[n]either the Fourteenth Amendment nor the full faith and credit clause requires uniformity of different States as to the place of domicile, where the exertion of state power is dependent upon domicile within its boundaries.”
Worcester County Trust Co. v. Riley, 302 U.S. 292, 299, 58 S. Ct. 185 (1937). This is true even if the result is double taxation of income. See Guaranty Trust Co. v. Virginia, 305 U.S. 19, 59 S.Ct. 1 (1948).

b. Commerce Clause.

Two state courts have heard Commerce Clause challenges to double taxation of income by two states. In each case, the state court has concluded that the Commerce Clause was not implicated and upheld the imposition of the state tax. A New Jersey domiciliary challenged New York’s ability to impose its personal income tax on his income based on his satisfying the requirements of a New York statutory resident. The New York Court of Appeals held that the Commerce Clause did not apply because the “income tax does not fall on any interstate activity, but rather on a purely local occurrence – the taxpayer’s status as a resident of New York.” Tamagni, 91 N.Y.2d 530, 695 NE2d 1125, 673 NYS2d 44 (1998), cert. denied, 525 U.S. 931, 119 S.Ct. 340 (1998). Similarly, the Minnesota Supreme Court rejected a taxpayer challenge on the ground that the claim did not involve interstate commerce. Luther, 588 N.W.2d 502 (Minn. 1999), cert. denied, 525 U.S. 931 119 S. Ct. 340 (1998).

B. Dual Resident Computations.

When an individual taxpayer is subject to the income tax in two states, or attempts to change her domicile from one state to another, the tax base, sourcing rules and the availability of credits will likely affect the extent of double taxation.

1. Practical Considerations.

a. Statute of Limitations.

If a taxpayer intentionally changes his domicile or is deemed by the taxing authority to be a domiciliary or statutory resident of a state, failure to file an income tax return in a state keeps the statute of limitations for the state to assess tax open indefinitely.

b. Original Return Position Binding?

State tax administrators may try to hold a taxpayer to the taxpayer’s determination of domicile as reflected on an original return.

2. Tax Base
a. General Rule.

States May Tax Resident’s Entire Net Income. A person who was a resident of New York but claimed to be domiciled in Montana argued that New York could not tax his entire net income. The taxpayer took the position that New York could not tax income from sources outside the state of a taxpayer who is not domiciled in the state. The New York Court of Appeals rejected the contention, holding that “in personal and income taxes domicile plays no necessary part. Residence at a fixed date has determined the liability for the tax.” People ex rel. Ryan v. Lynch, 262 NY 1, 186 NE 28, 29 (1933) The court quoted the U.S. Supreme Court's opinion in Shaffer v. Carter, “[a]s to residents [the State] may, and does, exert its taxing power over their income from all sources, whether within or without the State.” Shaffer v. Carter, 252 U.S. 37, 57, 40 S.Ct. 221 (1920).


a. General Rule.

Most states follow the rule that movables follow the person (the doctrine of mobilia sequuntur personam). See e.g., In re Lambert, 179 F3d 281 (5th Cir. 1999 regarding state bankruptcy law). As a result, income from intangibles is generally viewed as taxable by the state of the owner's domicile. This does not guarantee that two states will not claim the taxpayer as a domiciliary of each state, resulting in double taxation of intangible income.

b. Special Accrual Rules.

States may have specific rules to govern the allocation of income in the event of a change of domicile. See e.g, Conn. Agencies Regs. § 12-717(c)(1)-1(a); NYCRR § 154.1 et seq; Or. Admin R. § 150-316.037.

c. Special Sourcing Rules.

i. Hedge Fund Managers.

Some states have special sourcing rule for nonresidents who trade for their own account. New York and Connecticut each have provisions making clear that a non-resident’s trading activity in the state will not constitute state-source income. See e.g. New York L. §631(d); Conn. Agencies Regs. § 12-711(f)-1.

3. Credit Limitations
a. Statutory Limitations.

A statutory resident of Connecticut, domiciled in another state, is allowed a credit against her intangible income only if the other state allows a reciprocal income tax credit to a Connecticut domiciliary who is a statutory resident of the other state. Conn. Gen. Stat. § 12-704(d). New York does not provide a credit to Connecticut domiciliaries under such circumstances, so Connecticut will not allow a credit to the New York domiciliary who is also a statutory resident of Connecticut. As noted above, this scheme will pass constitutional muster, at least in New York. See Tamagni, supra.

b. Policy Limitations.

States take the position that credit is allowed only for taxes “properly due” another state. Thus, the fact that income tax was paid to another state may not preclude an argument over whether the tax was “properly due.”

C. State Laws and Interstate Agreements

1. The NESTOA Agreement.

See attached. This Agreement was the result of a multistate effort to reduce or eliminate double taxation of income by the signatory states. In 1997, New York and Connecticut proposed legislation in an effort to give effect to the NESTOA Agreement. The legislation passed in Connecticut, but not New York (1997 NY S 5208 and A 8602)


The taxpayer was a New York domiciliary who would satisfy the requirements as a Massachusetts statutory resident for a period of years based on his employment in Massachusetts. His wage income in Massachusetts was taxable in Mass and subject to a credit in New York. With respect to his intangible income, Mass. concluded “As a domiciliary of New York, the Taxpayer will . . . owe taxes to New York on his entire income. . . . Massachusetts will give the Taxpayer a credit for any taxes he pays to New York on income that is either (1) sourced to New York (2) or considered unsourced and therefore taxable as a preference, in New York, the State of domicile. Massachusetts will not allow a credit for any tax (if any there be) paid to New York on income, e.g. wages, sourced to the Commonwealth.”

3. New York Legislative Efforts and Media Criticism.
Earlier this year, media sources from The New York Times to Rush Limbaugh criticized New York for double taxation of statutory residents, including suggestions to repeal the statutory resident provisions.
Northeastern States Domicile Agreement, October 1, 1996

Determination of domicile.

NORTHEASTERN STATES TAX OFFICIALS ASSOCIATION
COOPERATIVE AGREEMENT ON DETERMINATION OF
DOMICILE

SECTION 1 PURPOSE OF COOPERATIVE AGREEMENT

WHEREAS, the revenue departments or divisions of the Northeastern States are responsible for enforcing the tax laws of their states in a fair and consistent manner to obtain compliance from the residents of their respective states; and

WHEREAS, multiple taxation of identical income creates the appearance of unfairness and fosters increased non-compliance; and

WHEREAS, non-compliance diminishes lawfully due tax revenue as well as create a higher burden on the compliant taxpayer; and

WHEREAS, the member states of the North Eastern States Tax Officials Association and other taxing jurisdictions recognize that mutual cooperation among the group will enhance the ability to work collectively at reducing the potential for multiple taxation of residents' income and to foster increased voluntary compliance in a cost effective manner;

NOW THEREFORE, the signatory states to this document agree among themselves to create a more uniform approach to the taxation of residents and a formalized process for resolving disputes in cases of multiple determinations of residency by member states' revenue agencies.

SECTION 2 DETERMINATION OF DOMICILE STATUS

The problems associated with domicile and residency are difficult to address because of the subjective nature of this whole area. It is therefore critical that any parameters selected to determine the individual's domicile be of a nature that would not be changeable at will or insignificant in nature. It is also important that the parameters be readily identifiable for ease of administration and increased voluntary compliance.

The revenue agencies agree that the adoption of uniform criteria which should be evaluated in determining an individual's domicile would provide a fair evaluation of the facts and circumstances present in any individual cases being reviewed. This agreement establishes the factors which the member agencies shall evaluate in their determination of an individual's domicile. The member agencies are free to consider any additional secondary factors which they may believe provide additional insight as to the individual's intent for the establishment of a domiciliary status. All member agencies adopting secondary factors agree to provide guidance to taxpayers and practitioners on such secondary factors.

The factors to be utilized are:
The member agencies do not adopt specific or uniform methods of evaluating the various factors since the facts and circumstances of each case and the economic conditions that exist in each locality may vary significantly.

An agency's staff shall review the following issues within the factors:

**Home**

What are the residences owned or rented by the taxpayer? Where are they located? How are they used? What is the size and value of each residence? Responses to all such questions shall be considered.

**Time**

Where and how the individual spends time during the tax year shall be considered. Consideration shall also be given to whether the taxpayer is retired or actively involved in a business or profession. How much travel the individual does and the nature of the travel shall be considered. The overall living pattern or life style of the individual shall be examined.

**Items “Near & Dear”**

The location of the items or possessions that the individual considers “near and dear” to his or her heart, of significant sentimental value, family heirlooms, collections of valuables or possessions that enhance the quality of one's life style shall all be reviewed.

**Active Business Involvement**

How the taxpayer earns a living, whether the taxpayer is actively involved in any business ownerships or professions and to what degree the individual is involved as well as how that involvement compares to the involvement in business outside of the state are areas that shall be examined.

**Family Connections** [To be reviewed when the first four factors are not conclusive]

Where the individual's minor children attend school and, in certain unique and discrete situations, the residence of the individual's immediate family.

**SECTION 3 SITUS OF SELECTED INCOME CLASSES**

The revenue agencies agree that the taxing jurisdiction to which earned income is sourced should be entitled to the tax revenue associated with such income. In instances where the income is sourced, but not taxed, to a state other than the state of domicile and the state of statutory residence, the state of domicile should be entitled to such revenue. The tax revenue associated with "non-sourced" income from intangible assets should belong to the taxpayer's state of domicile.

Income from other sources such as, but not limited to, flow-through entities are not part of this agreement and each revenue agency must follow its own state laws regarding the reporting and taxability of such income.
SECTION 4 CREDIT FOR TAXES PAID

The member states agree that the preferred method for the elimination of double taxation of the selected classes of income is the utilization of a credit for taxes paid to the other jurisdiction. The state to which income is sourced shall be entitled to the tax on earned income and the states of domiciled and statutory residence shall be required to give the individual a credit for taxes paid to another jurisdiction on such income. The state in which an individual is domicile shall be entitled to the tax on income sourced to, but not taxed by, a state other than the state of statutory residence and “non-sourced” income such as from intangible assets with the state claiming statutory residence being required to give the individual a credit for taxes paid to the state of domicile on such income.

In instances where current state law does not provide for such a method or the agency does not have the regulatory authority for such an interpretation of existing law, the agency shall make every reasonable effort to seek a legislative or regulatory change that would allow for the utilization of this preferred method. The agencies shall comply with all statutory and regulatory requirements of their state and this agreement shall in no way be construed to bind an agency to this uniform approach.

SECTION 5 PROCESS FOR THE RESOLUTION OF DISPUTED CASES

The revenue agencies agree that a formalized process shall be available to taxpayers after two or more states have made an initial determination that the individual is domiciled in their state, and such process shall be an administrative activity available before the utilization of the formal appeals process available in each of the respective states. The timing for the process would reduce the costs associated with having to handle formal appeals in one or more jurisdictions. The process shall also allow the parties to walk away if an agreement cannot be reached, in which case the taxpayer could then proceed with the appeal process already available to him or her. A closing agreement, if permitted under state law, would be developed and signed by the parties assuming that the process developed a resolution to the conflict, in which case it would be binding for future years unless the taxpayer provided clear and convincing evidence that a change in domicile had occurred.

The chief executive of each revenue agency agrees to appoint an individual within the respective agency, and such employee would be authorized to negotiate a solution with the taxpayer and the other revenue agencies. The revenue agencies also agree to utilize their best efforts in implementing and publicizing the process and any requirements for a taxpayer's utilization of it.

SECTION 6 SHARING OF DATA AND COMPLIANCE TECHNIQUES

The revenue agencies agree to share any data developed through their compliance techniques either voluntarily or through specific requests from another party to this agreement. The sharing of any data shall be within the parameters of state confidentiality statutes and through the Exchange Of Information Agreements currently in force among the member states.

SECTION 7 RATIFICATION OF AGREEMENT

The undersigned hereby ratify the Cooperative Agreement On Determination Of Domicile to the full extent permitted by their respective laws.

JURISDICTION: STATE OF CONNECTICUT
DATE APPROVED: DEPARTMENT OF REVENUE SERVICES
By: /s/ 10/2/96
STATE OF DELAWARE
DIVISION OF REVENUE
By: /s/ 10/2/96
GOVERNMENT OF THE DISTRICT OF COLUMBIA
By: /s/ 10/17/96
STATE OF MAINE
BUREAU OF TAXATION
By: /s/ 10/1/96
STATE OF MARYLAND
COMPTROLLER OF THE TREASURY
By: /s/ 10/2/96
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE
By: /s/ 10.2.96
STATE OF NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION
By: /s/ 10/2/96
STATE OF NEW JERSEY
DIVISION OF TAXATION
By: /s/ 10/2/96
STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
By: /s/ 10/1/96
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
By: /s/ 10/2/96
STATE OF RHODE ISLAND
DIVISION OF TAXATION
By: /s/ 10/2/96
STATE OF VERMONT
DEPARTMENT OF TAXES
By: /s/ 10/2/96

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