Personal Income Tax Issues Related To Residency And Domicile

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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 (Or. Tax Ct. 2000), aff’d, 35 P.3d 325 (Or. 2001). 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., 832 P.2d 1228 (Or. 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. The first section of this article 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. The second section of this article examines other tests to determine residency (typically referred to as statutory residency but herein referred to as “residency”) and the definition of a permanent place of abode, residency issues that arise in particular situations, and recent residency cases. The final section of the article 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.

**DOMICILE** • A person’s domicile is significant because a state may tax the worldwide income of a person domiciled there. 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 that income is 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).

**How Domicile Is Determined**

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 (Or. Tax Ct. 1971). Because a taxpayer’s own testimony on the matter is often 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 (Or. Tax Ct. 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 case law in each state may differ, more than one state may assert that an individual has his or her domicile in that state. See *Dorrance’s Estate*, 163 A. 303 (Pa. 1932), cert. denied, 287 U.S. 660 (1932), 288 U.S. 617 (1933), and *In re Estate of Dorrance*, 170 A. 601 (N.J. Prerog. 1934), aff’d, 184 A. 743 (N.J. Ct. Err. & App. 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 (1939) (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.

**Some Factors In Determining Domicile**

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:

- Physical presence (amount of time spent in the state);
- Residence (whether taxpayer owns or rents a residence in the state);
- Employment;
- Business connections and relationships;
- Family location;
- Real property;
- Bank accounts;
- Voter registration and voting;
- Public library card;
- Social clubs;
- Motor vehicle registration and driver’s license; and
- Professional services (lawyers, doctors, dentists, etc.).

**Change Of Domicile Generally**

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

- A fixed residence in a different jurisdiction;
- An intent to abandon his or her old domicile; and
- An intent to acquire a new domicile in the jurisdiction where the new residence is located.

See, e.g., *Ott v. Dep’t of Rev.*, 16 Or. Tax 102 (Or. Tax Ct. 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 or 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.*, supra. 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 when 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 percent and Washington has no personal income tax.)

Factors In Determining Change In Domicile

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. The factors typically include:

- Physical presence. (The more time a taxpayer spends in the state and the more frequent his or her visits, the more likely the taxpayer is to be found to have retained his or her domicile in the state.);
- Residence. (Whether the taxpayer owns or rents a residence in the state.);
- Employment. (Is the taxpayer still employed in the state? If the taxpayer is now employed out of state, is his or her position temporary or permanent?)
- Business connections and relationships. (Does the taxpayer maintain a business location or key business relationships in the state?)
- Family location. (Have the taxpayer’s spouse or other family members remained in the state? Although circumstances may vary, family members (and particularly the taxpayer’s spouse) remaining in the taxpayer’s former residence in the original state may subject a claim of change in domicile to particular scrutiny);
- Items “near and dear.” (Has the taxpayer moved items such as family heirlooms, keepsakes, and photos, and other items associated with “home” to the new state?)
- Bank accounts. (Has the taxpayer retained bank accounts in the originating state?)
- Voter registration and voting. (Has the taxpayer changed his or her voter registration to the new state? Due to residency requirements generally associated with voting, absent unusual circumstances such as voting rights on certain local matters based on property ownership in the jurisdiction, continuing to vote in the original state should be avoided.);
- Driver’s license and motor vehicle registration;
- Public library card;
- Social and athletic club memberships;
- Real and personal property;
- Professional services (lawyers, doctors, dentists, etc.). (Is the taxpayer continuing to use professionals located in the old state?) and
- Unemployment benefits.

States vary in the factors they consider and the weight they give to particular factors. The cases are decided based on the totality of the circumstances and generally no one factor is determinative.

Proving 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, 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, supra. 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 or her motor vehicles in the new state. The permanent addresses listed on the bank and brokerage accounts should generally 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.

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. For example, 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 (Or. Tax Ct. 2000), aff’d, 35 P3d 325 (Or. 2001) (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., 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.

How Are Military Personnel Treated?

Under section 511 of the Servicemembers Civil Relief Act, 50 U.S.C. App. §571, a person is not deemed to have lost his or her domicile or residence in any state solely by reason of his or 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.

What About Students?

Dormitories, fraternities, and 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 before 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 in-
come tax returns as a resident may be subject to close scrutiny.

**Domiciliaries With 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 maintain no permanent place of abode in the state, maintain a permanent place of abode elsewhere, and spend no more than 30 days during the tax year in the state. Conn. Gen. Stat. §12-701(a)(1)(A)(i); N.J. Rev. Stat. §54A:1-2.m.; N.Y. Tax Law §605(b)(1)(A)(i); Or. Rev. Stat. §316.027(1). Connecticut, 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 and Connecticut, also exclude 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); Conn. Gen. Stat. §12-701(a)(1)(A)(ii).

**RESIDENCY** • Individuals who are domiciled outside a state may still 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 income tax purposes. The standards for determining residency vary from state to state and although the most common tests may seem simple, that simplicity is deceiving.

**One Test To Determine Residency: PPA And Days**

The most common test to determine residency is the “permanent place of abode (PPA)” and day count test: An individual is considered a statutory resident if he or she maintains a PPA (i.e., residence) and is physically present in the state for a fixed period of time. Naturally, the states vary on the number of days prescribed, with more than 183 days being the most common (Connecticut, Delaware, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, and Washington D.C.); some states require “more than six months” of physical presence (Arkansas, Colorado, Maryland, and Nebraska); New Mexico requires 185 days; and Ohio requires 183 “contact periods.” Oregon has a high bar: an individual is a statutory resident only if he or she maintains a PPA and spends more than 200 days within the state. See Or. Rev. Stat. §316.027(1)(B).

**Another Test For Residency: Not A Temporary Or Transitory Purpose**

Some other jurisdictions, notably California and Illinois, apply an “other than a temporary or transitory purpose” test: Even if you establish a domicile outside of California or Illinois, resident income tax will be due if you are in California or Illinois for other than a “temporary or transitory” purpose. See Cal. Rev. & Tax Code §17014; 35 Ill. Comp. Stat. §5/1501(20). This means that if an individual is in California or Illinois for more than a vacation, social endeavor, business assignment or transaction of limited time duration, that individual may be subject to the resident income tax. In both 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
Residency and Domicile | 15

Code §17016; Ill. Admin. Code tit. 86, §100.3020. The residency analysis in these states is based upon all of the facts and circumstances of each case.

What Is a “Permanent Place of Abode”?

In most states, the definition of a PPA 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. This raises all kinds of questions, such as: What are the physical characteristics of the property? What facilities are found in the property? How is the property being used? Typically, the property must be capable of being used as a residence throughout the year. For example:

- Camps and cottages aren’t usually considered to be PPAs. A fairly typical rule is New York’s, which states, “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). See also Conn. Agencies Regs. §12-701(a)(1)-1(e) (Connecticut); 61 Pa. Code §101.1 (Pennsylvania);
- Properties under construction don’t fare very well as PPAs, either. Under New York’s rules: “barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will not ordinarily be considered a permanent place of abode.” 20 NYCRR §105.20(e). Massachusetts similarly excludes dwelling places “lacking both kitchen and bathing facilities.” Mass. Dep’t of Rev., Technical Information Release No. 95-7, Jan. 10, 1996 (“Mass. TIR 95-7”);
- Hotel and motel rooms are not usually considered PPAs. Connecticut for example, generally does not consider as a PPA “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.” Conn. Agencies Regs. §12-701(a)(1)-1(e). In 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.” Mass. TIR 95-7, supra.

What Is “Permanence”?

The “permanent” in PPA is also subject to varying definitions and interpretations. Frequency and length of time are typical factors:

- In Massachusetts, the Department of Revenue interprets a PPA to mean a dwelling place “continually maintained” by a person. Mass. TIR 95-7, supra;
- In New York, a PPA generally must be maintained for “substantially all of the year,” which is interpreted to mean for more than 11 months. N.Y. Dep’t of Tax’n & Fin., Permanent Place of Abode, Tax Bulletin, TB-IT-690, Dec. 15, 2011; N.Y. Dep’t. of Tax’n & Fin., Nonresident Audit Guidelines, Income Franchise Field Audit Bureau, Mar. 31, 2009; and
- In Maryland and Nebraska — “more than six months.”

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 (“temporary stay exemption”):

- In Massachusetts a temporary stay is generally defined as a period of time not to exceed one year. Mass. TIR 95-7, supra;
- In Connecticut, if the “assignment to [the] employer’s Connecticut office is for an indefinite period, [the] Connecticut apartment shall be deemed a permanent place of abode.” Conn. Agencies Regs. §12-701(a)(1)-1(e).

Maintenance

Whether a property is “maintained” by the taxpayer is also a matter of definition and interpreta-
tion. In most states, a dwelling place that is owned, leased to, or occupied by the taxpayer is regarded as a PPA. See, e.g., Conn. Agencies Regs. §12-701(a)(1)-1(e) (“[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.”). In New York, maintaining an abode is “doing whatever is necessary to continue one’s living arrangements in a particular dwelling place” and a taxpayer need not own or otherwise have a legal right to the dwelling. Matter of Evans, DTA No. 806515 (N.Y.S. Tax App. Trib., June 18, 1992), confirmed, Matter of Evans v. Tax Appeals Tribunal, 606 N.Y.S.2d 404 (N.Y. App. Div 1993).

Properties leased by the taxpayer to others is a different matter. In 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.” Conn. Agencies Regs. §12-701(a)(1)-1(e).

What About Vacationers And Vacation Homes?

In Matter of Barker, DTA No. 822324, N.Y. Tax App. Trib., Jan. 13, 2011, Mr. Barker’s summer vacation home in the Hamptons was found to be a PPA, notwithstanding that Mr. Barker spent less than 20 days at the home during the year. Mr. Barker was domiciled in Connecticut and regularly commuted to his job in Manhattan (thereby satisfying the 183 day count test). Since Mr. Barker’s vacation home was objectively usable during the year (and was used many weekends during the year by Mrs. Barker’s parents), and Mr. Barker maintained dominion and control over the home, it qualified as a PPA, and Mr. Barker was found to be a resident of New York State. (Since he did not have a residence in New York City, Mr. Barker was not a City resident). Significantly, the New York State Tax Appeals Tribunal held that “there is no requirement that [the taxpayer] actually dwell in the abode, but simply that he maintain it.” The Barker case is currently on appeal. Responding to growing concerns that individuals will be discouraged from owning New York summer vacation homes as a result of the Barker decision, New York legislators proposed legislation that provides that the usage or ownership of a home will not be sufficient to establish residency so long as the taxpayer spends no more than 90 days per year at the home and the home is located more than 50 miles from the taxpayer’s primary place of employment. See S3998A.

Parents/Students/Real Estate Investors

Another recent case in New York, Matter of Gaied, DTA No. 821727, N.Y. Tax App. Trib., June 16, 2011, that focuses on property rights is troubling. In that case, Mr. Gaied was domiciled in New Jersey and owned a multi-family home in New York, part of which was occupied by his elderly parents. Mr. Gaied paid for the utilities for his parents’ apartment and occasionally stayed there overnight to attend to his parents’ medical needs. Since Mr. Gaied owned the home and paid the utilities, the home was found to constitute Mr. Gaied’s PPA. The Tribunal said “[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, ‘[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it.’” This decision is troubling because it appears to say that an individual’s access to and use of the dwelling is irrelevant, and the individual’s ownership (property rights) and maintenance of a fully usable dwelling is determinative. Thus, the Gaied decision raises concerns for out-of-state parents that
own apartments in New York that are used by their children, as well as landlords and real estate investors that own New York apartment buildings or units.

**Students: Non-University Housing And PPAs**

Massachusetts makes an interesting distinction based on who owns the dwelling: a university-owned studio apartment available only to university-affiliated students, faculty, and staff, or a dormitory room, will not constitute a PPA; however, an off-campus apartment rented by university students will constitute a PPA. See Mass. TIR 95-7, supra, and Mass Dept. of Revenue, *Residency Status*, [http://www.mass.gov/dor/individuals/filing-and-payment-information/guide-to-personal-income-tax/residency-status.html](http://www.mass.gov/dor/individuals/filing-and-payment-information/guide-to-personal-income-tax/residency-status.html). New York takes a different approach. Section 105.20(e)(1) of the Personal Income Tax Regulations generally 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 §105.20(e)(1).

**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 is principally available to that individual, the individual would be considered as maintaining a PPA. However, if a company leases a corporate apartment for use by its top executives, salespeople, 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. Dep’t. of Tax’n & Fin., *Nonresident Audit Guidelines*, Income Franchise Field Audit Bureau, Mar. 31, 2009, p. 50.

**What Is “A Day Within” A Jurisdiction?**

As discussed above, states vary when it comes to the number of days that an individual needs to be present in the state to trigger residency. 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 10 minutes to purchase gas. There is typically no shopping or dining exception. However, travel in the state is typically disregarded if it is solely to board a train, plane, ship, or bus for a destination outside the state, or continuing travel, begun outside the state, by automobile, plane, train, or bus, to a point outside the state. Presence at the individual’s PPA is also not required for the day to count toward the day count.

**Burden Of Proof/Record Keeping Obligations**

Individuals who relocate to other states or individuals with residences outside their state of domicile should maintain accurate, reliable records to support the contention that they are not residents of a particular state (i.e., documentation of the individual’s whereabouts for each day of the year), and retain such documents for several years. Non-resident individuals with residences in a state bear the burden of establishing presence outside the state for statutory residency purposes. Individuals should keep a contemporaneous diary that details their physical location and third-party corroborating records as to their whereabouts.

**State Laws And Agreements Regarding Commuters**

Some states have reciprocal agreements with neighboring states that allow residents of one state to work in a neighboring state while only paying income taxes on their wages to their state of resi-
Duality. 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 you have non-wage income, you should expect to file a non-resident return with the neighboring state and pay income tax on the state sourced income. Examples of jurisdictions that have reciprocal agreements include:

- **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 provided that a certificate of nonresidence is provided to the employer. See District of Columbia, Office of Tax and Rev., Form D-4A (Certificate of Nonresidence);

- **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.);

- **Pennsylvania.** If you work in Pennsylvania and are a resident of Indiana, Maryland, New Jersey, Ohio, Virginia, or 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.

Examples of jurisdictions that have no reciprocal agreements include: Alabama, California, Colorado, Hawaii, New York tri-state area (New York, New Jersey, Connecticut).

**DUAL RESIDENCY** • If two states each determine that an individual is a “resident” (domiciliary or statutory resident) subject to tax, that individual may be subject to double taxation of his or her income. This situation can occur when an individual attempts to change his domicile unsuccessfully, or when an individual owns a residence in another state and time in the other state now exceeds the minimum statutory threshold of days to 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 possibility notwithstanding multi-state agreements or credits.

**Yes — It Is Possible To Be A Resident Of More Than One State**

As a general rule, while a person can have many residences, he or she can have only one domicile. See generally, Estate of Newcomb, 84 N.E. 950 (N.Y. 1908); Smith v. Smith, 389 A.2d 756 (Conn. 1978); Whittell v. Franchise Tax Board, 41 Cal. Rptr. 673 (Cal. Ct. App. 1964). But that’s cold comfort. Notwithstanding the general rule above, there is nothing to prevent two states from each independently determining that a taxpayer is domiciled in each respective state. See Dorrance’s Estate, supra.

**Double Taxation: Is It Constitutionally Permissible?**

The constitution does not prohibit double taxation when two states each reach the conclusion that it is the taxpayer’s state of residence. The Supreme Court has held that “[n]either the Fourteenth Amendment nor the full faith and credit clause in the decisions of the courts 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, supra, 302 U.S. at 299. This is true even if the result is double taxation of income. See Guaranty Trust Co. v. Virginia, 305 U.S. 19 (1948).
Additionally, two state courts have heard Commerce Clause challenges to double taxation of income by two states. In each case, the court concluded that the Commerce Clause was not implicated and upheld the imposition of tax. For example, a New Jersey domiciliary challenged New York’s ability to impose its personal income tax on his income on a statutory residency basis. 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 v. Tax Appeals Tribunal, 695 N.E.2d 1125, 1133 (N.Y. 1998), cert. denied, 525 U.S. 931 (1998). Similarly, the Minnesota Supreme Court rejected a taxpayer challenge on the ground that the claim did not involve interstate commerce. Luther v. Comm’t, 588 N.W.2d 502 (Minn. 1999), cert. denied, 528 U.S. 821 (1999).

### Dual Resident Computations

When an individual is subject to income tax in two states, the tax base, sourcing rules, and the availability of credits for taxes paid in other jurisdictions will likely affect the extent of double taxation. When faced with this situation, an individual should consider the following:

- **Statute of Limitations.** If an individual relocates to another state claiming a change in domicile and does not file a tax return in the former state or an individual takes the position that he or she is not a statutory resident and does not file an income tax return in the state where he or she maintains a residence, the state’s ability to assess tax may be open indefinitely because no return was filed;

- **Tax Base.** In general, states can tax a resident’s entire net income. In People ex rel. Ryan v. Lynch, 186 NE 28, 29 (N.Y. 1933), a New York resident who 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.” The court quoted the U.S. Supreme Court’s opinion in Shaffer v. Carter, 252 U.S. 37 (1920): “[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.” Id. at 57;

- **Sourcing Issues.** Most states follow the rule that movables follow the person (the doctrine of mobilia sequuntur personam). See, e.g., In re Lambert, 179 F.3d 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. Some states have special sourcing rules for nonresidents who trade for their own account. In New York and Connecticut income from a nonresident’s qualifying self-trading activity in the state should not constitute state-source income. See, e.g., N.Y. Tax. L. §631(d); Conn. Agencies Regs. §12-711(f)-1. States may also have specific accrual rules that are triggered when there is a change in residency status (i.e., accelerating income recognition). See, e.g., Conn. Agencies Regs. §12-717(c)(1)-1(a); 20 NYCRR §154.1 et seq.; Or. Admin R. §150-316.037; and

- **Credit Limitations.** As a public policy matter, many 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.” In some states, there are statutory limitations. For example, a statutory resident of Connecticut, domiciled in another state, is allowed a credit against his or 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.

State Laws And Interstate Agreements

In 1996, the North Eastern States Tax Officials Association (NESTOA) reached and ratified the “Northeastern States Domicile Agreement.” The Agreement is a cooperative domicile agreement that was the culmination of a multistate effort to reduce or eliminate double taxation of the income of residents of the signatory states. These states include Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Delaware. In 1997, New York and Connecticut each proposed legislation to their respective legislatures that would give effect to the NESTOA Agreement by amending their statutory credit provisions to provide more effective relief from the effects of taxation of an individual’s income by two states on the basis of residence in each state. The legislation passed in Connecticut, but not New York. See 1997 N.Y. S5208 and A8602.

Despite the fact that the NESTOA Agreement never became fully operational, Massachusetts has adopted an administrative position that supports the spirit of the Agreement. In Massachusetts Letter Ruling No. 08-11 (7/7/08), the Massachusetts Department of Revenue (DOR) addressed a situation in which a taxpayer was a domiciliary of New York and statutory resident of Massachusetts. The taxpayer’s wage income from his Massachusetts employment was taxable by Massachusetts and subject to a credit against his New York personal income taxes for taxes paid to Massachusetts. The Massachusetts DOR ruled that the taxpayer’s intangible income would be taxable only by New York. The DOR ruled “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 or (2) 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.” Id.

CONCLUSION • 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 residency provisions or codify a credit mechanism that would alleviate double taxation. Individuals relocating from a state whether due to retirement, employment, or otherwise, should not overlook the importance of state tax residency issues. In addition, individuals with multiple residences should not overlook the potential for double state taxation. For state income tax purposes, a home may be where the “vacation home” is.
APPENDIX
Northeastern States Domicile Agreement

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: HOME - TIME - ITEMS NEAR AND DEAR ACTIVE BUSINESS INVOLVEMENT — FAMILY CONNECTIONS
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: DATE APPROVED:

[Approvals by Signatory States]