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Moving to Another State?
Be Scrupulous in Counting the Days Spent in the Old One

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Growing numbers of people are buying or renting homes or apartments in areas other than where they have been lifelong residents, whether to enjoy the warm climate and favorable tax structures of states such as Florida or Arizona, or to be closer to their adult children in other states. Although they no longer consider their "old state" to be where they live, many of these people still continue to own or rent places of abode in that other state. Many of us know people who have moved to Florida, but continue to maintain a home in another state, as a respite from the summer heat of Florida, or as a place to stay when they "visit the kids."

The discussion which follows, although it uses New York as an example, also applies to states such as Connecticut, Delaware, New Jersey and Pennsylvania, which have nearly identical rules.

Domicile and Residence

The determination of residency is important. While residents are taxed on all their income, both from within and without New York, nonresidents are taxed only on their income from New York sources. New York source income includes income from: real or tangible personal property located in New York, such as rents received or gains on sales; earnings from services performed in New York; income from a business, trade, profession or occupation carried on in New York; the taxpayer's distributive share of New York State partnership income or gain (including LLCs that elect to be taxed as partnerships); and the taxpayer's share of New York State estate or trust income or gain.

A "resident individual" is defined as (a) any person domiciled in New York (subject to certain exceptions not relevant here) or (b) any person who is not domiciled in New York State but who maintains a permanent place of abode in New York State and spends in the aggregate *more than 183 days* of the taxable year in New York State. Thus, if 183 days or less per year are spent in New York, such a taxpayer is a nonresident.

Generally, a person's domicile is the place that the person intends as his or her permanent home. There is a legal presumption against a change in domicile from one location to another. The burden is on the taxpayer to establish, by clear and convincing evidence, that he or she has moved to a new location with a bona fide intention of making the new location his or her fixed and permanent home. Some states, such as Florida, seek to encourage new domiciliaries by recognizing formal declarations of domicile, to be filed with the clerk of the court of the county in which the new Floridian resides. Other helpful indicia of domicile include registering to vote (and voting) in the new state, surrendering the driver's license issued

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who's who

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Helpful Tip: *When a taxpayer changes domicile from one state to another state, the tax authorities of the old state often devote substantial resources auditing the returns of lifelong residents who move to another jurisdiction. Taxpayers who continue to maintain a permanent place of abode in the old state may be particularly scrutinized. The auditor in a residency audit will seek detailed records confirming that the taxpayer was not present in the old state for more than 183 days during the taxable year. Remember, in counting the number of days, presence in the old state for part of a day – whether to attend a meeting, have a meal with a friend, go shopping, attend the theater, pay a condolence call or consult a physician – often constitutes a day spent within the old state. The burden is on the taxpayer to prove that he or she was not physically present in the old state for more than 183 days.*

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by the old state and obtaining a driver's license in the new state, filing all federal and state income tax returns as a resident of the new state, severing as many ties as possible with commercial institutions in the old state, and executing a new will, power of attorney and other advance directives in accordance with the formalities of the new state.

Even if the domicile hurdle is overcome, the taxpayer can still be considered a resident of the old state if he or she maintains a permanent place of abode in the old state and spends more than 183 days of the taxable year in that state.

A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not he or she owns it, and will generally include a dwelling place owned or leased by the taxpayer's spouse. A place of abode is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose, such as a hotel room rented on a nightly basis. If the nondomiciliary taxpayer does not maintain a permanent place of abode in New York, even if he or she is present in New York for more than 183 days in the taxable year, he or she will continue to be a nonresident for state income tax purposes. As a nonresident, the taxpayer will be liable for the nonresident income tax only on his or her New York source income.

The Counting of Days

In counting the number of days in New York for a taxpayer who maintains a permanent place of abode in the state, presence in New York for any part of a calendar day constitutes a day spent within New York State. Thus, an hour to meet with an investment advisor is counted as a full day, as is an appointment to see a physician. However, presence in New York State is disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside the state.

The burden of proof is on the taxpayer who maintains a permanent place of abode in New York State to show that he or she was not physically present in New York for more than 183 days in any taxable year, and thus records must be maintained. It is important that travel records, telephone bills, utility bills and credit card statements be kept, especially if others are permitted to use such credit cards or to have the use of the place of abode in the taxpayer's absence.