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Temporary Absence during COVID-19/NYS and NYC Residency Issues

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New York State taxes its residents on all of their worldwide income, not just on New York source income. To be considered a resident of New York for tax purposes, an individual must meet either the Domicile test or the Statutory Residency test, both of which have been briefly explained below.

Many of us, in the recent months, have either moved away from our residences in New York State/City or other States due to the COVID-19 pandemic. This temporary move has led many questioning their residency status, asking questions like:

- Does moving temporarily to another location because of the COVID-19 pandemic mean I am no longer a New York State/City resident?
- Am I resident of a new State? And will I be paying state income taxes in this State as well?
- Do I still need to pay New York State & City (For NYC dwellers) income taxes as when I was staying in another state for the major part of 2020?

Unfortunately these questions do not have a simple yes or no answer. The majority of States establish residency based upon distinctly marked parameters and also facts and circumstances surrounding each case.

For the purposes of this memorandum we have laid out brief guidance with regards to residency as it pertains to the State and City of New York. But please note that most States follow the same format in determining tax residency

Definition of a New York State & City Resident for NYS income tax purposes

DOMICILE TEST:

You're a New York State resident for income tax purposes if:

a. your domicile is New York State; or
b. your domicile is not New York State but you **maintain a permanent place of abode** in New York State for more than 11 months of the year and spend more than 183 days in New York State/City during the tax year (Statutory Resident, explained below)

Domicile is defined by New York State as the place where the taxpayer "has his true, fixed, permanent home and is the principal place to which the taxpayer intends to return whenever absent". Thus a Taxpayer can have only one domicile at a time. Once an individual establishes a domicile, that location will remain his/her domicile until the person can show with "clear and convincing evidence" that he/she intended to both *give up their old domicile AND establish a new one in another State*. It is important to note that "giving up one's old domicile doesn't mean that the taxpayers are required to sell their old domicile but that would obviously be an important determining factor.

The State of New York focuses on the taxpayer's intent when determining if the taxpayers have changed their domicile. They consider the following 'Primary Factors' to support the taxpayer's intent of changing their domicile:

1. Home
The size, value, time and use of old home as compared to the nature, size and use patterns of the new domicile residence.

2. Active Business Involvement
The location of a taxpayer's continued employment or active participation in a business, if located in New York State, as compared to the new domicile residence.

3. Time
The time factor will utilize analysis of the time the taxpayer spends during the year. It will compare the time spent in New York in relation to the time spent at the taxpayer's other locations.

4. Near and Dear
The location of the items which the taxpayer holds near and dear to their heart, or those items which have significant sentimental value, such as family heirlooms, works of art, collection of books, stamps and coins, and those personal items that enhance the quality of life, is another factor that New York State will focus on to determine the taxpayer's domicile.

5. Family
The location of the taxpayers close family. The location of the schools where taxpayers children are registered would be a key determinant.

For situations in which it remains unclear as to the strength of a domicile determination by an analysis of the primary factors, an analysis of the following "other" factors may be considered such as, including but not limited to:

1. Location where the family's financial information is mailed/delivered.
2. Location of safe deposit box.
3. State of driver's license or State where they are registered to vote.
4. State in which their primary care physician is situated
5. Club membership locations.
6. Demonstrate change of residence on pertinent personal documents such as Wills, Trust agreements etc.
7. Mail forwarding request to the new residence.

A typical "change of domicile" checklist has about 20-25 items on it. Given the checklist items are typically easy to accomplish, these actions are not viewed as being as significant as the five factors when evaluating a domicile change. Having said that, not doing the checklist items can make a challenge by the state of old domicile much harder to defend.

STATUTORY RESIDENT –

The State of New York and New York City define a statutory resident as an individual who meets both the conditions listed below:

a. A person who is not domiciled in this state but maintains a permanent place of abode in New York State/City;
b. And spends in aggregate more than 183 days in New York State/City.

The state defines "maintaining a permanent place of abode" as "dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse.

With that said, your home/residence/apartment that you maintain in New York State/City will meet the definition of "***permanent place of abode***" and thus if you spend 183 days or more in New York, you will be considered a "Statutory New York State/City resident" for the **full year** and will be subject to tax on your worldwide income. The Taxpayers are strongly urged in this case to maintain clear and concise records of maintaining the number of days in and out of New York State.

Definition of a Day Spent in New York:

New York Personal Income Tax regulations, states that "presence within New York State for any part of a calendar day constitutes a day spent within New York State." Thus, any part of a day spent in New York State, for whatever reason (business or pleasure), would count as a day toward the 183-day rule, even if the taxpayer comes into New York and leaves on the same day, barring a few exceptions like:

1. Travel days – i.e. you are in New York en-route from a location to another.
2. You are in New York for medical care

POTENTIAL COVID 19 DOMICILE/RESIDENCY CONSIDERATIONS:

The change of state residency has always been the favorite area of Audit for the New York State tax department due to the evasion of taxes by the high net worth individuals.

As mentioned earlier, taxpayers can have only one domicile or residence at a time and it remains as such until the individual can show with clear and convincing evidence that both their intent and actions indicate that they are giving up the old residence in pursuit of making another location their new permanent domicile.

With that said, temporary absences of New York State domiciliary's from their New York State residences/domiciles due to COVID-19 is not sufficient to show the taxpayers intent to give up their residence/domicile in New York and establishing a new one in another State or out of New York City. Merely moving to another location cannot establish change of residency for New York State tax purposes or any other state for that matter.

KEY TAKE AWAYS

It is critical that before a taxpayer undertakes the process of changing domicile that he/she has a clear understanding of the domicile and statutory residency rules in the jurisdiction they currently reside in. In addition:

- The "old" state of domicile will most likely audit the taxpayer's claim of a change in domicile.
- Given the high likelihood of an audit, taxpayers must carefully plan, execute, and document the actions taken (i.e., five factors) in changing domicile.
- Moves to vacation homes that are temporary in nature (i.e., intended to last only as long as the pandemic does) do not make for strong cases in changing one's domicile.

Finally, given the significant financial drain the COVID-19 pandemic has had on states and cities, it is expected these jurisdictions will put an increased effort into identifying taxpayers that claimed a change in residency during 2020 and 2021. Given this likelihood, the historical high standards a taxpayer faced in proving a change in domicile (i.e., "clear and convincing evidence") most likely just got higher.

We, therefore, suggest that you read this memorandum carefully and contact us in the event you have any questions and concerns.

Questions? Contact us at info@lhfcpa.com.