Relinquishment of Prior Residence for State Income Tax Purposes: Wishing to Change Residence Does Not Make It So

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Relinquishment of Prior Residence for State Income Tax Purposes: Wishing to Change Residence Does Not Make It So

Prof. Jani E. Maurer*

We live in an increasingly mobile and global society. Individuals move from one state to another for a variety of reasons. When the move is from a state which imposes income tax, particularly to a jurisdiction which does not, questions may arise about whether the individual remains a resident of the state from which he departed for income tax purposes.1 In the quest for revenue, certain states are aggressive in pursuing efforts to collect income tax from persons who claim to have changed their permanent residence.2 These states may assert that for income tax purposes the individual remains a resident of the state he left. This article examines the law applicable to a New York State resident who believes he established permanent residence elsewhere and may be unpleasantly surprised to find that he remains a New York State resident for income tax purposes. The distinction between residents and nonresidents of New York affects whether any income tax is owed to New York, and if taxes are due, whether taxes are to be computed on a resident’s entire income or a

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1 This article addresses only state income tax and not state estate or inheritance tax to which a different test applies.

2 In many states, statutes similar to those applicable in New York impose income tax on persons who have attempted to terminate their status as residents. See generally Timothy P. Noonan and Ariele R. Doolittle, Gaid v. New York: The State’s High Court Weighs in on Statutory Residence Rules, 24 JOURNAL OF MULTISTATE TAXATION AND INCENTIVES 2, 8 (2014) (reflecting the extensive number of cases portraying permanent residents of New York State who were largely unsuccessful in asserting that their status changed, preventing them from becoming residents of Florida or another jurisdiction).
nonresident’s New York source income.\(^3\) While taxpayers with considerable income have the most at risk, states such as New York pursue taxpayers even when small sums are claimed due.\(^4\)

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I. APPLICABLE LAW

“An individual may be a resident of New York State for personal income tax purposes, and taxable as a resident, even though such individual would not be deemed a resident for other purposes.”\(^5\) New York State income tax law sets forth two tests for determining if one is a resident for state income tax purposes.\(^6\) The first test is whether a person is domiciled in New York, i.e., one who maintains his primary place of permanent residence in New York.\(^7\) Domicile “is established by physical presence coupled with an intent to establish a permanent home.”\(^8\) A person

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\(^3\) See N.Y. Tax Law § 631 (McKinney 2017). A New York State resident is subject to income tax on all income. Id. In contrast, a nonresident of New York is subject to tax only on New York source income. N.Y. Tax Law § 611. If an individual is a nonresident of New York, disputes may arise about whether income was attributable to New York sources, see generally Clapes v. Tax App. Trib. of N.Y., 825 N.Y.S.2d 168 (App. Div. 3d Dept. 2006), or how much income was attributable to New York sources. Attea v. Tax App. Trib. of N.Y., 883 N.Y.S.2d 610 (App. Div. 3d Dept. 2009).


\(^6\) See N.Y. Tax Law § 605(b) (McKinney 2015).

\(^7\) Id. at § 605(b)(1)(A). For income tax purposes New York State defines domicile as “the place which an individual intends to be such individual’s permanent home – the place to which such individual intends to return whenever such individual may be absent.” tit. 20, § 105.20(d). A person has only one domicile, although he may be a resident in multiple states. tit. 20, § 105.20(d)(4); see also In re Bauer, No. 818492, 2003 WL 78489 (N.Y. Div. Tax App Jan. 2, 2003).

may avoid inclusion in this defined group if one of two exceptions is satisfied. The first exception has three requirements, all of which must be met. This first exception requires that “the taxpayer maintains no permanent place of abode in [New York], maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in [New York . . . .]”\(^9\) The second exception applies to persons who reside outside the United States for the requisite time and also has three parts, all of which must be met to avoid status as a domiciliary of New York State. Under this exception, to be domiciled somewhere other than New York the individual must satisfy the following:

(I) within any period of five hundred forty–eight consecutive days the taxpayer is present in a foreign country or countries for at least four hundred fifty days, and (II) during the period of five hundred forty–eight consecutive days the taxpayer, the taxpayer’s spouse (unless the spouse is legally separated) and the taxpayer’s minor children are not present in [New York State] for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which the period of five hundred forty–eight consecutive days begins and the nonresident portion of the taxable year with or within which the period ends, the taxpayer is present in [New York State] for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in that portion of the taxable year bears to five hundred forty–eight . . . .\(^{10}\)

A married couple is generally treated as having the same domicile.\(^{11}\) Spouses may have separate domiciles if they are legally separated, and only rarely if they are not.\(^{12}\)

Under the second test New York recognizes a person whose domicile is not New York as a “statutory resident” subject to income tax in New York after a taxable year.\(^{13}\)
York State as a resident.13 A statutory resident is one “who is not domiciled in [New York State] but maintains a permanent place of abode in [New York State] and spends in the aggregate more than one hundred eighty—three days of the taxable year in [New York State], unless such individual is in active service in the armed forces of the United States.”14

Nonresidents include only persons who are not considered residents under either one of the foregoing tests.15 A taxpayer who claims he was not a New York domiciliary or a statutory resident in a given year, contrary to the Tax Department’s conclusion, bears the burden of proof.16 A person who is either domiciled in New York State or who qualifies as a statutory resident of New York is subject to New York income tax as a resident. Even if a taxpayer is able to establish that she is not a statutory resident, if she was once domiciled in New York, unless she is also able to prove that she changed her domicile, she is subject to income tax as a resident.17

Because the rules for determining domicile and resident or nonresident status reference days, the regulations specify how days are counted. Not surprisingly, the rules favor a decision that the taxpayer was in New York. As a general proposition, if a person is in New York for any part of a day, the day counts as one full day spent in New York.18 However, if a person merely travels through New York from one out of state location to another out of state destination, that presence within New York is not counted.19

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14 Id. at § 605(b)(1)(B). An exception exists for individuals in the military. tit. 20, § 105.20(d)(6). An individual in the military generally retains the domicile he had prior to joining the service, and the fact that he is stationed in New York and actually present there does not cause him to be domiciled in or a statutory resident of New York for income tax purposes. Id. For a person not in the military, the New York dwelling must be maintained for “substantially all of the year,” id. at § 105.20(a)(2), which is generally construed to be in excess of eleven months. See In re Mays, No. 826546, 2016 WL 6071985 at *5 (App. Div. Oct. 6, 2016).
15 N.Y. Tax Law § 605(b)(2) (McKinney 2015); tit. 20, § 105.20(b).
17 See In re Taylor, No. 822824, 2010 WL 2801873 (N.Y. App. Div. July 8, 2010); In re Slotkis, No. 817952, 2002 WL 394249 (N.Y. App. Div. Mar. 7, 2002). In these cases, although each taxpayer maintained a residence outside New York State and was present in New York for less than 183 days during the year, each remained subject to New York income tax as residents because they failed to prove a termination of New York domicile or establishment of domicile elsewhere. Taylor, 2010 WL 2801873; Slotkis, 2002 WL 394249.
18 tit. 20, § 105.20(c); Zanetti v. N.Y.S. Tax App. Trib., 8 N.Y.S.2d 733, 734–35 (App. Div. 2015). The court rejected the argument that a day should include an entire 24–hour period. Id. The taxpayer was able to establish that he spent 172 days outside New York and 167 days in the state. Id. The dispute concerned 26 days in which he was only in New York for part of the day. Because those 26 days counted as presence in New York, the taxpayer exceeded the 183–day limit and was a statutory resident. Id.
19 tit. 20, § 105.20(c) (This requires the taxpayer to retain adequate documentation to establish the details of her travel).
Thus, a person traveling through New York from New Jersey to Massachusetts has not spent a day in New York.\(^2^0\) The same is true for a person who enters New York merely to board “a plane, ship, train or bus for travel to a destination outside New York.”\(^2^1\)

An element of both the test to determine if one is domiciled in New York and the test to determine if one is a statutory resident is maintaining a permanent place of abode in New York. That element is addressed in Part II of this Article. Part III of this Article explains when and how a person once domiciled in New York may or may not succeed in relinquishing that status. Part IV of this Article focuses on presence in New York and counting of days present in New York as pivotal in qualifying or not qualifying as a statutory resident for income tax purposes. Part V of this Article briefly addresses persons residing outside the U.S. Because New York may assert both domicile and statutory resident status as the basis for imposing income tax liability on a taxpayer and only needs to prevail on one ground,\(^2^2\) a review of both Parts II and III is warranted.

The stated purpose of the statute is to address the legislature’s concern that persons who actually live in New York attempt to avoid income tax by falsely claiming to be residents elsewhere.\(^2^3\) A reader might consider whether the statute effectively accomplishes the stated legislative purpose.

\(^2^0\) Id.
\(^2^1\) Id.
\(^2^2\) See generally, In re Lieberman, No. 824101, 2013 WL 3790595 *3 (N.Y. Div. Tax App. July 11, 2013); In re Santos, No. 820335, 2007 WL 507052 (N.Y. Div. Tax App. Feb. 1, 2007); In re Knight, No. 819485, 2006 WL 3350785 (N.Y. Tax App. Trib. Nov. 9, 2006); In re Feldman, 1998 WL 168011 (N.Y. Tax App. Trib. Dec. 15, 1988). An example of a case whose facts exemplify cause for concern is In re Bourne’s Estate, 41 N.Y.S.2d 336 (Surr. Ct. Westchester Co. 1943), involving whether decedent was a resident of New York or Florida at death for purposes of imposition of estate tax. After being domiciled in New York for many years, Mr. Bourne expressed his desire to become a Florida resident. Toward that end he consulted Florida counsel. Mr. Bourne signed a Florida will, registered to vote in Florida and filed Florida intangible tax returns. He moved his yacht from New York to Florida and lived in it. Documents reflected that he purchased a residence. However, he never occupied the residence and he sold it the following year. He then rented a portion of his attorney’s home, but didn’t live there either. Mr. Bourne’s representations about his domicile were inconsistent. The majority of his vast wealth remained at all times in New York. He did not sell or rent his New York home. Instead, he continued to occupy it, left his personal belongings there, continued to have staff work there, and he used the New York address to register autos, sell real estate and engage in other financial transactions. The result was a ruling that decedent had not changed his domicile.

II. MAINTAINING A PERMANENT PLACE OF ABODE

A taxpayer seeking to avoid having a domicile in New York must establish that he does not maintain his primary permanent place of abode in New York State and he does maintain one elsewhere. To avoid statutory resident status a taxpayer will attempt to establish either that he does not maintain a permanent place of abode in New York State, or if he does he is not in the State for more than 183 days. Thus, maintaining a permanent place of abode in New York is relevant to both tests. A permanent place of abode is a dwelling owned, leased or legally used by a taxpayer or the taxpayer’s spouse.24 Maintaining a home refers to “doing whatever is necessary to continue one’s living arrangements in a particular dwelling place”, and includes making payments to support the home.25 There are two aspects to the permanent requirement. One, found in the statute,

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24 tit. 20, § 105.20(e)(1). Where a taxpayer was a Merchant Marine who maintained a residence in New York occupied by his spouse and child, the residence qualified as an abode. Oatman v. State Tax Comm., 377 N.Y.S.2d 659 (App. Div. 3d Dept. 1975); see also In re Mays, No. 826546, 2016 WL 6071985 at *5 (App. Div. Oct. 6, 2016). In Mays, the taxpayer accepted employment in New York. She resided during the tax year in dispute in two locations in New York City. Id. The first was a fully furnished apartment provided by her employer, sans lease, which the taxpayer contended was only for her exclusive use until she located more permanent housing. Id. The taxpayer failed to offer evidence, other than her testimony, that occupancy of this first apartment was intended to be temporary. Id. The second residence was a New York City apartment leased by the taxpayer’s fiancé. Id. Although the taxpayer signed no lease for either apartment, because she had exclusive use and access both apartments constituted residences maintained by the taxpayer as her abode. Id.

25 El–Tersli v. Comm’r of Taxation and Fin., 787 N.Y.S.2d 526, 528 (App. Div. 2005). (relying on Evans v. Tax App. Trib., 606 N.Y.S. 404 (App. Div. 1993), which addressed whether an individual was a New York City resident liable for city income tax.) In Evans the taxpayer admittedly lived in upstate New York in a home he owned, and was employed in New York City. Evans, 606 N.Y.S. 404. To avoid a long daily commute to work, during the work week Mr. Evans lived with his friend, a priest, at a church rectory in New York City. Id. The taxpayer had no lease and paid no rent. Id. He contributed to common living expenses, such as the costs of food, cleaning supplies and a housekeeper, while he stayed at the rectory. Id. The taxpayer left his furniture, clothing and other personal items in the rectory, had a key to facilitate unrestricted access, and had visitors while he stayed at the rectory for seven years. Id. New York City, like the state, imposed income tax on a person who maintained a permanent place of abode in the city and was present there for over 183 days during the calendar year. Id. at 405. The taxpayer argued unsuccessfully that his stay at the rectory did not constitute maintaining a permanent abode. Id. The fact that the taxpayer did not own, lease or rent the rectory did not prevent him from having a permanent residence there. Id. The limited acts of leaving personal objects at the premises, contributing to costs of upkeep and occupying the residence regularly constituted maintaining an abode. Id.
addresses the nature of the structure used as a home. The second, found in the regulations, requires that the dwelling be permanently maintained.

What constitutes maintaining a permanent place of abode under the regulations is not always clear. Historically, the position of the New York State Department of Taxation and Finance, regularly sustained by the Administrative Law Judges and the courts, was that a permanent place of abode existed if the taxpayer or the taxpayer’s spouse owned or rented a dwelling. This conclusion might be reached even if the taxpayer claimed he did not occupy the home, absent evidence that persons other than the taxpayer or the taxpayer’s spouse lived there. Where a taxpayer asserted that his father and brother occupied a rental apartment formerly occupied by the taxpayer, the absence of proof of that fact lead to the conclusion that the taxpayer still maintained the apartment as his permanent abode. Where a taxpayer continued to own and occasionally occupy his New York home, he maintained the abode although his adult daughter lived there.

The fact that the taxpayer is a record title owner of a home does not automatically mean he maintains a permanent abode, where the taxpayer is able to establish that he did not occupy or have the right to occupy the home and he did not purchase the home, even though he contributed to the costs of maintaining the home. A residence owned or leased by a taxpayer must be maintained by him for his own use and occupancy to qualify as a permanent place of abode.

When a taxpayer maintains a home in New York for the use of someone other than himself, his spouse or his dependent children, the

26 N.Y. Tax Law § 605 (McKinney 2015).
27 tit. 20, § 105.20(e)(1); Knight, 2006 WL 3350785 at *27.
28 tit. 20, § 105.20(e)(1).
29 See El–Tersli, 787 N.Y.S.2d 526. The taxpayer who claims other persons resided in an apartment he rented and allegedly vacated has to prove that fact. Id.
30 In re Feldman, No. 802955, 1988 WL 168011 (N.Y. Tax App. Trib. Dec. 15, 1988). The taxpayers owned a two family home in New York City. Id. They initially lived in the second floor unit while the husband conducted his medical practice in the first floor unit. Id. The husband cut back on his medical practice. Id. The taxpayers first leased and then purchased a Florida residence, where they spent winters. Id. Summers were spent in their summer home in upstate New York. Id. The first floor unit was remodeled to enable taxpayers to remain there during their minimal visits to New York. Id. Their daughter continued to occupy the second floor unit. Id. These facts justified the conclusion that the taxpayers maintained an abode in New York. Id. at *4.
31 Chancey v. State Tax Comm., 415 N.Y.S.2d 491 (App. Div. 1979). The taxpayer’s mother purchased, paid for and occupied a home in New York. Id. For estate planning purposes she titled the home in her name jointly with her son (the taxpayer) with rights of survivorship. Id. The taxpayer did not occupy the home but provided financial support to his mother. Hence, he directly or indirectly paid some home related expenses. Id. Based on these facts the home was not a permanent abode of the taxpayer. Id.
home may not be the permanent place of abode of the taxpayer for income tax purposes. The purpose of the statutory resident statute was to prevent abuse and income tax avoidance by persons who really were New York residents based on their activities, time spent in New York and access to a home. “[F]or an individual to qualify as a statutory resident, there must be some basis to conclude that the dwelling was utilized as the taxpayer’s residence.” A residential property in New York owned by a taxpayer but not habitable due to ongoing construction or renovation may fail to qualify as an abode for this purpose.

It may not be necessary for the taxpayer to own or rent the New York residence or to contribute financially to its maintenance for the taxpayer to be domiciled in New York, where he has the unrestricted right to occupy

33 Gaied v. N.Y.S. Tax App. Trib., 983 N.Y.S.2d 757 (N.Y. 2014). The taxpayer was initially domiciled in New Jersey, owned a business in New York, and commuted to work. Id. at 758. He purchased a multifamily apartment building in New York near his business, as both an investment and to provide a home for his parents. Id. Taxpayer’s parents occupied one apartment in the building and the other units were rented to tenants. Id. As the taxpayer supported his parents, the utilities (gas, electric and telephone) for service to his parents’ apartment were in his name and the taxpayer paid those bills. Id. The taxpayer stayed at the apartment only on rare occasions when a parent needed his help. Id. When he did so the taxpayer slept on the couch. Id. The taxpayer did not leave his personal belongings in the apartment. Id. There was evidence adverse to the taxpayer’s position that he was not a statutory resident of New York because the apartment was not his permanent place of abode. During one year in dispute the voter registration records reflected that the taxpayer voted in New York. At the end of the last tax year in dispute the taxpayer sold his New Jersey home, placed his belongings in storage and lived with a relative in New Jersey. At that time the taxpayer was renovating a room in the New York apartment building he expected to occupy in the future.

34 Id. The court stated that there was no rational basis to support the Tax Department’s interpretation of the statute that a taxpayer who maintains a residence but does not reside in it is a statutory resident of New York. Id. at 760.

35 See In re Stewart, No. 816263, 2000 WL 49084 (N.Y. Div. Tax App. Jan. 13, 2000). Ms. Stewart asserted that during the 1991 and 1992 tax years in dispute she did not maintain an abode in New York, because her East Hampton home was being renovated and was not habitable. Id. at * 6. Her contention was upheld for 1991, but not for 1992. Id. Ms. Stewart offered documentation indicating that renovation construction ended in 1991, although she thereafter claimed it continued during 1992. Id. The Tax Department questionnaire signed by Ms. Stewart reflected that she occupied the residence during the summer of 1991. Id. Books and magazines published reflected that Ms. Stewart occupied the New York home in 1991. Id. Construction work on the home was supposedly completed simultaneously with renovation of a cottage on the property, and there was evidence that Ms. Stewart’s daughter occupied the cottage in 1991. Id. Having cable T.V. service installed in the property with access to extra channels supported habitability. Id. The conflicting evidence led to the conclusion that the taxpayer maintained a New York abode in 1991. Id. In the same case the taxpayer owned a second residence, an apartment in New York City. Id. at * 3. Because that apartment was under construction and uninhabitable during the tax years in dispute, it did not constitute the taxpayer’s abode.
it.37 Where a taxpayer lived in a home rented by his parents in New York, then moved to California and later returned to his parents’ rental apartment, because he did not establish domicile in California he was deemed to remain domiciled in New York.38

The requirement of permanently maintaining an abode is not met if the residence “is maintained only during a temporary stay for the accomplishment of a particular purpose.”39 To illustrate, the nondomiciliary of New York who rents an apartment within New York for a month to conduct specific business is not likely permanently maintaining an abode. In contrast, a taxpayer who occupies one New York residence temporarily while searching for suitable long term lodging in New York is permanently maintaining an abode in the temporary living quarters.40 “[T]he permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place.”41 An apartment may constitute the taxpayer’s permanent abode although she is not named as a tenant on the lease, particularly where she has exclusive use of the apartment.

If an individual owns residential real property in New York occupied by a person (other than the taxpayer, the taxpayer’s spouse or the taxpayer’s minor child), the taxpayer does not occupy the home and the taxpayer permanently resides elsewhere, the residence is not the taxpayer’s permanent place of abode. It is still unclear whether New York residential property which the taxpayer owns or leases and which he could occupy qualifies as his permanent place of abode if he does not actually occupy the residence. If the taxpayer maintains the home and has the right to occupy it, precedent may still support the conclusion that it qualifies as the taxpayer’s permanent abode. If a person other than the taxpayer regularly occupies the residence as his home, it is not known how often the taxpayer who permanently resides elsewhere may stay in the home before it qualifies as the taxpayer’s permanent place of abode.

37 See In re Santos, No. 820335, 2007 WL 507052 (N.Y. Div. Tax App. Feb. 1, 2007); see also In re Mays, No. 826546, 2016 WL 6071985 at *5 (App. Div. Oct. 6, 2016) (finding that a dwelling was used by the taxpayer as her residence although she did not execute a lease or own it).
38 In re Santos, 2007 WL 207052 at *6. The opinion reflects the conclusion that the taxpayer always lived in New York prior to his move to California. Id. Thus, he was domiciled in New York. Id. The opinion does not mention the requirement that the taxpayer maintain an abode. Id.
40 Id. Because the legislature did not define “maintain” in the statute, the court concluded that “one maintains a place of abode by doing whatever is necessary to continue one’s living arrangements in a particular dwelling place.” Id.
41 Id.
“‘[A] permanent place of abode’ is one maintained by a taxpayer for ‘substantially all of the taxable year.’”\(^42\) For a property to qualify as a permanent place of abode, the taxpayer must have the right to occupy it.\(^43\) Where a taxpayer and his family vacate a New York apartment, relocate all personal property to a new home, but continue to own, renovate and pay utility bills on the New York home in preparation for its sale, the apartment no longer qualifies as a permanent abode of the taxpayer when the listing agreement precludes him from occupying it.\(^44\)

A taxpayer’s actual occupancy of a New York residential property, even on a regular basis, does not alone automatically cause it to be a permanent place of abode of the taxpayer. This is particularly true where the taxpayer does not own or rent the premises and has no legal right to occupy it at all times. The fact that a taxpayer stays overnight at his girlfriend’s New York apartment when she permits him to do so does not result in a conclusion that he maintains that apartment as his abode, when he does not contribute to the apartment expenses, does not leave his personal belongings there, and does not have unrestricted access.\(^45\)

Likewise, an apartment rented by a limited liability company and occupied periodically by the taxpayer was not maintained by him as a permanent residence, when an LLC in which the taxpayer was a member paid the rent and utilities, the taxpayer’s furniture and personal belongings were not left in the apartment, and the taxpayer did not have unrestricted access to all or a portion of the apartment.\(^46\)

A taxpayer’s irrevocable transfer of ownership of his New York home to another does not prevent the home from being the taxpayer’s place of abode when he continues to occupy it as a tenant.\(^47\) The transfer of


\(^{43}\) Id.

\(^{44}\) Id.


\(^{46}\) Id. at *28–29. The taxpayer indirectly contributed to the cost of maintaining the apartment, as his share of LLC profits was diminished by the costs. Id. The conclusion was reached despite the facts that the taxpayer guaranteed the lease, signed some rent checks written by the LLC, and furnished the apartment with items paid for by the LLC. Id. The taxpayer occupied the apartment infrequently, and it was used by other LLC members and LLC clients. Id.

\(^{47}\) In re Lieberman, No. 824101, 2013 WL 3790595 (N.Y. Div. Tax App. July 11, 2013). In Lieberman, the taxpayers irrevocably transferred ownership of their New York home to a qualified personal residence trust with a ten–year duration. Id. During and after the ten years the taxpayers continued to occupy the home. Id. After the trust ended, the home was
ownership to a qualified personal residence trust or to the taxpayers’ children does not alone affect the status of the home as taxpayer’s abode. 48

The statute expressly refers to a “permanent” place of abode. 49 A relevant question is whether any dwelling the taxpayer maintained was permanent within the meaning of the statute. The permanent requirement refers in part to the structure of the home. Not all structures qualify as permanent abodes. “[A] mere camper or cottage, which is suitable and used only for vacations, is not a permanent place of abode.” 50 Also excluded from the definition of permanent place of abode is any structure lacking cooking, bathing or other facilities normally found in a home, and housing occupied by a full time college student. 51

Where taxpayers were not New York domiciliaries and owned a dwelling in upstate New York, the dwelling qualified as a cottage suitable for and used only for vacation purposes. 52 The dwelling was accessible only by travel over a dirt trail, the trail was not well maintained, and the trail was located in an easement shared by nearby homeowners. The structure consisted of two bedrooms in a 1,000 square foot framed building with a cement foundation over a crawl space. The only heat was provided by electric baseboard units, but hot water and indoor plumbing were available. The home was not readily accessible during winter months, and neither the taxpayers nor owners of adjacent properties used the units during the winter. 53 The government’s argument that to qualify as a cottage the unit must lack both a furnace and running water was rejected. 54 Because the property was only suitable for brief vacations seasonally and owned by the taxpayers’ children, from whom the taxpayers rented the home. Id. During the rental period the taxpayers continued to pay all costs associated with occupancy of the home and it remained their permanent abode, despite their purchase of a residence in Florida. Id.

48 See id.
50 tit. 20, § 105.20(e)(1).
51 Id. A full time student is defined as one taking at least 12 credit hours per semester for at least two semesters during the tax year. Id.
53 Id. at *3. The tribunal noted the considerable disparity between the value of the New York residence in a summer resort area of about $40,000.00 compared to the considerably greater value ($480,000.00 in 1998 and $2,300,000.00 in 2002) of the taxpayer’s primary residence in New Jersey. Id. While the taxpayer – husband was employed in New York, he worked nowhere near the vacation home and did not commute to work from the vacation home. Id.
54 Id. at *4. The tribunal recognized that the regulation sets forth essentially two separate tests. One was that “a mere camp or cottage, suitable and used only for vacations, is not a permanent place of abode.” tit. 20, § 105.20(e)(1). The other was that “a barracks or any construction which does not contain facilities ordinarily found in a dwelling . . . will generally not be deemed a permanent place of abode.” Id.
was only used that way by the taxpayers, it did not qualify as a permanent place of abode.\textsuperscript{55}

Similarly, a summer home in upstate New York used only from May to September annually, located on a dirt road not maintained year round, which did not have water other than during the summer, was not a permanent structure within the meaning of the statute.\textsuperscript{56} The home had no basement, was not insulated or fully heated, and the taxpayers turned off utility service after each summer.\textsuperscript{57} Because the home was only suitable for occupancy during the summer it was not a permanent residence.\textsuperscript{58}

The standard for determining whether a structure is permanent is objective.\textsuperscript{59} If the structure has adequate facilities and services appurtenant to it to permit its use on a year round basis, the fact that the taxpayer found it suitable only for vacations or actually used it infrequently does not prevent it from qualifying as a permanent abode.\textsuperscript{60} When the taxpayer has the legal right to use and occupy the premises, the fact that occupancy by other family members permitted by the taxpayer deterred him from using the premises likewise does not prevent it from qualifying as a permanent abode of the taxpayer.\textsuperscript{61} That the residence is described as a “seasonal dwelling” on an insurance policy does not prevent it from being permanent, particularly when there is utility service all year.\textsuperscript{62} Similarly, where a taxpayer domiciled in Florida rents a New York apartment, has the right to use it at all times and only occupies it occasionally, the taxpayer maintained a permanent abode in New York despite her view that it was a vacation home.\textsuperscript{63}

\textsuperscript{55} Slavin, 2007 WL 1741119 at *5.


\textsuperscript{57} Id.

\textsuperscript{58} Id. In Feldman, the taxpayers owned another home in New York City, which was a permanent residence. Id.


\textsuperscript{60} Id. at *8. The taxpayers were domiciled in Connecticut, although the husband worked in New York and was present in New York for in excess of 183 days each year. Id. The taxpayers purchased a vacation home in Long Island, New York. Id. During the tax years in question, the taxpayers stayed at the vacation home for between 16 and 19 days a year. Id. The vacation home was small and equipped with utilities for year round living. Id. However, the taxpayers did not find it suitable for year round living, nor did they ever intend to occupy it other than as a vacation home. Id. The taxpayers’ subjective view was not relevant to whether the structure was a permanent abode. Id.

\textsuperscript{61} Id. at *5. The taxpayers allowed the wife’s parents to use the vacation home. Id. The parents did so to the extent that the taxpayers were deterred from occupying the property. Id. Because this was the taxpayers’ choice and the taxpayers had the legal right to occupy the home, these facts did not alter the outcome. Id.

\textsuperscript{62} Id.

The court determinations referenced above holding that ownership of an infrequently used New York vacation home by a person domiciled in another state constituted maintenance of a permanent residence in New York were issued before the court’s decision in Gaied. It is difficult to comprehend how causing a taxpayer admittedly living outside New York to be a statutory resident based on ownership and minimal use of a vacation home in New York, even if the home was equipped for year-round use, furthers the legislative purpose of the statute to prevent abuse.64

In contrast to vacation homes, when a taxpayer remains in a nursing home in New York to receive medical care, the taxpayer is not maintaining an abode in New York.65

Whether a residence is permanent also focuses on the taxpayer’s connection to the home. The amount of time the taxpayer occupies the dwelling is relevant to a determination of whether it qualifies as a permanent place of abode. But that fact alone is not determinative where the taxpayer has the right to occupy on a regular basis.66 Courts consider how frequently and regularly the taxpayer occupies the residence in ascertaining if the permanent requirement is satisfied.67

III. TERMINATING NEW YORK DOMICILE

The concept of domicile is relevant to whether one is subject to New York State income tax either as a domiciliary of New York or as a statutory resident. To avoid inclusion in either group, the taxpayer must affirmatively establish that his domicile changed from New York to another location or he was never domiciled in New York. A taxpayer residing in New York who asserts he was never domiciled there has the burden to prove his move to New York was temporary.68

64 See Barker, 2011 WL 198441 at *2.
67 Id. Where a taxpayer was living separately from his wife, their marital relationship continued, and the taxpayer generally spent one weeknight in his wife’s New York apartment each week, the apartment qualified as his permanent (although not primary) residence. Id. The facts that the taxpayer only stayed at the apartment if his wife was there, after notice to his wife, and only left minimal personal belongings at the apartment did not alter the outcome. Id. Nothing prevented the taxpayer from occupying the New York apartment more frequently. Id.
68 See Bernbach v. State Tax Comm., 471 N.Y.S.2d 903, 904 (App. Div. 3d Dept. 1984). Taxpayer moved from a rental apartment in New Jersey to a cooperative apartment he purchased in New York, allegedly for his wife to receive psychiatric care. Id. Because the taxpayer failed to establish that the move was temporary, the court upheld the Commission’s determination that the taxpayers became domiciled in New York. Id.
If a person who maintains his primary home in New York and is thus domiciled there moves out of state with no intent to return to New York, that person is no longer domiciled in New York.69 To change domicile the taxpayer need not intend to live in the new locale forever; it is sufficient if he intends to stay indefinitely and has no plans to return to New York.70 But a taxpayer who accepts temporary employment of short term duration outside New York does not change his domicile merely by residing in the new state.71 A taxpayer who has a “floating intention to return to his former domicile at some future and indefinite time” may still have changed his domicile.72 The taxpayer who claims to have changed her domicile to a state other than New York has the burden of proving that.73 “Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one’s domicile.”74

“To establish a change, the [taxpayer] bears the burden of proving, by clear and convincing evidence, that he or she obtained a new residence,

69 tit. 20, § 105.20(d)(2). No change of domicile results from a removal to a new location if the intention is to remain there for only a limited time; this rule applies even though the individual may have sold or disposed of such individual’s former home. Id.
70 In re Gemmel, No. 819222, 2004 WL 2634346 at *11 (N.Y. Div. Tax App. Nov. 10, 2004); see also McKone v. State Tax Comm., 490 N.Y.S. 2d 628 (App. Div. 1985). In McKone, the court ruled that taxpayers who moved from New York to Canada due to the husband’s job change, sold their New York home, acquired a home in Canada, moved all accounts and possessions to Canada and obtained permanent resident visas in Canada were no longer domiciled in New York. McKone, 490 N.Y.S. 2d at 630.
71 In re Santos, No. 820335, 2007 WL 507052, at*6 (N.Y. Div. Tax App. Feb. 1, 2007). The taxpayer accepted employment in California pursuant to a six–month employment contract. Id. During his first two months in California he resided in hotels. Id. Thereafter, he rented an apartment on a month–to–month basis, where he remained for about four months. Id. During his six months in California the taxpayer visited New York twice. Id. Although he initially went to California hoping to remain there permanently, after six months his plans changed and he returned to New York. Id. The temporary nature of his work in California, clearly delineated as temporary in his employment contract, supported the conclusion that the taxpayer lacked intent to change his domicile. Id. See also In re Simon, No. 801309, 1989 WL 127186, at *4 (N.Y. Tax App. Trib. Mar. 2, 1989), where the taxpayer left his family in Buffalo, New York, his historic home, to live first in Florida and then in Pennsylvania for teaching positions. Id. The taxpayer rented residences in each state to which he moved, and borrowed furniture to use in the residence. Id. Although the taxpayer obtained a Florida driver’s license, scant evidence reflected his intent to permanently relocate. Id. Instead, the taxpayer repeatedly returned to his family in Buffalo, leading to the conclusion that his domicile never changed. Id.
72 Gemmel, 2004 WL 2634346 at *11.
actually resided there and intended to make the new location a fixed and permanent home.\textsuperscript{75} That burden of proof is difficult to meet. The standard enunciated for determining if a change of domicile occurred is subjective, as it focuses on the individual taxpayer’s actual intent.\textsuperscript{76} But courts base their decisions on a review of objective factors used to ascertain if the taxpayer sufficiently manifested his intent by his actions.\textsuperscript{77} It is not necessary for a taxpayer to sever all ties to New York to establish a change in domicile.\textsuperscript{78} The taxpayer who after the move maintains no home in New York for his own use has the strongest case that he relinquished his New York domicile. However, selling a former residence does not guaranty that the taxpayer changed his domicile. If a taxpayer intends to remain at a new location for only a limited time, although he sold his former New York home he may remain domiciled in New York.\textsuperscript{79} A taxpayer who leaves New York expecting the move to another jurisdiction to be permanent, accepts employment in the new locale, maintains no home in New York and severs all ties with New York is generally no longer domiciled in New York, despite the fact that changed circumstances thereafter caused him to return to New York years later.\textsuperscript{80}


\textsuperscript{77} Slotkis, 2002 WL 394249 at *4; see also Patrick, 2017 WL 2801958 at *12.


\textsuperscript{79} tit. 20, § 105.20(d)(2).

\textsuperscript{80} Chancey v. State Tax Comm’n, 415 N.Y.S. 491, 492 (App. Div. 1979). The taxpayers, a married couple, lived in New York and were domiciled there until February 1965, when they moved to Chicago, Illinois. \textit{Id.} The husband accepted employment in Chicago with a union and expected to remain in Chicago long term. His predecessor held the union position for twenty years. \textit{Id.} The taxpayers rented an apartment in Chicago, moved all of their personal belongings with them, transferred bank accounts to Chicago, “registered to vote and voted from Chicago, joined a church and other clubs, changed their passports to reflect Illinois as their place of residence, took a ‘phone listing, filed federal tax returns listing Chicago as their residence, bought a car which they registered in conformity with Illinois law, took out insurance and maintained an account with a mutual fund operation in Chicago,” \textit{Id.} at 492. The taxpayers’ only remaining connections to New York after the move to Illinois were related to the husband’s mother. \textit{Id.} The mother lived in New York and titled her home and her bank account in joint names with her son for estate planning purposes. \textit{Id.} The taxpayer supported his mother and his federal income tax return reflected that fact. \textit{Id.} When the taxpayer’s employer in Chicago went out of business, the taxpayers returned to New York and lived in the mother’s home. The court found there was clear and convincing evidence that the taxpayers changed their domicile to Illinois, and that the New York Tax Commission’s decision to the contrary was arbitrary and capricious. \textit{Id.}
A taxpayer who continues to own a New York residential property may establish that she changed her domicile. A taxpayer who moved to California due to employment there and remained in California for years with no specific intent to return to New York was domiciled in California, despite her continued ownership of a home in New York where her domestic partner resided.81 Being employed in California full time for many years, being physically located in California for most of the year, renting a residence she occupied in California, moving personal possessions there and other facts caused the court to conclude that there was clear and convincing evidence of a change of domicile.82 The more evidence the taxpayer is able to introduce to show connections to the new domicile the greater the likelihood of a favorable ruling.

Taxpayers who sell their long term primary New York home and relocate to Florida may be able to establish change of domicile, even

81 Gemmel, 2004 WL 2634346.
82 Id. The taxpayer and her life partner initially lived in New York. They purchased a brownstone together, intended for use as part personal residence and part rental units for investment. They occupied parts of the brownstone as their residence, while other parts of the building underwent renovation. After owning and occupying the brownstone for over ten years, the taxpayer accepted a consulting position with a California business, requiring her to spend time in both states. Thereafter, she became president and CEO of the business, requiring her presence in California full time. Her contemporaneous business records documented her presence a majority of time in California, but evidence was lacking about where the taxpayer was on any given day. The taxpayer leased a home in California, and over time moved personal belongings from New York to California. While the taxpayer was living in California the mortgage on the New York home was refinanced, and the loan application reflected the taxpayer’s residence address was in California. The taxpayer’s written employment agreement with the California business reflected that the parties contemplated a long term, rather than a temporary, relationship. Other business documents, such as employer provided life insurance, reflected California as the taxpayer’s residence. While living in California, the taxpayer occasionally visited New York, staying either at the brownstone she owned or with relatives. When the California business was sold, the taxpayer remained employed in California with the purchaser under a three year contract. The taxpayer, on advice of an accountant, filed state and federal income tax returns as a California resident. Nonresident New York State income tax returns were also filed. Other facts were introduced to support the assertion that the taxpayer changed her domicile. The taxpayer had a California driver’s license, owned and registered a car in California, was visited by family and friends in California, employed doctors and dentists in California, and decorated her California home. It was only when the taxpayer’s life partner became ill that her plans changed and she returned to New York. The court weighed the facts tending to show domicile in California against those favoring New York and ruled for the taxpayer. Critical to the court’s ruling were the length of time the taxpayer was in California, that a majority of time was spent in California each year and the taxpayer’s employment there. Adverse facts were present. One was that the taxpayer leased a home in California whereas she owned an expensive home in New York. Another was that the taxpayer left tangible personal property of nominal value in New York.
though they purchase another New York vacation property.83 Similarly, a taxpayer who retained ownership of his New York residence after marrying and permanently relocating to Paris, France, established that he changed his domicile84 For many years the taxpayer lived in Connecticut with his first wife and their children, while he worked long hours in New York City. In 2008 he left his first wife and moved to New York City, where he initially rented an apartment and purchased the furniture in it. In 2009 the taxpayer and his childhood sweetheart agreed to marry as soon as they both divorced their spouses. The couple was to live in Paris, France. While awaiting entry of divorce decrees, the taxpayer purchased an apartment in New York, so his fiancé and her son would have a comfortable place to visit with him. In July 2009 the couple married. In 2010 they purchased an apartment in Paris, and by 2011 the apartment was renovated and ready for occupancy. On March 1, 2011 the taxpayer retired from his employment in New York, and on March 2, 2011 he moved to Paris. Despite retaining ownership of the New York residence, and staying in it periodically to receive medical treatment in New York and for personal visits for years after the move to Paris, the taxpayer was not domiciled in New York during or after 2011.85

83 Burke, 1994 WL 266764 at *13 (totality of the circumstances resulted in a ruling favorable to the taxpayers.). The taxpayers lived and worked in New York for many years, where they owned a home and two businesses. One business constructed and sold residential housing in New York, and a second constructed and rented low income housing for the elderly. Id. at *2. The taxpayers’ goal was to build businesses which could function without their active involvement and would generate income allowing them to enjoy retirement. Having decided to retire and continue ownership of the businesses which owned New York real estate, a manager was placed in control of the businesses. By 1985 taxpayers moved to Florida, and their active day to day involvement in the businesses declined dramatically. The tribunal accepted the taxpayer’s testimony that he averaged two telephone calls of less than 15 minutes each weekly to the business’ manager after his retirement. His testimony was supported by telephone records and an affidavit of the manager. The manager also supported the taxpayer’s assertion that most telephone calls and any infrequent visits to the business after his retirement were personal, as the business paid many of the taxpayers’ bills. Prior to 1985 the taxpayers owned a condominium in the Bahamas. Due to instability there and the inability of the taxpayers to become permanent residents of the Bahamas, in 1995 they purchased a Florida residence. Shortly thereafter their New York residence was listed for sale, and taxpayers purchased another New York vacation home. The taxpayers spent more than 30 days but less than 170 days at the New York vacation home thereafter. The former New York home was eventually sold furnished. Personal effects were moved to the Florida home, as was their boat. The first Florida residence purchased by taxpayers was sold five years later and another Florida home was purchased. The taxpayers had only minimal family or social ties to New York after 1985. Their personal investments and social activities were in Florida.


85 Id. The Tax Division claimed that the taxpayer was domiciled in New York, but did not assert that he was a statutory resident. Facts considered in reaching the decision
Non-U.S. citizenship does not prevent a person who permanently resides in New York with an intent to remain from being domiciled in New York for income tax purposes. However, when a U.S. citizen departs New York for a foreign country, the individual remains a New York domiciliary unless he can prove an intent to remain in the foreign country permanently or indefinitely.

Once an individual is a New York domiciliary, the pressing question is how to terminate that status. “It is well established that an individual’s original or selected domicile continues until there is a clear manifestation of an intent to acquire a new one.” So called “snowbirds” who spend part of the year in New York and part in warmer climates such as Florida, are particularly vulnerable to determinations that they remain New York domiciliaries for income tax purposes. Where the taxpayer continues to maintain a dwelling in New York, the state makes it challenging to terminate status as a domiciliary of New York. “The determination of an individual’s domicile is ordinarily based on conduct manifesting an intent favorable to the taxpayer included that his spouse resided only in Paris, France; in connection with the move the taxpayer promptly obtained legal permission from the French government to reside in France for the longest period possible; he owned a substantial home in Paris; had a French driver’s license; and he paid taxes in France. That the taxpayer retained his valuable New York apartment was not determinative, because he stayed there to obtain medical treatment only available in New York for a serious ailment. That the taxpayer moved to Paris the day after he retired, forfeited financial benefits by retiring early, became inactive in a New York club he belonged to, and had no long term residence in or family ties to New York, his accountant was not in New York, he did not insure the contents of his apartment in New York or have a safe there (whereas he did both in Paris), all supported his position that his domicile changed. Facts were present adverse to the taxpayer’s position. He remained an inactive member of a gym in New York after his move to Paris. He owned and periodically occupied an expensive New York apartment, which was neither sold nor converted into an investment property after he moved to Paris. Although he retired from his employment as of December 2010, he remained Vice Chairman of his former employer until March 1, 2011. After 2011 the taxpayer sat on the board of directors of companies located in Colorado and London, requiring attendance in 2012 at two board meetings held in New York, in addition to meetings held elsewhere. The taxpayer continued to receive treatment from medical professionals in New York during 2011 and thereafter. Tax forms, utility bills and credit card bills were addressed to the taxpayer’s New York residence, although he testified that he received them electronically. Id. at *7. Finally, the taxpayer spent considerable time in New York during each tax year in dispute.

86 tit. 20, § 105.20(d)(3).
to establish a permanent home with permanent associations in a given location."91 "The test of intent with respect to a purported new domicile has been stated as ‘whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it.'"92 To successfully assert that New York domicile was relinquished, the taxpayer must actually establish another domicile.93 A seaman in the Merchant Marine does not avoid being domiciled in New York when he previously lived in New York, his spouse and child continue to live there, he spends over 31 days a year in New York, and he claims to have no domicile.94

Because domicile only exists if the taxpayer’s primary home is in New York, and depends on both the taxpayer’s physical presence in New York and intent, a variety of factors are reviewed by the courts to determine

91 Clute v. Chu, 484 N.Y.S.2d 239, 241 (App. Div. 1984). In Clute the taxpayer was a long time domiciliary of New York, where he resided, managed a family business, held other employment positions and owned a home and investment real property. In increments, over a period of years, the taxpayer purchased a condominium in Florida, married a woman living in Florida, moved some furniture from his New York residence to the Florida home, sold the family business, resigned memberships in New York social organizations and joined organizations in Florida. The taxpayer attended to traditional actions associated with a change of domicile. He filed a declaration of domicile in Florida, registered to vote there, amended his Will to reflect Florida residence, registered his car in Florida, rented a safe deposit box in Florida and relinquished his box in New York, moved his bank account to Florida and filed Florida intangible tax returns. The continued ownership of a New York home and other New York real estate, combined with the taxpayer’s continued part time occupancy of that home, and his continued business interests in New York resulted in a ruling that taxpayer did not relinquish his New York domicile.

92 Bodfish v. Gallman, 378 N.Y.S.2d 138, 140 (App. Div. 1976) (quoting Matter of Bourne, 41 N.Y.S.2d 336 (N.Y. Surr.1943)). Bodfish involved a New York domiciliary whose employer relocated him to Pakistan, where he lived and worked for three years, at which time the employer transferred the taxpayer to London. Because the taxpayer entered Pakistan under a four–year visa rather than an immigration visa, initially moved to Pakistan without his family who remained in New York until his home was sold, leased multiple residences in Pakistan, and periodically returned to New York, he failed to provide clear and convincing evidence of an intent to change his domicile.


94 Oatman v. State Tax. Comm’n, 377 N.Y.S.2d 659, 661 (App. Div. 1975). see also Starer v. Gallman, 377 N.Y.S.2d 645, 648 (App. Div. 1975). In Starer the taxpayer lived in New York until 1963, when he graduated from high school and entered the U.S. Merchant Marine Academy located in New York. Starer, 377 N.Y.S.2d at 648. After graduating from the Academy, the taxpayer accepted employment with a New Jersey company on a ship. Id. He thereafter resided on the ship. Id. The taxpayer opened a bank account in New Jersey and joined a union there. He contended that he planned to eventually live in New Jersey. Id. His claim to have abandoned his New York domicile was rejected, based on his failure to actually establish a domicile in New Jersey. Id. Thus, he remained subject to New York income tax as a resident. Id.
presence and intent.\textsuperscript{95} These factors explained below are viewed as indicia or manifestations of the taxpayer’s intent.\textsuperscript{96} It is the totality of the circumstances that leads to a given outcome.\textsuperscript{97} No single fact is controlling.\textsuperscript{98} The factors are accorded different weight by the courts. Certain factors are viewed as self-serving. The consequence is that their presence is not very persuasive in favor of the taxpayer’s claimed intent to change domicile, but the absence of these factors leads to a determination of continued status as a New York domiciliary. “While any evidence reflective of intent is admissible, . . . a party’s statements of intent are accorded little or no weight and the emphasis is placed rather upon his or her conduct . . . .”\textsuperscript{99}

Typical actions a person permanently departing from New York might engage in, such as registering to vote in the jurisdiction of the new domicile, insuring and registering vehicles in the new jurisdiction, and obtaining a driver’s license there are given “due weight, but they will not be conclusive if they are contradicted by such individual’s conduct.”\textsuperscript{100} Contrary to most taxpayers’ perception, case law reflects that these acts, combined with purchase of a home in the new state and continued maintenance a home in New York, are rarely sufficient to prove a change in domicile.\textsuperscript{101} The regulations specifically state that one fact to be considered is whether the individual moved to escape New York tax.\textsuperscript{102} The time the taxpayer spends in a location is another fact relevant to domicile where the taxpayer maintains multiple residences.\textsuperscript{103}

In the vast majority of reported opinions, the courts uphold the tax department’s determination that the taxpayer did not succeed in giving up New York domicile. In addition to the individual factors considered by the

\textsuperscript{100} tit. 20, § 105.20(d)(2).
\textsuperscript{101} See e.g., In re Slotkis, No. 817952, *4, 2002 WL 394249 (N.Y. Div. Tax App. Mar. 7, 2002) (In the present matter, petitioners obtained a Florida driver’s license and a motor vehicle identification card, registered to vote in Florida, filed homestead exemption and exemption from ad valorem tax in Florida, executed new wills with their Florida address and filed their income tax returns using the Florida address. In reviewing the acts of a taxpayer alleging a change in domicile, formal declarations have been held to be less persuasive than the informal acts of an individual’s general habit of life).
\textsuperscript{102} tit. 20, § 105.20(d)(2).
\textsuperscript{103} tit. 20, § 105.20(d)(2). Recall that the taxpayer must establish that he spent no more than 30 days in New York during the year to avoid status as a New York domiciliary. N.Y. Tax Law § 605(b)(1)(A)(1) (McKinney 2015).
courts and noted below, for a taxpayer to prevail she may need to establish abrupt definitive change in lifestyle. Where taxpayers slowly, in incremental steps, purported to relocate from New York to Florida or another state, the incremental steps taken by taxpayers deterred the courts from concluding that domicile changed.104

(a) Time spent in New York. A critical fact considered by the courts in determining whether a taxpayer changed his domicile from New York to another jurisdiction is the time the taxpayer thereafter spent in New York.105 The statute precludes the taxpayer from being present in New York for more than thirty days if domicile was changed,106 (or more than 183 days to avoid status as a statutory resident). A taxpayer needs to maintain adequate contemporaneous records of where he is on a daily basis to satisfy the strict evidentiary standard.107 Emphasis is placed on whether any records submitted by the taxpayer were contemporaneously

104 Slotkis, 2002 WL 394249. The court noted how in 1983 the taxpayers first purchased a Florida apartment which they visited three to five times a year. Id. at *2. Thereafter, the husband retired and in 1995 the couple purchased a larger Florida apartment in a community where relatives lived. Although their plans were interrupted by the wife’s illness, the couple eventually spent winters in Florida and summers in New York. Id. Over a period of years, the husband first sold his New York business and later his New York investment property. Id. One reason for the ruling adverse to the taxpayers was that, due to their gradual transition to Florida and continued ties to and contact with New York, there was no clear change in the taxpayers’ behavior at any point manifesting an intent to be domiciled in Florida. Id.; see also In re Campaniello, No. 825354, 2015 WL 4071393 (N.Y. Div. Tax App. June 25, 2015). In that case the taxpayer, initially domiciled in New York, purchased a condominium in Florida in 1981. Id. From 1981 until 2007 the taxpayer conducted businesses and managed rental real estate he owned in Florida and New York, commuting weekly between the two states. Id. There was no evidence of specific definitive events reflecting that the taxpayer’s domicile changed or any point in time when this occurred. Id.


107 See Ingle v. Tax. App. Trib. of N.Y., 973 N.Y.S.2d 877, 880 (App. Div. 2013) (finding that testimony from the taxpayer that “she was in Tennessee on an ‘off and on’ basis and was in New York ‘periodically’, was not adequate to establish the taxpayer’s location”); see also In re Lieberman, No. 824101, 2013 WL 3790595, at *3 (N.Y. Div. Tax. App. July 11, 2013) (finding that calendar pages for the years in dispute showing where the taxpayers allegedly were on each day were not alone adequate evidence of days spent within and outside New York); In re Feldman, No. 802955, 1988 WL 168011, at *7 (N.Y. Div. Tax App. Sept. 15, 1988) (finding that taxpayers’ testimony about when they visited New York combined with copies of their electric bills was not adequate substantiation).
Day count summaries provided by a taxpayer’s employer reflecting only days she traveled were not sufficient evidence. While a taxpayer may offer testimony about his presence, supporting documentation such as a dairy, telephone records, toll receipts, airline tickets, hotel bills and credit card charge records, are preferred.

In addition to focusing on the number of days during a year in which the taxpayer is physically present in the new state compared to days in New York, courts view the number of years the taxpayer lives and works in the new locale as relevant. Even where a taxpayer spends many years working in a foreign country while residing there, other factors may result in a determination that she did not relinquish her New York domicile. The duration of residence outside New York needs to be clearly tied to intent to make the new locale the taxpayer’s domicile for New York domicile status to end.

(b) Continued maintenance of New York abode. One of the most critical factors considered by the court is whether the taxpayer continued

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108 See Campaniello, 2015 WL 4071393 at *11. The administrative law judge found the taxpayer’s non–contemporaneous travel summary allegedly detailing days in New York and elsewhere unconvincing, as flight information and expense reports were missing. Id., at *12. Similarly, a summary of days in Florida, New York or elsewhere reconstructed by the taxpayer long after the year in dispute from his credit card information was found incomplete and unconvincing. Id.

109 Gemmel, 2004 WL 2634346 at *14, n. 1. In that case the court accepted the taxpayer’s sworn testimony to establish that she spent a majority of the year outside New York. Id.


112 Id.; see Chancey v. State Tax Comm’n, 415 N.Y.S.2d 491, 492 (App. Div. 1979) (finding that the taxpayer’s presence outside of New York for four consecutive years before his return helped to convince the court that his domicile changed); see also Warnecke v. Tax App. Trib. of N.Y., 676 N.Y.S.2d 286, at *1–2 (App. Div. 1998) (ruling adverse to the taxpayer, a long time New York resident, resulted after he asserted he relinquished his New York domicile for only one year following which he reestablished his New York domicile).


114 Id. In Taylor, the taxpayer was initially a New York resident owning both a primary home and a vacation home in New York. She accepted multiple successive limited duration job transfers to locations outside the U.S., never selling or renting her New York homes. The employer provided the taxpayer with housing abroad and subsidized the cost of maintaining one New York home. Although the taxpayer eventually purchased a home in England, claimed she would remain there permanently and established social ties in England, her continued ownership of the New York residences combined with her retention of voting rights, a driver’s license and a New York employer precluded a finding that she relinquished her New York domicile.

115 Both the test for domicile and for statutory resident reference the taxpayer’s maintenance of a “permanent place of abode” in New York. For one to be a New York domiciliary that abode must be his primary residence. In contrast, under the statutory resident test it is accepted that the New York home is not the taxpayer’s primary abode.
to maintain a home in New York, but even that important fact is not alone determinative of whether the taxpayer’s domicile changed. Where the taxpayer owned a home in New York and continued to own and occupy it after he claimed to have changed his domicile, that fact favored a determination that he remained domiciled in New York. That was true when the taxpayer continued to spend more time in his New York home than his new home in Florida, even though his adult child occupied the taxpayer’s New York home. The same conclusion is reached where the taxpayer lives for most of the year in the new locale, but occasionally visits her New York residence. This conclusion does not change where the taxpayer occupies his Florida condominium for a majority of the year, but his wife of 51 years remains in their long standing New York residence and the taxpayer visits her frequently. Similarly, when a taxpayer owned

What constitutes changing a permanent place of abode is addressed here in the context of domicile, and in Part IV in the context of a statutory resident.

116 Gemmel, 2004 WL 263436 at *11; see In re Burke, No. 810631, 1994 WL 266764, at *12 (N.Y. Tax App. Trib. June 2, 1994). In Burke the taxpayers did not sell their primary New York residence until two years after their move to Florida, and they purchased a vacation home in New York. Id. Despite these facts the taxpayers established that their domicile changed.


119 Taylor, 2010 WL 2801873 at *11; see In re Campaniello, No. 825354, 2015 WL 4071393, at *19 (N.Y. Div. Tax. App. June 25, 2015). The court stated that “retention of a permanent abode in the location of the historic domicile is a factor in consideration of the domicile issue.” Id. Mr. Campaniello generally occupied his New York home from Tuesday to Friday and was in Florida on weekends. Id. His schedule varied when he traveled abroad. Id.

120 Campaniello, 2015 WL 4071393 at *20. Mr. Campaniello was originally from Italy. Id. He moved to New York to marry his wife. Id. The couple continued to reside in New York, purchased a residence there, raised a child there, and the husband worked there. Id. Over time the husband expanded his furniture business and real estate investments to Florida. Id. He purchased a South Florida apartment which he occupied for most of the year. Id. He continued to own businesses and rental real estate in New York and Florida. Id. Eventually, he claimed to have changed his domicile to Florida. Id. He and his wife filed separate New York income tax returns, as she was a New York resident and he claimed he was not. Id. Record keeping for his Florida businesses and real estate
homes in New York City and East Hampton, New York, purchased a residence in Florida and listed her East Hampton home for sale, but continued to live in the East Hampton property from June to November as she had previously, she remained domiciled in New York for income tax purposes.\textsuperscript{121} The failure of the taxpayer to spend any more time in Florida after her domicile allegedly changed than she had prior to her claimed change of domicile affected the court’s adverse determination.\textsuperscript{122} A change in conduct or behavior is needed to establish a change in domicile.\textsuperscript{123}

Proof that a taxpayer purchased a residence outside New York together with his unsupported assertion that he and his spouse resided in the new home is not alone adequate to establish a change in domicile.\textsuperscript{124} The taxpayer needs to offer further evidence of whether the new home was occupied as a primary residence, investment property or vacation home, what happened to the lease on the taxpayer’s prior New York residence, and similar facts to persuade the court that his prior New York home was abandoned as the taxpayer’s primary residence.\textsuperscript{125} Where the New York

\textsuperscript{121} Thibault v. State Tax Comm’n, 377 N.Y.S.2d 741, 742 (App. Div. 1975). In Thibault, prior to 1966 the taxpayer, a married woman, owned two New York homes. \textit{Id.} In 1966 she purchased a Florida residence. \textit{Id.} Two years later she listed the East Hampton property for sale, but continued to occupy it until it was sold in 1969. \textit{Id.} Prior to 1968 the taxpayer registered her auto in Florida, maintained a bank account and safe deposit box in Florida, and continued to spend time in Florida and New York much as she had previously. \textit{Id.} The taxpayer continued to vote in New York and maintain a bank account there. \textit{Id.} No Florida declaration of domicile was filed until 1969, after the East Hampton property was sold. \textit{Id.}

\textsuperscript{122} \textit{Id.}; see also \textit{In re Lieberman}, No. 824101, 2013 WL 3790595, at *5 (N.Y. Div. Tax. App. July 11, 2013). In Lieberman, the taxpayers maintained a home in Florida for years before claiming to have changed their domicile to Florida. \textit{Id.} They failed to provide any evidence that the time spent in Florida as opposed to New York each year changed in any substantial way after they allegedly became domiciled in Florida. \textit{Id.} This absence of evidence of a change in behavior led to the conclusion that they remained domiciled in New York. \textit{Id.}

\textsuperscript{123} \textsuperscript{123} See \textit{Lieberman}, 2013 WL 3790595 at *6 (“[w]hat is glaringly missing, other than the purchase of houses in Boca Raton, was any evidence of an intent to change their domicile to Florida. There was no mention of a daily routine in Florida, much less a social life.”)


\textsuperscript{125} See \textit{id.} at 528. The taxpayer and his spouse resided in a rental apartment in New York until they purchased a home in New Jersey. \textit{Id.} The furniture from the rental apartment was not moved to the New Jersey house. \textit{Id.} The taxpayer’s business was operating hot dog carts in New York. \textit{Id.} The taxpayer claimed to have changed his domicile to New Jersey, and thus he filed nonresident N.Y. income tax returns. \textit{Id.} Mr. El–Tersli previously served a one–year prison sentence for tax crimes. \textit{Id.} He failed to offer any evidence about whether the New Jersey home was a “primary residence, secondary residence, vacation home, [or] rental property”. \textit{Id.} He claimed that his former New York rental apartment was occupied
residence previously occupied by the taxpayer was leased by him, the fact that he subleases it while he resides elsewhere does not necessarily demonstrate a change in domicile.\(^\text{126}\) At a minimum, a taxpayer who relinquishes a New York rental apartment to live in another state should assure that bills for utility service to that apartment do not remain in his name and should remove his tangible personal property from the apartment, if he claims to have abandoned it as his residence.\(^\text{127}\)

Where taxpayers sell their New York home but rent a New York apartment in which they reside until they purchase a home outside New York, they remain domiciled in New York despite their belief that the rental is temporary housing.\(^\text{128}\) The same conclusion is reached when taxpayers sell their primary residence in New York and purchase a summer cottage in New York which they thereafter occupy for three months annually.\(^\text{129}\)

The taxpayer’s continued ownership of a home in New York does not preclude a finding that the taxpayer’s domicile changed.\(^\text{130}\) This was true by his father and brother after his move to New Jersey. \(\text{Id.}\) However, he did not introduce into evidence a lease assignment, revised lease, proof of who was paying rent or utilities or other documents or witness testimony to support his assertions. \(\text{Id.}\) Thus, he failed to meet the burden of proof that his domicile changed. \(\text{Id.}\)

\(^{126}\) Warnecke v. Tax App. Trib. of N.Y., 676 N.Y.S.2d 286, 287 (App. Div. 1998). Mr. Warnecke was a famous architect who resided in a rent–stabilized apartment in New York until December of 1987. \(\text{Id.}\) In 1987 he sold his New York office and sublet the apartment through June 1989. \(\text{Id.}\) The taxpayer claimed to have abandoned his New York domicile by the end of 1987. \(\text{Id.}\) In 1998 he spent 56 days in New York, and the rest of his time in California, Washington, D.C. and Florida. \(\text{Id.}\) His next stable residence was in Washington, D.C., where he moved in November of 1988. \(\text{Id.}\) The taxpayer returned to New York in 1989, at which time he purchased an apartment. \(\text{Id.}\) Because the taxpayer retained rights to his subleased apartment after June 1989, the utility bills were in his name and his tangible personal property remained in the subleased apartment during 1988, there was insufficient evidence that taxpayer changed his domicile for that year. \(\text{Id.}\)

\(^{127}\) See id at 287–88; see also In re Burke, No. 810631, 1994 WL 266764, at *5 (N.Y. Tax App. Trib. June 2, 1994). In Burke, the taxpayers’ bills for utilities, credit cards and travel expenses were sent to their New York business office for payment. \(\text{Id.}\) Despite these facts, the tribunal held that the taxpayers changed their domicile to Florida. \(\text{Id.}\)


\(^{129}\) Shulman v. Tully, 446 N.Y.S.2d 548, 548 (App. Div. 1982). After the sale of their primary residence, taxpayers spent at least eight months annually in St. Maarten. \(\text{Id.}\) In light of the three months during which they occupied the New York cottage annually, the retention of a New York bank account, New York driver’s licenses and a N.Y. post office box, and the lack of intent to relinquish U.S. citizenship, the taxpayers remained domiciled in New York. \(\text{Id.}\)

although the taxpayer leased rather than purchased a home in the state to which she moved, her life partner continued to occupy the New York home, and the home purchase was initially in part an investment to create rental income.\(^\text{131}\) That a former residence was also an investment property or was converted to an investment property is relevant to whether domicile changed. The reason for the failure to either sell the prior home or convert it to investment property may be relevant. A taxpayer’s failure to sell or rent her New York cooperative apartment after it ceased to be her primary residence did not preclude acknowledgment that she changed her domicile, where her former spouse was an owner of the cooperative and would not transfer title.\(^\text{132}\)

Use of the former New York residence after the taxpayer vacates it is relevant to a determination of change of domicile. “Retention of a real estate investment in New York is less significant than retention of a residence for purposes of determining domicile.”\(^\text{133}\) Where the taxpayer initially acquired the New York property for both personal residence and investment purposes, the investment motive may continue after the taxpayer moves to another state.\(^\text{134}\) In contrast, when the taxpayers’ adult children occupy the taxpayer’s former New York home, that is not likely to convince a court that a change of domicile occurred.

A New York domiciliary who sells his New York home and does not purchase or rent another abode in New York State is in a far better position to assert that he is no longer a New York resident for state income tax purposes. But the fact that the taxpayer does not own or lease a New York home immediately after the sale of his primary residence does not preclude a finding of continued New York domicile, where in later years the taxpayer rents or purchases another New York home and continues other contacts with New York.\(^\text{135}\) Courts at times focus on when the New York home was sold, particularly where the taxpayer claims to have changed her domicile prior to the sale.\(^\text{136}\) What is absent from evidence and the courts’ determination is instructive. Taxpayers rarely provide evidence of how the sale of the former primary residence was treated on their U.S.


\(^{133}\) Gemmel, 2004 WL 2634346 at *13.

\(^{134}\) In re Taylor, No. 822824, 2010 WL 2801973, at *5 (N.Y. Div. Tax App. July 8, 2010). The taxpayer must prove that she converted the residence into an investment property; her mere allegation or testimony that her intent changed is not adequate. \textit{Id.}


income tax returns.\textsuperscript{137} This information would be relevant due to the favorable federal income tax treatment available if the former home sold was the taxpayer’s primary residence during two or more years in the five years immediately prior to the sale.\textsuperscript{138} If a taxpayer did not claim exclusion of the gain on the former home from federal income tax, this should constitute evidence that the taxpayer changed his domicile years before its sale. Also relevant would be depreciation and other deductions the taxpayer claimed on his federal income tax return on the former residence, after the taxpayer vacated the residence, if it was allegedly converted to an investment property.

Even if a taxpayer sells his only residence in New York and reports that transaction on his federal income tax return as the sale of a primary residence, his other continuing contacts with New York may lead to the conclusion that he remains domiciled in New York.\textsuperscript{139} A taxpayer who wishes to relinquish New York domicile and is not ready to sell the home, due to economic or other factors, might instead convert the residence to an investment property or transfer the residence to an entity. Where the taxpayers transferred ownership of their former New York residence over a three year period to a partnership owned by their children, this aided in proving relinquishment of New York domicile.\textsuperscript{140}

\textsuperscript{137} But see \textit{In re} Burke, No. 810631, 1994 WL 266764, at *6 (N.Y. Tax App. Trib. June 2, 1994). In \textit{Burke}, the taxpayers reported that they sold their primary New York residence two years after they moved to Florida. \textit{Id}. Their home was listed for sale one year earlier. \textit{Id}.

\textsuperscript{138} I.R.C. § 121 (2012). This section permits a married taxpayer who sells a qualifying primary residence to exclude up to $500,000.00 in gain realized on the sale from gross income and a single taxpayer is permitted to exclude up to $250,000.00 in gain. \textit{Id}.

\textsuperscript{139} \textit{Buzzard}, 613 N.Y.S.2d at 295. The taxpayers, a married couple, sold their New York home and moved to Florida. \textit{Id}. At that point they neither owned nor rented a home in New York. \textit{Id}. Thereafter, they rented residences in New York which they occupied during the summer months, and they eventually purchased vacant land in New York and constructed a home there. \textit{Id}. The husband at all times continued active participation in his New York business, and after 1983 served as chairman of the Board of Directors and was a paid consultant. \textit{Id}. These positions necessitated his presence in New York. \textit{Id}. The taxpayers continued to maintain country club memberships in New York and bank accounts there. \textit{Id}. The professionals they consulted, including doctors, attorneys and accountants, were all in New York. \textit{Id}. A critical factor influencing the court’s ruling that the taxpayers’ domicile did not change to Florida was that they spent more time in New York than elsewhere. \textit{Id}. The facts that the taxpayers obtained Florida driver’s licenses, registered to vote in Florida, actually voted in Florida, were granted a Florida homestead exemption, filed Florida intangible tax returns and changed their estate plan documents to reflect Florida permanent residence were insufficient to convince the court that the taxpayers’ domicile changed. \textit{Id}.

\textsuperscript{140} Gray v. Tax Appeals Trib. of N.Y., 651 N.Y.S.2d 740, 741 (App. Div. 1997). The tax years in dispute in \textit{Gray} were 1987 and 1988. \textit{Id}. In 1997 taxpayers transferred a 40% interest in the home to the partnership. \textit{Id}. Although in 1998 they still owned a 60% interest, based on other facts the court determined that their domicile changed prior to 1998. \textit{Id}. In
(c) Continued employment or business activity in New York. If a taxpayer who claims to have moved out of state continues to be gainfully employed in New York, that fact supports a determination that he remains a New York domiciliary.\textsuperscript{141} Employment need not be full time to convince the court that New York domicile continued, and holding positions as a paid director of a New York company or as a consultant to a New York business may be adequate.\textsuperscript{142} A taxpayer who retired from his practice as a surgeon in New York, but continued to serve as a paid medical consultant to a New York hospital and nursing home remained domiciled in New York.\textsuperscript{143} When a taxpayer was domiciled in New York for over 40 years before asserting that he changed his domicile to Florida, his retention of a leasehold on real property he actively managed, which included four residential rental apartments and a store, supported the decision that he did not change his domicile even though he sold the investment property in the year he claimed to have changed domicile.\textsuperscript{144} Where the taxpayer’s employer and base of operations is in New York, and the taxpayer is repeatedly assigned to work in a foreign country on a short term (one to three year) basis, she is still domiciled in New York.\textsuperscript{145}

1998 another 40% interest in the New York home was transferred to the partnership, followed by a transfer of the remaining 20% in 1999. \textit{Id.} The opinion is silent about consideration paid or its absence, and the transfers to the partnership may have been gifts. \textit{Id.}

\textsuperscript{141} \textit{In re Zinn v. Tully}, 430 N.Y.S.2d 419 (App. Div. 1980), \textit{rev’d} 426 N.E.2d 484, 484 (N.Y. 1981); \textit{Clute v. Chu}, 484 N.Y.S.2d 239, 241–42 (App. Div. 1984). In \textit{Zinn}, the taxpayer and his family moved from New York to Florida in 1967. 426 N.E.2d at 484. Although they filed Florida declarations of domicile, registered autos in Florida, voted, and maintained bank accounts in Florida, they remained New York residents for income tax purposes according to the New York Supreme Court, Appellate Division, because the husband owned and managed a business in New York, retained ownership of a home there and filed New York State resident tax returns. \textit{Id.} In \textit{Clute}, although the taxpayer sold the business in New York by which he was primarily employed, his retention of positions as a director of two banks was instrumental in persuading the court that he remained domiciled in New York. 484 N.Y.S.2d at 241–42.

\textsuperscript{142} \textit{Buzzard}, 613 N.Y.S.2d at 295.


\textsuperscript{144} \textit{In re Slotkis}, No. 817952, 2002 WL 394249, at *1, *4 (N.Y. Div. Tax App. March 7, 2012) Mr. Slotkis owned a New York building, in which he owned and operated a hardware store from 1967 to 1993. In 1993 he sold the hardware store but retained ownership of the real estate. \textit{Id.} Four years later the taxpayer sold the real estate to the purchaser of the hardware store. \textit{Id.} at *2.

\textsuperscript{145} \textit{In re Taylor}, No. 822824, 2010 WL 2801873, at *1–2, *10 (N.Y. Div. Tax App. July 8, 2010) The court carefully scrutinized the terms of the taxpayer’s employment arrangement, including whether the employer might require her to return to New York, what relocation costs back to New York the employer paid, whether a housing subsidy was paid to account for the taxpayer’s continued costs of maintaining a New York home, how often the taxpayer returned to New York, and similar factors. \textit{Id.} The more ties which exist
business in New York is likewise viewed as supporting continued domicile.146 Retaining an ownership interest in a New York business combined with actively participating in that business supports a finding that the taxpayer remained domiciled in New York.147 Where the taxpayer’s historic home was New York, but over many years he conducted a variety of businesses in both New York and Florida, and maintained homes in both states, his active management of the businesses and maintenance of records for all enterprises in New York supported the conclusion that he did not change his domicile to Florida.148

In contrast, a taxpayer’s full time employment in another state requiring his presence in the other state tends to support a finding that domicile was changed to the new state.149 A taxpayer’s retirement from his
to New York due to employment and the more the position does not appear permanent, the less likely the taxpayer’s domicile will have changed. Id.


147 See Kartiganer v. Koenig, 599 N.Y.S.2d 312, 314 (App. Div. 1993). The taxpayers lived solely in New York until 1991, when they purchased a condominium in Florida. The taxpayer–husband was an owner of a New York business. Although he was decreasing his involvement in the business and he sought to sell the business, no sale occurred and he remained active in the business’ operations. A portion of his business activities were conducted by telephone or courier, presumably from his home in Florida. Other facts existed both in support of and in conflict with the taxpayers’ assertion that they changed their domicile to Florida in 1991. In addition to purchasing a Florida home, the taxpayers joined “social organizations, opened a checking account, secured a safe deposit box, executed codicils to . . . wills and filed a declaration of domicile as residents of Florida”. Id. at 314. Florida tax returns were filed. However, the taxpayers retained ownership of and occupied their New York home, retained New York driver’s licenses and a New York checking account, and the Florida wills directed that probate occur in New York. See also Lieberman, 2013 WL 3790595 at *6. Mr. Lieberman owned a New York real estate brokerage and management corporation and three New York real estate investment companies. His wife worked for his corporation. Although the number of employees of the corporation diminished as the taxpayer decreased activity, he continued to manage the businesses from his home in Florida and to travel to New York to attend to business. His continued active involvement in the business supported the conclusion that he remained domiciled in New York.


149 See Chancey v. State Tax Comm’n, 415 N.Y.S.2d 491, 492 (App. Div. 1979); but see In re Gemmel, No. 819222, 2004 WL 2634346, at *12 (N.Y. Div. Tax App. Nov. 10, 2004) (even where the taxpayer is gainfully employed full time in another jurisdiction, if no new domicile is effectively established due to absence of intent to remain in the new jurisdiction permanently, the taxpayer remains domiciled in New York.)
job is relevant, but not sufficient to compel a conclusion that domicile changed when other significant connections with New York remain.\textsuperscript{150} Where a taxpayer left New York for employment elsewhere, the courts consider whether that new job was expected at the outset to be temporary or permanent, and at what point it became permanent.\textsuperscript{151} A job that is clearly temporary at the outset does not support a change in domicile.\textsuperscript{152} Financial responsibilities and income generating activities connecting the taxpayer to New York, such as his active participation in administering a decedent’s estate there and selling estate assets, are indicative that New York domicile continued.\textsuperscript{153} Merely attending board of directors meetings in New York for a corporation not based in New York does not alone constitute conducting sufficient business to conclude that the taxpayer was still domiciled in New York.\textsuperscript{154}

The taxpayer’s continued ownership of New York businesses does not compel the conclusion that his domicile remained in New York, where responsibility for management and operation of the business is delegated to another.\textsuperscript{155} Merely benefitting from the income generated by a New York business in which the taxpayer owns an interest does not cause him to remain domiciled in New York, where the taxpayer is no longer actively involved in business operations.

(d) Ownership or rental of real estate in the new locale. While domicile cannot change unless the taxpayer establishes a new domicile outside New

\textsuperscript{151} See \textit{In re} Taylor, No. 822824, 2010 WL 2801873, *11 (N.Y. App. Div. July 8, 2010). The court examined the terms of the taxpayer’s various employment agreements in effect prior to and during the tax years when she was living outside New York. The fact that the agreements were of limited duration aided in convincing the court that the intent to permanently change domicile was lacking. \textit{Id.}
\textsuperscript{152} \textit{In re Santos}, No. 820335, 2007 WL 507052, at *6 (N.Y. Div. Tax. App. Feb 1, 2007). This is particularly true when the taxpayer’s other actions and failure to act are inconsistent with a change in domicile. \textit{Id.} Mr. Santos moved from New York to California for approximately six months after accepting temporary employment. \textit{Id.} at *2. He arranged only temporary housing in California in hotels and a month–to–month rental. \textit{Id.} He left most of his personal belongings in New York, never obtained a California driver’s license or relinquished his New York license, did not register to vote in California, joined no organization in California, and did not change his telephone number, mailing address for bank statements or other mail, and did not relocate his bank account to California. \textit{Id.} These facts justified the conclusion that he remained domiciled in New York. \textit{Id.} at *6.
\textsuperscript{154} \textit{In re} Patrick, Nos. 826838 & 826839, 2017 WL 2801958, at *13 (N.Y. Div. Tax App. June 15, 2017). This was particularly true as the corporations also held board of directors meetings at locations other than New York. \textit{Id.} at *5.
\textsuperscript{155} \textit{In re} Burke, No. 810631, 1994 WL 266764, at *13 (N.Y. Tax App. Trib. June 2, 1994). The taxpayer’s involvement in the business’ operations after his move to Florida was limited to sporadic personal visits of short duration, and an average of two weekly telephone calls of less than 15 minutes each. \textit{Id.}
York, the fact that the taxpayer purchased or rented a home in another state is not alone determinative that domicile changed. A favorable ruling for a taxpayer is not likely to result when she continues to spend considerable time at her New York home. The sale of one New York residence combined with the acquisition of an out of state residence, followed two years thereafter by the purchase of another New York residence did not result in a finding of change of domicile to the new state. A taxpayer who rents a home in the state to which he moved may succeed in claiming that his New York domicile ended, particularly where he retains no personal residence in New York to occupy. However, arranging only a temporary, short-term rental weakens the taxpayer’s position that he intended to remain in the new state permanently. Similarly, renting a furnished apartment in the new location supports a decision that domicile did not change. A taxpayer continuing to own a home in New York while renting a home in another state may reflect a lack of intent to move permanently and lends support to a finding that the taxpayer remained domiciled in New York. However, where other sufficient factors weigh in favor of the taxpayer’s position that domicile changed, the continued ownership of a New York home and rental of a residence in a new locale need not prevent the taxpayer from prevailing. A taxpayer who neither purchases nor rents a home in another state, but has the right to occupy a

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156 See, e.g., Taylor, 2010 WL 2801873 at *5, *10 The fact that taxpayer purchased a home in the United Kingdom and was employed full-time there did not preclude a determination that she remained domiciled in New York. Id. This was true although the home in the U.K. was larger and more expensive than the taxpayer’s two residences in New York. Id.; see also In re Wechsler, No. 806431, 1991 WL 95626, at *2, *6 (N.Y. Tax App. Trib. May 16, 1991).


161 Id. at *6.

162 See Gray v. Tax Appeals Tribunal, 651 N.Y.S.2d 740 (App. Div. 1997); but see Gemmel, 2004 WL 2634346 at *13 (holding that the taxpayer’s domicile changed based on other grounds).

163 See Gemmel, 2004 WL 2634346 at *12 (the taxpayer who owned a home in New York and rented one in California successfully changed her domicile. The court focused on the taxpayer’s employment and additional facts such as the taxpayer planting a garden and moving personal possessions to the rental unit.)
residence outside New York and does so, may have established a new domicile.\textsuperscript{164}

(e) Termination of taxpayer’s membership in civic and religious organizations in New York, particularly if combined with joining comparable organizations in his new state of domicile. While facts relevant to this point are frequently included in court opinions, they rarely influence an outcome favorable to the taxpayer.\textsuperscript{165} Their absence may injure the taxpayer’s position that he intended to change his domicile.\textsuperscript{166} A taxpayer’s continued membership in New York country clubs after he allegedly moved to Florida aided in convincing the court that he remained domiciled in New York.\textsuperscript{167} A taxpayer’s failure to join social or religious organizations in the state to which he moves may indicate a lack of intent to permanently reside in the new location.\textsuperscript{168} A taxpayer’s assertion that he worked too many hours in his new job to allow him to join or participate in such civic, religious or social organizations was not persuasive in convincing a court that domicile changed.\textsuperscript{169} A taxpayer’s actions to become a nonresident member of a New York country club and an inactive member of a gym in New York were noted by the court in connection with the claim that the taxpayer’s domicile changed.\textsuperscript{170} An active membership in a New York health club after the taxpayer permanently moved to

\textsuperscript{164} See \textit{In re Alfano}, No. 817356, 2001 WL 408759, at *4, *11 (N.Y. Div. Tax App. Apr. 12, 2001) (where the taxpayer moved from New York to a Connecticut residence purchased by a trust created by the taxpayer’s parents of which the taxpayer was one of several beneficiaries).


\textsuperscript{166} \textit{Lieberman}, 2013 WL 3790595 at *5 (The taxpayers did not belong to civic, social or religious organizations in New York or elsewhere).

\textsuperscript{167} See \textit{Buzzard v. Tax App. Trib.}, 613 N.Y.S.2d 294, 295 (App. Div. 1994); \textit{but see} \textit{Chancey}, 415 N.Y.S.2d at 491 (where the court noted that the taxpayers joined a church and clubs in Chicago, lending support to their position that they were no longer domiciled in New York).


\textsuperscript{169} \textit{Id.} at *4.

Connecticut but continued employment in New York did not preclude a determination that her domicile changed.\(^{171}\)

(f) Registering to vote and actually voting. This is yet another fact courts note.\(^{172}\) Continuing to remain registered to vote and voting in New York is indicative that no change of domicile occurred.\(^{173}\) While a taxpayer continuing to vote in New York is used to support a finding of New York domicile, a taxpayer registering to vote in the state he moved to is not alone very persuasive that domicile changed, particularly if he did not actually vote in person in the new state.\(^{174}\) Even if the taxpayer both registered to vote and actually voted in the state to which he moved, absent other compelling evidence these facts are not terribly persuasive in demonstrating a change of domicile.\(^{175}\) Voting both in New York and in the new place of residence does not demonstrate a change of domicile.\(^{176}\) The address a taxpayer reflects on a voter registration is relevant.\(^{177}\) Despite the relative unimportance of this fact, a taxpayer should register to vote and actually vote in person and not by absentee ballot in his new state of domicile, as failure to do so supports a government claim that domicile did not change.

(g) Filing a declaration of domicile in the new state. While this is a factor indicating intent,\(^{178}\) it is not particularly convincing or determinative of the outcome in favor of the taxpayer.\(^{179}\) Where a taxpayer allegedly

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\(^{173}\) See *Thibault v. State Tax Comm’n*, 377 N.Y.S.2d 741, 742 (App. Div. 1975); but see *Gaied v. Tax App. Trib.*, 6 N.E.3d 1113, 1114 (N.Y. 2014) (where despite a taxpayer voting in New York in one year, the court found he was not domiciled in New York).

\(^{174}\) See *Clute v. Chu*, 484 N.Y.S.2d 239, 241 (App. Div. 1984) (where the taxpayer claimed to have changed his domicile from New York to Florida in 1976, he registered to vote in Florida, but he did not actually vote in 1976); *Kartiganer v. Koenig*, 599 N.Y.S.2d 312, 314 (App. Div. 1993) (where the facts that the taxpayer registered to vote in Florida, obtained a Florida driver’s license and filed Florida tax returns were not dispositive of a change in domicile).


\(^{177}\) See *Ingle v. Tax Appeals Tribunal*, 973 N.Y.S.2d 877, 8880 (App. Div. 2013) (The court noted that the taxpayer did not reflect her Tennessee address on voter registration and bank documents, but instead used her parents’ Tennessee address. The address reflected thus did not support taxpayer’s claim that her domicile changed to her Tennessee address.).


changed her domicile from New York to Florida, her failure to file an affidavit of domicile until a year thereafter was indicative of the taxpayer’s intent not to become a permanent resident of Florida in the year she asserted.\textsuperscript{180} A taxpayer’s failure to file a declaration of domicile or to apply for a Florida homestead exemption was noted by one court when it found an absence of intent to establish Florida domicile.\textsuperscript{181} Even though “self-serving,” taxpayers should file the declaration and apply for a homestead exemption because courts regularly note these filings or their absence in decisions.\textsuperscript{182}

(h) Changing estate plan documents to reflect the new place of residence. This is another factor the courts note\textsuperscript{183} but do not rely on heavily. This was especially true where a Florida will directed that probate occur in New York.\textsuperscript{184}

(i) Relocating assets. This might include registering vehicles in the new state\textsuperscript{185}, moving bank\textsuperscript{186} and brokerage accounts\textsuperscript{187} to the new state, moving household furnishings and tangible personal property to the new state of residence, and relocating valuables in a safe deposit box.\textsuperscript{188} For these facts to have any evidentiary importance favorable to the taxpayer, virtually all assets must be moved. That entails closing all New York bank and brokerage accounts and ending safe deposit box leases. Opening accounts or safe deposit boxes in the new state of residence does not aid

\textsuperscript{182} Wechsler, 1991 WL 95626 at *6.
\textsuperscript{184} Kartiganer, 599 N.Y.S.2d at 314.
\textsuperscript{186} See Clute, 484 N.Y.S.2d at 241 (bank account was opened in Florida); Chancey, 415 N.Y.S.2d at 492. See also In re Santos, No. 820335, 2007 WL 507052, at *6 (N.Y. Div. Tax. App. Feb. 1, 2007) (where the taxpayer’s failure to move his bank account to California from New York, combined with his failure to change the address to which bank statements were sent from his New York address, militated in favor of a determination that his domicile did not change).
\textsuperscript{187} See Kornblum v. Tax Appeals Tribunal, 599 N.Y.S.2d 158, 160 (App. Div. 1993) (A taxpayer’s continued maintenance of bank accounts, brokerage accounts and a bank safe deposit box in New York after a move to Florida contributed to ruling that domicile did not change.); In re Burke, 1994 WL 266764 at *5, *8 (Moving $2,000,000.00 in treasury bills, CDs and cash to the new place of residence aided in supporting the conclusion that the taxpayers changed their domicile.).
\textsuperscript{188} Kartiganer, 599 N.Y.S.2d at 314. See also In re Patrick, Nos. 826838 and 826839, 2017 WL 2801958, at *5 (N.Y. Div. Tax App. June 15, 2017) (where the facts that the taxpayer did not insure the contents of his New York apartment or install a safe there but did insure the contents of his home in Paris, France and installed a safe there supported the conclusion that the taxpayer’s domicile changed).
the taxpayer’s case where old accounts or boxes remain. The positive effect of these acts is diminished where the taxpayer continues to maintain bank accounts in New York. Where prior to the time the taxpayer claimed to have changed her domicile from New York to Florida she already registered her vehicle in Florida, maintained a Florida bank account and safe deposit box, because there was no change these facts did not support a conclusion that the taxpayer’s domicile changed. Where a taxpayer fails to relocate assets to the state to which he moves, and instead leaves bank accounts in New York, this indicates to the court that no change of domicile occurred. So does continuing to receive bank or brokerage statements at the taxpayer’s New York residence address.

Whether the taxpayer moved furniture, household furnishings and other personal effects from New York to a home elsewhere is relevant. Where the taxpayer does so, this supports a determination that New York domicile ended. A contrary conclusion is reached when furnishings and personal effects remain in the prior New York home, which the taxpayer continues to rent or own, and new furnishings are acquired for the out of state home. The same conclusion is reached when the new home is

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189 See In re Lieberman, No. 824101, 2013 WL 3790595, at *3 (N.Y. Div. Tax App. July 11, 2013) (Where the taxpayers maintained safe deposit boxes in New York and Florida, this fact was viewed as supporting the determination that they did not change their domicile.).

190 Kartiganer, 599 N.Y.S.2d at 314. But see In re Alfano, No. 817356, 2001 WL 408759, at *10 (N.Y. Div. Tax App. April 12, 2001) (where the existence of a bank account in New York, and where the taxpayer was employed, did not alter the conclusion that her domicile changed to Connecticut).


acquired furnished and tangible personal property remains unchanged in the New York residence. Where the taxpayer leaves the vast majority of his personal belongings and clothing in his New York home occupied by his wife, and has an automobile to use while at that New York home, he does not establish that he abandoned his New York domicile. This conclusion was upheld despite the taxpayer’s claim that the objects that mattered most to him, including his sailboat, espresso machine, Italian doctoral diploma, classic concert guitar, and his Ferrari, were all in Florida. A taxpayer who moved from his parents’ New York rental apartment to California for a temporary job assignment, leaving most of his furniture in his parents’ apartment, did not prove intent to change domicile.

(j) Filing state tax returns in the new state of domicile; address on federal tax returns. These factors are noted by courts, but are not overly persuasive. One reason for the lack of importance accorded these factors may be that taxpayers are usually diminishing the state taxes they owe, either by relocating to a state with lower taxes or no taxes. Noticeably absent from the reported cases was evidence offered by taxpayers that their tax burden increased as a result of the move.

(\(\text{where the administrative law judge stated petitioners did not take any of their furniture from their Brooklyn house to Florida, as they intended to continue to use this home during their stays in New York, which is a strong factor in deciding that they did not intend to give up their New York domicile and make the Florida condominium their permanent home). But see In re Patrick, Nos. 826838 and 826839, 2017 WL 2801958, at *5 (N.Y. Div. Tax App. June 15, 2017) (where the taxpayer’s failure to move his tangible personal property other than an antique watch collection did not alter the decision that the taxpayer’s domicile changed).}

197 Id. at *21.
200 But see Taylor, 2010 WL 2801873 at *6 (where the taxpayer paid considerable tax as a resident of the United Kingdom, and nevertheless was held not to have permanently changed her domicile); In re Patrick, Nos. 826838 and 826839, 2017 WL 2801958, at *6 (N.Y. Div. Tax App. June 15, 2017) (where the fact that the taxpayer filed tax returns and paid taxes in his new location, Paris, France, supported the conclusion that his domicile changed and his New York tax returns were properly filed as a nonresident).
A taxpayer who claims to have changed his or her domicile would be expected to reflect the new home address on any federal tax returns thereafter filed. The Internal Revenue Service coordinates with state tax departments.\(^{202}\) If a taxpayer reflects a New York residence on his federal income tax return but does not file a New York income tax return, an audit may be triggered at the state level.\(^{203}\)

(k) Tax consequences of move.\(^{204}\) Courts are authorized to consider the state income tax consequences resulting in deciding the validity of the taxpayer’s claim that New York domicile was relinquished. This is an important factor, as the timing of the alleged change of domicile may alter the tax consequences. Where a New York domiciliary relocated to Tennessee during the year, a dispute existed about the timing of her change in domicile.\(^{205}\) The taxpayer’s employer sold the business in which the taxpayer owned stock.\(^{206}\) Aware that she would realize a large capital gain on her stock and owe considerable New York income tax, the taxpayer hastened her move back to Tennessee.\(^{207}\) The fact that the taxpayer was attempting to avoid New York State income tax was one reason supporting the conclusion that she did not establish by clear and convincing evidence that her domicile changed to Tennessee prior to the stock sale.\(^{208}\)

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\(^{203}\) See In re Santos, 2007 WL 507052 at *1–2 (The taxpayer used his parents’ permanent home address as his address on his federal income tax return. Although the taxpayer had lived with his parents, he claimed, unsuccessfully, to be permanently domiciled in California during the year in question.).

\(^{204}\) Tit. 20, § 105.20(d)(2) (addressing whether an alleged change in domicile was merely to escape taxation).


\(^{206}\) Id. at 879–80.

\(^{207}\) Id.

\(^{208}\) Id. at 881. In Ingle the taxpayer was originally from Tennessee. In 2000 she moved to New York due to a change in employment. Other than being employed in New York and leasing an apartment there, the traditional indicia of domicile were absent. The taxpayer “never owned or leased a car in New York, never had a safe deposit box in New York, never owned a burial plot, joined a club or organization, had a gym membership, went to church in or had an accountant, lawyer or will in New York.” Id. at 879–80. The opinion does not reflect whether the taxpayer registered to vote or actually voted in New York or used services of doctors or dentists in New York. The taxpayer’s job required her to travel frequently “and she was able to work from anywhere as long as she had her cell phone, laptop computer and access to an airport.” A dispute arose about when the taxpayer abandoned her New York domicile and became domiciled in Tennessee. On April 30, 2004 the taxpayer sold stock at a gain. If she was still a New York resident when the stock was sold $255,000.00 was owed in New York income tax. The taxpayer unsuccessfully asserted that she moved back to Tennessee on or before April 1st, whereas the Tax Department claimed the move occurred on June 30th. The taxpayer’s New York apartment lease expired on April 30, 2004. However, she signed a two–year lease extension. She also leased an apartment in Tennessee commencing on April 1, 2004. As of April 1, 2004 the taxpayer
(l) Location of professional advisors. When after a move out of New York the taxpayer continues to avail himself of the professional services of advisors in New York, such as accountants, lawyers, doctors and dentists, this fact militates in favor of a finding that the taxpayer continued to be domiciled in New York.209 A taxpayer who underwent surgery in New York and continued to seek medical treatment from his New York physician remained domiciled in New York, although this physician’s advice that the taxpayer live in a warmer climate was claimed to have motivated a change of domicile.210 A contrary conclusion was reached where the taxpayer exclusively used the services of doctors, dentists and hairdressers in her new locale.211 Even a taxpayer who receives care from medical professionals both within and outside New York may have relinquished New York domicile.212

(m) Reflecting change of domicile on legal documents. That a taxpayer reflected Florida as his primary residence on legal documents after he claimed to have abandoned his New York domicile does not generally alter the court’s decision that he remained a New York domiciliary.213

had a Tennessee bank account. On April 30, 2004 her employer deposited a payment owed to that account. As of April 2, 2004 the taxpayer registered to vote in Tennessee, and on April 13, 2004 she arranged for telephone service to the Tennessee apartment. The Tennessee voter registration and bank statement reflected the taxpayer’s parents’ address, rather than her apartment, as her permanent address. The taxpayer did not, prior to April 1st, move her belongings from the New York apartment to her Tennessee rental unit. Instead, the New York apartment lease was terminated on June 30, 2004, and that apartment was not vacated until July 9, 2004. The taxpayer lacked adequate records documenting where she was physically present each day after April 1, 2004. As a consequence, the court affirmed the decision that the taxpayer’s domicile did not change until July.


domiciliary based on other more important facts. Where there is no permanent abode in New York, the taxpayer proves his full time employment outside New York and other more determinative factors favor the taxpayer, his case is supported by changing his address on his passport, arranging a home telephone listing in the new state and reflecting the new home address on a federal income tax return filed. A taxpayer may sign loan applications, applications for life insurance, wills and related estate plan documents and other documents. It is important for the taxpayer’s new home address to be consistently reflected. When IRS Forms 1099, Forms K–1 or other documents submitted to the Internal Revenue Service by third parties reflect a New York address for the taxpayer, that information is likely to be shared with New York State and may trigger an audit. Tax forms, bills or other legal or financial communications sent to the taxpayer at a New York address support a finding that domicile did not change. That the taxpayer signed wills in New York, drafted by New York counsel, stating that the taxpayer resided in Florida, was noted by the tribunal but had no significant impact on the outcome, particularly where the wills were later revised in Florida.

(n) Historical home and location of family ties. The taxpayer’s continued relationships and contacts with family and friends in New York militates against a finding of change in domicile. This is particularly true where the taxpayer’s spouse, adult child and the child’s family continue to reside in New York, although the taxpayer asserts that his domicile changed to Florida. This factor is secondary, of lesser importance, and may be negated where the taxpayer is in touch with family members in New York and elsewhere. The fact that the taxpayers’ close relatives do not reside in New York is unlikely to have much impact on

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214 Chancey, 415 N.Y.S.2d at 492.
215 Id.
216 Gray, 651 N.Y.S.2d at 741.
the ultimate decision about their domicile.223 A taxpayer leaving New York to return to the place he was raised, where other family members reside, supports a finding that domicile changed.224

(o) Driver’s license, auto registration and insurance. Acquiring a driver’s license, and registering and insuring a vehicle in the new state of alleged domicile are facts regularly presented to the courts.225 When the taxpayer continues to maintain, register and insure vehicles in both states, those facts indicate that no change of domicile occurred.226 The failure to change a driver’s license, auto registration and insurance is viewed as supporting continued New York domicile.227 Proof that the taxpayer attended to these changes is not alone terribly persuasive of a change of domicile. They need to be connected to other more significant factors. The taxpayer obtaining a driver’s license in the state to which he moves is not indicative of a change in domicile where he neglects to relinquish his New York driver’s license.228 Retention of driver’s licenses in both states did not preclude the conclusion that the taxpayers changed their domicile, when the taxpayers believed a Florida license would not be adequate for a person present in New York in excess of 30 days.229

(p) Charitable contributions. The fact that a taxpayer shifts the charitable organizations to which he contributes from those in New York to those in the new state in which he resides is not of great consequence. Yet it supports the taxpayer’s assertion that his domicile changed.230

223 See, e.g., Lieberman, 2013 WL 3790595 at *2 (where the taxpayers’ children lived in Florida, Connecticut and Arizona, yet taxpayers remained domiciled in New York after acquiring a home in Florida.). See also Burke, 1994 WL 266764 at *6. Taxpayers’ only living son resided in Florida. Id. Children of the taxpayers’ deceased son lived in New York, but taxpayers had little contact with them. Id. The tribunal was influenced by the facts that taxpayers’ friends and social life were principally in Florida. Id.

224 McKone v. State Tax Comm’n, 490 N.Y.S. 2d 628, 628 (App. Div. 1985). See In re Alfano, No. 817356, 2001 WL 408759, at *9 (N.Y. Div. Tax App. Apr. 12, 2001) The taxpayer was originally from Connecticut, where her parents and siblings still lived. Id. The taxpayer moved to New York, where she worked and lived with her spouse. Id. Marital discord caused her to return to reside in Connecticut. Id. These facts supported a determination that the taxpayer’s domicile changed to Connecticut. Id.


226 See Campaniello, 2015 WL 4071393 at *10–11 (where the taxpayer maintained and used vehicles both in New York and Florida).


229 In re Burke, No. 810631, 1994 WL 266764, at *7 (N.Y. Tax App. Trib. June 2, 1994) The taxpayer husband also had a New York license to operate heavy equipment; although he did not cancel the license, he had not used it for 15 years.

230 Gray, 651 N.Y.S.2d at 741.
(q) Ownership of other real estate. In reviewing a taxpayer’s continuing ties to New York, ownership of real estate other than a residence may be considered. One fact noted as relevant in showing ties to New York is whether the taxpayer owned a burial plot in New York.\textsuperscript{231} As noted earlier, the taxpayer’s continued ownership and active management of investment real estate may lead to a finding that domicile did not change.

(r) Residence related litigation. A taxpayer defending against a lawsuit commenced by his landlord, in which the landlord questioned whether the rent–stabilized apartment occupied by the taxpayer was his primary residence, was supportive of the court’s decision that the taxpayer did not change his New York domicile, although the litigation occurred in years prior to the claimed relocation.\textsuperscript{232}

(s) Where the taxpayer received mail. Assuming that the taxpayer has documentation to establish where mail was addressed to him, this fact may be indicative of a change of domicile. A taxpayer able to establish that social security checks, all utility, insurance and other bills, bank and brokerage statements, and all meaningful correspondence was addressed to his new home outside New York is in a better position to prove that his domicile changed. Conversely, where the taxpayer continues to receive bills, bank and brokerage statements and other important communications at his New York address, domicile likely remains New York.\textsuperscript{233} As individuals continue to receive more communications electronically, the importance of this fact may diminish. Until then, a taxpayer should assure that all communications are properly addressed to his new residence.

(t) Miscellaneous Facts. Apparently inconsequential facts and documents have been introduced by taxpayers in an attempt to convince a court of a change in domicile and by the government to persuade a court otherwise. In one case a taxpayer’s evidence included his Florida library card.\textsuperscript{234} Another taxpayer unsuccessfully asserted that a provision in her Last Will and Testament directing that her cremated remains be scattered in London reflected her intent to live there permanently.\textsuperscript{235} The existence of a New York pistol permit did not preclude a finding that a taxpayer changed his domicile, when the gun was located in Florida.\textsuperscript{236} Similarly, the fact that the taxpayer held a New York insurance broker’s license was

\textsuperscript{233} See, e.g., In re Campaniello, No. 825354, 2015 WL 4071393, at *6 (N.Y. Div. Tax. App. June 25, 2015) (where the court noted where mail sent to the taxpayer was addressed).
\textsuperscript{234} Kornblum v. Tax Appeals Tribunal of N.Y., 599 N.Y.S.2d 158, 160 (App. Div. 1993); see e.g., Burke, 1994 WL 266764.
\textsuperscript{236} Burke, 1994 WL 266764 at *7.
not determinative of domicile, particularly as no insurance business was conducted.\textsuperscript{237}

(u) Reason for move. The reason motivating a taxpayer’s move out of New York is immaterial, except insofar at the motivation for the move reflects intent.\textsuperscript{238} At times the reasons for relocation influence the tribunal. Where a taxpayer moved from New York to Connecticut to escape the New York residence she owned and occupied with her spouse whom she thereafter divorced, the tribunal was persuaded that she changed her domicile to Connecticut.\textsuperscript{239} The opinion noted both facts relied on by the taxpayer and those relied on by the Commission.\textsuperscript{240} In concluding that the taxpayer relinquished New York domicile, it was noted that the case presented “a very unique situation where a high level successful business executive who was facing divorce sought to live near her family in Connecticut.”\textsuperscript{241}

A taxpayer’s ability to provide documentary evidence to support his assertions is critical. The greater the documentation available, the less likely the court will find that the taxpayer lacks credibility.\textsuperscript{242}

\textsuperscript{237}\textit{Id.}
\textsuperscript{239} \textit{Alfano}, 2001 WL 408759 at *8.
\textsuperscript{240} \textit{Id.} The taxpayer was originally from Connecticut, where her parents and siblings continued to reside. She moved to New York due to her employment there and her marriage to her first husband. They occupied a New York City cooperative titled in their names, for which the taxpayer’s parents provided one-half of the consideration. The taxpayer separated from her spouse, and moved into a Connecticut residence owned by a trust created by her parents. She moved her belongings to the Connecticut home and purchased furnishings for it. While the taxpayer remained employed in New York, she altered her work schedule to spend most of each week in Connecticut, at least when she was not traveling elsewhere for business. The taxpayer’s job required significant travel worldwide. The taxpayer eventually instituted an action for dissolution of her marriage in Connecticut, asserting that she was a permanent resident of Connecticut for at least a year. She married her second husband in Connecticut, filed Connecticut tax returns, signed a will in Connecticut, and obtained a Connecticut driver’s license and safe deposit box. The taxpayer continued to own a New York bank account and the New York cooperative apartment, and occasionally stayed in the apartment. The taxpayer was unable to sell the New York cooperative, because her former spouse was an owner and refused to vacate the apartment or transfer ownership to the taxpayer. The taxpayer received mail in New York, received medical care in New York and elsewhere, and belonging to a New York health club. \textit{Id.} at *10–11.
\textsuperscript{241} \textit{Id.} at *11.
\textsuperscript{242} Compare \textit{Ingle v. Tax Appeals Tribunal of N.Y.}, 973 N.Y.S.2d 877 (App. Div. 2013), where the court stated that the taxpayer’s “overall credibility was undermined by the lack of evidence to corroborate much of her testimony, her vague and evasive testimony regarding certain key facts, as well as some conflicting testimony given by her boyfriend”, \textit{Id.} at 880, with \textit{In re Gemmel}, No. 819222, 2004 WL 2634346 (N.Y. Div. Tax. App. Nov. 10, 2004), where the court found the taxpayer’s testimony credible. See also \textit{In re...
Where the taxing authorities assert that a taxpayer historically domiciled outside New York changed his domicile to New York, the government has the burden of proof by clear and convincing evidence.243 A taxpayer who lived for years only in New Jersey, worked in New York, and after separating from his wife moved into his parents’ New Jersey home did not change his domicile to New York by spending time at his girlfriend’s New York apartment or at a New York apartment rented by a business of which he was a minority owner.244 Because the taxpayer never intended to become domiciled in New York, took no action to establish a domicile there, and eventually changed his domicile from New Jersey to Connecticut, he never became domiciled in New York, despite the considerable time he was present in New York each year.245

A question may also arise about whether an individual previously domiciled outside of New York becomes a New York domiciliary by entering a nursing home in New York for care. Because intent is an element of establishing domicile, when a permanent resident of another state enters a New York nursing home on the advice and instruction of a Campaniello, No. 825354, 2015 WL 4071393 (N.Y. Div. Tax. App. June 25, 2015). In that case the taxpayer made a variety of assertions in support of his position that his domicile changed to Florida. However, he lacked documentation to establish that they were true. To prove his whereabouts on each day of the years in dispute, the taxpayer submitted a log prepared years later, and the passport, credit card statements and cell phone statements on which the log was based. Id. at *7. Not only did these documents reflect that they were sent to the taxpayer’s New York address, but they were inadequate as airline tickets, flight details and expense reports were missing, and the documents provided did not account for all tax years in dispute. Id. at *8, 12. Tax returns allegedly filed for some of the taxpayer’s businesses were not provided. Id. at *11.

244 Id. The government based its case on the taxpayer’s significant contacts to New York. Id. He worked primarily in New York, parked his car at the apartment leased by the limited liability company he worked for and owned a minority (40%) interest in, and spent in excess of 183 days annually in New York. Id. However, he did not personally pay to rent a New York apartment or to furnish it, and was not personally responsible for paying utility bills. Id. Nor did the taxpayer have unlimited or unrestricted access to either the LLC’s apartment, also used by other LLC members and LLC clients, or his girlfriend’s apartment. Id. The taxpayer stayed at the LLC apartment once a month, and at his girlfriend’s apartment once a week. Id.
245 Id. This opinion reflects how detailed the investigation is into the taxpayer’s affairs and how no fact is too unimportant to raise. Id. In addition to obvious facts, such as where the taxpayer owned homes, actually slept, stored his personal belongings and voted, the court considered why the taxpayer lived in his parents’ home, his father’s terminal illness keeping him in New Jersey, the location of his children and in–laws in New Jersey, and his presence there coaching his son’s sports teams. Id. The taxpayer’s credit card bills and telephone bills were thoroughly analyzed to ascertain his location on a daily basis. Despite the taxpayer’s membership in New York social clubs and employment in New York he never manifested any intent to become a New York resident. Id.
physician to obtain care needed due to physical or mental incapacity, that individual does not become a New York domiciliary. This conclusion was reached by the Commissioner of Taxation and Finance in an Advisory Opinion, even though it was anticipated that the taxpayer would remain in the New York nursing home for the rest of her life.

IV. STATUTORY N.Y. RESIDENT – WHO IS PRESENT ENOUGH (OR TOO MUCH)

Considerable litigation resulted over the years about whether a taxpayer is a statutory resident. A statutory resident, as explained previously, is a person who admittedly is domiciled outside New York but who (1) “maintains a permanent place of abode” in New York State; (2) spends more than 183 days in New York State; and (3) is not in active service in the armed forces. The first requirement was addressed in Part II of this Article, where the concepts of “maintains”, “permanent,” and “place of abode” were considered. The second requirement can be viewed as consisting of three parts: what constitutes a “day”; what counts as “presence”; and what is the substantiated day count. The substantial day count depends on whether the taxpayer met his burden of proof as to where he was on each day of the year at issue (or on the days in dispute).

Since a statutory resident spends more than 183 days of the taxable year in New York State, taxpayers endeavor to establish, often without success, that they were not in the state for the requisite time. The

247 Id. Prior to entering the New York nursing home, the taxpayer lived in New Jersey in a home she owned jointly with her sister.
248 The imposition of New York income tax on statutory residents was upheld against a challenge that imposition of the tax violated the U.S. Const., art. I, § 8 (the dormant Commerce Clause). Tamagni v. Tax Appeals Tribunal of N.Y., 695 N.E.2d 1125 (N.Y. 1998). Mr. and Mrs. Tamagni were domiciled in New Jersey. However, Mr. Tamagni worked in New York and maintained an apartment there. He was unable to establish that he was not in New York for over 183 days during the year. The statute has also withstood assertions that it resulted in a deprivation of property in violation of the Due Process Clause of the U.S. Const., 14th Amend. See also In re Klingenstein, 1998 WL 477697 (N.Y. Div. Tax App. Aug. 6, 1998).
taxpayer has the burden of proof on this point.\textsuperscript{252} Clear and convincing evidence is required.\textsuperscript{253} To meet this burden the taxpayer may be required to establish not only that she was not in New York for more than 183 days, but also where she was on days spent outside New York.\textsuperscript{254} Adequate records are required to substantiate the fact that a taxpayer was not in the state for more than 183 days.\textsuperscript{255} The taxpayers’ testimony that “they left for Florida in October or November and returned (to New York) in mid–April or May” is not adequate evidence.\textsuperscript{256} A taxpayer’s testimony unsupported by documentation, such as “travel records or receipts, tickets, hotel receipts, credit card invoices” is unlikely to alone satisfy the taxpayer’s burden of proof.\textsuperscript{257} A court commenting on the evidence required stated

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It is true that credible testimony can be sufficient to meet a taxpayer’s burden to establish that she was not present in New York for more than 183 days (\textit{Matter of Avildsen}, Tax Appeals Tribunal, May 19, 1994). It is also true that a taxpayer is not required to specifically account for her whereabouts on every day of the period in question if she can establish a ‘pattern of conduct’ from which her location may be determined for any particular day (\textit{Matter of Kern}, supra). However, the Tribunal has distinguished
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\begin{itemize}
\item \textsuperscript{253} \textit{Holt}, 2008 WL 2880343.
\item \textsuperscript{254} \textit{Stewart}, 2000 WL 49084 at *16. The tax auditor relied on daily itineraries and hired car invoices to conclude that the taxpayer was in New York on certain days. \textit{Id}. The taxpayer was able to establish that these records, although provided by her, were inaccurate. \textit{Id}. The records did not adequately account for changes in her schedule, hired car services she arranged for other persons or to transport props and similar matters. \textit{Id}. The Division of Tax Appeals agreed that the records could not establish that the taxpayer was in New York on given days. \textit{Id}. That left many days for which the taxpayer failed to offer adequate proof of her location. \textit{Id}. The taxpayer was not able to use these same unreliable records to prove where she was on given dates. \textit{Id}. Dates on which proof of the taxpayer’s location was not established were “unknown” and counted as days in New York. \textit{Id}.
\item \textsuperscript{255} tit. 20, § 105.20(c); see Schibuk v. N.Y.S. Tax Appeals Tribunal, 733 N.Y.S.2d 801, 803 (App. Div. 3d Dept. 2001) (reflecting that taxpayers’ failure to offer proof that they spent fewer than 183 days in New York during the years justified a ruling that they were statutory residents.).
\item \textsuperscript{257} \textit{Stewart}, 2000 WL 49084 at *16 (noting that “[n]o handwritten diary or day–to–day records were introduced.”).
\end{itemize}
these cases from those where testimony alone is offered as proof of whereabouts.258

Contemporaneous records maintained by the taxpayer showing his location on a daily basis need to be produced for the taxpayer to prevail.259 Examples of the records sought by the Tax Department and the court include detailed daily diaries, credit card statements, airline tickets, and restaurant and hotel receipts,260 bank statements and telephone records.261 Other pertinent documents include employer expense reports, telephone and utility bills, and passport copies.262 Where applicable, the taxpayer might submit a copy of his employment agreement or other documents reflecting that his employer knew and approved of the taxpayer working from a location outside New York. Affidavits and testimony of persons who knew the taxpayer’s whereabouts, such as a limousine driver who regularly took the taxpayer to and from the airport, would be useful. Taxpayers may establish that, although their New York residence was used, or utility bills or credit card charges reflect use in New York, it was not the taxpayers who were present, or an online credit card charge actually originated in another state where the taxpayer was located at the time of purchase.263

Taxpayers have unsuccessfully advanced various arguments about how days should be counted or what days should be included in

258 Id. at *17. Where a pattern of conduct is shown, a taxpayer’s testimony may add facts explaining her location on given days unaccounted for. Id. In Stewart no pattern was established, and the taxpayer failed to demonstrate that she was not in New York for in excess of 183 days during the year. Id.
260 Id.
261 In re Knoebel, No. 824117, 2013 WL 5433720 (N.Y. Div. Tax App. Sept. 19, 2013). See Stewart, 2000 WL 49084 at *2, where the auditor suggested that a daily schedule of the taxpayer’s location be established by “personal or business diaries, credit card receipts, checking accounts maintained in New York and Connecticut [taxpayer’s domicile], travel records, business expense reports, frequent flyer records, telephone invoices from New York and Connecticut and limousine or driver records.” Id.
263 Knoebel, 2013 WL 5433720. Mr. and Mrs. Knoebel lived in Pennsylvania but maintained an apartment in New York. Id. They were able to establish that various days during which their New York apartment was occupied, it was one of their adult daughters who was in residence. Id. Telephone calls were made from the apartment on days the taxpayers were in Pennsylvania. Id. The daughters also used the taxpayers’ credit cards in New York on days the taxpayers provided proof that they were elsewhere. Id. The taxpayers were ultimately not successful in avoiding status as statutory residents, due to their inability to prove their absence from New York for a sufficient number of days. Id.
determining when a taxpayer is within New York\textsuperscript{264} in an effort to avoid the bright line test enunciated in the regulations. The well–established rule set forth in the regulations\textsuperscript{265} that presence within New York State for any part of a calendar day counts as a day in New York was again recently upheld.\textsuperscript{266} A taxpayer domiciled outside New York but near the border claimed that days on which the taxpayer entered New York to dine at a restaurant or shop at a store for a few hours should not count as days the taxpayer was in New York.\textsuperscript{267} While the taxpayer worked in New York City and maintained a residence there, the dining and shopping trips were from the taxpayer’s home in Connecticut and bore no connection to his New York City apartment or his business.\textsuperscript{268} The taxpayer’s argument that a common sense “proximity test” should be used to determine the days on which a taxpayer was present in New York was rejected, and was viewed by the tribunal as likely to lead to further litigation about what was or was not proximate.\textsuperscript{269} Because the taxpayer’s dining and shopping trips were “not unintended, unavoidable, unplanned, inadvertent or involuntary” but were both “purposeful and voluntary”, his limited physical presence in New York counted as days in New York for purposes of determining his status as a statutory resident.\textsuperscript{270} The reason for a taxpayer entering New York is not generally relevant to determining statutory residence.\textsuperscript{271} For a taxpayer to be a statutory resident, there is no requirement that his purpose in entering New York on any given day bear any relationship to the New York abode he maintains.\textsuperscript{272}

Another Connecticut resident argued before the administrative law judge that the taxpayer’s trips to New York for the sole purpose of food

\textsuperscript{264} Leach v. Chu, 540 N.Y.S.2d 596 (App. Div. 1989) (upholding the definition of “day,” in the regulations, to include any part of a day rather than an entire 24–hour period.).

\textsuperscript{265} tit. 20, § 105.20(c).

\textsuperscript{266} Zametti v. N.Y.S. Tax Appeals Tribunal, 8 N.Y.S.3d 733 (App. Div. 2015). The court reaffirmed the rule in effect for over twenty–five years, noting “where, as here, there is longstanding precedent involving statutory construction, such precedent is not lightly set aside since, if the Court’s interpretation was incorrect, the Legislature could have thereafter clarified its intent.” Id. at 735.


\textsuperscript{268} Id. If the additional 21 or 22 days involving shopping or dining trips did not count as days in New York, the taxpayer was not present in New York for more than 183 days and thus would not have been liable for income tax as a statutory resident. Id.

\textsuperscript{269} Id. The tribunal also expected litigation about the time within a 24–hour period a taxpayer had to be in New York for him to be present, if the proximity test proposed by the taxpayer was adopted. Id. The tribunal found “the need for consistency provided by an easily defined and applied rule” set forth in the regulation defining days outweighed any inequity resulting when that rule was applied to the facts of a given taxpayer’s case. Id.

\textsuperscript{270} Id.

\textsuperscript{271} Id.

\textsuperscript{272} Id.
shopping should not be counted as days spent in New York for purposes of determining if he was a statutory resident.\textsuperscript{273} The judge considered the lack of a connection between the grocery trips and either the taxpayer’s New York employment or New York place of abode.\textsuperscript{274} The Tax Appeals Tribunal agreed with the taxpayer that, on the facts presented, including that the taxpayer and his spouse were “separated in fact”, the non-domiciliary taxpayer did not maintain a permanent place of abode in New York. Therefore, the day count was irrelevant, and the Tax Appeals Tribunal declined to address the day count or the shopping excursions.\textsuperscript{275}

Despite the literal wording of the regulation that if a taxpayer is present in New York for any part of a day the day counts as one spent in New York, the courts recognize an additional exception not appearing in the statute or the regulation. “[W]hen a nondomiciliary [of New York State] seeks treatment in New York for a serious illness, the time spent in the medical facility for the treatment of that illness should not be counted in determining whether such a nondomiciliary was a resident of the State for income tax purposes during such confinement.”\textsuperscript{276} Similarly a taxpayer initially domiciled outside New York does not become a statutory resident when she enters a nursing home in New York on the advice of her physician, although the taxpayer is expected to remain in the nursing home permanently.\textsuperscript{277} According to the government there are two justifications for this conclusion. Occupancy in a nursing home does not constitute maintaining an abode, and days in a medical facility do not count as days in New York.\textsuperscript{278} It is only days in a medical facility or nursing home that are not counted. Days during which the taxpayer is in New York at his residence receiving care as an outpatient or recovering from an illness are included in the computation as days spent in New York.

Where a taxpayer is domiciled in Florida but owns residential real property in New York occupied occasionally by the taxpayer, the

\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Stranahan v. N.Y.S. Tax Comm., 416 N.Y.S.2d 836, 839 (App. Div. 1979).\textit{Stranahan} involved a taxpayer domiciled in Florida who leased an apartment in New York City.\textit{Id.} She occupied the apartment infrequently during shopping trips, before leaving the country on vacations and while in New York to attend occasional social functions.\textit{Id.} During the year in question (1973) the woman became ill and sought treatment at a New York hospital.\textit{Id.} She was admitted to the hospital three times during the year spending a total of 148 days hospitalized.\textit{Id.} In between hospital stays, she occupied her New York apartment for 67 days, as her doctors determined she was too ill to return to her home in Florida.\textit{Id.} New York claimed she was a statutory resident, as she spent 215 days during the year in New York.\textit{Id.} The court rejected that determination.\textit{Id.}
\textsuperscript{278} Id.
taxpayer’s relocation to a New York nursing home for permanent care will not alone cause her to be a statutory resident of New York. However, when a non–domiciliary travels to New York to care for an ill relative, those days in New York are counted in determining if the non–domiciliary is a statutory resident.

When taxpayers sold and vacated their New York home during the year, a question may remain about the date on which they ceased to be residents. Having maintained a home in New York for part of the year, a factual inquiry is necessary to ascertain when resident status ended. Relevant facts might include:

(a) The date on which the taxpayer sold the New York home;
(b) The date on which taxpayer vacated the former New York residence and removed all belongings from the home;
(c) When the taxpayers enrolled their children in school in the new state of domicile; and
(d) Agreements pertaining to residence.

In one case while the taxpayers resided in New York they purchased a home in Vermont. The mortgage executed by the taxpayers included a representation that they would not occupy the Vermont home as their legal residence. This agreement precluded a change of domicile to Vermont until the mortgage was satisfied.

V. NONRESIDENT OUTSIDE THE U.S.

Historically, a higher standard was imposed on a New York domiciliary who claimed to have changed her domicile to a location

279 Commissioner of Taxation and Finance Advisory Opinion TSB–A–2006 (6)(1), Petition No. Z060130A, 2006 WL 2741862 (N.Y. Dept. Tax Fin. Aug. 28, 2006). The taxpayer was a married woman whose only connection to New York was owning real estate. Id. One apartment owned by the incompetent taxpayer and her spouse was occasionally occupied by her. Id. Two other New York apartments were owned by the taxpayer, her spouse and her daughter, a New York resident. Id.


281 Schibuk v. N.Y.S. Tax Appeals Tribunal, 733 N.Y.S.2d 801 (App. Div. 2001) (the taxpayers’ claim that they ceased being New York residents in June was rejected, where they contracted to sell their New York home in October and the sale did not close until December).

282 Id.

283 Id. at 803. In Schibuk this was the deciding factor, as the new Vermont residence had previously served as the taxpayer’s vacation home.

284 Id. at 802.

285 Id.

286 Id.
outside the U.S.\textsuperscript{287} \textquotedblleft The presumption against a foreign domicile is stronger than the general presumption against a change of domicile.\textsuperscript{288} The presumption may only be overcome by clear and convincing evidence.\textsuperscript{289} Whether this higher standard still applies or should still apply has been questioned.\textsuperscript{290}

[A] United States citizen will not ordinarily be deemed to have changed such citizen’s domicile by going to a foreign country unless it is clearly shown that such citizen intends to remain there permanently. For example, a United States citizen domiciled in New York State who goes abroad because of an assignment by such citizen’s employer or for study, research or recreation, does not lose such citizen’s New York domicile unless it is clearly shown that such citizen intends to remain abroad permanently and not to return . . . .\textsuperscript{291}

To relinquish New York residence for income tax purposes when one moves outside the U.S., in addition to possessing the requisite intent the taxpayer must establish domicile in the country to which he moved.\textsuperscript{292}

\textsuperscript{287} Mercor v. State Tax Comm., 459 N.Y.S.2d 938 (App. Div. 1983) (citing Matter of Reeves v. State Tax Comm., 437 N.Y.S. 2d 969 (1981)); Bodfish v. Gallman, 378 N.Y.S.2d 138 (App. Div. 1976).\textsuperscript{288} Bodfish, 378 N.Y.S.2d at 140.\textsuperscript{289} Klein v. State Tax Comm., 390 N.Y.S.2d 686, 687 (App. Div. 1977) (In May of 1969 the taxpayer husband accepted employment in Switzerland under a three-year employment contract. He and his wife moved to Switzerland, where they rented a residence, paid taxes, purchased an auto and joined civic organizations. The court did not find the evidence sufficiently compelling to support a determination that the taxpayers’ domicile changed from New York to Switzerland. The outcome unfavorable to the taxpayers was based in part on their inability to sublet their leased New York apartment, continued maintenance of bank accounts in New York, continued status as non-resident members of New York organizations, and a return visit to New York during which the husband executed a will including New York entities as beneficiaries).\textsuperscript{290} See Klein v. State Tax Comm., 402 N.Y.S.2d 396 (App. Div. 1977) (Fuchsberg, J. dissenting).\textsuperscript{291} tit. 20, § 105.20(d)(3).\textsuperscript{292} Bodfish, 378 N.Y.S.2d at 140 (Mr. Bodfish was employed by a corporation with worldwide offices. He resided with his family in New York, where he owned a home, until February 1970, when he was transferred by his employer to Pakistan. Mr. Bodfish lived in Pakistan until January of 1973, when his employer transferred him to London, England. During 1970, after his relocation to Pakistan, the taxpayer returned to New York three times. His family did not join him in Pakistan until July of 1970. The taxpayer entered Pakistan on a four–year visa rather than seeking permanent immigration status. These facts lead the court to conclude that the taxpayer remained domiciled in New York during 1970); see also Bernbach v. State Tax Comm., 471 N.Y.S.2d 903 (App. Div. 1984) (where a
Other factors considered to determine whether a taxpayer relinquished his New York domicile when he moves to a foreign country are whether the move is temporary or permanent, whether the taxpayer follows normal procedures to obtain permission to live and work in the new locale, secures employment in the new locale, the duration of the taxpayer’s prior residence in New York, what assets the taxpayer continued to own in New York, whether the relocation was employment related, and other ties to New York and the alleged new domicile after the move. Only factors initially relied on by the State Tax Commission for its initial determination may be considered by the court. If those factors are inadequate to support the Commission’s determination, other facts cannot be substituted which would justify the Commission’s conclusion. Actions demonstrating preparation to relocate to another country, without actually establishing domicile there, are not adequate to support a ruling favoring the taxpayer.

Where a U.S. citizen is a New York domiciliary and continues to maintain a residence in New York, she may remain domiciled in New York when she accepts employment in another country. This was the finding where a U.S. citizen maintained her former New York City home taxpayer established a domicile in France by moving there with his minor children, marrying a French national, residing in an apartment there for which his wife signed a nine–year lease, consulting counsel about remaining permanently in France, obtaining legal permission to do so, and obtaining employment in France).

Bernbach, 471 N.Y.S. 2d at 904–05 (The taxpayer’s retention of a New York bank account with a nominal sum on deposit was not determinative, particularly as he instructed his attorney to close the account. His continued ownership of a New York cooperative, occupied by his first wife after their divorce until it was sold also did not alter the conclusion that the taxpayer’s domicile changed. The court reached its determination, in part based on the taxpayer obtaining a French driver’s license and maintaining an auto registered in France. The court declined to consider certain facts noted by the Commission on appeal, because the Commission did not rely on the facts as a basis for its initial determination).

Id. at 905.

Id.

Kennedy v. N.Y.S. Income Tax Bureau, 446 N.Y.S.2d 429, 430 (App. Div. 1981) (Mr. Kennedy was a New York resident for 18 years before he commenced efforts to relocate to Canada. He left his wife and children in New York while he moved to Canada to work there. Mr. Kennedy lived in a leased residence in Canada, investigated medical care for his ill spouse, worked with a realtor in Canada to locate a home to purchase, and planned to sell his New York residence once he did so. “He also opened an account with a Canadian bank, registered his automobile with the Province of Ontario, filed and paid taxes to the Canadian government and inquired of the Canadian Consulate as to the procedures for becoming a landed immigrant.” Within 8 months after his move, Mr. Kennedy’s employment ended due to his Canadian employer’s financial reverses. These facts supported the conclusion that Mr. Kennedy was merely preparing to change his domicile but had not done so).

and a vacation property in New York State, while she accepted employment and lived for years in London. In reaching this conclusion emphasis was placed on the facts that the taxpayer’s employment contracts in each position were of limited one year to three year duration, her employment contract referenced New York as her home location, she was entitled to a housing allowance reflecting the employer’s belief that she would continue to maintain her New York home, and her employment contract required the employer to pay for her to return herself and her belongings to her former home. The tribunal concluded that the taxpayer’s determination of where she would reside at any time was based on her employment opportunities, negating any claim that she had, during the tax years in dispute, developed a fixed intent to remain in London permanently. This determination was reached although the taxpayer, who was unable to obtain U.K. citizenship during the tax years in dispute, applied for and obtained U.K. citizenship at the earliest opportunity. The taxpayer’s failure to establish that she adopted a new domicile resulted in her continued status as a domiciliary of New York.

In contrast, the fact that a taxpayer who moved from New York to France immediately applied for and obtained permission from the French government to remain as a resident for the longest term allowable was viewed as supporting a change in domicile. Similarly, where a long time resident of New York accepts a job relocation by his New York corporate employer to Australia, he may successfully establish that his domicile changed. The taxpayer was needed in Australia by his employer to attend to existing clients and expand the business. He married an Australian native, leased an expensive home in Australia which he eventually purchased, and repeatedly obtained the longest duration visas available, although he did not apply for Australian citizenship. While the taxpayer retained his New York rent controlled apartment and occasionally stayed there, after his move to Australia the apartment was

298 Id.
299 Id. The issue in the case was domicile, as the taxpayer was not present in New York for more than 183 days, but was present for more than 30 days.
300 Id.
301 Id. Many facts were present which could have supported a ruling in the taxpayer’s favor. She purchased and improved an expensive home in London, was active in charitable and civic organizations in London, and employed professionals there. However, the taxpayer’s behavior was viewed as inconsistent. She maintained both New York and United Kingdom driver’s licenses, voted in elections in both places, did not rent either of her New York homes, filed tax returns in the U.S. and the U.K., and claimed to have a Will requiring her remains to be left in London on her death.
302 Id.
principally used by his employer’s clients. The taxpayer had not invested in New York real estate, but made substantial investments in commercial property in Australia. He joined social clubs in Australia. The taxpayer eventually returned to New York for business reasons when his marriage ended, at which time he purchased a home in New York. These facts were adequate to demonstrate taxpayer’s intent to change his domicile to Australia at the time of his move.\(^{305}\)

Although a taxpayer sells his home in New York and departs from the U.S., if his move is not viewed as permanent he may remain domiciled in New York for income tax purposes.\(^{306}\) A taxpayer who accepted a job in England, sold his New York home and moved his family to England was still domiciled in New York as a debilitating medical ailment caused him to return to New York two years later.\(^{307}\) The court’s ruling was based on the taxpayer’s failure to prove, by clear and convincing evidence, that he intended to remain in England permanently.\(^{308}\)

The Tax Commission has taken the position, albeit unsuccessfully at times, that a taxpayer who sells his New York home, severs ties to New York and moves to Canada for a new job, does not change his domicile if there is any possibility that his stay in Canada is not indefinite and that he might conceivably return to New York.\(^{309}\) In one case the taxpayers obtained permanent resident visas in Canada, and had the legal right to

\(^{305}\) \textit{Id.} at *22 (Facts relied on by the Tax Division to support a contrary determination included taxpayer’s initial agreement to accept employment in Australia for at least two years, his retention of a New York driver’s license, his retention of his New York rental apartment, his failure to move furniture from the New York apartment to Australia, his business trips to New York, his receipt of bills pertaining to the New York apartment at that location, his occasional visit to a New York physician although his primary medical care was provided in Australia, and his occasional attendance at a cultural event in New York. These facts combined were not sufficiently persuasive to justify the conclusion that the taxpayer lacked the requisite intent to change his domicile).


\(^{307}\) \textit{Id.} at 939 (the court’s decision was based on the taxpayer’s testimony that he only intended to remain in England until he retired; thereafter, he planned to move to Florida where other family members lived; he only obtained an annually issued working visa and did not apply for U.K. citizenship, and he readily accepted job transfers under one year employment contracts).

\(^{308}\) \textit{Id.}

\(^{309}\) McKone v. State Tax Comm., 490 N.Y.S. 2d 628, 629 (App. Div. 1985) (Mr. and Mrs. McKone moved from Canada to New York when Mr. McKone accepted employment there. Six years later Mr. McKone accepted a change in location of employment in connection with a promotion to a Canadian office of his employer. The family sold their New York home, closed their New York bank accounts, and moved themselves and their possessions to Canada, severing all ties to New York. Neither taxpayer was from New York or had family or friends there. After the move to Canada the taxpayers belonged only to Canadian organizations. Mrs. McKone was from Canada and her family lived there. The taxpayers did not vote in New York after the move).
reside there. The court noted that the taxpayers were not required to prove that they intended to remain in a new location for the rest of their natural lives to change domicile. Instead, as the facts did not reflect that the taxpayers’ relocation was temporary, the fact that it might be of indefinite duration supported a finding that domicile changed. There was inconsistency in the Tax Commissioner’s position, in that when the taxpayer relocated to New York for a job of indefinite duration the Commissioner agreed that he became a New York domiciliary, but when identical facts reflected a move to Canada the Commissioner claimed no change occurred.

The reason or motivation causing a taxpayer to move to a foreign country is not determinative of whether he remains a New York resident. Nor is a taxpayer who departs from New York required to forfeit U.S. citizenship to establish that his domicile changed.

VI. STANDARD OF REVIEW AND IMPOSITION OF PENALTIES

When a taxpayer contests a decision of the State Tax Commission in New York, the decision is affirmed by the court unless “the Tax Commission acted irrationally or upon less than substantial evidence in

310 *Id.* at 629.
311 *Id.*
312 *Id.*
313 *Id.*; see also Bernbach v. State Tax Comm., 471 N.Y.S. 2d 903 (App. Div. 1984) (in that case questions included both whether the taxpayer became a New York resident and whether he relinquished that status. While the Commissioner claimed the taxpayer became a New York resident and remained one the court disagreed. The same factors applied to resolve each question, and the taxpayer was no longer a New York resident once he moved to France. The needed rational basis for the Commissioner’s determination was lacking).
314 Bernbach, 471 N.Y.S.2d at 904 (the fact that taxpayers moved to New York to facilitate the wife’s psychiatric treatment did not prevent them from becoming New York residents, or cause the move to be treated as temporary. Nor did the fact that the taxpayer husband may have been motivated to move to France to avoid losing custody of his minor children cause him to remain a New York resident).
315 Id at 904. In Bernbach the taxpayer initially lived in a rental apartment in New Jersey with his wife and children. The family moved to New York in 1971, and occupied a cooperative apartment Mr. Bernbach purchased. During the following year the husband moved to France with his children, filed for divorce, and planned to marry a French national. The taxpayer retained ownership of the New York cooperative until his divorce was final and his former spouse vacated it. The taxpayer consulted with a French lawyer and took action to be allowed to reside and work in France, and sought employment in France. He married his French girlfriend, lived in France, opened a bank account there, obtained a French driver’s license and registered a car in France. While years later the taxpayer moved to England for employment purposes, this did not alter the court’s conclusion that he changed his domicile upon relocating to France and was not thereafter a New York resident for income purposes.
determining that petitioner [the taxpayer] had failed in meeting his burden of proving a change in domicile during the tax years in question.\textsuperscript{316} The same burden applies to a nonresident of New York State who claims he is not a statutory resident.\textsuperscript{317} The Tax Commission’s determination is sustained if supported by substantial proof, even if the court might have reached a different decision had it considered the case de novo.\textsuperscript{318} When a taxpayer is contesting an assessment of income tax, he must prove the assessment was erroneous by clear and convincing evidence to prevail.\textsuperscript{319} Administrative proceedings of the Division of Tax Appeals are not trials in court and different rules apply. For example, the best evidence rule does not apply in administrative proceedings.\textsuperscript{320}

Taxpayers who falsely answer no to the question on the state income tax return about whether they or their spouse maintained a residence in New York are at an increased risk for imposition of penalties.\textsuperscript{321} At a minimum, the taxpayer is not likely to be viewed as credible if he falsely reports that no New York residence was maintained.\textsuperscript{322} The fact that an accountant prepared the taxpayer’s tax return is not alone grounds for avoiding negligence penalties.\textsuperscript{323} As stated by the Division of Tax Appeals, it is a well-settled principle that each taxpayer has a non-

\textsuperscript{317} El–Tersli v. Comm’r of Taxation and Fin., 787 N.Y.S.2d 526, 528 (App. Div. 2005) (the taxpayer must prove both “that he or she neither maintained a permanent place of abode in this state nor spent more than 183 days in the state during the tax year in dispute”).
\textsuperscript{318} Id.
\textsuperscript{319} Buzzard v. Tax Appeals Tribunal of N.Y., 613 N.Y.S.2d 294, 295 (App. Div. 1994); Clute, 484 N.Y.S.2d at 241. See Gray v. Tax Appeals Tribunal of N.Y., 651 N.Y.S.2d 740, 741 (App. Div. 1997); see also Kornblum v. Tax Appeals Tribunal of N.Y., 599 N.Y.S.2d 158, 160 (App. Div. 1993) (where the court explained “[B]ecause we are not at liberty to substitute our judgment for a reasonable determination by the agency which is supported by substantial evidence simply because it is possible reasonably to reach a different conclusion based upon the evidence presented, even if it could be said that, after taking into account the decreased weight traditionally accorded formal declarations, petitioners’ evidence reasonably supports a finding of changed domicile, such, standing alone, is not a basis for our intervention”) (citations omitted).
\textsuperscript{322} Campaniello, 2015 WL 4071393 at *20.
delegable “duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause . . . .”324