New York State Bar Association

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NYSBA

January 14, 1997

Michael H. Urbach
Commissioner of Taxation
and Finance
Department of Taxation
and Finance
W.A. Harriman Campus
Albany, NY 12227

Dear Commissioner Urbach:

In response to your request of September 4, 1996, I have enclosed with this letter a report containing our suggestions for revisions to the New York Nonresident Audit Guidelines. The principal author of the report is Robert E. Brown, Co-Chair of our Committee on Multistate Tax Issues.

The report makes two principal substantive recommendations:

1. We recommend that the Guidelines should be refined to better tailor the inquiry into the taxpayer's business contacts to the underlying question of where the taxpayer lives, and

2. In the application of the "Near and Dear" test, we suggest that auditors recognize that sentimental significance is different from monetary value, and the mere fact that valuable possessions are in one location or the other (or both) may not, in some cases, shed light on domicile.

In addition, we make a number of miscellaneous comments, particularly with respect to difficult issues in the counting of days.

Please contact me if you have any questions.

Very truly yours,

Richard L. Reinhold
Chair

[Enclosure]

NEW YORK STATE BAR ASSOCIATION TAX SECTION

TAX SECTION

SUGGESTIONS FOR REVIEW OF NEW YORK NONRESIDENT AUDIT GUIDELINES[1]

I. Introduction and Background

A. The Law

Under the New York State Personal Income Tax Law,[2] a New York State *resident* is subject to New York State personal income tax on worldwide income, whereas a New York State *nonresident* is subject to New York State personal income tax only on New York-source income. In light of this distinction -- and the fact that many other States impose little or no personal income tax on their residents -- the determination of whether an individual is a New York State resident or nonresident can mean the difference of thousands of dollars in a taxpayer's State personal income tax liability.

For New York State Personal Income Tax purposes, an individual is a New York State resident if either of the following two tests is satisfied:[3]

(1) The individual is "domiciled" in New York State (the "Domicile Test");[4] or

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[1] This report was written by Robert E. Brown, William F. Collins, Maria T. Jones, Carolyn Joy Lee and Robert G. Nassau. Helpful comments were received from William M. Colby, Paul R. Comeau, Peter L. Faber, Robert A. Jacobs, Stephen B. Land, Richard L. Reinhold and Arthur R. Rosen.

[2] Article 22 of Chapter 60 of the Consolidated Laws of New York State (the "Tax Law").

[3] Section 605(b)(1) of the Tax Law. An individual is a New York State nonresident if neither of these two tests is satisfied. Section 605(b)(2) of the Tax Law.

[4] Section 605(b)(1)(A) of the Tax Law. Notwithstanding a New York domicile, an individual will not be treated as a New York State resident if one of two exceptions set forth in Sections 605(b)(1)(A)(i) and (ii) of the Tax Law is satisfied.

(2) The individual is not "domiciled" in New York State, but he or she (a) .. maintains a "permanent place of abode" in New York State; and (b) spends in the aggregate more than 183 days of the taxable year in New York State (the "Statutory Residence Test").[5]

B. The Guidelines.

In order to assist its auditors in determining whether an individual satisfies either the Domicile Test or the Statutory Residence Test, the New York State Department of Taxation and Finance has published a District Office Audit Manual for Nonresident Audits (the "Guidelines").[6] With respect to the Domicile Test, the Guidelines conclude that the term "domicile" means:

> the place where the taxpayer has his/her true, fixed, permanent home. The domicile is the principal establishment to which s/he intends to return whenever absent. The term domicile should not be limited to refer to a specific structure but rather a place/area to which the taxpayer expects to return.[7]

In determining whether, based on the above definition, a taxpayer's domicile is New York State, the Guidelines instruct auditors first to analyze five "Primary Factors": Home, Active Business Involvement, Time, Items Near and Dear, and Family

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[5] he New York City personal income tax is administered by the New York State Department of Taxation and Finance. Section 11-1801 of the New York City Administrative Code. The Guidelines (as defined below) apply equally to audits of City taxpayers and the determination of whether an individual is a New York City resident or non-resident.

[6] Section 312 of the District Office Audit Manual, published on May 9, 1994. The Guidelines represent a revision of similar guidelines originally issued in 1993.

[7] Section 312.4(A) of the Guidelines. *See also* 20 NYCRR 105.20(d).

Connections.[8] This analysis is to be made by comparing the New York ties for each specific factor with the non-New York ties for that factor.[9] If an auditor determines, after an analysis of the Primary Factors, that there is a basis for concluding that the taxpayer's domicile is New York State, or the analysis is inconclusive, then the auditor may look at certain "Other Factors."[10]

On September 4, 1996, Michael H. Urbach, Commissioner of the Department of Taxation and Finance, wrote to Richard L. Reinhold, Chair of the New York State Bar Association Tax Section, and requested the participation of the Tax Section in a review of the Guidelines. Commissioner Urbach asked the Section to take a "fresh look" at the Guidelines, and noted that, as a result of the Department of Taxation and Finance's own in-house review, the "Family Connections" factor would be examined only when the other four Primary Factors were inconclusive.[11]

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8 Section 312.4(E) of the Guidelines.

9 *Id.*

10 Section 312.4(E)(3) of the Guidelines. Among the Other Factors enumerated in the Guidelines are: active involvement in community, religious, civic or service clubs; the address at which bank statements and bills are primarily received; the physical location of one's safe deposit box; and location of an individual's driver's license and voter registration.

11 Commissioner Urbach wrote as follows: "The Department recognizes that the analysis of an individual's family connections could be very intrusive into one's private and personal lifestyle. To minimize the invasive nature of an audit, a review of this factor will only be done if review of the other four primary factors . . . is not conclusive in determining domicile. In addition, the analysis of family connections will be limited to the taxpayer's immediate family." We believe that the place at which the taxpayer's minor children attend school may be more probative than intrusive in most cases.

The Tax Section last commented on non-resident audit guidelines on December 13, 1993.[12] In the Chair's letter transmitting the comments of the Section, Peter C. Canellos noted that the success and objectivity of any nonresident audit depend both on the written audit guidelines and procedures, and on the day-to-day application of these principles by field auditors. This continues to be true today.

In August, 1994, Section Chair Michael L. Schler commended the Department on the improvements made in the May, 1994, revision of the non-resident audit guidelines.[13] He wrote that "[t]he true test of the revised audit guidelines will come in the field," and he offered the help of the Tax Section in planning training programs for auditors.

C. The NESTOA Report[14]

As a consequence of a 1995 conference, the tax administrators of the NESTOA states created a working group to seek more uniformity in determining residency issues among those states. The policy goals for the working group were as follows:

1. Individuals should only be determined to be domiciliaries by one state for a specific period of time;

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12 Previously, on January 25, 1993, the Section had submitted a Report that suggested the adoption of audit guidelines as well as several legislative changes related to the determination of residency. *See Audit Guidelines and Regulations Governing New York State Residency Audits: Report and Suggestions for Change*, 93 STN 16-6 (January 26, 1993).

13 The Chair noted that the Section did not necessarily agree with all of the conclusions expressed in the revision concerning current law. *See New York State Bar Tax Section Writes Commissioner on Residency Audit Guidelines*, 94 STN 127-26 (September 13, 1994).

14 The North Eastern State Tax Officials Association (NESTOA) includes representatives from Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York (representing both New York State and New York City), Pennsylvania, Rhode Island and Vermont.

2. Individuals should not pay tax on identical income to multiple states; and

3. Criteria used should be as uniform as possible to increase voluntary compliance and allow for the easy exchange of information among the NESTOA states.

The working group met first on December 14, 1995, and published a final report on May 8, 1996.[15] The NESTOA Report recommended the five factors set out in the Guidelines as "best suited for a fair evaluation of a taxpayer's domicile."[16] On August 14, 1996, Commissioner Urbach requested a modification to the Working Group's Final Report, as a result of the Department of Taxation and Finance's internal re-evaluation of the "Family Connections" test. Changes were subsequently made to the NESTOA report to accommodate the Commissioner's request.[17]

II. Domicile Test

The determination of domicile is a particularly difficult issue for a tax audit because of the subjectivity of the inquiry. Ascertaining intent is necessarily more intrusive and burdensome than determining other issues of fact because all of the

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15 *Final Report to Commissioners: Domicile Status in NESTOA States,* prepared by NESTOA Domicile Working Group, Maurice P. Gilbert, Chair.

16 *Id.* at p. 4.

17 *See North Eastern States Tax Officials Association Cooperative Agreement on Determination of Domicile (October 1, 1996)*, 96 STN 214-8 (November 4, 1996). For a brief discussion of this Agreement, *see* Grossman, *Association of North Eastern Tax Officials Makes Proposals for Uniformity, Equity, Compliance*, 96 STN 208-46 (October 25, 1996). For a discussion of the varying rules or regulations in the NESTOA states *see* Comeau and Klein, *Uniformity May Be the Answer to Resolving Multistate Residency Issues,* J. Multistate Taxation (Nov./Dec. 1996).

evidence is circumstantial. The Guidelines were a positive step toward establishing balance and fairness in making this determination.

The Guidelines do not, however, address some of the substantive comments previously made by the Tax Section. It may be that the Guidelines were not intended to address such comments,[18] but we believe that these and other substantive comments, which are set forth below, deserve further consideration.

A. Home

The Guidelines should be amended to state that an individual who maintains no living quarters in New York, but maintains living quarters elsewhere, should be considered a domiciliary only in extraordinary circumstances.[19] These circumstances should be illustrated by examples.

B. Active Business Involvement

We have a number of concerns with the use of Active Business Involvement as a primary factor, as articulated in the Guidelines. Because our concerns can best be understood within the basic framework of the Guidelines, the context of the actual language of the Active Business Involvement factor, and the cases cited in support thereof, it is worth reviewing the hierarchical ranking of the factors and quoting some of the relevant materials.

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[18] See the comments of Thomas Heinz, Director of Personal Income Tax Audits as reported in Hanlon, *New York Continues to Wrestle with Nonresident Audit* Guidelines, 94 STN 96-16 (May 18, 1994).

[19] Section 312.4(E)(1)(a)(i) of the Guidelines. At present, this Section provides as follows: "Where an individual has only one home, decisions concerning domicile are more straightforward than when an individual maintains two or more residences at various locations. When a taxpayer sells or ends the lease on their [sic] New York residence and acquires living space in another state,

As noted above, the Guidelines, as modified earlier this year, set forth five "primary factors" that are to be considered first in auditing domicile. These factors are:

1. The location of the taxpayer's homes;
2. The amount of time spent by the taxpayer in various locations;
3. The location(s) of items that are "near and dear" to the taxpayer;
4. The location(s) at which the taxpayer is actively involved in business; and
5. The location of the individual's immediate family, and where his or her minor children attend school (if the first four are not conclusive).

The Guidelines instruct auditors that if the Primary Factors point to a finding of domicile in New York, or are inconclusive or equally weighted, then the auditor is to examine certain "Other Factors" to clarify where an individual might be domiciled. If, however, the Primary Factors, on balance, provide satisfactory evidence that the taxpayer is not a New York domiciliary, then the auditor is instructed to look no further.

The secondary set of factors to which the auditor looks in evaluating domicile, if the Primary Factors are not determinative, include:

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coincidental with each other, it is an important indicator that a change in domicile as occurred . . .. [Furthermore, the taxpayer] is giving an important signal of intent to change domicile."

1. The location of other members of the individual's family, and the places where the taxpayer enjoys their company;
2. Active involvement in community affairs, religious organizations and the like, particularly where a taxpayer is present in the state in connection with that involvement;
3. The address at which the taxpayer receives financial information, bills and other important communications;
4. The location of important documentation;
5. The state in which cars and boats are registered, and driver's licenses issued;
6. Where a taxpayer votes;
7. The frequency of use of New York professionals;
8. Parking tax exemption claims;
9. Telephone services; and
10. Declarations of domicile.

The Guidelines direct that these "Other Factors" cannot themselves provide a basis for a finding of domicile, but instead are to be considered to assist in resolving unclear situations.

With respect to the primary factor of active business involvement the Guidelines state the following:

> If a taxpayer continues active involvement in New York business entities, by managing a New York corporation or actively participating in New York partnerships or sole proprietorships, such actions must be weighed against the

> individual's involvement in businesses at other locations when determining domicile. The degree of active involvement in New York businesses in comparison to involvement in businesses located outside New York is an essential element to be determined during the audit.
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> In today's world of electronic gadgetry and instant communications, it matters little if the involvement with New York businesses takes place from afar or while physically present in New York State. The degree and dimension of a taxpayer's involvement in the day-to day operation, or in a policy making position, must be analyzed during the audit.
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> The extent of an individual's control and supervision over their [sic] New York business interests was decided by the Appellate Division of the Supreme Court, in *The Matter of Herbert L. Kartiganer,* 194 AD2d 879, 599 NYS2d 312, TSB-D-91(23)-I, where it states:
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> > The most significant factor is the petitioner's constant supervision and review of his business interests in New York . . . . The petitioner Herbert Kartiganer stated that they (the petitioners) maintained adequate internal controls over their proprietary interests in New York according to certain protocols and that these protocols required his approval of all proposals, his supervision of progress check points of ongoing projects and final review before submission to clients. The evidence in the record clearly shows that petitioner Herbert Kartiganer retained overall control of his New York business interests.

As an initial matter, it is important to correct an error in the Guidelines. The quoted language, which the Guidelines attribute to the Appellate Division in the *Kartiganer* case, does not appear in the Appellate Division decision. While, the Appellate Division decision does indicate that continued operation of a New York business may be probative of domicile the decision does not necessarily result in a conclusion that the physical presence of the taxpayer "matters little." The quoted

language is part of the decision of the Tribunal; the portion of that decision quoted in the Guidelines does not, however, fully express the Tribunal's reasoning.

Specifically, the facts in *Kartiganer* involved a taxpayer who had been domiciled in New York for many years, retained his New York residence, and on his tax returns for the relevant years reported that he had worked in New York, on business of his long held engineering firm, for 114 or 115 days each year. To evidence a change in domicile to Florida the taxpayer pointed to the purchase of a (smaller) condominium in Florida (to which he and his wife moved no items of significance), declarations of domicile in Florida, membership in Florida tennis clubs, and the fact he spent 115 days each year working on the engineering business from Florida.

In holding that Mr. Kartiganer had not satisfied the burden of proving a change in domicile from New York to Florida, the Administrative Law Judge stated that:

> Although the maintenance of significant business interests, which required the active involvement of Mr. Kartiganer, is the most persuasive indicia that petitioners did not change their domicile to Florida in 1982, there are many other factors that support the conclusion that petitioners did not change their domicile to Florida.[20]

Along the same lines, the Tribunal stated, just before the language quoted in the guidelines, that:

> The record contains formal declarations that petitioners intended to make Florida their new domicile, but many factors indicate that they failed to abandon their New York domicile and sever their ties with New York. Significant factors include the ownership and regular use of a house in

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[20] 1991 N.Y. Tax LEXIS 23 (January 21, 1991).

> New York, and petitioner's wage and tax statements showing that New York address. . . .

The Appellate Division decision contained the following conclusions:

> It is well settled that domicile is established by physical presence in a particular locality coupled with the intent to remain. In determining whether a change in domicile has occurred, no single factor is deemed controlling. [Citations omitted.]

The Appellate Division then cataloged the contacts the Kartiganers had with each of New York and Florida:

> Here, the record reveals that during the relevant time period, petitioners engaged in a number of activities that would appear to be consistent with relocating to Florida, including discontinuing their memberships in various social and religious organizations in this State and purchasing a home in Florida. Additionally, following their arrival in Florida petitioners, *inter alia*, joined a number of social organizations, opened a checking account, secured a safe deposit box, executed codicils to their respective wills and filed a declaration of domicile as residents of Florida. The record further indicates, however, that Kartiganer retained a significant proprietary interest in his engineering firm and continued to play an active role in its day-to-day operations. Indeed, Kartiganer testified that he remained in constant communication with the Orange County office by telephone and courier service. Additionally, petitioners continued to maintain their residence in Orange County, where Kartiganer resided from the beginning of June each year through the end of August and would occasionally visit at other times during the year. During this same time period, petitioners maintained a checking account in this State and Kartiganer was in possession of a New York driver's license. Finally, although petitioners executed codicils to their wills in Florida, each will specifically provided that it was to be probated in New York.[21]

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[21] 194 A.D.2d 879 at 881-82.

The Guidelines appear to suggest that the Appellate Division has decided that supervision and review of business interests is the most significant factor in determining domicile. Once the *Kartiganer* decision is correctly presented, however, it becomes apparent that, as usually happens with such litigation, the Appellate Division had before it a case with a variety of conflicting factors relevant to domicile. One such factor, which we agree was significant, was Mr. Kartiganer's ongoing participation in his business. We do not believe, however, that Kartiganer stands for the proposition that the physical location of a taxpayer while working "matters little." Mr. Kartiganer spent considerable time in the years at issue working in New York.[22]

Consistent with the Appellate Division statement that domicile depends upon physical location coupled with intent to remain, the Guidelines should be revised to delete the assertions that business contacts without physical presence indicate domicile in the state in which the business is located. An otherwise absent person whose primary factors other than Active Business Involvement point toward non-New York domiciliary status should not be treated as a New York domiciliary simply by reason of long distance contacts with business activities in New York. Likewise, a person present in New York should not be able to assert domicile-like contacts with another state based on long-distance business activities involving that other state. Put differently, even though

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[22] In this respect Mr. Kartiganer's conduct was much the same as the taxpayer in Matter of Zinn vs. Tully, 54 NY 713 (1981), whose retention of substantial investments in New York which occasioned frequent trips to New York in connection with the management of the business, coupled with the retention of their New York home and the filing of resident tax returns, supported the conclusion they remained New York domiciliaries. An example of a case in which continued New York business contacts did not support a finding of domicile is Matter of Angelico, Tax Appeals Tribunal, March 31, 1994, in which the Tribunal held that the New York

operation of a New York business from outside New York may contribute to a finding of a New York Active Business Interest, the fact that the taxpayer seldom comes to New York, maintains no home, family or objects near and dear in New York should generally assure that the individual will not be treated as a New York domiciliary.

Moreover, even in cases where a taxpayer is physically present in the state in connection with the conduct of business, a number of our members believe that the place where a taxpayer works should not be accorded the same weight in the hierarchy of the Guidelines as the four other, more traditional Primary Factors of home: where a taxpayer spends time; where the home(s) are located; where items of sentimental importance are kept; and where the immediate family resides. These members believe that, in some cases, the place of employment or business may shed light on domicile, but in many cases, work-related contacts "display little in the way of 'sentiment' or 'permanent association'."[23] These members therefore suggest that the Guidelines' use of Active Business Involvement should be revised to rank the location of a taxpayer while engaged in business activities on a par with the locations at which a taxpayer enjoys leisure activities, and as no more probative, and in many cases less probative, than the location of the taxpayer's family.

We recommend that, in analyzing the implications of a taxpayer's business contacts in determining domicile, the Guidelines should be refined to better tailor the inquiry to the underlying question of domicile. For example, a taxpayer whose claimed

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business activities of a taxpayer who was separated from his wife and living in New Jersey were not a sufficient basis for treating him as a New York domiciliary.

[23] *Matter of Guibor*, Division of Tax Appeals, July 18, 1991.

domicile is some distance from the place at which he or she works, and whose work pattern therefore entails frequent overnight stays in a more convenient place from which he or she commutes to work, presents a different picture from the suburban commuter who has a New York home, but regularly commutes to, and stays overnight in, the jurisdiction of claimed domicile. The taxpayer who comes into New York to pursue his or her main occupation has a different quality of association with New York than a taxpayer who comes to New York to see a Broadway show. These nuances should be reflected in the Guidelines.

Finally, in considering the appropriate role of retained contacts with a New York business, we suggest that the Department be sensitive to the potential side-effects of a rule that encourages taxpayers to relocate their businesses outside New York. The message of the Guidelines is that a taxpayer who desires an ongoing role in a business should relocate that business outside New York. Of course, that is not always possible, but sometimes it is, and if it is possible, it certainly would be a rational response to the current rule.

C. Near and Dear[24]

In assessing the nature of "near and dear" items, auditors must be sensitive to unique circumstances of the individual being audited. Obviously, that which is "near and dear" to any individual will sometimes be highly subjective. In this regard, the Guidelines send a confusing and sometimes inappropriate message to auditors by

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[24] *See generally* Section 312.4(E)(1)(d) of the Guidelines.

suggesting that auditors look for "personal items that enhance the quality of lifestyle"[25] as a way to establish domicile. People with several residences usually have items enhancing the quality of their lifestyle in every residence they maintain. For example, when a taxpayer is maintaining more than one residence, furniture appropriate to each residence will also be maintained. Antique furniture may stay in the New York residence because it is geographically inappropriate for the Florida home, and not because the taxpayer remains domiciled in New York. Auditors should not assume that because a person has the wherewithal to be possessed of expensive possessions that such expensive items are "near and dear" to an individual in the sense of making a house a home. The appraised value of possessions, insurance bills, or the lack of moving bills therefore should not automatically lead to the conclusion that the taxpayer's domicile follows the location of such possessions.. Auditors should consider the possibility that a taxpayer maintains such items in one location *because* they are not "near and dear" enough to move to the taxpayer's "home." Similarly, items with significant intrinsic value may be located in one location for reasons of preservation or safe-keeping, in which case the locus of the items is more an investment decision than a reflection on domicile.

Our comments regarding the Near and Dear Primary Factor are in no way intended to imply that the concept of "near and dear" possessions should not be a Primary Factor. Rather, these comments merely ask auditors to recognize that sentimental significance is different from monetary value, and the mere fact that valuable possessions are in one location or the other (or both) may not, in some cases, shed light on domicile.

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[25] Section 312.4(E)(1)(d), first bold paragraph, of the Guidelines.

D. Other Factors

The Guidelines' commentary on Other Factors Affecting Domicile[26] should be redrafted to reflect intervening amendments to the Tax Law relating to the taxpayer's contributions to, and involvement with, certain religious, educational, service, eleemosynary and governmental organizations.[27] It has long been the position of the Department of Taxation and Finance that charitable contributions to New York charities will not be taken into account in determining domicile.[28] The Tax Law now prohibits consideration of contributions which are deductible under 170(c) of the Internal Revenue Code, or are made to certain not-for-profit organizations[29] in the determination of domicile. The Tax Law also prohibits using the taxpayer's volunteer labor on behalf of such organizations in the consideration of domicile. To conform with this statutory change, the Guidelines' comments on "active and passive" involvement in not-for-profit organizations must be extensively rewritten.[30]

The Guidelines state that items such as telephone bills should be analyzed as part of the Other Factors after an analysis of the Primary Factors has been completed. In practice, however, items such as telephone and other bills, addresses for bank statements, and correspondence are frequently requested by the auditor at an early point, sometimes

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26 Section 312.4(E)(3) of the Guidelines.

27 Section 605(c) of the Tax Law, as added by Ch. 607 of the Laws of 1994, and effective July 26, 1994. *See, e.g.*, TSB-A-95(2)-I (February 16, 1995) for an example of the application of this statute to the contributions of time and money by a New York State nonresident to a New York not-for-profit organization.

28 *See* Opinion of Counsel, published as TSB-M-84-(17)-I (October 22, 1984).

29 Defined in subdivision seven of Section 179-q of the New York State Finance Law.

30 Section 312.4(E)(3)of the Guidelines.

with the initial questionnaire. Auditors need more guidance on whether, and when, to make these requests.

E. Citations of Controlling Case Law

We continue to believe that the Guidelines' citations of controlling case law could be more helpful. It would aid both practitioners and auditors if propositions for which cases are cited included cases on both sides of the issue. It would be particularly helpful if the cited cases were close cases.[31] Michael Schler's August 18, 1994, letter noted that the Guidelines are not intended as official pronouncements of existing law.[32] To the extent the Guidelines can help provide both auditors and practitioners with a realistic view of the risks and hazards of their relative positions, however, the Guidelines may facilitate a less adversarial audit.

F. Use of the Guidelines by Other Staff of the Department

The Commissioner of the Department of Taxation and Finance, because of his appropriate interest and concern in insuring that nonresident audits and assessments are conducted fairly from inception to collection, should make it clear to the entire Department, including Conciliation Conferees and Counsel's Office Attorneys, that cases should be handled and disposed of in accordance with the tax policies enunciated in the Guidelines. Absent a compelling reason (*e.g.*, a new statute like Tax Law §605(c)), the

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[31] Since "hard cases make bad law," the Guidelines should encourage settlement in such instances. In the experience of many practitioners, virtually every case that progresses beyond the initial stages of an audit is a "hard case."

[32] *See supra* footnote 13.

general tenor of these instructive Guidelines as a facilitating document should set the parameters for all interactions between taxpayers and any Department personnel.

G. Reasons for Domicile Change

In practice it seems that if a taxpayer desires to "avoid" New York taxes, and carefully crafts his or her affairs so as to accomplish this purpose, this conduct is considered suspect., *Matter of Newcomb* expressly states that the "motives" for one's change of domicile are "immaterial." [33] The Guidelines should remind auditors of this principle.

III. Statutory Residence Test

A. Day Count

On the subject of "day count," which is one of the most difficult areas for audit, the Guidelines are silent or obscure, and resolution is left to the field. While "day count" verification is almost always a major part of a residency audit, and a frequently testy and confrontational issue, auditors are afforded virtually no real guidance on this topic. We note the following issues:

1. Legislative Intent

The legislative intent of the Statutory Residence Test is to impose residence taxation on individuals who actually "live in" New York, but who have arranged their lives so that the facts that would establish New York domicile are difficult

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[33] 192 NY 238, 251 (1908).

to prove.[34] From this intent it follows that days unrelated to the taxpayer's permanent place of abode should not be counted. For example, it may be that a New Jersey domiciliary who works on Wall Street 240 days a year and who spends 21 days per year in her ski lodge condominium on vacation (away from New Jersey which is her actual domicile) near Albany should not be considered a New York statutory resident. The statutory issue is whether a residence represents a "place of abode" if its location renders it unsuitable for use in connection with taxpayer's New York employment, or other activity that accounts for the bulk of the taxpayer's New York presence.[35]

2. Day Count Verification

An issue which should be clarified in the Guidelines is the timing of day count verification. If an audit is ultimately to be resolved on the basis of the Domicile Test, why should a taxpayer be required to produce evidence of his or her whereabouts for every day of the year? Yet, in practice, the taxpayer and the auditor may spend many hours obtaining and reviewing day count verification when the auditor, or the auditor's supervisor, could have determined early in the audit process that the real issue is

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[34] Sponsor's Memorandum in support to Assembly Bill Int. 514, Print 519 of 1922, enacted as L. 1922, ch. 425, which provides in part as follows:

> The other problem has been that of persons who, while really and to all intents and purposes residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents. We have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those home; their offices are in new York; but they vote from their summer residences in New England or their winter residences in California or Florida and claim to be nonresidents.
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> The addition of the words suggested to subdivision 7 of section 260 will do away with a lot of this faking and will probably result in a man's conceiving his domicile to be at the place where he really resides.

[35] See Tax Law § 605(b)(1)(B). Note that under New York Source Income rules this taxpayer would pay tax on all her Wall Street earnings even though she was a non-resident taxpayer.

the Domicile Test. The Guidelines do not provide that detailed day count information is required for a Domicile Test determination, but they also do not caution against allowing the audit to become focused on day count verification before at least an initial determination of domicile has been made and communicated to the taxpayer. (The taxpayer could then request that the day count be verified, or could choose to focus on the domicile issue.)

3. The Definition of a "Day"

The Guidelines suggest that "accidental," "unintentional," or "unforeseeable" days probably should not be counted as New York days,[36] but very little guidance is offered to the auditor on how to identify and treat such days. The Guidelines imply that a taxpayer may be physically present in New York State for some portion of a day without that day counting as a New York day. However, the Guidelines do not explain the circumstances in which this could be permitted. We think the Guidelines should elucidate the *de minimis* test by the use of additional examples.[37] It is all well and good to say "(c)ommon sense must prevail," as the Guidelines do,[38] but the auditor may feel bound to apply an empirical rule (*i.e.*, "*any* portion of a day") rather than to be "subjectively reasonable." Additional examples of *de minimis* presence would obviate this problem.

The Department of Taxation and Finance may wish to consider describing:

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[36] *See* Section 312.5(C) of the Guidelines.

[37] Auditors should understand that while the fractional day may be counted for purposes of the Statutory Residence Test, it should not necessarily be counted for the Time Primary Factor of the Domicile Test.

[38] *Id.*

1) additional activities in which a taxpayer may engage in New York that will not be considered a day in New York, such as being present in New York for the purpose of out-patient medical treatment or being in New York as a party or a witness in litigation;

2) presence in New York of the type demonstrated in the two cases of *Matter of Moed*,[39] in which the taxpayer's presence in New York is completely unrelated to his New York place of abode or connections.

These are difficult concepts about which to develop policy.[40] However, it seems clear that it would be preferable for the Department of Taxation and Finance to set forth examples, rather than to have the policy set by the sometimes haphazard and unpredictable results of judicial intervention.

4. Acceptable Evidence of Day Count

While the Guidelines advise an auditor to look for and accept patterns of living on the part of a particular taxpayer, as provided orally by the taxpayer or the taxpayer's representative, many auditors are inclined to talismanic invocation of the record-keeping requirements of 20 NYCRRR 105.20(c), which requires that a taxpayer maintain evidence of his or her whereabouts on every day of the year. To date, the mandate of this regulation has been unpersuasive to the Tax Appeals Tribunal. Several Tribunal decisions have held that credible and consistent testimonial evidence can adequately prove that no portion of a particular day was spent in New York.[41] Since

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[39] 196 A.D.2d 906 (3d. Dept. 1993) and 204 A.D.2d 852 (3d. Dept. 1994) (Mr. Moed was present in New York State for court proceedings relating to his suspension from the practice of law).

[40] We recognize that creating additional circumstances in which a taxpayer's New York presence will be disregarded under a de minimis principle would result in increased complexity in the administration of domicile issues.

[41] *See, e.g., Matter of Avildsen* [the director], TSB-D-94-(15)-I (May 19, 1994); *Matter of Armel*, TSB-D-95-(28)-(I) (August 17, 1995); *and Matter of Wachsman*, TSB-D-95-(31)-(I) (January 12, 1995).

it is normal for people to display certain predictable and repetitive migratory patterns, and it is abnormal for people to document their presence in a particular location on every day of every year, an auditor should measure the credibility of a personal account in the context of an audit. A matter should not have to be contested before the Division of Tax Appeals before a credible, consistent account of a taxpayer's routine travels will be accepted. However, so long as the Regulation is in place, auditors will (and perhaps should) follow it and not the Guidelines. We recommend that the Department of Taxation and Finance give serious consideration to modifying this Regulation to match its policy and Tribunal decisions on this point.

In a similar vein, while the Guidelines state, for purposes of the Time Primary Factor, that a taxpayer may be asked to substantiate the entries in a diary,[42] in practice, auditors require that diary entries be substantiated, generally in full.[43]

It would be helpful if auditors were required to state which non-New York days they are conceding. Such concessions should be required when the facts support them, and other units of the Department should be bound by the concessions.

B. Relationship of Place of Abode to Day Count

While it is true that "(t)he statutory residency rules do not require that the taxpayer utilize the New York place of abode on every day that the New York presence is

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42 Section 312.4(E)(1)(c) of the Guidelines.

43 One unfortunate audit practice is the comparison of New York utility bills with bills incurred at a non-New York residence -- without adjustment for differing appliances, differing square footage and differing utility rates. The Guidelines should state specifically that relative utility costs are probative only if the foregoing differences and other similar factors have been taken into account.

demonstrated,"[44] perhaps some consideration should be given to whether the proper interpretation of the statute should be to consider the presence of the taxpayer in the state for the requisite 183 days in the context of the place of abode requirement. Thus, for example, a Florida domiciliary with a place of abode in Manhattan may have a *de minimis* contact with New York if she takes German friends to visit Niagara Falls and stays with them in a Buffalo hotel.[45]

IV. Training

While, in general, the Guidelines contain the correct expressions of overall principles, (*i.e.*, auditors should try not to be intrusive, and should look for the taxpayer's general patterns of life), much of the past controversy and communication about the nonresident audit program and the Guidelines has centered around the actual application of the Guidelines in the field. This may, in part, be due to a lack of clarity in the Guidelines on some issues, as discussed above, as well as the failure of some auditors to follow the spirit of the Guidelines in practice.

The Guidelines are comprehensive and, in many areas, quite reasonable, but personal income tax field auditors do not have a uniform, consistent level of

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[44] Section 312.5(C) of the Guidelines.

[45] Again, broadening the circumstances in which a taxpayer's New York presence will be disregarded under a de minimis principle may be expected to give rise to additional complexity in the administration of domicile questions.

understanding and comprehension of the subtleties of the Guidelines. We recommend, regardless of the nature and substance of any revisions, that there be mandatory and thorough training of all field auditors and supervisors concerning the Guidelines and the overall policies underlying the Guidelines. This training could involve participation by private sector representatives, role-playing exercises to increase auditor sensitivity, and candid discussions of appropriate and inappropriate practices. It would probably be a logical and efficient use of the Department's limited training time and resources to consolidate such training with training on the recently executed NESTOA Report.

V. The Effect of the Burden of Proof

Traditionally, the party asserting a change in domicile has been required to show the change by clear and convincing evidence.[46]

The application of the heavy burden of proof in audits results in very different determinations of domicile depending on whether the taxpayer is moving into or out of New York. Taxpayers (and often their representatives) believe that the inconsistent treatment results from the intransigence of the auditor, when in fact it is rooted in the burden of proof. By way of example:

1) If a phone call is made from a New York apartment by a taxpayer seeking to prove that he or she was not present in New York, an auditor will initially conclude that the taxpayer was in New York. In many cases the taxpayer will have difficulty showing by clear and convincing evidence that this was not the case. On the other hand, if a phone call is made from the out-of-state abode, the auditor will often determine that the identity of the caller cannot be determined. In this case, also, the taxpayer may have difficulty demonstrating the converse.

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[46] See Newcomb, supra footnote 33.

2) If a taxpayer moves from Florida to New York, and intends to move back to Florida for retirement on his 65th birthday, the taxpayer's domicile has not, in theory, changed. It is unlikely, however, that an auditor will accept this conclusion, even if the taxpayer maintains a permanent place of abode in Florida, and continues to use health, legal and accounting professionals in that State. On the other hand, a person moving from New York to Florida under identical circumstances would doubtless be considered a New York domiciliary on audit.

We do not suggest that the burden of proof be changed, but we think that auditors should be alert to anomalies that the burden may produce in the audit of an individual taxpayer.

VI. Relationship with Multistate Initiatives

We applaud the efforts New York has made by working with other NESTOA States to try to develop more uniformity and consistency in the application of residency principles. Some States (*e.g.*, Florida) which have many overlapping residency and domicile issues with New York are not members of NESTOA. The Department of Taxation and Finance should begin multistate dialogues with such States.