

Snowbird? Or the real deal?

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determine taxpayer intent.

Sometimes, though, auditors don't even have to reach the issue of taxpayer intent. New York has a "statutory residency" provision (Tax Law Section 605(b)) that says, regardless of your "intent," that you're a New York State resident for tax purposes if you "maintain a permanent place of abode" in New York, "AND (emphasis added) spend more than one hundred eighty three days" a year there.

If you "flunk" the 605(b) test, you lose the audit. But even if you "pass" the 605(b) test, you can still lose the audit, based on the auditor's evaluation of where you "intend" your domicile to be.

In trying to arrive at a taxpayer's intent, the guidelines direct auditors to examine five "primary" factors:

1. The Home. While the guidelines stress that "retention of a residence in New York is not, by itself, sufficient evidence to create a change in domicile," auditors

are told to look carefully at the size, the value and the nature of use of each residence, in addition to analyzing what types of "employees" (domestic help, groundkeepers, chauffeurs, etc.) are utilized at each location. If you claim to be "selling" your home in New York, you will undoubtedly be asked to produce proof that you have really moved out, as well as contracts with real estate brokers and the like. There's no distinction between owning and renting. The same rule applies: Did you intend to leave it?

2. Business Involvement.

Numerous non-resident audits are aimed at entrepreneurs who claim to have "sold" their business in New York (to their children or other insiders?) retired and moved to Florida. If you are in this position, auditors will look carefully at your continuing "active participation" and/or any "substantial investment in, or management of" that business; and your "active role in day-to-day decisions." Remaining "in constant communication" with new management, customers or vendors can weigh against a taxpayer asserting a change of domicile. Auditors will ask for phone and e-mail records, correspondence and other evidence of your involvement with the New York business in trying to determine your intent.

3. Time. You have "passed" the 605(b) test, but auditors are still told to look at a "quantitative analysis of time spent in New York in relationship to...." other locations. You would be a target of this factor if, for example, you spent about 5-6 months in Florida for many years and then, without changing much else, you went to 7 months in the year you claimed a "change" in domicile.

4. Items Near and Dear.

Sometimes referred to as the "teddy bear rule." If you move to Florida but left behind your "sentimental" possessions (family heirlooms, works of art, books, antiques, family photo albums, etc.) which "enhance and add quality to the individual's lifestyle," the auditors will ask for bills of lading, insurance policies and other records to show where the items are actually located during the audit years.

5. Family Connections.

If, like one taxpayer admitted in a losing case, you express a "commitment" to spend "as much time as possible" in New York with children and grandchildren, this factor could tip the balance in a non-resident audit, even though auditors are cautioned to be aware of the "intrusive nature" of the factor and to avoid the analysis unless it's absolutely necessary for their determination.

The audit guidelines suggest an examination of "other" factors in the unlikely

So you recently moved from New York to Florida? Abundant sunshine, no income tax, no estate tax — wonderful!

One problem: New York State tax authorities may not think you really moved! And they're assessing heavy income taxes, interest and penalties for the years you thought you had changed your domicile to Florida.

New York domiciliaries pay State income taxes on all income earned. Florida domiciliaries pay New York income taxes only on income derived from "New York sources," like rent received from a building you own in New York State. In an audit, taxpayers have the burden of showing by "clear and convincing evidence" that they had the intention of moving to Florida permanently, not simply that they went through the motions of "getting here." You can have several "residences," but only one "domicile" — the place you always call "home" and the place you always "intend" to return.

"Intent" is a very subjective test, but auditors in New York (and to a lesser extent other states with income taxes and estate taxes) use written audit guidelines to help them

event a determination of domicile cannot be made on the primary factors. These include the address you use to receive financial records and other important information, physical location of safe deposit boxes, location of vehicle registrations, voting status, listing of domicile in legal documents, etc.

The guidelines recite two “non-factors” NOT to be considered: Where you make charitable contributions and where you volunteer your time to charitable organizations. But if you move to Florida, you would be smart to change some of your giving and volunteering routine to demonstrate your intent to establish new roots.

At the commencement of a non-resident audit, you will receive a friendly letter from the NYS taxing authorities and a questionnaire with 10 seemingly straightforward questions. It would be wise to consult with your CPA, lawyer or other professional advisor before filing it out and sending it back.

Mike Stafford, a long-time member of The Florida Bar, currently serves as out-of-state representative on the Executive Council of The Florida Bar’s Real Property, Probate and Trust Law Section. He previously served as Chair of The Florida Bar Long Range Planning Committee, a member of The Florida Bar Board of Governors, a member of the Board of Directors of The Florida Bar Foundation, and two terms as a member of The Florida Bar Probate Rules Committee.



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