

# Are You Sure You Left New York?

*(The Tax Man May Not Think So)*

For tax purposes, leaving New York is more than simply living in Florida. Here's what you need to know.

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In our desire to “get here” and enjoy the tax benefits as soon as possible, we may not plan the move properly. As a result, The New York State Department of Taxation and Finance (NYS DTF), and to a lesser extent the taxing authorities in other “former” states, may take the position that you never really left, conducting “non-resident audits” that could subject you to state income taxes, and after you die, state estate taxes, in your “former” state.

Ever since the early 1990s, NYSDTF has had a separate unit to conduct non-resident audits, resulting in several hundred million dollars in extra tax receipts annually.

What are the auditors looking at? The short answer is “domicile.” You can have only one “domicile,” even though you have multiple “residences.” New York and virtually all other states define “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.”

Home (domicile) is where the heart is! So “domicile” is in large measure a matter of intent — where do you intend your home to be? As subjective as that standard might appear, that’s what the auditors are trained to examine.

Sometimes, however, 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,” 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.

Obviously, these types of audits can be extremely subjective, so the NYSDTF has issued a set of detailed guidelines for its auditors, attempting to bring uniformity and common sense to the process. The lengthy guidelines, updated in June of 2012, must be followed by the auditors.

Once a domicile is established in a certain state, it remains your domicile until you change it. So if you moved from New York to Florida, the burden is on you, the taxpayer, to show by “clear and convincing” evidence that you *intended* to change your domicile.

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, groundskeepers, 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 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 to 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.** This is sometimes referred to as the “teddy bear rule.” If you moved 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.

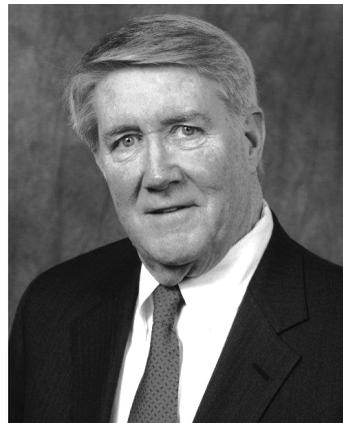
**5. FAMILY CONNECTIONS.** If, like one taxpayer admitted in a losing case, you express a

“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 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 NYSDTF and a questionnaire with 10 seemingly straightforward questions. It would be wise to consult with your CPA, lawyer or other professional adviser before filing it out and sending it back. ■



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