

## Trust & Estates

WWW.NYLJ.COM

MONDAY, AUGUST 31, 2015

# Snowbirds Beware: The Ins and Outs Of Nonresident Income and Estate Tax

BY MARION HANCOCK FISH AND  
JAIME J. HUNSICKER

It's that time of year when the snowbirds are breaking out their suitcases and making travel plans to flee the Empire State before the snowflakes start flying. Anyone who has experienced the past few New York winters can appreciate the desire to avoid the back-breaking shoveling, frozen eyelashes and wind-burned cheeks of a typical New York February.

While weather is certainly one incentive to fly off to southern climates, many snowbirds, some of whom may be clients, are heading south for an additional reason—to establish or maintain their non-New York residency for tax purposes.

This article provides an overview of New York income and estate taxation rules for nonresidents. While recent changes in the law have reduced the impact of the New York estate tax, the possibility of incurring New York income tax remains a strong motivator to establish residency outside New York.

MARION HANCOCK FISH is a partner at Hancock Estabrook and chair of the Trusts & Estates section of the New York State Bar Association. Jaime J. Hunsicker is an associate at the firm.

### Personal Income Taxation

New York taxes residents of the state on all income from all sources, with the highest rate being 8.82 percent.<sup>1</sup> In contrast, nonresidents of New York are only subject to personal income tax for income with New York sources.<sup>2</sup> New York source income is defined as the sum of the income, gain, losses and deductions derived from or connected with New York sources; for example, income from ownership of New York real or tangible property, or from services or business carried on in the state.<sup>3</sup> In other words, an individual who can establish legal residency outside New York will only be obligated to report and pay tax on income actually generated in New York.

**Defining Residency.** New York tax laws and the regulations of the New York State Department of Taxation and Finance (the Department) are aimed at thwarting “multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes ... but ... claim to be nonresidents.”<sup>4</sup> Between the tax statutes, regulations, countless cases, administrative hearings and the nonresident audit guidelines released by the Department, there

is ample guidance on how to determine residency.

Section 605(b) of the New York Tax Law sets forth two separate analyses in determining a taxpayer's residency status. The first question is whether the taxpayer is domiciled in the state. An affirmative finding under §605(b)(1)(A) subjects the taxpayer to tax as a New York resident. Even if not domiciled here, however, the taxpayer may be subject to residency taxation under the two-pronged test of whether the taxpayer (1) maintains a permanent place of abode in New York and (2) spends more than 183 days in the state.<sup>5</sup> This §605(b)(1)(B) test is what often trips up taxpayers who maintain homes here after moving to warmer and tax-friendlier states.

**Establishing Domicile.** Although in everyday language “residence” and “domicile” are used interchangeably, here they have different meanings. “Domicile” is “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.”<sup>6</sup> A person can only have one domicile at any given time, but may have several residences.<sup>7</sup> The determination of domicile is considered a subjective

inquiry, with the Court of Appeals offering examples in its decisions, such as: “If at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary,”<sup>8</sup> and “[a] change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention.”<sup>9</sup>

While these words from the Court of Appeals are helpful, the comprehensive audit guidelines of the Department are also useful. The Department offers five primary factors for determining domicile:<sup>10</sup>

1. Home: the individual’s use and maintenance of a New York residence compared to the nature and use patterns of a non-New York residence;
2. Active Business Involvement: the individual’s pattern of employment as it relates to compensation derived in the year being reviewed;
3. Time: an analysis of where the individual spends time during the year;
4. “Near and Dear”: the location of items the individual holds “near and dear” to his or her heart, or items with significant sentimental value; and
5. Family Connections.

If these five primary factors are insufficient to reach an objective determination of domicile, auditors are directed to consider “other factors” such as: addresses on financial records, location and registration of automobiles, voter registration and location of safe deposit boxes.<sup>11</sup> For the record, there are also “non-factors” considered irrelevant in

determining domicile including: where the taxpayer’s will is probated, mere location of bank accounts, charitable contributions to organizations in the state and volunteering for nonprofit organizations.<sup>12</sup>

*The Statutory Resident Test.* Under §605(b), the taxpayer must also pass the “statutory resident” test: Does the taxpayer maintain a permanent place

---

An individual who can establish **legal residency outside New York** will only be obligated to report and pay tax on **income actually generated in New York.**

of abode in the state and spend in the aggregate more than 183 days here?<sup>13</sup>

While the Tax Law does not define a “permanent place of abode,” the Department considers it to mean a residence that “you maintain, whether you own it or not; and that is suitable for year-round use.”<sup>14</sup> The regulations further define a “permanent place of abode” as a “dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse.”<sup>15</sup>

It is the 183-day prong of the statutory residency analysis that compels snowbirds to count with care their New York days. A Third Department decision issued in May 2015 held that when calculating the days a taxpayer spends in the state, “day” is defined as “any part of the day” and does not require a 24-hour stay.<sup>16</sup> To hold otherwise, said the court, would allow a person to manipulate the system by “arriving shortly after midnight one day and then leaving shortly before midnight the next day to have a stay of slightly under 48 hours not count as a single day.”<sup>17</sup> The court noted that this “would be at odds with the statutory purpose.”<sup>18</sup>

Once classified as a nonresident, the out-of-stater may still pay income tax to New York, but only on New York source income.<sup>19</sup>

### Estate Tax

On March 31, 2014, Gov. Andrew M. Cuomo signed into law substantial changes to the estate tax, designed in part to match the higher tax thresholds of federal estate tax. Beginning April 1, 2014, the estate tax exclusion amount was increased from \$1,000,000 to \$2,062,500 with incremental increases in the exclusion amount until 2019 when the exclusion will be the same as the federal amount, projected to be \$5,900,000, adjusted for inflation.<sup>20</sup>

Under the new laws, most New Yorkers and former New Yorkers are no longer worried about tax at death. Yet, wealthier snowbirds who maintain property in New York may still face filing requirements and nonresident estate tax.

Estate tax applies to the estate of an “individual who at his or her death was a resident of New York State.”<sup>21</sup> Unlike the income tax rules, the estate tax side does not define “resident.” As a matter of practice, courts will consider many of the same facts and circumstances that are articulated above for income tax purposes to determine residency in the estate tax context.<sup>22</sup>

A nonresident of New York is required to file a New York estate tax return if “the estate includes real or tangible personal property having an actual location in NYS and the federal gross estate plus any taxable gifts made while the individual was a resident of NYS exceeds the New York basic exclusion amount ...”<sup>23</sup>

**Real, Tangible or Intangible.** Property with New York ties that can be categorized as intangible rather than real or tangible is not subject to New York estate tax. Tangible personal property, defined in §951- a, refers to a person’s “stuff” and includes such

items as cars, artwork or jewelry.<sup>24</sup> “Intangible property” includes money, credits and securities within the state, except to the extent such property is part of a business, trade, profession or occupation carried on in New York.<sup>25</sup> A personal bank account maintained in New York by a Florida resident is a typical example of an intangible asset located in New York, and is treated as sited outside New York for estate tax purposes. This conclusion is required by New York’s state constitution which prohibits the state from imposing estate tax on a nonresident’s intangible property even if the property is located in the state.<sup>26</sup>

To avoid the New York estate tax return filing requirements and taxation, taxpayers may eliminate ownership or change the structure of ownership of real or tangible property by use of trusts and business entities. A revocable trust that holds title to the trust grantor’s real property directly, with nothing more, does not convert the property to an intangible asset for estate tax purposes.<sup>27</sup> What strategies might the nonresident taxpayer consider? Recent advisory opinions of the Department on business entities holding real estate offer instructive insights. For example, a nonresident’s ownership of a single member limited liability company (disregarded for federal income tax purposes) which holds title to a New York condominium does not escape the New York estate tax regime.<sup>28</sup> Conversely, interests in a limited liability company (LLC) which is classified for tax purposes as a partnership constitutes an intangible asset. The real estate held in such an LLC is not part of the nonresident’s New York estate.<sup>29</sup> Similarly, stock in a subchapter S corporation holding New York real property is considered intangible, provided the corporation is engaged in business activity.<sup>30</sup>

**Filing Requirements and Calculation of Tax.** Before April 1, 2014, executors of estates of nonresidents with New York real and tangible property were required to file and pay tax without the benefit of the estate tax exclusion amount.<sup>31</sup> The tax was calculated with reference to the ratio of the New York real and tangible personal property to the federal gross estate.<sup>32</sup> Now, if the total estate is less than or equal to the New York exclusion amount, currently \$3,125,000, no filing is required or tax due.<sup>33</sup> If the federal gross estate exceeds the New York exclusion and the estate holds New York real or tangible property, the executor must file a return.<sup>34</sup> New York estate tax is due when the value of the New York situs property exceeds the exclusion.<sup>35</sup>

The new estate tax rules include a gift add-back requirement for certain gifts made within three years of death.<sup>36</sup> Logically, this gift add-back rule does not apply to gifts made when the decedent was not a resident of New York and should not apply to gifts of intangibles, with a narrow exception.<sup>37</sup>

Regardless of level of wealth and income, snowbirds are well advised to consider their tax plans in advance of packing their bags. Taxpayers may want to deploy strategies such as transferring or restructuring New York assets, reducing New York source income and implementing snowbird calendars. With forethought, clients can steer clear of the snowbanks of New York taxation.

.....●●.....

1. N.Y. TAX LAW §612; Instructions for Form IT-201-I (2014), [www.tax.ny.gov/pdf/current\\_forms/it/it201i.pdf](http://www.tax.ny.gov/pdf/current_forms/it/it201i.pdf).
2. N.Y. TAX LAW §631(a); N.Y. TAX LAW §631(b)(1).
3. N.Y. TAX LAW §631(b)(1).
4. *Gaied v. NYS Tax Appeals Tribunal*, 22 N.Y.3d 592, 983 N.Y.S.2d 757, 760 (2014) (quoting *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530, 535, 683 N.Y.S.2d 44 (1998)).
5. N.Y. TAX LAW §605(b)(1)(B).
6. N.Y. COMP. CODES R. & REGS. tit. 20 §105.20(d)(1) (2015).
7. *Matter of Trowbridge*, 266 N.Y. 283, 289 (1935).
8. *Id.* at 291-92.

9. *In re Newcomb’s Estate*, 192 N.Y. 238, 251 (1908).
10. State of N.Y. Dept. of Tax and Finance, *Nonresident Audit Guidelines* (2014), [www.tax.ny.gov/pdf/2014/misc/nonresident\\_audit\\_guidelines\\_2014.pdf](http://www.tax.ny.gov/pdf/2014/misc/nonresident_audit_guidelines_2014.pdf).
11. *Id.*
12. *Id.*; N.Y. TAX LAW §605(c).
13. N.Y. TAX LAW §605(b)(1)(B); *Gaied*, 983 N.Y.S.2d at 760.
14. N.Y. Tax Bulletin TB-IT-690, Dec. 15, 2011; *Gaied*, 983 N.Y.S.2d at 760.
15. N.Y. COMP. CODES R. & REGS. tit. 20 §105.20(e)(1) (2015).
16. *Zanetti v. NYS Tax Appeals Tribunal*, 128 A.D.3d 1131, 8 N.Y.S.3d 733, 735 (3d Dept. 2015), appeal denied 2015 WL 3892571 (June 25, 2015).
17. *Id.* at 1133.
18. *Id.*
19. N.Y. TAX LAW §631(a).
20. N.Y. TAX LAW §952(c)(2).
21. N.Y. TAX LAW §952(a).
22. *In re Daly’s Estate*, 178 Misc. 943, 36 N.Y.S.2d 954, 959 (Surr. Ct. New York Cty. 1942) (focusing on the decedent’s manner of living, intent and conduct to determine residency at the time of her death).
23. N.Y. TAX LAW §971(a)(2); Instructions for Form ET-706 (4/14, revised July 27, 2015), [www.tax.ny.gov/pdf/2015/et/et706i\\_414.pdf](http://www.tax.ny.gov/pdf/2015/et/et706i_414.pdf).
24. N.Y. TAX LAW §951-a(c). A nonresident’s artwork sited in New York at the time of such taxpayer’s death is not subject to New York estate tax if such work is only in the state because it was loaned to a public gallery or museum for exhibition purposes. N.Y. TAX LAW §960(d).
25. N.Y. Const. Art. XIV, §3; New York’s Tax Policy Relating to the Taxation of Intangible Personal Property of Nonresidents, 1992 WL 319312, at \*2 (Oct. 9, 1992).
26. *Id.*
27. See Nina Krauthamer, “New York Estate Tax on Real and Tangible Property—When Intangibles Become Tangible,” located at [http://www.americanbar.org/content/dam/aba/publishing/rp/ereport/2013/1\\_february/te\\_krauthamer\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/rp/ereport/2013/1_february/te_krauthamer_authcheckdam.pdf) (last visited July 31, 2015).
28. N.Y. Advisory Opinion No. TSB-A-15(1)M, May 29, 2015.
29. N.Y. Advisory Opinion No. TSB-A-10(1)M, April 8, 2010.
30. N.Y. Advisory Opinion No. TSB-A-08(1)M, Oct. 24, 2008.
31. N.Y. TAX LAW §960, eff. Aug. 20, 2004-March 31, 2014.
32. *Id.*
33. N.Y. TAX LAW §960(b).
34. *Id.*
35. *Id.*
36. N.Y. TAX LAW §954(a)(3).
37. *Id.*; N.Y. TAX LAW §960; TSB-M-15(3)M, July 24, 2015; see also Instructions for Form ET-706.