ESCAPING YOUR FORMER STATE'S TAXING AUTHORITY

Becoming a Florida Resident is Easy!
Escaping Your Former State's Taxing Authority is the Hard Part!

Prepared By

Craig R. Hersch
Florida Bar Board Certified Wills, Trusts & Estates Attorney, CPA
Sheppard Law Firm

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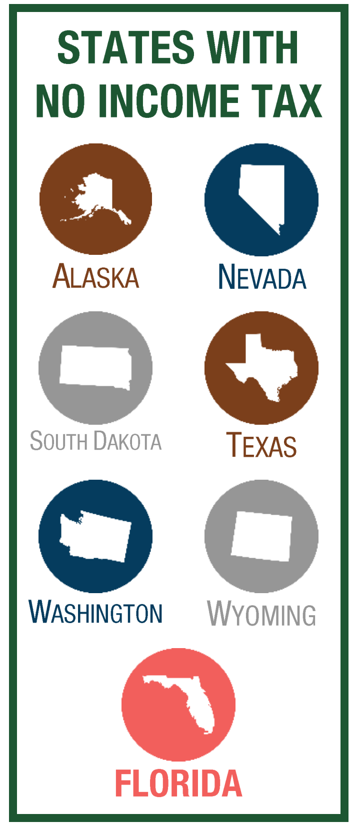
If you've relocated to Florida, are considering relocating to Florida, and you've paid or are currently paying state income tax, and you would like to read an in-depth analysis of these issues, then this paper is for you.



Forty-three states impose some level of income tax in addition to the federal taxes everyone pays. While Florida imposes no state income tax (or gift, estate, generation skipping transfer, or intangible tax), and becoming a resident of Florida is relatively easy, most clients don't understand that the real challenge lies in escaping your former state's taxing authority.

Here I'm going to review factors that state department of revenues consider when imposing tax on their current and former residents.

Because of budget shortfalls, many states have become surprisingly aggressive in pursuing those who have claimed residence in Florida and have stopped paying tax to their former state of residence.

When Can a State Tax Income?

The United States Supreme Court has set rules for the state taxation of residents and nonresidents. Thus, regarding residence, the Court declared in 1995 that:

> [A] jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction...

Regarding nonresidents, though, the Court stated:

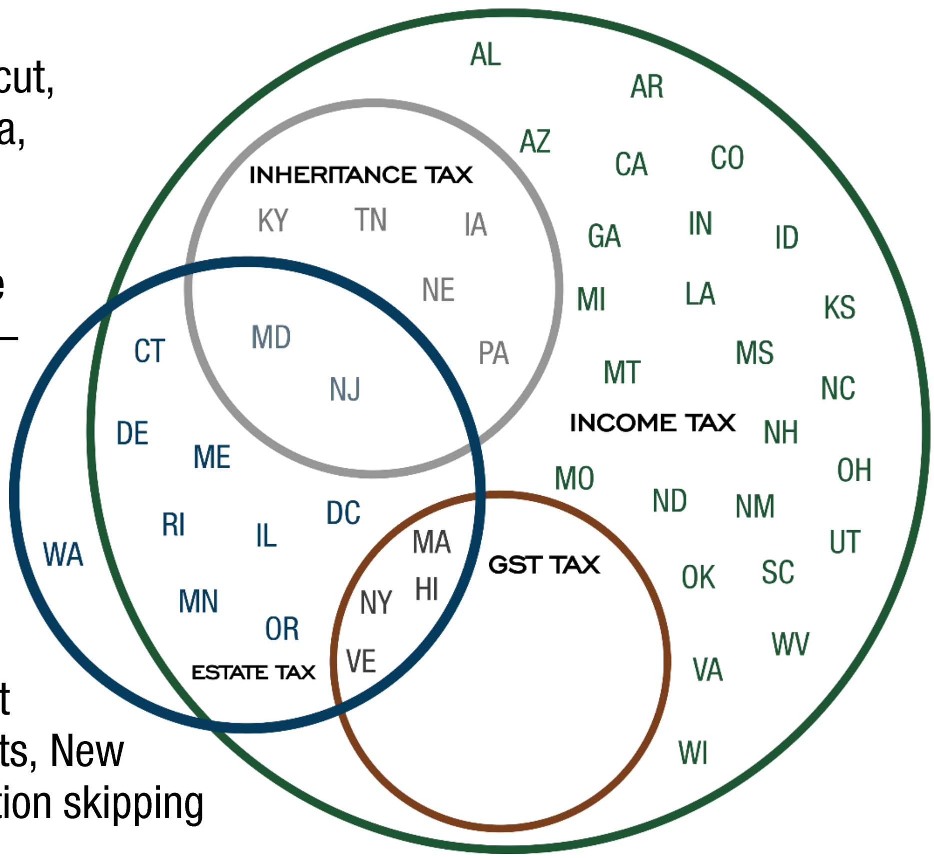
> FOR NONRESIDENTS..., JURISDICTIONS GENERALLY MAY TAX ONLY INCOME EARNED WITHIN THE JURISDICTION.

As a result, being classified as a resident or nonresident for state income tax purposes can make a huge difference. Whereas a resident is taxable on all income, a nonresident only is taxable on income attributable to real property, tangible personal property and business activity within the state, typically referred to as "source income". Many nonresident individuals, estates and trusts have little or no source income.

State Level Transfer (Gift, Estate, Generation Skipping Transfer) Taxes

In addition to income taxes, a resident should also be aware of state gift, estate and inheritance taxes.

As of 2020, 15 states – Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont and Washington – levy an estate tax. Seven states – Iowa, Kentucky, Maryland, Nebraska, New Jersey, Pennsylvania and Tennessee – impose an inheritance tax. Just two states, Connecticut and Minnesota, impose a gift tax. Just four states, Hawaii, Massachusetts, New York and Vermont have a generation skipping transfer tax.



Long ago, the Supreme Court established that only the state where an individual is domiciled at death may impose a death tax on intangible property (such as money, stocks, bonds and mutual funds). A state may impose a death tax on any real property situated within the state, regardless whether it is owned by a nonresident.

What's the Difference Between Estate & Inheritance Tax?

Estate Tax

A tax on the balance sheet of the decedent. This tax is imposed on the value of the decedent's estate when he or she dies

Inheritance Tax

A tax imposed on a person who inherits property from another. There is no federal inheritance tax, but some states do impose one.

What Defines Residence?

The question, "what defines residence?" is at the heart of these matters. There is no uniform definition. Each state has its own laws that determine whether a taxpayer is within their taxing authority's jurisdiction.

This paper will focus on residency for tax purposes. There are other definitions of residency, such as that for university students who wish to qualify for in-state tuition. Often those definitions are quite different. On taxes, there are even different definitions within the same state for individual, estate and trusts subject to tax.

Defining Florida Residence

Let's start with Florida. You may decide to file a Florida declaration of domicile evidencing your status as a Florida resident. Within this document you must declare whether you also maintain another place or places of residence in another state. You must also confirm that your residence in the State of Florida constitutes your predominant and principal home if you do.

You must sign the Florida Declaration of Domicile in the presence of a notary public or the deputy clerk of a Florida court. The Declaration must then be recorded in the public records of the county in which you reside. There's a minimal fee for recording.

While signing and recording a Florida Declaration of Domicile isn't required to establish your Florida residency, it does publicly notify your intent.

You can and should do other things to establish Florida residency, which are often more important than the domicile declaration. The following list typically holds greater weight when escaping a former state's taxing authority:

- [ ] Obtain a Florida driver's license
- [ ] Register your vehicles in Florida
- [ ] Register to vote and actually vote in Florida
- [ ] Open local bank accounts
- [ ] Apply for the Florida homestead exemption
- [ ] Update your estate plan
- [ ] Name a Florida physician(s) as your primary care doctor
- [ ] Obtain Florida health insurance or Florida Medicare supplement plan
- [ ] Change subscriptions and passport to reflect new domicile
- [ ] List your Florida residence as the address for your tax return and credit card statements
- [ ] Join a local house of worship such as a church, synagogue or mosque
- [ ] Spend more time in Florida than in any other state
- [ ] Relocating belongings and family pets
- [ ] Cut ties with your old state
    - [ ] Revoke a homestead declaration if your former state has one
    - [ ] Become an out of state member of your house of worship
    - [ ] Become an out of state member to your country club

☐	Don't hold offices in your former state's homeowner's association
☐	Don't hold political offices (Chairman of Republican or Democrat Party of your former county of residence as an example)
☐	Don't list your former home state as your address on social media
☐	Filing a final resident state tax return in your former state
☐	Obtaining non-resident licensing privileges in former state

Even after doing many of these things, individuals have had been assessed state income tax in their former home states. Each case is fact specific, so consider how you might appear to a tax collector after reading this entire outline.

Some Interesting Cases

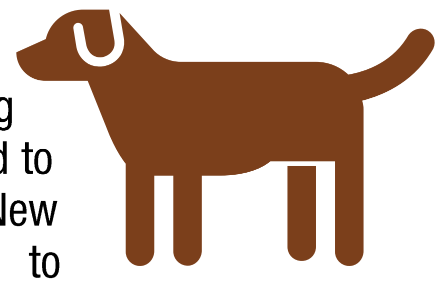
Whether one successfully escapes a former state's taxing authority is extremely fact specific. Consequently, we're sharing materials that we've studied demonstrating the precarious nature of the law with respect to state taxation. While not all cases involve someone attempting to escape to Florida, the concepts apply to nearly anyone who try to move from a taxable jurisdiction to one that does not impose state level taxes.

The following materials are adapted from and courtesy of Jonathan G. Blattmachr of Pioneer Wealth Partners, LLC in New York City, G. Michelle Ferreira of Greenberg Traurig in San Francisco, and Diana S.C. Zeydel of Greenberg Traurig in Miami, from their 2020 Heckerling Institute on Estate Planning Special Session, and from Richard W. Nenno, from his 2014 Heckerling Institute general session (pages 154 -174 of his outline). Mr. Nenno is the Managing Director and Trust Counsel at Wilmington Trust Company in Wilmington, Delaware.

The Heckerling Institute is a high-level estate planning conference conducted by The University of Miami Law School. There are more than fifty such sessions of various estate planning and tax topics conducted at the annual conference. Craig Hersch has attended this conference for more than thirty years. Michael Hill has attended this conference for nearly twenty years.

Home is Where Fido Lives

In a New York Division of Tax Appeals case, In RE Gregory Blatt No.826504. the taxpayer owned an apartment in New York City, working there for several years before taking a position as CEO of Match.com in Dallas, Texas. Texas, like Florida, does not impose any state income tax. The taxpayer never emotionally considered Dallas a permanent home, maintaining his abode in New York City even while he made a life for himself in Dallas. Despite doing nearly everything one would do to change residency, the New York Division of Taxation audited his 2009 and 2010 returns, assessing state income tax, interest and penalties. The taxpayer took it to court. The administrative judge's ruling in favor of the taxpayer, reversing of the assessment seemed to hinge on the critical fact the taxpayer moved his old dog from New York to Dallas. He even rented a larger apartment to accommodate his dog.



New York Division of Taxation Nonresident Audit Guidelines

A review of the New York State Taxation Department's nonresident audit guidelines is enlightening:

- Domiciled in the state is defined under the NY statutes as "the place the individual intends to be such individual's home and intends to return whenever absent." It also includes those not domiciled in the state, but maintains a permanent place of abode and spends more than 183 days of the taxable year in the state (with exceptions for active service)
- Change of domicile requires intent and occupancy
- A tax motivated intent to change domicile is "immaterial"
- The relative size, value and nature of use of the residences can be factored into play
- Whether the individual is actively involved in business in New York
- Where family heirlooms, collections, personal items that enhance the quality of lifestyle (such as a wine collection kept in a cellar)

- Commitment to return to spend time with family
- Where children attend school
- Nonfactors under the NY guidelines:
    - Location of the probate of individual's will
    - Location of passive partnerships
    - Location of bank accounts
    - Contributions to political candidates or causes
    - Location where tax returns are filed from
    - Charitable contributions and other volunteer services
- Safe harbor if the individual spends less than 30 days in New York – then not considered domiciled there;

It's likely that other states have similar guidelines for their state tax auditors to follow.

Everything Done Right Except...

In Bartholomew v. D.C. Office of Tax and Revenue,[1] the taxpayer lived in the District of Columbia until May 2002, at which point he moved to the United States Virgin Islands ("USVI") to begin a new job.[2] The USVI has very favorable tax laws for its residents, so the taxpayer wished to take advantage of those laws.

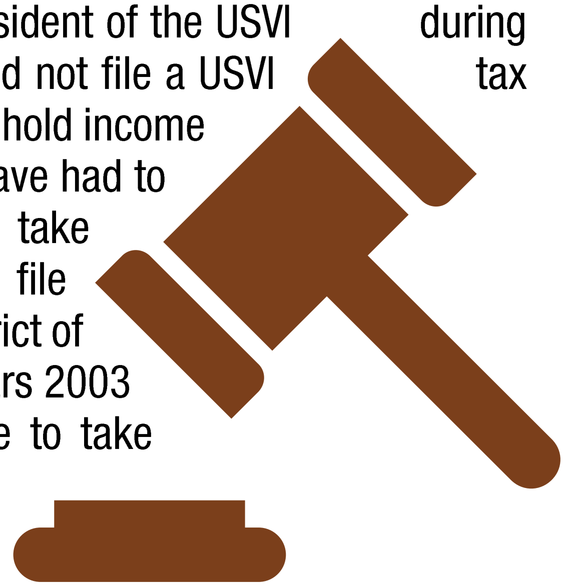
His wife and child remained in the District of Columbia, and he returned to live with them in the District of Columbia in May 2005 after he was diagnosed with health issues.[3] The taxpayer appealed the determination of the District of Columbia Office of Tax and Revenue ("OTR") and the subsequent affirmation by the Office of Administrative Hearings ("OAH") that, for the tax years 2003 and 2004, he was not a bona fide resident of the USVI, that he was domiciled in the District of Columbia, and that he thus should have filed an income-tax return with, and paid tax to, the District of Columbia for those years.[4] The OTR had originally determined that he owed a total of $3,228.71 for 2003 and 2004, but this amount was increased to $8,719.00, and later to $10,997.00.[5]

On hearing the appeal, the District of Columbia Court of Appeals noted that bona fide residents of the USVI who file a USVI income tax return and pay any tax owed to the USVI may be exempt from having to file an income-tax return with the United States and any state for a given tax year, regardless of where they are considered to be domiciled.[6] The court thus

had to first consider whether the taxpayer was a bona fide resident of the USVI in order to determine whether he could take advantage of this exemption for 2003 and 2004.

Although Congress amended the Internal Revenue Code in October 2004 to define "bona fide resident" of the USVI and similar jurisdictions for tax purposes, the court had to look to caselaw to determine the meaning of that term during the tax years in question.[7] The court looked to Sochurek v. Commissioner, which outlined eleven factors for determining foreign residency for United States tax purposes,[8] Vento v. Director of Virgin Islands Bureau of Internal Revenue, which condensed the eleven Sochurek factors into four groups: 1) the taxpayer's intent; 2) the physical presence of the taxpayer; 3) the taxpayer's social, family, and professional relationships; and 4) the taxpayer's own representations regarding his residency.[9] The court in Bartholomew adopted these four Vento categories "as the appropriate test to determine whether an individual taxpayer was a bona fide resident of the USVI."[10]

The court considered all of the evidence, including that the taxpayer "was employed by the government of the USVI and actually lived and worked there full-time for three years, with only work-related visits to the District when he would also see his family, until he unexpectedly resigned due to illness and returned to the District of Columbia in 2005."[11] Based on this evidence regarding the taxpayer's intent, physical presence, professional relationships, and his own representations, the court rejected the findings of the OTR and OHA and determined that he was a resident of the USVI during 2003 and 2004.[12] However, the court noted that he did not file a USVI tax return for the years at issue, although the USVI did withhold income tax from his paychecks.[13] Since the taxpayer would have had to file an income tax return with the USVI in order to take advantage of the exemption from the obligation to file income-tax returns with the United States and the District of Columbia, and since he failed to do this for the tax years 2003 and 2004, the court determined that he was unable to take advantage of the exemption even though he was a bona fide resident of the USVI.[14]



Since the taxpayer failed to take advantage of the exemption, it was then necessary for the court to determine whether he was domiciled in the District of Columbia for income-tax purposes during 2003 and 2004.

Since he was unquestionably domiciled in the District of Columbia before 2002, the court had to determine whether he successfully changed his domicile to the USVI for the tax years at issue.[15] To do this, "Bartholomew needed to show that he was physically present in the USVI and that he intended to abandon his old domicile in the District of Columbia and stay in the USVI for an indefinite period of time."[16]

Although it was clear that the taxpayer was physically present in the USVI, the OAH had determined that he did not have the requisite intent to abandon his previous domicile and to remain indefinitely in the USVI.[17] The court looked to the facts that his family remained in the District of Columbia the entire time he was working in the USVI, that he eventually returned to live with his family in the District of Columbia, that he used his family's District of Columbia address as his home address on his federal tax returns for the years at issue, and that he was unable to substantiate his testimony regarding his supposed cultural and social ties to the USVI.[18] The court also noted that he continued to do most of his banking in the District of Columbia during the years at issue and that "Bartholomew did not take other steps that would have demonstrated his intent to establish himself as a domiciliary of the USVI, such as obtaining a driver's license or registering to vote."[19] After considering all of the evidence, the court agreed with the OAH and determined that the taxpayer did not succeed in changing his domicile from the District of Columbia to the USVI for 2003 and 2004.[20]

Since the taxpayer failed to take advantage of the exemption from filing federal and District of Columbia tax returns and since he did not succeed in changing his domicile from the District of Columbia to the USVI, the court affirmed the OAH's holding affirming the OTR's determinations that he should have filed tax returns with, and that he owed income tax to, the District of Columbia for 2003 and 2004.[21]

Florida Taxpayers Successfully Fought Massachusetts Income Tax Assessment

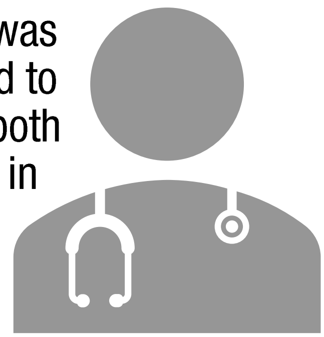
In Evans v. Commissioner of Revenue,[22] the taxpayers, husband and wife, appealed the Massachusetts Commissioner of Revenue's assessment of Massachusetts income tax owed for the tax years 2001 through 2005.[23]

The Commissioner had assessed income tax in the amount of $102,057, plus interest, for tax year 2001; $120,348, plus interest and penalties, for tax years 2002 through 2004; and $131,115, plus interest and penalties, for tax year 2005.[24]

The Appellate Tax Board of the Commonwealth of Massachusetts ("the Board") noted that "residents of Massachusetts are taxed on all of their income, regardless of the source . . .. In contrast, non-residents are taxed only on income derived from Massachusetts sources."[25] The Board thus had to determine whether taxpayers were residents of Massachusetts during tax years 2001 through 2005. The Board looked to the definition of "resident" provided by the Massachusetts General Laws: "(1) any natural person domiciled in the commonwealth, (2) any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth, including days spent partially in and partially out of the commonwealth."[26]

The first issue the Board had to decide in determining whether the taxpayers were residents of Massachusetts, then, was whether they were domiciled in Massachusetts during tax years 2001–2005. They were domiciled in Massachusetts before 2001, so the Board had to determine whether they had successfully changed their domicile to Florida beginning in 2001. The Board noted that "Massachusetts follows the common law rule that a person with legal capacity is considered to have changed his or her domicile by satisfying two elements: the establishment of physical residence in a different state and the intent to remain at the new residence permanently or indefinitely."[27]

After the wife was diagnosed with multiple sclerosis ("MS"), she and her husband decided to move from Massachusetts to Florida since they thought it would be better for her health.[28] They leased condos in Florida beginning in September 2000 and throughout much of 2001 through 2004 while they searched for a home to purchase.[29] They bought a condo in Florida in March of 2004 and, after extensively renovating the condo, moved in during the spring of 2005.[30] In 2000, the husband terminated the lease for an office located in Massachusetts that was used by his employee of his companies, and his companies qualified to do business in Florida starting that same year.[31] The taxpayers both obtained Florida driver's licenses and registered to vote in Florida in 2001.[32] In addition, they joined several country clubs and the local Jewish Community Center in Florida.[33] They formed social ties, and also had doctors, and other health care professionals in Florida.[34]



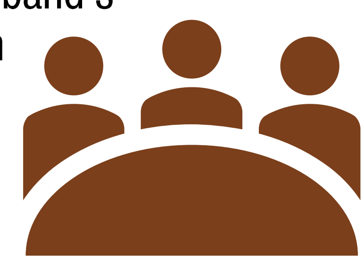
The taxpayers also retained some ties to Massachusetts during the tax years 2001–2005. They rented an apartment in Massachusetts before deciding to purchase a condo there in 2004.[35] They also retained a house on Nantucket for use as a summer vacation home.[36] However, they argued that "they maintained Massachusetts residences not because they desired to make Massachusetts the center of their domestic, social, and civil lives, but for Mrs. Evans to continue her relationship with her Boston-based MS specialist."[37] After considering all of the evidence, the Board decided that the taxpayers intended "to make Florida the center of their domestic, social, and civil lives indefinitely,"[38] and that they had thus successfully changed their domicile from Massachusetts to Florida during the tax years at issue.[39]

Since the Board determined that the taxpayers were no longer domiciled in Massachusetts and thus did not meet the first part of the definition of resident for purposes of Massachusetts income taxation, the Board then had to determine whether they met the second part of the definition, which required that they maintain a "permanent place of abode" and spend <u>more</u> <u>than</u> one hundred eighty three days in Massachusetts during a tax year.[40] It was already apparent that the taxpayers maintained a "permanent place of abode" in Massachusetts since they either rented an apartment or owned a condo in Massachusetts throughout the tax years at issue.[41]

After examining all of the evidence, the Board found that the taxpayers "were physically present in Massachusetts for 150 days in 2001; 166 days in 2002; 165 days in 2003; and 169 days in 2005."[42] Thus, the Board ruled that they also did not meet the second part of the definition of "resident" during tax years 2001, 2002, 2003, and 2005.[43] The Board then found that they spent 183 days in Massachusetts in 2004.[44] Since 183 days is not more than the 183 days of presence required by the statute, the Board ruled that the taxpayers were also not residents during 2004.[45]

Although the Board had determined that the taxpayers were not residents of Massachusetts during tax years 2001 through 2005, in order to determine whether they owed any income tax, the Board also had to examine whether they had any Massachusetts-source income during those years. To make this determination, the Board had to consider whether the husband had any gross income "effectively connected with a trade or business carried on in Massachusetts," regardless of whether or not he was "actively engaged in a trade or business or employment in the commonwealth in the year in which the income [was] received."[46] Since the husband only occasionally signed business documents for his companies or made business calls while in Massachusetts, and since his only employee no longer worked out of an office in Massachusetts during the tax years at issue, the Board ruled that the husband's business activities "did not rise to the level of carr[ying]on a trade or business."[47] Thus, the Board did not characterize the income he earned through his companies as Massachusetts-source income. The only Massachusetts- source income that the Board found that the taxpayers had during the tax years at issue was $1,730 from a wagering transaction carried out by the husband in 2001.[48]

Since the Board determined that the taxpayers were not residents of Massachusetts and did not earn Massachusetts-source income from the husband's companies during the tax years at issue, the Board granted them an abatement of $101,961 for tax year 2001 (after taking into account the $1,730 of Massachusetts-source income for that year), a full abatement of the total $120,348 for tax years 2002 through 2004, and a full abatement of $131,115 for tax year 2005.[49]



Domicile of the Person, Not Her Assets Determines Tax Jurisdiction

In Bradison v. Commissoner of Revenue,[50] the taxpayer appealed the order of the Minnesota Tax Court affirming the Minnesota Commissioner of Revenue's denial of her request for a Minnesota estate-tax refund.[51] The taxpayer's daughter was injured in an automobile accident in Idaho in 1995.[52] Before her death, two annuities were established for the daughter under a settlement agreement. The annuities were originally set up through an Iowa conservator but were transferred to a Wyoming conservator in 2001.[53] Wyoming, unlike Minnesota, does not assess income tax.

The family moved to Minnesota in 2004 in order to seek special medical treatment for the daughter, and the daughter passed away in 2006 due to complications from injuries caused by the automobile accident.[54] The conservatorship was terminated and the assets were transferred to the taxpayer, who was appointed personal representative of the daughter's estate.[55]

The original estate tax-return that was filed stated that the daughter was a resident of Minnesota at her death and showed that the estate owed $99,590 in estate tax to Minnesota.[56] The estate made a partial payment of $41,000, which was the amount that the taxpayer later requested as a refund on an amended return since she felt that the daughter actually was not resident in Minnesota at the time of her death.[57]

In order to determine whether the assets transferred from the conservatorship should have been included in the daughter's estate for purposes of Minnesota estate tax, the Supreme Court of Minnesota had to determine first whether the daughter was domiciled in Minnesota at the time of her death,[58] and second whether the daughter was the beneficial owner of the annuity payments when she died.[59]

In regard to the first issue, the court noted that the domicile of a minor child is usually determined by the custodial parent's domicile, but an exception may apply when a guardian of the child's person has been appointed.[60] The taxpayer argued that the daughter was a Wyoming domiciliary when she died since she was a ward of the Wyoming court.[61] However, the Minnesota Supreme Court noted that the Wyoming conservator only served as a guardian of daughter's assets, and not as a guardian of her person. Since only a guardianship of the person has an effect on a child's domicile, the Wyoming conservatorship was not determinative.[62] In regard to the second issue, the court determined that, since daughter's life was the measuring life for the annuities and the annuities were to be paid to her estate upon her death, she was the beneficial owner of the annuity payments, and therefore the payments were properly includible in her estate.[63]

Finding that the daughter was domiciled in Minnesota at the time of her death and that the annuity payments were properly includible in her estate, the court affirmed the denial of the taxpayer's request for a refund of $41,000 and upheld the assessment of unpaid Minnesota estate tax, penalties, and interest equaling $75,800.90.[64]

Minnesota Assesses Income Tax Despite NBA Referee's Attempts to Become a Florida Resident

In Mauer v. Commissioner of Revenue,[65] the taxpayer, a National Basketball Association referee,[66] appealed the Minnesota Tax Court's decision affirming the Commissioner of Revenue's ruling that he was domiciled in Minnesota for purposes of Minnesota income tax during the latter half of 2003 and all of 2004.[67] The Supreme Court of Minnesota affirmed the tax court's decision in its majority opinion.[68]

The court looked to Minnesota law to determine whether the taxpayer was a resident of Minnesota for tax purposes and noted that "[i]n Minnesota, a person is a resident for tax purposes if he or she is domiciled in Minnesota during the relevant tax period."[69] The court also looked to Minnesota law for the definition of domicile: "the bodily presence of an individual person in a place coupled with an intent to make such a place one's home."[70]

The court noted that there is a presumption in Minnesota that once a person is domiciled in Minnesota, he remains domiciled there until he establishes a new domicile.[71]

Since the taxpayer was undisputedly domiciled in Minnesota before July 2003, he had to rebut the presumption that he was still domiciled in Minnesota after that date by showing that he had established a new domicile.[72] He argued that he had changed his domicile to Florida beginning in July 2003.[73] The court looked at all of the evidence and considered a long list of factors used by the Department of Revenue in determining whether a taxpayer's domicile is Minnesota.[74] The taxpayer claimed that his change of domicile to Florida was evidenced by several actions he had taken in July 2003, including purchasing a townhome in Florida, obtaining a Florida driver's license, surrendering his Minnesota driver's license, registering to vote in Florida, signing a Florida declaration of domicile, and filing for a homestead exemption for his Florida residence.[75] He also opened a bank account in Florida, and registered and garaged one of his cars in Florida.[76]

However, the taxpayer still retained many ties to Minnesota. He still owned his large home in Minnesota, and, although he asserted that he tried to sell this home,[77] the court felt that he did not actually put forth much of an effort to do so.[78] He also garaged three luxury vehicles at his Minnesota home, and those vehicles were registered in Minnesota.[79] In addition, he continued to use his Minnesota bank account much more frequently than his new Florida bank account.[80]

The taxpayer asserted that he wanted to leave Minnesota for Florida in order to escape Minnesota's harsh winters and because he had a "bad taste in [his] mouth with respect to Minnesota" after being convicted by a Minnesota jury on federal tax evasion charges in 2001.[81] However, despite these assertions, he continued to spend a significantly greater amount of time in Minnesota than in Florida or any other place during the period at issue. He spent 46.2% of his time in Minnesota and 40% of his time travelling to other locations from July 1 to December 31 of 2003, whereas he only spent 14.1% of his time in Florida during that same period. In 2004, he spent 49.5% of his time in Minnesota, 33.1% of his time travelling to other locations, and only 17.5% of his time in Florida.[82]

The court noted that "acts must be given more weight than declarations" when examining a taxpayer's intent to change his domicile.[83] After considering all of the evidence regarding the taxpayer's ties to Minnesota and Florida, the court determined that "Mauer's acts, as opposed to his declarations, weigh[ed] in favor of the presumption that Mauer's domicile remained in Minnesota" during the second half of 2003 and all of 2004.[84]

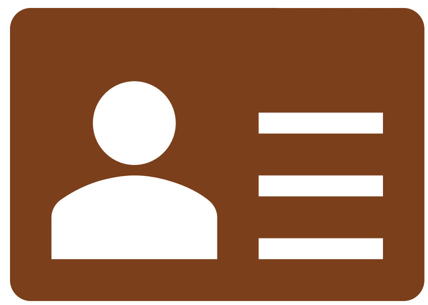
North Carolina Department of Revenue Successfully Disputes Florida Residency

In Fowler v. North Carolina Department of Revenue,[85] taxpayers, husband and wife, argued that they did not owe income and gift taxes to North Carolina for 2006 and 2007 since they believed they had changed their domicile from North Carolina to Florida. The North Carolina Department of Revenue ("Department") issued a Final Agency Decision rejecting many parts of the Recommended Decision issued by the Office of Administrative Hearings.[86]

The taxpayers were both born and raised in North Carolina,[87] and, in 1984 the husband formed a business there for which they both worked.[88] In 2002, the taxpayers bought a house in Florida, where they were planning to retire.[89] However, they retained their house in North Carolina, and, in 2003, they moved into a different custom-built house in North Carolina.[90] On January 19, 2006, the husband signed a Securities Purchase Agreement for the sale of 60 percent of his company, and the taxpayers flew to Florida on January 20, 2006, intending to change their domicile to Florida beginning on that day so that they would be domiciled in Florida when the sale of the husband's shares closed on February 3, 2006.[91]

The Department had to determine whether, for purposes of North Carolina income and gift taxes, the taxpayers were domiciled in North Carolina for the period from January 20, 2006 through the end of 2007. The Department first looked to the beginning of the definition of "resident" under North Carolina law, which states that "an individual who is present within the State for more than 183 days during the taxable year is presumed to be a resident."[92] However, this definition of resident does not define "day," and thus it was not clear whether partial days counted towards the required number of days. If travel days or partial days were included in the total, the taxpayers would have been in North Carolina for more than 183 days in both 2006 and 2007 and would have been presumed residents for those years.[93] If partial days were not included in the total, though, the taxpayers were in North Carolina for less than the required number of days both years. Since the definition of "day" was unclear, the Department was unable to rely on this presumption, and had to look to the rest of the definition of "resident," which goes on to state that "[a] resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State."[94]

Since the taxpayers were indisputably domiciled in North Carolina through January 19, 2006,[95] the Department had to determine whether the taxpayers succeeded in changing their domicile to Florida. The Department looked to caselaw for a relevant three-part test which required the taxpayers to prove: "(1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home."[96] The Department also noted that, in determining whether there was a change in domicile, all of the facts and circumstances must be considered, though the taxpayers' actions should be given greater weight than their declarations.[97]



The Department found that the taxpayers failed to establish the first prong of the test since it determined that the taxpayers had not abandoned North Carolina as their domicile during 2006 and 2007.[98] Although the taxpayers obtained Florida driver's licenses, registered to vote in Florida, signed and filed a Declaration of Domicile in Florida, and obtained a post office box in Florida in March 2006,[99] the Department felt this was not enough to establish a change of domicile. The taxpayers continued to own their North Carolina home and continued to use their North Carolina address for both personal and business purposes, including as a registered office for several North Carolina LLCs, throughout 2006 and 2007.[100]

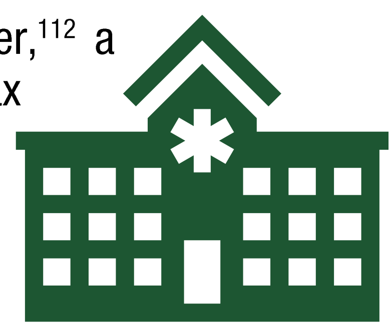
The Department noted that "[w]here someone retains his original home with all its incidental privileges and rights, there is no change in domicile."[101] In addition, even though the husband sold a portion of the shares in his North Carolina company on February 3, 2006, he still retained 32.6% of the company after that date.[102]

The Department also found that the taxpayers failed to establish the second prong of the test.[103] Both taxpayers were present in North Carolina for at least a great plurality of the days during 2006 and 2007 and were only in Florida for a small minority of the days during those years.[104] The Department thus found that "there was not an acquisition of a new domicile by actual residence at another place," as required by the second prong of the test.[105]

In considering the third prong of the test, which required the taxpayers to establish that they intended to make Florida their new home, the Department stated that although the taxpayers "declared that it was their intention to make Florida their permanent home on January 20, 2006, these declarations conflict with the facts and therefore are of slight weight."[106] Since the Department determined that the taxpayers failed to meet all three (or, in this case, any) of the prongs of the test to determine a change in domicile, the Department determined that the taxpayers failed to show that they changed their domicile from North Carolina to Florida during the period from January 20, 2006 to the end of 2007.[107]

Since it was determined that the taxpayers did not succeed in changing their domicile, they were subject to income and gift taxes in North Carolina for 2006 and 2007.[108] The taxpayers were also assessed 25% penalties for understating the amount of tax owed to North Carolina, even though they may not have been negligent in doing so.[109] The Department then determined that the taxpayers originally owed North Carolina $6,325,106 in income tax, but after applying a penalty of $1,581,276.50 and interest of $2,138,925.56, the total amount due had grown to $10,047,039.78 as of July 17, 2013.[110] In addition, as of the same date, the husband owed $187,681.97 and the wife owed $229,704.39 in gift tax, penalties, and interest.[111]

Move Back to Virginia for Wife's Illness Ruled Insufficient Evidence for Virginia Tax Assessment



In Public Document 13-178 of the Virginia Tax Commissioner,[112] a taxpayer sought correction of his Virginia individual income-tax assessment for 2010. The Virginia Department of Taxation had determined that the taxpayer was domiciled in Virginia in 2010 and that he thus owed Virginia individual income tax for that year. The taxpayer appealed, arguing that he was instead a resident of State A during 2010.

The Tax Commissioner noted that, "[f]or a person to change domiciliary residency to another state or country, that person must intend to abandon his Virginia domicile with no intention of returning to Virginia. Concurrently, that person must acquire a new domicile where that person is physically present with the intention to remain there permanently or indefinitely."[113] The Commissioner also stated that in order to determine domicile, one must consider all of the facts and circumstances, and not merely the intent of the taxpayer.

The Taxpayer moved from Virginia to State A in 2009 in order to start a new job, which was a "permanent position of indefinite duration."[114] He also established a permanent abode in State A, gave up his Virginia driver's license and acquired a State A driver's license, registered to vote in State A, and registered his vehicle in State A. His wife continued to live in the couple's home in Virginia, and the taxpayer had other automobiles registered in Virginia. However, his wife only remained in Virginia because she had developed an illness. The taxpayer moved back to Virginia in 2011 in order to attend to his wife during her illness, and because of his own health problems.

After considering all the taxpayer's evidence, the Commissioner found that the taxpayer had successfully changed his domicile from Virginia to State A for tax years 2009 and 2010, and thus allowed the abatement of the taxpayer's 2010 Virginia individual income-tax assessment.

"I'm a Stateless Nomad Defense" Fails to Convince Wisconsin Court

In Duley v. Wisconsin Department of Revenue,[115] the taxpayer appealed the Wisconsin Department of Revenue's denial of his Petitions for Redetermination of the amount of Wisconsin income tax he owed for tax years 2001, 2002, and 2006.[116] The Department of Revenue ("Department") had determined that he owed $10,185.43 for tax year 2001, $11,159.04 for tax year 2002, and $9,159.46 for tax year 2006,[117] though these assessments were later modified once he provided his W-2s and 1099s for those years.[118] The taxpayer, however, argued that he was not a resident of Wisconsin during those tax years and that he thus did not owe any income tax to Wisconsin.[119]

The Wisconsin Tax Appeals Commission ("Commission") noted that Wisconsin imposes an income tax on those persons residing within the state and that a person is considered to reside in Wisconsin if he or she is domiciled in that state.[120] The Commission also noted that "there is no such thing as a stateless lifestyle wherein the taxpayer is not domiciled for tax purposes in any state."[121] When a person already has a domicile, in order to change that domicile, the person must abandon the former domicile and both intend to and actually establish a new domicile.[122]

The taxpayer lived in Wisconsin from the time he was born until 1999.[123] He lived and worked in Louisiana for part of 1999, but filed a Wisconsin resident income-tax return for that year.[124] He then worked for a different employer in Louisiana for part of 2000, and moved to Washington in late 2000, where he remained until 2003.[125] He returned to Wisconsin in early 2003 and remained there until early 2005, at which point he returned to Louisiana.[126] He left Louisiana in August of 2006 and moved to Florida.[127] Since the taxpayer was domiciled in Wisconsin before the tax years at issue, the Commission had to determine whether he successfully changed his domicile to a jurisdiction other than Wisconsin.

The Commission noted that, during the tax years at issue, there was no credible evidence that the taxpayer had a driver's license in any state besides Wisconsin, that he voted in any state, that he filed income tax returns in any state besides Wisconsin, that he registered a vehicle in any state besides Wisconsin, nor that he bought any real estate or established a residence outside of Wisconsin.[128] The Commission also noted that the taxpayer used his Wisconsin address when filing his 2002 federal tax return,[129] and, in 2003, he renewed his Wisconsin driver's license.[130] The Commission, after considering the evidence and looking at "the totality of the circumstances," found that, although he did not live in Wisconsin during the years at issue, "he did not sufficiently cut his ties with Wisconsin nor did he establish permanent residency in another state."[131] The Commission then upheld the Department's modified assessments of Wisconsin income tax owed by the taxpayer for 2001, 2002, and 2006.[132]

Conclusion

Escaping your former state's taxing authority is not to be taken lightly, and as evidenced by a few cases cited herein, obtaining a driver's license, registering to vote and declaring Florida homestead might not be enough to convince the tax man.

Hopefully this paper gave you some insight. As always, Sheppard Law Firm is prepared to help our clients any way that we can. If you're considering becoming a client, call us at 239.334.1141 to learn more or visit **sheppardlawfirm.com**.

Citations

1 Bartholomew v. D.C. Office of Tax & Revenue, 2013 D.C. App. Lexis 685 (D.C. 2013).
2 2013 D.C. App. Lexis 685 at 2.
3 2013 D.C. App. Lexis 685 at 3.
4 2013 D.C. App. Lexis 685 at 1.
5 2013 D.C. App. Lexis 685 at 3–6.
6 2013 D.C. App. Lexis 685 at 14, citing Internal Revenue Code § 932(c)(4).
7 2013 D.C. App. Lexis 685 at 28.
8 2013 D.C. App. Lexis 685 at 31–32, citing Vento v. Director of Virgin Islands Bureau of Internal Revenue, 715 F.3d 455, 466 (3d Cir. 2013) and Sochurek v. Comm'r, 300 F.2d 34, 38 (7th Cir. 1962).
9 2013 D.C. App. Lexis 685 at 33–34, citing Vento, 715 F.3d at 467–68.
10 2013 D.C. App. Lexis 685 at 35.
11 2013 D.C. App. Lexis 685 at 35.
12 2013 D.C. App. Lexis 685 at 35.
13 2013 D.C. App. Lexis 685 at 7.
14 2013 D.C. App. Lexis 685 at 37.
15 2013 D.C. App. Lexis 685 at 21.
16 2013 D.C. App. Lexis 685 at 21, citing D.C. Code § 47-1801.04 (emphasis in original).
17 2013 D.C. App. Lexis 685 at 21–22.
18 2013 D.C. App. Lexis 685 at 22–24.
19 2013 D.C. App. Lexis 685 at 25.
20 2013 D.C. App. Lexis 685 at 26.
21 2013 D.C. App. Lexis 685 at 2.
22 Evans v. Comm'r of Revenue, 2013 Mass. Tax Lexis 3 (Mass. App. Tax Bd. 2013).
23 2013 Mass. Tax Lexis 3 at 1–4.
24 2013 Mass. Tax Lexis 3 at 2–5.
25 2013 Mass. Tax Lexis 3 at 43 (citation omitted).
26 2013 Mass. Tax Lexis 3 at 43.
27 2013 Mass. Tax Lexis 3 at 45.
28 2013 Mass. Tax Lexis 3 at 13.
29 2013 Mass. Tax Lexis 3 at 12–13.
30 2013 Mass. Tax Lexis 3 at 14–16.
31 2013 Mass. Tax Lexis 3 at 19.
32 2013 Mass. Tax Lexis 3 at 20.
33 2013 Mass. Tax Lexis 3 at 20–21.
34 2013 Mass. Tax Lexis 3 at 23.
35 2013 Mass. Tax Lexis at 16–17.
36 2013 Mass. Tax Lexis 3 at 19.
37 2013 Mass. Tax Lexis 3 at 25–26.
38 2013 Mass. Tax Lexis 3 at 29.
39 2013 Mass. Tax Lexis 3 at 53.
40 2013 Mass. Tax Lexis 3 at 43.
41 2013 Mass. Tax Lexis 3 at 53.
42 2013 Mass. Tax Lexis 3 at 54.

43 2013 Mass. Tax Lexis 3 at 54.
44 2013 Mass. Tax Lexis 3 at 54–55.
45 2013 Mass. Tax Lexis 3 at 55.
46 2013 Mass. Tax Lexis 3 at 56–57.
47 2013 Mass Tax Lexis 3 at 60 (internal quotation marks omitted).
48 2013 Mass Tax Lexis 3 at 60.
49 2013 Mass Tax Lexis 3 at 61.
50 Bradison v. Comm'r of Revenue, 825 N.W.2d 747 (Minn. 2013).
51 825 N.W.2d at 748.
52 825 N.W. 2d at 749.
53 825 N.W. 2d at 749.
54 825 N.W. 2d at 749.
55 825 N.W. 2d at 749.
56 825 N.W. 2d at 749.
57 825 N.W. 2d at 749.
58 825 N.W.2d at 750.
59 825 N.W.2d at 752.
60 825 N.W.2d at 750–51.
61 825 N.W.2d at 749–50.
62 825 N.W.2d at 751.
63 825 N.W.2d at 752.
64 825 N.W.2d at 748–49.
65 Mauer v. Comm'r of Revenue, 829 N.W.2d 59 (Minn. 2013).
66 829 N.W.2d at 64.
67 829 N.W.2d at 63.
68 829 N.W.2d at 77.
69 829 N.W.2d at 68 (citation and internal quotation marks omitted).
70 829 N.W.2d at 68.
71 829 N.W.2d at 68.
72 829 N.W.2d at 68.
73 829 N.W.2d at 69.
74 829 N.W.2d at 69–73.
75 829 N.W.2d at 64–65.
76 829 N.W.2d at 65–66.
77 829 N.W.2d at 66.
78 829 N.W.2d at 69.
79 829 N.W.2d at 66.
80 829 N.W.2d at 65.
81 829 N.W.2d at 74 (internal quotation marks omitted).
82 829 N.W.2d at 72.
83 829 N.W.2d at 75 (internal quotation marks omitted).
84 829 N.W.2d at 75.
85 Fowler v. N.C. Dep't of Revenue, 2013 N.C. Tax Lexis 1 (N.C. Tax 2013).
86 2013 N.C. Tax Lexis 1 at 1
87 2013 N.C. Tax Lexis 1 at 9–10.
88 2013 N.C. Tax Lexis 1 at 13.
89 2013 N.C. Tax Lexis 1 at 10.
90 2013 N.C. Tax Lexis 1 at 10.
91 2013 N.C. Tax Lexis 1 at 31.
92 2013 N.C. Tax Lexis 1 at 80, citing N.C. Gen. Stat. § 105-134.1(12).
93 2013 N.C. Tax Lexis 1 at 78–79.
94 2013 N.C. Tax Lexis 1 at 80, citing N.C. Gen. Stat. § 105-134.1(12).
95 2013 N.C. Tax Lexis 1 at 31.

96 2013 N.C. Tax Lexis 1 at 84 (internal quotation marks omitted), quoting Farnsworth v. Jones, 441 S.E.2d 597, 601 (1994) and citing Hall v. Wake County Board of Elections, 187 S.E.2d 52, 57 (1972).
97 2013 N.C. Tax Lexis 1 at 91–93, citing Hall v. Wake County Board of Elections, 187 S.E.2d 52, 57–58 (1972).
98 2013 N.C. Tax Lexis 1 at 96.
99 2013 N.C. Tax Lexis 1 at 43–44.
100 2013 N.C. Tax Lexis 1 at 95–96.
101 2013 N.C. Tax Lexis 1 at 103 (internal quotation marks omitted), quoting Farnsworth, S.E.2d at 600.
102 2013 N.C. Tax Lexis 1 at 104.
103 2013 N.C. Tax Lexis 1 at 96.
104 2013 N.C. Tax Lexis 1 at 97.
105 2013 N.C. Tax Lexis 1 at 96.
106 2013 N.C. Tax Lexis 1 at 98.
107 2013 N.C. Tax Lexis 1 at 98, 102.
108 2013 N.C. Tax Lexis 1 at 115.
109 2013 N.C. Tax Lexis 1 at 116, quoting N.C Gen. Stat. § 105-236(a)(5)(b), and citing Wal-Mart Stores East, Inc. v. Hinton, 676 S.E.2d 634, 653–54 (2009) for the principle that the assessment of the penalty did not require a finding of negligence.
110 2013 N.C. Tax Lexis 1 at 122.
111 2013 N.C. Tax Lexis 1 at 122–123.
112 Va. P.D. 13-178, 2013 Va. Tax Lexis 178 (Va. Dep't Tax. 2013), available at www.policylibrary.tax.virginia.gov/OTP/Policy.nsf.
113 2013 Va. Tax Lexis 178 at 2.
114 2013 Va. Tax Lexis 178 at 4.
115 Duley v. Wisconsin Dep't of Revenue, 2013 Wisc. Tax Lexis 11 (Wis. Tax Appeals Comm. 2013), available at www.wisbar.org/forPublic/INeedInformation/Tax%20Appeals%20Commission/2013/11-I- 178.htm.
116 2013 Wisc. Tax Lexis 11 at 2.
117 2013 Wisc. Tax Lexis 11 at 2.
118 2013 Wisc. Tax Lexis 11 at 16.
119 2013 Wisc. Tax Lexis 11 at 5.
120 2013 Wisc. Tax Lexis 11 at 7.
121 2013 Wisc. Tax Lexis 11 at 11 (citation and internal quotations marks omitted).
122 2013 Wisc. Tax Lexis 11 at 8.
123 2013 Wisc. Tax Lexis 11 at 3.
124 2013 Wisc. Tax Lexis 11 at 3.
125 2013 Wisc. Tax Lexis 11 at 3–4.
126 2013 Wisc. Tax Lexis 11 at 4.
127 2013 Wisc. Tax Lexis 11 at 4.
128 2013 Wisc. Tax Lexis 11 at 5–6.
129 2013 Wisc. Tax Lexis 11 at 13.
130 2013 Wisc. Tax Lexis 11 at 14.
131 2013 Wisc. Tax Lexis 11 at 15.
132 2013 Wisc. Tax Lexis 11 at 16.

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