Should I Stay or Should I Go: Considerations in Changing Domicile from New York

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SUMMARY OF DISCUSSION

1. Reasons Why An Individual May Want To Change Domicile from New York to Florida or elsewhere
2. What is Domicile and How to Effectively Change It
3. New York State Statutory Residency Test
4. New York State Nonresident Audit Guidelines

REASONS TO CHANGE DOMICILE

- Personal Motivations
  - Proximity to family
  - Retirement
  - Health issues
  - New job
  - Change in climate
- Tax Motivations
  - Favorable income tax laws
  - Favorable estate tax laws
- Creditor Concerns
  - Asset protection

REASONS TO CHANGE DOMICILE
TAX CONSIDERATIONS

- INCOME TAX
  - Most states, such as New York, impose an income tax; other states such as Alaska, Florida, Nevada, Wyoming, Texas and South Dakota do not. In addition, many cities, such as New York City, impose an income tax.
  - An individual who is not domiciled in New York can still be subject to New York State income tax if:
    - He or she spends the statutorily defined amount of time in New York (and maintains a permanent place of abode in New York); or
    - He or she has New York source income
  - New York source income consists of income generated from property located in New York, including rental income, or from a business, trade, profession or occupation carried on in New York.

REASONS TO CHANGE DOMICILE
TAX CONSIDERATIONS (CONT'D)

- ESTATE TAX
  - Following the passage of the Economic Growth and Tax Reconciliation Relief Act of 2001 (EGTRRA), many states decoupled from the Federal estate tax system and reinstated their own estate tax regime.
  - In addition to a Federal estate tax, a separate state estate tax may be payable, depending upon in which state the decedent was domiciled at his or her death and the location of the decedent's real property and tangible personal property.
    - For example, if a person dies a domiciliary of Florida, which has no estate tax, and owns real property in New York, there may be a New York estate tax due, depending upon the value of the New York real property.
  - Real property and tangible personal property have their situs in the state where they are located.
  - Intangible property generally has its situs in the state where the decedent is domiciled, regardless of where the asset is located.

REASONS TO CHANGE DOMICILE
TAX CONSIDERATIONS (CONT'D)

- New York in particular imposes an estate tax on "every deceased individual who at his or her death was a resident of New York State."
  - Alaska, California, Colorado, Florida, Georgia, Michigan, Nevada, New Hampshire, South Dakota and Texas do not impose an estate tax on estates of domiciliaries.
  - NY estate tax is also imposed on the property of non-residents if the property's "actual situs" is in New York State and the property is either includable in their federal gross estate or would be includable in their New York gross estate if they were a resident.
- Real property or tangible personal property can be converted into intangible assets by non-residents of New York.
  - In 2008, the New York State Department of Taxation and Finance issued Advisory Opinion TSB-A-08(1)M, which provides guidance on the conversion of real property or tangible personal property into intangible assets by non-residents of New York.

REASONS TO CHANGE DOMICILE
TAX CONSIDERATIONS (CONT'D)

- The Advisory Opinion concluded that an interest in an S Corporation owning New York real property is considered an intangible asset and, as a result, is not included in a nonresident decedent's New York gross estate so long as the corporation's purpose is the equivalent of a business activity or is followed by the carrying on of business by the corporation. If the corporation does not meet this "business purpose test," the value of the real property would be included in the nonresident decedent's New York gross estate.

- Likewise, the Advisory Opinion concluded that an interest in a single member LLC owning New York real property is also considered an intangible asset and, as a result, is not included in the nonresident decedent's New York gross estate so long as the single member LLC is treated as a corporation for Federal income tax purposes. However, the LLC would also have to meet the "business purpose test". (Similar opinion issued May 2015 – Advisory Opinion TSB-A-15(1)(M) (May 29, 2015)).

REASONS TO CHANGE DOMICILE *TAX CONSIDERATIONS (CONT'D)*

- On April 8, 2010 and October 12, 2011, the New York Department of Taxation and Finance issued two more Advisory Opinions (TSB-A-10(1) and TSB-A-11(1)M, respectively) regarding the conversion of real property interests into intangibles for New York estate tax purposes, in both cases ruling that a nonresident decedent holding an interest in New York real property via an interest in a general partnership (or multimember LLC) that was held by the decedent's revocable trust did not own an interest in the underlying real property for New York estate tax purposes.
  - The Advisory Opinions concluded that, assuming that IRC 2036 or the related economic substance doctrines do not apply, because a multiple member LLC or partnership is considered to be separate from its owner under the Internal Revenue Code, an individual's interest therein is similarly removed from the underlying property held by the LLC or partnership. Accordingly, such interest constitutes an intangible interest, which, for New York estate tax purposes has a situs outside of New York in the hands of a nonresident decedent. Therefore, such property is not subject to New York estate tax, despite the fact that the real property is located there.

REASONS TO CHANGE DOMICILE
TAX CONSIDERATIONS (CONT'D)

- Estate Tax
  - *Calculation.*
    - The New York estate tax is no longer a decoupled pick-up tax.
    - It is now calculated by determining the New York gross estate and subtracting certain deductions (which vary depending on whether or not the decedent was a New York resident) and applying the graduated tax rates set forth in Section 952(b) of the NYS Tax Law, with the highest tax rate of 16% being imposed when the New York taxable estate exceeds $10.1 million.
  - The New York State exemption amount, known as the Basic Exclusion Amount (BEA), set forth in Section 952(c) of the NYS Tax Law, is $5,250,000 until January 1, 2019, after which the BEA will match what the federal exclusion amount would have been prior to President Trump's changes to the estate tax provisions. Thus, it will be at least $5.6 million, which was the indexed exemption for 2018 prior to the passage of the new tax law.
  - The exclusion available at the state level quickly diminishes if the taxable estate exceeds the basic exclusion amount. If the taxable estate is more than 105% ($5,512,000 until 2019) of the basic exclusion amount, the estate will receive no state exclusion, which produces a "cliff" effect (which effectively reduces the exemption from estate tax to $1,000,000).
  - Unlike the Federal exemption, the NY estate tax exemption is not portable.

REASONS TO CHANGE DOMICILE
ASSET PROTECTION

- Creditor's rights against a person's assets vary from state to state.
- Depending upon the state in which an individual lives, he or she may receive asset protection for the following:
  - Homestead
  - Retirement Benefits
  - Life Insurance Proceeds
  - Tenancy by the Entirety Property
  - Medical Savings Accounts

REASONS TO CHANGE DOMICILE
ASSET PROTECTION/TENANCY BY THE ENTIRETY PROPERTY

- Tenancy by the entirety is a form of joint ownership that is only available to married couples and is distinct from joint tenants with rights of survivorship.
  - In New York, TBE is limited to real property and co-op apartments.
  - In other states, (for example, Florida) TBE is available for both real and personal property.
- Upon the death of the death of the first spouse, the surviving spouse would become the sole owner of the property and, thus, the property would become subject to the claims of the surviving spouse's creditors.
- This form of ownership is beneficial from an asset protection standpoint because tenancy by the entirety property is only subject to the claims of joint creditors (i.e., a creditor of both spouses resulting from the same claim).
- When the IRS is a creditor, the protection afforded property owned as tenants by the entirety may be limited.

REASONS TO CHANGE DOMICILE
ASSET PROTECTION/TENANCY BY THE ENTIRETY PROPERTY

- Estate Planning Objectives
  - Tenancy by the entirety ownership is useful for asset protection purposes and for purposes of avoiding probate, but it is not always ideal in the estate planning context, as the potential exists for “wasting” the estate and generation-skipping transfer (GST) tax exemptions. Note that with portability, the estate tax exemption *may* be salvaged.
  - For example, if the bulk of a couple’s assets are owned as tenants by the entirety, such ownership may not allow both spouses to take full advantage of their Federal estate and GST tax exemptions. This is because, upon the death of the first spouse, the entirety property passes outright to the surviving spouse, rather than to a bypass or credit shelter trust. While portability can be used to save the estate tax exemption, the GST tax exemption is not portable.
  - The failure to fund, or the underfunding of, a bypass or credit shelter trust upon the death of the first spouse has become less of a concern given the advent of “portability” of the federal estate tax exemption. However, the state estate tax exemption may not be “portable” (i.e., New York).

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE DOMICILE

- Common law – Domicile means living in [a particular] locality with *intent* to make it a fixed and permanent home . . . It requires a bodily presence in that place and also an *intention* to make it one's domicile.
  - Subjective and, therefore, somewhat unpredictable.
- New York regulations provide little additional guidance, defining 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."
- Once established, one's domicile continues until moved to a new location "with a bona fide intention of making such individual's fixed and permanent home there."
- Domicile is in contrast to residency, as you can have multiple residences.
  - Inherently, you cannot intend to return to each of these residences as a permanent home.

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE IT (CONT'D)

- Dual domicile – Be careful – Two or more states could assert domicile
- Exceptions to Domicile in New York
  - 30 Day rule (does not maintain a permanent place of abode in NY, maintains a permanent place of abode outside NY, spends less than 30 days in NY in a single year)
  - 548 Day rule (in foreign country for 450 of 548 consecutive days, taxpayer, spouse and minor children were in NY less than 90 days (# of days/548 x 90 = max days allowed in NY)
- How to Effectively Change Domicile
  - Intent is key
  - New York courts have held that "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."

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE IT (CONT'D)

- Two elements must be established to change domicile
  - Abandonment of the old domicile and acquisition of a new domicile
  - Actual change of residence.
- There is no definitive period of time that an individual must be in a location to establish a domicile, but an individual must:
  - (a) have an intent to create a new domicile, and
  - (b) reside in such new domicile to effectively change domicile.
- Burden of Proving Domicile
  - The party asserting the change of domicile must prove the change of domicile by clear and convincing evidence.
  - Similarly, the New York Department of Taxation and Finance bears the burden of proof to show that an individual who was previously a non-domiciliary of New York changed domicile to New York.

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE IT (CONT'D)

- If an individual wishes to change his or her domicile to Florida, he or she should do the following to establish the intent necessary to prove the change by clear and convincing evidence:
  - File a "Declaration of Domicile" in the Office of the Circuit Court in the county in which he or she resides.
  - File a copy of such Declaration or "Declaration of Non-Domicile" with the state of former residence.
  - Register to vote in Florida and vote as soon as eligible in all elections.
  - Sign a new Will and other estate planning documents to ensure such documents comport with and are governed by Florida law.
  - Apply for a homestead exemption afforded only to residents of Florida.
  - Open bank accounts and safe deposit boxes in a bank in Florida.
  - Register automobiles, airplanes and boats in Florida.

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE IT (CONT'D)

- Own or lease (for at least 12 months) and occupy a dwelling in Florida. While not necessary, it is helpful if the individual can sell, gift or rent the home located in New York.
- Obtain an "unrestricted" driver's license in Florida.
- File Federal income tax returns with the IRS in the Atlanta service center using a Florida address.
- File a final individual income tax return in old domicile state.
- Change address on credit cards and insurance policies to Florida address.
- Change social, religious and other national organization memberships to affiliations or branches in Florida and register as a nonresident member with the former state, if possible.
- Remove the telephone listing from the telephone book in the prior state (to the extent telephone books are still used…).

WHAT IS DOMICILE AND HOW TO EFFECTIVELY CHANGE IT (CONT'D)

- Refrain from using credit cards, bank accounts and telephones in the former state; make airline reservations or use country clubs in the former state in such a way that there are no questions regarding the duration of time spent in the prior state versus Florida.
- Never request any discount available only to residents of the prior state, such as school tuition or state senior citizen discounts.
- Consider placing real estate in the prior state in a revocable living trust, LLC, partnership or other entity.
- It should be noted, however, that in 2016 the New York Department of Taxation Appeals decision (*Matter of Campaniello,* DTA No. 825354) stated that while certain declarations are evidence of a domicile change, they "are less persuasive than informal acts which demonstrate an individual's general habit of life."

NEW YORK STATE STATUTORY RESIDENCE TEST

An individual is a statutory resident of New York State if:

- He or she *maintains a permanent place of abode* in New York and spends more than 183 days of the taxable year in New York.
  - "Maintains"
    - If an individual contributes toward expenses of a residence he or she does not own but in which he or she resides, he or she may be considered to be "maintaining" a residence.
    - In order for a taxpayer to "maintain" a permanent place of abode in New York, the taxpayer must actually have a residential interest in the property (i.e., the taxpayer must actually reside in the residence and not simply maintain the residence) – *Gaied v. New York State Tax Appeals* (February 18, 2014)
  - *A place of abode* has to be suitable for human habitation during the year
    - For example, a vacation residence that is not suitable to live in during the winter months is not a permanent place of abode.

NEW YORK STATE STATUTORY RESIDENCE TEST (CONT'D)

- 183 Day Rule/Number of Days Spent in New York
  - If an individual spends more than 183 days of the taxable year in New York (and maintains a permanent place of abode in New York), he or she will be considered a statutory resident.
  - Spending one minute in New York constitutes a full day, unless:
    - An individual is traveling through New York to reach another destination.
    - An individual is required to stay in New York because of a medical treatment.
  - There is now day counting software/app available – Monaeo

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES

- New York Department of Taxation and Finance publishes guidelines detailing the law and regulations concerning residency and domicile (the "Guidelines")
- The Guidelines note that domicile is defined as the combination of physical presence in a place and the intent to remain there indefinitely.
  - Intent to remain in a place is based on an individual's actions.
- An individual will have to demonstrate by clear and convincing evidence that he or she effected a genuine change of domicile or was never domiciled in New York State.
  - The two elements to prove a change of domicile are an actual change of residence and abandonment of the former domicile and acquisition of another.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- The Guidelines require the auditor to examine two general categories: (1) five primary factors and (2) other factors.
  - If the auditor has not reached a conclusion based upon the five primary factors, the auditor will examine "other" factors.
  - The auditor must demonstrate a positive link or bond to New York or the other locations.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Five Primary Factors
  - The home
  - Active business involvement
  - Time
  - Items "near and dear"
  - Where do close family members reside?

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- The home
  - The auditor will evaluate an individual's use and maintenance of a New York residence compared to his or her use and maintenance of the non-New York residence.
    - What is the size and value of each residence?
      - Not necessarily determinative
    - Where are holidays celebrated?
    - In which community has an individual established strong ties?
  - Whether an individual owns or rents the residence is not material; it just must represent a residence.
  - The mere retention of a residence in New York is not, by itself, sufficient evidence to negate a change of domicile.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Active Business Involvement
  - The auditor will analyze the individual's pattern of employment and from where he or she derives his or her compensation.
  - Business involvement also includes active participation in a New York trade, business, occupation or profession and/or substantial investment in, and management of, a New York closely held business, such as a sole proprietorship, partnership, limited liability company or corporation.
    - The degree of active involvement in New York businesses in comparison to involvement in business located outside of New York is an essential element.
    - In today's electronic world, involvement in New York businesses can take place from afar or while physically present in New York State.
      - 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.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Time
  - Where does an individual spend his or her time during the year?
  - The auditor will examine an individual's overall living pattern, including:
    - Whether the time he or she spends in New York compared to another state has changed significantly
    - Daily calendar entries
    - Credit card bills, telephone bills and any other documents that provide evidence of where time is spent
    - E-ZPass records
    - Cell phone records

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Items "Near and Dear"
  - Where does an individual keep items which he or she holds "near and dear" to his or her heart or which have significant sentimental value
    - Family heirlooms
    - Works of art
    - Collections of books, stamps and coins
    - Jewelry
    - Personal items that enhance quality of lifestyle
    - Pets

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Family Connections
  - Where do close family members reside?
    - The auditor will inquire as to where the individual's spouse and children live
      - The location of siblings is usually not considered
    - The location where minor children attend school can be an important factor.
  - Because an analysis of an individual's familial connections could be intrusive, the auditor should not request this information until the other primary factors have been evaluated.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- "Other" Factors
  - These factors are examined only if the auditor is unable to make a domicile determination based upon the five primary factors.
    - Citation in wills, testaments and other legal documents that a particular location is to be considered the place of domicile.
    - Address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received.
    - Physical location of safe deposit boxes used for family records and valuables.
    - Location of auto, boat and airplane registrations and driver's or operator's licenses.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- "Other" Factors (cont'd)
  - Where an individual is registered to vote and whether he or she has exercised that privilege.
    - Includes general elections in November and primary or off-season elections, including school board and budget elections.
  - Possession of a New York City Parking Tax exemption.
  - Telephone services at each residence, including the nature of the listing, the type of service features and activity at the location.

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- Nonfactors of Domicile
  - The auditor is instructed to not request or consider the following nonfactors:
    - Mere location of bank accounts
    - Location where Will is probated
    - Contributions made to political candidates or causes
    - Location where individual tax returns are prepared and filed
    - Place of interment
    - Passive interests in partnerships or small corporations
    - Charitable contributions
    - Volunteering for nonprofit organizations

NEW YORK STATE NONRESIDENT AUDIT GUIDELINES (CONT'D)

- If an individual does not intend to be a New York domiciliary:
  - He or she must sever all or as many ties as possible to New York.
  - He or she must take affirmative actions that demonstrate intent to be domiciled in another state.

Questions?

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