BusinessManagement DAILY

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Legal roundup — 4 cases on domicile, residency and taxes

As the year ends, questions of taxes, domicile, and residency should be top of mind for employers looking to avoid any unnecessarily complex tax issues in the new year. With so many employees having moved during the pandemic, permanently or "temporarily," a normally simple procedure may be a little less straightforward. However, it's vital to understand, as these concepts determine which states an employee is liable for taxes in and could result in complex and lengthy cases if gotten wrong.

What's the difference between domicile and residency? Residency is usually a straight time test—if you spend at least 183 days in a state, you're a resident of the state and are taxable there. Domicile is more emotional. Your domicile is the state you intend to make your permanent home and the state to which you return if you leave.

Key: You can have only one domicile, but many residences and you can be taxable in all. And because residency is a straight time test, states rely on domicile when they go after taxpayers who have moved. By examining some recent cases, you can get a better understanding of how these rules may apply to your business and employees.

The news from New York

We once heard a story from an attorney about a couple who retired and moved from New York to Florida, which frankly, isn't so unusual. They thought they had severed all ties with New York. They were wrong. They kept a family cemetery plot in the state, which was enough for New York to continue to tax them.

A recent case confirms just how hard it can be for New Yorkers to permanently move somewhere else and is instructive in the payroll and tax concept of domicile—the place you intended to make your permanent home, because you are always taxable in your domiciliary state.

If you're not in New York why should you care? The pandemic has taught employees one overriding lesson: You don't have to live near your work anymore. And, in fact, home builders constructing homes way outside expensive metropolitan areas are experiencing a boom.

I can't quit her

New York is an exceedingly hard state to quit.

Here, the taxpayers, a married couple, retired and moved from New York to Florida. For 2013 and 2014, they filed New York State nonresident returns reporting New York sourced income, indicating their last day as state residents was in June 2013.

An audit was commenced for tax years 2013 and 2014. The couple eventually provided the New York tax authorities with the following documents to show their permanent home was in Florida:

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- Charge card statements
- Florida drivers’ licenses
- Florida utility bills
- A Florida homestead exemption application
- A warranty deed for their Florida property
- A chronological history of their residences
- A complete list of their medical doctors
- A list of all family members in New York and Florida.

Two kinks for the couple: While they listed their Florida address on the New York nonresident tax forms, they didn’t list it as their permanent address. And they didn’t sell their New York home until 2015.

The auditor concluded the documentation was insufficient to prove the couple changed their domicile to Florida. *Auditor:* While the couple may have established some ties to Florida, their general habit of life indicated an equal commitment to both states. Further, the auditor tallied up the days spent in each state during 2014: 173 days in New York and 151 days in Florida.

Concluding the couple were still domiciled in New York, New York assessed the couple $102, plus interest for 2013 and $52,994, plus interest for 2014.

The couple disputed the assessment. An administrative law judge was unpersuaded by the material they presented and ruled for the state.

ALJ: Despite all the documentation, the couple hasn’t presented clear and convincing evidence to show they gave up their New York domicile and acquired a domicile in Florida for 2014. While they did take actions aimed at establishing Florida as their domicile, including purchasing a home in Florida, acquiring Florida drivers’ licenses and completing a Florida homestead exemption application, those formal declarations must be considered in conjunction with the informal acts showing an individual’s general habit of life.

The case is In the Matter of Boniface.

Ready to reopen?

This couple failed to convince the New York tax authority that their new domicile was Florida. Lucky for them, Florida doesn’t have an income tax, because if it did, they would have been double taxed.

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As more businesses reopen, you may find yourself confronting the concept of domicile, especially if employees moved out-of-state to buy houses in the exurbs.

You should inquire whether employees moved to a new permanent home in a new state as part of the reboarding process. If they have, you must register as a withholding agent with their new state of residence and withhold and report that state’s income taxes.

The dominion of the Dominion State

New York isn't the only place we're reading about such difficulties. Both New York and Virginia are hubs for people who are domiciled in one state and work in another. Where employees are domiciled is a key payroll factor, since employees are always taxable in their domiciliary states. And if employees are working there, you must withhold those taxes.

In a recently issued private-letter ruling, the Virginia Tax Commission concluded a resident who moved out of state to take a new job, but who retained his Virginia driver’s license and car registration, also retained his Virginia residency for tax assessment purposes.

The IRS alerted the state tax authorities that he understated his federal income for 2017. The State Tax Commission then also determined he understated his state tax liability. It issued an assessment for additional taxes and interest.

Straightforward enough, so far.

In responding to the tax assessment, the taxpayer claimed he wasn’t liable for the taxes and interest because he was a resident of another state during 2017. To prove it, he presented the following:

- A lease
- HR records
- Health insurance information
- Bank statements
- A letter confirming his acquisition of a state highway pass
- Vehicle service records.

The state saw it differently. The taxpayer hadn’t changed his domicile because his parents still lived in the state and he held onto his Virginia driver’s license and car registration. Most damning of all, according to the state, he filed a 2017 Virginia resident income tax return.

Tax Commission: No single factor determines whether individuals change their domicile. Even if the taxpayer intended to establish a domicile in a new state, the connections he retained to Virginia tend to show he didn't intend to abandon his Virginia domicile. In particular, he explained he retained his driver's license and car registration to make it easier for him to move back to Virginia should he not remain in his new job. This statement implies he hadn't yet fully formed an intent to change his domiciliary residence.

A welter of payroll problems

Let's say this taxpayer lived and worked in Virginia for a New Jersey employer and then transferred to a new position in a new state with the same employer. This employer would end up being required to withhold Virginia taxes because he's a domiciliary of Virginia *and* the other state's taxes because he's a resident of the other state.

What a mess, especially when you consider the following common occurrences:

- Kids often move away from their parents. If one factor in determining domicile is where your parents live, a lot of people are in trouble.
- It's also true that having moved into a new state, you can retain your old state's driver's license and car registration, at least until one or both expire.

So how do you assess whether an employee has demonstrated an intent to abandon one domiciliary state in favor of another?

Unfortunately, there's no authoritative way to do it. Back in the dim mists of antiquity, I moved for work, but kept my out-of-state driver's license and car registration for a while. No one in HR or Payroll ever asked whether moving into the state was intended to be permanent. It turns out it was, but there wasn't any way to know it at the time.

You will have certain documentation—the employee's address, banking information, state W-4 and Copy D of their W-2—and you should be able to rely on those documents until the state tells you otherwise.

Indiana—The Crossroads State

The crossroads aren't a good place to live—too many people coming and going.

A taxpayer moved from Indiana to Nevada in January 2019. She maintained her place of residence in Nevada throughout 2019 while training for her military deployment. She said her Indiana employer mistakenly listed her former Indiana residence as her permanent address through 2020.

She didn't file a 2019 Indiana tax return, after which the department of revenue snagged her by proposing a tax assessment for 2019. The taxpayer asserted she wasn't liable for the tax assessment because she left the state in 2019, no longer had a place of residence in the state, and didn't intend to return.

The state agreed she wasn't a resident of Indiana during 2019, since she didn't spend the minimum 183 days there. So it next turned to whether she continued to maintain her domicile in the state. The taxpayer presented the following documentation to prove she was a domiciliary of Nevada:

- A mortgage statement showing she purchased a home outside of Indiana in 2019
- Student loan documents
- Bank statements
- Utility bills
- Insurance policies
- A Nevada driver's license.

The department of revenue agreed her documentation was persuasive evidence of her change of domicile and granted her protest**.**

Tax evasion in the District

On the other hand, a taxpayer who claimed he was only a part-year resident of the District of Columbia during 2011 and 2012, with the rest of his time spent in New Hampshire, wasn't able to convince the D.C. Office of Tax and Revenue, a trial court and an appellate court he changed his domicile to New Hampshire.

Working against his claim: a bitter soon-to-be ex-wife, who provided records, including bank records, to OTR showing D.C. was still his domicile during those years. OTR investigated further and matched New Hampshire hotel receipts with his debit card. *Bottom line:* He spent fewer than 100 days out of the District.

To back up his claims of part-year residency in D.C., the taxpayer presented spreadsheets showing the dates and addresses relating to the time he said he spent in New Hampshire. He also said a commercial tax prep program concluded he was a part-year resident.

He was eventually convicted of tax evasion. *Trial court:* The New Hampshire address information supplied to OTR was unsupported and not believable and was an after-the-fact attempt by the taxpayer to justify his claim of part-year residency on his tax returns.

The court also credited the testimony of a hotel employee who said the taxpayer told her he was being audited and offered to pay a fee to use the hotel as his residence after his ex-wife accused him of cheating on his taxes. This was, according to the trial court, another attempt by the taxpayer to establish his domicile in New Hampshire after the fact.

The case is Witaschek v. District of Columbia.

The takeaway

Where employees live is a primary concern for Payroll, since state withholding depends on accurate information.

You should seek to solve the problems within your control. You couldn't, for example, do much about a bitter ex-spouse. But the Indiana taxpayer would have had an easier time if her former employer didn't mistakenly list her legal residence in Indiana.

With year-end approaching, you should have employees to confirm their legal addresses and then touch base with employees monthly to ensure your records remain accurate.

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