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Domicile in Multistate Personal Income Tax Residency Matters: Enter the Swamp at Your Own Peril

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Introduction

State income tax statutes define residency and provide the rules for taxation of a state resident. In most states, maintenance of a domicile in the state is sufficient, by itself, for taxation as a resident without regard to any other test. Unfortunately, rather than applying a set of easily measurable objective tests to meet this domicile standard, the state taxing authorities instead simply think they know it when they see it. Unfortunately, they do not and neither do taxpayers. Such an attitude is reminiscent of the concurring opinion of Justice Potter Stewart, who, when struggling with the definition of obscenity gave us the famous quote: "I know it when I see it."[1] While this type of judicial reasoning may be entirely appropriate in obscenity disputes, state definitions of "resident" for personal income tax purposes need not and should not resort to similar subjective standards.

The current domicile standard often requires a look into the intent of the taxpayer when determining domicile and the resulting tax liability.[2] Better options exist for an important standard crucial to the proper computation of tax liability and the integrity and administration of our state individual income tax systems. The current domicile standard has resulted in

1. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
2. *See, e.g.*, MASS. GEN. LAWS ch. 62, § 1(f) (2018); MINN. STAT. § 290.01(7) (2018); N.Y. TAX LAW § 605(b) (McKinney 2019).

uncertain, inconsistent, time-consuming, and invasive audits. The time has come to end these corrosive we-know-it-when-we-see-it audits that have eroded the confidence of taxpayers and created inefficiencies in tax administration. States should reconsider their laws in furtherance of sound tax policy.

This Article argues that states should remove the domicile concept from the definition of a resident and rely solely on an objective test or tests. Part I of this Article defines the terms *resident* and *domicile* using examples from the laws of Massachusetts, Minnesota, and New York. Part II discusses the problems created for individuals and state taxing authorities in the application of a subjective standard, the burden and standard of proof applied, and the domicile or residency bias of states. Part III describes how Congress defines a resident of the United States and the rationale behind Congress's movement away from its previous subjective standard. Using tax policy maxims, Part IV concludes by supporting a shift away from the current use of the subjective domicile standard and a modification of state tax laws to more closely follow the federal income tax definition of a resident.

I. Current Law in Many States

The laws of Massachusetts, Minnesota, and New York, described in this Part of the Article, illustrate the importance of the residency determination, provide the definitions of resident and domicile, and demonstrate state efforts to demystify the definition of domicile using objective factors. This Article will use these three states to illustrate the difficulties associated with the domicile test for residency.

A. Why Residency Matters

Forty-three states impose a personal income tax.[3] Forty-one states tax most income earned by an individual.[4] Two states,

3. Morgan Scarboro, *State Individual Income Tax Rates and Brackets for 2018*, TAX FOUND. (Mar. 5, 2018), https://taxfoundation.org/state-individual-income-tax-rates-brackets-2018/.
4. *Id.*

New Hampshire and Tennessee, limit their personal income tax to dividend and interest income.[5] In determining its tax base, a state may constitutionally tax the worldwide income of a state resident.[6] However, the U.S. Constitution limits the taxation of nonresidents to income sourced to that particular state.[7] In compliance with this constitutional mandate, states have drafted statutes and regulations defining nonresident source income that falls within the permissible tax base.

Massachusetts imposes tax on a nonresident's income derived from or effectively connected with:

> (1) [A]ny trade or business, including any employment, carried on by [the taxpayer] in Massachusetts . . .
> (2) [T]he participation in any lottery or wagering transaction in Massachusetts; or
> (3) [T]he ownership of any interest in real or tangible personal property located in Massachusetts.[8]

In Minnesota, nonresident individuals initially compute their taxable income the same way that residents do.[9] After applying the rate to get a tax liability, and subtracting nonrefundable credits, nonresidents apportion the tax itself according to the ratio that Minnesota-source federal adjusted gross income bears to total federal adjusted gross income.[10] In the calculation of the numerator of its fraction, the state definition of Minnesota–source federal adjusted gross income includes:

> – Wages, salaries, fees, commissions, tips or bonuses for work done in Minnesota

5. *Id.*
6. *See generally* New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).
7. U.S. CONST. amend. XIV, § 1; *see also* Shaffer v. Carter, 252 U.S. 37, 57 (1920).
8. MASS. GEN. LAWS ch. 62, § 5A (2018); 830 MASS. CODE REGS. 62.5A.1(2) (2018).
9. MINN. STAT. § 290.06 subdiv. 2c(e) (2018).
10. § 290.06 subdiv. 2c(e)(1) .

– Gross winnings from gambling in Minnesota
– Gross rents and royalties from Minnesota property
– Gains from the sale of land or other tangible property in Minnesota
– Gains from the sale of a partnership interest that had property or sales in Minnesota
– Gains on the sale of goodwill or income from a "non-compete" agreement connected with a business operating in Minnesota
– Minnesota gross income from a business or profession conducted partly or entirely in Minnesota, including any Minnesota gross income received as a shareholder of an S corporation or as a partner of a partnership[11]

Similar to Minnesota law, New York law requires that nonresidents compute their tax as if they were residents and then prorate the tax based on the ratio of New York source income to all income.[12] In the calculation of the numerator of its fraction, the state definition of New York-source income includes:

– [R]eal or tangible personal property located in New York State, (including certain gains or losses from the sale or exchange of an interest in an entity that owns real property in New York State . . . ;
– [S]ervices performed in New York State;
– [A] business, trade, profession, or occupation carried on in New York State;
– [D]istributive share of New York State partnership income or gain;
– New York State estate or trust income or gain;
– New York State Lottery winnings if the total

11. MINN. DEP'T OF REVENUE, INCOME TAX FACT SHEET 3: NONRESIDENTS (2018), https://www.revenue.state.mn.us/individuals/individ_income/factsheets/fact_sheets_fs3.pdf.
12. N.Y. TAX LAW § 601(e) (McKinney 2019).

proceeds of the prize are more than $5,000 . . .;

- [A]ny gain from the sale, transfer, or other disposition of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold, when the real property comprising the units of the cooperative housing corporation is located in New York State;
- [A]ny income . . . received related to a business, trade, profession, or occupation previously carried on in New York State, including but not limited to covenants not to compete and termination agreements . . . ; and
- [Income from] a New York S corporation in which you are a shareholder, including:
  - [A]ny gain recognized on the receipt of payments from an installment obligation for federal income tax purposes where the S corporation has distributed an installment obligation under IRC section 453(h)(1)(A) to the shareholders;
  - [A]ny gain recognized on the deemed asset sale for federal income tax purposes where the S corporation has made an election under IRC section 338(h)(10); and
  - [A]ny income or gain recognized on the receipt of payments from an installment sale contract entered into when the S corporation was subject to tax in New York in a case where the S corporation terminates its taxable status in New York.[13]

13. N.Y. ST. DEP'T OF TAX'N AND FIN., NEW YORK SOURCE INCOME OF NONRESIDENT INDIVIDUALS, ESTATES, AND TRUSTS, AND PART-YEAR RESIDENT INDIVIDUALS AND TRUSTS 1 (2011), https://www.tax.ny.gov/pdf/tg_bulletins/pit/b11_615i.pdf.

Although these states apply different formulae for reaching the tax base of nonresidents, each state attempts to limit the taxation of nonresidents to income earned within its borders. Because a residency determination results in the imposition of tax on worldwide income, such a determination substantially broadens the tax base of resident individuals that have earned income within and without their resident jurisdiction.

B. When Residency Disputes Arise

Residency disputes often arise when taxpayers move into or out of a state and the taxpayer disagrees with the government with respect to residency status. Between 1989 and 1998, New York conducted over 30,000 residency audits and assessments from these New York residency audits exceeded $1 billion.[14]

When things go well and no dispute arises, the residency state taxes the worldwide income of the resident and grants a credit to the taxpayer for taxes paid on income sourced to the nonresident state.[15] This credit often avoids or substantially reduces the taxation of the same income in the resident and nonresident state.

Occasionally, where a taxpayer meets the residency test of two states with a personal income tax, the situation becomes more complicated. Although we may hope for a constitutional limitation on state taxation in this situation, the U.S. Supreme Court has upheld the taxation by two or more states as residents in the estate tax context and the logic would likely apply in the income tax area.[16] Fortunately, when two states claim residency, that individual generally finds relief through the credit mechanism described above that grants a credit for taxes paid to the other state. Similar to the credit granted residents for tax paid to nonresident jurisdictions, the credit mechanism

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14. Paul R. Comeau & Andrew B. Sabol, *Multistate Residency Issues: Might Regional Uniformity Be Applied Nationwide?*, 7 J. MULTISTATE TAX'N & INCENTIVES 272, 273 (1998).

15. *See, e.g.*, MASS. GEN. LAWS ch. 62, § 6(a) (2018); MINN. STAT. § 290.06 subdiv. 22a (2018); N.Y. TAX LAW § 620(a) (McKinney 2019).

16. *See generally* Cory v. White, 457 U.S. 85 (1982); Worcester Cty. Trust Co. v. Riley, 302 U.S. 292 (1937).

often eliminates a duplication of tax on the same income.[17]

A move from a taxing state to a state with no personal income tax often produces a large tax disparity and may receive more attention from the states. The former resident state would like to continue to tax the individual as a resident giving that state access to a tax base that includes the individual's worldwide income. Successful abandonment of residency in the former state of residence, assuming no income sourced to the former resident state, leaves the former resident state with no tax base. Therefore, establishing a residency change from a taxing state to a state with no personal income tax can eliminate state personal income tax in its entirety. Because Florida is both a retirement destination and a state with no personal income tax,[18] retirees headed for Florida from states with a personal income tax provide an excellent illustration of the tax at stake.

To quantify the amount at stake in a move to a no-tax state,[19] a taxpayer can estimate the savings by multiplying the former residence state's taxable income by the marginal rate in that state. Massachusetts, Minnesota, and New York have tax rates of 5.1 percent,[20] 9.85 percent,[21] and 8.82 percent,[22] respectively.[23] Due to their higher tax rates, high-tax states, including the three States discussed in this Article, face greater revenue pressures due to the migration of individuals from higher-tax to lower-tax states. A Cato Institute study concluded that tax rates influence interstate migration flows.[24] In 2016,

17. *See* Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533 (2014) (discussing the credit mechanism and when that mechanism does not work perfectly for dual resident taxpayers).

18. FLA. CONST. art. VII, § 5 (prohibiting a personal income tax).

19. Assuming no income sourced to the former residence jurisdiction.

20. MASS. GEN. LAWS ch. 62, § 4(a) (2018).

21. MINN. STAT. § 290.06 subdiv. 2c (2018) (2019 highest marginal tax rate).

22. N.Y. TAX LAW § 601(a)(1)(B)(ii) (McKinney 2019) (2019 highest marginal tax rate).

23. *See* Jason Notte, *How Much Can You Save by Moving to a Low-Tax State?*, ST. (Mar. 28, 2018, 9:37 PM), https://www.thestreet.com/story/14523222/1/how-much-can-you-save-by-moving-to-a-low-tax-state.html (discussing calculation of savings from move to a no-tax state).

24. CHRIS EDWARDS, TAX & BUDGET BULLETIN: TAX REFORM AND

almost 600,000 people with aggregate income of $33 billion moved, on net, from the twenty-five highest-tax states to the twenty-five lowest-tax states in that single year.[25] Of the twenty-five highest-tax states, twenty-four of them had net out-migration in 2016.[26] Of the twenty-five lowest-tax states, seventeen had net in-migration.[27] The largest out-migration is from high-tax New York, whereas the largest in-migration is to low-tax Florida.[28] Due to the guidance provided by various popular internet resources, the migration to Florida may not surprise many. Potentially accelerating the move to Florida, numerous tax professionals have advertised their expertise in domicile changes to low-tax states.[29]

The states seem to have noticed this migration and the publicity surrounding the migration. Although states do not publish their targeting methodology for residency examinations, there are a wealth of examples from practitioners who have noted that Departments of Revenue seem to have an abundance of Florida retiree audits.[30] These retirees can become particularly attractive audit targets when they recognize a large capital gain after their purported change of residency. If the states succeed in classifying these taxpayers as residents in the year of capital gain recognition, it may tax their entire gain.[31] In the absence of a successful residency claim, Massachusetts,

INTERSTATE MIGRATION 1 (Sept. 6, 2018), https://object.cato.org/sites/cato.org/files/pubs/pdf/tbb-84-revised.pdf.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See, e.g.*, Sandra Block, et al., *10 Most Tax-Friendly States for Retirees, 2018*, KIPLINGER (Nov. 29, 2018), https://www.kiplinger.com/slideshow/retirement/T037-S001-10-most-tax-friendly-states-for-retirees-2018/index.html; Patrick Kiger, *Which States Provide the Best Tax Breaks for Retirees?*, AARP (June 5, 2017), https://www.aarp.org/money/taxes/info-2017/states-best-tax-breaks-retirees-fd.html.

30. *See, e.g.*, John H. Gadon, et al., *Home is Where the House is—or is It?*, PRACTICAL TAX LAWYER, Spring 2012, at 12; Susan B. Garland, *States Targeting Snowbirds Fleeing to Tax-Friendlier Climates*, KIPLINGER (Feb. 2016), https://kiplinger.com/article/retirement/T055-C000-S004-home-is-where-the-tax-haven-is.html.

31. *See, e.g.*, MASS. GEN. LAWS ch. 62, § 4(a) (2018); MINN. STAT. § 290.014 subdiv. 1; N.Y. TAX LAW § 601 (McKinney 2019).

Minnesota, and New York nonresidents escape taxation on gains from the sale or exchange of intangibles not derived from or effectively connected with the carrying on of a trade or business in the state.[32] Therefore, residents of the three states recognizing large capital gains from intangible sales avoid tax if they successfully abandon their residency in the taxing state for a state without a personal income tax. In its instructions to its auditors, New York announced its intent to target individuals with large capital gain recognition shortly after their residency change.[33] Therefore, to properly file and plan for state personal income tax liabilities, taxpayers must understand the varying definitions of domicile and resident.

C. Definition of Resident

As stated above, state income tax statutes provide the definition of a resident and the consequences of that determination. Despite the utilization of different tests for determining residency status, domicile in the state results in taxation as a resident, without regard to any other test, in most states and the District of Columbia.

When defining a "resident," many states follow a rule similar to that of Massachusetts. Massachusetts defines a "resident" for tax purposes in the following manner:

> (1) [A]ny natural person domiciled in the commonwealth, or (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

32. MASS. GEN. LAWS ch. 62, § 5A(a) (2018); MINN. STAT. § 290.17(2)(c) (2018); N.Y. TAX LAW § 631(b)(2) (McKinney 2019).

33. STATE OF N.Y. DEP'T OF TAX'N AND FIN., NONRESIDENT AUDIT GUIDELINES 84 (2014), https://www.tax.ny.gov/pdf/2014/misc/nonresident_audit_guidelines_2014.pdf (directing the department's auditors to pay special attention to taxpayers who recognize large capital gains "immediately" after a reported change of domicile).

> partially in and partially out of the commonwealth.[34]

In Minnesota, the term "resident" includes any individual domiciled in Minnesota and any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota.[35]

Similarly, New York defines a resident as one who:

> (A) [I]s domiciled in [New York]; or (B) is not domiciled in [New York] but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.[36]

Like many other states with a personal income tax, Massachusetts, Minnesota, and New York have another opportunity to catch taxpayers in their residency webs by finding residency based on a mere count of days present in the taxing state.[37] Although the states vary the number of days of presence required, most states treat 183 days as sufficient for residency.[38] Of the states employing this alternative test, many also require that the taxpayer have a permanent place of abode in the state.[39] Rooted in an objective count of days, this "days test" rarely creates the taxpayer angst that often follows a subjective domicile determination, and the states find it easier to enforce.[40] For that reason, this Article focuses on the domicile

34. MASS. GEN. LAWS ch. 62, § 1(f) (2018).

35. MINN. STAT. § 290.01 subdiv. 7 (2018).

36. N.Y. TAX LAW § 605(b) (McKinney 2019).

37. MASS. GEN. LAWS ch. 62, § 1(f) (2018); MINN. STAT. ANN. § 290.01 subdiv. 7(b) (2018); N.Y. TAX LAW § 605(b)(1)(A) (McKinney 2019).

38. MINN. DEP'T OF REVENUE, RESIDENCY REPORT 6–8 (2015), https://www.revenue.state.mn.us/research_stats/Documents/Residency_Report_03_13_15.pdf.

39. *Id.*

40. Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT'L L. 271 (2017).

test employed by the states and argues for its removal from the definition of resident. Instead, the "days test," or a modified version of that test, would constitute an appropriate replacement for the domicile standard.

D. Definition of Domicile

1. History of the Law of Domicile

The word "domicile," derived from the Latin *domus* meaning a home or dwelling place, dates back to the Roman Empire.[41] Roman law recognized a connection between a person and her community known as domicile.[42] Under Roman law, an individual could acquire and abandon a domicile provided that individual had an intention to do so and accompanied that intention with presence.[43]

English common law addressed the definition of domicile as early as 1820 in *Munroe v. Douglas*.[44] The Court declared, "[a]n acquired domicil is not lost by mere abandonment, but continues until a subsequent domicil is acquired . . ."[45] Later, in *Udny v. Udny*, Lord Westbury further defined domicile:

> Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or

41. 25 AM. JUR. 2D *Domicil* § 1 (2012); 28 C.J.S. *Domicile* § 3 (2004).
42. M.W. JACOBS, A TREATISE ON THE LAW OF DOMICIL 3, 7–11 (1887).
43. *Id.* at 7.
44. Munroe v. Douglas (1820) 56 Eng. Rep 940.
45. *Id.*

> particular purpose, but general and indefinite in its future contemplation.[46]

In 1853, a state law case reached the U.S. in *Dupuy v. Wurtz*.[47] There, the New York Court of Appeals faced questions concerning the validity of a will made by a testatrix, originally domiciled in New York.[48] She went abroad in 1859 for health reasons and remained abroad until her death in 1871.[49] In deciding that the testatrix had retained a New York domicile, the court established early U.S. concepts of domicile. The Court opined that every person must have a domicile, can have but one domicile, and that domicile continues until a new one is acquired.[50] In addition, a change of domicile required not only a change of residence, but also an intention to abandon the former domicile and acquire another as the sole domicile.[51]

Matter of Newcomb presented the New York courts with another interesting domicile issue.[52] After reaching the age of eighty, Mrs. Newcomb, a domiciliary of New York, decided to move to New Orleans where she had established a memorial monument for her daughter.[53] In anticipation of a domicile question, she executed several formal declarations, in one of which she said:

> I have now concluded to make my permanent home here, because on each succeeding day of my life now drawing to a close, I am the grateful witness of the successful development and steady growth of this noble institution (referring to the Memorial College), which now engrosses my thoughts and purposes and is endeared to me by such hallowed associations. In order that there may be no occasion for misapprehension

46. Udny v. Udny (1869) 1 Sc. & Div. 441, 458 (Scot.).
47. 53 N.Y. 556 (1873).
48. *Id.*
49. *Id.* at 558.
50. *Id.* at 561.
51. *Id.* at 561; 25 AM. JUR. 2D *Domicil* § 1 (2012).
52. *See generally In re* Estate of Newcomb, 84 N.E. 950 (N.Y. 1908).
53. *Id.* at 952–53.

> hereafter, especially in any matter touching the settlement of my estate, I desire to have it known by my particular friends that I have elected to make the city of New Orleans my place of domicile and permanent home, although of course I may occasionally visit or reside in other places.[54]

The Court held such declarations admissible as evidence of her intent as to domicile.[55] It also noted "a person may have two places of residence, as in the city and country, but only one domicile."[56] Echoing the definitions of domicile discussed above, the Court defined domicile as "living in that locality with the intent to make it a fixed and permanent home."[57] The Court ultimately found for the taxpayer and her intent to establish a domicile in New Orleans.[58] A review of the days spent in New York City and New Orleans leads readers to believe that the Court must have placed great weight on her declaration of domicile. Between the date of the declaration and her date of death, she spent less than 150 days in New Orleans and more than 500 in New York City.[59]

In 1914, a domicile case reached the U.S. Supreme Court in *Williamson v. Osenton*.[60] There, the Plaintiff moved from West Virginia to Virginia and brought a suit in Virginia for divorce.[61] The Defendant argued that the Plaintiff's jurisdiction remained in West Virginia (the same as Defendant), thus the requisite diversity of citizenship did not exist.[62] In finding for the Plaintiff, the Court relied on a stipulation of facts that the Plaintiff went to Virginia "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States

54. *Id.* at 953.
55. *Id.* at 955.
56. *Id.* at 954.
57. *Id.*
58. *In re* Estate of Newcomb, 84 N.E. at 954.
59. *Id.* at 953.
60. *See generally* 232 U.S. 619 (1914).
61. *Id.* at 623.
62. *Id.*

court."[63] Justice Holmes defined domicile as ". . . the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."[64] In resolving the case before him, a purported change of domicile, Justice Holmes stated, "[t]he essential fact that raises change of abode to change of domicil is the absence of any intention to live elsewhere."[65]

In 1971, the Restatement (Second) Conflict of Laws stated, "[a] person's domicil is usually the place where he has his home."[66] Home, in turn, is "the place where a person dwells and which is the center of his domestic, social and civil life."[67]

From Roman law through the Second Restatement: Conflict of Laws, domicile determined many of the rights and obligations of the parties, the characterization of property, the validity and construction of a will, the place of probate, and other issues. In constructing their definitions of domicile for tax purposes, states followed a similar path.

2. Domicile in State Tax Law

As described below, state tax definitions of domicile remain consistent with Roman law, common law, early U.S. law outside of the tax context, and the definitions provided in the Second Restatement.

In 1840, Massachusetts faced a tax domicile question in *Thorndike v. City of Boston*.[68] A Boston citizen had moved out of the country but kept his mansion in the city anticipating his wife's return after his death.[69] The taxpayer never intended to move back to the city.[70] Boston believed that the taxpayer, still a domiciliary, owed poll tax and a tax on personal property.[71] In

63. *Id.*
64. *Id.* at 625 (citing Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 157 (1898)).
65. *Williamson*, 232 U.S. at 625.
66. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. a (AM. LAW INST. 1971).
67. *Id.* § 12.
68. 42 Mass. 242 (1840).
69. *Id.*
70. *Id.*
71. *Id.*

ruling in favor of the taxpayer, the Massachusetts Supreme Judicial Court made the following statement about domicile:

> No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versâ*, by acquiring a new domicil, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur, that the evidence of facts tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin.[72]

In 1933, the Massachusetts Supreme Judicial Court addressed a personal income tax matter in *Commonwealth v. Davis*.[73] The Plaintiff, Davis, argued that he had moved from Massachusetts to Texas and the assertion of the personal income

72. *Id.* at 245–46.
73. 187 N.E. 33, 37 (Mass. 1933).

tax violated both the Massachusetts and U.S. Constitution.[74] The Court first noted the following:

> It is difficult if not impracticable to give a definition of domicil at once accurate and comprehensive. It commonly depends upon no one fact or combination of circumstances but upon all the factors disclosed in the particular case. In general it is said to be the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode.[75]

After reviewing the facts in Davis, the court made the following finding:

> The fact that he made no change in his method of living, the relative attractiveness to him of Brockton and Luling as places of abode, the small amount of time spent and the meagre personal belongings left in the latter place, and the evidence as to his philanthropic, social and family interests, the various reasons for the change put forward from time to time and the very elaborateness of his formal public announcements on the subject, all might have been regarded as negativing, or at least as failing to prove, a change of domicil.[76]

In 1956, keeping with history, Massachusetts promulgated personal income tax regulations that defined domicile as "the place that is an individual's true, fixed, and permanent home, determined by established common law principles and the facts and circumstances of each case."[77] More recently, in *Reiersen v. Commissioner of Revenue*, the taxpayer claimed he maintained

74. *Id.*
75. *Id.*
76. *Id.* at 38.
77. 830 MASS. CODE REGS. 62.5A.1(2) (2018).

a domicile in the Republic of the Philippines and earned his entire income from sources in that country.[78] The Court determined that Reiersen had found in the Philippines, business and social success he had not enjoyed in Massachusetts.[79] Reiersen had made friends and joined clubs.[80] The Court also called his family connections "distant."[81] The Court acknowledged his expressions of intent to establish domicile in the Philippines and found that intent reinforced by objective evidence offered at trial.[82] The Court ruled, "the subsidiary facts found by the board require a conclusion that Reiersen had a present and future intent during the years in issue to make the Philippines his home and the center of his business, social, and civic life."[83]

Minnesota's rules similarly define domicile as:

> The bodily presence of an individual person in a place coupled with an intent to make such a place one's home. The domicile of any person is that place in which that person's habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return.
>
> . . . .
>
> The mere intention to acquire a new domicile, without physical removal, does not change the status of the taxpayer, nor does the fact of physical removal, without the intention to remain, change the person's status.[84]

An individual can have only one domicile at any particular time and that domicile, once shown to exist, continues until the

78. 524 N.E.2d 857, 857 (Mass. App. Ct. 1988).
79. *Id.* at 860–61.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Reiersen*, 524 N.E.2d at 861 (citing Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 700–03 (1st Cir. 1979)); Leavitt v. Scott, 338 F.2d 749, 751 (10th Cir. 1964).
84. MINN. R. 8001.0300(2) (2019).

taxpayer abandons that domicile.[85] "An absence of intention to abandon a domicile is equivalent to an intention to retain the existing one."[86]

In *Larson v. Commissioner*,[87] the taxpayer:

> [O]wned more property in Minnesota than he did in Nevada, spent more time in Minnesota than he did in Nevada, registered more vehicles in Minnesota than Nevada, and maintained bank accounts and mail delivery in Minnesota.
>
> Larson also maintained other personal and professional connections in Minnesota that he did not have in Nevada.[88]

Larson used attorneys, accountants, and personal assistants in both jurisdictions during the tax years.[89] Larson did not prove that he intended to change his domicile to Nevada.[90] The Court not only looked at Larson's stated intent and his actions in the tax years, but also looked at the "acts and circumstances" of Larson's life thereafter to evaluate "the sincerity of [his] announced intent."[91]

New York defines 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."[92] Once established, that domicile continues until the individual in question moves to a new location with the bona fide intention of establishing a new fixed and permanent home.[93] No change of domicile results from a removal to a new location if the taxpayer intends to remain there only for a limited time.[94] A person can have only one domicile

85. *Id.*
86. *Id.*
87. 824 N.W.2d 329, 332 (Minn. 2013).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 333.
92. N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20(d)(1) (2019).
93. § 105.20(d)(2).
94. *Id.*

and if a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home.[95]

In 1943, the New York Court of Appeals measured an individual's intent to create a new domicile by considering "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it."[96] With regard to an alleged change of domicile, courts have found formal declarations less persuasive than the informal acts of an individual's "general habit of life."[97]

Although New York auditors may focus on objective factors to make their assessments, New York courts have found in favor of taxpayers that provided the court with compelling testimony as to their subjective domicile intent.[98] In *Matter of Patrick*, the taxpayer returned to New York to marry his long lost love from 40 years earlier, Clara.[99] After experiencing some medical issues, he separated from his wife at that time to begin his search for Clara.[100] He found Clara again in 2008.[101] In 2009, Clara and the taxpayer finalized their divorces to their spouses and married.[102] On March 1, 2011, the taxpayer retired and joined Clara in Paris.[103] The taxpayer sought permanent residency in France, obtained a French driver's license, and became a world traveler with Clara.[104] He purchased and extensively renovated a Paris home and changed his lifestyle.[105] Despite these changes, the taxpayer spent roughly twice as many days in New York as he spent in Paris in both 2011 and

95. § 105.20(d)(4).

96. *In re* Estate of Bourne, 41 N.Y.S.2d 336, 343 (1943), *aff'd*, 47 N.Y.S.2d 134 (N.Y. App. Div. 1944), *and aff'd*, 58 N.E.2d 729 (N.Y. 1944) (citation omitted).

97. *See, e.g.*, *In re* Trowbridge, 194 N.E. 756, 758 (N.Y. 1935).

98. *See, e.g.*, *In re* Patrick, DTA Nos. 826838 and 826839 (N.Y. Div. of Tax App. 2017).

99. *Id.* at 5.

100. *Id.* at 4.

101. *Id.* at 5.

102. *Id.* at 7.

103. *Id.* at 9.

104. *In re Patrick*, DTA Nos. 826838 and 826839, at 11.

105. *Id.* at 8.

2012.[106] His need for certain surgical procedure expertise in New York, contributed to his New York presence for these two years.[107] The auditor concluded that the taxpayer's home, active business, family, "near and dear" items, and time spent in each location favored a finding of New York domicile.[108] The administrative law judge found that the taxpayer's "credible testimony in this regard was unequivocal" and that he "considered Paris his home."[109]

In an attempt to assist taxpayers and auditors with domicile determinations, Massachusetts, Minnesota, and New York have listed certain objective factors indicative of a taxpayer's subjective intent with respect to domicile.

E. Domicile Factors

Thirty-three states use a set of factors to determine domicile for tax purposes.[110] These states use these objective factors to ascertain the subjective intention of taxpayers with respect to their choice of domicile.

1. Massachusetts

In its regulations, Massachusetts defines domicile as "the place which is an individual's true, fixed and permanent home, determined by established common law principles and the facts and circumstances in each case."[111] The Massachusetts Department of Revenue has identified the following domicile factors on its website, under guidance entitled "Changing your domicile," that it believes will guide taxpayers in a determination of whether they have changed their domicile.[112]

106. *Id.* at 10–14.

107. *Id.* at 12.

108. *Id.* at 7. These five factors constitute New York's primary domicile factors, discussed in Part I, E. 3 below.

109. *Id.* at 21.

110. MINN. DEP'T OF REVENUE, *supra* note 38, at 6.

111. 830 MASS. CODE REGS. 62.5A.1(2) (2018).

112. *Learn About Legal and Residency Status in Massachusetts*, MASS. GOV., https://www.mass.gov/service-details/learn-about-legal-and-residency-status-in-massachusetts (last visited July 11, 2019).

Factors that will be considered when determining if you've changed your domicile:

- You've purchased or leased a new home or an apartment in the new location
- You've moved his personal property to the new location
- You got permanent employment in the new location
- You canceled Massachusetts bank accounts and opened new accounts in the new location
- You sold real property in Massachusetts or canceled leases
- You issued address change notices
- You changed voter registration
- You got a driver's license and automobile registration in the new location
- You changed membership in churches and clubs
- Generally, you're involved in the new community[113]

Although the Massachusetts Department of Revenue examines each of the factors described above, Massachusetts has signed the Northeastern States Tax Officials Association Cooperative Agreement on Determination of Domicile requiring a focus on the five factors described below in Part II(E)(4).

2. Minnesota

Minnesota uses twenty-six factors to determine domicile.[114] This list represents the Minnesota Department of Revenue's attempt to specify concrete relationships, activity, behavior, or other actions that it believes constitutes objective evidence of an individual intent to establish a permanent home. Because some of the twenty-six factors overlap with one another, taxpayers and their representatives can combine the factors into groups to

113. *Id.*
114. MINN R. 8001.0300 subp. 3 (2019).

simplify the relevant concepts: employment-related factors; homes and living arrangements; business relationships; social and civic relationships; and other factors.

Minnesota's twenty-six factors, or the "A-Z factors," follow:

> Considerations. The following items listed will be considered in determining whether or not a person is domiciled in this state:
> - [L]ocation of domicile for prior years;
> - [W]here the person votes or is registered to vote, but casting an illegal vote does not establish domicile for income tax purposes;
> - [S]tatus as a student;
> - [C]lassification of employment as temporary or permanent;
> - [L]ocation of employment;
> - [L]ocation of newly acquired living quarters whether owned or rented;
> - [P]resent status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available for rent to another;
> - [W]hether homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and whether the homestead status of the former living quarters has not been renewed;
> - [O]wnership of other real property;
> - [J]urisdiction in which a valid driver's license was issued;
> - [J]urisdiction from which any professional licenses were issued;
> - [L]ocation of the person's union membership;
> - [J]urisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles;
> - [W]hether resident or nonresident fishing or hunting licenses purchased;
> - [W]hether an income tax return has been filed as a resident or nonresident;
> - [W]hether the person has fulfilled the tax

obligations required of a resident;

- [L]ocation of any bank accounts, especially the location of the most active checking account;
- [L]ocation of other transactions with financial institutions;
- [L]ocation of the place of worship at which the person is a member;
- [L]ocation of business relationships and the place where business is transacted;
- [L]ocation of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member;
- [A]ddress where mail is received;
- [P]ercentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment)that the person is physically present in each jurisdiction other than Minnesota;
- [L]ocation of jurisdiction from which unemployment compensation benefits are received;
- [L]ocation of schools at which the person or the person's spouse or children attend, and whether resident or nonresident tuition was charged; and
- [S]tatements made to an insurance company, concerning the person's residence, and on which the insurance is based.[115]

Unlike Massachusetts and New York, Minnesota has not adopted the five factors of the Northeastern States Tax Officials Association Cooperative Agreement on the Determination of Domicile as the most important or primary factors to be considered in weighing the taxpayer's domicile.[116]

115. *Id.*
116. *See id.*

3. New York

New York divides its domicile factors into two general categories: primary factors and other factors.[117] An analysis of the five primary factors (home, active business involvement, time, items near and dear, and family connections) should generally provide a basis for New York domicile before documentation concerning the "other" factors is requested from the taxpayer.[118] The analysis of the primary factors should look at the New York ties for the specific factor in relation to the ties for the factor that exist in other locations.[119]

New York also listed the following other factors:

- The address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received.
- The physical location of the safe deposit boxes used for family records and valuables.
- Location of auto, boat, and airplane registrations as well as the individual's personal driver's or operator's license.
- Where the taxpayer is registered to vote and an analysis of the exercise of said privilege. The auditor should not limit the review to the general elections in November, but also question the taxpayer's participation in primary or other off-season elections, including school board and budget elections.
- Possession of a Manhattan Parking Tax exemption.
- An analysis of telephone services at each residence including the nature of the listing, the type of service features, and the activity at the location.
- The citation in legal documents that a particular location is to be considered the

117. STATE OF N.Y. DEP'T OF TAX'N AND FIN., *supra* note 33, at 14.
118. *Id.* at 15–33.
119. *Id.* at 15–34.

individual's place of domicile or that a particular residence is considered to be a primary residence. Examples would include, but are not limited to, wills; divorce decrees or separation agreements; applications for school tax relief exemption (STAR); leases for rent-controlled or rent-stabilized apartments.

- Green cards indicating that an immigrant can legally reside in the United States on a permanent basis.[120]

In addition, the Guidelines list factors deemed irrelevant in determining one's domicile. The Guidelines call these items "non-factors" and instruct auditors not to invest time in exploring their impact on the domicile issue and not to accept these as proof of domicile when received from taxpayers.[121] These non-factors include but are not limited to:

- The place of interment;
- The location where the taxpayer's will is probated;
- Passive interest in partnerships or small corporations;
- The mere location of bank accounts;
- Contributions made to political candidates, or causes; and
- The location where the taxpayer's individual income tax returns are prepared and filed.[122]

4. NESTOA Agreement

On October 2, 1996, eleven states and the District of Columbia entered into a cooperative agreement known as the Northeastern States Tax Officials Association Cooperative Agreement on Determination of Domicile.[123] This Agreement

120. *Id.* at 38.
121. *Id.* at 40.
122. *Id.* at 40.
123. Northeastern States Tax Officials Association Cooperative

describes its purpose as facilitating the application of the tax laws in a fair and consistent manner that fosters compliance, reduces multiple taxation, increases tax revenue, and lowers the burden on compliant taxpayers.[124] More specifically, the policy goals for the working group drafting the NESTOA Cooperative agreement were as follows:

- Individuals should only be determined to be domiciliaries by one state for a specific period of time;
- Individuals should not pay tax on identical income to multiple states; and
- Criteria used should be as uniform as possible to increase voluntary compliance and allow for the easy exchange of information among the NESTOA states.[125]

The states ultimately agreed on the following five most important domicile factors for investigation in domicile disputes: (1) size, use and relative value of dwelling places; (2) relative time spent in each jurisdiction; (3) location of "near and dear" items; (4) location of principal business involvement; and (5) location of family connections.[126]

Where appropriate, the Agreement also discusses the consideration of other factors: location of social and civic activities, location of places of worship, and other indicia of residence.[127] When addressing each of the factors, the Agreement requires a review of the following questions:

Home

What are the residences owned or rented by the taxpayer? Where are they located? How are they used? What is the size and value of each residence? Responses to all such questions

Agreement on Determination of Domicile, Oct. 1, 1996 [hereinafter NESTOA Cooperative Agreement].

124. *Id.*

125. *Id.* § 1.

126. *Id.* § 2.

127. *Id.*

shall be considered.

Time

Where and how the individual spends time during the tax year shall be considered. Consideration shall also be given to whether the taxpayer is retired or actively involved in a business or profession. How much travel the individual does and the nature of the travel shall be considered. The overall living pattern or life style of the individual shall be examined.

Items "Near & Dear"

The location of the items or possessions that the individual considers "near and dear" to his or her heart, of significant sentimental value, family heirlooms, collections of valuables or possessions that enhance the quality of one's life style shall all be reviewed.

Active Business Involvement

How the taxpayer earns a living, whether the taxpayer is actively involved in any business ownerships or professions and to what degree the individual is involved as well as how that involvement compares to the involvement in business outside of the state are areas that shall be examined.

Family Connections

When the first four factors are not conclusive, courts should review where the individual's minor children attend school and, in certain unique and discrete situations, the residence of the individual's immediate family.[128]

The five factors represent a step forward in an effort to clarify the definition of domicile. However, each factor has more than one question in its body, the Agreement does not prioritize the factors or the questions within each factor, and the Agreement continues to permit a review of other indicia of

128. *Id.*

domicile where appropriate.[129] Like the domicile factors of each state described above, the Agreement attempts to bring certainty to the subjective intent of a taxpayer, through a review of objective factors, by individuals unfamiliar with the taxpayer's true intention.

II. The Problems with the Current System

Residency determinations in states asserting the domicile of a taxpayer are uncertain, unpredictable, and time-consuming, which results in the inefficient administration of these laws. These deficiencies are brought about by the application of a subjective standard, the burden and standard of proof placed on taxpayers, and the domicile bias of auditors conducting these audits.

A. Difficulties with a Subjective Standard

In the drafting of the NESTOA Cooperative Agreement, the Northeastern States noted that "[t]he problems associated with domicile and residency are difficult to address because of the subjective nature of this whole area."[130] Before the drafting of the NESTOA Cooperative Agreement, the courts in Massachusetts, Minnesota, and New York had their own struggles with the subjective standards. Since state law generally looks to objective factors to determine the subjective intentions of taxpayers, taxpayers and the states have fought over the identification of the relevant factors and the relative weight given each factor. The following discussion reflects judicial and administrative difficulties with a subjective standard in Massachusetts, Minnesota, and New York.

1. Massachusetts

As a starting point to our discussion of state difficulties with a subjective standard, the Massachusetts Supreme Judicial Court described the domicile standard as follows:

129. NESTOA Cooperative Agreement, *supra* note 123.
130. *Id.*

> No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case . . . ; and it may often occur, that the evidence of facts tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another.[131]

The Massachusetts Supreme Judicial Court followed this quotation with a discussion of the weight given each of the factors and combinations of factors used in applying a subjective standard.[132] The Court held that the fact finder in a particular dispute must determine the weight given to each factor or combination of factors.[133]

In a more recent decision, the Massachusetts Supreme Judicial Court reiterated the standard's lack of guidance when it stated, "[a]scertainment of the domicil [sic] of an individual is mainly a question of fact to be determined from all the evidence and circumstances."[134] That determination "depends upon no one fact or combination of circumstances but upon all the factors disclosed in the particular case."[135]

These decisions leave taxpayers and administrators with no advance guidance with respect to the weight given to each factor or combination of factors. This situation improves slightly with application of the five factors of the NESTOA Cooperative Agreement, but potential Massachusetts domiciled taxpayers face we-know-it-when-we-see-it disputes with little or no guidance at the time of tax return preparation.

131. Tax Collector of Lowell v. Hanchett, 134 N.E. 355, 357 (Mass. 1922).
132. *Id.*
133. *Id.*
134. Commonwealth v. Davis, 187 N.E. 33, 37 (Mass. 1933).
135. *Id.* at 50.

2. Minnesota

Minnesota's rules accurately summarize the analysis used in most states: "No positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile but such intention may be proved by acts and declarations, and of the two forms of evidence, acts must be given more weight than declarations."[136] Like Massachusetts, Minnesota's rules begin with the proposition that the analysis involves an effort to discern subjective intent and no precise definition will uniformly guide taxpayers and state taxing authorities in their interpretations.[137]

The Minnesota Supreme Court addressed its domicile factors and the relative weight given each factor in *Mauer v. Commissioner of Revenue*.[138] First, the Minnesota Supreme Court rejected an approach that determined domicile by counting factors; it then proceeded to count factors and found that the taxpayer had established a Minnesota domicile.[139] The taxpayer argued that three factors favored Minnesota domicile and the remaining eleven factors favored domicile in no particular state.[140] The Commissioner argued that ten factors favored Minnesota domicile and four favored domicile in no particular state.[141] In determining the taxpayer's domicile, the Minnesota Tax Court found that eight of the twenty-six factors favored Minnesota domicile, six factors favored Florida domicile, six provided no indication of domicile, and six did not apply.[142] The dissent felt the majority got lost in the twenty-six factor test, while ignoring major events of the taxpayer's life.[143] When commenting on the domicile test, the dissent said, "[t]axpayers in Minnesota enter the domicile swamp at their own peril."[144] In response to the dissent, the majority noted, "[w]e acknowledge

136. MINN. R. 8001.0300 subp. 2 (2019).
137. *Id.*
138. 829 N.W.2d 59 (Minn. 2013).
139. *Id.* at 69–70.
140. *Id.* at 70.
141. *Id.*
142. *Id.*
143. *Mauer*, 829 N.W.2d at 78.
144. *Id.*

that any inquiry about a taxpayer's domicile will be an intensive fact-specific inquiry and that the results of such fact-specific inquiries may not always be as precise as we would hope. But the factors do have merit and do provide guidance."[145]

The dissent took issue with the twenty-six factor domicile test by calling it "no test at all" and rejected the Commissioner's depiction of the current approach to domicile as "common sense."[146] The dissent compared the Commissioner's review of the factors in *Mauer* to similar findings of the Commissioner in other cases before the Minnesota Supreme Court.[147] According to the dissent, the Commissioner selectively minimizes documentary declarations of domicile, such as the address on a driver's license.[148] In *Mauer*, because the taxpayer had attained a Florida driver's license, the Commissioner disregarded the documentary declaration.[149] In other cases, the Commissioner emphasized a failure to change a driver's license address as evidence of no change in domicile.[150] Similarly, the Commissioner dismissed Mauer's Florida homestead status as an easily met requirement.[151] However, when the taxpayer did not change his or her homestead status, the Commissioner had previously treated that failure as evidence of no change in domicile.[152]

The Minnesota Tax Court has labeled "posturing" factors the items dismissed by the Commissioner and discussed above in the *Mauer* dissent.[153] In *Page v. Commissioner*, the Minnesota Tax Court considered a taxpayer's acts such as "sending change of address cards to various credit card companies and other creditors, closing their Minneapolis bank accounts, and relying solely upon their Illinois bank accounts" as carrying little, if any,

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145. *Id.* at 75.

146. *Id.* at 78.

147. *Id.*

148. *Mauer*, 829 N.W.2d at 78.

149. *Id.*

150. *Id.* (citing Syfco v. Comm'r of Revenue, No. 4624, 1987 WL 5138, at *6 (Minn. T.C. Feb. 11, 1987)).

151. *Id.*

152. *Id.* (citing Page v. Comm'r of Revenue, No. 4011, 1986 WL 15695, at *7 (Minn. T.C. Mar. 12, 1986)).

153. *Page*, 1986 WL 15695, at *9.

weight in a domicile analysis.[154] In *Sanchez v. Commissioner*, the Minnesota Tax Court similarly dismissed out-of-state driver's licenses, checking account, credit cards, and voter registration.[155]

In summary, it appears at times that the Commissioner finds the "posturing" factors compelling when absent and less than compelling when present. The majority in *Mauer* acknowledged such a potential for abuse:

> [W]e acknowledge and agree with the dissent's desire to convey to both the Commissioner and the tax court that they must strive to apply the Department's factors in a consistent and equitable manner. For taxpayers to have trust and confidence that Minnesota's tax system is fairly and equitably applied to all, it is vitally important that taxpayers be able to understand the Department's factors and how those factors are applied in any given situation. Such an understanding is important so that taxpayers can adjust their expectations, intentions, and actions accordingly.[156]

3. New York

Individuals facing potential New York residency audits must also assess the domicile factors with a focus on the primary factors described above in Part I(E)(3). Although a more complete discussion of these primary factors occurs in a discussion of the NESTOA Cooperative Agreement that follows, one particular dispute highlights some of the eccentricity of the courts in addressing these matters.

In re Blatt illustrates a court's analysis of the domicile factors and a court's fixation on one element of a particular domicile factor.[157] The taxpayer moved from New York to Texas

154. *Id.*
155. No. 7910, 2008 WL 8679077, at *5 (Minn. T.C. Oct. 9, 2008).
156. Mauer v. Comm'r of Revenue, 829 N.W.2d 59, 76 n.2 (Minn. 2013).
157. DTA No. 826504 (N.Y.S. Div. Tax App., Feb. 2, 2017).

for a new job.[158] He initially maintained a residence in each state, but over time committed to living in Texas.[159] Subsequent to the year at issue, the taxpayer returned to New York for a new position.[160] While he was living in Texas, he stopped paying tax to New York as a resident.[161] Among the various domicile factors weighed by the court were the taxpayer's "near and dear" items.[162] Although the taxpayer maintained a home in both New York and Texas, he moved his beloved dog from New York to Texas.[163] The dog's location compelled a finding of domicile in Texas.[164] Did Blatt offer compelling testimony or did the administrative law judge love dogs?

4. NESTOA Cooperative Agreement

In Part I(E)(3), this Article lists the five primary indicia of domicile as follows:

- Home. Size, use and relative value of dwelling places.
- Time. Relative time spent in each jurisdiction.
- Near and Dear. Location of "near and dear" items.
- Business. Location of principal business involvement.
- Family. Location of family connections.

Each factor has more than one question in its body, the Agreement does not prioritize the factors or the questions within each factor, and the Agreement continues to permit a review of other indicia of domicile "where appropriate."[165] The NESTOA Cooperative Agreement also describes some of the questions auditors should investigate in their analyses of each factor.

158. *Id.* at ¶ 55.
159. *Id.* at ¶¶ 38, 40, 42, 55.
160. *Id.*
161. *Id.*
162. *Id.* at 22.
163. *In re* Blatt, DTA No. 826504 at ¶ 22.
164. *Id.*
165. NESTOA Cooperative Agreement, *supra* note 123.

However, these questions cannot encompass all the possible nuances of an individual's life in arriving at subjective intent to establish a domicile in a particular jurisdiction. It takes little imagination to expand and question the sufficiency of the questions provided for each of the primary factors. For illustrative purposes, consider the questions used to measure the relative size, use, and market value of a dwelling place owned by the taxpayer when that taxpayer owns more than one home.

Should an auditor give less weight to the home factor when the taxpayer's family lives in another jurisdiction? Did the taxpayer decorate the home with "near and dear" items, and how does their value affect the relative value comparison? Should a consideration of relative value involve an adjustment for cost of living by location? If the taxpayer plans to downsize upon retirement, should the auditor give less weight to the relative size and value of the dwelling? How should an auditor assess the relative size, use, and market value of a home where the taxpayer cannot occupy the home due to a spousal separation agreement? When a home in the claimed former residence jurisdiction has a loss of market value below the principal of the mortgage, should the auditor ignore the retention of the home? In addition to the nuances that may affect the domicile analysis, the taxpayer has the burden of proof in these disputes, and often the level of proof exceeds that imposed in other tax matters.

B. Burden and Standard of Proof

Litigants with the burden of proof have the responsibility to put forth sufficient evidence to prevail on their claims.[166] This burden of proof entails both the burden of producing the evidence and the burden of persuading the trier of fact.[167] The standard of proof refers to the amount of evidence required to prove a legal claim or assertion.[168] The U.S. Supreme Court has held that a standard of proof serves to "instruct the factfinder

166. John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion,* 68 HARV. L. REV. 1382 (1955).

167. *Id.* at 1382–83.

168. *Standard of Proof*, BLACK'S LAW DICTIONARY (10th ed. 2014).

concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[169] Ordinarily, courts apply a preponderance of the evidence standard of proof in civil claims.[170] In some instances, civil cases apply a higher standard referred to as the clear and convincing standard.[171]

When the standard of proof for the particular matter requires proof by a preponderance of the evidence, the party with the burden of proof must establish the facts to be more probably true than false.[172] The clear and convincing standard requires that the "truth of the facts asserted should be strong."[173] The party with the burden of proof "must establish that the facts, which he asserts, are highly probably true."[174]

1. Massachusetts

In Massachusetts, the burden of proof in tax matters generally rests with taxpayers.[175] However, Massachusetts places the burden of proof on the party asserting that a change of domicile has occurred.[176] The practical implications are that taxpayers leaving the state have the burden of proving a change of domicile and the Massachusetts Department of Revenue has the burden of proof with respect to taxpayers entering the state. Typically, in the absence of a statutory mandate, Massachusetts taxpayers face a preponderance of the evidence standard of proof

169. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

170. J. P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 245 (1944).

171. *Id.*

172. *Id.* at 247.

173. *Id.* at 253.

174. *Id.* at 254.

175. *See* Towle v. Comm'r of Revenue, 492 N.E.2d 739, 741–42 (Mass. 1986) (referring to use tax on boat); William Rodman & Sons, Inc. v. State Tax Comm'n., 368 N.E.2d 1382, 1385 (Mass. 1977) (referring to excise tax on cigarettes); Staples v. Comm'r of Corps. & Taxation., 24 N.E.2d 641, 643–44 (Mass. 1940) (referring to income tax on annuity income).

176. Horvitz v. Comm'r of Revenue, 747 N.E.2d 177 (Mass. App. Ct. 2001) (noting that the Commissioner in this case had both the burden of production and the burden of persuasion since the Commissioner was asserting a change of domicile).

in tax matters before the Appellate Tax Board.[177]

2. Minnesota

Minnesota also believes that the burden of proof falls on the party asserting that a change of domicile has taken place.[178] Minnesota applies a preponderance of the evidence standard of proof.[179] Therefore, like in Massachusetts and New York, the practical implications are that taxpayers leaving the state have the burden of proving a change of domicile and the Minnesota Department of Taxation has the burden of proof with respect to taxpayers entering the state.

3. New York

New York law provides that the burden of proving a change of domicile rests with the party asserting the change.[180] Therefore, like in Massachusetts, the practical implications are that taxpayers leaving the state have the burden of proving a change of domicile and the New York Department of Taxation has the burden of proof with respect to taxpayers entering the state. The difference between Massachusetts and New York is the standard applied. Massachusetts applies a preponderance of the evidence standard, and New York applies a clear and convincing standard.[181] Therefore, New York taxpayers asserting a domicile change must meet the burden of proof and the higher standard of proof.

177. *See, e.g.*, Bayer Corp. v. Comm'r of Revenue, Nos. F239697, F239698, & F245722, 2005 WL 2179233 (Mass. App. Tax Bd., Sept. 8, 2005).

178. *In re* Smith's Estate*,* 64 N.W.2d 129, 131 (Minn. 1954); McCutchan v. Comm'r of Taxation*,* Docket No. 563 (Minn. Tax Ct. Jan. 20, 1956).

179. Red Owl Stores, Inc. v. Comm'r of Taxation, 117 N.W.2d 401, 407 (Minn. 1962).

180. *See* N.Y. TAX LAW § 105.20(d)(2) (McKinney 2019); *see generally* Bodfish v. Gallman, 378 N.Y.S.2d 138 (1976).

181. Ruderman v. Ruderman, 82 N.Y.S.2d 479, 481 (1948).

C. Domicile or Residency Bias

Taxpayers can find domicile or residency bias in administrative guidance issued by the states and in their respective court decisions. This bias may generate a disproportionate number of audits of taxpayers with proposed no-tax residency states and finds its way into the court decisions and arguments put forth by the commissioners of revenue. Minnesota and New York have not hidden that bias well.

The above discussion of Minnesota's domicile factors argues that the Minnesota Commissioner of Revenue finds the "posturing" factors compelling when absent and less than compelling when present.[182] If pushed, the Commissioner of Revenue would likely argue that these positions reflect zealous advocacy rather than bias and other facts supported a domicile and residency conclusion. However, the *Mauer* dissent made a compelling argument that the Commissioner of Revenue has made selective use of the "posturing" domicile factors.[183]

Minnesota has also wrestled with the role of tax avoidance in domicile determinations. The Minnesota Supreme Court has stated, "[i]t is to be pointed out that if the necessary intention to change one's domicile is, in fact, present, the motive or purpose in making the change [e.g., tax avoidance] is unimportant."[184] However, one commentator has suggested that the actions of Minnesota courts do not always follow this mandate.[185] In furtherance of his belief that tax avoidance is considered, this commentator goes further and suggests proposed residency states with no income tax are disproportionately at issue in domicile disputes before Minnesota courts.[186] "Minnesota is often referred to among friends as 'the Hotel California: You can check out any time you like, but you can never leave.'"[187]

182. *See infra* Part II(A)(2).

183. Mauer v. Comm'r of Revenue, 829 N.W.2d 59, 78 (Minn. 2013).

184. Miller v. Comm'r of Taxation, 59 N.W.2d 925, 926 n.2 (Minn. 1953) (internal citations omitted).

185. Joseph E. Cooch, *When Everything Matters, Nothing Matters: Minnesota's Unprincipled Approach for Determining Domicile in Tax Disputes, and a Path Forward*, 37 HAMLINE L. REV. 229, 247 (2014).

186. *Id.*

187. Dale Kurschner, *The Great Migration*, TWIN CITIES BUS., at 41, (Apr. 2016), http://pageturnpro2.com.s3-website-us-east-1.amazonaws.com/Publicat

The New York Nonresident Audit Guidelines direct the department's auditors to pay special attention to taxpayers who recognize large capital gains immediately after a reported change of domicile. "Large capital gains are uncommon, and often the only change in lifestyle demonstrated by the individual is the fact that a substantial gain was realized in the year of, or immediately after, the alleged change of domicile."[188] This language in the New York Nonresident Audit Guidelines demonstrates a residency bias by implying that taxpayers assert domicile change to avoid tax following a large capital gain. Despite the Department's assertion that individuals assert domicile change to avoid tax, on many occasions the link between the capital gain and the domicile change could be a mere change in employment status or other life event. Indeed, that large capital gain could be the sale of stock in a business following an individual's retirement.

The Guidelines miss the mark in at least one other respect. Although courts must review a taxpayer's intentions to change her domicile, an intention to avoid tax should not affect that taxpayer's status as a domiciliary. At least in New York, the courts have long recognized the right of a taxpayer to "change his or her domicile for the purpose of avoiding taxation."[189] In *Ingle v. Tax Appeals Tribunal*, the Court considered the state income tax consequences of domicile abandonment in a review of a taxpayer's subjective intent to change her domicile.[190] Where a New York domiciliary relocated to Tennessee during the year, a dispute existed about the timing of her change in domicile.[191] The taxpayer's employer sold the business in which the taxpayer owned stock.[192] Aware that she would realize a large capital gain on her stock and owe considerable New York income tax, the taxpayer hastened her move back to Tennessee.[193] The Court found that the taxpayer's tax avoidance

ions/201603/1688/71391/PDF/131032230076236000_TCB0416.pdf.

188. State of N.Y. Dep't of Tax'n and Fin., *supra* note 33 at 84.

189. Andrews v. Graves, 32 N.Y.S.2d 352 (1942), *aff'd*, 42 N.E.2d 748 (N.Y. 1942).

190. 973 N.Y.S.2d 877 (2013).

191. *Id.* at 879–80.

192. *Id.* at 880.

193. *Id.*

motive, among other matters, supported the conclusion that she did not establish by clear and convincing evidence that her domicile changed to Tennessee prior to the stock sale.[194]

New York defines 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."[195] Minnesota defines domicile as "that place in which that person's habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return."[196] An individual's motivation, pure or riddled with tax avoidance, appears in neither state's definition of domicile. This bias has infected Minnesota and New York's judicial determinations. Adopting a new standard for residency, such as that used in federal income tax, may remove this bias and lead to equitable results for taxpayers and states.

III. Following the Feds

Under current law and similar to state personal income tax laws, the Internal Revenue Code imposes tax on the worldwide income of resident aliens and U.S. citizens.[197] However, the Internal Revenue Code imposes tax on nonresident aliens only to the extent their income flows from U.S. sources or constitutes income effectively connected with the conduct of a U.S. trade or business.[198] Therefore, similar to state personal income tax laws, residency status results in a broad base for taxation.

As described below, Congress arrived at the current statutes controlling the taxation of aliens after a journey through the uncertainty that existed under prior law. A history of the evolution of federal income taxation in this area may enlighten states in their consideration of residency status for tax purposes.

194. *Id.* at 880–81 (referring to a vehicle registration and registration to vote in Tennessee done to escape taxation).

195. N.Y. TAX LAW, § 105.20(d)(1) (McKinney 2019).

196. MINN.. R. 8001.0300 subp. 2 (2019).

197. I.R.C. § 1 (2017).

198. *See* I.R.C. § 2(d) (2005); § 871 (2018).

A. Defining a Resident—The First 70 Years

Prior to 1984, the Internal Revenue Code did not define the terms "resident alien" or "nonresident alien."[199] Instead, taxpayers relied on Treasury Regulations and Revenue Rulings for guidance. Treasury Regulations generally determined residency based on an alien's intentions and the length and nature of his or her stay.[200]

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.[201]

199. Treas. Reg. § 1.871-2 (1957).
200. *Id.*
201. *Id.*

Unfortunately, in an attempt to define resident alien, the regulation quoted above used other undefined terms that needed definition.[202] The regulation lacked definitions of transient, sojourner, and floating intention.[203] These undefined terms provided little additional guidance because the factors used to define resident alien also lacked a precise definition. Unfortunately, the Regulations further confused taxpayers by creating a set of rebuttable presumptions concerning the length and nature of the alien's stay in the United States.[204]

With the exception of one revenue ruling, the rulings provided little guidance because they addressed narrow fact patterns and questions. Revenue Ruling 69-611, one of the few rulings of general application, offered some guidance on the issue of residence.[205] Revenue Ruling 69-611 raised a presumption of residence if an alien remained within the United States for one full year. Taxpayers could rebut this presumption with proof they did not intend to remain in the country and came to the U.S. as mere visitors.[206]

B. Reason for the Federal Law Change

Congress believed that the tax law should provide a more objective definition of residence for income tax purposes.[207] The enactment of Section 7701(b) reflected Congressional intent, through an objective definition of residence, to facilitate tax planning, return preparation, and enforcement.[208] Congress understood that an objective definition might allow some aliens otherwise taxable as residents to avoid resident status, and would impose resident status on some aliens that did not meet the definition of residents under the current rules.[209] On balance, however, Congress found that the certainty provided by

202. § 1.871-2(b).
203. *Id.*
204. *Id.*
205. Rev. Rul. 69-545, 1969-2 C.B. 117.
206. *Id.*
207. H.R. REP. NO. 98-432, at 1523 (1984), *reprinted in* 1984 U.S.C.C.A.N. 468.
208. *Id.*
209. *Id.*

the new objective definition outweighed other considerations and adopted a regime that depended on length of stay.[210]

C. Section 7701(b) Arrives

In its switch to an objective definition of resident, Congress incorporated its new definition in Section 7701(b) of the Internal Revenue Code. Section 7701(b) begins with the proposition that aliens (not U.S. citizens) pay tax as nonresident aliens unless they meet one of two tests. Aliens meeting either the "green card test" or the "substantial presence test" for the calendar year face taxation of their worldwide income similar to the taxation of residents for state personal income tax purposes.[211]

A taxpayer meets the "green card test" if the individual has (1) attained the privilege of residing permanently in the United States under the immigration laws; and (2) the government has not revoked that status.[212] A taxpayer meets the "substantial presence test" if the individual has physical presence in the United States on at least: (1) thirty-one days during the current year, and (2) 183 days during the three-year period that includes the current year and the two years immediately before that, including: (a) All the days you were present in the current year, (b) 1/3 of the days you were present in the first year before the current year, and (c) 1/6 of the days you were present in the second year before the current year.[213]

This "substantial presence test" effectively captures and taxes the worldwide income of individuals that have spent 183 days in the United States in the current taxable year. This test also captures those individuals spending 183 days in the United States over a three-year period, but accords less weight to the preceding years in arriving at the total days. This extended test prevents taxpayers from stringing together nearly a full year of U.S. presence without taxation as a resident. For example, in the absence of this extended period test, an individual could couple a stay of 182 days in one year with another 182 days

210. *Id.*
211. I.R.C. § 7701(b)(1)(A) (2018).
212. §§ 7701(b)(1)(A)(i), 7701(b)(6) (2018).
213. § 7701(b)(3)(A) (2018).

immediately following in the succeeding year without taxation as a resident.

D. State Adoption of an Equivalent Presence Test

1. Massachusetts

Until 1995, Massachusetts defined a resident solely as an individual domiciled in the state. The legislature adopted provisions similar to Section 7701(b) of the Internal Revenue Code when it enacted Chapter 38 of the Acts of 1995 modifying the definition of "resident" to add the permanent place of abode and 183 days of presence test to the domicile standard (without the extended period of Section 7701(b)).[214] Instead of following Congress's replacement of the domicile standard, Massachusetts expanded its residency definition by adding an alternative way to treat individuals as residents.

2. Minnesota

Minnesota's residency rules have remained largely unchanged since enactment of its personal income tax in 1933 (and the Minnesota Department of Revenue's adoption of the twenty-six factor test in 1982).[215] However, in 1987, Minnesota adopted the permanent place of abode and 183 days of "substantial presence test."[216] Like Massachusetts, Minnesota expanded its residency definition by adding an alternative way to treat individuals as residents.

3. New York

Unlike, Massachusetts and Minnesota, New York adopted its "presence test" prior to enactment of Section 7701(b) of the

214. *See TIR 95-7*: *Change in the Definition of "Resident" for Massachusetts Income Tax Purposes*, MASS.GOV (Jan. 10, 1996), https://www.mass.gov/technical-information-release/tir-95-7-change-in-the-definition-of-resident-for-massachusetts.

215. *See* MINN. R. 8001.0300(2) (2019).

216. 1987 MINN. LAWS 1044.

Internal Revenue Code.[217] In 1922, the New York State Legislature enacted a statutory definition of a resident for income tax purposes that included a person "who maintains a permanent place of abode within the state, and spends in the aggregate more than seven months of the taxable year within the state."[218] The tax department supported the new law as "an alternative to the highly subjective common law test of domicile, which had governed residency determinations until that point."[219] In 1954, the Legislature amended the seven-month test for presence in New York and replaced it with the 183-day rule.[220] In explaining the justification for the proposed change, the department's memorandum in support noted that there had been many cases of tax avoidance, even evasion, and that "persons who really are residents nevertheless manage to comply with the present seven-month rule by spending long weekends, holidays and vacations outside the state."[221]

IV. Tax Policy

The domicile standards enacted by the states fail the test of fundamental principles of tax policy. An adoption of an objective standard can move states toward better tax policy.

A. Fundamental Principles of a Sound Tax System

Adam Smith set forth four maxims applicable to taxes in general: (1) taxes should be proportional to taxpayers' abilities to pay, (2) the tax due should be certain and not arbitrary, (3)

217. *See* N.Y. TAX LAW § 350(7) (1987) (repealed 1987).

218. *See id.*

219. Timothy P. Noonan & Joshua K. Lawrence, *The Goods on* Gaied*: What It Means, From the Front Lines, Noonan's* NOTES BLOG 409, 409 n.4 (May 19, 2014), https://www.hodgsonruss.com/media/publication/44_The%20Goods%20on%20Gaied%20-%20What%20It%20Means,%20From%20the%20Front%20Lines%205%2019%2014.pdf. (stating "the tax law had previously defined the term 'resident' as 'any person who shall, at any time during the last six months of the calendar year, be a resident of the state.' But it did not define what constituted being a resident during that period").

220. *Id.* at 410 (citing Mem. of Dept. of Taxation & Finance, 1954 N.Y. LEGIS. ANN., at 296).

221. *Id.*

the tax should be levied at a convenient time, and (4) the tax should be administered in the most economical way possible.[222] Similar to the tax policy principles in *The Wealth of Nations*, the states have developed and published their own tax policy principles.[223]

In 2010, The National Conference of State Legislatures released a handbook that addressed tax policy principles that states should consider when imposing a personal income tax.[224] The handbook concludes that states should review the reliability, equity, compliance and administration, interstate and international competition, economic neutrality, and accountability of their personal income tax laws.[225] Of these principles, domicile presents the greatest challenge to compliance and administration. Although this document does not address residency or domicile in its discussion, the handbook does discuss the need to reduce compliance costs for taxpayers and limit the amount of required record maintenance.[226]

In 2013, the Massachusetts Legislature established the Tax Fairness Commission.[227] The Massachusetts Legislature charged the Commission with analyzing Massachusetts tax laws and the equity of current tax policies.[228] Although The Report of the Tax Fairness Commission in Massachusetts did not directly address domicile or residency, it provided guidance with respect to the fundamental principles of a sound tax system.[229] It determined, among other things, that a tax should "be as simple, administratively efficient, and cost-effective as possible; and . . . be as predictable as possible."[230]

222. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 639–41 (1776).

223. *Id.*

224. NAT'L CONF. OF STATE LEGISLATURES, TAX POLICY HANDBOOK FOR STATE LEGISLATORS (2010), http://www.ncsl.org/documents/fiscal/TaxPolicyHandbook3rdEdition.pdf.

225. *Id.* at 4.

226. *See id.* at 5.

227. COMMONWEALTH OF MASS., REP. OF TAX FAIRNESS COMM'N 1 (2014), https://itep.org/wp-content/uploads/TaxFairnessCommissionReport.pdf.

228. *Id.* at 1.

229. *Id.* at 7.

230. *Id.*

In 2015, the Minnesota Department of Revenue delivered a report to the Minnesota Legislature on its personal income tax laws governing residency and domicile.[231] The report outlined various policy goals for the residency and domicile laws in Minnesota:

- Help ensure consistent, transparent, and fair treatment of all taxpayers
- Make it easier for taxpayers to understand how residency is determined for taxes
- Reduce the time and effort needed for taxpayers who are selected for a residency audit[232]

Governor Andrew Cuomo established the New York State Tax Reform and Fairness Commission in December 2012 to conduct a comprehensive and objective review of the State's tax structure, including its corporate, sales, estate and personal income taxes.[233] The Governor charged the commission with developing revenue-neutral policy options to modernize the current tax system with the goals of increasing its simplicity, fairness, economic competitiveness and affordability.[234]

B. Application of Tax Policy Principles to Domicile Determinations

Combining the concepts discussed by Adam Smith and the state tax commissions discussed above, this Part addresses certainty, and cost-effectiveness in the administration of the domicile law as a test for residency.

231. MINN. DEP'T OF REVENUE, *supra* note 38, at 1.
232. *Id.* at 10.
233. N.Y. STATE TAX REFORM AND FAIRNESS COMM'N, FINAL REP., (2013), https://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/greenislandandreportandappendicies.pdf.
234. *Id.* at 3.

1. Certainty

Adam Smith argued that "[t]he tax which each individual is bound to pay ought to be certain, and not arbitrary."[235] He argued the following:

> The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.[236]

The domicile rules of many states begin with the proposition that the analysis involves an effort to discern subjective intent and no precise definition will uniformly guide taxpayers and state taxing authorities in their interpretations.[237] Such a rocky start dooms states to problems with certainty. When the determination of domicile or the exact date that domicile begins or ends is murky, taxpayers lose respect for the taxing authorities and the system itself.

Even if we were to assume that taxpayers could navigate the domicile definition, identifying the precise day that the change in domicile occurs creates its own problems. Consider the recent wealthy retiree that wishes to move to Florida: The retiree purchases a new home in Florida on January 3rd, makes some minor renovations on January 14th, lists her home in the old domicile for sale on February 2nd, purchases new furniture for the Florida home on March 4th, begins to live in the Florida home on March 15th, moves some additional furniture to Florida on April 1st, signs a contract for sale of the home in the old domicile on April 15th, and closes the sale of the former

235. SMITH, *supra* note 222, at 639.
236. *Id.*
237. *See, e.g.*, MINN. R. 8001.0300 subp. 2 (2019).

residence on June 1st. During this same tax year, retiree's spouse moves to the new Florida home on April 10th, but both retiree and her spouse spend time in both locations until June 1st. This fact pattern clearly demonstrates an intent to change domicile, but when did it occur? A review of the domicile factors in Massachusetts, Minnesota, and New York provide little guidance in our efforts to pinpoint the exact date that the taxpayers' acts create sufficient evidence to prove a domicile change. Instead, practitioners and taxpayers make their best guess and collect support for their choices. If challenged, the taxpayer has the burden of proving the domicile change date in a system of uncertainty.

In Minnesota, taxpayer uncertainty became so uncertain that the Minnesota Commissioner of Revenue listed fourteen myths permeating the taxpayer community with respect to domicile and residency in that state.[238] These myths permeated the taxpayer community with respect to the Department of Revenue's analysis of domicile and residency.[239] The myths generally reflected taxpayer difficulty with the twenty-six factor domicile test described in Part II(D) of this Article and fell into various categories. Consistent across several of the identified myths, many taxpayers believed that the existence of one domicile factor doomed them to residency status.[240] One myth related to an outdated factor used in the residency determination: the location of a bank account in the state.[241] Responding to this myth, the Department of Revenue stated that no one factor is determinative and conceded that the use of this particular factor has less relevance due to the modernization of the banking industry.[242] Another myth reflects a paranoia running through the tax community: "Revenue will track where my pets are by the microchips that are implanted and use that against me if the microchip is registered in Minnesota."[243]

Subsequent to the issuance of the Minnesota Residency Report, the legislature amended the statutes to address many of

238. MINN. DEP'T OF REVENUE, *supra* note 38, at 18.
239. *Id.*
240. *Id.*
241. *Id.* at 18.
242. *Id.*
243. *Id.*

these myths and prohibit the consideration of various matters in the determination of an individual's domicile.[244] Despite these myths and other definitional difficulties in Minnesota, the State proposed changes to its domicile factors rather than an elimination or substantial modification to the definition of resident.

2. Economical Administration

It has been said that "[e]very tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state."[245] Smith interpreted this last maxim to mean that a tax (1) should be capable of economical administration, (2) should not "obstruct the industry of the people," (3) should not offer undue opportunities for evasion, and (4) should not impose "unnecessary trouble, vexation, and oppression" upon the public.[246] As described, *infra*, the ordinary domicile audit includes a substantial invasion of privacy, considerable document production efforts, and may continue for months or more than a year. Eliminating the subjective component and moving to a physical presence test would accelerate the pace of the audits rather than create the "unnecessary trouble, vexation, and oppression" in its current form.

Some tax professionals refer to residency audits as "tax colonoscopies."[247] This procedure ordinarily begins with the mailing of a domicile questionnaire to a targeted taxpayer.[248] The Minnesota Residency Report describes its audit process as follows:

- Auditor Notifies Taxpayer of Audit, Requests Information

244. MINN. STAT. § 290.01 subdiv. 7(c) (2018).

245. SMITH, *supra* note 222, at 640.

246. *Id.*

247. *Residency Audits: The Curse of Second Homes*, WESTVIEW INV. ADVISORS, http://www.westviewinvest.com/blog/residency-audits-curse-second-homes (last visited Feb. 6, 2019).

248. MINN. DEP'T OF REVENUE, *supra* note 38, at 17.

- Taxpayer Gathers Information
- Taxpayer Submits Information
- Auditor Reviews Information
- Auditor Requests More Information
- Taxpayer Gathers and Submits Additional Information
- Auditor Reviews Additional Information, Prepares Report
- Auditor Presents Audit Report to Taxpayer/Representative[249]

On its face, the process seems logical and measured; however, revisiting the information requested and its need may lead to a different conclusion. As a starting point, gathering the information and reviewing the information takes time. The Minnesota Residency Report grants taxpayers thirty days to respond to the initial request and suggests that its auditors review that information over the next thirty days.[250] Because the rules seek information on twenty-six domicile factors, it requires little imagination to understand the depth and extent of the inquiry.[251] Compare this examination to taxpayers facing an audit on the "substantial presence test" who merely address their days spent in the state and whether they have a permanent place of abode in the state.[252] If Minnesota truly wanted to "reduce the time and effort needed for taxpayers who are selected for a residency audit,"[253] it need only remove the domicile test and rely entirely on the presence test.

Privacy suffers as auditors raise questions concerning family relationships, personal relationships, business relationships, travel habits, spending habits, and other personal matters. In a recent audit of this author's client, the Massachusetts Department of Revenue requested and received information concerning a taxpayer's marital relationship, child visitation privileges, religious worship habits, parental

249. *Id.*
250. *Id.*
251. MINN. R. 8001.0300 subp. 3 (2019).
252. MINN. STAT. § 290.01 subdiv. 7(b) (2018).
253. MINN. DEP'T OF REVENUE, *supra* note 38, at 10.

relationships, vacation preferences, hobbies, movie preferences, credit card spending, and gambling abilities.

In a California case that truly goes beyond normal behavior for both the taxpayer and the Government, Gilbert Hyatt spent more than twenty years in various courts fighting a residency determination where he produced 220 declarations, affidavits from more than 150 witnesses, and thousands of pages of contemporaneous documentary evidence.[254] In turn, the Franchise Tax Board sent more than 100 letters and information demands to third parties, including Hyatt's banks, utility companies, newspapers, medical providers, attorneys, and business associates. In addition, the Franchise Tax Board conducted interviews and collected signed statements from various individuals estranged from Hyatt at the time.[255]

Bill Leonard, a member of the California State Board of Equalization and a twenty-four year member of the California Legislature, provided the following critique of the Franchise Tax Board's conduct:

> . . . the FTB investigators crossed many ethical lines and demonstrated how tax agents are not held to the same legal standards we demand of law enforcement officers. Tax agents rummaged through his trash without warrants, visited business partners and doctors, and shared his Social Security Number and other personal information with the media. This is outrageous behavior and I call on the FTB to rein in their agents. What really galled me is the FTB testified in open court that this level of harassment was only a typical audit. If true, then the storm troopers are alive and well at the FTB.[256]

254. Hearing Summary, Franchise and Income Tax Appeal at 6, *In re* Appeal of Gilbert P. Hyatt, Case No. 435770 (1991).

255. *Id.* at 6–7.

256. David Nolte, *California Loses Big in Litigation Involving Its Tax Jurisdiction and Related Residency Audits*, HG.ORG LEGAL RES., https://www.hg.org/article.asp?id=5410 (last visited Feb. 6, 2019).

Conclusion

As the states developed their presence laws, many initially adopted those laws to supplement, rather than replace, the facts and circumstances domicile test of residence. The historic definition of residence as domicile was already on the books and deeply embedded in practice and case law.[257] The dual definition of residence for state income tax purposes gave the states two "bites at the apple" to classify an individual as a resident and subject the taxpayer to state taxation on her worldwide income.

Despite the historic application of the domicile test and the revenue raising potential, states should abandon the domicile concept in favor of an objective standard consistent with tax policy maxims. This would increase cost-effective implementation of state law and provide taxpayers and auditors with certainty in tax return preparation and examinations.

In 1984, Congress showed us the way in its move from the federal "subjective test" to a "substantial presence test"[258] comparable to the states' presence tests. States with both the domicile and presence test may object to the elimination of the domicile test and the potential loss of revenue. However, those states could address such concerns by adjusting the residency test to meet revenue targets. This adjustment could include such changes as removing the permanent place of abode requirement or altering the number of days required for residency.

Grateful taxpayers may applaud a test that relies heavily on a mere count of days in a state and avoids invasive, time-consuming inquiries into their personal lives. Ultimately, a move away from the domicile standard would help ensure consistent, transparent, and fair treatment of all taxpayers and restore confidence in our tax system.

257. *See* Tamagni v. Tax Appeals Tribunal, 695 N.E.2d 1125, 1128 (N.Y. 1998).

258. *See supra* Part III.