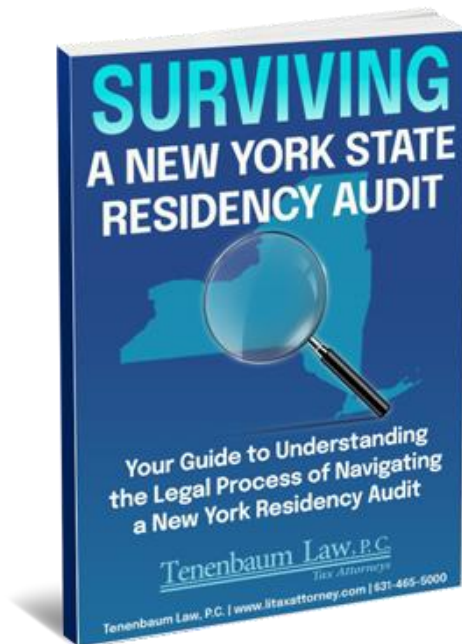


# Tenenbaum Law, P.C.

*Tax Attorneys*

**Do you have more than 1 home?  
You may owe taxes!**



***Tax Attorneys Representing Taxpayers in IRS and New York State Tax Matters***

**534 Broadhollow Road, Suite 301  
Melville, New York 11747  
[taxhelpline@litaxattorney.com](mailto:taxhelpline@litaxattorney.com)**

**T 631.465.5000  
F 631.465.5003  
[litaxattorney.com](http://litaxattorney.com)**

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## **I. WHAT IS A NEW YORK STATE RESIDENCY AUDIT AND HOW DOES IT AFFECT YOU?**

A residency audit is intended to establish whether a taxpayer accurately filed a New York personal income tax return as a *nonresident*, *part-year resident*, or *resident*.

Residency audits can be difficult and personally intrusive, but following these basic tips and knowing what is expected can make the experience smoother and easier.

**Why should you care about your residency status?**

New York State residents are required to pay tax on all **WORLDWIDE INCOME!**

Nonresidents and part-year residents are subject to tax only on **INCOME ALLOCABLE TO NEW YORK STATE**, such as wages earned for services provided within the State.



VS.



**Before you consider a mad dash out of New York State, learn the residency rules and how they can apply to you.**



## II. AM I A NEW YORK STATE RESIDENT?

New York has 2 means of determining that you are a New York State resident for income tax purposes:

1. **Domicile test:** The one place you intend to have as your permanent home is determined to be in New York;

**OR**

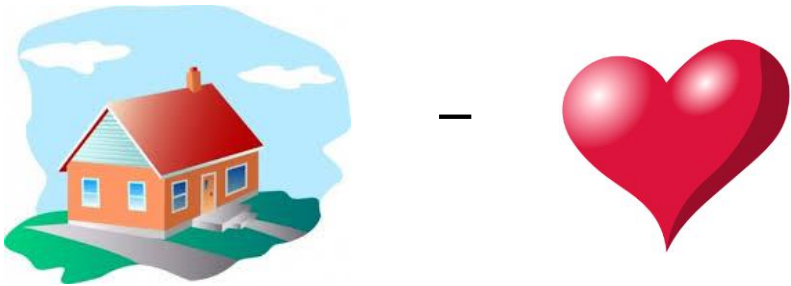
2. **Statutory residency test:** You have a permanent place of abode maintained for substantially all of the year in New York and spend, in the aggregate, more than 183 days of the year in the state.

### III. DOMICILE TEST

The auditor will first determine the location of your domicile.

Domicile is your one true home; the one place you intend to have as your permanent abode.

*Home is where the heart is*



Once established, your domicile remains in use until you abandon it and move to a new location with the intention of making it your permanent home.

Most people think they know where they reside, but the answer can be more complicated than you think.

*Intent is Key!*

**Tip:** A domicile audit is typically centered around showing a change – that is, it looks at whether you had a change in lifestyle or a change in your general habit of life during the audit period, which would indicate a new domicile.

## A. 5 Primary Factors Considered by Auditors for Determining Your Domicile

1. **Home:** The auditor will compare the use and maintenance, value, and size of the New York State home to that of the non-New York State home, among other factors.



2. **Business Activities:** The auditor will inquire into your continued employment and/or active participation in New York State companies.
3. **Time:** The third primary factor involves an analysis of the time you spent in New York as compared to the time spent at your out-of-state residence.

*Note:* An examination of your personal travel diaries or appointment books, passports, credit cards, and phone bills may be required.

4. **Near and Dear:** The auditor will want to know where you keep family heirlooms, works of art, collections of books or stamps, jewelry, pets, and items of sentimental value such as photo albums.
5. **Family:** The fifth primary factor, family connections, focuses on where your spouse and children reside and where your minor children attend school.





## **B. “Other” Factors for Domicile Test**

There are other factors, subordinate to the primary factors, which may be considered in determining your domicile. Where the primary factors indicate a New York domicile, these other factors should be reviewed, but are not considered to carry the weight and significance of the primary factors. For situations in which domicile remains unclear, an analysis of these other factors will be taken into account.

These include the following:

- Mailing address;
- Voter registration;
- Driver’s license;
- Vehicle registration;
- Declaration of residence in one’s will; and
- Location of bank accounts and/or safety deposit box.

## C. Non-Factors for Domicile Test



There are certain factors which New York State should not use against you in a residency audit. These factors include burial plot location, location intended for probate, location of passive interests in partnerships or small corporations, location of political contributions, or where your tax returns are prepared and filed.

**Tip:** Establishing domicile can be very document intensive and personally invasive. Have your paper trail ready.

## D. Burden of Proof

The burden of proof *always* lies with the party asserting the change of domicile. For example, if you always claimed to be a nonresident of New York State, the burden is on the State to prove that you changed your domicile from outside of New York to New York. On the other hand, if you were domiciled in New York and claim to have changed to a different state, you will have the burden of proof to show a change in domicile.

**Tip:** If you are planning to move out of New York, maintaining accurate records is a necessity!

## E. Statutory Exceptions to Domicile Test

There are two statutory exceptions when you will not be taxed as a resident for personal income tax purposes, even though you are domiciled in New York.

### ***Exception 1:***

Taxpayers who (1) do not have a permanent place of abode in New York and (2) spent fewer than 30 days in New York will not be considered a resident for income tax purposes.



### ***Exception 2:***

Taxpayers who (1) are in a foreign country for at least 450 days of any 548 consecutive day period and (2) neither he/she nor his/her family spends more than 90 days in New York will not be treated as a resident for income tax purposes. This exception usually applies when New York residents are positioned in foreign offices by their multinational employers.

## IV. STATUTORY RESIDENCY TEST

Even if you are deemed to be domiciled outside of New York, you may still be taxed as a New York resident if you meet the Statutory Residency Test. Under this test, you will be treated as a resident of New York if you:

1. Maintain a “**Permanent Place of Abode**” in New York for substantially all of the year; AND
2. Spend more than **183 days** of the tax year in New York.

Remember that a partial day is considered a full day for this purpose.

### A. Permanent Place of Abode

New York defines a *permanent place of abode* as a residence (building or structure in which a person can live):

1. That is maintained by the taxpayer for substantially all of the year (whether or not it is owned by the taxpayer); and
2. Is suitable for year-round use.

A structure that is not suitable for year-round use and that you use only for vacations is not a permanent place of abode. Barracks or any structure that does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., is not generally considered to be a permanent place of abode.



However, every situation needs to be considered individually. For example, a hotel room or apartment without cooking facilities could be a Permanent Place of Abode if maintained on a permanent basis. A vacation home may be a Permanent Place of Abode if it is suitable for year-round use



but not always. A case decided in 2022 determined that a vacation home that was only used for three weeks a year was not a Permanent Place of Abode. These cases are fact-specific so legal assistance is essential.

It is important to note that you do not necessarily have to stay at or near your Permanent Place of Abode to meet the Statutory Residency Test.

## Maintenance of a Permanent Place of Abode

There are certain factors which are considered to determine whether you have maintained a Permanent Place of Abode in New York State. They include:

- Whether the abode is suitable for year-round use;
- Whether you have legal rights to the abode;
- Whether you have unfettered access to the abode;
- Whether you are using the abode's address to register your car and receive mail;
- Whether the abode had been maintained for more than 10 months during the year.



If the abode is under construction and therefore uninhabitable, then it will not be considered a Permanent Place of Abode.

## Apartments Kept for Relatives

In these situations, New York State will look to the particular facts and circumstances of each case to determine if it is a Permanent Place of Abode. Factors that are considered are:

- Whether the dwelling is exclusively or primarily used by someone other than you;

- Whether you keep items in the home;
- The size of the home; and
- Whether or not you have unrestricted access to the home.

### **“Substantially” All of the Year**

The test for statutory residency requires that you maintain your abode for “substantially all of the year.” Generally, this is a period of 10 months, but this is not an absolute rule. Therefore, if the dwelling is not available to you for 10 months of the year, then it will likely not meet the Statutory Residency test. Note that prior to 2022, the standard was 11 months.

**Tip:** The maintenance of living quarters in New York must be disclosed on your New York resident or non-resident income tax return. Failure to properly disclose living quarters in New York could lead to penalties and, in certain cases, criminal action.

### **B. The 183 Day Count**

The second prong of the Statutory Residency test looks to whether you spent more than an aggregate of 183 days of the tax year in New York State.



### **A Day in New York**

The description of a day in New York is not defined by statute. Section 105.20 of the New York Personal Income Tax regulations, however, states that “presence within New York State for any part of a calendar day constitutes a day spent within New York State.” Thus, any part of a day spent in New York State, for whatever reason (business or pleasure),

would count as a day toward the 183 day rule, even if you come into New York and leave on the same day. The interpretation of “any part of a day” could mean stepping over the state line for one second. However, there are certain limited exceptions for travel through the State and for medical necessity.

Taxpayers often mistakenly believe that they must spend significant time at their Permanent Place of Abode in order to qualify as statutory residents. However, this is not the case as discussed above.

### **Burden of Proof for Day Count**

You have the burden to prove your whereabouts by clear and convincing evidence, which can be a daunting task. This means you must prove a negative: that you were not in New York State.

New York State may ask to analyze the following documentation: a diary, appointment log, or calendar. You may also be asked or subpoenaed to provide credit card and bank statements, detailed cell phone bills, EZ Pass records, ATM receipts, passport records, and data from security or swipe cards. Furthermore, smartphone applications have been developed, such as TaxDay or Monaeo, to track and record an individual’s location using GPS signals.

## **V. CONCLUSION**

New York State Residency Audits can be burdensome, complex, and invasive. Before a nonresident taxpayer considers buying a place in New York City or spending the winter months in his/her second home in a warmer climate, he/she should take a moment to think about how it might impact his/her residency status. Without adequate planning, and careful attention to the law and factual details, taxpayers may find that their New York State residence is more costly than they had anticipated.

## ABOUT US

The law firm of Tenenbaum Law, P.C. focuses its practice on the resolution of tax controversies. It has been repeatedly recognized as one of the top tax law firms on Long Island by **Long Island Business News**, as well as one of the Top 100 Women-Owned Firms by the **New York Law Journal**. The founding member of the firm, Karen Tenenbaum, has over 35 years of experience in the area of taxation and is skilled in New York State and New York City residency audits.

In addition to comprehensive legal support to taxpayers facing or planning against residency audits, the firm offers comprehensive services to businesses and individuals with respect to their Federal and State tax matters including:

- Tax Controversy Resolution
- Federal and State Tax Audits
- Sales and Use Taxes
- IRS Appeals
- NYS Conciliation Conferences
- Federal and New York State Collection Issues
- Liens, Levies, Warrants, and Seizures
- Offers in Compromise
- Installment Agreements and Installment Payment Agreements
- Innocent Spouse Claims
- Responsible Person Assessments
- Non-Filers

The firm is located in Melville, New York, on the border of Nassau and Suffolk counties on Long Island. Our clients are based primarily in the greater New York City area, with others coming from around the country.

Tenenbaum Law, P.C. welcomes the opportunity to discuss your tax controversy matter with any of the firm's seasoned attorneys.

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534 Broadhollow Road  
Suite 301  
Melville, New York 11747  
T 631.465.5000  
F 631.465.5003  
taxhelpline@litaxattorney.com  
[www.litaxattorney.com](http://www.litaxattorney.com)



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