

## **When You've Paid New Jersey Enough**

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Most of us who have spent our adult lives in the Garden State would agree that it's been a fine place to pursue a career, raise a family, and generally enjoy life in the fast lane. When the children are gone and our working days are over, however, we may want to ask whether it's time to stop paying NJ income taxes and make sure our estates won't be subject to NJ death taxes. This question becomes especially intriguing for individuals who start spending a lot of time at one or more homes in other jurisdictions with lower taxes, or no taxes at all.

This article reviews the key factors that should determine whether someone who has lived in NJ and then establishes a home outside the state will be successful in escaping the state's income and death taxes. We want to stress at the outset that this is only an overview, that there are numerous wrinkles we can't mention given space constraints and the limits on what we know (we aren't practicing lawyers or accountants), and that the services of a qualified tax professional are essential when it's time for serious planning.

In general, NJ's gross income tax is imposed on (a) the total income of someone who is a "resident" of the state, and (b) whatever portion of the income of a "non-resident" is derived from NJ sources. "Income from NJ sources" includes compensation for services performed in NJ as well as income derived from real estate or other tangible property located in NJ and profits from certain NJ business entities. Someone will be a resident either (a) because he is "domiciled" in NJ or (b) because, although he is domiciled outside NJ, he maintains a permanent home in NJ and spends more than 183 days of the year in NJ. One exception to the automatic resident status for any NJ domiciliary: one is not a resident if one's only permanent home is outside the state and one is here fewer than 31 days per year.

These rules for determining who is a NJ resident involve objective criteria with one critical exception: where an individual is domiciled. Determining domicile has always involved an individual's subjective intent about where her home base is, the place to which she will ultimately return regardless of where and for how long she may live elsewhere. An individual is typically deemed to have only one domicile at a time (although there have been some notorious cases where an individual's estate was subject to multiple states' death taxes because of uncertainty about the decedent's domicile).

Domicile, once acquired, continues until it is clearly changed to a new domicile. One's first domicile will be the primary home in which one grew up, and will then change as one's education and career lead one elsewhere. Disputes with the NJ tax authorities arise when an

individual who has lived in and been domiciled in NJ establishes a home outside the state and believes he or she has changed domicile to that new location. At that point, an NJ income tax audit may be triggered when one starts filing NJ income tax returns as a non-resident, or stops filing any NJ returns at all.

Many factors may be used to determine whether someone has changed his or her domicile from NJ to another state. The most critical appear to include: (a) relative amount of time spent in the other state vs. time spent in NJ; (b) value and size of one's new home in the other state compared to one's home, if any, in NJ; (c) extent of business or professional activities in the other state vs. activities in NJ; (d) where one keeps one's most precious tangible possessions; and (e) where one most frequently spends time with other family members and friends. Regardless of other factors, it will probably be difficult to prove that one has changed domicile from NJ to another state if one maintains one's former residence in NJ and engages in significant business or professional activities here.

The physical presence rules are applied on a calendar year basis. Anyone claiming to have become a non-resident who still spends some time in NJ should keep careful records, with supporting documents, showing exactly how many days were spent in different places. Note that, in the year someone moves his or her domicile to a different state and satisfies the non-resident criteria, there will still be a "part-year resident return" to be filed for the first part of the year when he or she was a NJ domiciliary.

As for death taxes, NJ has two flavors: an inheritance tax and an estate tax. The inheritance tax can apply to both residents and non-residents; the estate tax applies only to residents. An inheritance tax of 11% to 16% will apply to bequests above very modest exemption levels to beneficiaries other than the decedent's spouse or domestic partner, descendants, ancestors, and charities. In the case of a NJ resident, the inheritance tax applies to bequests of any asset other than life insurance (unless it's payable to the estate) and real estate or tangible property located outside NJ. With a non-resident, the inheritance tax applies only to bequests involving real estate or personal property located in NJ.

As noted, NJ's estate tax applies only to residents; it does not apply to bequests by non-residents of any property located in NJ. Estates below \$675,000 are exempt; estates between \$675,000 and \$2 million pay between 1% and 5%; and estates over \$2 million pay a net effective rate of 5% to 9%, taking into account the deductibility of the NJ estate tax for federal estate tax purposes. In determining the estate subject to tax, there are deductions for (a) the decedent's debts and the funeral and administration expenses, (b) any gifts to the decedent's spouse or domestic partner (including gifts to a trust that will be includable in the spouse's or partner's taxable estate), and (c) any gifts to charities.

This estate tax has become a significant factor in planning for NJ residents, now that the federal estate tax exemption has risen to \$3.5 million. From a federal tax perspective, it may make sense when the first spouse dies to put up to the first \$3.5 million of the decedent's assets into a "bypass trust" or "credit shelter trust", where the assets can be used for the surviving spouse's benefit but will not be included in the survivor's taxable estate. However, anything over \$675,000 put into a bypass trust will be exposed to the NJ estate tax, resulting in a check to Trenton of \$229,200 if the bypass trust is funded with \$3.5 million (minus the tax). Of course, it

might not make sense to fund a bypass trust with the full \$3.5 million, where a lesser gift would probably leave the surviving spouse with an estate under the federal exemption of \$3.5 million on her or his death, and would increase the portion of the couple's assets that would receive a basis step-up at the survivor's death.

For purposes of both NJ inheritance tax and estate tax, a decedent's "residence" means his or her domicile, not where he or she happened to be living at the time of death. Following your death, the inquiry for NJ death tax purposes will be: what was your true home, the place you viewed as the center of your life to which you would ultimately return regardless of time spent in other places? For death taxes, unlike income taxes, there is no exception for people who are found to still be domiciled in NJ even though they no longer maintain a home here and spend little or no time here. Domiciled in NJ = a "NJ resident" = exposure to NJ inheritance and estate taxes.

Here is a well-established checklist of action steps to be taken when you want to change domicile from NJ to another state while still maintaining some connections to NJ. You don't have to take every step on the list to have a chance of avoiding NJ taxes, but the more you do the better your odds.

- Switch your "address of record" for everything possible to the new state, including your voter registration, driver's license, all federal agencies (Social Security, Medicare), bank, brokerage, and other financial accounts, credit cards, all insurance coverages, subscriptions, memberships, and federal tax returns. Use your new state's address on every document you fill out, every website on which you're registered, and for any media appearance. Stop claiming any benefit to which you've been entitled only because you've been a NJ resident.
- Sell your NJ residence. If you still want a regular place to hang your hat when you visit NJ, rent (ideally) or purchase (less helpful) a smaller residence than your home in the new state.
- Acquire a significant residence in the new state, move a lot of your precious things there, and spend a lot more time there than in NJ, at least in the early years.
- If you will continue to spend any time in NJ, maintain detailed records of your comings and goings that will be accessible and intelligible to you, other family members, and your executor.
- Become active in business, professional, athletic, charitable, and social activities in the new state. Continued contributions to NJ charities will not be a problem; continued service on charitable boards could be.
- Establish relationships with medical professionals in the new state, and stop seeing your NJ doctors and dentists unless absolutely necessary.
- Update all of your estate planning documents to recite your new domicile and conform to the new state's formalities.

As should be clear, changing one's domicile to avoid exposure as a "resident" to NJ income and death taxes is no small matter. It will be straightforward for anyone who is moving out of the state for all purposes and creating a new life in a new home. For others, however, who will retain some ties to NJ, particularly a residence or significant economic or social relationships,

they are well advised to seek advice from a qualified tax professional to assure that their intent to change domicile will prevail if challenged by the NJ tax authorities.

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