

**Abandoning Domicile in Massachusetts:  
Attention to Details Plus a "Gut Check"**

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June 1, 2010

Two recent Massachusetts Appellate Tax Board (ATB) decisions, *Cotter* (Docket No. C293719, January 15, 2010) and *Swartz* (Docket No. C287671, March 31, 2010) confirm that lawyers and other advisors must pro-actively supervise a taxpayer's attempt to abandon domicile in Massachusetts. Checklists are a good first step to guide a taxpayer because the devil is in the details, but the taxpayer's lawyer or other advisor should also do a "gut check" to determine whether the taxpayer's projected lifestyle in the new state is compatible with abandoning domicile in Massachusetts. Ultimately, the taxpayer's intent will be discerned from his or her everyday activities before and after "abandoning" domicile in Massachusetts, not merely how many "to dos" on a domicile checklist are checked off.

The fact patterns in both cases are somewhat similar. A longtime Massachusetts resident taxpayer creates a successful local business, and then buys and maintains a home in Florida in addition to maintaining a home in Massachusetts. The resident retains close family ties in Massachusetts, and also retains business and investment connections to Massachusetts. In both *Cotter* and *Swartz*, the ministerial acts of changing voting, vehicle registration and other legal documents to the new state were found to have been inconsistent with abandoning domicile in Massachusetts. The Massachusetts Department of Revenue (DOR) used these inconsistencies as evidence that the taxpayers had failed to sever material connections with the Commonwealth and, therefore, had not abandoned domicile in Massachusetts. The ATB agreed with the DOR in both cases and found that the taxpayers were residents of Massachusetts for state income tax purposes.

The taxpayer in *Cotter* failed to timely change his address to Florida on key financial accounts, including his bank accounts, life insurance policies and even the mortgage account for his Florida condominium. Most unfortunate was the taxpayer's written statement on November 1, 2003, made to a Florida casino, that his address for income tax purposes was his Massachusetts home. Not surprisingly, the ATB concluded that, "the fact that [taxpayer] did not change his address on these accounts...established that the [taxpayer] was more interested in making a superficial show to establish the appearance of domicile...rather than genuinely changing his domicile to Florida."<sup>1</sup>

In *Swartz*, the former CEO of Timberland and his wife were found not to have abandoned their Massachusetts domicile as of the dates of two large sales of Timberland stock in late 2004. This resulted in a large capital gain tax liability for the taxpayers.

In *Swartz*, the ATB found substantial evidence of the taxpayers' family ties to Massachusetts (two of their three children lived in Massachusetts, as did all of their grandchildren). The taxpayers' testimony before the ATB was that on October 13, 2004 – two weeks before the very two significant sales of Timberland stock at issue – the taxpayers purchased a Brookline condominium "to be closer to their children who lived in Boston and Newton."<sup>2</sup> On the same day that the taxpayers purchased their Brookline condominium they filed Declarations of Domicile declaring their Delray Beach, Florida home to be their principal residence. Unfortunately, the deed for the purchase of the Brookline condominium, executed on October 13, 2004, listed the taxpayers as being "of Marblehead, Massachusetts" not of Delray Beach, Florida.

The taxpayers in *Swartz* were not issued Florida drivers' licenses until two months after the significant sales of Timberland stock. While Mr. Swartz registered to vote in Florida two weeks before the stock sales in question, his wife did not register to vote in Florida until five weeks after the stock sales. In fact, shortly after the stock sales in question Mrs. Swartz voted in the November 2004 presidential election by means of an absentee ballot in Marblehead. The statement from Mr. Swartz from the Boca West Golf Club in Florida was addressed to him at his

Marblehead home, as were Mr. Swartz's Visa credit card statements and the couple's American Express credit card statements. The 2004 Palm Beach County, Florida real estate tax bill for the couple's Del Ray Beach home was also addressed to their Marblehead home. While the couple engaged a Florida law firm to prepare estate planning documents reflecting a Florida domicile, these documents were executed in Florida six months after the stock sales in question.

The ATB in *Swartz* found that the taxpayers' efforts to reflect a change of domicile to Florida were "merely ministerial acts which were not even effective until after the sales of Timberland stock; moreover, [taxpayers] continued to use their Marblehead home on important documents and files,"<sup>3</sup> after their purported change of domicile.

The ATB in *Swartz* stated that "the [taxpayers] failed to meet their burden of proving that their social, civic or other ties to Florida were stronger during the tax year at issue than in previous years... there was no meaningful change in [the taxpayers'] activities between those prior tax years and the tax year at issue except for [the taxpayers'] recognition of the significant capital gains and the purchase of another Massachusetts residence."<sup>4</sup>

One takeaway from *Swartz* is that a taxpayer's gradual multi-year change of domicile may be very difficult to sustain. The ATB will scrutinize year over year activities in Massachusetts and elsewhere to determine whether there has been a meaningful shift in the level of the taxpayer's activities from Massachusetts to the new state. A clear, easy to observe change in the taxpayer's year over year activities is preferable.

Advisors must ask themselves where the center of the taxpayer's physical, business, social, civic and family activities will be? Here are some practical steps (but by no means a complete list of the) actions that must be carefully undertaken and documented by a Massachusetts resident to demonstrate a clear intent to abandon domicile in Massachusetts and establish domicile elsewhere:

- File a declaration of domicile with the applicable circuit court located in the new state, and release any homestead of record on Massachusetts property;
- File for homestead protection in the new state;

- Register to vote and actually vote (preferably in person) in the new state, and notify the town clerk to remove oneself from the voting roles in Massachusetts;
- Register all motor vehicles in the new state (be careful about boats that remain registered in Massachusetts; consider renting a boat);
- Obtain a driver's license in the new state, and then destroy the Massachusetts license;
- Notify the US Passport Office of the new address, requesting a new passport be issued listing the new address in the new state;
- Arrange to execute new estate plan documents prepared by a lawyer licensed to practice in the new state, and execute those new legal documents in the new state immediately after moving there;
- Ensure that immediately following the change of domicile the address on all credit card, bank, brokerage statements and life insurance policies is changed to the new address (and have new bank checks printed listing the new address);
- Maintain all primary bank accounts in the new state, and limit the number and size of bank accounts in Massachusetts;
- Join clubs (as a resident member) and engage in meaningful civic and social activities in the new state, and resign or change membership status in clubs or charitable activities located in Massachusetts to non-resident or part-time status; and
- Maintain a daily calendar during the tax year to confirm one's whereabouts, and ensure that telephone and credit card statements are consistent.

For a taxpayer who maintains a home in Massachusetts, the taxpayer has the burden to prove that he or she has spent more than 183 days outside of Massachusetts and that he or she has established a domicile outside the Commonwealth. The DOR considers a taxpayer's legal residence for tax purposes to be Massachusetts, even if the taxpayer is domiciled in another state, if that taxpayer maintains a "permanent place of abode" in Massachusetts *and* spends more than 183 days (including partial days) in Massachusetts during a calendar year. Credit card

statements, telephone logs and toll transponders may be very helpful to demonstrate the taxpayer's physical presence outside Massachusetts.

The ATB has acknowledged that retaining some minimal ties to Massachusetts does not preclude a determination of domicile outside of Massachusetts. The ATB does not require that a taxpayer sever all links to Massachusetts, such as never visiting family members living in Massachusetts or seeking medical treatment in Massachusetts.

The lawyer must apply a common sense approach in these types of situations. In the eyes of the DOR, developing a large circle of new friends in the new state or becoming heavily involved in civic or charitable causes in the new state are vital objective factors that will support a determination that the taxpayer has abandoned his or her domicile in Massachusetts. When a taxpayer performs meaningful activities in the new state *and* consistently complies with almost all of the "to do's" on a domicile checklist immediately after a move to the new state, the ATB is prepared to find that such a taxpayer has successfully abandoned domicile in Massachusetts.

## Endnotes

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<sup>1</sup> ATB 2010-62.

<sup>2</sup> ATB 2010-256.

<sup>3</sup> ATB 2010-270

<sup>4</sup> ATB 2010-270