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Statutory residency and *Wynne*

On October 7th, the Supreme Court declined to hear two very similar cases from individual taxpayers who argued that, in light of the Court's 2015 *Wynne* decision, it was unconstitutional for New York to deny "statutory residents" a credit for tax paid to their "home" jurisdiction on "intangible" income that was economically unrelated to that jurisdiction. In denying *certiorari*, the Court seemed to imply that it does not perceive a constitutional issue with New York's statutory residency rules, the same as in 1998, when the Court denied *cert* to a comparable case involving a similarly unhappy New York statutory resident.

Statutory residency arises when a state claims an individual as an income tax resident, even though that state is not the person's "home" (or domicile). In New York, for example, a taxpayer can trip the statutory residency rules when the taxpayer is "in" New York for more than 183 days a year AND maintains a "permanent place of abode" in the state. (If the abode is in New York City, the taxpayer can also be deemed a statutory resident of the City; the top New York State and City rates, respectively, are 8.82% and 3.876%, or 12.696% in total.) Once a taxpayer is a New York statutory resident, the taxpayer's worldwide income is subject to New York tax – in addition to tax in the taxpayer's "home" jurisdiction. (Many states have rules similar to New York's.)

Although New York, for example, gives a credit for tax paid to the other state for income earned in that state or related to a trade or business there, it does *not* give a credit for tax paid on income from, say, stocks and bonds; rather, such assets are considered "intangible property" that "resides" with the taxpayer. Thus, if the taxpayer has two income tax "residences," the taxpayer can be taxed twice on intangible income – with no offsetting credits.

This is essentially what happened with the two sets of taxpayers here: both of these married couples lived in Connecticut (their domicile) but regularly commuted into New York City, where they spent more than 183 days a year AND maintained a permanent place of abode.

Richard Chamberlain and Martha Crum worked in New York City, where they maintained a townhouse from 2009 to 2011. Chamberlain was the president of Chamberlain Communications Group, and Crum taught at Hunter College. In 2007, they sold their interest in Chamberlain Communications, and continued to work in New York City. From 2009 through 2011, they filed joint Connecticut resident returns and joint New York non-resident returns. New York audited these tax years and determined that Chamberlain and Crum were statutory residents of New York during this period; it assessed over $2.7 million in taxes on the sale of the company and other intangible income, with no credit for the Connecticut tax paid on this income. Chamberlain and Crum paid the assessed tax under protest and sued New York in 2016, arguing that based on the Supreme Court's 2015 *Wynne* decision, New York's "tax scheme was invalid under the dormant Commerce Clause." Their argument was unavailing in the New York courts, and Chamberlain and Crum filed for *certiorari* in June of this year.

Samuel and Louise Edelman were the founders and majority owners of Edelman Shoe, which they sold in 2010 to another company. After the sale, they continued to work in New York City, where they maintained an apartment. In 2010 and 2013, they filed joint Connecticut resident returns and joint New York non-resident returns. New York audited their non-resident returns and determined that the Edelmans were statutory residents of New York in 2010 and 2013, assessing over $6 million in taxes, most of which related to the sale of Edelman Shoe; it gave no credit for the Connecticut tax paid on the sale because the business wasn't carried on in Connecticut. The Edelmans paid the assessed tax under protest and sued New York in 2016, with the same argument as Chamberlain and Crum: namely, that based on *Wynne*, New York's tax scheme was invalid under the dormant Commerce Clause. The Edelmans were equally unsuccessful in the New York courts and filed for *certiorari* in June of this year.

In its brief against the Court granting *certiorari*, New York's attorney general (AG) consolidated the two cases. The upshot of the AG's brief was that *Tamagni v. Tax Appeals Tribunal*, decided by the New York Court of Appeals in 1998 (and denied *cert* that same year), was still controlling authority on New York's statutory residency/credit issue. The Supreme Court's 2015 *Wynne* decision did not undermine *Tamagni* and was distinguishable: whereas *Wynne* dealt with Maryland's failure to give a Maryland domiciliary taxpayer *full* credit for income earned AND taxed out of state (the Court held this violated the dormant Commerce Clause), *Tamagni* was simply concerned with whether someone was a statutory resident of New York and therefore taxable on intangible income; this did not implicate interstate commerce or the interstate labor market. And even if the Court later concluded that this issue merited attention, there was no urgent need to address it; the Court "should allow the issue to percolate in the lower courts, and await the emergence of a conflict, or at the very least the emergence of multiple decisions addressing the issue, before undertaking to consider the issue itself."

As noted above, the Court denied *cert.*

Comments. New York's long-standing statutory residency rules can be an unpleasant surprise for taxpayers and an expensive lesson about the potential tax hazards of maintaining a residence in a location where the taxpayer regularly spends time but does not have his "home." So given that the Court denied *cert* to *Tamagni* over twenty years ago – and that the *Tamagni* facts were squarely on point (New Jersey domiciliary, New York statutory resident, no New York credit for the New Jersey tax

on Tamagni's portfolio income and an unsuccessful Commerce Clause challenge) – why did Chamberlain and Edelman think they might fare better?

The answer is *Wynne* – and presumably the hope that even if the New York courts were constrained by *Tamagni*, the Supreme Court might be willing to take a more expansive view of its *Wynne* holding and regard, for example, a taxpayer's commuting between one state and another as implicating the Commerce Clause. This argument seems to require a broad reading of *Wynne*, however, as its facts are fundamentally different from those of *Tamagni, Chamberlain* and *Edelman*, which address statutory residency and two states taxing the same "unsourced" income with no offsetting credit. Although the taxpayers argued that these differences were formalistic and missed the bigger issue of the "intolerable" burden on interstate commerce, others might describe those differences as fundamental enough that *Wynne* is not really on point.

Taxpayers caught by statutory residency rules that are similar to New York's may try to press their case by relying on *Wynne*, but *Chamberlain* and *Edelman* suggest that success might prove elusive.

The takeaway is that taxpayers who live in one state but commute regularly to another state for work might want to think twice about maintaining a "permanent place of abode" in that non-domiciliary state. The same caution also applies to, say, someone who lives on Long Island, New York, but commutes daily into New York City; although commuting, by itself, will not make the individual a New York City statutory resident, once a pied-à-terre gets thrown into the mix (gosh, those operas can run late!)…oh dear. In other words, considering the potential tax risk, a hotel might be preferable even if it's not the same thing as the comfort of a "home away from home."

Here are abbreviated citations for the various cases mentioned in this discussion: *Comptroller of Treasury of Md. v. Wynne,* 575 U.S. ___ (2015); *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998); *Edelman v. New York State Department of Taxation and Finance*, 80 N.Y.S.3d 241 (N.Y. App. Div. 2018); *Chamberlain v. New York State Department of Taxation and Finance,* 88 N.Y.S.3d 357 (App. Div. 3d Dept. 2018).

November 7520 rate

The November 2019 7520 rate is 2%, an increase of 0.20% (20 basis points) from October's rate of 1.8%. The November mid-term applicable federal rates (AFRs) have nudged up slightly, and are: 1.59% (annual), 1.58% (semi-annual and quarterly) and 1.57% (monthly). The October mid-term AFRs were: 1.51% (annual) and 1.50% (semi-annual, quarterly and monthly).

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