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## NY Legislative Session: What Passed, What Didn't, What's Next

BY SHARON L. KLEIN

The second year of the 2021-2022 legislative session, which began on Jan. 5, 2022, ended on June 2, 2022. Here are some of the most significant developments.



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### What Passed

**1. Second Homeowners in New York Win Big ... for Now.** Although the statutory residence legislation in New York is not new, a great victory for the taxpayer in a recent case gives it top billing in terms of statutory developments. Pursuant to NY Tax Law §605(b)(1)(B), an individual can be taxed as a statutory resident in New York if that individual (1) maintains a permanent place of abode in New York and (2) spends 183 days or more in the state during the taxable year.

The issue in *Matter of Obus and Coulson*, DTA No. 827736, was

whether a New Jersey domiciliary who owned a vacation home in New York, which he and his wife used just a couple of weeks a year, was taxable as a statutory resident. Since the taxpayer worked in New York, and was physically present for more than 183 days, the sole issue in the case was whether he maintained a permanent place of abode during the tax years in question. The Administrative Law Judge declined to allow taxpayers to rely on *Gaied v. Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014). In *Gaied*, the petitioner was a New Jersey domiciliary who worked in New York and owned an apartment building where his parents resided, but he had no bedroom or personal belongings there. The

Court of Appeals concluded a mere ownership interest is not sufficient to create a permanent place of abode—there must be some basis to conclude that the residence was utilized as the taxpayer's residence.

The Administrative Law Judge in *Obus* determined that, since the taxpayers purchased the home as a vacation home for their enjoyment, *Gaied* simply did not apply. Even though taxpayers had rented separate living quarters at the house year-round to a tenant and used the house themselves only two to three weeks a year, the judge found that did not prevent them from using the property, nor did the fact that they used it exclusively for vacations transform its characterization as a permanent place of abode. In *Matter of Obus v. New York State Tax Appeals Trib.* 2022, NY Slip Op 04206, June 30, 2022, the Appellate Division, Third Department, disagreed.

Focusing on the legislative intent of the law, the appellate court noted that the statutory resident law was intended to discourage tax

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evasion by those who are for all intents and purposes residents of the state. Citing *Gaied*, the court noted that, to qualify as a permanent place of abode, there must be a showing that the taxpayer has a residential interest in the property. Accordingly, the taxpayer must have “utilized” the dwelling as their residence, which is a fact sensitive and subjective inquiry. Based on the facts, including the taxpayer’s minimal use of the property, which was far from his place of business in New York City, the court found that the taxpayer, who fell outside the target statutory resident class of taxpayers, did not have a residential interest in the vacation home.

The Department of Taxation and Finance has reportedly requested permission to appeal the decision, so we have not yet heard the final word.

In another update related to the statutory residence test, the New York State Department of Taxation and Finance recently amended its Nonresident Audit Guidelines. For the purposes of determining statutory residency, the Department previously defined maintaining a permanent place of abode in New York for “substantially all of the year” to mean 11 months. Beginning in 2022, a 10-month rule will apply.

**2. Permanent Electronic Notarization on the Way.** Remote Online Notarization (RON) and Remote-Ink Notarization (RIN) both allow a notary to witness documents via

live audiovisual technology. RON is a completely electronic process, whereas RIN requires wet ink notarization of paper documents. On Dec. 22, 2021, Gov. Kathy Hochul enacted RON legislation (S.1780), effective 180 days after enactment (June 20, 2022). The new law requires the Secretary of State to provide regulations setting forth standards for ensuring the signal transmission is secure, conducted in real time and the notary is able to communicate with and identify the signer at the time of the notarial act. A notary must register with the New York Department of State (DOS) prior to performing electronic notarizations. The new law does not address remote witnessing of wills.

Creating a new online registration system will take longer than the six-month effective date provided in the law. In the interim, A.8691/S.7780 establishes a temporary RIN system that does not require additional licensing or fees, but notaries do need to use the appropriate technology to ensure they are recording the notary sessions, performing the necessary identity verification, and maintaining the necessary log. The DOS has until Jan. 31, 2023 to complete the fully electronic notarization system. After Jan. 31, 2023, only RONs will be permitted.

**3. Pass-Through Entity Tax (PTET) Updated.** The Tax Cuts and Jobs Act of 2017 limited the deduction for state and local taxes (SALT) to \$10,000. On Nov. 9, 2020, the IRS



issued Notice 2020-75, allowing partnerships and S corporations to elect annually to pay state and local taxes through the entity in exchange for the partners or shareholders receiving a personal income tax credit equivalent to the pass-through entity tax (PTET). In essence, because the SALT cap applies only to individuals, state and local income taxes assessed at the entity level should be fully deductible for federal tax purposes without regard to the individual SALT cap.

On April 19, 2021, New York enacted a PTET for eligible partnerships (including limited liability companies taxable as partnerships) and S corporations, effective for taxable years beginning on or after Jan. 1, 2021 (N.Y. Tax Law §§860 & 861).

*New York’s Pass-Through Entity Tax Expanded to Resident S Corporation Shareholders (Enacted as part of 2022-23 Budget).* Although partnerships and limited liability companies making the New York PTET election were not limited to New York source income, S corporation shareholders were so limited, irrespective of whether the shareholders were residents or nonresidents. As of Jan. 1,

2022, the new law establishes two types of S corporations: Electing Standard S corporations and Electing Resident S corporations. If, at the time of its PTET election, the S corporation certifies that all shareholders are New York residents, the PTET election extends to all items of income, gain, loss, or deduction to the extent included in the resident shareholders' taxable income. If an S corporation has resident and nonresident shareholders, it will be taxed as an Electing Standard S corporation, and the PTET will be limited to NY source income only.

For 2022 only, S corporations must certify by March 15, 2023 to be taxed as Electing Resident S corporations. In future years, the election must be made by March 15 of the same tax year.

*New York City Establishes Pass-Through Entity Tax (Enacted as part of 2022-23 Budget).* Effective for tax years beginning on or after Jan. 1, 2023, an eligible city partnership or an eligible city resident S corporation may make the annual irrevocable NYC PTET election by March 15 (NY Tax Law Article 24-B). An eligible city partnership must have at least one city resident partner. For an eligible city resident S corporation, all shareholders must be city residents.

Any eligible city partnership and resident S corporation that makes the NYS PTET election may make the NYC PTET election for the same taxable year. The NYC PTET is imposed

at a flat rate of 3.876% (the highest NYC personal income tax rate). City PTET income includes all items of income, gain, loss, or deduction to the extent they are included in the city taxable income of a resident owner. Resident partners, members, or shareholders receive a credit against their personal income tax equal to their direct share of the NYC PTET.

*Due Date for Making 2022 PTET Extended.* For taxable year 2022 only, the due date to make a PTET election

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is extended from March 15, 2022 to Sept. 15, 2022 (A.10080/S.8948). For tax year 2023 and going forward, the PTET election must be made by March 15.

**4. New York and Federal Tax Deadlines Conformed.** NY Tax Law §171 allowed New York State (NYS) to give taxpayers affected by a disaster declared by the president or the governor up to a 90-day extension on their state tax deadlines. This has caused taxpayer hardship, for example after Hurricane Ida, when the IRS granted a second extension that NYS could not match, citing a 90-day limit for extensions within the state tax law. The new

law (A.9461/S.8398, amending NY Tax Law §171) coordinates state and federal extensions of time by authorizing the Commissioner to extend state tax deadlines beyond the 90-day period whenever federal tax deadlines have been extended.

**5. Estate Tax Treatment of Dispositions to Surviving Spouses Who Are Not U.S. Citizens Extended.** In order for a disposition to a surviving spouse who is not a U.S. citizen to qualify for the federal marital deduction, the disposition must pass in a Qualified Domestic Trust (QDOT). For estates below the federal filing threshold, the New York estate tax is based on the taxable estate computed on a pro-forma federal return. Although not required for New York purposes (there is no New York tax imposed on the termination of a QDOT or a principal distribution from a QDOT), dispositions to non-U.S. citizen spouses had to be in QDOT form because federal elections on the pro-forma return flow through to the New York return. This artificial need to create a QDOT resulted in significant unnecessary administrative burdens and legal fees.

A law enacted in December 2013 eliminated the requirement to create a QDOT if no federal return was required to be filed and the disposition would otherwise have qualified for the federal estate tax marital deduction. The law, which via two prior extensions (in 2016 and

2019), was set to sunset on July 1, 2022, has been extended to July 1, 2025 (A.10444/S.9398, NY Tax Law §951(b)).

**6. Middle Class Tax Cut Accelerated (Enacted as Part of 2022-23 Budget).** This budgetary provision accelerates the phase-in of the middle-income tax cuts, which were slated to take effect between 2018 and 2025. Full implementation will now occur by 2023. The 2023 rates have dropped for married individuals filing jointly from 5.73% to 5.5% for income between \$27,900 and \$161,550, and from 6.17% to 6% for income between \$161,550 and \$323,200 (NY Tax Law §601).

**7. Power of Attorney Updates.** *Powers of Attorney Executed in Accordance With Law at Time of Execution Are Valid (Passed Senate and Assembly, Not Yet Enacted).* New York overhauled its Power of Attorney (POA) legislation, effective June 13, 2021 (NY Gen. Oblig. Law §5-1513), eliminating the Statutory Gift Rider, allowing for substantially compliant language, expanding an agent's power to make gifts in a calendar year that aggregate \$5,000 instead of the previous \$500, and adding a requirement that POAs must be signed by two disinterested witnesses, among other changes. Although the new law grandfathered existing powers of attorney, it was ambiguous as to whether grandfathered powers of attorney had to be executed by both the principal

and the agent in accordance with the laws in effect at the time of execution. A new subdivision will clarify that, if a principal signs a power of attorney that conforms to the law in effect at the time it was executed, it will remain valid and enforceable under the new law, even if the agent signs at a later date (A.10234/S.9209).

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The New York Trust Code has been **over a decade in the making**, the result of comprehensive review and study by all the major professional associations in New York. It would apply not only to new trusts but to virtually all trusts created before the effective date unless there is a clear indication of contrary intent in the trust and vested rights will not be adversely affected.

*Principals To Notify Co-Trustees and Co-Beneficiaries When Signing Power of Attorney (Passed Senate and Assembly, Not Yet Enacted).* When a principal who is a trustee of a trust signs a POA that allows the agent to affect the trust and the agent is not a co-trustee, this proposal (A.4601/S.8892) would require the principal to notify all other co-trustees of the signing of a POA and identify the agent. Similarly, if a beneficiary signs a POA and the agent is not a co-beneficiary, the principal must notify all other beneficiaries of

the signing and identify the agent. The justification for this change as explained in the memorandum in support is to prevent a nonparty raiding the trust and taking all the funds. With respect to a beneficiary, it is unclear how a nonparty could accomplish that.

### What Didn't Pass

**1. Proposal To Revise Commissions of Individual Trustees of Charitable Trusts (Passed Senate).** Individual trustees of wholly charitable trusts and trustees of non-charitable trusts are compensated differently under current law. A proposal to eliminate that discrepancy has been introduced many times over the years but has never passed. The proposal has been reintroduced this legislative session (A.7800/S.6499). Under Surrogate's Court Procedure Act §2309(5), a trustee of a wholly charitable trust is entitled to only 6% of the annual income collected. The proposal would provide commissions to individual trustees of wholly charitable trusts at the same rates as individual trustees of non-charitable trusts, with a reduced rate of 80% of the rates for a non-charitable trust with a principal value of up to \$20 million, and a reduced rate of 50% on the principal value in excess of \$20 million. Corporate trustees will still be entitled to reasonable compensation at published rates. As with non-charitable trusts, the charitable trust commissions would be payable one-third

from income and two-thirds from principal.

**2. Proposal To Extend Revocatory Effect of Divorce (Passed Senate).** Estates, Powers and Trusts Law (EPTL) §5-1.4 provides that divorce revokes dispositions to, and fiduciary nominations of, former spouses. However, the revocatory effect of the section does not extend to the relatives of an ex-spouse. In *Matter of Lewis*, 25 N.Y.3d 456 (2015), EPTL §5-1.4 disqualified the decedent's ex-husband from inheriting under her will or acting as executor. However, the ex-husband's father (the decedent's ex-father-in-law), was the successor beneficiary and executor and he was not disqualified under the terms of the statute. Presumably the ex-husband would inherit or obtain the property from his father, causing an end-run around the statute. While the court acknowledged this, it opined that the statute was clear and unambiguous in omitting the relatives of ex-spouses from disinheritance. Under a proposal that has passed the Senate (A.7798/S.6503), dispositions to divorced spouses would continue to be expressly revoked, and there would be a rebuttable presumption revoking dispositions to relatives of the ex-spouse, unless there is substantial evidence of contrary intent.

The most prudent course of action, however, is not to rely on state default law. Divorced spouses, spouses in the process of getting a divorce, and unmarried couples who

are separated should give immediate attention to their planning documents, to ensure they reflect their intent.

### What's Next?

**Proposal To Adopt the New York Trust Code (Introduced in Assembly).** The New York Trust Code (NYTC) (A.7677) is a comprehensive statute that would modernize New York law, updating many statutory provisions to reflect current times, codifying existing case law, and generally providing a centralized statutory trust code. Among the most important new provisions are the following: allowing nonjudicial settlement agreements; allowing judicial modification of dispositive provisions; allowing reformation to correct mistakes; codifying the standard of capacity necessary to create a revocable trust (same as required to make a will); allowing a testamentary trustee to resign without court approval; and adopting a New York Directed Trust Act, allowing a settlor to separate fiduciary responsibilities by naming a trust director with the authority to direct the trustee regarding the investment, management, or distribution of trust property.

The NYTC has been over a decade in the making, the result of comprehensive review and study by all the major professional associations in New York. It would apply not only to new trusts but to virtually all trusts created before the effective date

unless there is a clear indication of contrary intent in the trust and vested rights will not be adversely affected.

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