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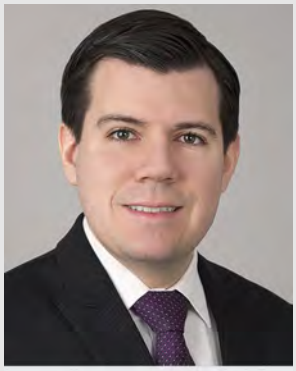

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In this installment of A Pinch of SALT, Kearns and Capouet describe the District of Columbia's statutory residency law, its associated risks, and what individuals can do to mitigate those risks.

The District of Columbia occupies a unique position among subnational jurisdictions in the United States given its status as a nonstate, federal enclave. The District's status allows it to impose individual income tax on only residents under the district clause of the U.S. Constitution, the Home Rule Act of 1973, and implementing statutes that are subject to general congressional oversight.[1] Unlike *states*, which may tax source income of nonresidents, the District cannot tax nonresident income, including wages earned in the District. This limitation affects the District's tax structure in a few ways, including the imposition of the District's entity-level tax on unincorporated businesses.[2]

Because of the ambiguities in the District's definition of statutory resident, the Office of Tax and Revenue's (OTR's) interpretation has created concern among individuals who have connections to the District and their employers. This risk has been exacerbated by Attorney General Karl Racine's recent filing of a complaint under the District's false claims act regarding an individual's

[1] U.S. Const. Art. I, section 8, cl. 17 (granting Congress the right to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); D.C. Code sections 1-206.02(a)(5) (the D.C. Council "shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to . . . Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District"), 47-1806.03 (imposing individual income tax on the taxable income of residents only).

[2] *See* D.C. Code sections 47-1806.01 and 47-1808.01 et seq. (nonresidents may be subject to the unincorporated business tax on their share of partnership and unincorporated business income).

District residency status — the first such filing under the District's recently expanded alternative tax enforcement provisions.[3] This article describes the District's statutory residency law, its associated risks, and what individuals can do to mitigate those risks.

Background

The District imposes income tax only on resident individuals and part-year resident individuals.[4] As in other U.S. jurisdictions, District residents are subject to tax on all their income, subject to a credit for taxes paid to another state, territory, or possession of the United States, or political subdivision thereof.[5] District law defines resident as:

> [A]n individual domiciled in the District at any time during the taxable year, and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not the individual is domiciled in the District. . . . In determining whether an individual is a resident, an individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode.[6]

The above definition contemplates a statutory resident (that is, one who maintains a place of abode for 183 days or more) and a domiciliary resident. To determine domiciliary residency, the District takes into consideration subjective factors of intent, as well as objective considerations like physical presence.[7]

Further, temporary absences are deemed to be days in the District when applying the 183-day "place of abode" test.[8] The OTR explains in its residency regulation that "in determining whether an individual has maintained a place of abode in the District for one hundred eighty-three (183) days, temporary absences from a District residence (i.e., vacations, hospitalization, business trips, and the like [)] shall be considered as periods of District residency."[9]

On its face, D.C. Code section 47-1801.04(42) does not expressly require that an individual be physically present in the District for 183 days or more before being deemed a statutory resident; it only requires that the individual maintain a "place of abode" in the District for that time period. The absence of a physical presence criteria differs from the statutory residency provisions of many states, which adopt an express in-state presence requirement of more than 183 days.[10] However, the District's neighbors — Virginia and Maryland — enacted statutory definitions of

[3] *District of Columbia v. Saylor*, Case No. 2021 CABSLD 001319 B (D.C. Super. Ct. complaint in intervention filed Aug. 22, 2022). On August 31 Racine announced that his office was pursuing an action against billionaire Michael Saylor for allegedly owing individual income tax to the District as a resident. Racine is also pursuing a violation of the D.C. False Claims Act (FCA) regarding Saylor's failure to file a return and pay the tax and pursuing claims against his employer for allegedly conspiring with him to avoid paying District income tax. Racine contends that Saylor has been responsible for District individual income tax since 2005 because he has been either (1) domiciled in the District or (2) a statutory resident, or both. This is the first lawsuit filed by the attorney general under the recently amended FCA. Before 2021 the FCA did not apply to tax matters whatsoever. However, the D.C. Council amended the act to apply to "claims, records, or statements made pursuant to those portions of Title 47 [Taxation, Licensing, Permits, Assessments, and Fees] that refer or relate to taxation" if (i) the claim, record, or statement was made on or after January 1, 2015; *and* (ii) the District taxable income, District sales, or District revenue of the person against whom the action is being brought equals $1 million for any tax year subject to any action brought under the FCA, and the damages pleaded in the action total $350,000 or more. D.C. Code section 2-381.02.

[4] D.C. Code sections 47-1806.01, 47-1806.04(a).

[5] *Id.*

[6] D.C. Code section 47-1801.04(42).

[7] *See District of Columbia v. Murphy*, 314 U.S. 441 (1941).

[8] D.C. Code section 47-1801.04(42).

[9] D.C. Mun. Regs. tit. 9, section 105.6.

[10] In fact, the OTR asked the D.C. Office of Administrative Hearings in *Bechtel* to adopt New York's regulatory definition of the term "permanent place of abode" in 20 NYCRR section 105.20(e)(1): "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer." However, the ALJ quickly dismissed that argument because New York also requires more than 183 days of actual physical presence in the state. *Bechtel v. Office of Tax & Revenue*, Case No. 2016-OTR-00017, at 15-16 (motion for summary judgment granted Oct. 30, 2018) (hereinafter *Bechtel MSJ*). *See also* Conn. Gen. Stat. Ann. section 12-701(a)(1)(B) (defining a Connecticut statutory resident as one "who is not domiciled in this state but maintains a permanent place of abode in this state and is in this state for an aggregate of more than one hundred eighty-three days of the taxable year"); Ind. Code section 6-3-1-12 (defining an Indiana statutory resident as "any individual who maintains a permanent place of residence in this state and spends more than one hundred eighty-three [183] days of the taxable year within this state"); Mass. Gen. Laws ch. 62, section 1(f) (defining a Massachusetts statutory resident as "any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth, including days spent partially in and partially out of the commonwealth"); Or. Rev. Stat. section 316.027(1)(a)(B) (defining an Oregon resident as "an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than 200 days of the taxable year in this state unless the individual proves that the individual is in the state only for a temporary or transitory purpose").

resident that resemble the District's. Nonetheless, those states apply a physical presence requirement via administrative guidance or regulation, respectively.[11] It appears, therefore, that Virginia and Maryland have recognized the legal issues that may result from disassociating physical presence from tax residency, as discussed below. Yet the District has no similar guidance. Despite its status as the sole factor in determining whether an individual is a statutory resident of the District, "place of abode" is not defined by D.C. statute, regulation, or OTR administrative guidance.[12]

The OTR has interpreted D.C. Code section 47:1801.04(42) to be a bright-line rule that deems any individual who merely "owned and maintained" a home in the District, and had "unfettered access" to that home, to be a statutory resident.[13] Thus, under the OTR's version of statutory residency, merely owning or renting, and having continuous access to, a dwelling in the District creates residency for the owner or tenant, even if that individual was domiciled elsewhere or spent no time in the District.

Defining 'Place of Abode' — It's Up to the Courts

Because of the lack of statutory and administrative guidance, decisions by the D.C. Office of Administrative Hearings (OAH) and the D.C. Court of Appeals[14] have constructed the framework for determining District statutory residency.[15] Most recently, the OAH issued two decisions in *Bechtel v. D.C. Office of Tax and Revenue*[16] that are instructive regarding how taxpayers can interpret "place of abode" and evaluate their D.C. statutory residency risk.

In *Bechtel*, the OTR asserted that the petitioner, Brendan Bechtel, owed individual income tax to the District for tax year 2011. During that year, Bechtel was — as the OTR conceded — a domiciliary resident of California. He moved to the District in 2010, yet maintained his San Francisco home for his use when visiting the area until he sold it in March 2013 (he had previously purchased another California home in 2011). In December 2010 Bechtel purchased a house in the District. He did not rent, lease, or sell the District house until September 2015, because he had expected to travel to the area occasionally for family visits or business meetings.

Bechtel's additional connections with the District are as follows:

- He worked at an office in Virginia until June 24, 2011, then left the District on June 27, 2011, to relocate to Houston, Texas.
- He had business meetings in Houston on June 28 and 29.
- Following the Houston business trip, he stayed overnight in the District on the way to a family vacation.
- He visited the District six other times during 2011.
- Following the vacation, he returned to Houston on July 4, 2011, and stayed at a hotel near his office until July 12, 2011.
- During that period, he signed a lease for a Houston apartment on July 8 and moved in on July 12.
- However, his mail, including credit card statements, was sent to his California address.
- From January 2012 to March 2013 Bechtel worked in Australia.

[11] Va. Code section 58.1-302 (defining the term "resident" as "every person domiciled in Virginia at any time during the taxable year and every other person who, for an aggregate of more than 183 days of the taxable year, maintained his place of abode within Virginia, whether domiciled in Virginia or not"); Va. P.D. Rul. Nos. 21-69 (May 25, 2021) ("a person who is not a domiciliary resident of Virginia, but who stays in Virginia for an aggregate of more than 183 days is also subject to Virginia taxation"), 01-146 (Oct. 1, 2001) ("a taxpayer who maintains a place of abode and is physically present in Virginia for more than 183 days during any taxable year is an actual resident for Virginia individual income tax purposes") *citing* P.D. Rul. No. 93-22 (Feb. 5, 1993). *See also* Md. Code Ann., Tax-Gen. section 10-101 (defining resident as "an individual, other than a fiduciary, who: 1. is domiciled in this State on the last day of the taxable year; or 2. for more than 6 months of the taxable year, maintained a place of abode in this State, whether domiciled in this State or not"); Md. Code Regs. 3.04.02.01(7)(b) ("'Resident' includes an individual who: (i) For more than 6 months of the taxable year maintains a place of abode in this State; and (ii) Spends, in the aggregate, 183 days or more within this State during the taxable year.").

[12] D.C. Code section 47-1801.04(42); D.C. Mun. Regs. tit. 9, section 105; D.C. OTR, "Audit Division — Frequently Asked Questions" (last accessed Sept. 24, 2022).

[13] *Bechtel MSJ* at 15.

[14] The D.C. Court of Appeals is the District's highest court.

[15] *See, e.g., Sensenig v. District of Columbia*, Dkt. No. 2278 (D.C. Super. Ct., Tax Div. Jan. 4, 1977) (under prior law, finding that a Pennsylvania domiciliary resident was a District statutory resident when he spent over 200 days in the District and that a hotel to which he regularly returned was a "place of abode").

[16] *Bechtel MSJ* and *Bechtel* motion for reconsideration, denied Apr. 28, 2021.

- Bechtel obtained a D.C. driver's license in December 2010 and a California driver's license in June 2011 but did not obtain a Texas driver's license until 2013.

For his 2011 state tax returns, Bechtel filed a "California Nonresident or Part-Year Resident Income Tax Return" as a domiciliary nonresident. He did not file a statutory resident individual income tax return with the District or any other state in 2011.[17]

The OTR argued that Bechtel maintained a place of abode for more than 183 days and was therefore a statutory resident under D.C. Code section 47:1801.04(42). Specifically, the OTR alleged that (i) the taxpayer "continued to own and maintain a house in the District of Columbia after he moved and that he thus maintained a place of abode in the District for the entire year," and (ii) the taxpayer's move to Texas was a "temporary absence" that should be considered a "period of District residency" under D.C. Mun. Regs. tit. 9, section 105.6; or if not for the entire year, the business trip to Texas from June 27 until at least July 4 (the 184th day of 2011) was a "temporary absence."[18]

Bechtel argued that he was not liable for District individual income tax in 2011 because (i) he relocated from the District to Texas on June 27, 2011 (the 178th day of 2011); and (ii) even if he had maintained a place of abode in the District for 183 days, finding him subject to the tax would violate the commerce clause under *Comptroller of the Treasury of Maryland v. Wynne*[19] because he was physically present in the District for fewer than 183 days in 2011.

'Principal Place of Residence'

In attempting to determine what "place of abode" should mean for purposes of District statutory residency and the statutory context in which it is used, the administrative law judge explained that "a 'place of abode' is the place that serves as an individual's *base of operations* or *principal place of residence* because it is the place to which one returns after temporary absences."[20] The ALJ further explained that "it is the length of time a person maintains a principal residence in the District of Columbia, and not the number of days of physical presence, that determines statutory residency."[21] Given the context of "place of abode" in the District's statutory regime and its importance in determining residency, the ALJ declined to adopt the OTR's rigid interpretation of the term.

'Temporary Absences' and the *McNulty* Three-Part Test

Whether or not an individual maintains a principal place of residence in the District turns on whether they return to the District following "temporary absences." In *Bechtel*, the ALJ declined to characterize the taxpayer's move to Texas as a "temporary absence" or "business trip" for purposes of assigning those days to the District under the 183-day test, as described in the statute and regulation.[22] Instead, the taxpayer's move to Texas on July 12, 2011, "was a relocation from a principal place of residence in the District of Columbia to a new principal place of residence in Texas."[23]

In further discussing the import of "temporary absences" from the District, as set forth in D.C. Mun. Regs. tit. 9, section 105.6, the ALJ discussed *McNulty*.[24] In *McNulty*, a 2006 decision, the OAH found that a California domiciliary resident who accepted a temporary work assignment in the District in January 2004 maintained a place of abode in the District for longer than 183 days and was thus subject to D.C. personal income tax. For the first two months of 2004, the individual stayed in hotel rooms for a total of 28 nights, but in March she rented a corporate apartment in the District under a one-month agreement and stayed overnight there for 28 days. Effective April 1, 2004, she entered a one-

[17] Bechtel had made an estimated individual income tax payment to the District in 2011. He later filed a District Form D-40B, "Nonresident Request for Refund," stating that he "was not a resident of any state in 2011." *Bechtel MSJ* at 10.

[18] *Bechtel MSJ* at 14.

[19] *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015).

[20] *Bechtel MSJ* at 16 (emphasis added).

[21] *Bechtel MSJ* at 16.

[22] *Bechtel MSJ* at 21.

[23] *Id.*

[24] *McNulty v. D.C. Office of Tax and Revenue*, No. TR-C-06-800051 (D.C. Off. of Admin. Hearings Oct. 11, 2006).

year lease of an apartment in the District and stayed overnight there for 174 days.[25]

Noting that there is "no clear definition of 'place of abode'" for purposes of the District's statutory residency test, the *McNulty* ALJ outlined three general principles for determining whether the individual maintained a place of abode in the District:

> (1) unless some other indicia are present, the temporary stay in a District hotel room cannot be considered the maintenance of a place of abode, as this would ordinarily constitute a "temporary absence" from the person's home;
>
> (2) when a person rents a property for a sustained period of time, the person should be deemed to maintain a place of abode for the entire rental time, even if the person leaves the District for temporary periods during the rental; and
>
> (3) when a person rents a property in the District as a place to stay while commuting to work in the District, this is an indicator of the maintenance of a place of abode.[26]

Based on these principles, the ALJ concluded that the individual "maintained a place of abode" in the District in 2004 for 306 days (that is, from the rental of the corporate apartment effective March 1, 2004, through the end of the year) — "much longer than the 183 days required" under the District's statutory residency test, and thus the individual was treated as a District resident for personal income tax purposes.[27]

Applying *McNulty*, the ALJ in *Bechtel* concluded that an individual does not terminate a place of abode, once established in the District, until that individual establishes a place of abode — that is, a principal place of residence or base of operations — in another state. Thus, the taxpayer in *Bechtel* was deemed to be a statutory resident for the 2011 tax year, as he maintained a place of abode in the District for more than 183 days and his temporary absences from his place of abode (the initial visits to Texas and vacation in New Hampshire) were days deemed to be in the District under D.C. Code section 47:1801.04(42) and D.C. Mun. Regs. tit. 9, section 105.6. Ultimately, in a second order, the OAH determined that the *Bechtel* taxpayer was a part-year statutory resident under District tax law, owing tax from January 1 through July 12, 2011 — the point at which the taxpayer established a principal place of residence in Texas by moving into an apartment in the state, thereby revoking his District principal place of residence for the remainder of that tax year.[28]

You Always Go Home Again — 'Base of Operations'

The *Bechtel* ALJ also invoked the term "base of operations" to delineate the meaning of "place of abode." "Base of operations," a term with legal significance in the District and elsewhere, applies in the analogous contexts of unemployment insurance and the corporate income tax payroll factor, as all situations ultimately deal with situsing wages or the income of an individual with connections to multiple states.[29]

If an employee's services are not localized in any one state — an analysis beyond the scope of

[25] *Id.* at 8.

[26] *Id.* at 15.

[27] *Id.* at 17.

[28] *Bechtel v. Office of Tax & Revenue*, Case No. 2016-OTR-00017 (motion for reconsideration denied Apr. 28, 2021).

[29] The District adopts the nationally uniform "localization of work" rules to assign wages to a state for purposes of paying unemployment insurance taxes. *See generally* D.C. Code section 51-101(2)(B)(i)(II) (for purposes of unemployment insurance wage reporting, "employment" is in the District if some of the employee's service is performed there and the employee's base of operations is in the District). The purpose of this unemployment insurance uniformity is to "cover under one state law all of the service performed by an individual for one employer, wherever it is performed." U.S. Department of Labor Employment & Training Administration, Unemployment Insurance Program Letter No. 20-04, attachment 1 (May 10, 2004). The adoption of the "localization of work" tests, which result in an all-or-nothing determination of the assignment of wages from multistate employment, "prevent[s] overlapping coverage when an employee performs services in more than one state for a single employer." California Employment Development Department, "Information Sheet: Multistate Employment," DE 231D Rev. 12 (Dec. 2017). *See also* D.C. Code section 47-1810.02(f)(2)(C) (for purposes of calculating the payroll factor numerator for tax years before January 1, 2015, "compensation is paid in the District" by looking to the individual's "base of operations" in some instances).

this article — the next successive test used to determine allocation of wages is the base of operations test.[30] The U.S. Department of Labor describes an employee's base of operations as:

> [T]he place, or fixed center of more or less permanent nature, from which the individual starts work and to which the individual customarily returns in order to receive instructions from the employer, or communications from customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to exercise the individual's trade or profession at some other point or points.[31]

Like the taxpayer in *Bechtel*, the base of operations test usually applies in the context of frequent business travelers who may only return to their office between trips. Importantly, as noted by the Department of Labor, the state where direction and control occurs is "immaterial" for these employees.[32] But instead of looking at an individual's base of operations in the context of employment (that is, work location) for unemployment insurance purposes, a similar analysis ought to apply at the personal level when evaluating:

i. whether an individual has a "place of abode" in the District;
ii. application of the "temporary absences" exclusion; and
iii. the individual's status as a statutory resident.

Wynne: Does District Statutory Residency Pass Muster?

The ALJ next turned to the constitutionality of the interpretation of D.C. Code section 47:1801.04(42). As with other courts, the OAH interprets statutes in favor of their constitutionality.[33] Thus, the OTR's read of D.C. Code section 47:1801.04(42), which was based on the mere owning or leasing of a residence, could not be sustained because "it is not only inconsistent with the statutory scheme, it is an interpretation that would make the District of Columbia statute unconstitutional under the Commerce Clause."[34] Discussing *Wynne*, the ALJ correctly (and easily) found that the OTR's interpretation of D.C. Code section 47:1801.04(42) failed the internal consistency test and "therefore must be rejected because it would inhibit interstate commerce and render the statute unconstitutional."[35] Indeed, if every state adopted the same statutory residency rule as proffered by the OTR, the OAH concluded that "an individual who maintained a dwelling for their use in more than one state could be deemed to be a statutory resident of multiple states."[36] That interpretation

[30] D.C. adopts the "waterfall" approach to allocation under the localization rules: The first test that applies determines where *all* the employee's wages must be reported, and therefore where *all* the employer's unemployment insurance taxes must be paid. An employer must perform this analysis for each employee to which it pays wages subject to a state's UI laws. D.C. Code section 51-101(2). *See also Hughes v. District of Columbia Department of Employment Services*, 498 A.2d 567, 569 (D.C. 1985) (adopting the "principally localized" test for workers' compensation as follows: "1) The place(s) of the employer's business office(s) or facility(ies) at which or from which the employee performs the principal service(s) for which he was hired; or 2) If there is no such office or facility at which the employee works, the employee's residence, the place where the contract is made and the place of performance; or 3) If neither (1) nor (2) is applicable, the employee's base of operations").

[31] U.S. Department of Labor Employment & Training Administration, *supra* note 29.

[32] *Id.*

[33] *See United States v. Smith*, 685 A.2d 380, 384 (1996) ("We are under a general obligation to interpret statutes so as to support their constitutionality.") (*quoting District of Columbia v. Gueory*, 376 A.2d 834, 836 (D.C. 1977)).

[34] *Bechtel MSJ* at 17. District of Columbia legislation enacted by the D.C. Council under the Home Rule Act that is subject to the 30-day congressional review process is subject to the dormant commerce clause's limitations. For purposes of the interstate commerce clause, "the District of Columbia is considered a state." *Pharmaceutical Research & Manufacturers of America v. District of Columbia*, 406 F. Supp. 2d 56, 67, n. 11 (D.C. Dist. 2005) (*citing Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984)) (holding that a D.C. statute that was enacted by the D.C. Council under the 30-day review period violated the commerce clause). The D.C. Court of Appeals has held that the commerce clause analysis applies when "Congress passes legislation for the District of Columbia under the power expressly delegated to it by Article I, section 8, cl. 17 of the Constitution" and "acts 'in like manner as the legislature of a State.'" *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 199 (D.C. Cir. 1996) (quoting *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886)). In some contexts, however, the D.C. Court of Appeals has held that a District statute enacted by Congress does not violate the commerce clause. *See District of Columbia v. Helen Dwight Reid Educational Foundation*, 766 A.2d 28 (D.C. 2001); *Neild v. District of Columbia*, 110 F.2d 246 (D.C. 1940).

[35] *Bechtel MSJ* at 17-18.

[36] *Bechtel MSJ* at 18.

would "deter individuals from buying or renting in more than one state, thereby impeding interstate economic activity."[37]

Jumbo-Slice-Sized Takeaways?

Considering the District's statutory residency decisions — namely *Bechtel* and *McNulty* — and analogous provisions from other jurisdictions or contexts, individuals concerned about becoming a District resident may evaluate their risk under a number of factors. Recognizing that *Bechtel* and *McNulty* are persuasive authority — but not controlling — for other ALJs, much less the D.C. Court of Appeals, those decisions help define the boundaries of the District's statutory residency law as they most squarely address the meaning of place of abode.[38]

Generally, a statutory resident must maintain a place of abode — a principal place of residence or base of operations — in the District. Thus, a statutory resident has unfettered access to their apartment, condominium, or house in the District (that is, it is not leased out) and treats the property as if it were their home by keeping it furnished and maintaining utilities, akin to the "residential interest" test in New York. Also, a statutory resident would normally return to their District abode between business trips or vacations. In other words, the District home of a statutory resident is their personal base of operations (a professional base of operations in the DMV area would negatively affect the individual's nonresident chances). Other facts may be of importance, such as the issuing state of the individual's driver's license and so forth, although prevalence of those factors may steer the individual to domiciliary residency.

Moreover, any connections in other states that are the inverse of the above may affect an individual's status as a District statutory resident. It appears that statutory residency remains with the individual until revoked by their establishing a principal place of residence or base of operations elsewhere, much like the common analysis in the domicile context. For instance, does the individual own or lease property in another state that they regularly visit and treat as a residence? It may be particularly helpful if the individual files as a domiciliary resident, or even as a statutory resident in another state, unlike the taxpayer in *Bechtel*. Indeed, as the *Bechtel* ALJ suggested by defining place of abode as a "principal place of residence" and "base of operations," an individual may only have one such place of abode under the District's statutory residency test, or else the regime may be unconstitutional under *Wynne*.

Evaluation of District residency — whether domiciliary or statutory — is important not only for individuals, but also their employers. Many companies may maintain apartments or condominiums for government affairs staff, executives, and others. In so doing, those companies should consider the application of the residency rules when entering into those agreements and providing access to employees. More practically, status as a District resident will need to be considered when determining an employer's withholding obligation and, if that obligation exists, the amount to withhold when accounting for the credit for taxes paid or other issues.[39] ■

[37] *Id.* Following the U.S. Supreme Court's decision in *Wynne*, courts have analyzed whether individual income taxes comply with the internal consistency test of the commerce clause. However, these courts have considered instead the impact of states' taxation of intangible property income or the tax scheme's credit provision. *See Steiner v. Utah State Tax Commission*, 2019 UT 47 (Utah 2019) (holding that Utah's income tax scheme was constitutional because the "provision of credits for income taxes already paid to other states satisfies the dormant commerce requirements"); *Edelman v. New York State Department of Taxation & Finance*, 162 A.D.3d 574 (N.Y. App. Div. 1st Dep't 2018) (distinguishing *Wynne* as not concerning the taxation of intangible investment income). The OTR's interpretation of its statutory residency definition, as reflected in its *Bechtel* litigation position, presents a more extensive violation of the U.S. Constitution than in those cases.

[38] *See Bechtel* MSJ at 22, n.95.

[39] D.C. Code section 47-1801.04(17) (defining an employee subject to wages withholding as "an individual having a place of abode or residing or domiciled within the District at the time the tax is required to be withheld in respect to the individual's employment by another, and to every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether domiciled in the District or not, including an officer of a corporation"); D.C. Code section 47-1806.04(a) (allowing a District resident to take a "credit equal to the amount of individual income tax such individual is required to pay and, in fact, has paid to any state . . . or political subdivision thereof, upon income attributable to such state . . . for such taxable year or portion thereof while concurrently a resident of the District").