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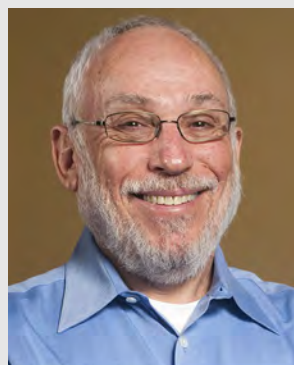
# **New York's Proposed Mark-to-Market Tax Decouples From Federal Tax**

by Henry Ordower

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## New York's Proposed Mark-to-Market Tax Decouples From Federal Tax

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Henry Ordower is a professor of law at Saint Louis University School of Law. He thanks Vince Jones and David Kullman for their research assistance.

In this article, Ordower examines proposed legislation in New York that would tax the unrealized gain and other deferred income of billionaires in the state, and the complexities that the legislation's enactment is likely to generate.

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### The State Tax Dilemma

States, often hamstrung by state constitutional balanced budget requirements preventing deficit spending, must reduce services (or increase taxes) if revenue is insufficient to fund them.<sup>1</sup> To maintain revenue and services, states have sought — sometimes aggressively — additional sources of tax revenue. As earnings of athletes and entertainers increased, for example, states began taxing a portion of their earnings from playing or

performing occasionally in the state.<sup>2</sup> Similarly, use tax payment lines began to appear on state income tax returns.<sup>3</sup> In response to the increasing volume of sales by remote vendors, taxing authorities sought to require them to collect use taxes on goods shipped into the state.<sup>4</sup> This strategy was bolstered significantly by the Supreme Court decision in *South Dakota v. Wayfair Inc.*<sup>5</sup> Unlike “Amazon” laws imposing use tax collection obligations on out-of-state vendors that have a physical presence in the taxing state, *Wayfair* enables states to require out-of-state vendors without a physical presence in the taxing state to collect use tax on the taxing state’s behalf.<sup>6</sup> Some states have been slow to implement legislation using the authority that *Wayfair* provides, but it is likely that all states with a sales and complementary use tax ultimately will enact the legislation to ensure collection of use tax revenue.<sup>7</sup>

<sup>2</sup> See, for example, N.Y. Tax Law section 631; Mo. Rev. Stat. section 143.183 (2018); and Jerome R. Hellerstein and Walter Hellerstein, *State Taxation*, para. 20.05(4)(d), at 18 (2003).

<sup>3</sup> For example, line 91 of California Form 505. Inclusion of use tax lines has enjoyed limited success in the absence of third-party collection of use taxes or reporting of sales to the state to resident purchasers. And for athletes generally, see B. Anthony Billings, Kyungjin Kim, and Jeanette A. Boles, “Taxation of Professional Athletes: Jock Taxes,” *Tax Notes State*, Feb. 1, 2021, p. 451.

<sup>4</sup> Institute for Local Self-Reliance, “Internet Sales Tax Fairness” (“In 2008, New York pioneered a policy strategy that effectively skirted the constraints of *Quill* and forced Amazon, Overstock, and other web-only retailers to collect the state’s sales tax.”).

<sup>5</sup> *South Dakota v. Wayfair Inc.*, 585 U.S. \_\_\_ (2018).

<sup>6</sup> *Wayfair* overruled Supreme Court precedent in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which required a physical presence but invited Congress to change that requirement. Congress failed to act, and the Supreme Court then reversed itself. For additional discussion, see Henry Ordower, “Avoiding Federal and State Constitutional Limitations in Taxation,” *Tax Notes State*, Aug. 24, 2020, p. 803.

<sup>7</sup> Hannah Meehan, comment, “Leveling the Playing Field for Remote Sellers: Missouri’s Response in a Post-Wayfair World,” 65 *St. Louis U. L.J.* (forthcoming Mar. 2021).

<sup>1</sup> For example, Mo. Const. Art. III, section 37; and Mo. Const. Art. IV, section 24. See generally Jared Walczak, “State Strategies for Closing FY 2020 With a Balanced Budget,” Tax Foundation (Apr. 2, 2020); and U.S. Government Accountability Office, Briefing Report to the Chairman, Committee on the Budget, House of Representatives, “Balanced Budget Requirements: State Experiences and Implications for the Federal Government” (1993).

During the ongoing COVID-19 pandemic, states with commuter destination cities like Boston and New York City have been threatened with loss of income tax revenue because neighboring-state residents stopped physically working in the commuter destination state. Some of these states have asserted continuing taxing jurisdiction over the wages resident employers pay the employees working remotely from their states of residence. New Hampshire has sued Massachusetts under the original jurisdiction of the Supreme Court to resolve the interstate dispute.<sup>8</sup> The assertion of continuing taxing jurisdiction risks saddling employees who stopped commuting — possibly only temporarily — with income tax obligations in both their state of residence and the state where they previously worked.

Residence states like New Jersey and Connecticut ceded primary taxing jurisdiction to the commuting destination state through a credit against their state income tax for tax payable to the state where the employee was working.<sup>9</sup> These states may deny the tax credit because, absent physical presence of the employee in the destination state, that state arguably no longer has jurisdiction to collect the income tax. This quest for enhanced state income tax revenue may mark the beginning of increased competition among states for individual incomes taxes.<sup>10</sup>

Historically, states with income taxes<sup>11</sup> tied most of their income tax computations to federal income tax computations, although each state makes adjustments that distinguish the computation of state taxable income from the federal taxable income. The decision to follow federal computations was sensible and simple. That decision facilitated state reporting and

enabled states to rely primarily on federal auditing and limited the amount of infrastructure each state needed to enforce tax compliance. Decoupling from the federal income tax is not a new concept, but most decoupling was at relatively low cost to the states. An example is the capital gain preference. Except for a short period following recodification of the Internal Revenue Code in 1986, net capital gains of individuals and trusts have enjoyed a rate preference under the federal income tax<sup>12</sup> but not under most state income taxes. In recent years that separation required no distinct computational mechanism because it was simply the imposition of a rate on net income. Earlier, when the preference at the federal level was a deduction, the state had to adjust federal adjusted gross income to tax capital gain fully. States have decoupled from federal income tax computations in other ways — recently from the 2017 qualified business income deduction.<sup>13</sup> Colorado, Idaho, and North Dakota follow the federal income tax deduction for qualified business income; other states using federal AGI as their computational point of departure do not follow federal rules.

Consistent reliance on federal tax computations does not prevent multiple state tax impositions, but it does avoid some complexities from differing computations. For businesses that must apportion their revenue among states in which they operate, inconsistent state apportionment formulas yield confusion and duplicative taxation.<sup>14</sup> As states decouple from federal income tax rules and assert broader taxing jurisdiction than before, complexity and discontinuities may grow and result in multiple tax impositions.

This article addresses the structure of state income taxes and credits for taxes paid by residents to other states and the confusion that

<sup>8</sup>*New Hampshire v. Massachusetts*, Sup. Ct. Dkt. No. 220154 (Oct. 23, 2020) (challenging under the Supreme Court's original jurisdiction the extraterritorial reach of Massachusetts's income tax into New Hampshire on New Hampshire commuting employees' wages when they are working remotely without entering Massachusetts. New Hampshire does not tax income from services. New Jersey does tax wage income and joined other states in filing an amicus brief supporting New Hampshire's claim).

<sup>9</sup>See N.J. Stat. Ann. section 54A:4-1 (West 2020).

<sup>10</sup>Joseph N. Endres and Christopher L. Doyle, "New York's Partial Decoupling From the CARES Act," *Tax Notes State*, Feb. 1, 2021, p. 417.

<sup>11</sup>Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming have no income tax. New Hampshire and Tennessee do not tax income from the performance of services, including wages.

<sup>12</sup>IRC section 1(h). Before 1987 the rate preference was indirect through a 50 or 60 percent net capital gain deduction or partial exclusion. Net capital gain under section 1222(11) is the excess of net long-term capital gain over net short-term capital loss.

<sup>13</sup>Section 199A, added by the Tax Cuts and Jobs Act in 2017 (most states begin their state income tax computation from federal AGI and the qualified business income deduction is not an adjustment to federal gross income, so it is not part of that computation).

<sup>14</sup>R. Bruce Johnson, "The Multistate Tax Commission — Its History and Its Future," 6 *St. & Loc. Tax Law*. 45, 50-51 (2001); and Andrea Muse, "States Trending Toward Single Sales Factor, Panelist Says," *Tax Notes Today State*, Jan. 27, 2021.

nonuniform decoupling generates across state borders. Separation from federal rules may help to stanch the loss of state revenue from federal tax amendments<sup>15</sup> and enhance state tax revenue — especially revenue that the state otherwise might never capture but to which it may have a claim.

This article focuses on proposed legislation in New York state that would tax the unrealized gain and other deferred income of New York's billionaires<sup>16</sup> and the complexities that legislation's enactment would likely generate. It will consider responses from other jurisdictions to ameliorate the discontinuity that the New York legislation will cause as states seek to increase their income tax revenue and capture a larger share of the income tax base without running afoul of constitutional limitations on states' taxing power, especially equal protection<sup>17</sup> and the right to travel.<sup>18</sup>

### Unrealized Appreciation and Other Deferred Income

Among the features of the federal income tax most favorable to wealthy taxpayers is the realization requirement. Gain and loss are not realized until the taxpayer chooses to sell property.<sup>19</sup> Inclusion of gain and loss in gross income, referred to as recognition, generally follows realization unless another tax provision defers the recognition.<sup>20</sup> With limited exceptions,<sup>21</sup> if a taxpayer does not choose to sell property, their economic gain remains free from the income tax. A taxpayer may dispose of property in several

ways without recognizing the economic gain embedded in the property. The taxpayer may give the property to others<sup>22</sup> — even claiming a charitable contribution deduction equal to the value of the property<sup>23</sup> — and exchange the property for different property.<sup>24</sup> The taxpayer may monetize the appreciation in value by borrowing against the security of the property without disposing of it.<sup>25</sup> If the appreciated property passes from the taxpayer to another at death, the embedded economic gain permanently escapes income taxation because the decedent's estate receives a new basis in the property equal to its fair market value on the decedent's date of death against which to measure gain or loss.<sup>26</sup>

Combining the realization requirement and the new basis at death enables affluent taxpayers who hold much of their wealth in appreciated property to escape both federal and state income tax on their economic gains. States have no federal constitutional or statutory obligation to follow federal taxation rules or principles, but it is customary for them to do so. Even if realization were a requirement under the 16th Amendment definition of income, as it originally may have

<sup>15</sup>When the federal rules for depreciation deductions accelerate depreciation recovery — for example, the intended reduction of the federal income tax is accompanied by reductions in state income taxes.

<sup>16</sup>N.Y. S08277, 2019-2020 General Assembly. Many leading academics urged enactment of the proposal in a December 9, 2020, letter to Gov. Andrew Cuomo (D) and others.

<sup>17</sup>*Camps Newfoundland/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (property tax exemption discriminating against out-of-state residents violates equal protection).

<sup>18</sup>*Kent v. Dulles*, 357 U.S. 116 (1958) (recognizing fundamental right to travel). *Camps Newfoundland/Owatonna*, 520 U.S. 564.

<sup>19</sup>Section 1001(a) (gain is realized from the sale or other disposition of property if the amount realized under section 1001(b) on sale exceeds the taxpayer's adjusted basis in the property under section 1011).

<sup>20</sup>Section 1001(c). Installment sales (section 453) defer inclusion in income of realized and recognized gain and are not an exception to recognition governed by section 1001.

<sup>21</sup>Exceptions include mark-to-market inclusion for commodities and other financial positions (section 1256), mark-to-market inclusion for dealer securities (section 475), and the expatriation tax (section 877A).

<sup>22</sup>Section 1001(c) (requiring a sale or exchange for recognition) and section 102 (no inclusion of value of gift in recipient's income); and section 1015 (donee takes donor's basis if the donor is living, thereby preserving the donor's economic gain for inclusion if the donee sells the property).

<sup>23</sup>Section 170 (charitable contribution deduction).

<sup>24</sup>Section 1031 (nonrecognition of realized gain if the taxpayer exchanges real property for like-kind property); section 1034 (nonrecognition of realized gain if the taxpayer reinvests the proceeds from an involuntary disposition of property in property that is related in service or use); section 351 (nonrecognition of gain on exchange of property for corporate stock); and section 721 (likewise for a partnership or limited liability company interest).

<sup>25</sup>Borrowing money does not yield includable income because the taxpayer has an obligation to repay the borrowed funds even if the taxpayer is not personally obligated to repay because the borrowing is without recourse. *Crane v. Commissioner*, 331 U.S. 1 (1947).

<sup>26</sup>Section 1014(a) (property received from a decedent's estate has an adjusted basis equal to the FMV of the property at the decedent's date of death without regard to the decedent's adjusted basis in the property while alive). The new basis at death rule does not apply to property that would yield income with respect to a decedent under section 691 including retirement accounts, other than Roth IRAs, and installment sale contracts. Section 1014(c). The new basis at death rule was changed twice to a rule requiring recipients of property from a decedent to continue the decedent's pre-death basis. The first change in 1976 enacting section 1023 (repealed 1977) while the second change applied only to decedents dying in 2010, a year in which there was no estate tax. Repeal of this rule may become part of President Biden's proposals to increase taxes on wealthy taxpayers. Paul Sullivan, "The Estate Tax May Change Under Biden, Affecting Far More People," *The New York Times*, Jan. 15, 2021.

been interpreted to be,<sup>27</sup> states are free to adopt their own income definitions and reject both the realization requirement and the new basis at death rule. Nevertheless, states have uniformly, and understandably, followed federal taxation on these matters. Perhaps the stress on state treasuries from the pandemic<sup>28</sup> marks the moment for states to capture additional revenue by decoupling further from federal tax rules.

While the realization requirement affords all property owners the opportunity to enjoy increases in property value without current taxation, the loss of potential tax revenue from failure to tax economic appreciation is troubling. Commentators<sup>29</sup> and politicians<sup>30</sup> have argued that both the realization requirement and the new basis at death rule<sup>31</sup> have become obsolete. Without providing relief for some taxpayers, changing the rule may prove politically problematic in that it might compel homeowners to sell or encumber their homes to raise the funds needed to pay the tax on appreciation in value.<sup>32</sup> Where great wealth is involved, however, eliminating this opportunity to avoid taxation of gain is appealing and a potential source of much-needed tax revenue.

### The New York Mark-to-Market Tax

Against this background and consistent with calls to increase taxes on the wealthy, the proposed legislation in New York would tax billionaires on much of their deferred income and the unrealized appreciation in their assets. If

enacted,<sup>33</sup> the mark-to-market (MTM) tax would require resident billionaires to realize and recognize gain for New York income tax purposes as if they had sold all their assets, including pension savings plans, at their FMVs on July 1, 2020. Taxpayers subject to the MTM tax would be able spread the additional tax liability over 10 years but must pay a 7.5-percent-per-annum charge on the deferred amounts. Special valuation rules would seek to eliminate any value discounting the taxpayer has undertaken. For purposes of determining whether a taxpayer is a billionaire, the net FMV of their assets is enhanced under rules akin to constructive ownership rules<sup>34</sup> by the assets of related persons, including spouse, minor children, some private foundations to which the billionaire has contributed, and assets the billionaire transferred to third parties by gift within the previous five years. Billionaires who had been residents of New York for fewer than five years as of July 1, 2020, may increase the adjusted bases of their assets for purposes of the MTM tax to FMV on the date they became a resident. That basis increase, as opposed to the basis increase following inclusion of MTM gain in income, must not apply to basis for purposes of an actual sale. If it did, it would offer less-than-five-year residents of New York a planning opportunity to escape state tax on much of their unrealized gain. After 2020, the MTM tax becomes an annual mark-to-market inclusion requirement for resident billionaires.

Enactment of the MTM tax and its effective date, if enacted, are unknown.<sup>35</sup> The pending legislation would apply to billionaires who were New York residents on July 1, 2020 — a date now past. Because the legislation was introduced on May 1, 2020, a non-domiciled billionaire with a permanent abode in the state had only a short window during which to avoid the 183-day residency definition,<sup>36</sup> and thus imposition of the

<sup>27</sup> *Eisner v. Macomber*, 252 U.S. 189, 211-12 (1920).

<sup>28</sup> The coronavirus began to spread in early 2020. *A Dictionary of Epidemiology* 179 (2008); and World Health Organization, “WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19” (Mar. 11, 2020).

<sup>29</sup> This commentator, for example: Ordower, “Capital, an Elusive Tax Object and Impediment to Sustainable Taxation,” 23 *Fla. Tax Rev.* 625 (2020); and Ordower, “Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base,” 67 *Buffalo L. Rev.* 1371 (2019).

<sup>30</sup> See U.S. Senate Committee on Finance, “Wyden Unveils Proposal to Fix Broken Tax Code, Equalize Treatment of Wages and Wealth, Protect Social Security” (Sept. 12, 2019); and Joseph J. Thorndike, “Biden Wants to Reform the Capital Gains Preference — It Will Be Hard,” *Tax Notes State*, Feb. 1, 2021, p. 473.

<sup>31</sup> Harry L. Gutman, “Taxing Gains at Death,” *Tax Notes Federal*, Jan. 11, 2021, p. 269.

<sup>32</sup> This concern has been raised repeatedly regarding ad valorem real property taxes and contributed to successful voter tax limitation initiatives, including Proposition 13 in California.

<sup>33</sup> Whether New York’s proposal is a serious contender for passage is doubtful. See, e.g., Luis Ferré-Sadurni and Jesse McKinley, “Cuomo Offers Doomsday Proposal to Attack a Possible \$15 Billion Deficit,” *The New York Times*, Jan. 19, 2021.

<sup>34</sup> Section 318.

<sup>35</sup> Anna Gronewold, “Cuomo Warns of Tax Hikes, Dire Cuts if Feds Can’t Find \$15B,” *Politico*, Jan. 19, 2021.

<sup>36</sup> N.Y. Tax Law section 605(b)(1) (B). Section 605(b)(1)(A) includes another test for taxpayers domiciled in New York without a permanent abode.

tax. Had New York offered more time between the proposed effective date and the introduction of the legislation, its billionaires might have established residence in another state to avoid the tax and the tax would not produce revenue as planned.<sup>37</sup> Even if the proposal fails, it may be a harbinger of future MTM tax legislation in states needing to increase tax revenue.

### Exit and Continuation Taxes

Rather than taxing billionaires immediately on all economic gain, a state might tax gain accrued during residence when the taxpayer ceases to be a state resident. New York could have used such a tax to backstop a longer period between introduction and effective date. While the United States and other countries, including Canada, impose a tax on expatriating individuals that requires them to include deferred income and mark their assets to market and include gain as if they had sold their assets on the date of expatriation,<sup>38</sup> a state seeking similarly to tax those who cease to be residents might run afoul of the constitutional right to travel. Such a tax advances the legitimate state interest of protecting its tax base by preventing appreciation and deferred compensation that accrued during a taxpayer's resident period from permanently escaping the state's income tax. Insofar as the state could have taxed the income when earned or accrued, but permitted the tax benefit of deferral, the state has a rational basis for taxing the income when it is about to lose taxing jurisdiction over the taxpayer.<sup>39</sup> Moreover, the federal prohibition on the alternate scheme of a continuation tax on retirement fund distributions, discussed below, limits the state's ability to capture that tax revenue another way. Nevertheless, immediate and burdensome taxation of deferred income and unrealized appreciation when taxpayers relocate is likely to

deter taxpayers from changing their state of residence and perhaps excessively burdens their fundamental right to travel.<sup>40</sup>

Paralleling an expatriation tax is a continuation tax.<sup>41</sup> A continuation tax does not impose any immediate burden when the taxpayer changes their state of residence. Instead, the taxpayer's previous residence state taxes the portion of deferred income and includable gain that accrued while the taxpayer was resident when the taxable event — that is, receipt of payment or sale of property — occurs. Several state courts have held such a tax to be constitutional and permissible, but federal legislation now prohibits states from asserting continued taxing jurisdiction over some types of retirement income of previous residents.<sup>42</sup> Given this federal prohibition and the uncertainty about the constitutionality of an exit tax, decoupling from the federal computation of income, including abandonment of the realization requirement and other federal income deferral rules, becomes an attractive structural change to bolster state tax collection and protect the state tax base from future revenue loss accompanying changes of residence.<sup>43</sup>

### The MTM Tax and Other States

With its effective date of July 1, 2020, the proposed MTM tax stands to generate significant revenue quickly for New York from resident billionaires who missed the opportunity to change their residence to a state not considering

<sup>37</sup> For an argument that a challenge to the MTM tax on grounds of constitutionally impermissible retroactivity would fail, see Reuven S. Avi-Yonah et al., "Is New York's Mark-to-Market Act Unconstitutionally Retroactive?" *Tax Notes State*, Feb. 8, 2021, p. 541.

<sup>38</sup> IRC section 877A.

<sup>39</sup> *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (applying a rational basis standard of review to the California property tax assessment scheme of Proposition 13 despite its likely increased tax burden on taxpayers moving to California).

<sup>40</sup> *Id.* at 10-11 (Right to travel was not before the Court in *Nordlinger*; it is an argument that could be brought in the future.). In the EU, a French expatriation tax was held to violate the Treaty of Rome because it burdens free movement. Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, 2004 E.C.R. I-2452.

<sup>41</sup> Compare IRC section 877 (taxing an expatriate on income following expatriation).

<sup>42</sup> 4 U.S.C. section 114 (2017); and Hellerstein and Hellerstein, *State Taxation*, para. 20.07, at 9 (2003) (In 1996 Congress enacted legislation prohibiting a state from imposing "an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).").

<sup>43</sup> New York has many taxpayers who retire to low-state-income-tax jurisdictions such as Florida and Texas collecting their deferred pension compensation from New York employment free from New York state tax. Alexandre Tanzi and Wei Lu, "Even Before Covid 2,600 People a Week Were Leaving New York City," *Bloomberg*, Dec. 5, 2020; and Jack Kelly, "New Yorkers Are Leaving the City in Droves: Here's Why They're Moving and Where They're Going," *Forbes*, Sept. 5, 2019.



a similar tax.<sup>44</sup> Operation of the MTM tax raises issues regarding harmonization of tax rules among states and poses a serious risk of double or multiple impositions of income tax on the same income and gain. There is also a question whether the tax might be a wealth tax imposed ad valorem on property. If it is, and it burdens intangible personal property, the New York state constitution prohibits it.<sup>45</sup> Further questions arise whether the tax unreasonably discriminates against a class of taxpayers, but the class of billionaires hardly seems worthy of constitutionally enhanced scrutiny and protection.

### Tax Basis Discontinuity Under the MTM Tax

A few examples suffice to illustrate the complex range of basis and double tax issues that enactment of the MTM tax will generate.

Example 1. Taxpayer (T), a billionaire resident in New York for more than five years, owns appreciated real property in New Jersey. The MTM tax includes the unrealized appreciation in the property in T's New York income tax. Two years later, T sells the property. New Jersey follows federal computations and taxes the gain based on T's adjusted basis, not as increased following imposition of the MTM tax, but following federal adjusted basis. Because the gain would not be taxable in New York, insofar as T has an increased basis in New York, the gain would not generate a credit in New York for the New Jersey tax. New Jersey would not credit the earlier MTM tax because the tax credit structure always has the resident taxing jurisdiction ceding tax to the nonresident jurisdiction, not vice versa, as is the case here.

Example 2. T, as in Example 1, following imposition of the MTM tax, moves to New Jersey. After establishing residency there, T sells

corporate shares that were subject to the MTM tax in New York. T is taxable in New Jersey on the gain following federal adjusted basis. T no longer is taxable in New York, so there is no tax in New York against which to credit the New Jersey tax, and New Jersey would not need to credit the earlier MTM tax and New York would not refund the earlier MTM tax when T is correctly taxed in New Jersey. Because the MTM tax increases the basis in T's assets as it imposes the tax, T can avoid the New Jersey imposition by selling all T's assets before changing residence. That choice would make little sense to T because T would become subject to federal income tax as well — hardly a reasonable trade-off for avoiding a possible future New Jersey income tax on some of T's assets.

Many other examples will suggest themselves readily that result in the same income taxed under the now-differing state rules by two states without a resident tax credit available because the years of tax imposition differ. T in the examples could avoid the result in Example 2 by not changing residence.

The Example 1 double tax is more difficult to avoid other than by selling all non-New York real property in the same year as the MTM tax takes effect, but that is no longer possible if New York adheres to its 2020 effective date to prevent billionaires from changing residence to avoid the tax and would trigger the federal income tax if it were possible. New Jersey might consider taxing the gain on the New Jersey property when New York taxes it under the MTM tax to force New York to offer a tax credit for the New Jersey tax and cede the tax revenue to New Jersey. This tax in New Jersey violates precedents under which states may not tax out-of-state taxpayers less favorably than resident taxpayers.<sup>46</sup> New Jersey might generalize the tax and apply it to its residents as well, but that change would be without substance because there would be no occasion on which the MTM tax would be imposed on a non-New York resident, but it may be imposed when there is a difference in determining the taxpayer's state of residence.

New York may alter the proposed MTM tax to provide a refund of the tax when the income is

<sup>44</sup>Revenue estimates for the MTM Act are \$23.3 billion in additional revenue for New York for 2020, and another \$1.2 billion in each subsequent year.

<sup>45</sup>N.Y. State Const. Art. 16, section 3 provides in part: "Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally." This section would seem to prohibit New York from taxing the amount included under IRC section 965 because the section further states: "Undistributed profits shall not be taxed." See *supra* note 16 letter to Gov. Cuomo arguing that the proposed tax is on income, not property.

<sup>46</sup>*Camps Newfound/Owatonna*, 520 U.S. 564.

properly taxed in another jurisdiction. The proposal does not do so, although it would provide a credit for a similar tax imposed by another jurisdiction before imposition of the MTM tax. New York also might offer a generalized future credit against New York tax liability for these duplicative taxes without limiting the credit to matching income source with creditable out-of-state tax, as most resident credits do. But if the taxpayer does not own New York property and never resides in New York again, this credit would be of little value.

The reaction of other states to enactment of the MTM tax would be to follow New York and impose a like tax on their residents — certainly a difficult political challenge. The New York proposal, however, is not compelling for other states. When it would become effective, New York residents who previously were residents of another state would get a credit against the New York tax for an MTM-like tax paid in another state. No state ever has imposed such a tax, so the credit means nothing. The MTM tax would also permit new residents of New York — under the proposal meaning those resident for fewer than five years — to increase the basis of their assets to FMV on the date they become residents, so they are taxable under the MTM tax only on value increases accruing since they became New York residents. The new residents would retain their historical bases for purposes of the regular income tax lest they escape the New York income tax when they sell assets while New York residents. The basis complexity is manifest insofar as imposition of the MTM tax results in an increase in New York basis both for regular income tax and MTM tax inclusion purposes so as not to tax the same income in New York twice.

The proposal is unclear on status changes. If a resident of another state who is not a billionaire has substantially appreciated assets when they move to New York and does not become a billionaire until they have been a resident for six years, the MTM tax would be imposed in the sixth year. The MTM tax proposal is unclear regarding whether the taxpayer's basis for purposes of the tax became FMV when the taxpayer became a New York resident regardless of their billionaire status at that time. If that becomes the rule, anyone moving to New York

who aspires to become a billionaire would have to determine the value of all their assets when they become a New York resident and maintain that record to protect against the MTM tax. But for purposes of the New York resident income tax on realized gain and collection of deferred compensation, the basis remains the smaller historical basis.

To avoid many of these problems for their residents who might move to New York sometime in the future, other states would enact a tax like the MTM tax, but at a lower threshold determined by the relative likelihood that someone will become a billionaire more than five years after moving to New York. New Jersey might set that level at a mere \$500 million, for example, and Connecticut at \$400 million of assets, thereby setting off a race to the bottom by other states whose residents might someday move to New Jersey or Connecticut. Ultimately, the outcome would become current taxation of appreciation in value and the elimination of deferred compensation for state tax purposes — that is, virtually complete decoupling from the federal income tax, ideally under uniform rules across state borders.<sup>47</sup> New York should take a leadership role in transitioning to broad-based mark-to-market taxation, as such decoupling may encourage Congress to eliminate many of the deferrals that are available and to include in taxpayers' incomes the annual change in value of all taxpayers' assets under a mark-to-market system. Such a system would eliminate the need for a new basis at death since unrealized appreciation would be taxed annually under a Schanz-Haig-Simons comprehensive tax base.<sup>48</sup> ■

<sup>47</sup>Uniformity has been elusive on sales tax matters and revenue apportionment despite the efforts of the Multistate Tax Commission but has been more successful in major metropolitan areas on matters like mass transit and environmental controls.

<sup>48</sup>Henry Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* 49 (1938).