



# TaxNewsFlash

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## New York: Credits for dual residents, court declines to review cases

The New York Court of Appeals—the state’s highest court—this week dismissed appeals filed by individuals who were residents of Connecticut and New York. At issue was New York’s taxation, without an offsetting “resident credit,” of their portfolio investment income that was also taxed by Connecticut.

The cases are: *Edelman v. Department of Taxation and Finance*, 2019 NY Slip Op 66249 (Mar. 26, 2019), and *Chamberlain v. Department of Taxation and Finance*, 2019 NY Slip Op 66247 (Mar. 26, 2019).

The state’s high court briefly stated that “no substantial constitutional question is directly involved.” The actions by the state’s appellate court in effect reaffirms its own 1998 decision in the *Tamagni* case.

The *Edelman/Chamberlain* litigants had contended that the U.S. Supreme Court decision in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015) had implicitly invalidated the *Tamagni* rationale, based on the anti-multistate double taxation application of the “internal consistency [dormant] commerce clause.” The *Wynne* decision involved resident income taxation by Maryland counties on business income earned in and duplicatively taxed out-of-state. The internal consistency test hypothesizes as to whether there would be multiple taxation by different states if every state had the same tax structure.

### Background

Under New York law, residents pay individual income tax on their worldwide income, which is essentially the same tax base as their federal adjusted gross income. There are two ways by which one can be classified as a New York tax resident (with the “worldwide” tax base being the same either way):

- Domiciled in New York and / or
- As a so-called “statutory resident” of New York

Statutory residency entails a conjunctive two-element test: (1) the taxpayers maintain a permanent place of abode [even a second home] in New York; and (2) are present in New York for at least 184 days—whether business or personal days—during the tax year. Largely in the case of statutory residency (which generally involves a person who is a tax “domiciled” resident in another state), a person can be a dual resident (e.g., domiciled in Connecticut and a statutory resident of New York (due to having a second home in New York and daily commuting to a job based in New York)). Dual residents face the prospect of being taxed by both states on the same income. As is typical, to alleviate such double taxation, New York provides its residents with a credit for the tax they pay, on the same income, to the other state.

However, with the Connecticut and New York fact pattern as an example, the resident credit has not been allowed to New York statutory residents on their Connecticut tax paid on non-business portfolio investment income (such as stock dividends and capital gains) because New York does not consider that income as being “sourced” to Connecticut. Rather, New York (and Connecticut) impose tax on residents on their investment income simply due to their status as residents, which is clearly permissible under longstanding U.S. Supreme Court precedents.

### **Appellate court’s decisions**

The issue in *Edelman* and *Chamberlain*—similar to that for the Maryland counties in *Wynne*—is whether New York is constitutionally compelled to provide residents with a credit for income doubly taxed out of state. However, whereas the *Wynne* decision held that the internal consistency test applied to a state’s taxation of its own residents, and thereby ordered the Maryland counties to provide a resident credit so as to preclude double taxation on business-type income (and did not involve a dual resident), the cases in *Edelman* and *Chamberlain* involved: (1) double taxation of investment income; (2) earned by New York [and Connecticut] dual residents.

*Wynne* naturally led to speculation that New York’s tax on a statutory resident’s portfolio income—without the provision of an ameliorative resident credit—was invalid, under the rationale that *Wynne* had implicitly undercut New York’s 1998 *Tamagni* decision on “internal [in]consistency” grounds. Accordingly, the *Edelman* and *Chamberlain* litigants brought court challenges for resident credits, on the basis that they fell within the parameters of *Wynne*, and that *Tamagni* was no longer good law. With *Tamagni* having been rendered by New York’s highest court, it was not surprising to find the intermediate appellate courts hesitant to declare *Tamagni* implicitly invalid. Nevertheless, the courts’ intellectual attempts to distinguish *Wynne* met with substantial criticism from state tax constitutional law experts, especially relative to the conclusion that New York’s tax on intangible investment income—without a credit for taxes paid to Connecticut—did not affect interstate commerce.

Taxpayers were hopeful that the New York Court of Appeals would apply *Wynne* to overrule *Tamagni*, and order the sought-for resident credits. The Court of Appeals, however, chose not to hear the appeals, based on its succinct observation that “no substantial constitutional question is directly involved.”

### **What’s next?**

The only option remaining for the *Edelman* and *Chamberlain* taxpayers is to file a writ of certiorari, for the U.S. Supreme Court to hear an appeal of their cases. Whether the U.S. Supreme Court would grant certiorari is unclear.

While not isolated as an issue in *Edelman* and *Chamberlain*, it would seem that New York City’s resident income tax, which is applied on the same worldwide tax base as New York State’s resident tax, but without any resident credit provided by the City (even as to business earnings taxed by and sourced to other states), is especially susceptible to a challenge on *Wynne* grounds—that is, at least as to the City’s taxation of business earnings, and irrespective of whether the City resident is a dual

resident outside of New York. In that regard, New York City's tax on its residents' out-of-state business earnings (taxed out-of-state) would seem to be analogous to the Maryland counties' tax regime at issue in *Wynne*.

Taxpayers may want to consider filing protective refund claims for the New York City resident income tax at least for any situation when the taxpayers have filed for a resident credit as to their New York State level income tax.

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