

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(2)I
Income Tax
March 19, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I071029A

On October 29, 2007, a Petition for Advisory Opinion was received from Town of Webb Property Owner's Association, c/o Robert McCoy, PO Box 457, Old Forge, New York 13420.

The issue raised by Petitioner, Town of Webb Property Owner's Association, is whether an individual who is domiciled outside New York will be considered a resident of New York State for personal income tax purposes as a result of registering to vote in New York.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner would like to encourage certain nonresident property owners to vote in the town of Webb (Webb). According to Webb's town clerk, the only requirement to vote in Webb is that the individual must physically reside in the town for 30 days prior to registering to vote and be at least 18 years of age.

Some seasonal residents who are domiciled outside New York are concerned what effect registering to vote in Webb would have on their resident status. Most of these individuals do not stay in New York for more than six months; each year they close down their residence or camp for at least a month during the fall, winter, and spring months.

Applicable law and regulations

Section 605(b) of the Tax Law provides, in part:

(1) Resident individual. A resident individual means an individual:

(A) who is domiciled in this state . . . or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

(2) Nonresident individual. A nonresident individual means an individual who is not a resident or a part-year resident.

Section 105.20 of the Personal Income Tax Regulations (Regulations) defines a resident individual and provides, in part:

(a) General. An individual may be a resident of New York State for personal income tax purposes, and taxable as a resident, even though such individual would not be deemed a resident for other purposes. As used in this Subchapter, the term *resident individual* includes:

(1) all persons domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and

(2) any individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

* * *

(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.

* * *

(e) Permanent place of abode. (1) A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State.

Opinion

Pursuant to section 605(b)(1) of the Tax Law, a resident individual means an individual who is domiciled in New York or one who is not domiciled in New York but maintains a permanent place of abode in New York and spends in the aggregate more than 183 days of the taxable year in the State, unless the individual is in active service in the Armed Forces of the United States.

Domicile is the place where an individual maintains his or her fixed home (i.e., the place that the individual intends to return whenever the individual is absent). An individual can have only one domicile. If an individual has two or more homes, the individual's domicile is the one that such person regards and uses as his or her permanent home. See section 105.20(d) of the Regulations.

A domicile once established continues until the individual moves to a new location with an intention of making the new location a fixed and permanent home. To effect a change of domicile, there must be an actual change in residence, coupled with the intent to abandon the former domicile. See section 105.20(d)(2) of the Regulations. There are a number of factors that are considered in the determination of whether an individual maintains a residence with the intent to establish a domicile. Primary factors in determining an individual's domicile are active

business involvement in the area, time spent at the residence, personal items or effects kept at the residence, and family connections in the area. These factors provide a basis for determining domicile before information relating to other factors is considered. A domicile determination cannot be made by examining only one side of a factor; nor can a decision be made by examining only one factor. In addition to the primary factors, other factors can provide insight in a domicile determination. Other factors to consider include, but are not limited to, physical location of safe deposit boxes used for family valuables, location of the individual's personal driver's license, and where the individual is registered to vote. While these other factors may be less significant than some of the primary factors noted above because they are easily controlled by the individual, the Tax Department will analyze all factors to determine an individual's domicile. If after analyzing the primary factors, the conclusion is that there is no change of domicile, there is no need to consider the other factors. However, if after analyzing the primary factors, there is still some question of domicile, the other factors will be considered.

While the location where a person is registered to vote is not a primary factor, it will be considered if there is a question of domicile. On the other hand, if it is clear from an analysis of the primary factors that a person is not domiciled in New York State, the fact that such person is registered to vote in New York will not, by itself, cause such person to be domiciled in New York. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation. See section 105.20(d)(2) of the Regulations. Whether registering to vote in New York will be conclusive to the Department's determination of a particular individual's domicile is a factual matter that is not susceptible of determination in this Advisory Opinion.

An individual who is not domiciled in New York may be considered a resident of New York if he or she maintains a permanent place of abode in New York for substantially all of the taxable year and spends in the aggregate more than 183 days of the taxable year in New York. See section 605(b)(1)(B) of the Tax Law and section 105.20(a)(2) of the Regulations. For this purpose, substantially all of the taxable year means a period exceeding 11 months. See *Marcum & Kliegman, LLP*, Adv Op Comm T&F, July 6, 2004, TSB-A-04(4)I.

The words "maintain" and "permanent" are not limited to any particular usage but, instead, may apply to a variety of circumstances (*Matter of Evans*, Dec Tax App Trib, June 18, 1992, DTA No. 806515, affd 199 AD2d 840). The Tribunal stated in *Evans* that "one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place." The Tribunal further stated that "the permanence of a dwelling place ... cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place." In general, a *permanent place of abode* means "an abiding place maintained by a person with such degree of continuity as to be considered permanent." (1940 Opns Atty Gen 245)

Determinations of a taxpayer's status as a resident individual for purposes of personal income tax have long been based on the principle that the result "frequently depends on a variety

TSB-A-08(2)I
Income Tax
March 19, 2008

of circumstances, which differ as widely as the peculiarities of individuals” (*Matter of Newcomb*, 192 NY 238).

Therefore, whether an individual will be considered a resident of New York as a result of registering to vote in New York cannot be determined in this Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to “a specified set of facts” (Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a)).

DATED: March 19, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.