

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-90 (4) I
Income Tax
February 15, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I891017A

On October 17, 1989, a Petition for Advisory Opinion was received from Edith M. Dabelstein, 15 Howard Ave., Valhalla, New York 10595.

The issue raised by Petitioner, Edith M. Dabelstein, is whether her domicile will change as a result of marrying a nondomiciliary Army officer stationed in New York. Related questions are whether Petitioner will be considered a resident of New York, what income is taxable in New York State and what returns will be required.

Petitioner lives and works in New York State. She is a resident of New York and files a New York resident tax return. Petitioner's fiance is an Army officer on active duty stationed in New York State for three years. He is a resident of Pennsylvania and files a Pennsylvania resident tax return.

Petitioner and her fiancé will be married in 1990. They will not maintain any residence other than the one provided by the Army at Ft. Drum, New York. They will live in New York State for two years. After that time, they will move to another Army post and will only maintain the residence provided by the Army at the new post.

In 1990, Petitioner and her husband will have three sources of income: his salary from the Army, her salary from a local New York company and investment income from a New York bank. When they leave New York State, they will continue to have investment income from a New York bank.

Section 605(b)(1) of the Tax Law defines the term "resident individual" as an individual:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year 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.

Section 102.2(d)(1) of the Income Tax Regulations provides that, in general, domicile is the place which an individual intends to be such individual's permanent home - the place to which the individual intends to return whenever such individual may be absent.

Section 102.2(d)(2) of the Income Tax Regulations provides that a domicile once established continues until the person 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.

It is well established that to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present. (Minsky v Tully, 78 AD2d 955.) Residence without intention or intention without residence, is of no avail. (49 NY Jur 2d, Domicile and Residence, § 9; see Matter of Newcomb, 192 NY 238.)

Section 102.2(d)(6) of the Income Tax Regulations states:

Federal law provides in effect that for the purposes of taxation, a serviceman is not deemed to have lost his residence or domicile in any state solely by reason of being absent therefrom in compliance with military or naval orders. Thus, such Federal law insures that a serviceman domiciled in New York State would not be deemed a domiciliary for income tax purposes in another state in which he is stationed. On the other hand, a serviceman domiciled in another state who is stationed in New York State would not be deemed a domiciliary, for personal income tax purposes, of New York State. The rule is, generally speaking, that the domicile of a person is in no way affected by service in the armed forces of this country. A change of domicile has to be shown by facts which objectively manifest a voluntary intention to make the new location a domicile. It is possible for a serviceman to change his domicile; however, the requisite intent is difficult to prove.

Herein, pursuant to section 102.2(d)(6) of the Regulations, Petitioner's husband's domicile did not change when he entered active military service and he continues to be domiciled in Pennsylvania. Petitioner is now a domiciliary and resident of New York State. It is Petitioner's intention to travel with her husband to whatever Army post the military sends him. Therefore, at the time of her marriage, Petitioner will no longer intend that her domicile be located in New York State.

Section 102.2(d)(5) of the Regulations provides that generally the domicile of a husband and wife is the same. However, to effect a change of domicile, an individual must have an actual change of residence to the new location which is intended to be the individual's permanent home. Since Petitioner will continue to live in New York State, Petitioner's domicile will not change on the date of her marriage. In fact, it is possible that Petitioner's domicile will not change as long as Petitioner's husband remains in active military service and they do not establish a new permanent home.

In addition, Petitioner will continue to be a resident of New York State as long she continues to live in New York State. However, for any taxable year that Petitioner meets all of the requirements

of section 102.2(b) of the Regulations, Petitioner will be considered a nonresident of New York for such taxable year. Section 102.2(b) provides that:

Any person domiciled in New York State is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the requirements in paragraph (1) or all three requirements in paragraph (2) of this subdivision:

(1) For a specific taxable year all three of the following requirements are met:

(i) he maintains no permanent place of abode inside New York State during such year;

(ii) he maintains a permanent place of abode outside this State during such entire year; and

(iii) he spends in the aggregate not more than 30 days of the taxable year in this State; or

(2) For a specific taxable year beginning after December 31, 1977, all three of the following requirements are met:

(i) within any period of 548 consecutive days he is present in a foreign country or countries for at least 450 days;

(ii) during such period of 548 consecutive days he is not present in New York State for more than 90 days, does not maintain a permanent place of abode in this State at which his spouse (unless such spouse is legally separated) or minor children are present for more than 90 days; and

(iii) during any period of less than 12 months, which would be treated as a separate taxable period pursuant to Part 148 of this Subchapter, and which is contained within such period of 548 consecutive days, he is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such period of less than 12 months bears to 548.

As long as an individual who is domiciled in New York State continues to meet the requirements of either paragraph (1) or paragraph (2) of this subdivision, he will be considered a nonresident of New York State for income tax purposes. However, if for any taxable year he fails to meet those conditions, he will be subject to New York State personal income tax as a resident for that year. Where an individual domiciled in New York State claims to be a nonresident for any taxable year, the burden is upon him to show that during that year he satisfied the requirements set forth in paragraph (1) or paragraph (2) of this subdivision.

Section 102.2(e) of the Income Tax Regulations provides that a permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer, and will generally include a dwelling place owned or leased by the taxpayer's spouse. The determination of whether a serviceman maintains a permanent place of abode is not dependent merely upon whether the serviceman lives on or off military base. This is only one of many factors to be considered in determining whether a permanent place of abode is being maintained. Some of the factors include the type and location of quarters occupied by the individual and the individual's immediate family and how and by whom such quarters are maintained. Further, the maintenance of a place of abode by a serviceman will not be considered permanent if it is maintained only during a duty assignment of a limited or temporary nature.

In Richard W. LaVigne v. State Tax Commission, 38 AD2d 773, the issue raised was whether a serviceman domiciled in New York but living on a military base outside the State is able to maintain(s) a permanent place of abode elsewhere within the meaning of subdivision (a)(1) of section 605 of the Tax Law.

The Supreme Court, Appellate Division held that "the determination of a permanent place of abode outside the State should not depend merely upon whether petitioners lived on or off the military base". Additionally, it held that it should be determined "whether other factors do or do not establish that petitioners had a permanent place of abode outside the State".

In Flather v. Norberg, 377 AD2d 225, the Supreme Court of Rhode Island (where section 44-30-5(a)(1) is identical in language to section 605(a)(1) of the Tax Law of New York State) held that:

In determining whether individual has established "permanent place of abode" in another state for purposes of determining personal income tax liability, establishment of permanent place of abode requires maintenance of fixed place of abode over significant period of time to create well-settled physical connection with given locality.

In Matter of Stewart A. Brazin, Dec St Tax Comm, January 24, 1983, TSB-H-83(342)I, petitioner was assigned to the Naval Amphibious Base in Coronado, California under permanent change of station orders. He remained at such duty station for approximately two years and lived in the Bachelor Officer Quarters at his discretion for the full duration of his assignment. The evidence submitted led to the inference that petitioner's Bachelor Officer Quarters did in fact constitute a fixed place of abode which was maintained over a sufficiently significant period of time to create a well-settled physical connection with that geographical area.

In order to determine whether a "permanent" place of abode is maintained, proper construction of the word "maintain" must be ascertained.

In Rothfeld v. Graves, 264 App Div 54, where a claim for refund was denied after an informal hearing on the ground that maintenance by someone else of a place of abode, in which an incompetent domiciliary of the State of New York is cared for,

was not sufficient compliance with the statute to relieve the petitioner from taxation, the court held that:

It is certain that Alfred Rothfeld was domiciled in the State of New York where his committee was appointed and where they lived. It is also clear that he maintains no permanent place of abode within the State but there is maintained for him (emphasis supplied) a permanent place of abode without the State and that he does not spend in the aggregate thirty days of a taxable year within the State.

He is entitled to the exemption that he claims and the determination under review should be annulled.

In Matter of Stewart A. Brazin, supra., the petitioner has demonstrated that the Bachelor Officer Quarters in which he lived during the taxable year were "kept effective" and "occupied" by him during the entire taxable year. Whether the United States Government or the petitioner paid for the upkeep of the quarters is immaterial as long as said quarters were maintained either by or for him.

Herein, the determination of whether Petitioner maintains a permanent place of abode in New York State or elsewhere is a question of fact not susceptible of determination in an 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, subd. twenty-fourth; 20 NYCRR 901.1(a). For the taxable years that Petitioner is domiciled in New York State and is a New York State resident, Petitioner's salary and investment income will be subject to tax under Article 22 of the Tax Law. For the taxable years Petitioner is domiciled in New York State but meets the requirements of section 102.2(b) of the Regulations, Petitioner will be considered a nonresident for such years. As a nonresident, only New York source income is subject to tax under Article 22 of the Tax Law. New York source income is determined pursuant to section 631 of the Tax Law. Under section 631, if Petitioner's salary continues to be derived from or connected with New York sources it would be subject to tax. However, Petitioner's investment income from a New York bank would only be subject to tax to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state.

It should be noted that since Petitioner's husband is an Army officer stationed in New York but domiciled in Pennsylvania, he will not be considered a resident of New York for any taxable year and his military salary would not be subject to New York State income tax.

Finally, section 651(b)(4) of the Tax Law provides as follows:

If either husband or wife is a resident and the other is a nonresident, they shall file separate New York income tax returns on separate forms, in which event their tax liabilities shall be separate, unless such husband and wife determine their federal taxable income jointly and both elect to determine their joint New York taxable

income as if both were residents, in which event their tax liabilities shall be joint and several except as provided in paragraphs five and six of this subsection and in subsection (e) of section six hundred eighty-five.

DATED: February 15, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.