

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

TSB-A-92 (5) I
Income Tax
July 13, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I920511A

On May 11, 1992, a Petition for Advisory was received from Haythe & Curley, 437 Madison Avenue, New York, New York 10022.

The issue raised by Petitioner, Haythe & Curley, is whether Taxpayer has changed his domicile from New York to Connecticut and is a nonresident of New York State under the fact pattern presented.

Taxpayer has been domiciled in New York City for many years. During this period, Taxpayer has owned a cooperative apartment in New York City and a year-round vacation home in Montauk, Long Island. The New York City apartment has been Taxpayer's permanent residence. Taxpayer is the sole shareholder of a corporation with an office in New York City and Taxpayer has developed long-term professional relationships with certain bankers, investment advisers and attorneys in New York. Taxpayer is a member of several clubs in New York and makes substantial donations to certain New York charities.

Taxpayer has purchased a home in Connecticut that he intends to make his permanent residence and has sold his apartment in New York. Taxpayer has registered to vote in Connecticut and obtained a Connecticut driver's license. He will continue to own his vacation home in Montauk, but has no permanent place of abode in New York City. Taxpayer has moved his corporation's headquarters to a location in Connecticut that is near his new home. A few employees of Taxpayer's corporation continue to work in a New York City office of the corporation and Taxpayer spends some time at the New York office. However, Taxpayer will be present in New York for less than 183 days per year. Taxpayer will maintain his club memberships in New York and his relationships with his New York bankers, investment advisers and attorneys. Taxpayer will continue to contribute to New York charities.

Section 605(b)(1) of the Tax Law defines a "resident individual" as an individual (1) who is domiciled in New York State unless the individual maintains no permanent place of abode in New York State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in New York State or (2) who is not domiciled in New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than one hundred eighty-three days of the taxable year in New York State.

The Tax Law does not contain a definition of domicile. However, section 105.20(d) of the Income Tax Regulations provide, in pertinent part, as follows:

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 in some other place.

* * *

(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 in 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.

Section 105.20(e)(1) of the Regulations defines a permanent place of abode as "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"

In order 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 (Matter of Minsky v Tully, 78 AD2d 955. The substance of the matter was stated long ago by the Court of Appeals in Matter of Newcomb (192 NY 238, 250):

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals. . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without

residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile. . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. . . every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animus revertendi.

. . . This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice.

These basic principles have been restated and refined in numerous cases by a variety of courts in the years since they were laid down by the Court of Appeals (see, Matter of Zinn v Tully, 54 NY2d 713, revq 77 AD2d 725; Matter of Brunner v Hochman, 41 NY2d 917; Matter of Babbin v State Tax Commn, 67 AD2d 762, affd 49 NY2d 846; Matter of Klein v State Tax Commn, 55 AD2d 982, affd 43 NY2d 812; Matter of Bodfish v Gallman, 50 AD2d 457; Matter of Nask, Dec Tax App Trib, September 29, 1988, TSB-D-88(19)I).

The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v Gallman, supra). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v Tully, supra).

As previously stated, determinations of change of domicile are questions of fact which depend on a variety of individualized circumstances (Matter of Newcomb, supra, at 250). Questions of fact are not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts" Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a). Therefore, a determination cannot be made in an Advisory Opinion as to whether Taxpayer has changed his domicile to Connecticut and is a nonresident of New York.

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Accordingly, Petitioner should apply the rules as set forth in section 605(b) of the Tax Law and section 105.20 of the Income Tax Regulations as well as pertinent case law to determine whether Taxpayer is domiciled and/or a resident of New York State.

DATED: July 13, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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