

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

TSB-A-93 (1) I
Income Tax
February 5, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I930105A

On January 5, 1993, a Petition for Advisory Opinion was received from Kenneth Springer, 1836 12th Fairway, West Palm Beach, Florida 33411.

The issue raised by Petitioner, Kenneth Springer, is whether he changed his domicile when he permanently relocated outside New York, even though he continues to maintain a permanent place of abode in New York.

Petitioner has permanently relocated to Florida effective April 1, 1992. Petitioner's move to Florida has been necessitated by the permanent relocation of his two closely held S corporations, in which Petitioner is a majority shareholder and key executive of each. The two corporations, which formerly were incorporated in New York, were reincorporated in Florida as part of the relocation and will no longer be engaged in business activity in New York.

Petitioner is presently living in a home in Florida, which prior to the move was his second home, as he was domiciled and resided in a home in Westchester County before the move. He continues to retain ownership of his former New York residence, due to the current state of the depressed real estate market. The house will be unoccupied throughout much of the year, except for occasional visits there by Petitioner and/or his spouse. It is anticipated that Petitioner and his spouse will utilize the house for approximately 45 to 90 days each year, principally during the summer months while visiting with family and friends in the New York area.

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 provides, 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 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.

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 Gatlman, 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). The continued maintenance of a permanent place of abode in New York is one factor that may be considered in making such a determination.

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 Petitioner has changed his domicile to Florida.

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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 he is domiciled and/or is a resident of New York State.

DATED: February 5, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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