

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

TSB-A-93 (4) I
Income Tax
April 29, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I930317A

On March 17, 1993, a Petition for Advisory Opinion was received from Gerard C. Pompilio, CPA, Richard A. Eisner & Co., 575 Madison Avenue, New York, New York 10022.

The issue raised by Petitioner, Gerard C. Pompilio, is whether a taxpayer changes his domicile from New York City to Washington, D.C. at such time as the United States Senate confirms his nomination to serve in the executive branch of the United States government.

The taxpayer is married with two minor children and is currently domiciled in New York City. Their current principal residence is a cooperative apartment in New York City. They also own a vacation home in Suffolk County, New York. The taxpayer is currently an active businessman in New York City, but will be taking, upon United States Senate confirmation, a position in the executive branch of the federal government.

The taxpayer and his wife have contracted to sell their New York City apartment. The sale will close when the taxpayer is confirmed for the government position. They will not purchase, rent or occupy any residence within New York City after this sale.

The taxpayer and his wife have contracted to purchase a home in Washington, D.C. The purchase will close when the taxpayer is confirmed for the government position. This home will become their principal residence. They intend and expect that this will permanently become their principal residence, although the taxpayer's government position may only be for a period of years depending on future presidential elections, and other factors not currently known. They have no current intention to ever permanently return to New York.

The taxpayer will be moving into his permanent residence in Washington, D.C. as soon as his confirmation is completed. He is presently in Washington, D.C. for approximately five days a week. During such time he is residing at a residence in Washington, D.C. which he purchased many years ago and then gifted a life estate in such residence to his mother and step-father, who have been residents of the Washington, D.C. area for their entire lifetimes and of the District itself for a least five years.

The taxpayer's wife and children will remain in New York City until the children's school year finishes in late spring of 1993. The children will then be enrolled in a Washington, D.C. school for the 1993-1994 and future school years.

The taxpayer's wife and children expect to spend much of the summer in Suffolk County, New York. The taxpayer expects to spend only weekends in Suffolk County during the summer months. Other than summers, the taxpayer and his family

will reside wholly in their Washington, D.C. residence. The taxpayer may occasionally be in New York City on short trips related to United States government business and/or personal investment matters, but this is expected to be rare.

It is the taxpayer's and his wife's intention to change their domicile from New York State and City to Washington, D.C. The taxpayer was raised in the D.C. area, although he has been domiciled in New York City for many years.

The taxpayer's business interests will be converted into investments. He will no longer be actively involved in any New York business ventures. The taxpayer was a general partner in an investment firm until his retirement in 1991. As a result of retirement, the taxpayer's general partnership interest was converted into a limited partnership interest in accordance with the firm's policies and procedures. Such limited partnership interest was entitled to only a specified percentage return on capital, which increased slightly once a minimal profit level for the firm was achieved (far less than the firm's experience has been for many years.) Upon the taxpayer's confirmation, his limited partnership interest will be converted into a subordinated debenture. The debenture is a debt obligation. It contains all the characteristics of a legal debt. The debenture will pay interest at a fixed rate. No interest payments are contingent upon, or determined by, profits of the firm. For federal income tax purposes, however, the partnership will report the interest paid to the taxpayer as a guaranteed payment on a federal partnership Schedule K-1, and will continue to reflect the amount of the debenture in a capital account, solely as a result of the technicalities of section 1.704-1(b)(2)(iv)(e)(2) of the Treasury Regulations, which require the treatment described until the debenture is paid off, notwithstanding its clear legal and tax status as debt.

The taxpayer's and his wife's personal effects, which are now in New York City will be moved to Washington, D.C. They will change their voting registration to Washington, D.C., and they will actually vote there. Most of the taxpayer's checking, savings and investment accounts will be changed to Washington, D.C. They will change their automobile registration and insurance to Washington, D.C. and they will acquire Washington, D.C. driver's licenses.

The taxpayer and his wife will establish new religious and social affiliations in Washington, D.C. Their New York affiliations will be either terminated or changed to nonresident membership. They do not have, and have never had, burial plots. The taxpayers will execute new wills in Washington, D.C.

The taxpayer and his wife will engage professionals (i.e., doctors, dentists, attorneys) in Washington, D.C. They may also continue to use some professionals, particularly accountants and perhaps some attorneys, in New York.

The taxpayer and his wife will send change of address notices to friends, business colleagues, bank, credit card companies, etc. informing them of their Washington, D.C. address. Their newspaper, magazine, and periodical subscriptions will be changed to Washington D.C. They will notify the Social Security Administration of their change in address.

The taxpayer and his wife will file tax returns based upon their Washington, D.C. address.

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 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.

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 animo 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

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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 the taxpayer will change his domicile to Washington D.C.

Accordingly, the taxpayer 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 will be domiciled and/or a resident of New York State.

DATED: April 29, 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.