

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

TSB-A-94 (11) I
Income Tax
August 16, 1994

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I940705B

On July 5, 1994, a Petition for Advisory Opinion was received from William V. Gotthardt, RD #1, Box #5, Hancock, New York 13783.

The issue raised by Petitioner, William V. Gotthardt, is whether he is considered a resident domiciled in New York State.

Petitioner is originally from New York. Petitioner joined the Marine Corp in 1976 and served until 1980. During this time Petitioner kept New York as his primary residence. While in the service Petitioner married and started a family. After leaving the service in 1980, Petitioner took a job in New Jersey. Petitioner has worked in New Jersey and has had a place of abode in New Jersey for the last 14 years. Petitioner has spent 240 days a year in New Jersey for the past 14 years. Petitioner has claimed New Jersey as his state of residence and domicile for these years.

In 1980, Petitioner and his family rented an apartment in New Jersey and he and his wife both worked in New Jersey until 1986. For those six years Petitioner and his wife both claimed New Jersey as their primary residence and paid state tax only to New Jersey.

In 1986, due to the high cost of housing in New Jersey, Petitioner and his wife built a house on land they owned in New York. Petitioner's wife and his four children moved into the house in New York while Petitioner stayed with relatives and continued to work in New Jersey. From 1986, Petitioner lived with his relatives and worked in New Jersey five days a week per year until 1992. Petitioner normally works 48 hours per week and his house in New York is about 2.5 to 3 hours away (133 miles). In 1992, Petitioner's relatives in New Jersey moved away and Petitioner started renting a room in a private home near his work place in New Jersey. Petitioner still lives there.

Petitioner has worked at the same building for more than 10 years so Petitioner's job is not a short term situation. Petitioner is happy with his job and is used to this type of living so there is no immediate plan to stop working and living this way. Once some of Petitioner's children go to college, Petitioner and his wife will sell or rent the house in New York and Petitioner's wife and the rest of the children will move back to New Jersey to be with Petitioner. Petitioner states that he doesn't see good employment opportunities increasing in Delaware County in the near future so that Petitioner would not change jobs and move to New York.

Petitioner's wife did not work from 1986 to 1990. In 1990, Petitioner's wife started working in New York State. At that time, Petitioner was advised by his tax representative to start paying joint taxes in both New York and New Jersey and he did.

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 established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v Tully, supra).

TSB-A-94 (11) I
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August 16, 1994

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 New York.

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: August 16, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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