

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

TSB-A-98(1) I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I970926A

On September 26, 1997, a Petition for Advisory Opinion was received from Richard Ellis Pentoney, 7498 Burke Road, RD 2, Jamesville, New York 13078.

The issue raised by Petitioner, Richard Ellis Pentoney, is whether he is a nonresident of New York State for personal income tax purposes under Article 22 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner does not have an abode in New York State or in the United States. Petitioner's last abode in the United States was 203 Scotholm Blvd., Syracuse, New York, which was sold in 1979. When Petitioner sold his abode, Petitioner, his wife and daughter moved on board the sailing vessel "HERON" situated in Kittery, Maine, where it was being prepared for permanent world sailing. This work was completed in 1981, and Petitioner and his family sailed from the United States. The boat has not returned, but one time Petitioner and his family did return for two weeks in order to clean up some personal matters. Petitioner states that the vessel "HERON" has been his sole abode since 1979 and he intends it to remain so indefinitely. If circumstances dictate that he must move ashore, Petitioner does not intend to establish a new abode in any northern state and perhaps not anywhere in the United States.

Petitioner does not own or maintain any house or property in the United States.

Petitioner states that the address at 7498 Burke Road, RD2, Jamesville, New York 13078 that is used on his correspondence is the residence of Mr. J. Donald Mabie, a friend who collects and forwards Petitioner's mail to him whenever he is in one of the world's ports long enough. Mr. Mabie has power of attorney to act for Petitioner with regard to financial matters. Mr. Mabie's address has never been Petitioner's abode and Petitioner does not intend to return there.

Section 605(b)(1) of the Tax Law defines a 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 105.20(d) of the Personal Income Tax Regulations ("Regulations") defines domicile, in pertinent part, as follows:

(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...

(4) A person can have only one domicile....

Section 105.20(e) of the Regulations defines permanent place of abode, in pertinent part, as follows:

(1) A permanent place of abode means 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. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose....

Section 105.21 of the Personal Income Tax Regulations defines a nonresident individual, in pertinent part, as anyone who is not a resident individual as defined in section 105.20 of the Personal Income Tax Regulations.

In Matter of Starer v Gallman, 50 AD2d 28, the petitioner, a domiciliary of New York State obtained employment in 1967 with a shipping company and was assigned to a ship out of the port of Hoboken, New Jersey. When he accepted this employment, he intended to make his home there and not to have a New York home.

He joined a union in New Jersey and obtained a post office address and bank account in Hoboken. He did not vote in New York in 1967. During the entire year 1967 he lived on board the ship, even when the ship was in port. The court held that the merchant seaman's stateroom on a ship, such stateroom "can hardly, either in law or logic, be considered a residence in Hoboken, nor do we consider the other evidence offered by petitioner as to a change of domicile sufficient to change his last previous domicile, which in this instance is New York State."

To effect a change in domicile, there must be actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v Kramer, 142 App Div 444,445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

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 evidence 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....

In this case, Petitioner was a domiciliary of New York State before he started living on his sailing vessel, the "HERON". The burden of proof is on the Petitioner to prove that he has effected a change in domicile. In order to effect a change in domicile, Petitioner must show, pursuant to section 105.20(d) of the Regulations and the cases cited above, that he has established a residence at a particular location and that he intends to make that location his new domicile. Petitioner may intend to give up his New York domicile, but based on the facts presented Petitioner has not shown that he has established a new domicile. Therefore, New York State continues to be Petitioner's domicile.

However, Petitioner's sole abode since he sold his home in Syracuse, New York, in 1979, has been his sailing vessel, the "HERON". Pursuant to section 105.20(e) of the Regulations, this sailing vessel constitutes a permanent place of abode under the circumstances presented. When Petitioner began living on the "HERON", it was situated in Kittery, Maine. It remained there until 1981 when

Petitioner, and his family, sailed from the United States. To date, the "HERON" has not returned to the United States. Petitioner states that he returned one time to the United States for two weeks to settle some personal matters. Petitioner has not maintained a permanent place of abode in New York State since he sold his home in 1979 and he has not been present in New York State more than 30 days for any taxable year after 1979.

Therefore, pursuant to section 605(b)(1)(A) of the Tax Law, Petitioner, as a domiciliary of New York State, has met the requirements to be considered a nonresident of New York State. After 1979, Petitioner has not maintained a permanent place of abode in New York State for any taxable year, has not spent more than 30 days of any year in New York State, and has maintained a permanent place of abode outside New York State. Accordingly, Petitioner is a nonresident of New York State for personal income tax purposes under Article 22 of the Tax Law.

DATED: February 2, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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