

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(7)I
Income Tax
November 6, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I020513A

On May 13, 2002, a Petition for Advisory Opinion was received from Paul Gajkowski, c/o Pustorino Puglisi, 515 Madison Avenue, New York, New York 10022.

The issues raised by Petitioner, Paul Gajkowski, are:

1. Whether a hotel room that does not have a cooking facility is considered a permanent place of abode.
2. Whether an apartment that does not have a cooking facility is considered a permanent place of abode.

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

Taxpayer is a nondomiciliary of New York State and maintains a permanent place of abode in the state of domicile. Taxpayer is considering leasing a hotel room on a long term basis. The hotel room would not have a cooking facility. The hotel room can be used throughout the year and will not be used for a temporary or a particular purpose. Taxpayer is also considering purchasing an apartment in New York State. Prior to moving to the apartment, the cooking facility will be removed. The apartment can be used throughout the year and will not be used for a temporary or a particular purpose.

Applicable Law and Regulations

Section 605(b)(1) of the Tax Law provides, in part:

Resident individual. A resident individual means an individual:

* * *

(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(e) of the Personal Income Tax Regulations ("Regulations") defines permanent place of abode, and provides, in part:

Permanent place of abode. (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....

Opinion

Determinations of a taxpayer's status as a resident or nonresident individual for purposes of personal income tax have long been based on the principle that the result "frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals." (Matter of Newcomb, 192 NY 238)

The words "maintain" and "permanent" are not limited to any particular usage but, instead, may apply to a variety of circumstances inherent in the subject matter at hand. (Matter of Evans, Dec Tax App Trib, June 18, 1992, TSB-D-92(16)I, aff'd 199 AD2d 840) "[O]ne maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place." (Evans, id.) "[T]he permanence of a dwelling place ... cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place." (Evans, id.) In general, a "permanent place of abode" means "an abiding place maintained by a person with such degree of continuity as to be considered to be permanent." (1940 Op Atty Gen 245)

When determining whether Taxpayer is maintaining a permanent place of abode for purposes of section 605(b)(1) of the Tax Law and section 105.20(e) of the Regulations, consideration should be given to whether the living arrangements will be maintained as a dwelling on a permanent basis. Taxpayer's proposed living arrangements in New York will consist of either a long term lease of a hotel room or the purchase of an apartment where the cooking facilities have been removed. In either case, the living arrangements will constitute a dwelling that will be maintained by Taxpayer and will be used throughout the year. Such living arrangements will not be used for a temporary stay for a particular purpose. Therefore, in either case, Taxpayer will be considered to be maintaining a permanent place of abode pursuant to section 605(b)(1) of the Tax Law and section 105.20(e) of the Personal Income Tax Regulations. The fact that the dwelling will not contain cooking facilities does not preclude such dwelling from being considered a permanent place of abode in New York that is maintained by Taxpayer.

DATED: November 6, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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