

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

TSB-A-04(4)I
Income Tax
July 6, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I040115A

On January 15, 2004, a Petition for Advisory Opinion was received from Marcum & Kliegman, LLP, c/o Carolyn Mazzenga, CPA, 130 Crossways Park Drive, Woodbury, New York 11797.

The issue raised by Petitioner, Marcum & Kliegman, LLP, is whether a nondomiciliary of New York State maintains a permanent place of abode in New York State, under section 605(b)(1)(B) of the Tax Law, for the purpose of determining if an individual is considered a resident of New York where the individual donates the use of his place of abode located in New York State to a charitable organization for a three-month period.

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

A Connecticut domiciliary owns a place of abode in East Hampton, New York, where he spends three to five months a year with his family. The remainder of the year is spent at his Connecticut residence. The individual works in New York City and spends more than 183 days within New York State. The Connecticut residence is substantially closer to his job in New York City than his East Hampton residence.

The individual plans to donate the use of his East Hampton house to a local charitable organization for a continuous three-month period. The charity will use the house for various fund raising activities or other events related to its charitable purposes. The individual and the charity will execute a written lease for the use of the house for the three-month period. During the three-month period, the individual will not have access to or use of the house for any reason. Also, the individual's phone will be disconnected and all clothing and other personal effects will be removed. For the period, the charity will be assuming responsibility for all utilities and care of the house. The individual's furniture will remain in the house.

The charitable organization has been approved by the Internal Revenue Service as a recognized not-for-profit organization under section 501(c)(3) of the Internal Revenue Code. The individual is not related to the charitable organization.

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 of the Personal Income Tax Regulations (Regulations) defines a resident individual and provides, in part:

(a) *General.* An individual may be a resident of New York State for personal income tax purposes, and taxable as a resident, even though such individual would not be deemed a resident for other purposes. As used in this Subchapter, the term *resident individual* includes:

(1) all persons domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and

(2) any individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

* * *

(e) *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....

The Department of Taxation and Finance Income Tax Nonresident Audit Guidelines, dated July 25, 1997, provides that for purposes of section 105.20(a) of the Regulations, the phrase *substantially all of the taxable year* means:

For statutory resident purposes, an individual who maintains a permanent place of abode in New York State, must maintain such abode "for substantially all of the taxable year". For this purpose, substantially all the taxable year means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a

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statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, s/he too, would not be a statutory resident despite spending over 183 days in New York. Since the individual in each of the above examples did not maintain their permanent place of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year. Audit Division policy considers the "substantial part of a year" rule to be a general rule rather than an absolute rule. For example, suppose a couple rents an apartment in New York year after year, but each year they sublet the apartment to their son for the month of December. Under the absolute rule, this couple would not be maintaining a permanent place of abode in New York since they do not maintain it for more than 11 months of any particular year. However, the Division's position is that this couple should properly be covered by the 183 day rule since they are maintaining the abode on a regular basis.

Opinion

To be considered a resident of New York State pursuant to section 605(b)(1)(B) of the Tax Law and section 105.20(a)(2) of the Regulations, a nondomiciliary individual must maintain a permanent place of abode in New York for substantially all of the taxable year and spend in the aggregate more than 183 days of the taxable year in New York.

The Department of Taxation and Finance Income Tax Nonresident Audit Guidelines dated July 25, 1997, page 38, provides that for this purpose, the phrase *substantially all of the taxable year* means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th for the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire taxable year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the taxable year, the individual would not be a statutory resident despite spending over 183 days in New York.

In *Matter of Hofler*, Dec St Tax Commn, May 15, 1981, TSB-H-81-(162)-I, the issue addressed was whether the petitioners maintained a permanent place of abode within New York State if they leased the property. In that case, the petitioners leased their residence located in New York to unrelated individuals. During the terms of the leases, the petitioners did not have the right to live in the house; that right vested in the tenants. In the Tax Commission's view, the petitioners did not maintain a permanent place of abode in New York State. See also, *Matter of Cunningham*, Dec St Tax Commn, January 18, 1984, TSB-H-84-(14)-I.

In this case, it is undisputed that the individual will spend more than 183 days in New York State and maintain the East Hampton residence for nine months during the year. The issue is

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whether the individual will maintain a permanent place of abode in New York for substantially all of the taxable year. For a continuous three-month period, the East Hampton abode will be leased to a charitable organization on a contractual basis. The individual will lease occupancy and use of the residence to the charitable organization, and the charitable organization will assume responsibility for all utilities and care of the house. For the duration of the lease agreement, the individual will not have access to the residence.

The individual will relinquish full control of and access to the residence as a result of a written lease with the charitable organization whereby it will have the sole and exclusive right to use the property for a three-month period. Following *Hofler, supra*, and *Cunningham, supra*, the East Hampton residence will not be deemed a permanent place of abode maintained by the individual for the three month period. Therefore, the individual will not maintain a permanent place of abode in New York State for substantially all of the taxable year. Accordingly, the individual will not be considered a statutory resident of New York for purposes of section 605(b)(1)(B) of the Tax Law and section 105.20(a)(2) of the Regulations.

It should be noted that for purposes of defining the phrase *substantially all of the taxable year*, the Audit Guidelines consider the 11 month rule to be a general rule rather than an absolute rule. Generally, if an individual leases his or her house to a third party for a period of one month or more in the taxable year, the individual would not be deemed to maintain a permanent place of abode for substantially all of the taxable year. However, even if the individual leases his or her house for a period of one month or more, the individual may be deemed to maintain a permanent place of abode for substantially all of the taxable year if the individual enters into such leases year after year on a recurring basis.

DATED: July 6, 2004

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