

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

TSB-A-83 (3) I
Income Tax
June 20, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I821012E

On October 12, 1982 a Petition for Advisory Opinion was received from Robert T. Muhlenbruch, 6089-C Maine Road, Plattsburgh AFB, New York 12903.

The issue raised is whether Petitioner is a resident of New York State, for purposes of the Personal Income Tax imposed under Article 22 of the Tax Law.

Petitioner, a domiciliary of Illinois at the time, entered military service in 1965. In 1973 Petitioner left military service, rented an apartment in New York State and took employment. Petitioner states that this employment was of an indefinite nature. He further states that it was his intention to remain in such employment, and to continue residing in New York, only if the job worked out to his satisfaction. It did not do so and, after approximately three months, Petitioner decided to re-enter military service. While awaiting re-entry into military service, Petitioner resided in Welland, Ontario, Canada. Upon such re-entry, Petitioner was assigned to Plattsburgh Air Force Base, New York. Petitioner states that when he retires from military service, he intends to return to Illinois. He also states that he has never registered to vote in New York.

Section 605(a) of the Tax Law defines the term "resident individual" as ". . . an individual:

(1) who is domiciled in this state, unless

(A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate no more than thirty days of the taxable year in this state or.

(2) 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."

Domicile may be defined as "the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent." 20 NYCRR 102.2(d)(1)

Section 102.2(d)(6) of the Personal Income Tax Regulations provides as follows:

"Federal law provides in effect that for the purposes of taxation, a serviceman is not deemed to have lost his residence or domicile in any state solely by reason of being absent therefrom in compliance with military or naval orders. Thus, such Federal law insures that a serviceman domiciled in New York State would not be deemed a domiciliary for income tax purposes in another state in which he is stationed. On the other hand, a serviceman domiciled in another state who is stationed in New York State would not be deemed a domiciliary, for personal income

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tax purposes, of New York State. The rule is, generally speaking, that the domicile of a person is in no way affected by service in the armed forces of his country. A change of domicile has to be shown by facts which objectively manifest a voluntary intention to make the new location a domicile. It is possible for a serviceman to change his domicile; however, the requisite intent is difficult to prove."

It appears from the foregoing that Petitioner was domiciled in Illinois in 1965, at the time he entered military service. Petitioner presents no information which would indicate a change of domicile during his period of military service ending in 1973. In 1973 Petitioner took up residence in New York. According to Petitioner he did not, while living in New York for the ensuing three months, have an intention to remain in New York and adopt New York as his home. Rather, he took up employment on an indefinite, rather than a permanent, basis, and resolved to remain in New York only if his job proved to be satisfactory to him. As it did not, he removed from New York, never having established domicile therein. His subsequent assignment to the Plattsburgh Air Force Base presumably did not effect a change of domicile, pursuant to 20 NYCRR 102.2(d)(6), quoted above. Petitioner has presented no information which would indicate an intention to adopt New York as his domicile while stationed at Plattsburgh. Indeed, it is his stated intention to return to Illinois upon retirement.

Accordingly, based on the information presented by Petitioner, as set forth above, Petitioner is not a domiciliary of New York and has not been such during the period in question. Further, his maintenance of a permanent place of abode in the State for more than 183 days of any of the taxable years in question occurred while in active service in the armed forces of the United States. It follows that Petitioner is not now and has not been a resident of New York, within the meaning of section 605(a) of the Tax Law, and was not required to file tax returns as a resident, during the years in question. Further, as a nonresident, Petitioner would have been subject to tax only on income, other than military pay, derived from or connected with New York sources. Tax Law, § 632(e). Any refund of tax to which Petitioner may be otherwise entitled is subject to the following limitation: with respect to any taxable year, a claim for credit or refund must "be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid." Tax Law, § 687(a). It should be noted that the issuance of refunds may be conditioned upon verification of the facts presented by Petitioner herein.

DATED: June 15, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau