ASSESSMENT OF PUBLIC COMMENT

DEPARTMENT OF TAXATION AND FINANCE

Written comments were received regarding proposal TAF-42-08-00016-P from the New York State Society of Certified Public Accountants ("NYSSCPA"), the Business Council of New York State, Inc. ("Business Council"), the New York State Bar Association Tax Section ("Tax Section"), and a New York State resident attending law school in Florida.

The NYSSCPA states that there has been "a vast amount of litigation, the subject of which centered on what constitutes a 'temporary stay' in New York" and that "[w]hat constitutes a 'temporary stay' as compared to a permanent stay is the cause of the longstanding controversy." The NYSSCPA indicates that the "determination requires a detailed and often onerous examination of the intent of both the employer and the employee. This examination results, at best, in a protracted audit and litigation and, at worst, in inconsistent results among similarly situated taxpayers." Nevertheless, the NYSSCPA recommends that the rule to eliminate the temporary stay provisions not be adopted. The NYSSCPA asserts that eliminating the rule would put New York businesses at a competitive disadvantage and subject taxpayers to tax on certain income in both their state of domicile and in New York as their state of statutory residence. This effect on taxpayers is also noted by the Tax Section. The NYSSCPA indicates that the rule would effect a major change in Department interpretation of the Tax Law provision.

The Business Council also asserts that the rule, by subjecting more individuals to tax as residents, would negatively impact business. The Business Council indicates that a number of its members bring non-domiciliaries into New York for temporary work assignments and that they find the temporary stay provisions to be "fairly straightforward" and not "particularly confusing".

It is noted first that the fact that a taxpayer may be subject to tax as a domiciliary of another state and a statutory resident of New York is a function of the statutory structure of the personal income tax. This fact does not argue against what the Department believes is a fairer interpretation of the statutory provisions, even though more taxpayers will be treated as residents. As noted in the Regulatory Impact Statement , "[t]he proposed rule levels the playing field among non-domiciliary taxpayers, providing equal treatment for all taxpayers who maintain a permanent place of abode within the state for more than eleven months, and spend more than 183 days within the state, irrespective of their purpose for doing so." The Department acknowledges that the rule would change longstanding practice and interpretation, but believes it is moving toward a better interpretation of the Tax Law.

With respect to the Business Council's comment that its members routinely bring individuals in for temporary work assignments and that it finds the temporary stay rule fairly straightforward, we note that being in New York for a temporary assignment was not sufficient to qualify under the temporary stay rule. In order for the place of abode to not be considered permanent under the rule, it would have to be maintained for a fixed and limited period for the accomplishment of a "particular purpose." The Department has found this rule to be difficult to administer and that is confirmed by the above-noted statements by the NYSSCPA. The Tax Section also observes that "[t]here is no question that the temporary stay exception has been the source of considerable confusion."

Noting that section 605(b) defines a statutory resident as one who maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state, the Business Council argues that a temporary stay rule is already embodied in the statute's definition of resident, and that taxpayers should therefore be permitted to avoid taxation as residents on the basis of a claimed temporary stay regardless of the proposed rule. The Tax section also suggests that a taxpayer could assert that he or she is not "maintaining a permanent place of abode in New York ... because his or her apartment is not being maintained on a <u>permanent</u>

basis”. The Business Council and the Tax Section conflate the permanency requirement relating to the place of abode with the temporal requirement relating to the taxpayer. In order to be considered a resident for tax purposes, an individual must maintain a permanent place of abode in the state, and spend more than 183 days in the state. While recognizing its longstanding interpretation, the Department believes that a better interpretation of “permanent place of abode” focuses on the nature of the place of abode. Thus, section 105.20(e)(1) of the Regulations defines "permanent place of abode," recognizing the distinction between these criteria by indicating that a mere camp or cottage, suitable and used only for vacations, or an abode not equipped with facilities normally found in a dwelling, such as facilities for cooking or bathing, will not be considered a permanent place of abode.

Moreover, the regulations provide that the place of abode must be maintained for substantially all of the taxable year, and the Department has construed this to mean more than eleven months. The temporary stay provisions unnecessarily extend this eleven month period of "nonresidency" based on the individual's purpose for being in the state and the anticipated duration of his or her stay. The proposed rule recognizes the fairness of defining residency status for tax purposes based on the benefits and services received from the state, without regard to the taxpayer's subjective purpose for being in the state. The Department has determined that a better interpretation of the Tax Law rests the residency analysis on objective criteria, using easily applied rules.

The Business Council also raises the possibility that taxpayers planning on claiming temporary stay for the 2008 tax year may not have paid sufficient tax - estimated or withheld - to cover the potential increase in their tax liability and may therefore be subject to penalty and interest. Under section 685(c) of the Tax Law, taxpayers generally will not be subject to the addition to tax for failure to pay estimated tax if the tax paid is equal to ninety percent of the tax shown on the taxpayer's return for the taxable year or one hundred percent (one hundred ten percent for taxpayers whose income for the preceding year exceeds one hundred fifty thousand dollars) of the tax shown on the taxpayer's return for the preceding year. The addition to tax is the amount of the

underpayment, multiplied by the rate of interest prescribed under section 697(j), for the period of the underpayment, meaning that the addition essentially reflects the time value of money, rather than a punitive exaction. Additionally, section 685(d) provides certain exceptions to the addition to tax for failure to pay estimated income tax, including instances where the underpayment is less than $300, where there was no tax liability for the preceding year, and where the Department determines that such addition would be against equity and good conscience, due to casualty, disaster, or other unusual circumstances.

The Tax Section recommends that the temporary stay exception be retained, but that it be modified to: (1) be limited to a three-year period; (2) allow the Department to rebut a taxpayer claim that the taxpayer is in New York or intends to be in New York for three years or less; (3) state that coming to New York to work for a particular employer for a limited period of time is a sufficiently limited purpose; and (4) address how the temporary stay exception would apply to non-work purposes, such as college or medical emergencies. As discussed, the Department believes that elimination of the temporary stay rule results in a better and fairer interpretation of the statute. We note specifically that the Tax Section's recommendation to effectively eliminate the particular purpose aspect of the rule in focusing only on the limited period of time would, in the Department's view, result in an unwarranted expansion of the taxpayers that would qualify.

The Tax Section recommends, if the rule is adopted, that its effect be postponed to tax years beginning after 2008. As discussed in the Regulatory Impact Statement, the elimination of the temporary stay rule would provide more equitable treatment among non-domiciliary taxpayers. The Department does not believe that a delay is in order.

With regard to the comments submitted by the New York State resident attending law school in Florida, the writer expressed approval of the proposed rule as a more equitable treatment of residency status for tax purposes that will result in increased revenue. Noting that the proposed rule is effective for tax years ending on or after December 31, 2008, the writer suggests that the temporary stay provisions should be "phased out"

gradually for taxpayers who may have relied on the temporary stay exception. The Department acknowledges this concern, but prefers to implement what it feels is the best interpretation of section 605(b)(1) as soon as possible. First, it is difficult to determine how a phase-out could be administered for these taxpayers. A taxpayer is either a resident or a nonresident under the Tax Law. Second, as discussed above and pointed out by the writer, the elimination of the temporary stay rule would provide more equitable treatment among non-domiciliary taxpayers. The Department does not believe that a delay is in order.

No changes were made to the rule as a result of these comments.