

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(1)M
Estate Tax
October 18, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M070322B

On March 22, 2007, a Petition for Advisory Opinion was received from Deborah Rothman as Trustee of the X Trust Agreement dated May 15, 1985, as amended, c/o Bruce Mac Corkindale, CPA. P.C., 3960 Merrick Road, Seaford, New York 11783.

The issue raised by Petitioner, Deborah Rothman, as Trustee of the X Trust Agreement, is whether the admittance of an individual to an assisted living home and subsequently to a nursing home in New York State would cause the individual to be considered a resident of New York for New York estate tax purposes.

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

Ms. X was born in Vilnius, Russia, on December 15, 1911. Ms. X and her husband came to the United States in 1962. In August 1967, they purchased a house in San Francisco, California. They both lived in the house from 1967 until the death of Ms. X's husband in May 1974.

After 1974, Ms. X lived in Saratoga, California, in a separate apartment in the home of her daughter. In 1979, Ms. X remarried. During the period 1979 through 1989, Ms. X lived in Israel for one-half of each year and lived the remainder of the year in the apartment of her daughter's home. After the death of her second husband in 1989, Ms. X lived entirely in California in the apartment of her daughter's home.

In 1998, Ms. X was no longer able to care for herself and needed specialized care and medical attention. Ms. X had lost her ability to think, reason, and remember; and was extremely confused. At the time, Ms. X's immediate family consisted of the daughter she lived with in California, a daughter who lived in Rochester, New York, and a daughter who lived in San Francisco, California. Ms. X needed a facility that provided kosher food and Yiddish-speaking personnel and was located close to one of her daughters.

In November 1998, acting pursuant to a power of attorney, two of Ms. X's daughters had her admitted to an assisted living facility located in Rochester, New York. The facility was located close to the home of one of her daughters and provided the special care that Ms. X needed. Ms. X was able to reside in the assisted living facility as opposed to a nursing home despite the fact that she required 24-hour care because she was able to employ companions and nurses who provided the constant supervision and care required.

Ms. X required constant companionship, supervision, and care. The assisted living facility was able to provide the special care Ms. X needed until January 2005. As her condition continued to deteriorate, in January 2005 it was necessary to move Ms. X to a nursing home located in Rochester, New York. Ms. X died at the nursing home in 2006. Ms. X's cause of death was end stage Lewy Body Dementia.

Even though Ms. X was admitted to an assisted living facility located in New York, she always considered California to be her home. Her apartment in California remained unchanged and unoccupied. Petitioner asserts that Ms. X never intended to change her domicile, never wanted to move to New York, and always intended and hoped to return to California. Upon her death, Ms. X's body was transported back to California where she was buried.

Ms. X used her California address on all of her investments, correspondence, tax returns, and bank statements until her death. She had multiple investments in California limited partnerships and had no business involvement in New York. Ms. X filed her state personal income tax returns as a California resident until 1998, when her family had admitted her to the assisted living facility located in Rochester, New York. On the advice of an accountant, for the tax years 1998 through 2005, Ms. X filed California personal income tax returns as a nonresident of California and filed New York State personal income tax returns as a resident of New York.

Applicable law

Section 952(a) of the Tax Law provides:

A tax is hereby imposed on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York State. The tax imposed by this subsection shall be an amount equal to the maximum amount allowable against the federal estate tax as a credit for state death taxes under section two thousand eleven of the internal revenue code.

Section 960(a) of the Tax Law provides:

General. A tax is hereby imposed on the transfer, from any deceased individual who at his death was not a resident of New York state, of real and tangible personal property having an actual situs in New York state and either (i) includible in his federal gross estate or (ii) which would be includible in his New York gross estate pursuant to section nine hundred fifty-seven (relating to certain limited powers of appointment) if he were a resident of New York state.

Section 103(15) of the Surrogate's Court Procedure Act, provides:

Domicile. A fixed, permanent and principal home to which a person wherever temporarily located always intends to return.

Opinion

For New York estate tax purposes, a tax is imposed by section 952(a) of the Tax Law on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York State. For purposes of section 952(a), the term *resident* is intended to mean domiciliary (see *Estate of John Edward Mullins*, 189 Misc 438). The New York Surrogate's Court Procedure Act defines a domicile as a fixed, permanent, and principal home to which a person, wherever temporarily located, always intends to return. Domicile, in general, is the place which an individual intends to be such individual's permanent home (see *Matter of Newcomb*, 192 NY 238; 101 NY Jur 2d, Taxation and Assessment, 2012).

In *Newcomb*, *supra*, the essential elements to establish a change of domicile are the abandonment of the former domicile and establishment of a residence in a new locality with the intention to remain and make a new home.

In *Estate of Sadie Rottenberg, Deceased*, 19 Misc 2d 202, the court held that a decedent who did not possess sufficient mental capacity could not effectuate a change of domicile either at the time of admission to a hospital or afterwards.

In November 1998, Ms. X moved into an assisted living facility located in Rochester, New York. Even though Ms. X filed her personal income tax returns for the tax years 1998 through 2005 as a nonresident of California and filed New York State personal income tax returns as a resident of New York, the filing of those returns in this case is not conclusive in the determination of domicile. To effect a change of domicile, there must be not only a physical change of residence but an intention to abandon the former domicile and to acquire another. Also, an individual must possess sufficient mental capacity to choose a new place of domicile. A decision by an individual with the requisite mental capacity to move into an assisted living facility in order to obtain greater access to health care and support services would result in a change of domicile if the individual planned on not returning to his or her former residence with the intention of remaining in New York and making a new home there. In the present case, Ms. X did physically change her residence to New York when she moved into the assisted living facility. However, the determination of whether Ms. X possessed sufficient mental capacity to effectuate a change of domicile or intended to change her domicile to New York at the time she was admitted to the assisted living home is a factual matter that is not susceptible of determination in this Advisory Opinion. An Advisory Opinion merely sets forth the applicability

TSB-A-07(1)M
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of pertinent statutory and regulatory provisions to “a specified set of facts.” Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a).

DATED: October 18, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.