

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-11(8)I
Income Tax
October 12, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I110531A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether he will be considered a resident of New York State and New York City and have to pay New York State and City income tax if he buys a studio apartment in New York City.

We conclude that, if Petitioner is a domiciliary of Florida, the mere ownership of real property in New York State alone will not make Petitioner a New York State/City resident nor subject his income to New York State personal income tax. If, however, Petitioner is determined to be a New York statutory resident, then his income from any source will be subject to New York State personal income tax.

Facts

Petitioner is retired and is a full-time resident of Florida. Petitioner has also registered to vote in Florida and has his automobiles registered there. Currently, Petitioner's income is derived from investments, social security, pension, and 401K ("retirement funds"), none of which are from New York sources. Petitioner, however, is considering purchasing a studio apartment in New York City which he will use occasionally.

Analysis

Tax Law § 612(a) provides that for New York residents, income from all sources, even income not connected to New York sources, is subject to New York State income tax. Additionally, Tax Law § 605(b) defines who is a New York resident and includes an individual "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." *See* Tax Law § 605(b)(1)(B). The definition of "resident" for City purposes is provided under the New York City Administrative Code § 11-1705(b), and is identical in substance to that for New York State income tax purposes except that "New York City" replaces "New York State".

The Personal Income Tax Regulations provide that "[a] permanent place of abode means a dwelling place of a permanent nature 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." 20 NYCRR § 105.20(e)(1).

In determining whether an individual who is not domiciled in New York is a statutory resident, it is the taxpayer who carries the burden of proving by clear and convincing evidence that he or she is not present in the State or City for more than 183 days during the tax year. (See *Matter of Kornblum v. Tax Appeals Trib. of State of N.Y.*, 194 AD2d 882, [3d Dep't 1993]; *Matter of Smith v. State Tax Commn.*, 68 AD2d 993, [3d Dep't 1979]; *Matter of Holt*, Tax Appeals Tribunal, July 17, 2008). Generally, presence within New York State for any part of a calendar day constitutes a day spent within New York State. See 20NYCRR § 105.20(c). "Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Department of Taxation and Finance adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State." Id. If a contemporaneously maintained diary or calendar documenting his or her whereabouts is not maintained, he or she may meet his burden of proof through testimonial evidence, documentary evidence, or a combination of the two (See *Matter of Armel*, Tax Appeals Tribunal, August 17, 1995; *Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994, *rearg. denied*, Tax Appeals Tribunal, January 25, 1995; *Matter of Moss*, Tax Appeals Tribunal, November 25, 1992). A clearly established "pattern of conduct" from which a taxpayer's location may be determined for a particular day suffices to meet the burden of proof with regard to that day (See *Matter of Kern*, Tax Appeals Tribunal, November 9, 1995, *confirmed* 240 AD2d 969, [3d Dep't 1997]. General testimony regarding the "patterns and habits of life" when coupled with supporting documentary evidence, is sufficient to meet the burden of proof (See *Matter of Armel*). In *Matter of Holt*, the Tribunal stated that "[s]tatutory residence cases ... are very fact intensive and require specific evidence through substantiating contemporaneous records to show a taxpayer's whereabouts on a day-to-day basis during each year in question. Such records could include not only day calendars but airline tickets, restaurant and hotel receipts and credit card statements."

The issue of domicile is highly fact-dependent and not susceptible of determination in this Advisory Opinion. See TSB-A-93(1)I. However, if Petitioner is domiciliary of Florida, Petitioner will be subject to New York State income tax on all of his income only if he is deemed a New York statutory resident. If Petitioner is not deemed to be a New York statutory resident, he will be subject to New York income tax only on income that is derived from New York sources, if any.

DATED: October 12, 2011

/S/

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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.