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

TSB-A-11(9)I
Income Tax
November 8, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I110727A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioners ask whether they qualify as part-year New York residents for 2010. The issue turns on whether Petitioners became statutory residents when they changed their domicile from New York to Connecticut and had restricted access to and use of their New York City residence prior to its sale in 2011.

We conclude that Petitioners did not maintain a permanent place of abode in New York for 2010 and, thus, the Petitioner who spent in excess of 183 days in New York in 2010 should not be taxed as a resident of New York in that year.

Facts

Petitioners moved out of their New York City apartment on May 14, 2010 and changed their domicile from New York to Connecticut. Vehicle registrations, drivers' licenses, voter registrations, bank accounts, etc., were moved to Connecticut from New York. All of their personal items were moved to Connecticut, and the New York apartment telephone was disconnected. Petitioners continued to pay for electrical utilities on the New York property as part of the common charges included in monthly assessments until sale of the property in 2011.

Extensive renovations began in the apartment on May 24, 2010, including but not limited to removal of a media room wall, relocation of office built-ins from the media room to the bedroom, removal of Bose theatre sound systems, replacement of the foyer tile floor with wood, and removal of a 10-foot shoe closet and storage area in the foyer. After demolition and rewiring was completed, sheetrock was replaced, patched, and sanded; all the wood floors throughout the residence were sanded and refinished; and all the walls and ceilings were repainted. Work was completed on or about June 24, 2010 for the first previews of the apartment by the real estate agent to other brokers. The first showing occurred on July 22, 2010.

Prior to being listed for sale, new staging furniture, carpets, art work, bath towels and bed linens, other decorative accessories and personal effects were either bought, borrowed on loan, or provided by the real estate agent to make the residence appear to be "lived in" and more attractive to a potential buyer. At the staging time, a house cleaner was hired to clean the residence every two weeks. Upon completion of the sale, the art work, decorative accessories, and personal effect were returned to those who loaned them, and the staging furniture was sold or donated to charity.

The listing agreement stipulated the Petitioner would not live in the apartment during the period of the sales process, in order to maintain the property in pristine condition, as well as to allow showing of the property to potential buyers on a moment's notice. All keys to the apartment were turned over to the real estate agent.

A signed contract for sale of the property was completed on December 6, 2010. A closing for the property occurred on February 23, 2011. Petitioner returned to the apartment one week prior to closing to remove all staged furniture.

Both Petitioners work in New York City, but only one spent more than 183 days in New York during 2010.

Analysis

Tax Law §601 imposes New York State personal income tax on "resident individuals." Tax Law §605(b)(1) defines a "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state…, or
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> (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….

Petitioners stated that they changed their domicile from New York to Connecticut on May 14, 2010, and we will assume for purposes of this Advisory Opinion that domicile was established in Connecticut on that date. One of the Petitioners spent more than 183 days in New York during 2010. Therefore, in order to conclude that the Petitioner who spent more than 183 days in New York during 2010 was only a part-year resident individual of New York, instead of a full-year resident individual required to pay New York personal income tax on all his or her 2010 income from all sources, the issue is limited to whether that Petitioner maintained a permanent place of abode in New York during the taxable year.

The Tax Law does not include a definition of the term "permanent place of abode." However, the regulation at 20 NYCRR 1-5/2-(e)(1) provides, in part, the following interpretation of this term:

> *Permanent place of abode.* (1) 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.

In addition, "a permanent place of abode" is one maintained by a taxpayer for "substantially all of the taxable year."[1] As a general rule, the Department has interpreted "substantially all of the taxable year" as more than 11 months during the year.[2] "Maintained" is not defined.

Several recent cases decided by the Tax Appeals Tribunal have interpreted this regulation. In ***Matter of John J. and Laura Barker*** (Tax Appeals Tribunal, January 13, 2011 and June 23, 2011), a case in which the Petitioners bought a house suitable for year round use that they used only for seasonal vacations, Petitioners argued that the house was not a permanent place of abode, because the house was subjectively undesirable for their year-round use due to their family- and work-related commitments. The Tribunal rejected Petitioner's argument, saying:

> It is well settled that a dwelling is a permanent place of abode where, as it is here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling, **(*see e.g., Matter of Roth***, Tax Appeals Tribunal, March 2, 1989…. As we stated in ***Roth***, "[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it (***Matter of Roth, supra).***

The ***Barker*** decision, however, may be distinguished from the case at hand. Due to their work, family, and civic commitments elsewhere, the Barkers themselves used the house only for some weekends from late May to early October during the years at issue. When the Barkers were not there, they permitted Mrs. Barker's parents to use the house which the parents did several days a week during the summer months and on many weekends the remainder of the year.

A similar conclusion was reached by the Tribunal in ***Matter of Gaied*** (Tax Appeals Tribunal, June 16, 2011). Petitioner, in that case, maintained an apartment residence for his elderly parents in a building that he owned. Petitioner stayed in the apartment only on rare occasions to attend to his parents' medical needs and kept no personal items in the apartment. Indicating that a taxpayer need not live in a dwelling in order for the dwelling to qualify as a permanent place of abode, the Tribunal held:

> Where a taxpayer has a property right to the subject premises, it is neither necessary nor appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer's subjective use of the premises.

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[1] 20 NYCRR 105.20(a)(2).
[2] TSB-M-09(2)(I).

Matter of Gaied, supra may also be distinguished from the facts in this Advisory Opinion. Petitioner in ***Gaied*** was found to have unfettered access to the apartment he maintained for his parents.

In the matter at hand, Petitioners entered into a real estate listing contract under which they were legally bound to turn over all the keys to their apartment to the real estate agent, remove all their personal possessions from the apartment, and agree not to live in the apartment during the period of the sales process. Although Petitioners did pay for maintenance, such as electric utilities as part of the common charges included in monthly assessments, until the property was sold, they were contractually prohibited from entering the apartment during the period during which it was being shown to potential buyers. As such, Petitioners did not maintain a permanent place of abode in New York, because they did not have unfettered use of their apartment. We conclude that the Petitioner that spent more than 183 days in New York during 2010 was not a "resident individual" in that year for purposes of New York State personal income tax, because he or she did not maintain a permanent place of abode for substantially all of the taxable year.

DATED: November 8, 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.