

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-18(3)I
Income Tax
August 29, 2018

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO I151029A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether his office in Long Island can be deemed a “permanent place of abode” within the meaning of Tax Law § 605(b)(1)(B).

We conclude that Petitioner’s office in New York State does not constitute a permanent place of abode within the meaning of Tax Law § 605(b)(1)(B).

Facts

Petitioner and his wife are domiciled in Washington, D.C. Petitioner is an executive with a New York-based investment management firm that maintains offices on Long Island. The firm’s Long Island location includes two different buildings and employs approximately 200 employees.

Petitioner is responsible for overseeing the firm’s daily trading activity for several investment funds that trade in U.S. and international securities and commodities markets. Petitioner is required to work during the night and consult with the firm’s traders during European and Asian trading hours. Because of Petitioner’s work duties, the firm permits him to stay overnight in his office but only on nights when the markets in which the firm trades are open. Otherwise, Petitioner must vacate the office at the end of the work day. Petitioner also is prohibited from having any other overnight guests in his office on any night. The firm has advised Petitioner in writing of these restrictions, noting that overnight stays are limited to those nights needed for work purposes and that the building is neither zoned nor insured for residential use.

Petitioner typically travels from Washington, D.C. to the firm’s Long Island office on Monday mornings and returns to Washington on Thursday evenings. Petitioner does not own or rent any abode in New York. When Petitioner is in New York, typically on Monday, Tuesday and Wednesday nights, he sleeps in his office.

When Petitioner stays overnight, he sleeps on a Murphy bed in the office. The office is approximately 330 square feet and does not include any cooking facilities, bathing facilities, or a separate bathroom. Petitioner has access to common restrooms and an on-site gymnasium with showering facilities, both of which are available to all firm employees. The firm’s space has a kitchen area; however, the kitchen is intended for use by the firm’s kitchen staff and not for employees’ personal use. When Petitioner is in New York, he orders meals from local restaurants and does not use cooking facilities in the building. Petitioner is not required to provide any consideration, contribution, or reimbursement to the firm for the sleeping arrangement. Also,

Petitioner does not receive any personal mail at the office. Petitioner does maintain a small closet of work clothes in the office along with some toiletries, but otherwise maintains his personal effects in Washington.

Analysis

Tax Law § 605(b)(1)(B) defines a resident individual as an individual who maintains a permanent place of abode in the State and spends in the aggregate more than 183 days of the taxable year in the State. Personal Income Tax Regulation 105.20(e)(1) provides that the term “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 the taxpayer’s spouse. 20 NYCRR § 105.20(e)(1). A mere camp or cottage that is suitable and used only for vacations is not a permanent place of abode, and any construction that does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing etc., generally will not be considered a permanent place of abode. 20 NYCRR 105.20(e)(1).

In order to qualify as a permanent place of abode, there must be some basis to conclude that a dwelling is utilized as the taxpayer’s residence. *Matter of Gaied v. Tax Appeals Trib.*, 22 N.Y.3d 592, 594 (2014). Case law and the Department of Taxation and Finance Income Tax Nonresident Audit Guidelines (June 2014) have identified certain factors to consider when determining whether a dwelling has the requisite relationship. These factors include, but are not limited to, the physical attributes of the dwelling and the relationship of the taxpayer to the dwelling, such as ownership, property rights, maintenance, relationship to co-habitants, registration for governmental/business services, personal items and access. *See*, Income Tax Nonresident Audit Guidelines, pp. 51-59.

Whether or not a taxpayer has free and continuous access to a place of abode is a primary consideration in determining whether a taxpayer maintains a permanent place of abode for substantially all of the taxable year. In the *Matter of John M. Evans v. Tax Appeals Tribunal of the State of New York et al.*, 199 A.D.2d 840 (N.Y. App. Div. 3rd Dep’t 1993), the Appellate Division affirmed the Tribunal’s determination that the taxpayer’s unrestricted right to use a room in a rectory constituted maintaining a permanent place of abode, despite the fact that the taxpayer had no legal right or relationship to the property. While the Tribunal recognized that the determination of whether a taxpayer is maintaining a permanent place of abode is based on a variety of factors, it ultimately found that the taxpayer’s use of the residence constituted maintaining a permanent place of abode because the taxpayer contributed to the household expenses, had exclusive use of his room, provided his own furnishings and personal effects, regularly used the residence for a long-standing period of time to access his full time job, and had unlimited access to his room and other rooms in the residence.

In the *Matter of Craig F. Knight* (Tax Appeals Tribunal, November 9, 2006, DTA No. 819485), the Tribunal concluded that the factors found significant by the Appellate Decision in *Evans* were lacking in the case before them. Mr. Knight was domiciled in New Jersey but worked in New York. He had access intermittently both to an apartment rented and maintained by another individual and also to a two-bedroom apartment rented to the business for which he worked. With

regard to the individual's apartment, Mr. Knight could not access the apartment without prior notice; he did not maintain clothing, personal articles or furniture in the apartment; he did not have a dedicated room to which he had free and continuous access; he did not use the residence for daily attendance at his full-time job; and he did not share in the expenses of maintaining the apartment. The Tribunal also found that the factors in *Evans* were not present for Mr. Knight's use of the business's apartment, except to the extent that he bore a proportionate share of the expenses by reason of being a part owner of the business. The business apartment was used intermittently by the three members of the business, each of whom had a key, and there was no agreement among them as to the usage. Thus, the petitioner was found not to be maintaining a permanent place of abode.

In this case, the facts and circumstances indicate that Petitioner's arrangement does not provide unfettered access to the dwelling. Petitioner's use of the office space is restricted to work nights when overseas markets are open and Petitioner may be required by his position to consult with firm traders of those overseas markets. Furthermore, Petitioner is prohibited from staying overnight on nights other than those specifically allowed above and is always forbidden from having overnight guests. In addition to the absence of unfettered access, Petitioner's arrangement demonstrates the lack of other necessary characteristics to be considered a permanent place of abode within the meaning of Tax Law § 605(b)(1)(B). These factors include the lack of bathing or kitchen facilities in the office that are ordinarily found in a dwelling, as well as other physical attributes to qualify as an abode. Other relevant factors here include the fact that the building is not permitted by zoning laws to be used as a residence; Petitioner does not contribute any money or other consideration to maintain the dwelling; the personal items kept in the office generally are work clothes; Petitioner does not use the office address on any registrations, such as a driver's license, voter registration, car registrations, etc.; and Petitioner does not receive personal mail or maintain any other personal items at his office. Considering all the factors, it is concluded that Petitioner's office does not constitute a permanent place of abode for purposes of Tax Law § 605(b)(1)(B).

DATED: August 29, 2018

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.