

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-86 (13) I
Income Tax
September 30, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I860508A

On May 8, 1986, a Petition for Advisory Opinion was received from Laurance B. Rand as guardian for Hope Sayles c/o Edwards and Angell, 2700 Hospital Trust Tower, Providence, Rhode Island 02903.

The issue raised is whether Hope Sayles is a resident individual not domiciled in New York who spent in the aggregate less than 183 days of the taxable year in the State of New York during 1982 and 1983.

Laurance B. Rand, a resident of South Port, Connecticut, is the guardian of Hope Sayles under appointment by the Probate Court of the City of Pawtucket, Rhode Island. Mr. Rand describes the facts of this case as follows:

Hope Sayles is an adult individual adjudged to be incompetent due to mental disorders. She has been incompetent at all times since her childhood. Hope Sayles is subject to the guardianship of the Probate Court of Pawtucket, Rhode Island and has been subject to the jurisdiction of the court since before reaching the age of majority.

The parents of Hope Sayles, now deceased, were at all times domiciled in the State of Rhode Island. Until her mother's death in 1946, Hope Sayles lived at the Sayles' homestead in Rhode Island and was domiciled in Rhode Island.

Effective March 1, 1948, Laurance B. Rand, as guardian of Hope Sayles, leased a hotel apartment in New York City for the accommodation of Hope Sayles and her companions when staying in New York. As of June 23, 1958, he acquired, in his capacity as such guardian, a cooperative apartment in New York City for the same purposes. Since then, it appears that Hope Sayles has not maintained a residence in Rhode Island.

Mr. Rand states that during each of the calendar years 1982 and 1983, Hope Sayles spent in the aggregate less than one hundred eighty-three days in New York State. He also states that neither he nor Hope Sayles had or has any power or intention to change Hope Sayles' domicile from Pawtucket, Rhode Island.

Section 605(a) of the Tax Law defines a "resident individual" as 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

Section 102.2(d) of the personal income tax regulations of the Tax Commission provides, in part:

(1) Domicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there... The burden is upon any person asserting a change of domicile to show that the necessary intention existed

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home ... a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere.

(5)...A child's domicile ordinarily follows that of such child's parents, until such child reaches the age of self-support and actually establishes his or her own separate domicile... The domicile of a child for whom a guardian has been appointed is not necessarily determined by the domicile of the guardian 20 NYCRR 102.2.

While the present regulations of the State Tax Commission have been amended subsequent to the taxable years in question (1982 and 1983) they, nevertheless, set forth the longstanding policy of the State Tax Commission and the Department of Taxation and Finance and will be given due consideration in this Advisory Opinion.

Initially, it is noted that the question of whether a domicile has been changed is one of fact rather than of law. Ratkowsky v. STC, 267 A.D. 643, 47 NYS2d 905 (1944). The scope of Advisory Opinions is limited to "setting forth the applicability to a specified set of facts of pertinent statutory and regulatory provisions " 20 NYCRR 901.1(a). Accordingly, it is outside of the scope of Advisory Opinions to decide whether Petitioner has changed her domicile to New York. Since the question arises within the context of a claim for refund, it must be answered within that context. However, the following discussion of relevant law and regulations should aid in the resolution of this question.

It is well established as a matter of law in New York State that, except in unusual circumstances, an incompetent individual is incapable of forming the intention necessary to change such individual's domicile. Rothfeld v. State Tax Commission, 264 A.D. 54, 34 NYS2d 895 (1942); Ratkowsky v. State Tax Commission, *supra*; But see In the Matter of the Estate of William Meyers, 59 Misc 2d 507 (1969). However, although this question is not entirely free from doubt, it

appears that under some circumstances the legal guardian of an incompetent or the court appointing such guardian may have the power to change an incompetent's domicile. First Trust and Deposit Company v. State Tax Commission, 3 NY2d 410 (1957); In the Matter of Gibbs v. Berger, 59 AD2d 282 (1977).

Hope Sayles was a domiciliary of Rhode Island prior to the death of her parents inasmuch as she lived in Rhode Island on the Sayles' homestead with her parents who were domiciliaries of Rhode Island. See 20 NYCRR 102.2(d)(5). Her Rhode Island domicile is presumed to continue until she moved to a new location with the bona fide intention of making the new location her fixed and permanent home. See 20 NYCRR 102.2(d)(2). Since Hope Sayles lacked the legal capacity to form such intention, it must be presumed that her domicile remained in Rhode Island in the absence of a showing that Laurance B. Rand, as legal guardian of Hope Sayles, or the Probate Court of the City of Pawtucket has taken some action which serves to change Hope Sayles' domicile. See First Trust and Deposit Co. v. State Tax Commission, *supra*.

Accordingly, in the absence of a showing of a change of domicile of Hope Sayles by Laurance B. Rand or the Probate Court of the City of Pawtucket, it must be presumed that Hope Sayles is a non-domiciliary of New York and, as such, is subject to the personal income tax imposed under Article 22 of the Tax Law as a nonresident since, although maintaining a residence in New York, she spent less than 183 days in the state in each of the years in question.

DATED: September 30, 1986

s/Frank J. Puccia
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.