

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

TSB-A-91 (10) I
Income Tax
December 24, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I910904B

On September 4, 1991, a Petition for Advisory Opinion was received from Mae LaBue, c/o Rose, Dratch & Co., PA, 175 Fairfield Avenue, Suite 4C/D, West Caldwell, New Jersey 07006.

The issue raised by Petitioner, Mae LaBue, is whether she will be a New York resident for all or part of taxable year 1991 and for all future tax years.

Petitioner has been a New Jersey resident since February 14, 1981. She resided in a one-family residence located in New Jersey. This residence was, and still is, owned by Petitioner as a joint tenant with her sister. On March 20, 1990, Petitioner was admitted to Providence Rest, a nursing home located in the State of New York, Borough of the Bronx. Her admission was pursuant to the advice of her physician whose diagnosis included cerebral vascular accident with progressive debilitation, severe left hemiparesis, and hypertension. Her physician stated that she is unable to perform menial tasks and she needs constant nursing care, including the administering of medication by a nurse. "In addition, she must be monitored on a regular basis in a care facility." It is believed that due to the foregoing medical conditions, Petitioner will be confined to the Providence Rest facility for the balance of her life.

Section 605(b)(1) of the Tax Law provides that a resident individual is (1) an individual who is domiciled in New York State unless the individual maintains no permanent place of abode in New York State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than 30 days of the taxable year in New York State, or (2) an individual who is not domiciled in New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

Section 102.2(d) of the Personal Income Tax Regulations provides that domicile, in general, is the place which an individual intends to be such individual's permanent home--the place to which such individual intends to return whenever the individual may be absent. A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such person's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time.

Section 102.2(e) of the Personal Income Tax Regulations provides that a permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer, and will generally include a dwelling place owned or leased by his or her spouse.

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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. Herein, Petitioner was domiciled in New Jersey prior to her admittance to a nursing home in New York State. Petitioner's admission was made pursuant to the advice of her physician who stated that she is unable to perform menial tasks and that she needs constant nursing care, including the administering of medication by a nurse. In addition, she must be monitored on a regular basis in a care facility. It is believed that Petitioner will be confined to the nursing home for the balance of her life. Accordingly, Petitioner's presence in New York State is not the result of her own intent and decision but due to a physical or mental incapacity. Therefore, Petitioner remains a domiciliary of New Jersey during the period of time she remains in the nursing home in New York State.

Since Petitioner is not domiciled in New York, to be considered a resident of New York State, Petitioner would have to maintain a permanent place of abode in New York and spend in the aggregate more than 183 days in the taxable year in New York State. Petitioner's stay in a nursing home for the purpose of receiving nursing care does not constitute the maintenance of a permanent place of abode in New York State and any day spent in such facility would not count as a day in New York for purposes of the 183 day rule. (See: Stranahan v New York State Tax Commission, 68 AD2d 250)

Accordingly, Petitioner is not a New York domiciliary and will be a nonresident of New York State for the taxable years during which her presence in New York State is maintained at the nursing home.

DATED: December 24, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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