

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

TSB-A-95 (3) I
Income Tax
February 23, 1995

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I941006B

On October 6, 1994, a Petitioner for Advisory Opinion was received from Richard A. Eisner & Company, LLP, 575 Madison Avenue, New York, New York 10022.

The issue raised by Petitioner, Richard A. Eisner & Company, LLP, is whether, the taxpayer described herein, is a New York City resident individual within the meaning of section 11-1705(b)(1)(B) of the New York City Administrative Code.

Taxpayer and his spouse own a home outside of New York City and are domiciled outside of New York City. Their child lives with them and attends school in the community. Since both spouses are employed on a full-time basis, they employ domestic help at their home. They do not currently own or rent a residence in New York City, or in any way have a permanent place of abode in New York City. Both taxpayer and his spouse work in New York City.

Taxpayer's spouse expects to obtain new employment requiring her to have a New York City residence. Such residence need not be her principal residence and there is no requirement that she be domiciled in New York City. She will rent a one bedroom apartment in New York City in her own name and pay the rent with her own funds. Generally, she will use the apartment for sleeping quarters during some or all of the week and return to her home outside New York City for weekends. The Petitioner states that since taxpayer's spouse will spend more than 183 days in New York City during the taxable year. Since she will be maintaining a permanent place of abode in New York City and spending more than 183 days of the year there, she will be deemed a statutory resident of New York City, pursuant to section 11-1705(b)(1)(B) of the New York City Administrative Code.

The taxpayer works on a full-time basis in New York City and spends more than 183 days in New York City during the taxable year. However, each night, after work, he returns to his home outside New York City and intends to continue this lifestyle. He does not intend ever to be present in his wife's New York City apartment, which is located in a different borough of New York City than his employment. He does not even intend to have a key to his wife's apartment. The apartment will be maintained and used exclusively by the taxpayer's spouse. The taxpayer will not provide any financial contribution to the maintenance of his wife's apartment.

The New York City personal income tax authorized under Article 30 of the Tax Law is similar to the New York State personal income tax authorized under Article 22 of the Tax Law and is administered by New York State in the same manner as the New York State Personal Income Tax.

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Section 11-1705(b) (1) (B) of the New York City Administrative Code defines a residential individual, in part, as an individual who is not domiciled in New York City, but maintains a permanent place of abode in New York City and spends in the aggregate more than 183 days of the taxable year in New York City. This is similar to Section 605(b) of the Tax law which defines a resident individual, in part, 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 183 days of the taxable year in New York State.

In People ex rel Mackall v Bates, 278 AD 724 (3rd Dept 1951), the petitioner lived with his wife in an apartment in New York City. Petitioner moved to Washington, D.C. when he took employment there. His wife remained in the New York apartment and took over the rental of it, but the apartment remained accessible to petitioner and he made continuous contributions to his wife's general support. The Court agreed with the State Tax Commission that petitioner "maintained" a permanent place of abode in New York while he worked in Washington.

However, the Department of Taxation and Finance's residency audit guidelines note that a residence maintained by one individual but used exclusively by another should not be deemed a permanent place of abode for the individual who maintains it.

Herein, the taxpayer's spouse will rent an apartment in her own name and pay the rent with her own funds. The taxpayer will not provide any financial contribution to the maintenance of his wife's apartment. The taxpayer states that he does not intend to ever be present in such apartment and will not even have a key to such apartment.

If the taxpayer does not, in fact, provide any financial contribution to the maintenance of his wife's apartment and he does not use such apartment, such apartment maintained and used exclusively by the taxpayer's wife is not a permanent place of abode for the taxpayer. Accordingly, the taxpayer would not be a resident of New York City for purposes of the New York City personal income tax under section 11-1705(b) (1) (B) of the New York City Administrative Code.

DATED: February 23, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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