

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

TSB-A-97(3) I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I961022A

On October 22, 1996, a Petition for Advisory Opinion was received from Carl and Nancy Kukulka, 4512 Northwest 58th Avenue, Gainesville, Florida 32653.

The issue raised by Petitioners, Carl and Nancy Kukulka, is whether they are statutory residents for the entire 1996 taxable year pursuant to section 605(b)(1)(B) of the Tax Law or are part-year residents up to the date that they changed their domicile to Florida.

Petitioners submit the following facts as the basis for this Advisory Opinion.

Petitioners state that they resided at 1 Vantage Drive, Pittsford, New York in 1995 and until August 13, 1996. As a New York resident, Carl Kukulka was employed as a professor of physical therapy at Ithaca College in Ithaca, New York. Nancy Kukulka was an employee of the Canandaigua City School District in Canandaigua, New York. She terminated her employment on a permanent basis on June 14, 1996.

In February, 1996, Carl Kukulka accepted a full time permanent position as chairperson of the Department of Physical Therapy of the College of Health Professions at the University of Florida in Gainesville, Florida. Mr. Kukulka states that his job description describes a permanent position which includes many responsibilities for long-term planning and department development.

In anticipation of their relocation, the family residence and only place of abode owned by the Kukulkas was listed for sale with a real estate broker. The Petitioners closed the sale of their New York residence on November 21, 1996.

Mr. Kukulka relocated from New York on May 31, 1996 to formally begin work on June 3, 1996 as department chairman at the University of Florida. Other members of the family, including Mrs. Kukulka and their two minor children, continued to reside in Pittsford until August 13, 1996, at which time all family members permanently moved all of their belongings, other than the real property, to their newly purchased house residence located at 4512 Northwest 58th Avenue, Gainesville, Florida 32653.

All household furnishings, clothing and other tangible personal effects were moved by professional movers from Pittsford to Gainesville during the period between August 9, 1996 and August 17, 1996. The Kukulkas occupied their Florida residence on August 17, 1996.

The Petitioners state that they changed their domicile to Florida when they moved to Florida in August. They state that they have totally oriented their life to permanent residency in Florida, including enrollment of their children in Florida schools, registration as Florida voters, purchase of a substantial

residence in Florida, permanently changing their address and the establishment of relationships with Florida commercial and service providers. Both Petitioners have notified New York State to inactivate their New York physical therapy licenses. When they moved to Florida, the only tangible property interest that remained in New York State was the Petitioners' New York home which contained no furniture or clothing or any other property that was not listed for sale. The New York property was not used after August 17, 1996, and the only utilities kept in service were to keep the heat on so that the pipes would not freeze.

Section 605(b) of the Tax Law defines a resident and nonresident individual as follows:

(1) Resident individual. A resident individual means an individual:

(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

(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 eight-three days of the taxable year in this state ...

(2) Nonresident individual. A nonresident individual means an individual who is not a resident or a part-year resident.

...

(5) Part-year resident individual. A part-year resident individual is an individual who is not a resident or nonresident for the entire taxable year.

Section 105.20(a)(2) of the Personal Income Tax Regulations provides that a resident individual includes any individual who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

Section 105.20(e) of the Personal Income Tax Regulations, defines a permanent place of abode as a dwelling place permanently 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.

The Department of Taxation and Finance Income Tax Nonresident Audit Guidelines dated May 9, 1994, provides, on page 35, that for statutory resident purposes, the phrase "substantially all of the taxable year" means a period exceeding 11 months. For example, an individual who maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year would not be a statutory resident for the entire year despite spending over 183 days in New York State.

In the Matter of Kritzik v Gallman, 41 AD2d 994 (1973), the taxpayers moved from New York to Connecticut on July 27, 1967. The taxpayers tried to establish that they were statutory residents of New York for the entire year 1967, so that the distributive share of partnership losses of the husband could be taken into account in computing their New York tax liability for the year. The court rejected the contention, stating that "[w]hen petitioners moved to Connecticut in July, they no longer maintained a permanent place of abode in New York. They could not, therefore, meet the statutory requirements for residents. (Tax Law, §605, subd. [a], par.[2].)" This implies that had they maintained a permanent place of abode for the year in New York and met the other requirements of the statute, they could have established that they were statutory residents for the years, despite having changed their domicile during the year.

In the Matter of Robert P. Palmquist and Betty G. Palmquist, Dec St Tax Commn, April 28, 1986, TSB-H-86(86)I, the petitioners were domiciliaries and residents of New York State. On or about September 1, 1981, petitioners changed their domicile to New Hampshire. Since they did not maintain a permanent place of abode in New York State after September 1, 1981, they were nonresidents of New York State for the last four months of 1981. Accordingly, the petitioners were part-year residents for that taxable year.

In this case, the question is whether the Petitioners maintained a permanent place of abode for substantially the entire taxable year. The Petitioners moved all of their household furnishings, clothing and other tangible personal effects to their new home in Florida on August 17, 1996. Petitioners state that since August 17, 1996, when they changed their domicile to Florida, the New York house did not contain any furniture or clothing or any other property that was not for sale. Prior to the move in August, the New York house was listed for sale with a real estate broker, and the closing on the sale of the house occurred on November 21, 1996. Therefore, like Kritzik, supra, and Palmquist, supra, and pursuant to the Department's Audit Guidelines, the Petitioners did not maintain a permanent place of abode in New York State for substantially all of the taxable year 1996 as required by section 105.20(a)(2) of the Personal Income Tax Regulations to be treated as resident individuals for entire taxable year 1996. Therefore, the Petitioners are part-year residents for taxable year 1996. They were residents from January 1, 1996 through August 17, 1996 when they changed their domicile to Florida, and nonresidents from August 18, 1996 through December 31, 1996.

DATED: March 7, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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