

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

TSB-A-98(7) I  
Income Tax  
August 7, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I971209A

On December 9, 1997, a Petition for Advisory Opinion was received from Norman & Anglina Cooper, 3801 NE 207<sup>th</sup> Street, Aventura, Florida 33180.

The issues raised by Petitioners are: (1) Do they have a temporary place of abode in New York State? (2) Are they statutory residents of New York? (3) Have they changed their domicile to Florida? (4) What is the initial year to be examined? (5) Who has the burden of proof? (6) Have the Audit Division income tax audit guidelines been followed? and (7) May an additional year be added to the audit?

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioners were domiciliaries of New York. Mr. Cooper planned to retire in 1992 at age 62, and states that in 1991 he entered into an oral agreement to that effect with the company which employed him. Mr. Cooper states that the agreement included, among other things, an agreement that after his retirement Mr. Cooper would be a consultant at a portion of his prior salary.

However, the company, realizing it needed Mr Cooper's services for an additional limited period, requested that he postpone his planned retirement date for a period of two years so that he could help establish an overseas network. The company provided several incentives for Mr. Cooper to stay on, such as an increase in salary and the opportunity to make whole his incentive stock awards when he retired, which was contemplated to be at the end of 1994. Mr. Cooper agreed, and, in 1992 he appointed Michael Boyer as President of the company so he could spend more time out of the office and Mr. Boyer could be groomed to take his place completely in several years. Mr. Cooper did not change his employment status in 1992. Mr. Cooper states that he discontinued working as an employee for the company at the end of 1994, when an independent contractor relationship ensued with the consulting agreement.

In anticipation of his initially planned retirement at the end of 1992, Petitioners decided to move and become Florida residents. Petitioners sold their home in Long Island and leased an apartment in New York. Petitioners purchased a residence in Florida on May 6, 1991, for \$430,000 and expended over \$250,000 in improvements and furnishings, and intended to make it their domicile.

During 1992 and 1993, they needed a place to stay in New York during the days they were in New York for business and other purposes, so they continued to lease the New York apartment on a yearly basis. During 1992 and 1993, their son had a fellowship at New York University Hospital, now completed, and used the apartment, which was convenient to the hospital. Their other children had long since left New York State.

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Petitioners assert that, during this time, they took many steps to establish themselves as domiciliaries in Florida, while at the same time, eliminating most attachments to New York. They moved all their "near and dear" items to Florida. They changed their wills, they obtained Florida drivers' licenses, the wife served on Florida juries, they filed Florida intangible tax returns, they ultimately established religious membership in Florida, they used Florida doctors and dentists. They became involved in their Florida condo, and they frequented local restaurants.

They became involved with the year-round race tracks, and joined the Thoroughbred Owner & Breeders Association, becoming part owner in three race horses. At times, they attended the track up to three days a week. They attended training sessions at Gulfstream Park.

It is Mr. Cooper's contention that, despite their extensive, continuous residency in New York, the facts of their life were drastically changed as they pointedly altered their lifestyle starting May 6, 1991, the day they purchased their new residence in Florida, intending to make it their domicile. Petitioners contend that where employment is clearly and unequivocally established for a limited period of time and the taxpayers clearly intend to give up their New York residency and pursue their new lifestyle, utilizing their new residence in Florida, their New York tenancy satisfied the requirements of "a temporary residence". Accordingly, Petitioners contend that their New York residence was converted from a permanent to a temporary residence.

Section 601(a), (b) and (c) of the Tax Law imposes, for each taxable year, the New York State personal income tax on the New York taxable income of every resident of New York State. Section 601(e) of the Tax Law imposes, for each taxable year, the New York State personal income tax on the taxable income which is derived from sources in New York State of every nonresident which is equal to the tax base multiplied by the New York source fraction.

Section 605(b)(1) of the Tax Law defines a resident individual as 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 eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

Section 605(b)(2) of the Tax Law provides that a "nonresident individual" means an individual who is not a resident or a part-year resident.

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Section 105.20(d) of the Personal Income Tax Regulations ("Regulations") defines domicile, in pertinent part, as follows:

(1) 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 such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual'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; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct...

(4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year 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 such person may be domiciled elsewhere.

To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v Kramer, 142 App Div 444,445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals.... In order

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to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect.... Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile....

In the Matter of Richard E. Gray v NYS Tax App Trib, 235 AD2d 641 (1997), the Court held that evidence that the taxpayers retained their New York State residence until their primary business interest was sold provided substantial evidence for the administrative conclusion that the taxpayers did not abandon their New York State domicile, and remained subject to New York personal income tax, until the time of sale of the business interest, despite their strong ties to another state. (see, Matter of Kartiganer v Koenig, 194 Ad2d 879; Matter of Clute v Chu, 106 AD2d 841; Matter of Zinn v Tully, 77 AD2d 725, [dissenting mem], revd on dissenting mem below 54 NY2d 713.)

The determination of whether a change of domicile has occurred, is a question of fact which depends on a variety of individualized circumstances (Matter of Newcomb, supra). Questions of fact are not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts". Tax Law, §171.20; 20 NYCRR 2376.1(a).

Section 105.20(e)(1) of the Regulations defines a "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. However, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to the individual's employer's New York State office for a fixed and limited period, after which the individual is to return to the individual's permanent location. If the individual takes an apartment in New York State during this period, the individual is not deemed a resident, even though the individual spends more than 183 days of the taxable year in New York State, because the individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on the individual's income from New York State sources. However, if the individual's assignment to the individual's employer's New York State office is not for a fixed or limited period, the individual's New York State apartment will be deemed a permanent place of abode and the individual will be a resident if the individual spends more than 183 days of the year in New York State. For a place of abode to be deemed not permanent, the stay in New York must be temporary (i.e., for a fixed and limited period) and the stay must be for the accomplishment of a particular purpose.

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In this case, Petitioners were domiciliaries and residents of New York State when they owned their home on Long Island. That home on Long Island constituted a permanent place of abode in New York State. Petitioners state that in anticipation of retirement, they sold their home on Long Island and leased an apartment in New York City (although not stated in the facts, it is presumed this happened prior to May 1991).

With respect to issues "1" and "2", it cannot be determined whether Petitioners are statutory residents of New York pursuant to section 605(b)(1)(B) of the Tax Law, or whether they have a temporary place of abode in New York pursuant to section 105.20(e)(1) of the Regulations, until Petitioners' domicile is determined. However, if Petitioners' domicile changed to Florida, then pursuant to section 605(b)(1)(B) of the Tax Law, they would be considered statutory residents of New York State for taxable years that they maintain a permanent place of abode in New York State and spend in the aggregate more than 183 days of the year in New York.

With respect to issue "3", as previously stated, the determination of when and/or whether Petitioners changed their domicile from New York to Florida is a factual matter that cannot be made within the context of this Advisory Opinion.

With respect to issues "4" and "7", the determination of what taxable years should be reviewed by the Audit Division within the context of an examination of Petitioners' personal income tax returns is not within the scope of an advisory opinion.

With respect to issue "5", pursuant to section 601 of the Tax Law, the personal income tax is imposed on residents and nonresidents of New York State. To determine whether an individual is a resident or nonresident pursuant to section 605(b) of the Tax Law, it is necessary to first determine whether such individual is domiciled in New York State for the taxable year. Pursuant to section 105.20(d) of the Regulations and Newcomb, supra, the burden of proof is on the person asserting a change of domicile. In this case, the burden of proof is on Petitioners to prove that a change of domicile occurred in a particular taxable year.

With respect to issue "6", Petitioners state that "it is requested that you review the actions by audit in conforming with the guidelines." An advisory opinion sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". (Tax Law §171, subd twenty-fourth.) It is not within the scope of an advisory opinion to review an audit.

DATED: August 7, 1998

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

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