

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(6)I
Income Tax
TSB-A-06(4)M
Estate Tax
August 28, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z060130A

On January 30, 2006, a Petition for Advisory Opinion was received from Richard I. Furman, c/o Mark David Rozen, Three Grove Isle, Apt. 901, Miami, Florida 33133.

The issue raised by Petitioner, Richard I. Furman, is whether the admittance of Petitioner's wife, Rosemary F. Furman, to a nursing home in New York State would cause Mrs. Furman to be considered a resident of New York for personal income tax and estate tax purposes.

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

Rosemary F. Furman was born in New York City. She has been domiciled in Florida since she was 15 years old. She currently resides in Miami, Florida, where she has lived since 1981. Mrs. Furman has owned property and maintained a savings account in Florida. Prior to her illness, Mrs. Furman maintained a Florida driver's license and her vehicles were registered in Florida. She was registered to vote in Florida. In addition, she belonged to various social clubs and organizations in Florida.

Rosemary F. Furman's immediate family consists of her husband (Petitioner), who lives with her in Florida; a daughter who lives in New York; and another daughter who resides in Connecticut. Mrs. Furman and Petitioner own an apartment in New York City, which they have used on occasion. They also own two apartments together with their daughter who lives in New York. Mrs. Furman has no active involvement in New York.

In the late 1990s, Mrs. Furman's health began to decline and she was diagnosed with an early stage of Alzheimer's disease. At the present time, Mrs. Furman is incompetent, in need of constant medical supervision, and needs to be placed in a nursing home. Petitioner is considering various nursing facilities located in Florida and New York.

Applicable law and regulations

Section 605(b)(1) of the Tax Law provides, in part:

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 . . . 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 952(a) of the Tax Law provides:

A tax is hereby imposed on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York state. The tax imposed by this subsection shall be an amount equal to the maximum amount allowable against the federal estate tax as a credit for state death taxes under section two thousand eleven of the internal revenue code.

Section 960(a) of the Tax Law provides:

General. A tax is hereby imposed on the transfer, from any deceased individual who at his death was not a resident of New York state, of real and tangible personal property having an actual situs in New York state and either (i) includible in his federal gross estate or (ii) which would be includible in his New York gross estate pursuant to section nine hundred fifty-seven (relating to certain limited powers of appointment) if he were a resident of New York state.

Section 105.20 of the Personal Income Tax Regulations (Regulations) defines a resident individual and provides, in part:

(a) General. An individual may be a resident of New York State for personal income tax purposes, and taxable as a resident, even though such individual would not be deemed a resident for other purposes. As used in this Subchapter, the term *resident individual* includes:

(1) all persons domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and

(2) any individual (other than an individual in active service in the Armed Forces of the United States) 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.

* * *

(c) Rules for days within and without New York State. In counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Department of Taxation and Finance adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State.

(d) Domicile. (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.

* * *

(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.

* * *

(e) Permanent place of abode. (1) A permanent place of abode means 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. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, 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. . . .

Opinion

To be considered a resident of New York State pursuant to section 605(b)(1) of the Tax Law and section 105.20(a) of the Regulations, an individual must be domiciled in New York State or, if not domiciled in New York State, an individual must maintain a permanent place of abode in New York State for substantially all of the taxable year and spend in the aggregate more than 183 days of the taxable year in New York State.

In *Mae LaBue*, Adv Op, Comm, T&F, December 24, 1991, TSB-A-91(10)I, the petitioner was domiciled in New Jersey prior to her admittance to a nursing home in New York State where it was believed that she would spend the rest of her life. The petitioner was admitted to the nursing home because she was unable to perform menial tasks and she needed constant nursing care, including the administering of medication by a nurse. It was held for personal income tax purposes that the petitioner did not intend to abandon her former domicile and acquire a new domicile. Her presence in New York State was not the result of her own intent and decision but due to a physical or mental incapacity. Therefore, she remained a domiciliary of New Jersey during the period of time she was in the nursing home in New York. It was further held that, in determining whether she was a resident of New York, any day spent in such facility did not count as a day in New York for purposes of the 183-day rule.

In *Stranahan v NYS Tax Comm*, 68 AD 2d 250, it was held that when a nondomiciliary who maintained an apartment in New York City sought treatment in New York State for a serious illness, the time spent confined to a medical facility for the treatment of such illness should not have been counted in determining whether the nondomiciliary was a resident of New York State for personal income tax purposes.

The apartment owned and occasionally used by Petitioner and Mrs. Furman in New York City is considered a permanent place of abode maintained in New York State for substantially all of the taxable year. However, following *Mae LaBue*, *supra*, and *Stranahan*, *supra*, the admittance of Petitioner's wife, Rosemary F. Furman, to a nursing home in New York State would not cause Mrs. Furman to be considered a resident of New York State for personal income tax purposes since any day spent in such facility would not count for purposes of the 183-day rule.

For New York estate tax purposes, a tax is imposed by section 952(a) of the Tax Law on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York State. For purposes of section 952(a), the term *resident* is intended to mean domiciliary (see *Estate of John Edward Mullins*, 189 Misc 438). In *Estate of Sadie Rottenberg, Deceased*, 19 Misc 2d 202, the court held that a decedent who entered a hospital for purposes of medical treatment and care did not possess sufficient mental capacity to effectuate a change of domicile either at the time of admission or afterwards. Accordingly, the admittance of

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Petitioner's wife, Rosemary F. Furman, to a nursing home in New York State would not cause Mrs. Furman to be considered a resident of New York for estate tax purposes.

DATED: August 28, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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