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No More Temporary Residence in New York

By: Joseph Lipari and Debra Silverman Herman

Under the New York State Personal Income Tax, a resident of New York is generally subject to tax on his worldwide income.¹ The breadth of the tax has been considered a serious impediment to New York employers who wish to relocate employees temporarily or for other persons who for one reason or another want to live in New York for a period of time, such as to attend school. Currently, these issues have been alleviated by means of an exception to the residency rules generally referred to as the “Temporary Stay” exception.²

The Temporary Stay Exception has resulted in substantial litigation and rulings involving disputes over whether the individual was in New York for a “fixed and limited period” and “to accomplish a particular purpose.” Citing, among other things, the difficulty in administering the rule, the Commissioner of the New York State Department of Taxation and Finance (the “Department”) recently signed a proposal to adopt amendments to the New York State personal income tax regulations that would eliminate the rule beginning in tax year 2009.³ The public has 45 days from October 15, 2008 to submit comments on the proposed amendments.

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Since New York State administers New York City’s personal income tax and the State’s regulations also apply⁴ when determining New York City residency status, individuals that have relied on the Temporary Stay Exception for prior years may have New York State and City income tax exposure for tax year 2009 and subsequent years. Employers and employees, and students should be aware of the impact of this change for tax year 2009 and plan accordingly.

New York Residency

A person not domiciled in New York will be taxed as a resident (as noted above, on his worldwide income) if he maintains a permanent place of abode in New York and spends more than 183 days of the tax year in New York (the “183-day rule”).⁵ Significantly, an individual must maintain a permanent place of abode for “substantially all of the taxable year” to be considered a resident (the “Substantially All Requirement”). The Department has generally interpreted this requirement to mean a period exceeding eleven months during a calendar year.⁶

The Temporary Stay Exception

To satisfy the 183-day rule, the individual’s residence that is maintained in New York must be “permanent.” The regulations currently provide that “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”.⁷ The regulations further state, as an example of the Temporary Stay Exception, “an individual domiciled in another state may be assigned to such individual’s employer’s New York office for a fixed and limited period, after which such individual is to return to such individual’s permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident . . .”⁸

The District Office Audit Manual produced by the Department provides further guidance on what is meant by the term “fixed and limited.”⁹ An individual is “presumed present in New York for a fixed and limited period . . . if the duration of the stay in New York is reasonably expected to last for three years or less,” absent facts and circumstances providing otherwise.¹⁰ A stay in New York is considered of “indefinite duration if the stay is realistically expected to last more than three years, even if it does not actually exceed three years.”¹¹ The District Office Audit Manual makes clear that “the employee must determine if the stay in New York will be temporary or indefinite at the time the employee starts work in New York.”¹² As such, the better practice when considering accepting temporary employment in New York or undertaking an assignment or starting school has been to obtain an Advisory Opinion

from the Department on the residency question.¹³

According to the District Office Audit Manual, the term “particular purpose” means that an “individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions.”¹⁴ To assist individuals in documenting the “particular purpose” on audit, the District Office Audit Manual advises individuals to obtain written documentation from the employer that details the exact duties to be performed in New York and the duration of the stay. Rulings and cases often examine the employment contract to determine the taxpayer’s purpose in New York.

Cases and Rulings

The Temporary Stay Exception cases and rulings have not been particularly helpful in indicating where the dividing line is between temporary and permanent. The more favorable taxpayer cases involve athletes and students who were residing in New York for a hockey season and school season. For example, in *Matter of MacMillan*,¹⁵ the New York State Tax Commission determined that a professional hockey player did not maintain a permanent place of abode in New York based on his presence in New York during the hockey season, and his return to Canada during the off-season. (This case has not deterred the Department from asserting that other professional athletes, such as Derek Jeter, a New York Yankee baseball player, are domiciled in New York.¹⁶)

In an Advisory Opinion requested by a parent taxpayer, the Department considered whether the taxpayer (and her son) could obtain a New York apartment and reside with her son at such apartment while the son attended a religious high school for four years.¹⁷ The Department determined that the stay would be temporary because it is for a fixed and limited period, “for the four years Taxpayer’s son will be at high school”, and the stay would be for the accomplishment of a particular purpose,

with respect to the son, “to attain his high school education . . .” and with respect to the Taxpayer, “to give parental care to her minor son.” In a subsequent case, where the Temporary Stay Exception was raised on audit, the Department took the position that an individual attending medical school and two residency programs in New York was a resident. An Administrative Law Judge of the Division of Tax Appeals rejected the Department’s position and concluded that the individual was not a statutory resident because the primary purpose of her presence in New York was to accomplish a particular purpose, becoming a credentialed doctor, even though the individual got married and had several children during this ten-year period.¹⁸

Cases involving business executives and other professionals, in particular individuals present in New York on H-1B visas, are less favorable. Several cases have held that bankers attending analyst and other educational training programs do not qualify for the Temporary Stay Exception on the theory that expanding an employee’s knowledge of banking is not a particular purpose.¹⁹ The Department has also generally opined that an individual in New York serving as an “executive of the company, a sales manager or a production line worker” would not qualify for the Temporary Stay Exception due to the individual’s general duties.²⁰ The Division of Tax Appeals and the Department have also generally rejected the Temporary Stay Exception with respect to consultants, bankers,²¹ and engineers²² that either worked on several different projects or for multiple employers over a less than three-year period on the theory that there was not one particular project. Not surprisingly, in *Matter of Ciechanover*, an executive for an Israeli bank lost on a motion for summary judgment. He had been working for five years at the New York office of a bank and stayed in an apartment owned by the bank. When he was promoted (with no termination date) and had to spend less time in New York, he argued that the permanent abode thereafter became temporary.

In contrast, the Department has upheld the Temporary Stay Exception in two Advisory Opinions involving four-year assignments to New York by a lawyer picked to be managing partner of his multi-office firm²³, and for an executive who would retire after the four-year period and return to Nebraska.²⁴ In both cases, the taxpayers had specific contracts setting forth the limited period of employment, their employer’s assumed all of the obligations for the temporary New York residence, and each petitioned the Department prior to their stay.

Regulatory Amendments

The Department’s amendments would remove the Temporary Stay Exception in its entirety from the State’s personal income tax regulations. The Department believes the amended regulation is a better interpretation of the Tax Law that does not itself contemplate a temporary stay exception. In the Regulatory Impact Statement accompanying the proposed amendments, the Department explains that individuals temporarily residing within New York may continue to be considered non-residents if they maintain their residence in New York for less than eleven months, and therefore, fail to satisfy the Substantially All Requirement.²⁵ This statement is interesting because the Department’s District Office Audit Manual states that the Substantially All requirement is “a general rather than an absolute rule,” and such concept is not in the Tax Law.²⁶

Although one may agree that the removal of the exception is good because it “levels the playing field among non-domiciliary taxpayers” who maintain permanent places of abode, regardless of their reasons for having the New York residences, the Substantially All Requirement will likely increase the number of persons held to be residents.²⁷ The Department may have concluded that the increased revenues from imposition of the Substantially All test will largely be paid by foreign nationals working in the U.S. on H-1B Visas that will extend over an eleven month pe-

riod. As set forth in the Regulatory Impact Statement, “according to information from the Department’s Audit Division, nearly all of the cases involving temporary residence (focusing on New York City addresses) involve foreign nationals in the United States on working visas (H-1Bs).”²⁸ For this segment of the population, the potential revenue gain due to elimination of the Temporary Stay Exception is \$15 million for New York State and \$30 million to New York City.

Impact of Change on Employers, Employees and Other Persons

The Department maintains that the amendments produce “clear, objective, and easily applied rules for assessing residency status.”²⁹ This much is true, but the effects may be troublesome for

students and other business executives that currently rely on the exception. For example, students residing in dormitories or other residences for less than eleven months will likely not be affected. However, students that sign leases in excess of eleven months (i.e. students who attend school or work in New York during the summer) may no longer be considered temporary residents.

Business executives and other professionals should consider their housing arrangements in New York for tax year 2009 and plan accordingly. Employers should consider providing these individuals with a corporate apartment, since certain corporate apartments that are used by multiple employees may not be considered a permanent place of

abode for any of those employees. Employers, individuals and their practitioners may also wish to provide the Department with comments on the proposed amendments. The comment period is open until December 1, 2008.³⁰

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¹ N.Y. Tax Law § 612(a). The same treatment applies for City residents under the New York City Personal Income Tax. N.Y.C. Admin. Code § 11-1712.

² 20 NYCRR § 105.20(e)(1)(the “Temporary Stay Exception”).

³ N.Y.S. Dept. of Tax’n & Fin., *Notice of Proposed Rulemaking*, ID No. TAF-42-08-00016-P, N.Y.S. Register, Oct. 15, 2008. The Temporary Stay Exception is currently set forth in the personal income tax regulations as a reasonable interpretation of the Tax Law’s “permanent place of abode” requirement; there is no statutory temporary stay exception to the definition of “permanent place of abode.” In effect, the Department has determined that the Temporary Stay Exception is no longer a reasonable interpretation of the Tax Law. *See* N.Y.S. Dept. of Tax’n & Fin., *Notice of Proposed Rulemaking*, ID No. TAF-42-08-00016-P, N.Y.S. Register, Oct. 15, 2008, Regulatory Impact Statement, p. 35 [hereinafter Regulatory Impact Statement] (stating “in eliminating these provisions, the Department is moving to what it believes is a better interpretation of section 605(b) of the Tax Law, which does not contemplate a temporary stay exception”).

⁴ 20 NYCRR §§ 290.1 & 290.2.

⁵ An individual is classified as a New York resident if either the individual is domiciled in New York (with certain exceptions discussed in footnote 7) or satisfies the 183-day rule. N.Y. Tax Law § 605(b)(1)(B)(New York State); N.Y.C. Admin. Code § 11-1705(b)(1)(New York City).

⁶ N.Y.S. Dep’t of Tax’n & Fin., *Income Tax District Office Audit Manual*, Feb. 1998, Part 1 Field Audit Nonresident Audits, Audit Area – Statutory Resident [hereinafter District Office Audit Manual], §B, Permanent Place of Abode. As will be discussed further in the article, the Substantially All Requirement is not set forth in the Tax Law and is considered a “general rule rather than an absolute rule” by the Department. *Id.*

⁷ 20 NYCRR § 105.20(e)(1). The definition of permanent place of abode is also relevant for two exceptions to the rule that classifies as residents persons domiciled in New York, which is the reason the definition broadly covers an abode outside New York. First, an individual domiciled in New York who (i) maintains a permanent place of abode outside New York during the year, (ii) does not maintain a permanent place of abode in New York during the year, and (iii) spends fewer than 30 days in New York during the year is treated as a nonresident. N.Y. Tax Law § 605(b)(1)(A)(i). Second, an individual who is present outside the U.S. for 450 out of 548 days and does not maintain a permanent place of abode in New York where either the individual or the individual’s family spends over 90 days during the 548 day period. N.Y. Tax Law § 605(b)(1)(A)(ii).

⁸ *Id.*

⁹ *See* District Office Audit Manual supra note 6, §C Temporary Place of Abode.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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- ¹³ An Advisory Opinion is binding on the Department with respect to the taxpayer that requests a ruling.
- ¹⁴ District Office Audit Manual, *supra* note 6, §C Temporary Place of Abode.
- ¹⁵ N.Y.S. Tax Comm'n, TSB-H-84(67)I, Mar. 9, 1994.
- ¹⁶ *See e.g. Matter of Jeter*, DTA No. 821646, N.Y.S. Div. of Tax App., ALJ Unit, Order, Nov. 8, 2007.
- ¹⁷ *Maria T. Jones, Esq.*, N.Y.S. Dept. of Tax'n & Fin., TSB-A-97(8)I, Nov. 4, 1997.
- ¹⁸ *See Matter of Kaltenbacher-Ross*, DTA No. 818499, N.Y.S. Div. of Tax App., ALJ Unit, May 23, 2003.
- ¹⁹ *See, e.g., Matter of Halim*, DTA No. 820656, N.Y.S. Div. of Tax App., ALJ Unit, Feb. 15, 2007; *but see Matter of Gontijo*, DTA No. 820829, N.Y.S. Div. of Tax App., ALJ Unit, June 14, 2007.
- ²⁰ N.Y.S. Dept of Tax'n & Fin., TSB-A-98(11)I, Sept. 10, 1998.
- ²¹ *See Matter of Goldberg*, DTA No. 820248, N.Y.S. Div. of Tax App., ALJ Unit, Feb. 22, 2006.
- ²² *See Matter of Hirsch*, DTA No. 819652, N.Y.S. Div. of Tax App., ALJ Unit, Dec. 15, 2005.
- ²³ *Roger Cukras on behalf of Taxpayer A*, N.Y.S. Dept of Tax'n & Fin., TSB-A-94(15)I, Jan. 5, 1995.
- ²⁴ *Charles M. Hopper*, N.Y.S. Dept. of Tax'n & Fin., TSB-A-94(3)I, Nov. 9, 2003.
- ²⁵ Regulatory Impact Statement, *supra* note 2, p. 35.
- ²⁶ District Office Audit Manual, *supra* note 6.
- ²⁷ Regulatory Impact Statement, *supra* note 2, p. 35.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ Public comment will be received until 45 days after publication of the Notice of Proposed Rulemaking in the N.Y.S. Register, which occurred on October 15, 2008. Since the 45th day occurs on a weekend, comments should be accepted until the end of the next business day. (The Notice of Proposed Rulemaking and the Department's website provide the name and address of the individual to whom comments should be submitted. See [http://www.tax.state.ny.us/rulemaker/ comments .htm](http://www.tax.state.ny.us/rulemaker/comments.htm).)