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

TSB-A-94 (9) I
Income Tax
July 5, 1994

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I940311A

On March 11, 1994, a Petition for Advisory Opinion was received from David and Leslee Rogath, P.O. Box 7917, Greenwich, Connecticut 06836.

The issue raised by Petitioners, David and Leslee Rogath, is whether they are considered statutory residents for taxable year 1989, under section 605(b)(1)(B) of the Tax Law, if they changed their domicile from New York State to Connecticut on July 7, 1989.

Petitioners, husband and wife, were domiciled in New York State through December 31, 1988. During 1988, Petitioners decided to move their business and their family to Connecticut. Petitioners purchased a $6,000,000 residence in Connecticut on July 7, 1989 and shortly thereafter they moved into the house with their furnishings and their child.

Once the taxpayers had entered into a contract to purchase the Connecticut residence, they listed their residence at 40 Fifth Avenue in New York City for sale with real estate brokers. Petitioners listed the apartment for sale prior to the purchase of the Connecticut residence, during the summer of 1989 and in subsequent years Petitioners aggressively attempted to sell the apartment. Petitioners sold the 40 Fifth Avenue residence on August 19, 1993. Although the apartment remained furnished and supplied with telephone service and utilities, this was at the suggestion of the real estate brokers, who advised Petitioners that this would facilitate the sale of the apartment.

As a result of the depressed state of the real estate market in the Northeast and especially the New York City market for cooperative apartments, the apartment did not sell during the year 1989. Petitioners established their business in Connecticut and changed their voter registrations, driver's licenses and car registrations to Connecticut. For the purposes of this opinion it is presumed that Petitioners changed their domicile to Connecticut on July 7, 1989.

Prior to July 7, 1989, Petitioners spent less than 183 days in New York State. However, between July 7 and December 31, 1989 Petitioners spent approximately five to six nights at the 40 Fifth Avenue residence and a total of approximately 80 days in New York. In the aggregate, the total number of days Petitioners spent in New York State during 1989 exceeded 183 days.

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 eighty-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.

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.

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 cold 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] of the Tax Law.)" 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.

The Appellate Division addressed this further in the Matter of Smith v State Tax Comm, 68 AD2d 993, (1979), where it determined that the taxpayers, who had changed their domicile from New York to Florida during the year, nevertheless were statutory residents since they spent more than 183 days in New York during the taxable year and they maintained a permanent place of abode in New York because they were unable to sell their New York residence during the taxable year. Therein, the taxpayers moved from New York to Florida in July of 1970. In September 1970, the taxpayer sold a large amount of corporate stock. Initially, the stock was taxed on the ground that there was no change of domicile in 1970 and, therefore, the taxpayers were New York residents for the entire year. After a formal hearing, the State Tax Commission held, on June 24, 1977 that although a change in domicile did occur in July, 1970, the taxpayer were taxable as residents for the entire year under section 605(a)(2) of the Tax Law since they maintained a permanent place of abode in New York for the entire year and spent more than 183 days in New York State. The Appellate Division confirmed the assessment, rejecting the taxpayers' argument that they only had notice as to the change of domicile issue and not the issue of whether they were residents under section 605(a)(2) of the Tax Law. The court stated:

> Furthermore, a fair reading of section 605 (subd [a], par [1]) reveals that if the taxpayer could not establish domicile in Florida they would at least in part have to establish that they did not maintain a "permanent place of abode" in New York and did not spend more that 30 days of the taxable year here. On the other hand, if domicile was not in issue, then they would have had to show that no permanent place of abode was maintained in this State and no more than 183 days of the taxable year were spent here (Tax Law, 605, subd [a], par [2]).

In the Matter of Eli and Beatrice Kornblum, Dec Tax App Trib, January 16, 1992, TSB-D-92-(3)I, the Tribunal affirmed the administrative law judge's determination that the petitioners were statutory residents even if a change of domicile was established. Therein, the petitioners sought to prove that they changed their domicile from New York to Florida in October 1983. The administrative law judge determined that the taxpayers had not established a change in domicile, but that even if they did change domicile, they maintained a permanent place of abode in New York State and did not prove that they did not spend at least 183 days of the year in New York for the tax years at issue. Hence, they were properly assessed under section 605(a)(2) of the Tax Law as statutory residents. The Appellate Division in Kornblum v. Tax Appeals Tribunal 194 AD2d 882 affirmed the Tribunal decision stating that the taxpayers continued to be domiciliaries of New York State for the tax years at issue.

In the Matter of Harold M. and Pearl M. Veeder, Dec Tax App Trib, January 20, 1994, TSB-D-94-(4)I, the Tribunal affirmed the administrative law judge's determination that it was unnecessary to resolve the question of the petitioner's domicile because it is clear that, regardless of their domicile, they were statutory residents of New York State because it was established that petitioners maintained a permanent place of abode within New York State during the years in issue and they did not sustain their burden of showing that they did not spend more than 183 days of the taxable year in New York State.

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, 192 NY 238, 250; Kenneth Springer, Adv 0p Comm T & F, February 5, 1993, TSB-A-93(1)I. 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.Twenty-fourth; 20 NYCRR 2376.1(a). Therefore, herein, a determination cannot be made in an Advisory Opinion as to when and/or whether Petitioners changed their domicile from New York to Connecticut during 1989.

However, it is unnecessary to resolve the question of Petitioners' domicile because regardless of their domicile, they maintained a permanent place of abode in New York State for the entire taxable year 1989, and they spent in the aggregate more than 183 days of the taxable year 1989 in New York State.

Accordingly, regardless of Petitioners' domicile, for taxable year 1989, Petitioners are subject to tax as statutory residents of New York State pursuant to section 605(b)(1) of the Tax Law. Kritzik, supra.; Matter of Smith, supra.; Matter of Kornblum, supra.; and Matter of Veeder, supra.

DATED: July 5, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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