

REPORT #799

TAX SECTION

New York State Bar Association

Letter on New York Nonresident

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New York State Bar Association

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August 18, 1994

Honorable James W. Wetzler
 Commissioner of Taxation and Finance
 Building 9, W. A. Harriman Campus
 Albany, New York 12227-1215

Re: New York Nonresident Audit
Guidelines

Dear Commissioner Wetzler:

As you know, the Department of Taxation and Finance recently promulgated revised audit guidelines relating to "residency audits," *i.e.*, personal income tax audits that involve questions of an individual's domicile or statutory residence in New York, or of the allocation of income to New York. The residency audit program has been a source of considerable concern and discussion, and last year the Tax Section commented on an earlier version of these guidelines.¹

We strongly commend you and your staff for these greatly improved guidelines. We are very pleased by the many changes in substance and tone reflected in the revised guidelines, including many changes reflecting our prior comments. We are particularly pleased to see the emphasis that an auditor should compare New York contacts with out-of-state contacts, instead of merely relying on the extent of retained New York contacts.

¹ The Tax Section's comments on the first set of guidelines, issued in February 1993, were provided to you under cover letter dated December 23, 1993.

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Moreover, the new guidelines properly reinforce the message that the purpose of an audit is to "verify the correctness of the return filed," and that the auditor's "mission" is not to find residence but to establish the facts through a fair and balanced inquiry. The guidelines also properly remind auditors of the burdensome and intrusive nature of residency audits, and properly encourage the use of short-form questionnaires and "triage" to require a detailed analysis only where it is warranted.

We do not necessarily agree with all of the conclusions expressed in the guidelines concerning current law,² nor do we believe that every suggested audit question in the guidelines will necessarily be relevant to the ultimate resolution of a particular case. We recognize, however, that the revised guidelines are designed simply as guidelines for the conduct of audits, and are not official pronouncements of existing law. Accordingly, we believe the Department has a legitimate interest in suggesting to its auditors the lines of inquiry discussed in the guidelines. Furthermore, while we believe that there continue to be aspects of the law and regulations that could benefit from substantive reexamination, we recognize that these issues are beyond the scope of the guidelines.

The true test of the revised audit guidelines will come in the field. It is imperative that every auditor engaging in residency audits embrace these guidelines, especially the balanced spirit of the guidelines, as a mission statement. While it will be helpful for taxpayers to be able to refer to the guidelines, the guidelines will achieve their intended effects only if they become reflected in the day-to-day handling of residency audits.

² For example, the guidelines state that membership in and regular attendance at a house of worship are not to be considered at all in evaluating an individual's domicile. We believe, however, that an individual can rightly point to his or her patterns of religious behavior as relevant to domicile.

The promulgation of the revised guidelines also serves to raise another question, which is the degree to which these and other audit guidelines are to be followed by Conciliation conferees and Law Bureau attorneys. Audit guidelines reflect the Commissioner's policy. Where the application of audit guidelines to a particular case leads to the conclusion that a deficiency should not have been asserted, conferees and attorneys should be directed to follow the policies reflected in the guidelines and dispose of the case accordingly. Formalizing a direction to conferees and attorneys to cancel asserted deficiencies where the taxpayer establishes that the case would not have been pursued under the guidelines would be particularly helpful in the residency audit area, given the transition in audit experience as a result of the promulgation of these new guidelines.

We understand you may be planning training programs to acquaint the auditors with the new guidelines. We would be pleased to assist you in this effort in any way. Again, we thank you for your responsiveness to our comments, and for the thoughtful and comprehensive revisions to the nonresident audit guidelines.

Very truly yours,

Michael Schler
Chair, Tax Section

cc: William F. Collins, Esq.