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August 14, 2009

Mr. John W. Bartlett
Director of Regulations
New York State Department of Taxation and Finance
Building 9, Room 161
W. A. Harriman Campus
Albany, New York 12227

Re: Draft Amendments to Residency Rules
for Student Housing¹

Dear Mr. Bartlett:

We are responding to your letter dated July 21, 2009, requesting comments or suggestions regarding a draft amendment of 20 NYCRR Section 105.20 (attached).

Under New York State Tax Law Section 605(b), an individual is taxable as a resident for personal income tax purposes if he or she is either a domiciliary or a statutory resident. The tax law defines a statutory resident as a

¹ This letter was prepared by Paul R. Comeau, Co-Chair of the Individuals Committee of the Tax Section of the New York State Bar Association. (The letter may be referred to as New York State Bar Association Tax Section, *Letter to John W. Bartlett re Proposed Amendments to Residency Rules for Student Housing* (Report No. 1187, Aug. 14, 2009).) Helpful comments were received from Kimberly S. Blanchard, Robert E. Brown, Peter L. Faber, Robert J. Levinsohn, Maria T. Jones, Jeffrey S. Reed, Arthur R. Rosen, Michael J. Schler, and Irwin M. Slomka.

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person who in a given year is not domiciled in the State but who maintains a permanent place of abode in the State and spends more than 183 days of the year in the State. Tax Law Section 605(b)(1)(B). The statutory residence concept was intended as an objective surrogate for the concept of domicile, the Legislature recognizing that domicile, being subjective, would often be hard to prove.

The draft amendment to the regulations addresses the question of when a permanent place of abode is maintained. Existing regulations and cases already provide considerable guidance on this subject. Generally, a place suitable for year-round living (heated, insulated, accessible) with cooking, bathing, and sleeping facilities and used or available for use as a dwelling by the individual qualifies as a place of abode. An apartment house or vacation quarters may qualify, whether they are rented, owned, or simply used regularly and freely by the individual. A place maintained by one spouse is generally deemed to be maintained by the other.

The proposed change in the regulations would carve out a special exception for undergraduate student housing. The exception would apply to dormitories, houses, or apartments, even if the abode otherwise met the “normal” criteria set forth above.

The new language consists of two changes to Section 105.20(e)(1). First, the term “dwelling place permanently maintained” would be changed to “dwelling place of a permanent nature.” Second, the following two sentences would be added at the end of the section:

“A dwelling place maintained by a full-time student enrolled at an institution of higher education, as defined in section 606(t)(3) of the Tax Law, in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent place of abode with respect to that student. A full-time student is an individual who is carrying a minimum courseload in such program of 12 credit hours per semester for at least 2 semesters, or the equivalent, during the individual’s taxable year.”

Overall Comment. We commend the Department for attempting to bring clarity to an area of the tax law that has given rise to much controversy over the years. Nevertheless, the regulation in some respects could cause confusion. During the past year, the Department amended these regulations to eliminate the “temporary stay” language, which treated an abode as “temporary” rather than “permanent” if the occupant was in New York for a limited duration and to accomplish a particular purpose. The underlying statute, which requires a “permanent” place of abode, was not amended, but a portion of the regulations was deleted without the addition of any new language. In an earlier report, the Tax Section questioned the elimination of the temporary stay language, reasoning that treating a person who was in the State temporarily for a limited purpose as a resident was inconsistent with the statutory language that required a permanent place of abode and that was intended by the Legislature to be an objective equivalent

of domicile, which implies permanent residence.² Although you have not asked us to comment on the earlier amendment, we remain of the view expressed in our earlier report that the “temporary stay” exception is implicit in the statute and the Department’s longstanding recognition of this cannot be changed by the removal of the “temporary stay” example from the regulations.³

Advisory opinions⁴ and other guidance under the old regulations seemed to imply that a person domiciled outside New York and coming into the State to enroll as a student might qualify as a “temporary” resident taxable as a nonresident. The elimination of the “temporary stay” language from the regulations may have led some to wonder whether the “student” exception had also been eliminated. The regulation will be helpful in clarifying that the student exception continues to apply.

Although we agree that students who are in the State temporarily to pursue a course of study should not be treated as residents for tax purposes if they are not otherwise domiciled in the State (as stated in our November 2008 report), we believe that the same treatment should be extended to individuals other than students who come into the State for a limited purpose for a limited period of time. Accordingly, we recommend that the Department provide additional examples of such situations, and that the regulations dealing with student housing make clear that the exception for students is not exclusive.

Assuming that the regulations are to contain a limited exception for student housing, more detail and examples would be helpful. For example, many dormitories do not have cooking facilities for each residential unit and many have shared bathrooms. It would be helpful if the regulations provided specifically that dormitory housing could under no circumstances be a permanent place of abode. If the Department’s intention is to focus only on year-round student housing, including off-campus homes or apartments with cooking, bathing, and sleeping facilities suitable for and in fact used by the student for substantially the entire tax year (more than 11 months), the regulations should so provide.

We assume that a person who is domiciled in the State remains a tax resident even though he or she occupies housing in the State as a student while pursuing a degree. The regulations should make clear that they apply only to the statutory residence test and do not affect the determination of whether a person is a tax resident in the state by reason of being domiciled there.

² New York State Bar Association Tax Section, *Report on the Proposed Removal of the “Temporary Stay” Exception from 20 NYCRR Section 105.20(e)(1)* (Report No. 1171, Nov. 26, 2008).

³ “The Court of Appeals has recognized that the failure of the State or local legislatures to reverse a long-standing interpretation of a statute is a strong indication that the interpretation is the correct one.” *In the Matter of American Airlines, Inc.*, New York City Tax Appeals Tribunal, TAT(E)05-29(HO) (June 29, 2009), citing *Matter of Will of Schinasi*, 277 N.Y. 252, 265-266 (N.Y. 1938); *RKO-Keith-Orpheum Theatres, Inc v City of New York*, 308 N.Y. 493, 500 (N.Y. 1955); *Engle v. Talarico*, 33 N.Y.2d 237, 242 (N.Y. 1973); *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 78 (N.Y. 1981); see also McKinney’s Statutes § 129(a).

⁴ See TSB-A-97(8)I and TSB-A-97(10)I.

Comment on the First Change. Under the draft amendment, the term “dwelling place permanently maintained” would be changed to “dwelling place of a permanent nature.” This is a significant substantive change, focusing on the “nature” of the dwelling rather than its “maintenance.” Maintenance implies use, funding, upkeep, and the like, while “nature” seems focused on the kind of structure involved. This could be viewed as eliminating any exception for “transitory” housing, whether dormitories for students, barracks for members of the armed forces, or temporary quarters for transitional employees. We believe that such a change would be inconsistent with the statute and with the Legislature’s purpose in enacting the statute, which was to provide an objective determination of a domicile equivalent. Accordingly, we recommend that this change not be made.

Comments on the Second Change. We have several comments on this part of the draft regulation.

We believe that there should be no requirement that the school assign the housing. The regulation should make this clear.

We believe that a place already occupied by a student should be included in the exception if the education and other requirements are met. For example, if an Ohio taxpayer comes to New York City in order to seek a career in the performing arts, and later concludes that pursuing further education is a better option, the taxpayer’s apartment should be eligible for the exception once he or she becomes a student assuming that the taxpayer’s domicile is still Ohio, because the taxpayer’s reason for living in the state has changed. Regulations should clarify this point. (As noted above, the regulation would have no effect on a determination as to the person’s domicile.) Accordingly, if a non-domiciliary was already a statutory resident by reason of maintaining a permanent place of abode in the State and meeting the day count requirement, the regulations should provide that the exception applies for a given year if the educational and other requirements are met.

Maintenance by the student should not require the payment of rent or other expenses by the student. Put another way, if the housing is paid for by the student’s parents or friends or by a grant from the educational institution, a government, or a foundation, those payments should be viewed for purposes of this regulation as payments to the student followed by payments by the student for the maintenance of the apartment.

The draft amendment would limit the exception to students enrolled in undergraduate programs leading to a degree. We see no legal or policy reason for distinguishing between undergraduates and students enrolled in graduate or professional schools. For that matter, if a student is full-time, it should not matter that he or she is enrolled in a technical or trade school. We recognize that this is a matter of policy, but we can see no principled reason for limiting the exception to undergraduates. The regulation should also provide that the exception is not lost if the person fails to obtain a degree, as long as he or she was enrolled as a full-time student for the requisite period.

The regulations should provide that the same place of abode need not be occupied by the student throughout the year. For example, a student may live in one place in the spring semester and in a different place in the fall semester that follows it. A less common example would be a student, not domiciled in New York, who lives in his or her parents' home for five months during the year while enrolled in college, and then moves into a dormitory for the remaining seven months. The parents' home should qualify for the exception. That the dwelling may have multiple occupants (e.g., family members, friends) should not affect qualification for the exception.

We believe that the exception should apply not only to the student but also to other immediate family members such as the student's spouse and children.

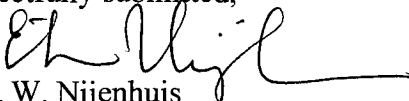
The Department has indicated elsewhere that a place of abode is generally not "permanent" unless it is maintained for "substantially all of the taxable year," which has been defined as at least 11 months during the calendar year.⁵ The regulations should indicate that the requirement that the student housing be occupied for at least two semesters during the year does not affect the 11-month rule.

In fact, we question as a matter of policy whether the two-semester rule is appropriate. This would mean that the exception would not apply to a year in which the student begins the educational program (presumably in August or September) or ends the program (presumably in May or June). We recommend that the regulations provide that student housing is not treated as a permanent place of abode as long as the taxpayer is a full-time student for a semester that begins or ends during the year. Obviously, the housing occupied before or after enrollment would not be eligible for the exception.

We appreciate the opportunity to provide these comments. We would be pleased to work with you and your staff in connection with the proposed amendments, and, again, we compliment you for your efforts in bringing clarity to this important area of the law.

* * *

Respectfully submitted,


Erika W. Nijenhuis
Chair

cc: Kathleen D. O'Connell
Tax Regulations Specialist 2

Enclosure

⁵ Audit Guidelines ¶ 1001.5.B.1. TSB-M-09(2)I.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, subsection (a) of section 697, and subsection (b)(1) of section 605 of the Tax Law, the Commissioner of Taxation and Finance hereby makes and adopts the following amendments to the New York State Personal Income Tax Regulations under Article 22 of the Tax Law, as published in Subchapter A of Chapter II of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, such amendments to read as follows:

Section 1. Paragraph (1) of subdivision (e) of section 105.20 of such regulations is amended to read as follows:

(1) A permanent place of abode means a dwelling place [permanently] of a permanent nature 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. A dwelling place maintained by a full-time student enrolled at an institution of higher education, as defined in section 606(t)(3) of the Tax Law, in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent place of abode with respect to that student. A full-time student is an individual who is carrying a minimum courseload in such program of 12 credit hours per semester for at least 2 semesters, or the equivalent, during the individual's taxable year.

Section 2. These amendments shall take effect on the date that the Notice of Adoption is published in the State Register, and shall apply to taxable years ending on or after December 31, 2009.

Dated: Albany, New York
XXX, 2009

Jamie Woodward
Acting Commissioner and Executive Deputy
Commissioner of Taxation and Finance

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