

## **Inbound to New York? Understanding the Nonresident Income Tax Status Rules**

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A number of contentious issues have arisen in recent years concerning New York state individual income taxation as the New York State Department of Taxation & Finance (the "Department") has honed in on additional revenue-raising opportunities. They include nonresident tax withholding by employers, domicile issues for taxpayers with homes in multiple states, including "snowbirds", and, the subject of this article, the nonresident tax treatment accorded to foreign nationals working in New York State (and, if applicable, City) for a limited period of time.

A particular fiscal benefit accorded to foreign nationals in the Tri-State region in recent years has been nonresident tax status. New York, Connecticut and New Jersey apply similar rules with varying criteria. State taxing authorities saw fit some years ago to tax such individuals, whose permanent home (a.k.a. "domicile", more about this later) is outside the US but who physically reside within the State (or City), on state source income only rather than worldwide income, provided certain conditions are met. The mechanism arguably carries the advantage of encouraging skilled foreigners and their employers to conduct operations within New York, New Jersey and Connecticut.

Many companies assign foreign national employees to New York State (City) for two to three years. Many of these assignees have taken advantage of the New York exception to "statutory residency" that permits those assigned to New York for a "temporary period" for a "particular purpose" to claim New York nonresident tax status. Essentially, the benefits of this status are that New York City resident tax, if applicable, may be avoided completely on all income, New York State tax is only imposed on earned income for days worked in the state, and outside investment income from sources other than New York also falls outside the tax base. In many cases, the claiming of such status can, therefore, yield significant tax savings with 2006 State and City income marginal tax rates at 6.85% and 3.648%, respectively (and even higher in recent years).

So, what's the problem? As far back as the mid 1990s, the Department announced its position regarding its strict interpretation of these "temporary period" and "particular purpose" rules. <sup>(1)</sup>

The real issue lies in the potential lack of understanding of these rules by taxpayers and the losing combination of absent assignment documentation and noticeably increased audit activity in this arena. A number of taxpayers have found themselves in indefensible positions on the nonresident positions taken on their tax returns.

### **The Basic Rule - Statutory Residency**

Section 605(b)(1)(B) of the New York state tax law provides that a "resident individual" includes an individual who is not *domiciled* in New York 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 (*emphasis added*).

The concept of "domicile" was defined by Roman Law based upon the word "domus" (meaning home or house) and connotes the idea of permanent home to which one will return from any temporary stay in another location. The rule has changed very little since and so remains as unclear as in its former glory. This, however, is a subject for another day.

Assuming that the Department accepts a person's non-domicile status in New York, the "permanent place of abode" requirement is often the basis for its denial of the nonresident tax status to foreign nationals.

### **"Permanent Place of Abode"**

Section 105.20(e)(1) of the Personal Income Tax Regulations (Regulations) defines a "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. However, a place of abode, whether in New York or elsewhere, is not deemed permanent if the stay is only "temporary" (i.e. for a fixed and limited period), and is for the accomplishment of a "particular purpose".

### **"Fixed and Limited Period"**

Section 105.20(e)(1) of the Regulations provides guidance on the term "temporary." Accordingly, it means a fixed and limited period as opposed to a stay of indefinite duration. The Regulations specify that an employee's stay in New York will be presumed to be temporary (i.e., the presence in New York is 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**, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years.

What this points to is not simply the arbitrary timeline drawn in the sand by the Department as to when "temporary" ends but also the critical importance of assignment documentation to support the intended duration.

The position is further complicated by the fact that the sands of time proverbially shift. New York has not always followed its own doctrine as to the maximum of the three years but without full explanation has granted an additional year but under very fact-specific circumstances to permit religious school attendance.

### **"Particular Purpose"**

The Regulations also provide guidance on the meaning of the phrase "particular purpose." Where an individual is present in New York 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, he or she will be considered to be in New York for a particular purpose (*emphasis added*).

The Regulations give the example of an individual working in California who is assigned to New York to install a piece of equipment. Once the equipment is installed, the individual returns to California. That assignment would be for a particular purpose.

However the Department's 1997 Audit Manual cites an example where a salesman with years of experience in a particular product line is assigned to New York as a sales manager because New York sales are weak with regard to that product. It is expected that the individual will devote substantial efforts towards improving those sales. However, work performed as a sales manager constitutes general duties in New York's view as opposed to a particular purpose, since it is the general goal of every company to sell its products. In these circumstances, the

assignment would not be for a particular purpose. Although the Manual seems to be at pains to stress the difference in activity as opposed to the actors involved here, one cannot help but think that the belief seems to be that we can all be salespeople, but few of us engineers.

### **Advisory Opinions**

There have been a couple of New York Advisory Opinions in recent years regarding assignees of an Italian bank, which confirm the Department's narrower interpretation of these rules. [\(2\)](#)

In one case, the temporary transfer of the employee to the New York branch with the objective of "enlarging the employee's knowledge of multinational banking" was deemed to be too general in nature with general goals and conclusions than intended by section 105.20(e)(1) of the Personal Income Tax Regulations. Also, the term of the employee's assignment was open ended. Clearly, the taxpayer suffered from a lack of specificity in the documentation surrounding the assignment.

New York's position on these matters seems to have achieved their objective of narrowing effectively a foreign national taxpayer's filing options – in many cases a nonresident tax position is no longer tenable. However, one certainty seems vacuum-packed - no documentation; no argument. But is there another option available to optimize one's tax position?

### **"Substantially All Of The Taxable Year"**

A deliberate omission in emphasis on our part in our statement above of section 105.20(e)(1) of the Personal Income Tax Regulations (but no doubt not lost on some) is the fact that permanent place of abode comes with a qualifier, namely that New York tax residence is predicated on the maintenance of such for "*substantially all of the taxable year* (generally, the entire taxable year disregarding small portions of such year)". As such, it opens the door not simply to the definition of the term itself but also a question as to *how long* in the calendar year such a permanent place of abode has been maintained.

The impact of this is exemplified by another Advisory position concerning a Connecticut domiciled taxpayer who, while spending greater than 183 days in New York, donated the use of his place of abode located in New York State to a charitable organization for a

three-month period during the year and was deemed to qualify as a nonresident throughout the year <sup>(3)</sup> .

The Office of Tax Policy Analysis Technical Services Division of the Department concluded that, the reference to "substantially all the year" is a "general" as opposed to an "absolute" stating:

**"substantially all the taxable year means a period exceeding 11 months.** For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, s/he too, would not be a statutory resident despite spending over 183 days in New York. Since the individual in each of the above examples did not maintain their permanent place of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year."

As such, in the assignment context, it appears this position can be reasonably relied upon by individual taxpayers, of international origin or otherwise, to claim non-residence throughout the year in years of arrival to and departure from New York State.

The reference to "absolute" versus "general" appears to be the anti-avoidance catch-all to be used by the Department. The concern is to guard against the taxpayer manipulating the rule whereby one month in aggregate of non-availability of the permanent place of abode is engineered while in reality the dwelling is at his/her disposal throughout the year.

## **Summary**

Where does this leave us?

Basic housekeeping is a must. If an assignee would qualify for non-residence under the particular purpose rules, documentation is clearly paramount and which contains the level of specificity required to satisfy the requirements. The burden of proof lies with taxpayer to establish the merits of the claim. International assignment policies may need to be revised in order to meet the parameters laid down by the Department.

Second, tax returns filed with the authorities should contain appropriate disclosure in order to claim entitlement to the nonresident position. Even in the apparently more objective criterion of "substantially all the year", appropriate disclosure is required to claim entitlement in duly filed tax returns.

Lastly, what about the past? There may well be residual issues to deal with, perhaps even current audit activity, for which professional advice should be sought. If no such activity, it may still be worth taking advice to consider filing amended tax return(s) on a proactive basis. Our experience tells us that pre-emptive action is generally worthwhile but is clearly dependent upon what is at stake. Professional advice should be sought before acting or making any direct contact with the tax authorities.

**This article is based upon the law and regulations at the time of writing, or to the judicial and administrative interpretations thereof and does not constitute taxpayer advice. The taxpayer should contact a tax advisor upon receiving any inquiries from any taxing authorities and should review the most recent laws, regulations and cases relating to audit procedures.**

### **Footnotes:**

(1) Pre-1993, New York tax auditors appeared inconsistent in their approach to income tax audits. 1993 saw an attempt by the New York Department of Taxation and Finance to provide more uniformity when it issued a comprehensive set of field audit guidelines. The Revised Manual for Non-Resident Audits issued in July of 1997 severely restricts the application of the temporary assignment exemption.

(2) Banca Nazionale del Lavoro, Petition No. I980618B, TSB-A-98(10)I; Roberto Mancone, Petition No.:I980618C, TSB-A-98(11)I

(3) Marcum & Kliegman, LLP Petition No. I040115A, TSB-A-04(4)I  
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