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November 26, 2008

The Honorable Robert L. Megna  
Commissioner of Taxation and Finance  
New York State Department of Taxation and Finance  
Building 9, State Campus  
Albany, NY 12227

The Honorable William Ryan  
Director, Taxpayer Guidance Division  
New York State Department of Taxation and Finance  
Building 9, State Campus  
Albany, NY 12227

Re: Report on the Proposed Removal of the "Temporary Stay"  
Exception from 20 NYCRR Section 105.20(e)(1)

Dear Commissioner Megna and Director Ryan:

By way of background, there are two statutory bases to tax an individual as a resident in New York. First, New York taxes an individual as a resident if the individual is "domiciled" in the state (i.e., the individual intends for New York State to be the individual's fixed and permanent home).<sup>1</sup> Second, New York also taxes an individual as a resident if the individual is not domiciled in New York State but "maintains a permanent place of abode" in New York and spends more than 183 days of the taxable year in New York (i.e., the individual is a "statutory resident").<sup>2</sup> The consequence of being

N.Y. Tax Law § 605(b)(1)(A).

N.Y. Tax Law § 605(b)(1)(B).

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taxed as a resident under either basis is that the individual is taxed on all of his or her income, whereas a non-resident is taxed only on items of income attributable to New York sources. The existing regulations provide that an individual is not treated as maintaining a permanent place of abode in the state if the individual's dwelling is maintained only during a "temporary stay" for the accomplishment of a particular purpose.<sup>3</sup> The "temporary stay" exception protects individuals who are in New York only for a temporary period of time from being taxed as residents.

The Department of Taxation and Finance recently issued Notice TAF-42-08-00016-P which announces that the Department intends to amend, retroactive to January 1, 2008, personal income tax regulation section 105.20(e)(1) to remove the "temporary stay" exception. The amendment would also apply for New York City tax purposes.

We write to recommend that the Department retain the "temporary stay" provision of the existing regulations (rather than deleting it, as the Notice proposes), but that the regulations provide reasonable limits on the exemption. More specifically, we recommend that the regulation deny the temporary stay exception for individuals who expect to live in New York State for more than three years. This test would be easily understood by taxpayers and would be easy for auditors to apply. Further, to prevent abuse, we recommend that taxpayers be required to show that they have a limited purpose for being in New York on a temporary stay, such as an offer of temporary employment. We also recommend that the regulations provide that college students and individuals in New York due to a medical emergency that arose while in New York are not maintaining a "permanent place of abode" in New York.

There are two reasons for our recommendation that the temporary stay exception be retained in the regulations. First, we do not believe that eliminating the temporary stay exception from the regulations will necessarily eliminate the temporary stay exception. In particular, taxpayers who are in New York only for a temporary period of time may still be able to demonstrate that they are not permanently maintaining a place of abode in New York based on section 605(b)(1)(B) of the Tax Law and its legislative history. Second, we believe our suggestion will help effect the Department's objective to clarify the "permanent place of abode" test in section 605(b)(1)(B), will produce consistent and non-arbitrary results, and prevent potential abuses.

In the event that you do not adopt our recommendation, we request that any amendment to the regulations apply on a prospective basis only. The regulation has been in effect for 16 years and taxpayers have been relying on it.

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<sup>3</sup> 20 NYCRR § 105.20(e)(1).

We appreciate your consideration of our comments. We would be pleased to discuss these matters with you further or to provide any other assistance that you would find helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Miller", written over the text "Respectfully submitted,".

David S. Miller  
Chair

Enclosure

cc: The Honorable Daniel Smirlock  
Deputy Commissioner and Counsel of the  
Department of Taxation and Finance  
New York State Department of Taxation and Finance  
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The Honorable William Comiskey  
Deputy Commissioner of Enforcement and Operations  
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The Honorable Jamie Woodward  
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