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)

INTRODUCTION

There are two statutory bases for taxing 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).[1] 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").[2] The consequence of being taxed as a resident under either basis is that an 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.[3]

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 (the "Department") recently issued Notice TAF-42-08-00016-P (the "Notice"), 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

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[1] N.Y. Tax Law § 605(b)(1)(A).

All references to section numbers are to the N.Y. Tax Law or the regulations promulgated or proposed thereunder.

[2] N.Y. Tax Law § 605(b)(1)(B).

[3] 20 NYCRR § 105.20(e)(1).

would also apply for New York City tax purposes. This report responds to the request for comments made in the Notice.[4]

We 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. There are two reasons for this recommendation. 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.

I. BACKGROUND

As mentioned above, New York taxes an individual who is not domiciled in New York as a resident if the individual "maintains a permanent place of abode" in the state and spends more than 183 days of the taxable year in New York (i.e., the individual is a "statutory resident").[5] The statute does not define the term "permanent place of abode." The 1922 legislative history notes that the statutory resident definition was aimed at individuals:

> who, while really and [for] all intents and purposes [are] residents of [New York] have maintained voting residency elsewhere and

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[4] The principal author of this report is Jeffrey S. Reed. Substantial comments were provided by Peter Blessing, Peter L. Faber, Maria T. Jones, Carolyn Joy Lee, Robert J. Levinsohn, David S. Miller, Arthur R. Rosen and Irwin L. Slomka.

[5] N.Y. Tax Law § 605(b)(1)(B).

> insist on paying taxes to us as nonresidents. We have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes...but they vote from their summer residences...or their winter residences...and claim to be nonresidents.[6]

The intent was that the statutory resident designation would

> do away with a lot of this faking and will probably result in a man conceiving his domicile to be the place where he really resides. Undoubtedly, a number of these people, if they have to pay income taxes in New York as residents, will decide to call themselves residents of New York so as not to pay income taxes as residents in the state where they merely have a summer place.[7]

Later legislative history is consistent with this.[8]

The regulations have contained a "temporary stay" exception since at least 1972.[9] The current version of the regulations was effective from January 29, 1992.[10] It provides, unhelpfully, that an individual maintains a permanent place of abode when there is a dwelling place permanently maintained by the taxpayer.[11] However, the regulation also sets forth two exceptions or circumstances under which an individual will *not* be considered maintaining a "permanent place of abode" in the state. First, an individual is not treated as maintaining a permanent place of

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6 1922 Income Tax Bureau Memorandum (contained in the bill jacket).

7 *Id.*

8 1954 Income Tax Bureau Memorandum (contained in the bill jacket) ("Individuals who really are residents nevertheless manage to comply with the present seven months rule by spending long weekends, holidays and vacations outside the State. For example, a wealthy individual maintains a place of abode in New York and also a place of abode outside the State. His sole business interest is in New York but [through using short work weeks, long weekends, and vacations] he is able to avoid the imposition of the New York personal income tax even though he should be considered a resident.").

9 *See* former 20 NYCRR § 102.2(e).

10 20 NYCRR §105.20(e)(1).

11 *Id.* (providing that an individual is maintaining a permanent place of abode when there is "a dwelling place permanently maintained by the taxpayer").

abode in New York if the individual's in-state dwelling is not suited to be a permanent home (for example, the dwelling is a camp or cottage and is only suitable for habitation during part of a year).[12]

Second, the regulation provides that an individual does not maintain 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. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State.[13]

This is known as the "temporary stay" exception. The temporary stay exception has been the subject of a significant amount of litigation. Prior to 1997, the Department interpreted the

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[12] *Id.* ("[A] mere camp or cottage, which is suitable and used only for vacations, it 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."). For a recent application of this exception, *see Joseph and Kathleen Slavin*, ALJ Determination DTA No. 820744 (July 7, 2007) (property with no cable service and that was nearly impossible to access in winter months was a camp or cottage and not a "permanent place of abode").

[13] *Id.* (emphasis supplied).

exception to apply quite broadly. For example, an advisory opinion issued shortly after the 1992 version of the regulation was adopted concluded that a nondomiciliary individual who contracted to be the managing partner of a law firm's New York office for a four-year period was not maintaining a permanent place of abode in New York while living in a New York apartment during that four-year period.[14] In reaching that conclusion, the advisory opinion noted that the individual's stay in New York was temporary rather than permanent, as his contract was of a "fixed and limited period of four years." Shortly thereafter, the Department ruled that an individual who was present in New York to fulfill a four-year contract did not maintain a permanent place of abode in the state.[15] This second ruling could be considered more expansive than the first ruling because the second advisory opinion did not list a specific purpose for the four-year employment contract (whereas, in the first advisory opinion, the four-year contract was specifically for management of the firm's New York office).

The Department's 1997 personal income tax audit guidelines (the "audit guidelines") limit the temporary stay exception in two fundamental ways. First, the audit guidelines create a presumption that an individual's stay is deemed temporary if it is reasonably expected to last for three years or less; however, the Department can offer evidence rebutting that presumption.[16] Stays of longer than three years are considered permanent (i.e., non-temporary). Second, the

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[14] *Mr. A.*, New York Advisory Opinion TSB-A-94(15)I (Jan. 5, 1995).

[15] *Charles M. Harper*, New York Advisory Opinion TSB-A-94(3)I (Feb. 7, 1994).

[16] New York State Department of Taxation and Finance Nonresident Audit Guidelines, para. 5C, p. 40 ("[I]t is the Department's position that an employee will be presumed present in New York State for a fixed and limited period (i.e., the stay in New York is temporary) 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 more than three years, even if it does not actually exceed three years. The employee must determine if the stay will be temporary or indefinite at the time the employee starts work in New York.").

audit guidelines state that the temporary stay exception will not apply unless the individual is present in New York State "to accomplish a specific assignment [with] readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions."[17] By way of example, the audit guidelines provide that an individual assigned to install a particular piece of equipment in New York qualifies for the temporary stay exception, but a worker who is located in New York State to perform a more general assignment, "such as to be an executive of the company, a sales manager or production line worker," does not qualify for the exception.[18] Therefore, the audit guidelines essentially contain two new "tests" that an individual must meet to qualify for the temporary stay exception: (1) presence in New York State for three years or less; and (2) a specific, non-general, work-related purpose for being in New York State.

Following the issuance of the 1997 audit guidelines, there has been confusion about the scope of the temporary stay exception, and whether the tests contained in the audit guidelines would be applied by judges interpreting the temporary stay exception. There have been no New York State Tax Appeals Tribunal decisions on this issue so there is no binding precedent, and administrative law judges have ruled for and against taxpayers on the issue. One administrative law judge decision rejected the approach taken in the guidelines and determined that a taxpayer qualified for the temporary stay exception despite living in New York for almost ten years.[19] The taxpayer in the case moved to New York in 1987 from New Jersey to pursue a medical

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[17] *Id.* at 40-41.

[18] *Id.* Thus, the approach adopted in the 1997 audit guidelines would likely reverse TSB-A-94(15)I and treat the managing partner of a law firm as having a permanent place of abode in New York, even if the individual's tenure is three years or less because managing a law firm office would likely be considered a general assignment with general goals and conclusions.

[19] *Matter of Laura Kaltenbacher-Ross*, Docket No. 818499, ALJ Determination (May 29, 2003).

degree. She completed medical school in 1991, stayed in New York to complete her residency program, switched specialties in 1994, married a New Yorker in 1994 and in 1997 decided to stay in New York and raise a family in New York. The years at issue were 1994 through 1996. The taxpayer argued that she was in New York during those years only to complete her residency. Accordingly, viewing her frame of mind based only on the audit period, she intended to be in New York temporarily to accomplish a specific purpose. The ALJ agreed with the taxpayer and rejected the Department's arguments, based on the audit guidelines, that the temporary stay exception did not apply because the taxpayer (1) was in New York for over three years; and (2) did not have a specific, non-general work related task that she was seeking to accomplish in New York. In its determination, the ALJ specifically noted that the 1997 audit guidelines were not binding on the Division of Tax Appeals.

More recent ALJ determinations have effectively adopted the position taken by the Department in the audit guidelines. These determinations, while sometimes noting that the audit guidelines are not binding,[20] generally require taxpayers to produce evidence demonstrating both that (1) they intend to be in New York for a limited period of time; and (2) that they have a specific, non-general work-related reason for being in New York. A fairly typical case in this regard is *Matter of Vazquez*, in which a Venezuela citizen working for an investment firm argued that the temporary stay exception applied.[21] The taxpayer began employment at the firm in 1998

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[20] *See Matter of Naftali and Shiri Hirsch*, Docket No. 819652, ALJ Determination (December 15, 2005) ("The income tax field audit guidelines which provide that an employee is presumed to be present in the State for a fixed and limited period (a temporary stay) if the duration of the stay is reasonably expected to last for three years or less and for an indefinite duration if the stay is expected to last for more than three years is simply a guideline for the Division's auditors, rather than a law or a regulation. It is certainly not binding or dispositive in this forum.)."

[21] *Matter of Vazquez*, Docket No. 819810, ALJ Determination (May 5, 2005).

and focused on Latin American project finance work; he was named head of the firm's mergers and acquisitions department by 2002. The audit period was 2000 and 2001, during which time the taxpayer rented an apartment in New York City. The taxpayer argued that he qualified for the temporary stay exception because he was only in New York on a temporary basis (until his visa ran out) and had a specific, work-related purpose for being in New York (namely, to focus specifically on Latin American project finance work). The ALJ disagreed and determined that the taxpayer had not met his burden of proving that his stay in New York was temporary. In particular, the taxpayer had not provided a particular date when his assignment would end and his contract with his employer was on an "at will" basis. Additionally, the ALJ determined that the taxpayer did not meet his burden of showing that his stay in New York was for the accomplishment of a particular purpose, because neither the taxpayer's offer of employment nor his job description described a specific project or referred to a specific transaction that the taxpayer was in New York to accomplish.

As noted, these ALJ determinations and the audit guidelines themselves have no legal force or effect, which leaves the precise contours of the temporary stay exception unclear.

II. THE EFFECT OF ELIMINATING THE TEMPORARY STAY EXCEPTION

If the temporary stay exception no longer existed, individuals who currently qualify for the temporary stay exception would be taxed as statutory residents in New York. This would mean that New York would tax all their income. These individuals would also be taxed on all of their income in their state of domicile if they are domiciled in another jurisdiction, like New York, that imposes an income tax on individuals and taxes domiciliaries as residents.

New York grants residents a credit for tax paid to other states, but the credit is available only to the extent that the tax paid to the other state is attributable to items of income derived from that state.[22] The majority of states restrict credits in this manner.

Accordingly, in the typical case, an individual who loses the benefit of the temporary stay exception will be taxed by New York on all of his or her income and will receive a credit in his or her domicile state for the wages associated with work performed in New York. However, assuming that the credit rules in the domicile state are similar to the New York credit rules, neither New York nor the domicile state would allow a credit for income that is not associated with the other state, such as investment income. Therefore, that income will be taxed twice, both by New York and by the domicile state. This may be contrasted with the current treatment, under which individuals qualifying for the temporary stay exception are taxed by New York on their New York source income, such as New York wages, and generally receive a credit in their state of domicile for the tax associated with New York wage income.

New York City currently does not impose an income tax on non-residents. Therefore, under the current regulations, individuals who qualify for the temporary stay exception are not subject to New York City tax. If, however, the temporary stay exception were eliminated, these individuals would become residents of New York City and will be taxed on all of their income.

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[22] N.Y. Tax Law § 620.

III. COMMENTS AND RECOMMENDATIONS

A. Legal Effect of Eliminating the Temporary Stay Exception from the Regulation

The proposed regulation would simply eliminate the temporary stay exception from the statutory resident regulation, but it does not expressly preclude a temporary stay exception.

Following the amendment, it is possible that a taxpayer who maintains an apartment in New York for a temporary period of time could successfully argue that he or she is not "maintaining a permanent place of abode" in New York within the meaning of section 605(b)(1)(B) because his or her apartment is not being maintained on a *permanent* basis. Additionally, the legislative history and the Department's longstanding interpretation of the statute supports the argument that an apartment maintained for a temporary period of time is not maintained on a permanent basis within the meaning of the statute.

Therefore, it is unclear whether eliminating the temporary stay exception from the regulation will eliminate the temporary stay exception. As a result, taxpayers in New York for only a temporary period of time will likely take different filing positions, will likely achieve different and potentially arbitrary results, and litigation will almost certainly result.

B. Revise the Statutory Resident Regulation to Provide Reasonable Limitations on the Temporary Stay Exception

To prevent the confusion that will likely result from eliminating the temporary stay exception from the regulation, and to put an end to the confusion that has existed with respect to the temporary stay exception, we recommend revising the regulation to place reasonable limitations on the temporary stay exception. Our suggestion would help taxpayers to determine how they should be filing. Additionally, reasonable limitations would aid in curbing tax abuse

and would help ensure fairness. If the regulation is properly revised, it will produce consistent and sensible tax results for non-domiciled individuals living in New York on a temporary basis. Our suggestions for the revised regulation, which draw heavily on the audit guidelines, are as follows.

1. Three Year Limitation

We recommend that the three year limitation contained in the audit guidelines be placed in the revised regulation. The three year limitation prevents abuses—for example, an individual living in New York for ten years cannot argue that his or her abode is being maintained on a temporary basis. It also sets a clear bright line standard that taxpayers can follow and easily apply. Three years is a reasonable proxy for "non-permanent" and is the standard we suggest should be used in the revised regulation.

2. Rebuttable Presumption

We recommend that the Department be given express authority to rebut any taxpayer claim that the taxpayer is in New York or intends to be in New York for three years or less. The audit guidelines provide a similar anti-abuse rule. For example, if a taxpayer claims that he or she qualifies for the temporary stay exception and intends to be in New York only for a short period of time, the exception should not apply if the Department is able to produce evidence demonstrating that the taxpayer intends to be in New York for a long period of time. Such evidence could include, for example, an offer of indefinite employment with a New York-based employer or proof that the taxpayer has signed a long term New York apartment lease.

3. Purpose

In order to qualify for the temporary stay exception, we recommend that taxpayers be required to show a particular purpose for being in New York for a limited period of time. This is only reasonable – to show that an abode is not being maintained on a "permanent" basis, a taxpayer should be able to provide a reason why the taxpayer will not be maintaining that abode permanently. We recommend that the revised regulation make clear that only a documented purpose for being in New York for a temporary period of time will meet the requirement. For example, a one-year letter of employment from a New York employer or proof of enrollment in a New York university's one year graduate program would meet the requirement.

This approach may be contrasted with the approach in the 1997 audit guidelines, which requires taxpayers to show a limited, work-related purpose for being in New York in order to qualify for the temporary stay exception. We believe that the 1997 audit guidelines set up a potentially artificial distinction by recognizing the temporary stay exception if a taxpayer is working for an employer on a particular project but do not recognize the temporary stay exception if the taxpayer is working for the same employer (but not on any one particular project). We are also concerned that this distinction may elevate the wording of an employment contract over substance. Accordingly, we would not recognize this distinction and recommend that the revised regulation state that coming to New York to work for an particular employer for a limited period of time is a sufficiently limited purpose.

4. College Students and others in New York for a Non-Work Related Purpose

We do not believe that the temporary stay exception should be limited to individuals in New York for a work-related purpose. We recommend that the revised regulation provide that certain other individuals who have a limited purpose for being in New York for a temporary period of time will not be considered to be maintaining a permanent place of abode in New York. For example, college students should not be considered to be "maintaining a permanent place of abode" in New York under the statutory resident test and should not be taxed as residents.[23] Similarly, individuals who are unable to leave New York due to a medical emergency that arose while in New York should not be considered "maintaining a permanent place of abode" in New York and should not be taxed as residents.[24] We have no evidence that the Department believes that these classes of individuals should be filing as residents, but it would be helpful to have some regulatory guidance on this point.[25]

C. Retroactivity

The Notice announcing that the temporary stay exception will be eliminated from the regulations was issued in mid-October, 2008 and provides that the amended regulation will be

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[23] The regulation should address whether the same treatment will be extended to students in graduate programs lasting for many years and also to students who are working full-time and taking classes on a part-time basis.

[24] *See Stranahan v. New York State Tax Commission*, 416 N.Y.S.2d 836, 839 (App. Div. 3d Dep't, 1979) (Kane concurring) ("It should be concluded that the statute was never intended to extend to a nondomiciliary forced to remain within this jurisdiction.").

[25] In the case of individuals present in New York due to a medical emergency, the 1997 audit guidelines currently provide that days spent by such individuals in New York should not count toward the 183-day count. However, the audit guidelines do not expressly provide that such an individual qualifies for the temporary stay exception.

effective retroactive to January 1, 2008. We note that taxpayers rely on the Department's regulations (and especially on regulations that are in accordance with the Department's longstanding interpretation of a statute). We believe that taxpayers should be given sufficient notice any time the Department changes a binding regulation. Accordingly, if the Department eliminates the temporary stay exception from the regulations, the amendment should be made effective prospectively for tax years beginning after December 31, 2008 and not retroactively to January 1, 2008.

IV. CONCLUSION

There is no question that the temporary stay exception has been the source of considerable confusion. It has been ingrained in the New York tax treatment of individuals for decades, but its precise limits have never been clear. We do not believe that the solution is to altogether eliminate the temporary stay exception from the regulation. This would only raise the question of whether the temporary stay exception can be derived from the language of section 605(b)(1)(B). Rather, we recommend that the temporary stay exception be provided for by regulation, and that the regulation precisely delineate its contours. The revised regulation we recommend would contain several commonsense limitations that would prevent abuse and would help to ensure consistent and non-arbitrary results. We would be willing to work with the Department to help craft a revised regulation designed with these goals in mind and we have offered suggestions for the revised regulation.

In the event that the Department decides to instead eliminate the temporary stay exception from the regulation, as stated in the Notice, we recommend that the amended

regulation take effect as of January 1, 2009, so as to protect individuals who have relied on the current version of the regulation.