

An End to the Temporary Stay Test in New York?

by Timothy P. Noonan and Jack Trachtenberg

Over the past three years, I have twice written in *State Tax Notes* to analyze New York's special residency rules involving so-called temporary stays.¹ Like many of the other topics I generally cover in this column on a monthly basis, the topics were basically a response to audit activity within the New York State Department of Taxation and Finance. In 2005 I reported on the department's new interpretation of the "temporary stay" rules, and some early taxpayer victories in those types of cases. Just last year I penned a follow-up article addressing some of the more recent cases in which the department's interpretation of the temporary stay test was generally upheld. In both articles, I suggested that somewhere, somehow, a change needed to be made. Other practitioners took the same position.² In particular, it seemed that the department's interpretation of the temporary stay test was not consistent with either the spirit or the letter of the tax law and regulations.



Well, it looks like we may have gotten our wish -- sort of. The tax department has recently proposed a *repeal* of the regulatory provisions regarding temporary stays that is contained in New York's Personal Income Tax Regulations. On October 15 the department published its proposal for repealing these provisions for tax years ending in 2008.³ In this article, we examine the proposed change.

Background

As noted in previous articles, the temporary stay issue arises in the context of New York's statutory residency rules, and centers on whether the taxpayer maintains a permanent place of abode in New York. The tax department's regulations, in defining what constitutes a permanent place of abode, provide specific reference to an abode that is maintained only temporarily to accomplish a particular purpose:

A place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.⁴

Over the past few years, there has been confusion, not so much with the rule per se, but regarding the tax department's interpretation of it. Although the regulation appears to, on its face, contain only two criteria (that the stay must be "temporary" and that the apartment be maintained for a "particular purpose"), the department took a much more stringent interpretation both in its nonresident audit guidelines and in personal income tax audits. The department interpreted the word "temporary" to mean "fixed and limited," and its guidelines also created a presumption that contemplated a three-year period as the maximum time someone could be in New York under this test. It also interpreted the "particular purpose" requirement as requiring that the taxpayer be present in New York state "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."⁵ That interpretation has caused problems over the years, created difficulty in many audits, and been the subject of litigated cases.

Proposed Change

The tax department has admittedly drafted a simple solution to that problem, at least at first blush: It is proposing to *eliminate* the provisions regarding temporary stays from the regulations altogether! To support the deletion of that provision, the department included a "regulatory impact statement" describing the basis and objectives of the change. Some highlights are as follows:

- The amendments are set to take effect for the tax years ending on or after December 31, 2008, meaning that those taxpayers whose 2008 tax year ends December 31, 2008 -- basically everybody -- will be subject to this rule effective in 2008.
- The department indicates its objective is to "eliminate problematic provisions of the personal income tax regulations" and to provide for a "better interpretation" of the residency rules contained in the tax law. Under the

department's view, the "temporary stay concept" does not appear in the statute, and therefore the elimination of the temporary stay provisions from the regulation is justified.

The department further justifies the change because "the temporary stay rule has also proven difficult to administer" and "will provide taxpayers and the Department with clear, objective, and easily applied rules for assessing residency status for New York State personal income tax purposes."

The regulatory impact statement also attempts to estimate the cost of that change, focusing on the total number of nonimmigrants in New York on H-1B visas, based on information received from the department's audit division indicating that nearly all the identified cases involving temporary residents "involve foreign nationals in the United States on working visas (H-1Bs)."

Commentary

This is, obviously, an attempt to make a fairly significant change. Having written extensively on this issue and, more importantly, having handled more than 50 of these cases, we unsurprisingly have some comments.

Temporary Versus Permanent Place of Abode

First, we think there is a real question whether the elimination of the temporary stay exclusion in the regulations will eliminate the potential argument for taxpayers who are in New York temporarily. As noted above, the department takes the position that the temporary stay concept does not appear in the statute, and therefore it is a "better interpretation" of New York's residency rules to remove the temporary stay concept from the regulations.

The department is granted wide latitude when it comes to adopting regulations interpreting the Tax Law. Nonetheless, it is well established that a regulation will not be deemed valid if it is inconsistent with or contrary to a legislatively enacted statute.⁶ Consequently, it is unsurprising that practitioners who are familiar with the tax law's definition of resident have some concerns regarding the validity and efficacy of the department's attempt to eliminate the temporary stay rule.

New York's tax law defines a statutory resident (the class of residents affected by the department's attempted rule change) to include any individual who "is not domiciled in this state but maintains a *permanent* place of abode in the state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state."⁷ Clearly, the plain language of the statute requires that a taxpayer's abode be "permanent" in nature before the state can tax the individual as a resident. It would appear, therefore, that the maintenance of a "temporary" place of abode should not suffice to trigger resident taxation under the tax law. Put differently, one could argue forcefully that a temporary stay rule is already embodied in the statute's definition of resident and that taxpayers should be permitted to avoid resident taxation on the basis of a claimed temporary stay regardless of the department's proposed rule change.

Indeed, a review of the legislative history strongly suggests that an individual may not be taxed as a statutory resident if the individual's presence in New York lacks some level of the permanence that must be present to tax an individual as a domiciliary. The memorandum in support of the original statutory residency provision says New York has "several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but they claim to be nonresidents."⁸ Thus, the statutory residency provisions were designed to tax those "who, while really and [for] intents and purposes [are] *residents* of the state, have maintained a voting residence elsewhere and insist on paying taxes to [New York] as nonresidents."⁹ In short, and as noted by the Court of Appeals, the statutory residency statute is "intended to discourage tax evasion by New York *residents*."¹⁰

That legislative history suggests that statutory residency was intended, in large part, to be a surrogate for domicile. The State Legislature was concerned about individuals who should have been paying taxes as "residents" (that is, as domiciliaries), but who avoided resident taxation by claiming to fall outside the often elusive legal definition of domicile (for example, by registering to vote in another state). The statutory residency provisions provide a disincentive to that behavior by setting forth a mechanical test for resident taxation that focuses on the presence of some factors (other than voter registration and so forth) that are typically present when one has established a domicile in the state. Specifically, statutory residency looks to the maintenance of a home in New York and to whether the taxpayer has spent the majority of his or her time in the state. But because the Legislature intended to capture those who were avoiding taxation despite their true status as domiciliaries, it limited taxation on the basis of statutory residency to those who maintained a "permanent" home in New York. Just as the Legislature may not tax individuals on the basis of domicile if they are in the state temporarily, it did not intend to tax individuals on the basis of statutory residency if the abode maintained in the state was not permanent in nature.

Case law interpreting the Tax Law's statutory residency provisions has done so in a manner that is consistent with the legislative history outlined above. In *Matter of Evans*,¹¹ the Tax Appeals Tribunal held that the permanence of an abode "depends on a variety of factors and must encompass the physical aspects of a dwelling as well as the individual's relationship to the place."¹² Applying that standard, the tribunal held that the taxpayer was properly held to be a statutory resident because "nothing in [his] living arrangements suggests that they were temporary."¹³ In particular, the tribunal noted that the "long-standing (12 years) and regular nature of petitioner's arrangements are certainly evidence of what can reasonably be described as 'permanence.'"¹⁴

Matter of Evans demonstrates that there is a "temporary stay" exception inherent in the tax law's definition of resident. The taxpayer in *Evans* did not lose because he failed to meet the criteria set forth in the temporary stay regulation that the department now seeks to eliminate. Rather, he lost because there was no evidence that his abode was not a permanent place of abode as required by the tax law. The taxpayer's living arrangements in *Evans* were not temporary; to the contrary, the evidence demonstrated that his living arrangements in New York were "long-standing" and "regular." Had the taxpayer in *Evans* shown he was in the state temporarily, he could have prevailed in proving his abode was not permanent.

In light of that legislative history and case law, there is a real question whether the department's elimination of the temporary stay regulation would change anything at all. Even without the regulation, it appears that there is significant support for the argument that there is a temporary stay exception built into the tax law itself. And to the extent that the proposed regulatory change seeks to affirmatively write that exception out of the tax law, there exists a compelling argument that the revised regulation is invalid because it is inconsistent with and contrary to the statute. The department, in its proposed rule change, claims the tax law "does not contemplate a temporary stay exception,"¹⁵ but the discussion above makes that assertion questionable. Consequently, taxpayers who are not domiciled in New York and who maintain an abode in the state on a temporary basis should consider whether the department's proposed regulatory change suffices to prevent them from filing as nonresidents. That analysis should, of course, be done giving due consideration to the risks involved in failing to file as a resident, including the potential for audit, imposition of penalties, and the accrual of interest that may have to be paid on any asserted tax deficiency.

Source of the Confusion

We certainly agree with the department that the temporary stay rule created a lot of uncertainty and difficulty, and the department has used that as one of the reasons justifying its elimination of the temporary stay regulation. But the temporary stay exclusion -- in and of itself -- is not what was causing the problem. As noted above, the rule as set forth in the regulations is pretty clear: The taxpayer must be in New York temporarily and she must be in New York for a particular purpose. That's pretty simple. The difficulty lies not in the rule, but in the tax department's interpretation of the rule. Frankly, a better approach would be to have eliminated, or at least modified, the department's interpretation, not to throw the rule out altogether. That is like "throwing the baby out with the bath water."

Also, as alluded to in the discussion above, we think the department's change might make interpretation of New York's residency rules even more problematic from an audit perspective. At the end of the day, the rules still require a "permanent" place of abode. Thus, a "temporary" place of abode would not qualify. And what is meant by "temporary" place of abode? At least the current regulations attempt to define it. If that definition is removed, what are we left with? In short, although the department's attempts to make New York's residency rules clearer are laudable and noteworthy, this proposed change, if made final, probably will create even more confusion and uncertainty.

Retroactivity?

Finally, there's a more practical problem with the proposed change: It appears to apply retroactively to tax years in 2008. Setting aside the question whether a regulation like that can apply retroactively under existing administrative procedure law, there's also the problem of compliance. Indeed, taxpayers who were planning on taking this position in 2008 might not have made proper estimates or have had enough tax withheld to cover the potential increase in their tax liability. Additional interest and penalties may apply here because of potential underpayments. If the proposed change goes through, taxpayers and their accountants should make sure they catch up on estimates if needed.

Conclusion: Speak Now or . . .

The changes in New York's residency rules are, at least at this point, merely *proposed* changes. The regulations are not yet final. As noted in the statement published in the New York State Register, taxpayers and practitioners do have the opportunity to comment on these regulations any time between October 15, 2008, and November 30, 2008. Interested parties can direct comments to William Ryan, at the following address: Director, Department of Taxation Finance, Taxpayer Guidance Division, Building 9, State Campus, Albany, NY 12227, or at 518-457-1153. For practitioners and taxpayers who have an interest in this issue, now might be a good time to make your comments known.

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FOOTNOTES

¹ See Timothy Noonan, "Temporary Stays in New York: A New Set of Rules in Residency Audits" *State Tax Notes*, Feb. 21, 2005, p. 551, *Doc 2005-2554* [\[PDF\]](#), or *2005 STT 34-17* [📄](#); and Noonan, "New York Practice Issue -- More Developments in the Temporary Stay Area," *State Tax Notes*, July 30, 2007, p. 313, *Doc 2007-16738* [\[PDF\]](#), or *2007 STT 147-5* [📄](#).

² See Arthur R. Rosen and Jeffrey B. Gottlinger, "New York Should Reconsider Its Policies on Temporary Residents," *State Tax Notes*, Oct. 31, 2005, p. 465, *Doc 2005-19725* [\[PDF\]](#), or *2005 STT 209-24* [📄](#).

³ Notice of Proposed Rule Making, NYS Register, ID No. TAF-42-08-00016-P (Oct. 15, 2008).

⁴ 20 NYCRR section 105.20(e).

⁵ New York State Department of Taxation and Finance Nonresident Audit Guidelines, para. 5C.

⁶ *Matter of Grieg*, DTA No. 815529, Sept. 16, 1999.

⁷ N.Y. Tax Law section 605(b)(1)(B) (emphasis added).

⁸ *Tamagni v. Tax Appeals Trib.*, 673 N.Y.S.2d 44 (1998) (citing Bill Jacket, L. 1922, ch. 425). (For the decision, see *Doc 98-15815* or *98 STN 99-22*.)

⁹ *Id.* (emphasis added).

¹⁰ *Id.* (emphasis added).

¹¹ Tax App. Trib. (June 18, 1992).

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NYS Register (Oct. 15, 2008) at 35.