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certified public accountants

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November 26, 2008

John W. Bartlett
Director of Regulations
Taxpayer Guidance Division
Department of Taxation and Finance
W. A. Harriman Campus
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Albany, NY 12227

By e-mail: tax_regulations@tax.state.ny.us

Re: Proposal of Amendments to Section 105.20(e)(1) of the Personal Income Tax Regulations

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned proposal. The NYSSCPA thanks the New York State Department of Taxation and Finance for the opportunity to comment.

The NYSSCPA's New York, Multistate and Local Taxation Committee deliberated the proposal and drafted the attached comments. If you would like additional discussion with us, please contact Wayne K. Berkowitz, Chair of the New York, Multistate and Local Taxation Committee, at (212) 832-0400, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,

Sharon Sabba Fierstein

Sharon Sabba Fierstein
President

Attachment

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NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

COMMENTS ON PROPOSAL OF AMENDMENTS TO SECTION 105.20(e)(1) OF THE PERSONAL INCOME TAX REGULATIONS

November 26, 2008

Principal Drafters

Wayne K. Berkowitz
Kenneth T. Zemsky

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New York State Society of Certified Public Accountants

Comments on Proposal of Amendments to Section 105.20(e)(1) of the Personal Income Tax Regulations

We are responding to a request from the New York State Department of Taxation and Finance (the "Department") to provide comments for use in the development of amendments to the provisions of the personal income tax regulations that define the term "resident individual" for income tax purposes.

Specifically, we are commenting on the section of 20 NYCRR 105.20(e)(1), which states that "…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."

The existing regulation is governed by section 605 of the Tax Law and deals with one of the tests of residency. The law provides that an individual who is not domiciled in New York is considered a resident if he (she) maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state. The existing regulations mirror this same language and explain that one cannot have a "permanent" place of abode if the stay within the state is for a fixed or limited period of time for the accomplishment of a particular purpose (a "temporary stay").

In the past few years, there has been a vast amount of litigation, the subject of which centered on what constitutes a "temporary stay" in New York. The typical facts were that an employee had been sent to New York by his (or her) employer. The employee was in New York for an extended period of time and secured living quarters there. The regulation was designed to protect those employees that are in New York for a "particular purpose" from being subject to New York State and City income tax on all of their sources of income.

What constitutes a "temporary stay" as compared to a permanent stay is the cause of the longstanding controversy and is what impacts the courts' decisions. This determination requires a detailed and often onerous examination of the intent of both the employer and the employee. This examination results, at best, in a protracted audit and litigation and, at worst, in inconsistent results among similarly situated taxpayers.

The proposal would jettison the concepts of fixed or limited stays and the particular purpose requirement. Accordingly, the new regulation, if enacted, would provide that if the individual maintained an abode for at least 11 months of the taxable year and spent in excess of 183 days in the state, (s)he would be taxed as a resident. It would be harmful for the Department to finalize the draft regulation for the following reasons.

Eliminating the "temporary stay" provision would put New York State and New York City at a competitive disadvantage in attracting business. Multistate and multinational employers often seek to shift talent in the form of valuable employees to New York in order to expedite a new business opportunity. Employers are often required to make these employees "whole" by compensating them for any additional tax burden they might incur. By eliminating the temporary stay provisions, employees present in New York for more than 11 months face the potential of double taxation: incurring a liability on some of the same income in both their state of domicile, as well as New York State and New York City. This would result in an additional cost to employers seeking to expand in New York State and New York City. Consequently, they might choose to forego the business expansion into New York, especially during the current economic climate.

Without a corresponding statutory change to Section 620 of the Tax Law, the elimination of the "temporary stay" provision might guarantee that these employees will be double taxed (or triple taxed in the case of New York City) on their income, other than wages earned in New York. In its current form, Section 620(a) provides *". . .a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada,* ***upon income both derived therefrom*** *and subject to tax under this article."* [Emphasis added.]

Because earnings from bank accounts, stocks, bonds, etc. ("intangible income") is generally considered derived from a taxpayer's resident state, a taxpayer who would be considered to be a resident of New York State and New York City due to the elimination of the "temporary stay" provisions would be compelled to pay tax to both his state of domicile, New York State and New York City. Without an amendment to the credit provision, such as the one made by Connecticut several years ago[1], elimination of the temporary stay provision deviates from the concept of maintaining a fair and equitable tax system.

The elimination of the "temporary stay" rule also results in a radical departure from the Department's recent interpretations of the Tax Law. Only a few years ago, the Department issued residency audit guidelines that were highly publicized to give guidance to auditors (and to taxpayers and tax practitioners) on the interpretation of the

[1] Connecticut Tax Law Section 12-704(d) provides; ". . . if an individual is not domiciled in this state but maintains a permanent place of abode in this state and is in this state for an aggregate of more than one hundred eighty-three days of a taxable year and such individual is domiciled in another state of the United States, a political subdivision of such state, or the District of Columbia for the taxable year, such individual shall be allowed a credit under this section against the tax otherwise due under this chapter for income tax imposed by and paid to the qualifying jurisdiction in which such individual is domiciled on such individual's income from intangible personal property, to the extent such income is from property not employed in a business, trade, profession or occupation carried on in this state, and on such individual's income derived from or connected with sources within another state of the United States or the District of Columbia that does not impose an income tax on such income. This subsection shall apply only where the jurisdiction in which such individual is domiciled allows an income tax credit for the tax imposed by this state to an individual who is domiciled in this state for a taxable year but maintains a permanent place of abode in such jurisdiction and is in such jurisdiction for an aggregate of more than one hundred eighty-three days of the taxable year that is analogous to that provided in this subsection."

relevant regulations and the underlying statute. These guidelines explicitly state that, "It is the Department's position (in interpreting the underlying statute) that for a place of abode not to be permanent, both of the above conditions must be met. That is (1) the stay in New York must be temporary (*i.e.*, for a fixed and limited period) and (2) the stay must be for the accomplishment of a particular purpose."

For the Department to disregard a widely accepted, recent interpretation of the underlying statute would give credence to those who might claim elements of inconsistency and partiality in the Department's administration of the laws. We believe it is not sound tax policy to effect significant change in an underlying statue absent a legislative change.

The guidelines had, for the first time, defined the 11-month rule. The 11-month rule was not introduced to give guidance on the terms “permanence,” “temporary stay” or “particular purpose.” Rather, it was intended to define whether an abode was "maintained" for the requisite time period. As the guidelines state, "...such abode...must be maintained for substantially all the year for the person to be held a resident of New York State. The Department has interpreted substantially all the year to mean that the abode is maintained for more than 11 months of the tax year."

Thus, the draft regulation would use a test developed to define maintenance of the abode to usurp the concepts of permanence and its concomitant principles of temporary stay and particular purpose. This is exacerbated when one considers that elevating a guideline to a virtual rule of law allows the City of New York, aided by the State, to do by regulation what it cannot do by statute: namely, to impose a tax on nonresidents. Moreover, the draft takes what was intended to be merely instructive as a guideline and elevates it to a principle of law.

Finally, converting the 11-month rule to a "rule of law" is unduly inflexible. What of a situation, wherein a transient is forced by exigent circumstances to extend his (or her) stay beyond the 11 months, without any fault or delay on the taxpayer's part? This inflexibility can be readily seen in less onerous circumstances such as situation in which a nonresident alien invests in real property within New York. Such a transient would have to be advised not to purchase realty within the State and City to avoid maintaining an abode for substantially all of the year which could then trigger an unintended change in the individual’s state of residence.