

Amendments to the Definition of Permanent Place of Abode in the Personal Income Tax Regulations

The Tax Department recently adopted amendments to section 105.20(e) of the Personal Income Tax Regulations. These amendments relate to the definition of *permanent place of abode*, which is a factor used in determining whether a taxpayer will be considered a resident or nonresident for personal income tax purposes. The amendments apply to New York State, New York City, and Yonkers income taxes for the tax years that **end** on or after December 31, 2008 (for calendar year filers, that means tax years 2008 and after).

This memorandum provides a description of the amendments.

Background

Under section 605(b)(1) of the Tax Law, an individual who is not domiciled in New York is considered a resident for personal income tax purposes if that individual maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state.

Section 105.20 (e)(1) of the Regulations provides the definition and further guidance on what will constitute a permanent place of abode. **Before** the amendments, it read as follows:

A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is 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. **Also, 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. For example, an individual domiciled in another state may have been 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. The 183-day rule applies only to taxpayers who are not domiciled in New York State. (Emphasis added)

Description of amendment and resulting effect

The amendment to the regulations repealed the language and related example that provided that an abode would not be considered permanent if it was maintained only during a temporary stay for the accomplishment of a particular purpose. As a result of the amendments, for tax years ending on or after December 31, 2008, New York State will no longer recognize a temporary stay exception in determining whether or not a taxpayer maintains a permanent place of abode inside or outside New York State.

Accordingly, a taxpayer is maintaining a permanent place of abode in New York State if the abode meets the physical characteristics described in the regulation (for example, it is not a mere camp or cottage) and the taxpayer maintains the abode for substantially all of the tax year (disregarding small portions of the year). Generally, a taxpayer *maintains a permanent place of abode for substantially all of the tax year* if the taxpayer maintains the abode for more than eleven months.

Under section 605(b)(1)(A) of the Tax Law, a taxpayer who is domiciled in New York State is a resident for personal income tax purposes unless the taxpayer meets one of the following rules:

30-day rule

- The taxpayer did not maintain any permanent place of abode in New York State;
- the taxpayer did maintain a permanent place of abode elsewhere; and
- the taxpayer spent 30 days or less in New York State during the tax year.

or

548-day rule

- Within any period of 548 consecutive days the taxpayer is present in a foreign country or countries for at least 450 days;
- during the 548 consecutive day period the taxpayer is present in New York State for 90 days or less, and the taxpayer's spouse (unless legally separated) or minor children spent 90 days or less during the 548-day period in a permanent place of abode in New York State maintained by the taxpayer; and
- during the nonresident portion of the tax year in which the 548-day period begins, and during the nonresident portion of the tax year in which the 548-day period ends, the taxpayer is present in New York State for no more than the number of days that bears the same ratio to 90 as the number of days in that portion of the tax year bears to 548.

For purposes of the 30-day rule and the 548-day rule described above, the regulation change also applies in the determination of whether a taxpayer is maintaining a permanent place of abode inside or outside New York State.

New York City and Yonkers

Since both the New York City and the Yonkers income taxes conform to the rules and regulations applicable to New York State income taxes, the amendments to the regulation described previously also apply to those taxes. (Note: In applying the rules for residency, the words *New York State* should be replaced by either the words *New York City* or *Yonkers*.)

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