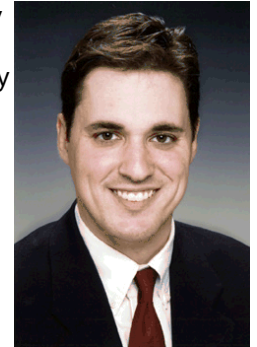


New York Practice Issue -- More Developments in the Temporary Stay Area

by Timothy P. Noonan

Any practitioner involved in New York residency audits over the past several years has undoubtedly encountered the "temporary stay" issue. For years, based on a literal interpretation of New York's regulations, some taxpayers took the position, based on their temporary status in the state, that they did not qualify as New York state or city residents regardless of how much time they spent in New York. And for many years their position was not challenged by New York auditors, presumably, in large part, because of favorable rulings on the issue.¹



Everything changed several years ago, when auditors began challenging taxpayers' claims of nonresidency based on their temporary status. Under the guidance provided in 1997 audit guidelines, auditors began applying more stringent tests, and folks like us started to take notice. Initially, taxpayers were successful in thwarting the Department of Taxation and Finance's aggressive change of position, as was reported in my February 2005 article on this issue.² But more recently, the tax department has been successful in several nonprecedential administrative rulings, putting a damper on those early taxpayer successes. Nonetheless, just when it seemed the issue quieted down a bit, a new decision has come out, giving taxpayers and practitioners renewed hope. It's clear now that this will continue to be an issue for taxpayers to fight and for practitioners to write about, unless and until the Tax Appeals Tribunal speaks or the tax department takes steps to clear up the confusion.

Because of the importance of this issue, I thought this would be a good time to update the developments in this area since my 2005 article in this magazine.

Background

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. A permanent place of abode is defined in New York's regulations as a "dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer."³ The tax department's regulations at 20 NYCRR section 105.20(e), however, provide that an individual will not have a permanent place of abode if the abode 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. For example, an individual domiciled in another state may be assigned to the individual's employer's office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such individual takes an apartment in New York State during that period, the individual is not deemed a resident, even though such individual spends more than 183 days of a tax year in New York State, because such individual's place of abode is not permanent.⁴

That regulatory exception contains two criteria: First, the stay in the abode must be "temporary" -- that is, it must be intended to last for a "fixed and limited" period of time. Second, the apartment must be maintained for the accomplishment of a "particular purpose."

But as noted, the tax department's interpretation of that regulation, as set forth in 1997 audit guidelines, was much more stringent. First, the department equated the word "temporary" to "fixed and limited" and created a presumption that that contemplated a three-year maximum. Moreover, the tax department put its own spin on the particular purpose requirement, 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 Under that interpretation, a taxpayer sent to New York to install a piece of equipment would have a particular purpose, but someone sent to increase sales would not!

Practitioners and taxpayers have had several complaints about that strained analysis, as noted in my February 2005 article on this issue. First, there is no support for the "three-year rule" in the law, regulations, or case law. Indeed, all that is required is that the stay is temporary; temporary can mean 1 year, 3 years, or 10 years. Second, why someone must have a *specific* purpose, and more importantly why something such as "improving sales" would not constitute a valid purpose, is also unclear. Nowhere is that more evident than in the example in the regulations. Under the example, a person who is sent to New York for a "fixed and limited period" meets the exception. That's it. There is no discussion of a three-year rule. There is no discussion of job duties. All that is required is that the assignment be fixed and limited and that the taxpayer expects to leave at the end. Thus, someone sent to New York for a fixed and limited period to improve sales would presumably qualify based on the express terms of this example.

Developments in Case Law

As noted above, and as reported in my February 2005 article, early cases suggested that the taxpayer's interpretation would prevail over the tax department's. In *Matter of Tan*, the taxpayer's duties involved improving sales, and his job was extended beyond three years, but he still managed to win his case. In *Kaltenbacher-Ross*, the taxpayer was in New York for 10 years and still was held to qualify under the temporary assignment rules.

But more recently, the cases have gone the tax department's way. In *Vazquez*,⁶ the taxpayer was hired by an investment banking firm to "originate, coordinate and execute" various corporate transactions between Latin American and European companies. The taxpayer stayed in New York from 1998 to 2002 on a temporary visa that was renewed. The administrative law judge determined that the taxpayer did not qualify for the temporary stay exclusion. Similarly, in *Goldberg*,⁷ the taxpayer moved to New York and obtained a job with an investment banking firm, with the goal of relocating later to South America. While the taxpayer was in New York, his duties included producing research reports on Latin American investments, educating sales and trading teams, and building relationships with South American banks and other institutions. Based on those facts, the ALJ determined that the taxpayer did not establish that he was in New York for a temporary stay to accomplish a particular purpose. Other recent cases contain similar facts and conclusions.⁸

The cases all have the same recurring themes. Most notable is that few taxpayers actually showed up at the hearing to testify. Any practitioner practicing in the Division of Tax Appeals understands that because the burden of proof rests so heavily on taxpayers, a full administrative record with testimony by taxpayers and other witnesses is critical for success. As the old saying goes, "bad facts make bad law." If neither the taxpayer nor the employer is present to explain the nature of the assignment, it is almost impossible to establish a full and appropriate factual record. Second, there is no real adherence to the "three-year rule" by ALJs in these cases. In particular, the ALJ in *Matter of Hirsch* cited a tribunal decision that discussed the definition of the word "temporary" in the context of IRC section 162(a)(2).⁹ There, the tribunal noted that federal courts "have refused to place a specific time limit upon the length of employment that would automatically result in employment being characterized as indefinite in nature and have recognized that no single element is determinative of the issue of temporariness." Clearly that undermines the use of a three-year test or rule. Also, in most of these cases the existence of a temporary visa has not been viewed as determinable in viewing the question whether a taxpayer is here temporarily.

More troubling, however, is the interpretation by some ALJs of the "particular purpose" test. Some seem to accept the notion in the guidelines that to meet that test, something more than a "general job description" is required.¹⁰ Nonetheless, because of the incompleteness of the factual record in many of the cases, it is unclear how far administrative courts would take the tax department's specific purpose test. Would someone sent for a fixed and limited period to improve sales meet the test? The tax department would probably say no. Under the regulations, we would say yes. That set of facts, however, has not yet presented itself for a court to decide. So unfortunately the recent decisions do little to solve the controversy created by the department's guidelines.

A New Hope?

That is especially true because not all developments have been tax department-friendly. In addition to the decisions in *Tan* and *Kaltenbacher-Ross*, a recent small claims determination demonstrates that there still is confusion in the application of the regulations. In *Matter of Gontijo*,¹¹ the taxpayer was employed by a New York City financial consulting firm. Her position entailed the following responsibilities:

Serving as the second (and sometimes as the third) most experienced member of an advisory team that renders financial advisory services to (primarily) multinational companies headquartered (primarily) in Europe and the Americas on (primarily) cross-border mergers, acquisitions, divestitures, joint ventures, restructuring, alliances and minority shareholder transactions.

Assisting, Managing Directors (MD) on established . . . Country marketing programs -- with the objective of you demonstrating (and further developing) your marketing skills to enable you to establish a country focus (and build a related revenue stream) under the leadership and supervision of a designated MD.

That job description would not seem to satisfy the level of specificity required by the tax department's guidelines. Moreover, the job description in this case is somewhat similar to that of taxpayers in *Vazquez* and other cases.

But the presiding officer held that the taxpayer's duties "were in no way general." Instead, the decision recognized that the taxpayer had a specific skill set, and that while she had many tasks as part of her assignment -- an issue criticized by the department in this case and in many other cases and audits -- that did not run counter to the notion that she had a particular purpose. That the taxpayer stayed in New York after the term of her initial assignment was also irrelevant because her circumstances changed, necessitating a change in the assignment. Finally, an apparent confusion in the employment agreement was resolved by the presiding officer by reference to the taxpayer's testimony and the documents in the record -- again highlighting the importance of a full record at the hearing. The confusion arose because, although the assignment had a set three-year term, the offer also noted that the taxpayer was an "at will" employee. To most auditors, and to the tax department in this and other cases, that undermined the temporary nature of the assignment.¹² But the presiding officer reconciled those differences based on the taxpayer's testimony and the documents in the record, all of which showed that the duration of the assignment was expected to be three years or less.

So the analysis in *Gontijo* is more in line with the analysis that has been urged by taxpayers and practitioners in years past, and it is similar to that contained in my February 2005 article. Basically, the idea is that an assignment can have a particular purpose even if there are multiple tasks, or even if it encompasses more than a specific project. All that is necessary is that the taxpayer's stay be temporary and that it be for the accomplishment of a particular purpose. And that's exactly the test contained in the regulation. There is no need to read extra tests or requirements into the regulation.

Outlook for the Future

In my February 2005 article, I suggested that we likely would have more clarity on this issue in a few years. As my wife and seven children can attest, however, I am not always right. Indeed, the exact opposite has occurred -- there is less certainty. There is more confusion. And there is still room for interpretation and litigation. I hope that, at some point, the Tax Appeals Tribunal will speak definitely on the issue or the tax department will work to clarify the uncertainty caused by its internal audit guidelines. But I don't think I'll make any predictions this time.

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Noonan's Notes on Tax Practice is by Timothy P. Noonan, a partner with Hodgson Russ LLP, Buffalo, N.Y. He wishes to thank Joseph N. Endres, an associate at Hodgson Russ, for his work on early drafts of this article.

FOOTNOTES

¹ See *Cukras*, TSB-A-95(15)l; *Harper* TSB-A-94(3)l.

² See "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* [\[1\]](#).

³ 20 NYCRR section 105.20(e).

⁴ *Id.*

⁵ Guidelines at para. 5.C.

⁶ *Matter of Vazquez*, administrative law judge (May 2005).

⁷ *Matter of Goldberg*, ALJ (February 2006).

⁸ *Matter of Legorreta*, ALJ (November 2006); *Matter of Navlakha*, ALJ (June 2006); *Matter of Do Valle*, ALJ (June 2006); *Matter of Goldberg*, ALJ (February 2006); *Matter of Hirsch*, ALJ (December 2005); *Matter of Sebah*, ALJ (September 2005). There have also been some recent decisions in small claims proceedings to the same effect.

⁹ *Matter of Hirsch*, *supra* note 8.

¹⁰ See, e.g., *Matter of Vazquez*, *supra* note 6.

¹¹ Small claims determination (June 2007).

¹² See *Matter of Do Valle*, ALJ (June 2006); *Matter of Goldberg*, ALJ, (February 2006); *Matter of Weldon*, small claims determination (November 2005); *Matter of Faber*, small claims determination (November 2005); *Matter of Vazquez*, *supra* note 6.

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