New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-12(4)I
Income Tax
August 28, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I120308A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether his ownership interest in a private, member-owned residential club in New York City ("The Club") qualifies as Petitioner's "maintaining a permanent place of abode" in New York for purposes of determining New York State residency for New York income tax purposes.

We conclude that Petitioner will not be deemed to be "maintaining a permanent place of abode" in New York solely by reason of his ownership interest in The Club.

Facts

Petitioner is a domiciliary and resident of New Jersey where he maintains a permanent place of abode. He regularly commutes to his workplace in New York City and, for purposes of this Advisory Opinion, is assumed to be present in New York for more than 183 days in each taxable year.

In addition to his New Jersey home, Petitioner is considering purchasing an ownership interest in The Club, which offers studio, one- and two-bedroom luxury apartments. Each member in The Club owns a one-eighth tenancy-in-common deeded fee interest in one of The Club's residences. Ownership is evidenced by a real estate deed that is recorded and is guaranteed by a title insurance policy. Members also own the furnishings and accessories in the residences which include bedding, linens, kitchen utensils, cookware, flatware and silverware. Like any other form of real estate in New York, the ownership interest can be sold or transferred by the owner, subject to The Club and Condominium Declarations and Bylaws.

Each member has a priority right to use a residence for 45 days per year, but there is no limit to the amount of use. If some members do not use a residence for their 45 days, then other members may be able to use a residence for more than their 45 allotted priority days. Pursuant to The Club's Policies and Procedures, each member may reserve one Annual Visit for up to 7 days during The Club's year. In addition, each member may make any number of Reserved Visit reservations for up to 7 days each and Short-Notice reservations for up to 3 days each throughout the year, provided that a member may not have more than two Reserved Visit reservations and one Short-Notice reservation outstanding at any given time. The reservations are given on a first-come, first-served basis, subject to the other members' priority rights to use a residence for 45 days. Additional rules permit an owner to reserve an available residence in a different Club residence category if no residences are available in such owner's residence type. Owners and guests accompanied by an owner have day use of The Club's amenities and services except the athletic

facility (Athletic Facility) in The Club which is available to owners or unaccompanied guests only when they are in residence. The Club has a right to limit day use, and as such, day use of The Club is subject to availability and priority usage rights assigned to owners and/or guests lodging at The Club.

Analysis

Section 605(b)(1)(B) of the Tax Law defines a "resident individual" as an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States. In order for a taxpayer to be considered maintaining a permanent place of abode, the taxpayer must maintain the abode for substantially all of the taxable year (generally considered to be more than 11 months). [1]

Whether or not the taxpayer has free and continuous access to a place of abode is a primary consideration in determining if the taxpayer maintains a permanent place of abode for substantially all of the taxable year. In the *Matter of John M. Evans v. Tax Appeals Tribunal of the State of New York et al.*, 199 A.D.2d 840 (N.Y. App. Div. 3rd Dep't 1993), the Appellate Division affirmed the Tribunal's determination that the taxpayer's unrestricted right to use a room in a rectory constituted maintaining a permanent place of abode, despite the fact that the taxpayer had no legal right or relationship to the property. While the Tribunal recognized that the determination of whether a taxpayer is maintaining a permanent place of abode is based on a variety of factors, the Tribunal ultimately found that the taxpayer's use of the residence constituted maintaining a permanent place of abode, because the taxpayer contributed to the household expenses, had exclusive use of his room, provided his own furnishings and personal effects, regularly used the residence for a long-standing period of time to access his full time job, and had unlimited access to his room and other rooms in the residence.

Conversely, in the *Matter of the Petition of Leon Moed* (Tax Appeals Tribunal, January 26, 1995, DTA No. 810997), the Tribunal found that the petitioner did not maintain a permanent place of abode in New York as a result of his ability to occasionally stay at his wife's New York City apartment after their marital separation, when she was in residence and with prior notice to his wife. Unlike *Evans*, the Tribunal found no evidence of a shared rental. The wife paid all the expenses on the apartment. There was no evidence indicating any connection between the petitioner's informal marital separation agreement to pay money to his wife and his ability to use the apartment, and no connection between his purchase of some furniture for the apartment prior to their separation and his subsequent use of the apartment. Because the petitioner did not have "free and continuous access to the apartment," the Tribunal found that he did not maintain a permanent place of abode in New York for the tax years in issue.

In the *Matter of Craig F. Knight* (Tax Appeals Tribunal, November 9, 2006, DTA No. 819485), the Tribunal concluded that the factors found significant by the Appellate Decision in *Evans* were lacking in *Knight*. Mr. Knight was domiciled in New Jersey but worked in New York.

[1] 20 NYCRR 105.20(a)(2).

He had access intermittently to both an apartment rented and maintained by another individual and also a two-bedroom apartment rented to the business in which he worked. With regard to the individual's apartment, Mr. Knight could not access the apartment without prior notice; he did not maintain clothing, personal articles or furniture in the apartment; he did not have a dedicated room to which he had free and continuous access; he did not use the residence for daily attendance at his full-time job; and he did not share in the expenses of maintaining the apartment. The Tribunal also found that the factors in *Evans* were not present for Mr. Knight's use of the business's apartment, except to the extent that he bore a proportionate share of the expenses by reason of being a part owner of the business. The business apartment was used intermittently by the three members of the business, each of whom had a key, and there was no agreement among them as to the usage. Thus, the petitioner was found not to be maintaining a permanent place of abode.

In the case at hand, Petitioner's right to use a residence is subject to the Club's Policies and Procedures, which restrict his access. Although there is no absolute limit to the amount of use, each member has a priority right to use a residence for only 45 days per year. The reservations are given on a first-come, first-served basis, subject to the other members' priority rights to use a residence for 45 days, and members are limited in the number of reservations they may make at any given time. Owners and guests accompanied by an owner have day use of The Club's amenities and services except the Athletic Facility which is available to owners or unaccompanied guests only when they are in residence. The Club has a right to limit day use, and as such, day use of The Club is subject to availability and priority usage rights assigned to owners and/or guests lodging at The Club.

Petitioner is one of many people using the residence at The Club and, with the exception of an Annual Visit and priority days, use of the residence is awarded on a first-come, first-served basis. His access is circumscribed by The Club's Policies and Procedures. Like the taxpayer in *Moed*, Petitioner did not have "free and continuous access to the apartment" and thus he did not maintain a permanent place of abode in New York for New York income tax purposes solely by reason of his ownership in The Club.

DATED: August 28, 2012

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.