

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(3)I
Income Tax
May 31, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I000128D

On January 28, 2000, a Petition for Advisory Opinion was received from the Estate of Rosa M. Schmitz, c/o Hodgson, Russ, Andrews, Woods & Goodyear, LLP, One M&T Plaza, Suite 2000, Buffalo, New York 14203.

The issue raised by Petitioner, the Estate of Rosa M. Schmitz, is whether Ms. Schmitz was domiciled in or a statutory resident of New York State during 1998 and 1999 under section 605(b)(1) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Ms. Schmitz was born in New York on August 11, 1905. She married, and in 1955 she moved to Roanoke, Virginia, where she purchased a single-family home at 2107 Carter Road. She did not continue to maintain a house in New York after her move to Roanoke.

In the mid-1980's, Ms. Schmitz's health began to decline and she was diagnosed with an early state of Alzheimer's disease. On September 17, 1987, she appointed her son Robert Schmitz power-of-attorney over her affairs.

Ms. Schmitz continued to live in her Roanoke home until the summer of 1998, when, at the age of 93, she was no longer able to care for herself. She was suffering from advanced bladder and breast cancer, and her Alzheimer's had progressed to the point where she was no longer competent. Consequently, she required constant nursing care.

In the summer of 1998, Ms. Schmitz's immediate family consisted of her son Robert Schmitz, who lived in Scotia, New York; her daughter Rosalie Johnson, who lived in Peoria, Illinois; and her elderly sister Maria McCane, who lived in the Baptist nursing home in Scotia, New York.

Acting in his capacity as power-of-attorney, Robert Schmitz had his mother admitted to the Wynwood adult care facility in Niskayuna, New York, on August 14, 1998. He subsequently had his mother admitted to the Clare Bridge adult care facility in Niskayuna, New York because it was better equipped to care for her as her condition continued to deteriorate.

Due to her advanced age and failing health, Ms. Schmitz's family understood that she would never return to her home in Roanoke. Consequently, acting in his capacity as power-of-attorney, Robert Schmitz listed Ms. Schmitz's Roanoke home for sale shortly after her admission to the

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Wynwood facility. The Roanoke home was sold on December 26, 1998. Ms. Schmitz maintained no other homes.

During her life, Ms. Schmitz kept all of her valuable possessions at her home in Roanoke. Once her home was sold, her household items were split between her son and daughter, and movers were employed to bring these items to their respective homes. Many items were left to a local charity in Virginia.

While living in Virginia, Ms. Schmitz had a Virginia driver's license and her vehicles were registered in Virginia. She became unfit to drive while living in Virginia, and her license was allowed to lapse. Her car was given to a family member.

Ms. Schmitz had no active business involvement in New York or Virginia.

Prior to her relocation to New York, Ms. Schmitz spent the bulk of her time at her home in Roanoke. She occasionally traveled to visit her son and daughter in their respective states.

While she was competent, Mrs. Schmitz maintained a safe deposit box at First Virginia Bank-Southwest, but it was emptied and discontinued when she began to fail mentally. In May of 1993, all of her equities and securities were put in trust with First Virginia Bank-Southwest, and she maintained a checking and savings account with this bank up until the time of her death, which her son Robert Schmitz used to pay her bills as power-of-attorney. All bank statements, bills and other financial documents were sent to Robert Schmitz as power-of-attorney.

Ms. Schmitz's last will and testament was drawn up and executed in Virginia.

Ms. Schmitz filed her state tax returns as a Virginia resident until 1998, when her family had her admitted to the Wynwood facility in Niskayuna. Her son, acting as power-of-attorney, filed 1998 part-year resident tax returns on her behalf with both Virginia and New York.

In 1999, while a patient at the Clare Bridge facility in Niskayuna, Ms. Schmitz was hospitalized with a broken leg. Mrs. Schmitz was readmitted to the facility upon her release from the hospital, and she died shortly thereafter on October 7, 1999, at the age of 94.

Discussion

Section 605(b)(1) of the Tax Law provides that a resident individual is (A) an individual who is domiciled in New York State unless the individual maintains no permanent place of abode in New York State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than 30 days of the taxable year in New York State, or (B) an individual who is not domiciled in

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New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

Section 105.20(d) of the Personal Income Tax Regulations provides that domicile, in general, is the place which an individual intends to be such individual's permanent home – the place to which such individual intends to return whenever the individual may be absent. A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such person's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time.

Section 105.20(e) of the Personal Income Tax Regulations provides that a permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer, and will generally include a dwelling place owned or leased by his or her spouse.

In Stranahan v NYS Tax Commn, 68 AD2d 250, it was held that when a nondomiciliary sought treatment in New York for a serious illness, the time spent in a medical facility for the treatment of such illness should not have been counted in determining whether the nondomiciliary was a resident of New York, for purposes of Article 22, during such confinement.

In Mae LaBue, Adv Op, Comm T&F, December 24, 1991, TSB-A-91(10)I, the petitioner was domiciled in New Jersey prior to her admittance to a nursing home in New York State where it was believed that she would spend the rest of her life. The petitioner's admission was made because she was unable to perform menial tasks, and she needed constant nursing care, including the administering of medication by a nurse. It was held that her presence in New York State was not the result of her own intent and decision but due to a physical or mental incapacity, and she remained a domiciliary of New Jersey during the period of time she was in the nursing home in New York. It was further held, that her stay in the nursing home did not constitute the maintenance of a permanent place of abode in New York State and any day spent in such facility did not count as a day in New York for purposes of the 183 day rule to be considered a statutory resident of New York.

To effect a change of domicile there must be not only a physical change of residence but an intention to abandon the former domicile and to acquire another. In this case, Ms. Schmitz was a domiciliary of Virginia, and only came into New York to live in adult care facilities after she became incompetent and unable to care for herself. Assuming that, due to her incapacity, her presence in New York was not the result of her own intent and decision to make New York her fixed and permanent home pursuant to section 105.20(d) of the Personal Income Tax Regulations, Ms. Schmitz remained a domiciliary of Virginia.

Further, under these circumstances, following Mae LaBue, supra, and Stranahan, supra, Ms. Schmitz did not maintain a permanent place of abode in New York and spend more than 183 days

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in New York during the years in question. Accordingly, Ms. Schmitz was not a statutory resident of New York State under section 605(b)(1)(B) of the Tax Law.

DATED: May 31, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.