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## Tax Breaks Crumble for **Temporary** Stays

With change in law, time that non-domiciliaries spend here has its costs.

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As some taxpayers on extension prepare to finalize their income tax returns for 2009, more out-of-state individuals may not be happy to learn that their worldwide income could be subject to New York tax even if they are only temporarily in New York for a limited purpose.

Due to legislation enacted in 2009 that was applied retroactively to 2008, (see TSB-M-09(2)I, issued by the New York State Department of Taxation and Finance on Jan. 16, 2009) the “temporary stay exception” was effectively ended, changing the definition of a “statutory resident” for income tax purposes. This article will review the taxation of non-domiciliary individuals and discuss how the repeal of the temporary stay exception to the definition of a statutory resident may affect certain individuals.

The determination of whether an individual is a New York resident is important for income tax purposes. While non-resident taxpayers are subject to New York income tax only on New York source income, resident taxpayers are taxed on all income, irrespective of whether the income is generated in New York.

If an individual is domiciled in New York, he or she generally is a New York resident for income tax purposes. Even if not domiciled in New York, an individual may be a statutory

New York resident for income tax purposes if the individual (i) maintains a permanent place of abode in New York and (ii) spends in the aggregate more than 183 days of the taxable year in New York. (Section 605(b) of Article 22 of the New York State Tax Law). A permanent place of abode is defined as a dwelling place permanently maintained by the taxpayer, irrespective of whether it is owned or leased. Whether a dwelling is permanently maintained is a facts-and-circumstances test that looks at the dwelling

As of 2008, the temporary stay exception was **repealed** in New York. The **simple test** now is whether the out-of-state domiciliary maintains a **permanent** place of abode in New York and spends in the aggregate more than **183 days** of the taxable year in New York.

itself and the taxpayer’s relationship to the dwelling.

To satisfy the first prong of the statutory resident analysis, the permanent place of abode must be maintained for “substantially” all of the taxable year, which has been defined as a period of more than 11 months. For example, if an individual purchased a permanent place of abode on March 1 and spends more than 183 days in New York in a given year, he or she would not qualify as a statutory resident since the first prong of the test was not satisfied (i.e., the permanent

place of abode was not maintained for substantially all of the year.)

It should be noted that the New York Audit Division considers the 11-month rule as a general rule and not absolute. Recent Audit Guidelines issued in 2009 provide that occasional or brief absences would not be sufficient to permit taxpayers to circumvent the “substantially all of the year” prong of the permanent place of abode test. (Nonresident Audit Guidelines, State of New York—Department of Taxation and Finance, 2009) Examples of failing to circumvent the rule, as provided in the Audit Guidelines, include subletting a New York apartment for one month out of the year or renting out an apartment in Saratoga Springs for six weeks during the summer racing season. Another advisory opinion held that 10½ months spent in New York was sufficient to satisfy the so-called 11-month rule.

### Temporary Stay Exception

Prior to the recent change in the law, New York tax regulations provided a temporary stay exception, which excluded from the definition of permanent place of abode one that is maintained during a temporary stay for a fixed and limited period for the accomplishment of a particular purpose. (Section 105.20(e)(1) of the Personal Income Tax Regulations) The particular purpose must be to accomplish a specific goal or assignment as opposed to a general assignment or goal.

For example, prior to 2008, if an individual was in New York on a three-year assignment for a specific employment purpose, he or she would not be considered a statutory

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resident even if the individual spent 183 days in New York because the first prong of the statutory resident analysis would not be satisfied.

As of 2008, the temporary stay exception was repealed in New York, which means that the review of the reason for the stay in New York by an individual domiciled in another state is now somewhat irrelevant. The simple test is whether the out-of-state domiciliary maintains a permanent place of abode in New York and spends in the aggregate more than 183 days of the taxable year in New York.

### Medical Days Exception

Another exception that can potentially be applied to the statutory resident analysis is the medical days exception, which provides that if an individual is confined to a medical institution in New York, the time spent will not count toward the 183-day rule (the second prong of the test). Outpatient care, time visiting doctors or time spent in an assisted living facility—especially if such treatment is consciously made and voluntary—typically does not fall within the medical days exception.

The leading case in New York that created the medical days exception (*Stranahan v. New York State Tax Commission*, 68 A.D.2d 250 (3d Dept. 1979)) noted that although there was not an exception for an involuntary presence in New York, there should not be a distinction between an employee's temporary assignment and an individual who comes to New York for the limited purpose of obtaining medical treatment and is prevented from leaving due to a physical condition.

As a result, the *Stranahan* court held that when a non-domiciliary seeks treatment in New York for a serious illness, the time spent in a medical facility for the treatment of that illness should not be counted in determining whether an individual is a statutory resident during such confinement. In essence, the court used the reasoning behind the temporary stay exception to craft the medical days exception, and now the temporary stay exception no longer exists.

Interestingly—notwithstanding the repeal of the temporary stay exception—the current Audit Guidelines suggest that the medical days exception is still currently available to taxpayers. Bear in mind also that the

temporary stay exception dealt with the fact that the taxpayer failed to satisfy the “permanent place of abode” prong of the statutory residence test, while the medical days exception deals with the number-of-days prong of the test.

### Practical Application

The repeal of the temporary stay exception may not ultimately impact a large number of taxpayers. Prior to the repeal, non-domiciliaries spending time in New York for employment purposes found it difficult to successfully satisfy the burden of proof that they were not a statutory resident under the temporary stay exception. The Audit Guidelines admit that few situations would actually qualify for temporary stay relief in the employment context because it is difficult to satisfy the limited duration and particular purpose prongs of the temporary stay test. The guidelines suggest that a category of taxpayers that might have qualified under the temporary stay exception prior to the repeal covered students enrolled in an educational institution for a fixed amount of time to accomplish a particular purpose (i.e., to obtain a degree.)

Another context worth noting is a non-domiciliary who comes to New York to seek medical treatment for a limited period of time to accomplish a specific goal. For example, a Florida resident with cancer may wish to move to New York to receive top-notch treatment that lasts for one year. Because such treatment typically does not entail confinement to an institution and because the decision to receive such treatment would be consciously and voluntarily made, the medical days exception arguably would not apply to this fact pattern. However, the temporary stay exception, prior to its repeal, arguably would apply so long as the treatment is limited in duration and is to accomplish the specific purpose of receiving treatment.

Under these facts, even if the taxpayer maintained an apartment for more than 11 months and spent more than 183 days in New York that year, the apartment would not be considered a permanent place of abode and the taxpayer would not be considered a statutory resident. Due to the repeal, these same facts currently would result in the taxpayer being subject to New York tax on his or her worldwide income.

In this case, to avoid falling within the definition of a statutory resident, the taxpayer would have to consider not maintaining the new dwelling for more than 11 months. However, as mentioned above, renting the apartment for a period slightly less than 11 months may in some cases be sufficient to satisfy the general 11-month rule.

Also, prior to the repeal, an out-of-state individual who moved to New York to enter into an assisted living facility and to be close to family members may have attempted to argue that he or she should qualify for temporary stay relief. Although it is unlikely that such an argument would be successful because of the indefinite duration of the stay, the repeal of the temporary stay exception ensures that a taxpayer under these facts has no chance, as a certainty, of relief, if he or she otherwise maintains a permanent place of abode and is in New York for more than 183 days in the year.

Contrast this scenario with the involuntary move of an out-of-state individual who requires around-the-clock care to a nursing home. This individual may not only be eligible for the medical days exception, but the nursing home may not satisfy the “permanent place of abode” prong of the analysis as well.

In enacting the new legislation, the Legislature accomplishes one of its goals of treating different non-domiciliaries equally. From a practical perspective, it also reminds non-domiciliaries who spend a significant time in New York for a particular purpose to pay close attention to the number of days spent in New York and to consult with their advisers since the temporary stay exception is no longer available.