

General Information Letter: A taxpayer who remains domiciled in another state, enters Illinois only for purposes of his or her job, and returns to the state of domicile every weekend remains a nonresident.

June 16, 2005

Dear:

This is in response to your letter dated May 3, 2005 in which you state the following:

I have been asked to seek clarification of a point of Illinois tax practice that I hope you will deem suitable for a general information letter. I recognize that the Department can give an opinion only on Illinois law and practice (any description here of other jurisdictions' laws is only for context) and that it cannot rule on any particular case prior to audit. Yet the increasing number of weekend commuters makes my question topical. The European Union, for example, has been addressing the issue and there is a Web site directed at affected persons: <http://www.frontalier.com/>.

The question:

Does "temporary or transitory purpose" include a taxpayer who is domiciled in another jurisdiction and is a "weekend commuter" performing work or services and spending the night in Illinois four or five days a week and, each weekend, returning to his or her family in another jurisdiction (not Indiana, Iowa, Kentucky, Michigan or Wisconsin, which have a reciprocal tax agreements). Would the answer be the same if the taxpayer commuted weekly in this fashion for one, two or ten years, or for an entire working lifetime?

We can leave aside special cases, including military, airline, merchant shipping, diplomatic and government personnel. In GIL 990097 (snowbird case) you seem to imply that ownership or rental of accommodation is not relevant (as it is in some states, such as N.Y.).

(As you probably know, a number of states and the District of Columbia impose income tax on worldwide income based on domicile or residence *in the alternative* regardless of presence or absence from the state. Some (like California and New York) do not impose the tax on a domiciliary resident elsewhere who visits and remains within the state less than a fixed number of days (30, 45) in a particular period of time (such as a year). Non-domiciliaries may be taxed as residents if they have accommodation available, or if they spend a specified period of time in the state. Illinois is vague on the latter point, which concerns us here. Twelve states, not including Illinois, have laws which give credit for income tax paid to a Canadian province on income earned there.)

The definition of "domicile" for tax purposes (i.e., the willingness of the tax authorities to agree that a taxpayer has abandoned a particular domicile) varies among states. The California appellate case, *Noble v. Franchise Tax Bd.*, 118 Cal. App. 4th 560 (2d App. Dist 2004) <http://uniset.ca/xborder/fgncred/118CalApp4th560.html> is instructive on this point, and indeed it turns on an interpretation of "temporary or transitory purposes". Two states that I know of have taxed telecommuters under particular sets of facts, and Canada has imposed taxes on a residence basis of a person employed in France whose family remained in Canada: *Huckaby v. New York State Div. of Tax Appeals*, 2005 N.Y. LEXIS 497, 2005 WL 705977 (Tennessee

telecommuter taxable in New York); Indiana Letter of Findings 97-0512 AGI (telephone consultations from North Carolina for an Indiana client taxable in Indiana); Caron v. The Queen (taxable both in France (place of work) and in Canada (residence of family)) <http://decision.tcc-cci.gc.ca/en/1998/html/1998tcc954210.html> .

Illinois' definition of "resident", and your general information letters on the subject, invariably refer to residence as constituted by a presence that is not "for other than a temporary or transitory purpose". (86 Ill. Adm. Code 100.3020) In your analyses you define this in terms of "intent". Many, probably most and perhaps all other, states restrict "intent" to matters of domicile. (UK tax law has a concept of "ordinary residence" which looks to intent for its starting date.) A number of states treat sojourners as resident for tax purposes if they are "actual" or "statutory" residents (N.Y., for example). Example 2 of 100.3020 in its two branches would, in conflict of laws (*Restatement*) terms and the practice of other states, reflect upon domicile rather than residence. Illinois' use of asynchronous 9-month (for establishing) and 12-month (for losing) periods of residency involves a further ambiguity: when counting time "in the aggregate": it is not clear whether you would count actual days (in our hypothesis 4 or 5 x 52, less vacations and holidays) in seeking an answer.

A check in Westlaw and RIA shows no reported Illinois cases discussing residence and tax, or defining "intent" beyond the bare terms of 100.3020.

A further query:

100.3020(i) (dual residency), GIL 990097 (snowbird case) and GIL 892210 (football player) leave open the possibility that, given the subjective nature of the Illinois test for residence, one might opt to be deemed a resident in a marginal case if that is beneficial in terms of eligibility for credit for tax paid to another state. Is this correct?

Dual residents may pay more or less tax than they would if they filed as nonresidents: (a) tax credit may be available only to residents (Ill. Stat. 601(b)(3)) and (b) states do not necessarily give credit for tax paid to a second state on income derived from a third state (N.Y. Tax Law § 620; Tamagni v. Tax Appeals Tribunal, 91 N.Y.2d 530, 695 N.E.2d 1125, 673 N.Y.S.2d 44 (1998)). If the other state taxes only "unearned" income (in the manner of Tennessee's Hall income tax) then the difference may be substantial.

If your Department is unable to provide guidance other than to refer to the published regulations, and if a taxpayer has to guess at how to file and then await audit or hope to remain "below the radar", there is a risk of double taxation with loss of a tax credit otherwise available because of a time bar (in the manner of U.S. v. Dalm, 494 U.S. 596 (1990) (taxation as gift or income)). Unless the taxpayer is fortunate enough to be domiciled in Minnesota, which apparently waives the statute of limitations in such a case (Minn. Stat. 290.06(22)(f)). I do hope that you will be able to share your views or provide guidance, without of course binding the Department or the State in any way.

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill. Adm. Code §1200, or on the website <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

Section 1501(20)(A) of the Illinois Income Tax Act ("IITA", 35 ILCS 5/101 et seq.) defines "resident" for individual taxpayer purposes as follows:

(20) **Resident.** The term "resident means:

(A) an individual (i) who is in this State for other than a temporary or transitory purpose during the taxable year; or (ii) who is domiciled in this State but is absent from the State for a temporary or transitory purpose during the taxable year;

A further explanation for determining whether an individual is considered to be an Illinois resident for Illinois income tax purposes can be found in 86 Ill.Admin.Code 100.3020. The relevant sections are as follows

100.3020 Resident (IITA Section 301)

...

c) Temporary or transitory purposes. Whether or not the purpose for which an individual is in Illinois will be considered temporary or transitory in character will depend upon the facts and circumstances of each particular case. It can be stated generally, however, that if an individual is simply passing through Illinois on his way to another state, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in Illinois for but a short period, he is in Illinois for temporary or transitory purposes, and will not be a resident by virtue of his presence here. If, however, an individual is in Illinois to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to Illinois with no definite intention of leaving shortly thereafter, he is in Illinois for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may also maintain an abode in some other state.

...

d) Domicile. Domicile has been defined as the place where an individual has his true, fixed, permanent home and principal establishment, the place to which he intends to return whenever he is absent. It is the place in which an individual has voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. Another definition of "domicile" consistent with the above is the place where an individual has fixed his habitation and has a permanent residence without any present intention of permanently removing therefrom. An individual can at any one time have but one domicile. If an individual has acquired a domicile at one place, he retains that domicile

until he acquires another elsewhere. Thus, if an individual, who has acquired a domicile in California, for example, comes to Illinois for a rest or vacation or on business or for some other purpose, but intends either to return to California or to go elsewhere as soon as his purpose in Illinois is achieved, he retains his domicile in California and does not acquire a domicile in Illinois. Likewise, an individual who is domiciled in Illinois and who leaves the state retains his Illinois domicile as long as he has the definite intention of returning to Illinois. On the other hand, an individual, domiciled in California, who comes to Illinois with the intention of remaining indefinitely and with no fixed intention of returning to California loses his California domicile and acquires an Illinois domicile the moment he enters the state. Similarly, an individual domiciled in Illinois loses his Illinois domicile:

- 1) by locating elsewhere with the intention of establishing the new location as his domicile, and
- 2) by abandoning any intention of returning to Illinois.

...

f) Presumption of residence and nonresidence. If an individual spends in the aggregate more than nine months of any taxable year in Illinois it will be presumed that he is a resident of Illinois. An individual who is absent from Illinois for one year or more will be presumed to be a nonresident of Illinois. These presumptions are not conclusive, and may be overcome by other satisfactory evidence to the contrary.

g) Proof of residence or nonresidence

- 1) The type and amount of proof that will be required in all cases to rebut or overcome a presumption of residence or nonresidence cannot be specified by a general regulation, but will depend largely on the circumstances of each particular case. The taxpayer may submit any relevant evidence to the Department for its consideration. Such evidence may include, but is not limited to, affidavits, evidence of: voter registration, automobile or drivers license registration, filing an income tax return as a resident of another state, home ownership or rental agreements, club and/or organizational memberships and participation, telephone and/or other utility usage over a duration of time. In appropriate instances, the Department may request any relevant evidence which may assist it in determining the taxpayer's place of residence.

...

You are correct in your assessment that the Illinois test for residency for Illinois income taxation purposes is highly subjective. As you can see, intent is a controlling factor in determining residency. Generally, the above guidelines will provide the means to determine the question of residency with any given set of facts.

Your letter presents the following fact scenario: a taxpayer is domiciled outside of Illinois and is a "weekend commuter" performing work or services in Illinois requiring the taxpayer to spend the night in Illinois four or five days a week with the taxpayer returning to taxpayer's family (who live outside of Illinois) each weekend.

The facts you present clearly state that the taxpayer is domiciled outside of Illinois. The definition of

domicile as presented in Section 100.3020(d) states that a taxpayer's domicile is "the place where an individual has his true, fixed, permanent home and principal establishment, ...the place in which an individual has voluntarily fixed the habitation of himself and family, not for a mere special or limited purpose, but with the present intention of making a permanent home, ..." According to Illinois regulations, we agree that the taxpayer is domiciled outside of Illinois. This is because the taxpayer's family and permanent home are outside of Illinois. The regulations further clarify that a taxpayer can only have one domicile at any one given time. If such domicile is outside of Illinois as in the facts you have presented, and the taxpayer comes to Illinois for business purposes with the intention of returning to his domicile outside of Illinois, then the taxpayer is not an Illinois resident for Illinois income tax purposes. This conclusion remains the same regardless of how long the taxpayer commutes so long as his domicile remains outside of Illinois.

Your next inquiry indicates that the laws of Illinois may provide taxpayers the opportunity to choose whether or not they will be deemed Illinois residents depending on whether such status is beneficial to them. We do not believe this to be the case. Although you may believe that the fact scenario you provided in your letter is "a marginal case" that would allow the taxpayer to choose his residency status depending on what is most beneficial for tax purposes, we do not. We see the facts as clearly indicating that the taxpayer is not a resident of Illinois.

Please keep in mind that even nonresidents may have filing obligations with the state of Illinois pursuant to IITA Sections 301(c), 302, 303, 304 and 502. As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. Should you have additional questions, please do not hesitate to contact our office.

Sincerely,

Heidi Scott
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