taxnotes®

state

Volume 94, Number 11 ■ December 16, 2019

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Reprinted from *Tax Notes State*, December 16, 2019, p. 927

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In this installment of Noonan's Notes, the authors analyze the ongoing *Obus* litigation, a statutory residency case that may resolve a long-running debate about what constitutes a permanent place of abode in New York.

Much to the delight of practitioners like us, residency issues — specifically New York income tax residency issues — made for interesting headlines in 2019. First, of course, with the near-elimination of the state and local tax deduction in 2018, stories of taxpayers fleeing high-tax states have made headlines in both the tax press and mainstream media.[1] And more recently, this took a slightly more comedic turn, as our commander in chief decided to join the flight out of New York and claim (or attempt to claim) a change of residency to Florida.[2]

So looking ahead to 2020, we expect that residency issues, audits, and litigation will continue to be part of the tax landscape. In this special edition of *Noonan's Notes*, we look at one specific case involving New York's "statutory residency" test that may resolve a long-running debate about what constitutes a "permanent place of abode" in the state.

Background: The Statutory Residency Test

Under New York's rules, a taxpayer can be a resident if he meets one of two specific residency tests. The primary test for residency is based on a taxpayer's domicile, or where his permanent or primary home is located. If a taxpayer maintains his domicile in New York, he qualifies as a New York resident for state income tax purposes.[3] Thus, for example, if a certain leader of the free world is deemed to be domiciled in the state because he maintains his permanent and primary home in New York, he will be taxable as a New York state resident. But the alternative test for residency is considerably more objective, at least in most cases. Under the statutory residency test, a taxpayer domiciled in another state can nonetheless be taxable in New York if he spends more than 183 days in the state and maintains a permanent place of abode there.[4]

One interesting (and somewhat troubling) aspect of the statutory residency rules is that

[1] *E.g.*, Brittany De Lea, "Florida to See Population Boom Over Coming Years as SALT Deductions Remain Capped," Fox Business News (Aug. 13, 2019); and Ben Steverman, "High-Tax States Make It Hard for the Rich to Leave," Bloomberg (Mar. 4, 2019).

[2] Andrea Muse, "Tax Issues May Cloud Trump's Move to Sunshine State," *Tax Notes Today State* (Nov. 4, 2019); and Ashlea Ebeling, "President Trump Thumbs Nose at New York Tax Collector With Move to Florida," *Forbes* (Oct. 31, 2013).

[3] N.Y. Tax Law section 605(b)(1)(A).

[4] N.Y. Tax Law section 605(b)(1)(B).

taxpayers qualifying as statutory residents are by definition necessarily residents of another state. Thus, double taxation of statutory residents is common. And 2019 saw the end of the road — via the U.S. Supreme Court's denial of certiorari — for two legal challenges in which taxpayers facing such double taxation argued that New York's statutory scheme was unconstitutional, in violation of the commerce clause.[5] This result will only magnify potential problems faced by statutory residents and certainly raise the stakes for cases involving taxation of statutory residents.

The Next Statutory Residency Battle: Vacation Home Cases

2020 will likely answer a long-running question about whether a seldom-used vacation home in New York maintained by a nonresident can be considered a "permanent place of abode" for statutory residency purposes. The question of what constitutes a permanent place of abode, as New York practitioners and readers of this column know, has been an oft-litigated issue in New York. But *Matter of Nelson Obus and Eve Coulson*[6] — an administrative law judge determination now being appealed to New York's Tax Appeals Tribunal — presents a compelling new twist in the continuing debate over the limits of statutory residency in New York.

The taxpayers in the *Obus* case were New Jersey domiciliaries. During the years at issue, Nelson Obus worked at a New York City investment firm and commuted to and from the city daily. He and his wife did not maintain an apartment in the city but did own a modest vacation home more than 200 miles north of the city, near New York's Adirondack Mountains. The home was maintained year-round but only used sporadically throughout the year. The couple rented out a separate apartment unit within the home to a year-round tenant. Although the number of days the taxpayers spent at the home is in dispute, the ALJ concluded that it totaled no more than two to three weeks per year.

Based on New York's two-prong test for statutory residency, the taxpayers in *Obus* (who filed as nonresidents) were deemed resident individuals of New York and assessed nearly $530,000 in additional tax following an income tax audit. As noted, a resident for personal income tax purposes in New York includes not only a person domiciled in the state, but also any nondomiciliary who: (1) is present in New York more than 183 days in the aggregate, and (2) maintains a permanent place of abode in the state.[7] Obus met the 183-day test based primarily on his work in New York City. That, combined with the distant vacation home, resulted in Obus being deemed a resident individual subject to tax on 100 percent of his income from all sources — the same tax treatment faced by someone domiciled in New York.

If this scenario sounds familiar to practitioners, it should. Our firm litigated this same issue and basic fact pattern years ago in *Matter of John and Laura Barker*,[8] in which we argued that a seldom-used vacation dwelling in the Hamptons — maintained and used solely for brief vacations by a Connecticut couple — could not constitute a permanent place of abode for the taxpayers. Treating the couple as residents of New York based on a modest beach cottage used for two to three weeks in the aggregate per year, we argued, conflicted not only with the original legislative intent behind statutory residency, but also with the State Department of Taxation and Finance's own regulations — which provide that a "mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."[9]

The Tax Appeals Tribunal in *Barker* agreed the home was purchased and used solely for vacations, but it held that the amount of use and other aspects of the taxpayers' relationship to a vacation dwelling were irrelevant. Rather, the tribunal held that "where, as here, the dwelling

[5] *See Edelman v. New York Department of Taxation, et al.*, ___ S. Ct., 2019 WL 4921468 (Mem) (2019); and *Chamberlain et al. v. New York Department of Taxation*, ___ S. Ct., 2019 WL 4921467 (Mem) (2019).

[6] *Matter of Nelson Obus and Eve Coulson*, DTA No. 827736 (N.Y. State Div. of Tax App. Aug. 22, 2019).

[7] N.Y. Tax Law section 605(b)(1); 20 NYCRR section 105.20(a).

[8] N.Y. Tax Appeals Tribunal, Jan. 13, 2011.

[9] 20 NYCRR section 105.20(e)(1).

is objectively suitable for year-round living and the taxpayer maintains dominion and control over the dwelling," it constitutes a permanent place of abode. The tribunal added that "there is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."

If *Barker* were the only relevant authority out there, the *Obus* challenge would have little traction — given the tribunal's view that mere maintenance of a dwelling that is "objectively suitable" for year-round living can create a permanent place of abode regardless of the taxpayer's use of it. But the rationale relied upon in *Barker* has since been largely undermined by another intervening decision: the New York Court of Appeals' decision in *Gaied v. Tax Appeals Tribunal*.[10] The big question posed in the *Obus* appeal is whether the *Gaied* decision forces a new look at the vacation home scenario.

In *Gaied*, the Court of Appeals held that a New Jersey domiciliary could not be deemed a statutory resident of New York based on an apartment the taxpayer maintained for his elderly parents who resided there. In doing so, the court overturned a Tax Appeals Tribunal decision that had relied on some of the same rationale in *Barker* to rule that the apartment constituted a permanent place of abode for the taxpayer, even though it was maintained for his parents. The tribunal had held in *Gaied* (as it did in *Barker*) that "where a taxpayer has a property right to the subject premises, it is neither necessary nor appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer's subjective use of the premises."[11] And since the taxpayer in *Gaied* had limited access to the apartment he maintained for his parents (sleeping on the couch once or twice a month), the tribunal ruled the permanent-place-of-abode test was met. As in *Barker*, the tribunal repeated that there is "no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."[12]

The Court of Appeals flatly disagreed. In a unanimous decision, the court rejected the tribunal's notion that a taxpayer need not dwell in an abode for it to be deemed a permanent place of abode, finding "no rational basis for that interpretation" and holding that "in order for an individual to qualify as a statutory resident, there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence."[13] In reaching this conclusion, the court turned to the legislative history of New York's statutory residency provisions, emphasizing that their purpose was to prevent taxpayers "who are 'really and [for] all intents and purposes . . . residents of this state'" from claiming to be domiciled in another state, yet actually residing in New York. According to the *Gaied* court:

> In *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125 (1998), this Court examined the legislative history of the tax statute, and noted that there had been 'several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but . . . claim to be nonresidents'. . . . We explained that the statutory residence provision fulfills the significant function of taxing individuals who are 'really and [for] all intents and purposes . . . residents of the state' but 'have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents' . . . 'In short, the statute is intended to discourage tax evasion by New York residents.'[14]

So with that backdrop, the *Gaied* court found that the tax department's interpretation of the permanent-place-of-abode test — which ignored whether or how a taxpayer *used* a dwelling — was inconsistent with the legislative intent underlying the statutory residency provision, which again was to capture those taxpayers who really, and for all intents and purposes, were

[10] 22 NY3d 592 (2014). We can't lie: This case is one of our favorites. If you won a case at New York's highest court, you'd want to talk about it too, right? *See, e.g.*, Timothy P. Noonan and Joshua K. Lawrence, "The Goods on *Gaied*: What It Means, From the Front Lines," *State Tax Notes*, May 19, 2014, p. 409.

[11] *Gaied*, 22 NY3d at 596.

[12] *Id.* at 596.

[13] *Id.* at 598, 594.

[14] *Id.* at 597.

living in the state. Instead, the court found that in order to be taxed as a statutory resident, there must be some evidence that a taxpayer used their dwelling as a residence for themselves, or more specifically, that that taxpayer maintained a "residential interest" in the place.[15]

Barker Revisited?

The *Gaied* court emphasized the "camp or cottage" exemption as an example of what would not be deemed "a dwelling place of a permanent nature" under the regulations defining a permanent place of abode. But that's as far as the court went on the exemption. So where does that leave cases like *Barker*? Given *Gaied*'s requirement that a residential interest in a dwelling exist before it can be held a permanent place of abode, can a vacation dwelling owned by a commuter, located hundreds of miles away from his office and used no more than three weeks a year, still make a person a resident of New York? More specifically, is the tribunal's conclusion in *Barker* still correct, that a dwelling "objectively suitable for year-round living" will always fail the "camp or cottage" exclusion even if only used for vacation purposes?

At least according to the ALJ's determination in *Obus*, *Gaied* does not change the analysis. The ALJ dismissed *Gaied* as having "easily distinguishable" facts from the vacation home scenario. First, the ALJ dismissed the idea that the rental of a separate apartment to an unrelated party prevented the remainder of the house from being a permanent place of abode for the taxpayers. Second, the ALJ distinguished the *Obus* situation from that in *Gaied*, noting that the permanent place of abode determination here doesn't rest on "mere ownership" of a dwelling as it did in *Gaied*. Rather, according to the ALJ, "the facts of this case demonstrate that petitioners purchased the Northville home for their use throughout the year and maintained the property for their use." As for the argument that the home met the "camp or cottage" exclusion, the ALJ also reiterated the *Barker* rule that a dwelling objectively suitable for year-round use (like the *Obus* home) cannot meet the exclusion, adding that "the fact that petitioners chose to use this home exclusively for vacations does not transform its characterization as a permanent place of abode."

There are problems with this analysis, however. First, the ALJ's attempt to distinguish *Gaied* as having "easily distinguishable" facts repeats a common mistake made by the tax department in its application of *Gaied* to many cases over the past five years. We should not forget that the Court of Appeals in *Gaied* did not end up actually deciding the case on the merits; in other words, it did not set forth the permanent-place-of-abode test and then apply that test to the facts in *Gaied*. Rather, all it said was that the tax department's interpretation of its statutory residency rules was not consistent with the legislative intent behind the provisions in the first place. As noted, the court recognized that those provisions were intended to apply to taxpayers who really were, for all intents and purposes, living like residents of the state. And it found that the tax department's conclusion — that how or whether a taxpayer used a place was irrelevant — was inconsistent with that legislative intent.

Thus, the notion that the court's analysis in *Gaied* should not apply to future cases when the "facts are different" has always been a bit of a red herring. The facts of *Gaied* ultimately don't matter. What matters was the court's analysis and how the court interpreted the test. So it is simply too easy to say that the *Gaied* decision can't apply to taxpayers like Obus because the facts in *Gaied* were different. Instead, what a court should do is apply the *Gaied* rationale to the set of facts presented before it.

That kind of analysis is absent, however, from the *Obus* determination, just as it was in *Barker*. There is simply no discussion of the *legislative intent* behind statutory residency, and how taxing a commuter like Obus as a resident is consistent with that intent, when his only residential connection with the state comes from visits to a vacation home 200 hundred miles from his work — amounting to no more than three weeks in total. As the Court of Appeals stressed in *Gaied*, and before that in *Tamagni*, the original intent of New York's statutory residency

[15] *Id.* at 597.

provisions was to curb tax evasion by New York *residents* — that is, those who "really and [for] all intents and purposes are residents of the state, [but] have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents."[16] The original aim of these provisions was not to widely expand the reach of the tax law to draw in nondomiciliaries with only transitory, non-abiding connections with New York. Rather, it was to combat tax evasion by people *residing* in New York. Thus, applying the rules in a rigid, mechanical fashion without consideration of the purpose of statutory residency makes little sense.

Conclusion

As we head into 2020, the double taxation faced by statutory residents remains a real problem. So it's only natural that taxpayers will continue to test the limits of the provisions and work to ensure that they are extended only as far as the legislation was supposed to go. *Obus* presents a set of facts puzzling to many: How can a taxpayer whose only residence in New York is a vacation property be taxed as a resident, the same as taxpayers who live in New York full-time? In 2020 we'll find out the answer to this long-standing debate. ■

[16] *Id.* at 597.