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Residency Ruling Raises Stakes For Owning an 'Abode' in New York

by Timothy P. Noonan and Joshua K. Lawrence

Timothy P. Noonan *Joshua K. Lawrence*

Another residency article? Look, as most of my colleagues know, I usually just go with the flow. That's probably why I (Noonan) have nine kids. And in recent months, we've seen New York residency issues in the headlines on an almost weekly basis. That, no doubt, is a result of increased audit activity and the aggressive positions the New York State Department of Taxation and Finance frequently takes in residency cases. Unfortunately, based on the most recent development covered here, the rules are getting even more confusing and potentially more onerous.

On June 16 New York's Tax Appeals Tribunal issued its final decision — actually, its second final decision — in the *Matter of John Gaied*.[1] This case has been highlighted by me in previous articles here and in other publications, as well as by other commentators recently.[2] The issue involves New York's statutory residency test, whereby an individual can be taxed as a resident if he maintains a permanent place of abode in New York and spends more than 183 days in the state. Specifically, the *Gaied* case focused on the "permanent place of abode" prong of the test. And in a nutshell, the New York State Tax Tribunal's now-settled ruling holds that an individual who has a property right in a dwelling will be deemed to be maintaining a permanent place of abode for purposes of New York residency, regardless of whether the individual actually ever uses that abode. We'll say it again: An individual who has a property right in a dwelling will be deemed to maintain a permanent place of abode even if the individual never stays there.

That represents a significant departure from current law, at least if you apply the tribunal's prior analysis in the seminal case of *Matter of Evans*[3] and the dozens of cases following *Evans*. The June ruling also conflicts with the tax department's own audit guidelines, which instruct that a dwelling should not be considered a permanent place of abode if the taxpayer never uses it as a residence.[4] Further, the department's guidelines have instructed auditors since 1997 that a residence maintained by one person but used exclusively by someone else should not be considered a permanent place of abode for the person who maintains it.[5] The tribunal's decision in *Gaied* puts those long-standing policies in doubt. So practitioners who deal even occasionally with the issue of statutory residency had better listen up. *Gaied* represents a huge development in this area.

Brief Overview

The taxpayer in *Gaied* was domiciled in Old Bridge, N.J., about a 40-minute drive from Staten Island in New York, where he also owned two auto repair businesses. Operating the business required

[1]Tax Appeals Tribunal, June 16, 2011. (For the decision, see *Doc 2011-13773* or *2011 STT 125-17*.)

[2]*See* Timothy P. Noonan, "An Easier Fix to New York's Statutory Residency Problem?" *State Tax Notes*, May 9, 2011, p. 425, *Doc 2011-8930*, or *2011 STT 89-6*; *see also* Timothy P. Noonan and Joshua K. Lawrence, "The *Gaied* Case: A Potential Game-Changer in The Statutory Residency Area," *The Trusted Professional*, June, 2011, p. 1; Craig Karmin, "State Tax Probe Expands," *The Wall Street Journal*, Mar. 8, 2011.

(Footnote continued in next column.)

[3]Tax Appeals Tribunal, June 18, 1992, *aff'd* 199 A.D.2d 840 (3rd Dept. 1993).

[4]*See* Nonresident Audit Guidelines, p. 47 (Mar. 31, 2009).

[5]*Id.* at 48.

the taxpayer to be on Staten Island on a daily basis, resulting in his presence in New York City on more than 183 days. Thus, like many commuter types, Gaied satisfied the time aspect of the statutory residency test. But the legal issue centered on whether a rental property he also owned on Staten Island constituted maintenance of a "permanent place of abode" for statutory residency purposes. Gaied testified that he had purchased the property purely as an investment, and it was established at hearing that he leased two of the house's three units to tenants. However, Gaied retained the third apartment to provide a home for his elderly parents, who depended on him for support. The parents lived in the apartment for all years at issue, and Gaied paid all their utility bills. He testified that he occasionally stayed overnight at the apartment, but only because of his father's poor health, and only if they requested him to stay. On those occasions, he slept on the couch because he did not have a bedroom or a bed there. Nor did he keep any belongings at the apartment, he testified.

Assessed by the tax department as a statutory resident of New York City, Gaied challenged the assessment and (at least initially) convinced the Tax Appeals Tribunal that although he maintained an abode in New York, it was not a permanent place of abode for *him*; rather it was place of abode solely for his parents. The tribunal's initial ruling in July 2010 reversed the holding of an administrative law judge that the combination of maintaining and using the apartment — even if solely at the behest of his parents — was sufficient for a finding of a permanent place of abode. The tribunal's 2010 decision had focused on the concept from *Evans* that the physical aspects of an abode should be considered, as well as the nature of its use by the taxpayer. In weighing those two distinct factors, the tribunal found that the Staten Island apartment, in which the taxpayer had no belongings or living quarters for himself and where he stayed only for reasons of his father's poor health, could not qualify as a permanent place of abode for him.

The tribunal's complete reversal on all those issues raises more questions than it answers. But we'll take a shot at answering some of the questions that have been posed to us since *Gaied* came out.

Questions and Answers

Q: Why is this still a story? Didn't the tribunal already rule?

A: Indeed it did. As noted above, the tribunal initially overturned the ALJ's determination and found that the apartment Gaied maintained for his parents could not qualify as a permanent place of abode because he did not have unfettered access to the place, he didn't keep any personal items there, he didn't maintain living quarters for himself, and he didn't use it as a residence. It was his parents' place; it wasn't his place. That ruling was issued in July 2010 and, generally, unless a taxpayer files an Article 78 challenge protesting the decision, the decision becomes final. The tax department cannot directly appeal a final decision of the Tax Appeals Tribunal. Unfortunately for the taxpayer, however, the division took the highly unusual step of requesting *reargument* in the case, claiming that the tribunal simply got its first decision wrong.

Q: What was the division's basis for reargument?

A: The division made that unusual claim based, in part, on cases that were issued in the 1980s, before the seminal case in the "permanent place of abode" area, *Matter of Evans,* was issued (in 1992). But two pre-*Evans* cases (specifically *Matter of Roth*[6] and *Matter of Boyd*[7]) contained dicta suggesting that a taxpayer need not *dwell* in an abode for it to be "permanent"; all that was required was maintenance. The division used what some (including me) believed was an improper reading of these cases to argue that since Gaied owned the dwelling in question, it automatically qualified as his permanent place of abode, even though he never used it as a residence. The division made the argument by plucking a statement — arguably out of its context — from *Matter of Roth,* that "there is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."

Q: Why did the division's motion for reargument create such controversy?

A: In part, this response came from the practitioner community, which complained that the division was attempting to disavow the tribunal's seminal precedent in *Evans* to impose a more drastic and far-reaching residency test. That argument even became part of the proceedings in *Gaied*, via an amicus brief filed with the tribunal by the New York State Society of Certified Public Accountants. In part, the controversy arose because the division's argument created what some feared would lead to an incredibly slippery slope, whereby even a parent who acquires an apartment for a college-bound child but never uses the apartment could more or less be subject to residency taxation for maintaining a permanent place of abode. Under the division's position on reargument — that one need not dwell in an abode in order for it to be "permanent" and that maintenance alone is sufficient — that fear was certainly justified.

Q: So whose side did the tribunal take?

A. Well, that's an interesting question. For purposes of a binding legal decision, the tribunal adopted the tax department's view. Two of the tribunal's three commissioners, in an about-face from

[6]Tax Appeals Tribunal, Mar. 2, 1989.
[7]Tax Appeals Tribunal, July 7, 1994.

their July 2010 opinion, held that the division's citation and reliance on the *Roth* and *Boyd* cases was correct. Specifically, the tribunal held 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." In other words, if an individual owns a dwelling or has a property right in a dwelling, it doesn't matter if the taxpayer ever stays there. It doesn't matter if he or she keeps any belongings there. It doesn't matter if use of the place has been turned over to others. All that appears to matter, based on the tribunal's self-reversal in *Gaied*, is that the taxpayer has a property right; that alone is sufficient to potentially subject the individual to taxation as a New York resident.

What's interesting is that not all tribunal members thought that way. In a rare dissenting opinion, the tribunal's president, James Tully Jr., argued that the initial decision in *Gaied* represented a fair and proper application of the tests set forth by the tribunal in its 1992 decision in *Evans*. Citing *Evans*, he said that "property rights are not determinative of permanence" and that the circumstances surrounding Gaied's maintenance and use of the apartment — its use as a home for his parents, his lack of a bed or personal items, and the nature of his occasional stays — warranted a finding that the apartment couldn't be considered a permanent place of abode for *him*. Of course, Tully lost the vote, since his two fellow tribunal members voted to reverse the July 2010 decision as being in error. One wonders, though, whether the incredibly high standard for even considering reargument could be met in a case in which one of the tribunal members supported the initial decision. In any event, this is the second time in a year that the tribunal has issued a decision in the statutory residency area with one dissenting member. Late last year, the tribunal issued its decision in *Matter of Robertson*, a case in which the tax department's "day count" rules were subject to severe scrutiny. In a victory for the taxpayer, two of the commissioners took the tax department to task for its onerous interpretation of the evidentiary standards for proving one's days outside New York. But one commissioner, Carroll Jenkins, nonetheless voted to support the tax department's construction of the day-count rules.

Q: So if a parent purchases or rents an apartment for a child and never uses it, could that apartment be deemed a permanent place of abode for the parent?

A: Well, that fact pattern wasn't explicitly presented to the Tribunal in the *Gaied* case. But it certainly seems a logical extension to the tribunal's broad statement 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." So if the dwelling place is physically suitable for *someone* to use, and the taxpayer owns the dwelling, nothing else need matter. Parents beware!

Q: But what if there's no place for the taxpayer to sleep?

A: Based on the tribunal's reversal in *Gaied*, that might not matter. In a footnote, the tribunal disavowed the notion that a dwelling place must have a separate bedroom or bed to constitute a permanent place of abode. In fact, it's specifically asserted in the footnote that "the lack of a bedroom or *bed* would not preclude . . . [the] premises from being deemed a permanent place of abode."[8]

Q: Aren't these holdings seemingly contradictory to the department's policies and guidelines?

A: That's an easy one: Yes. Absolutely. One hundred percent. The division's arguments in the *Gaied* matter and the tribunal's ultimate holding run contrary to policy statements made in both the 1997 and recently issued 2009 Nonresident Audit Guidelines. For instance, the 2009 Nonresident Audit Guidelines say that "generally, residential property ([a] house, condo, apartment, etc.) will not be considered a permanent place of abode if the individual never uses the property as a residence."[9] Moreover, the guidelines instruct that a "residence that is maintained by one individual but used exclusively by another should not be deemed a permanent place of abode for the individual who maintains it."[10] In the section of the guidelines dealing with the permanent place of abode question, the department also devotes a considerable amount of attention to an ALJ determination, *Matter of Stein*.[11] In the *Stein* case, a husband acquired full ownership and use of a New York City apartment as part of a divorce settlement. He had purchased the apartment for his wife while the two were still married but testified he never had any desire to stay in the apartment, even though he was not precluded from using if he wanted to. The audit guidelines highlight in bold type a citation from the ruling, which found that regardless of Mr. Stein's ownership of the apartment and the ability to access it, his relationship was such that it could not constitute a permanent place of abode. Namely, Mr. Stein:

> had no living arrangement with the apartment, during the audit period or previous thereto. Mr. Stein maintained no clothing or personal effects at the cooperative apartment. He did not sleep there or utilize it for business, personal or social purposes. His relationship

[8]*Gaied* at n.14 (emphasis added).
[9]Nonresident Audit Guidelines, p. 47 (Mar. 31, 2009).
[10]*Id.* at 48.
[11]ALJ determination, Sept. 7, 1995.

with the apartment vis-à-vis the spirit of statutory residency was nonexistent.

Neither the guidelines nor ALJs' determinations constitute binding precedent in New York. But tribunal decisions do. And the tribunal's determination in *Gaied* makes it clear that the result in a case like *Stein* may be quite different under the newly announced standard. In fact, under *Gaied*, one wonders whether there will be any spirit left in statutory residency — or if decisions regarding permanent place of abode in New York will come down simply to bricks, mortar, and a property right.

Conclusion

Do you have more questions? We do, too. It's unclear how the department will interpret the tribunal's ruling. It's unclear whether the case will be upheld if appealed by the taxpayer. And even so, given the split decision, it's unclear how long the *Gaied* standard will last, especially with the term of one commissioner coming to an end. So stay tuned, and don't give up hope. We hope that at some point the spirit behind the statutory residency rules will be resurrected. ☆

Noonan's Notes is a column by Timothy P. Noonan, a partner with Hodgson Russ LLP, New York and Buffalo. This month's column is coauthored with Joshua K. Lawrence, an associate with the firm.