

## **Gaied v. New York: 3 Years Gone**

**by Timothy P. Noonan and Daniel P. Kelly**

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Noonan's Notes is a column by Timothy P. Noonan, a partner in the Buffalo and New York offices of Hodgson Russ LLP. Daniel P. Kelly, an associate in the Buffalo and Palm Beach, Florida, offices, coauthored this article.

In this edition of Noonan's Notes, the authors discuss *Gaied v. New York State Tax Appeals Tribunal*. Noonan and Kelly write that though the case did jump-start a shift in how residency cases are handled, it wasn't quite the shift they envisioned when the case was decided three years ago. Questions still abound about whether the New York tax department is applying the right test in the wake of this important decision.

February 18, 2014. That was probably just another bitterly cold winter day for most folks, but not for us tax practitioners. No, February 18 was the start of something big. It marked a rare win at the New York Court of Appeals — the state's highest court — for personal income tax payers in the seminal residency case *Gaied v. New York State Tax Appeals Tribunal*.<sup>1</sup>

<sup>1</sup>22 N.Y.3d 592. Timothy P. Noonan represented the taxpayer in this case.

Despite the roundhouse kick that we thought *Gaied* would be for taxpayers, we kept our hopes in check. In the May 2014 edition of *State Tax Notes*, we wondered out loud: “[*Gaied*] should jump-start a shift in how statutory residency cases are handled. Time will tell whether that comes to pass.”<sup>2</sup>

Well, three years have passed, and *Gaied* actually did jump-start a shift in how residency cases are handled, though not necessarily how we envisioned it. In this article we'll review the *Gaied* decision and the tax department's written and audit responses to *Gaied*, and we'll discuss some of the issues we've seen since *Gaied* as first published.

### New York Statutory Residency — Overview

Let's set the legal table for this discussion. The *Gaied* decision dealt with New York's statutory residency test. Under that test, if a taxpayer who is domiciled elsewhere spends more than 183 whole or part days in New York City or state and maintains a “permanent place of abode” in New York City or state for substantially all of the tax year (generally a period exceeding 11 months), the taxpayer will be taxed as a full New York City or state resident.<sup>3</sup> The day count and permanent place of abode (PPA) portions of the state's statutory residency test pose separate and unique challenges, but *Gaied* addressed only the PPA issue.

<sup>2</sup>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.

<sup>3</sup>New York Tax Law section 605(b)(1)(B); New York City Administrative Code section 11-1705(b)(1)(B); see also 20 NYCRR 105.20(a)(1).

The foundation of the court of appeals' decision in *Gaied* was the legislative history behind the adoption of, and subsequent adjustments to, the predecessor to current New York Tax Law section 605(b). So before we dive in, it's important to understand the legislative intent behind the statute.

New York's statutory residence test dates back to 1922, when the New York State Legislature added to the definition of a state resident anyone "who maintains a permanent place of abode within the state, and spends in the aggregate more than seven months of the taxable year within the state."<sup>4</sup> In its memorandum supporting the new statutory residency provision, the tax department made clear why it thought the measure was necessary: It was an alternative to the highly subjective common law test of domicile, which had governed residency determinations until then.<sup>5</sup> As the tax department said in its memo: "We have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but they . . . claim to be nonresidents: their offices are in New York; but they vote from their summer residences in New England or their winter residences in California or Florida and claim to be nonresidents."<sup>6</sup> The addition of that new test, according to the tax department, "would do away with a lot of this faking and probably result in a man's conceiving his domicile to be at the place where he really resides."<sup>7</sup>

That point was further highlighted in 1954, when the Legislature amended the seven-month test for presence in New York and replaced it with the 183-day rule (essentially a six-month test). In explaining the justification for the proposed change, the tax department's memorandum in support noted that there had been many cases of

tax avoidance, even evasion, and that "persons who really are residents nevertheless manage to comply with the present seven-month rule by spending long weekends, holidays and vacations outside the state."<sup>8</sup>

To close the loop leading up to *Gaied*, in 1998 New York's court of appeals referenced that legislative history in *Tamagni v. New York State Tax Appeals Tribunal*,<sup>9</sup> which involved the constitutionality of the statutory residency scheme — in particular, the lack of a full resident credit for taxes paid to other states. The court, citing the legislative history, said New York's statutory residence test was enacted to discourage tax evasion by New York residents, adding that the provision "serves the important function of taxing those who, while 'really and [for] all intents and purposes [are] residents of the state,' but (per the opinion) 'have maintained voting residence elsewhere and insist on paying taxes to us as nonresidents.'" The court made that statement in part to justify its later holding in the case, allowing the tax department to subject those residents to double taxation on intangible income.<sup>10</sup>

Thus, the intent underlying New York's statutory residency test was to ensure that people who actually resided in New York couldn't escape tax simply by declaring their legal residence and domicile to be elsewhere. Seems simple enough.

### Enter Sandman — John Gaied and His Staten Island Apartment Complex

Over the last several decades, however, there has been nothing simple about the statutory residency test. Before *Gaied*, we already knew that a mere camp or cottage (as long as it wasn't

<sup>4</sup>See former New York Tax Law section 350(7).

<sup>5</sup>The Tax Law had previously defined the term "resident" as "any person who shall, at any time during the last six months of the calendar year, be a resident of the state." The Tax Law did not define what constituted being a resident during that period (L. 1918, ch. 691, sec. 7).

<sup>6</sup>Mem. of Income Tax Bureau, Bill Jacket, L. 1922, ch. 425.

<sup>7</sup>*Id.*

<sup>8</sup>Mem. of Dept. of Taxation & Finance, 1954 N.Y. Legis. Ann., at 296 (emphasis added).

<sup>9</sup>91 N.Y.2d 530, 535 (1998), *cert. denied*, 525 U.S. 931 (1998).

<sup>10</sup>This result, by the way, is under attack in a couple cases we are handling, based in part on the U.S. Supreme Court's 2015 decision in *Comptroller of the Treasury v. Wynne*. But that's a topic for another interesting article later.

suitable for four-season living) wouldn't cut it,<sup>11</sup> and dwellings that were otherwise uninhabitable for enough of a tax year so as to defeat the "substantially all" requirement usually would not constitute a PPA.<sup>12</sup> But the trickier questions persisted: Would a four-season vacation home in the Hamptons constitute a PPA, even if the taxpayers only used it a few weeks a year? In *Barker*, the tax department (and division of tax appeals) said yes.<sup>13</sup> Would arrangements made by a commuting lawyer to stay in a guest bedroom at a New York rectory constitute a PPA, even if no rent was paid or lease was in place, and the only payments were for shared expenses or in-kind (food, services, and so forth)? In *Evans*, the tax department and division of tax appeals said yes.<sup>14</sup> Would an abode the taxpayer owned or leased in New York, despite the taxpayer either never using it or using it sparingly constitute a PPA? In *Gaied*, the tax department and the division of tax appeals also said yes.

After a circuitous path through New York's division of tax appeals,<sup>15</sup> Gaied appealed the tribunal's adverse decision to New York's appellate division. And although the appellate

division upheld the tribunal's ruling, it did so in a split decision, which set the stage for an appeal to the court of appeals.<sup>16</sup>

On February 18, 2014, the court of appeals reversed the appellate division's decision, marking victory for *Gaied* and nonresident taxpayers everywhere. In reversing the appellate division's decision, New York's court of appeals started where the appellate division dissent left off. The court decided that the tax department was interpreting the law incorrectly, and it presented a new standard for determining whether a dwelling constitutes a PPA. In doing so, the court did what is required in any case of statutory construction: It sought out the Legislature's intent. And as we had urged for years, the court started its analysis by referring to its decision in *Tamagni* and to the concern voiced by the Legislature in 1922 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.'" <sup>17</sup> Based on that, the court recognized that the purpose of New York's statutory residency rule was to discourage tax evasion by individuals who are actually residents — that is, people who really live in New York but still attempt to be taxed as nonresidents.

Based on that background, the court found that the test applied by the tribunal — that "there is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it"<sup>18</sup> — had no rational basis. It was insufficient to base a residency determination on the fact that a taxpayer had a property interest in a dwelling, or that it was suitable for year-round habitation. Rather, as the court held, "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."

However — and this is key to our further discussion below — the court didn't then apply the facts to *Gaied* and cancel his tax assessment. Instead, it remanded the case to the tribunal for a

<sup>11</sup>20 NYCRR section 105.20(e)(1) ("A permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode").

<sup>12</sup>*Id.*

<sup>13</sup>*Matter of Barker*, DTA No. 822324 (N.Y. Tax App. Trib. 2011), *aff'd*, DTA No. 822324 (N.Y. Tax App. Trib. 2012).

<sup>14</sup>*Matter of Evans v. Tax Appeals Tribunal*, DTA No. 806515 (N.Y. Tax App. Trib. 1992), *confirmed*, 199 A.D.2d 840 (N.Y. App. Div. 3d Dept. 1993).

<sup>15</sup>*Gaied* initially won at the tribunal level, only to have the tribunal grant the department's motion for reargument and reverse themselves. DTA No. 821727 (Tax App. Trib. 2011).

<sup>16</sup>*Gaied v. New York State Tax Appeals Tribunal*, 101 A.D.3d 1492 (3d Dept. 2012).

<sup>17</sup>22 N.Y.3d 592, 597.

<sup>18</sup>DTA No. 821727 (Tax App. Trib. 2011).

determination based on the new standard it had set forth.<sup>19</sup> And that is the part of the decision that has been most misunderstood. The court said nothing about the specific facts of *Gaied's* situation, nor did it set forth a test specific to the facts in his case (that is, where a taxpayer maintains a place for someone else). Instead, it just set forth a new standard of law: For a taxpayer to be deemed a statutory resident, there must be some basis to conclude that the taxpayer was using a place "as a residence." Again, the court made that statement in the context of the law's history, which was to tax people who "really lived in" New York.

### 3 Years Gone – What's Changed, What Hasn't

In the immediate aftermath of the *Gaied* decision, the tax department issued a revamped version of its Nonresident Audit Guidelines, with a new section dedicated to the impact of the court of appeals' *Gaied* decision. The tax department's guidelines are thorough, and they're often helpful in resolving issues that arise during an audit. But we were critical of the revised guidelines section dealing with *Gaied* back in 2014,<sup>20</sup> and that unfortunately continues through to today.

Our frustration boils down to the fact that despite the court of appeals charting new territories with its holding, the tax department seems to think that even with the new standard, things haven't really changed. On page 54 of the June 2014 guidelines, the tax department says, "The court's finding is consistent with current Audit policy that the taxpayer must have a relationship to the dwelling for it to constitute a permanent place of abode." But if the court of appeals determined that a taxpayer's relationship to a dwelling was all that was necessary to have the dwelling constitute a PPA, the court of appeals probably would have upheld the appellate division. *Gaied*, after all, stayed at the Staten Island apartment occasionally. He owned it. He was around it almost daily. There were all kinds of "relationship" facts and factors that connected

him to the place. But the court of appeals went beyond that kind of standard. Specifically, the court said that there must be some basis to conclude that a dwelling is maintained as the taxpayer's residence before it will be considered a PPA.

### A Taxpayer's Usage Is Still Important

Overall, we agree with the tax department on a key issue: The facts and circumstances of a given case will help resolve whether the taxpayer maintained the dwelling as a PPA in New York. How often a taxpayer stays at an abode is one of those key facts. As we see it, without the taxpayer staying overnight at the dwelling, it doesn't matter if he owned or rented the dwelling, kept possessions there, or what have you. Under the *Gaied* standard, it could not have been the taxpayer's PPA, because there would be no indication that the taxpayer actually maintained the dwelling as a residence if the taxpayer didn't stay there. And again, the legislative history behind New York's statutory residency law confirms that point: The law was meant to prevent tax avoidance and to impose tax on people actually residing in New York on a regular basis (originally, for months at a time during a tax year). Without the taxpayer staying at the dwelling in New York, there is absolutely no basis to consider the dwelling a PPA.

If a taxpayer uses a dwelling more regularly but there are other facts that indicate that he did not maintain the dwelling as a residence for himself permanently, this also raises questions under the new *Gaied* standard. That conclusion gets back to the purpose of New York's statutory residency statute and the court's decision in *Gaied*, which was to tax people who really lived in New York. Does a taxpayer who spends 10 to 20 nights at an apartment in New York really live here? What about the vacation-home owner who spends a few weekends in her place — and far away from where she works in New York regularly? Those are situations in which the question — does the taxpayer really live here? — becomes so relevant. But the tax department doesn't appear willing to factor that question into the analysis.

<sup>19</sup>The case was resolved thereafter.

<sup>20</sup>Timothy P. Noonan, "New York Tax Department's Response to *Gaied* Misses the Mark," *State Tax Notes*, July 21, 2014, p. 145.

## Confusion About 'Facts' Abounds

One reason for this is that the tax department sometimes seems confused about what the court's *Gaied* decision really means. Specifically, whenever we have a PPA case in which *Gaied* is potentially relevant, we hear a similar refrain from tax department auditors: "The facts in *Gaied* were different; his parents lived there."

But again, that argument totally misses the point. *Gaied* stands for the proposition that a dwelling cannot be a taxpayer's PPA without proof that the taxpayer maintained the dwelling as a residence. As outlined above, the court in *Gaied* stopped short of deciding the case on its own merits; it merely set forth the law to be applied in PPA cases. And that new standard must be applied in all cases, not just cases in which a taxpayer may be maintaining a place for someone else to use.

## The Tax Department's Current Test

From our standpoint, the *Gaied* court set forth a pretty simple standard for deciding PPA cases: The taxpayer has to use the place as a residence. But the department now seems to be applying a different test. Under its view, if: (i) a dwelling is available for the taxpayer to use — that is, the taxpayer has unfettered access to the place — and (ii) no one else is living there, the dwelling will be a PPA.

That standard, however, misses the mark. It minimizes the importance of a taxpayer's actual usage of a dwelling; it runs counter to the mandate that a taxpayer must maintain the dwelling as a residence; it runs counter to the legislative intent behind New York's statutory residency rule; and it runs counter to the commentary we heard during oral argument for the *Gaied* decision, in which Chief Judge Lippman said, addressing counsel for the tax department, "There's got to be some rhyme and reason to it. And what I'm saying to you — what makes sense is, if you don't really reside there, that's the ultimate test, and no one who [] doesn't actually reside [should be subject to tax as a resident] — I can make sense of the statute if that's the test."<sup>21</sup>

<sup>21</sup>Transcript of oral argument at 13-14, *Gaied*, 22 N.Y.3d 592.

## What's Next?

Well, given how much we seem to enjoy writing about *Gaied*, you can count on more articles. But joking aside, we're not really sure. We discuss these issues almost every day with the tax department, and both sides generally understand that a complete look at the facts and circumstances of a taxpayer's situation is necessary to determine if the taxpayer maintained a PPA in New York. But the parties here seem to be applying different tests. Given the attempts we've seen to limit the scope of the *Gaied* decision, the new test we're seeing applied in some cases, and the other instances in which we think the purpose of New York's statutory residency test is being subverted, that area of the law remains unsettled. More cases are likely coming, and with *Gaied* in the same corner as the taxpayers, we think the taxpayers stand a great chance for another big win. ■



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