

Gaied v. New York: The State's High Court Weighs in on Statutory Residence Rules

It is not too often that we get a state's highest court to wade into the tax world, and it is especially great when the taxpayer emerges victorious from such a long battle.

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The concept of residency is usually the starting point for all state income tax considerations. And while almost every state imposes, at various rates, a personal income tax, in general the states use a similar sets of conventions and tests to determine whether or not a taxpayer qualifies as a resident.

About 25 years ago, the New York State Department of Taxation and Finance began a residency audit program, perhaps the first of its kind in the nation. And over the past 25 years, the Tax Department has developed a sophisticated audit program with around 250 highly trained auditors focused on income tax and residency issues. Tens of thousands of residency audits have been conducted; numerous administrative decisions and court opinions have been issued; and the Tax Department itself has issued almost six different versions of detailed residency audit guidelines to its audit staff. ¹

But it has been close to 100 years since New York's highest court has weighed in on the interpretation of the state's residency rules under the income tax. That changed on 2/18/14

when the New York State Court of Appeals (the state's highest court) issued its decision in *Gaied v. New York State Tax Appeals Tribunal*.² This ruling took specific aim at New York's "statutory residency" test, and clarified that in order for a person to be taxed as a statutory resident in New York, that person must, at a minimum, have a residential interest in New York living quarters. The court's ruling set off a firestorm of press accounts celebrating the victory, and it also raised new questions about the scope of New York's residency laws.³ In this article, we will discuss this watershed decision and how it impacts future residency cases in New York.

General Background

Before getting to the specifics of the case, let us lay out the context. In New York, as in other states, there are two ways in which a taxpayer can be treated as a "resident" of the state.⁴ The first test, and the one common among all states, is the "domicile" test. Under this test, a person who maintains a New York "domicile"—generally defined as the person's permanent and primary home—can be taxed as a resident of New York. This domicile test looks to common law principals going back more than 100 years, and it involves a subjective inquiry into whether or not a taxpayer's "heart" is located in New York. Many a practitioner has been engulfed in difficult domicile audits with New York over the past 25 years.⁵

But the *Gaied* case involved New York's alternative test for residency, called "statutory residency." Under the statutory residency test, a person who is domiciled somewhere else still can be taxed as a New York State (or City) resident if the person: (1) spends more than 183 days in New York; and (2) maintains a permanent place of abode in New York.⁶ The focus in *Gaied* was on this latter prong of the test, i.e., whether Mr. Gaied maintained a "permanent place of abode" in New York.⁷

Initial Proceedings

Like virtually all state tax cases, this all started with a typical tax audit. Mr. Gaied was audited by the New York State Tax Department for the years 2001 through 2003 during which period he was unquestionably domiciled in New Jersey. He had filed his New York

income tax returns for each of these years as a nonresident, responding "No" to the question of whether he maintained living quarters in New York.

Mr. Gaied had owned an automotive service and repair business in Staten Island (one of the five New York City boroughs) since 1994, and purchased a multi-unit apartment building there in 1999. He purchased the building for the dual-purposes of serving as a place for his parents to live and also as an investment property. Mr. Gaied's parents, who had lived in a first-floor apartment there since 1999, were dependent upon him for support, and in addition to providing their housing, he also paid their utility bills. On his federal, New Jersey, and New York tax returns, Mr. Gaied claimed his parents as dependents.

Prior to and throughout the audit period, Mr. Gaied lived in Old Bridge, New Jersey, which was roughly 28 miles from his Staten Island business. As the business was open 24 hours a day, Mr. Gaied worked very long hours, after which he would return to his New Jersey home, where he was domiciled since 1994. Once every month or so, at his parents' request, Mr. Gaied would stay overnight in their apartment in order to assist them with different tasks, such as providing transportation to medical appointments. When so doing, Mr. Gaied would sleep on his parents' couch as there was no bed or bedroom available for his use. To that end, Mr. Gaied kept no clothing or personal belongings in his parents' apartment nor did he carry a key to the apartment.

Nonetheless, at the conclusion of the audit, the Department decided that Mr. Gaied maintained a "permanent place of abode" in New York by virtue of the apartment in which his parents lived. This conclusion was based, in part, on factual issues about the nature and extent of his use. But it also was based, in part, on the notion—applied regularly by the Department—that if a taxpayer has access to a place in New York that the taxpayer owns, this is enough to create a permanent place of abode for the taxpayer. Since Mr. Gaied was admittedly in New York more than 183 days each year on account of his business, the Department took the position that he satisfied the two-prong test under N.Y. Tax Law §605(b)(1)(B) and was therefore a "statutory resident." Based on this determination that he was a resident of New York State and New York City, the Department issued a Notice of Deficiency (the "Notice") to Mr. Gaied, asserting personal income tax due in excess of \$250,000, plus interest and penalties.

The administrative law judge determination. Mr. Gaied filed a petition in the Division of Tax Appeals to protest the Notice. After a hearing, in August 2009, in *Matter of Gaied*,⁸ the administrative law judge (ALJ) issued a determination denying the petition and sustaining the Notice on grounds that Mr. Gaied "maintained an apartment ... for his parents ... and would on occasion stay overnight during the years at issue."

The Tax Appeals Tribunal proceedings: I and II. Mr. Gaied appealed the ALJ's determination by filing an exception with the Tax Appeals Tribunal. In July 2010, the Tribunal, relying on the long-standing and well-settled interpretation of N.Y. Tax Law §605(b)(1)(B), granted Mr. Gaied's exception and reversed the ALJ's determination (*Matter of Gaied*,⁹ ("*Gaied I*"). In so doing, the Tribunal relied on *Matter of Evans*,¹⁰ long the standard-bearer for statutory residence cases, for the proposition that determining whether an individual "maintains a permanent place of abode" requires an inquiry into both the "maintenance" and the "permanence" of that abode. As to the permanence prong, the Tribunal, quoting from *Evans*, opined that the inquiry "'must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place.'"

Even though Mr. Gaied clearly "maintained" an apartment in New York, the abode did not meet the "permanence" requirement since, according to the facts found at the ALJ level: (1) Mr. Gaied did not maintain any living arrangements there for himself; (2) the residence was maintained exclusively for his parents; (3) he did not maintain a bed or bedroom in the place; (4) he stayed there only at his parents' request; (5) he did not keep personal effects in the apartment; and (6) when he later moved out of New Jersey and into New York, he did not take up residence in his parents' apartment. Thus, the Tribunal concluded that Mr. Gaied did not maintain a permanent place of abode within the meaning of N.Y. Tax Law §605(b)(1)(B) and was therefore not a resident during the audit period, and issued its decision accordingly.

Gaied redux. Just as the ink dried on *Gaied I*, the Tax Department took the rare step of moving to reargue the case. The Tribunal took the also rare step of granting the Department's motion¹¹ and, in June 2011, went on to reverse its own decision in *Gaied I* with a split decision in *Gaied II*.¹² Indeed, the decision was so controversial that the Tribunal's President issued an equally rare dissenting opinion.

In *Gaied II*, the Tribunal announced a new standard for determining when a dwelling constitutes a permanent place of abode. In this unprecedented decision, the Tribunal held that the two-pronged "maintenance" and "permanence" test in *Matter of Evans* did not apply when the taxpayer owned the abode in question. Instead, the Tribunal held that so long as property is suitable for usage—regardless of the person's actual usage—a property right in a dwelling is sufficient to render a dwelling a "permanent place of abode" without regard to whether the person actually dwells there.¹³ Thus, applying this new rule, the Tribunal reversed *Gaied I* and held that Mr. Gaied was a statutory resident during the audit period.

The Article 78 proceeding. Under Article 78 of New York's Civil Practice Law and Rules, and N.Y. Tax Law §2016, taxpayers are allowed to appeal adverse decisions of the Tax Appeals Tribunal to New York's appellate-level court, in this case the Appellate Division, Third Department, in Albany. There, in *Gaied v. New York State Tax Appeals Tribunal*,¹⁴ a 3-2 decision, the Third Department confirmed the Tribunal's *Gaied II* split decision. In doing so, the Third Department's majority observed that "the issue distills to whether petitioner maintained a permanent place of abode in New York pursuant to the statute," and instructed that "a variety of factors and circumstances may be relevant" to making this determination. The majority, without explicitly confirming the new legal standard of *Gaied II* (i.e., that subjective usage is irrelevant where property rights are present), proceeded to list examples of factors and circumstances that would be relevant in determining whether a person maintains a permanent place of abode, including:

"the extent to which the person challenging the assessment paid living expenses, supplied furniture in the dwelling, had a key, had free and continuous access to the dwelling, received visitors there, kept clothing and other personal belongings there, used the premises for convenient access to and from a place of employment, and maintained telephone and utility services there in his or her name, as well as whether the premises were suitable for year-round use."¹⁵

With this as the backdrop, the majority confirmed *Gaied II* and held that "[e]ven though a contrary conclusion would have been reasonable based upon the evidence presented, we are constrained to confirm, since our review is limited and the Tribunal's determination is

amply supported by the record." In other words, the majority saw it as a close case but, under the standard applied by the Tribunal, there was enough there to uphold the Tribunal's (second) decision.

The Appellate Division's dissenting opinion. The dissent, however, saw it much differently, and focused first on the appropriate legal standard. To do so, it started with the legislative intent of the law, which the dissent recognized was to "tax those who 'really and [for] all intents and purposes [are] residents of the state.'" ¹⁶ The dissent asserted that the inquiry should focus on the person's own living arrangements in the purported permanent place of abode, and whether the taxpayer himself had a "residential interest" in the place.

Setting up that as the appropriate legal standard, the dissent found that Mr. Gaied did not maintain a permanent place of abode in New York during the audit period. While the dissenting judges could not overcome the majority's holding, their "double dissent" was particularly significant in that it afforded Mr. Gaied an appeal as of right to the Court of Appeals. ¹⁷

The Court of Appeals Opinion

In what will likely be the landmark "permanent place of abode" case for years to come, on 2/18/14 New York State's highest court issued its unanimous decision in *Gaied v. New York State Tax Appeals Tribunal*. ¹⁸ In this seminal decision, the court rejected the majority's decision in *Gaied II*, as confirmed by the Third Department's majority, and unambiguously held that there was "no rational basis for [the Tribunal's] interpretation" in *Gaied II*.

Judge Eugene Pigott, writing for the court, began the opinion by stating the new rule: that in order for a taxpayer to be treated as a statutory resident, the "permanent place of abode" in question must be used as the person's residence. He centered his analysis with a discussion of *Matter of Tamagni v. Tax Appeals Tribunal of State of New York*, ¹⁹ a case where the court had previously examined the legislative history underlying the statutory residence statute. In particular, Judge Pigott focused on the court's observation in *Tamagni*, where it noted the concern voiced by the legislature in enacting the new residency test 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."'" ²⁰ Further, based on this legislative history outlined in *Tamagni*, he noted that the purpose of N.Y. Tax Law §605(b)(1)(B) is to discourage tax evasion by individuals who are truly residents, i.e., people who really live in New York but, nonetheless, attempt to be taxed as nonresidents.

From there, the court turned to the text of the law and regulations. And while noting that the term "permanent place of abode" is not defined in the statute, the court pointed out that the Department's regulations "define it as 'a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, [which] will generally include a dwelling place owned or leased by such taxpayer's spouse.'" ²¹ The court then contrasted that definition with the Tribunal's interpretation of the term in *Gaied II*—echoing the Department's position in its motion for reargument—that to qualify as a statutory resident, a person needed only to maintain the dwelling in question, not reside there. Indeed, that had been the drum the Department was pounding all along in this case, i.e., that a person need not reside in an abode but "simply ... maintain it." ²²

Observing that the court's review was limited to whether the Tribunal's interpretation of "permanent place of abode" comported with the meaning and intent of the statute, the court, as noted above, found that there was *no rational basis* for the Tribunal's interpretation of "permanent place of abode" in *Gaied II*. In doing so, the court focused on three critical points:

- First, the statute makes it clear that the "permanent place of abode" must actually "relate to the taxpayer."
- Second, the legislative history supports the idea that the law was intended "to prevent tax evasion by New York *residents*" (emphasis in original).
- Third, the regulations are consistent with this, providing that, in the court's words, "the taxpayer must, himself, have a residential interest in the property" in order for it to constitute a permanent place of abode for the taxpayer.

And with that, the Court of Appeals reversed the judgment of the Appellate Division, with costs, and directed the Appellate Division to remand the matter to the Tribunal for further

proceedings in accordance with this new, correct standard. The ruling was a unanimous, 7-0 decision.

Inquiring Minds Want to Know: Questions and Answers

So what does all this mean? Since the issuance of the decision, many of our clients and fellow practitioners have had a variety of questions about what this decision will mean in future cases and audits. Many of the press accounts raised questions as well. We, thankfully, have some answers! Here's a sampling:

1. What is the significance of this decision? For one thing, it is the first time that New York's highest court has endeavored to interpret the state's residency rules in this fashion and, in particular, it is the first time that the term "permanent place of abode" has been interpreted by our highest court. Since there is so much audit activity in this area, with hundreds of millions of dollars in play every year, it is important that our highest court has weighed in on the matter.

In terms of the overall merits of the decision, for years the Tax Department has broadly interpreted its residency rules such that individuals who maintained some connection with property in New York could possibly be taxed as statutory residents if they also spent more than 183 days here. Under the Department's view, it did not always matter whether a taxpayer actually lived or resided here in any fashion—all that was required was that they maintained an abode of some sort. But as the Court of Appeals pointed out in its decision, this test was originally intended to discourage tax evasion by people who "really were residents" of New York, i.e., people who, in fact, lived here. Thus, in no uncertain terms, the court held that in order for an individual to qualify as a resident under this test, there must be some basis to conclude that the taxpayer maintained a dwelling in the state that was used as the taxpayer's residence. Put another way, the court said that the abode in question must relate to the taxpayer, and that the taxpayer himself must have a residential interest in the property. This result should affect many open cases, as well as help restore the "statutory residency" test to its original intention: that is, to tax those persons (and only those persons) who really live in New York.

2. What is the next step in the case? Per the Court of Appeals' order, the case will be remanded to the Tribunal for further proceedings. No other specifics are given, and it is not like this kind of thing happens every day. So the timeline is not yet known.

Nevertheless, the Department's position—as laid out by the Tax Appeals Tribunal in *Gaied II*—was that Mr. Gaied's maintenance of a dwelling in New York was all that mattered, and the fact that he did not actually reside or maintain living arrangements for himself at his parents' dwelling was irrelevant. The Court of Appeals expressly rejected that interpretation, effectively nullifying the Tribunal's second decision.

So where does that leave us? We are right back to where we started, with the Tribunal's first decision in this matter, where it held that since Mr. Gaied did not have living quarters at his parents' apartment, he did not maintain a permanent place of abode in New York. That factual finding is still valid, and was never changed or overturned by the Tribunal.

3. Will this affect other statutory residency cases? Or is the holding really limited to cases where a taxpayer maintains a dwelling for somebody else? We think the decision has broader effects. As noted above, the court's reference to the legislative intent is incredibly significant, as it ensures that the "statutory residency" test will now be interpreted based on its original intention; that is, to tax those persons (and only those persons) who "really are residents." And that could mean that it is supposed to apply to those people who *really do live in New York*. For instance, note how the court specifically mentioned the many 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."²³ The "statutory residency" test was not intended to draw in the typical New York City commuter who may have a place in the state that is held for investment or used rarely or for vacation purposes. Also, the same judge who wrote the *Gaied* opinion penned a decision in late 2013 that also—albeit in another context—talked about the distinction between domicile and residency, and what it means to be a "resident":

"Generally, establishing residence 'turns on whether [one] has a significant connection with some locality in the State as the result of *living there for some length of time* during the course of a year,' ... whereas '[e]stablishment of a domicile in a [place] generally requires a

physical presence in the [place] and an intention to make the [place] a permanent home,' ... i.e., intent to remain there for the foreseeable future."²⁴

There again, the idea is that a "resident" should encompass people who really live in New York for substantial periods of the year.

So now we see how this ruling could have much broader implications in these statutory residency cases. Does a typical commuter with a rarely used apartment in New York really live here? Does a taxpayer who works in New York City but maintains a vacation home in the Hamptons or the Catskills really live here? What about the commuter who is trying to sell an apartment he used to live in but no longer does? As far as we are concerned, under the new standard set by the Court of Appeals, all of these cases may be in play.

4. How will the Tax Department respond to the decision? It remains to be seen just what the Tax Department will do. The position laid down by the Court of Appeals is completely the opposite of what the Department argued in *Gaied* and in other recent statutory residency cases like *Matter of Barker*.²⁵ So it is a big win for the taxpayer, and one might expect the Department to initiate a significant shift in policy. We think, however, that the Department may argue that this really is not that big of a change, and that this is kind of what their policy has been all along, despite the harsh position it took in the *Gaied* litigation. But this merely scratches the surface. Again, we think that the court's reference to the legislative history, and the idea that a taxpayer must really reside in New York in order to be taxed as a statutory resident, is a big shift in thinking.

Also, for what it's worth, while we think the Department's position here (and in other cases like *Barker*) was off-base, we do appreciate that it has a difficult task when it comes to interpreting and applying its own residency rules. Yes, some auditors may be difficult and over-zealous. But at higher levels, the Tax Department has really tried to get to the right answer in its interpretations. What's more, it does an excellent job of publicizing its positions, with the Nonresident Audit Guidelines being a prime example.²⁶ They may not always get it right, but the effort is there, and you cannot say that for all state tax administrations.

5. Does this decision have impact in other states? It definitely could. Many states have the same "statutory residency" test,²⁷ and the border states (New Jersey, Connecticut, Pennsylvania) in particular are often paying attention to what is happening in New York cases. Also, if New York takes corrective action through a legislative or regulatory change, others states may follow along, as was the case with the so-called "Amazon taxes" we see popping up all around the country that are patterned after the New York law enacted a few years ago.²⁸

Conclusion

The fact that we have New York's highest court weighing in on a tax issue like this, and basing its analysis on statutory construction and legislative intent, is a good thing for taxpayers everywhere. It is not too often that we get a state's highest court to wade into the tax world, and it is especially great when the taxpayer emerges victorious from such a long battle.

- Indeed, lost in a lot of the hoopla over the case here is that this litigation affected a good person, a family man who was taking care of his parents, and now also is supporting a young family. All of us practitioners see how these residency cases really affect people's lives. They are difficult cases, where the rules are unclear and audit determinations are often based on arbitrary factual distinctions. Clients often feel persecuted, sometimes justifiably, sometimes not. But it has been really rewarding to see this through to New York's highest court on Mr. Gaied's behalf. The fact that the result comes with a potential game-changing rule from the high court makes it all the better! []

END NOTES

1

See, e.g., Comeau, Klein, and Kelly, "New York Residency Audit Guidelines Seek to Encourage Ties to State," 3 J. Multistate Tax'n 117 (Jul/Aug 1993); Comeau, Klein, and Kelly, "New York's Revised Residency Audit Guidelines Put the Focus on Lifestyle Patterns," 4 J. Multistate Tax'n 219 (Nov/Dec 1994); Comeau and Sabol, "Latest Version of New York's

Nonresident Allocation Audit Guide Still Leaves Questions," 9 J. Multistate Tax'n 22 (Mar/Apr 1999).

2

N.Y., No. 26, 2/18/14, 2014 NY Slip Op 1101, 2014 WL 590486 , *rev'g* 101 App Div 3d 1492, 957 NYS2d 480, 2012 NY Slip Op 9108, 2012 WL 6699044 (3d Dept., 2012). The authors represented Mr. Gaied before the New York State Court of Appeals.

3

See, e.g., Barbanel, "Lower Taxes Seen for Nonresidents Who Own Property in New York," Wall St. J., 2/20/14; Villmer, "NY Residency Ruling Shortens Leash for Auditors," Law360, 2/20/14 (online at www.law360.com); Koreto, "Landmark Gaied Residency Ruling Overturned by Courts," The Trusted Professional, March 2014, page 4 (the newspaper of the NYSSCPAs); Villmer, "NY High Court Balks at Tax Authority's Residency Test," Law360, 2/18/14 (online at www.law360.com); Zelinsky, "The *Gaied* Decision: A Rare Victory for Tax Sanity in New York," Oxford University Press's OUPblog, 3/3/14 (online at <http://blog.oup.com/2014/03/gaied-decision-taxation-new-york/>); McMahon, "Court Chalks Up One for Taxpayers," Empire Center's NY Torch, 2/19/14 (online at www.nytorch.com); Elkin, "Unreasonable Is Better Than Crazy," Scarsdale Patch, 2/25/14 (online at <http://scarsdale.patch.com/groups/larry-elkins-blog/p/unreasonable-is-better-than-crazy>); Branfalt, "New York High Court Overturns Tax Tribunal's Definition of Statutory Resident," State Tax Notes (2/19/14), electronic cite: 2014 STT 33-1.

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New York City imposes a separate income tax, also using the same residency-based rules.

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For a discussion of the factors that are considered in determining an individual's domicile, see, e.g., Comeau, Klein, and Kelly, "New York's Revised Residency Audit Guidelines Put the Focus on Lifestyle Patterns," *supra* note 1. See also Comeau and Sabol, "Multistate Residency Issues: Might Regional Uniformity Be Applied Nationwide?," 7 J. Multistate Tax'n 272 (Jan/Feb 1998).

6

N.Y. Tax Law §605(b)(1)(B); 20 N.Y. Comp. Codes Rules & Regs. §105.20(a)(2).

7

Incidentally, the same week the Gaied decision was issued by the court of appeals (*supra* note 2), the New York State Tax Appeals Tribunal issued a decision on the "days" prong of the statutory residency test, holding that for purposes of that test, any part of a day counts as a day. See Matter of Zanetti, N.Y. Tax App. Trib., No. 824337, 2/13/14. The taxpayer in that case had argued that, pursuant to N.Y. Gen. Constr. Law §19, the definition of "day" should mean only a full calendar day spent in New York.

8

N.Y. Div. of Tax App., ALJ Determination, No. 821727, 8/6/09.

9

N.Y. Tax App. Trib., No. 821727, 7/8/10.

10

N.Y. Tax App. Trib., No. 806515, 6/18/92, *confirmed sub nom.* Evans v. Tax App. Trib. of State of N.Y., 199 App Div 2d 840, 606 NYS2d 404, 1993 WL 540078 (3d Dept., 1993).

11

Matter of Gaied, Tax App. Trib., No. 821727, 2/24/11 (order granting motion for reargument to address the following three issues: whether the physical attributes of the Staten Island apartment constituted a "permanent place of abode"; whether Mr. Gaied's parents had exclusive use of the apartment; and whether Mr. Gaied's overnight stays qualified as a temporary stay for the accomplishment of a particular purpose). We are aware of only two other instances since the Tribunal convened its first quorum more than 25 years ago that it has granted a party's motion to reconsider one of its decisions. See Matter of Stuckless, Tax App. Trib., No. 819319, 12/15/05 (motion for reargument granted); and Matter of Schulkin, Tax App. Trib., No. 814744, 11/20/97 (motion for reargument granted, decision modified).

12

Matter of Gaied, Tax App. Trib., No. 821727, 6/16/11.

13

The cited authority for this determination included the Tribunal's earlier decision in Matter of Barker, Tax App. Trib., No. 822324, 1/13/11, in which it applied the same test to hold that a Connecticut-resident taxpayer who maintained a rarely used cottage located on Long Island, hours away from his workplace in New York City, could be taxed as a "statutory resident" of New York.

14

101 App Div 3d 1492, 957 NYS2d 480, 2012 NY Slip Op 9108, 2012 WL 6699044 (3d Dept., 2012).

15

In this regard, the Third Department cited *Matter of Schibuk v. N.Y.S. Tax App. Trib.*, 289 App Div 2d 718, 733 NYS2d 801, 2001 NY Slip Op 10051, 2001 WL 1587836 (3d Dept., 2001), *leave to app. dismissed* 98 N.Y.2d 720, 748 N.Y.S.2d 900, 778 NE2d 551 (2002); *Matter of Evans v. Tax App. Trib. of State of N.Y.*, 199 App Div 2d 840, 606 NYS2d 404, 1993 WL 540078 (3d Dept., 1993); *Matter of Smith v. State Tax Comm'n*, 68 App Div 2d 993, 414 NYS2d 803 (3d Dept., 1979).

16

Quoting *Matter of Tamagni v. Tax App. Trib. of State of N.Y.*, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 NE2d 1125 (1998), *cert. den.* U.S.S.Ct., 10/13/98. This case was discussed in Shop Talk, "New York Resident Tax Scheme Is Valid Despite Potential Double Tax," 8 J. Multistate Tax'n 187 (Sep/Oct 1998).

17

See N.Y. Civ. Prac. Law & Rules §5601(a) (authorizing an appeal as of right from a final determination "where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal").

18

N.Y., No. 26, 2/18/14, 2014 NY Slip Op 1101, 2014 WL 590486 , *rev'g* 101 App Div 3d 1492, 957 NYS2d 480, 2012 NY Slip Op 9108, 2012 WL 6699044 (3d Dept., 2012).

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Note 16, *supra*.

20

Quoting Tamagni, *supra* note 16, quoting Income Tax Bureau Mem., Bill Jacket, L. 1992, ch. 425.

21

Quoting 20 N.Y. Comp. Codes Rules & Regs. §105.20(e)(1).

22

This language quoted in Gaied II was taken (out of context, we argued) from Matter of Roth, Tax App. Trib., No. 802212, 3/2/89.

23

See note 20, *supra*.

24

Osterweil v. Bartlett, 21 N.Y.3d 580, 977 N.Y.S.2d 153, 999 NE2d 516 (2013), quoting Antone v. General Motors Corp., Buick Motor Div., 64 N.Y.2d 20, 484 N.Y.S.2d 514, 473 NE2d 742 (1984). Emphasis added.

25

Tax App. Trib., No. 822324, 1/13/11, *reh'g den.* 6/23/11. Also see note 13, *supra*.

26

See, e.g., *supra* note 1.

27

See, e.g., Eisenstadt, "Minnesota: Court Upholds Taxing Statutory Residents' Out-of-State Income," 11 J. Multistate Tax'n 38 (May 2001).

28

The "Amazon tax," named after the world's largest Internet retailer, targets online vendors for state sales tax collection responsibility. See Cristman, "New York: Novel Sales Tax Law Seeks to Reach Internet and Other Out-of-State Vendors," 18 J. Multistate Tax'n 35 (August 2008); and Hecht, Burkard, Melone, Sutton, Yesnowitz, and Jones, "New York: State Clarifies New Affiliate Nexus Standard for Sales Tax Vendors," 19 J. Multistate Tax'n 32 (February 2010). See also Bingel and Genz, "New York: High Court Upholds 'Amazon Tax' Provision for Internet Retailers," 23 J. Multistate Tax'n 33 (July 2013); and U.S. Supreme Court Update, 23 J. Multistate Tax'n 40 (February 2014).

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