GAIED V. NEW YORK STATE: SPLIT DECISION BY COURT SETS UP SHOWDOWN ON NEW YORK RESIDENCY RULES

State & Local Tax Alert
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There has been yet another important development in the *Gaied* case, a New York residency matter that has dominated the headlines over the past few years. The issue in the case is whether an apartment owned by a taxpayer in New York but maintained for his elderly and sick parents counts as a "permanent place of abode" for New York state residency taxation purposes, justifying full resident taxation of the taxpayer. Just last week, in an appeal handled by Timothy P. Noonan, a partner at Hodgson Russ, a New York appellate court held that the taxpayer could be taxed as a resident despite this tenuous connection to New York. But it was a divided ruling, with two judges dissenting, setting up the case for a decisive, final showdown in New York's highest court. Click here to see a copy of the court's decision.

Some quick background: the taxpayer in *Gaied* purchased a three-unit Staten Island apartment building as an investment, and as a residence for his aging and sick parents, who relied on him for their full support. The taxpayer infrequently stayed at the apartment, sleeping on the couch—and even then only at his ill father's request. The taxpayer leased out the remaining two units his parents did not occupy, and he continuously remained a resident of New Jersey, while working in New York, throughout the audit period. The taxpayer did not challenge the fact that he spent over 183 days in New York each year during the audit period. The only remaining issue then, and the hurdle keeping the Division of Taxation of the New York State Department of Taxation and Finance from imposing resident taxation, was whether the taxpayer kept a "permanent place of abode" in New York as defined in New York law.

In a 2009 ruling, an administrative law judge in New York's Division of Tax Appeals held that the taxpayer's access to his parents' apartment—though limited—was enough to justify resident taxation in New York. On appeal, the New York Tax Appeals Tribunal reversed the decision, finding that the taxpayer's restricted access to the apartment, lack of personal items there, and lack of usage of the place as a residence established that the abode lacked the "permanence" necessary to qualify as a "permanent place of abode." But in an unusual move, the Division requested re-argument, positing that so long as a taxpayer has property rights in a dwelling and it was suitable for usage, it could constitute a "permanent" place of abode, even if the

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taxpayer doesn't ever actually use it as a dwelling place. And in 2011, after granting the motion to rehear the case, two of three judges at the Tribunal agreed with the Division, overturning the Tribunal's prior opinion and moving against the grain of settled case law and the Division's audit guidelines. We reported this surprising decision in July 2011 (click here to see the alert). The taxpayer hired the attorneys here at the firm to appeal the Tribunal's decision to the Third Department.

Last week, on appeal to the Third Department, a divided panel upheld the decision of the Tribunal. But in so doing, the three-judge majority of the five-judge panel did not even consider the Division's irrational position regarding ownership/property rights. Instead, the Third Department weighed various facts and circumstances in the record (including the extraneous fact that the taxpayer was registered to vote in New York, though he never voted) to find that there was enough to conclude that the Tribunal's determination was supportable. But even the three-judge majority found this to be a toss-up, noting that "a contrary conclusion would have been reasonable based upon the evidence presented." Still, though, it is heartening that the majority did not latch on to the Division's "property rights" argument—the one that caused so much of an uproar back in 2011 when it was embraced by the Tribunal.

More important, however, was the fact that two of the judges on the panel dissented, finding that the Tribunal's decision was "irrational" in light of the language in the tax law imposing resident taxation. Specifically, the dissenting opinion noted that the entire purpose underlying the "statutory residency" test was not to expand the reach of the Tax Law to impose tax on individuals with transitory connections to New York. Instead, the law was put in place to tax those taxpayers who "really are residents" of New York, as has been previously stated by New York's highest court. Imposing resident taxes on a person who didn't have a bed at his parents' apartment and only stayed there infrequently to care for his parents ran contrary to the legislative intent underlying the statutory residency rules. Thus, the idea that Mr. Gaied "really was a resident" just because he was nice enough to keep a place for his folks is irrational. And this is the real gem in the dissent. For years, taxpayers like Mr. Gaied and legal commentators have been saying that the Division's expansion of the residency rules to encompass classes of taxpayers with tenuous connections to New York is improper and wrong. At long last, the argument has been embraced by judicial decision-makers.

This two-judge dissent is not just a consolation prize for the taxpayer. It also means that, under court rules, the case can be appealed to New York's highest court "as of right." Thus, in a case with more twists and turns than the recent fiscal-cliff negotiations, we finally will have the last word on this case when the Court of Appeals makes its ruling. So stay tuned. The final ruling in this matter promises to have a huge effect on residency cases in the future.

More on Multi-State Residency and Taxation

New publication. The newest, updated edition of New York Residency and Audit Allocation Handbook, written by Hodgson Russ partners Timothy P. Noonan, Paul R. Comeau, and Mark S. Klein, is now available from CCH. In the guide, the authors present an in-depth and practical look at New York's residency and income allocation audit programs, including detailed, yet easy-to-read, information drawn from the current tax law and from their own experiences. Click here for more information.

Seminar series. Hodgson Russ's annual seminar "Florida Residency Update: How you know when you have it, and what you may want to do if another state says you don't" will be presented in January and February 2013 in several Florida locations. The seminar provides information on income tax, homestead, and estate planning issues and guidance on how you may be able to reduce taxes, protect assets, and avoid pitfalls when moving from another state or maintaining dual residences.