

Taxpayer Poised for Big Savings in Controversial NY Residency Case

By: Brad J. Polizzano, Esq.

We may finally have some closure in *Gaied*, a NYS residency case that has been in the NY courts since 2009.

WHAT'S AT STAKE?

John Gaied owned a residential building with several units in Staten Island. In one of the units lived his parents. During the years in question, 2001 through 2003, Mr. Gaied occasionally spent the night on his parents' couch at their request to attend to their medical needs. He also paid the unit's utility bills.

Throughout this time, Mr. Gaied also owned and lived in a home in Old Bridge, New Jersey and regularly commuted from there to his auto repair business in Staten Island.

The Staten Island units were less than two miles from Mr. Gaied's auto repair business, while the New Jersey home was approximately thirty miles away.

If Mr. Gaied were considered a "statutory resident" of New York City for the years in question, he would be subject to paying New York State and New York City taxes on all his income, regardless of where it was earned. He clearly met one of the two required prongs to the "statutory resident" test by spending more than 183 days in New York City each year, evident by the time spent working at his business. The issue in *Gaied* was whether he also maintained a permanent place of abode in New York City, the second prong to the "statutory" resident test.

In 2008, the State asserted that Mr. Gaied owed \$253,062.00 in additional New York State and City personal income tax, plus interest, for his 2001 through 2003 tax years.

WINDY CASE BACKGROUND

This case has taken so many twists and turns that all the parties involved must feel beyond dizzy. It all began with a decision by an Administrative Law Judge in 2009, deciding against the taxpayer. The taxpayer appealed, and the Tax Appeals Tribunal reversed the ALJ determination, siding with the taxpayer.

What happened next took most—if not everyone—by surprise. The Division of Taxation filed a motion to the Tax Appeals Tribunal for reargument of the case. The Tax Appeals Tribunal granted the motion, agreeing to listen to both sides one more time. On June 16, 2011, the Tax Appeals Tribunal withdrew its own previous decision after the reargument, and found in favor of the Division of Taxation.

Mr. Gaied did not give in at that point. He appealed to the Appellate Division, Third Judicial Department. While the appellate court upheld the Tax Appeals Tribunal's decision, the ruling was a divided 3-2. The taxpayer appealed again to the State's highest court, the Court of Appeals.

In a unanimous decision, the Court of Appeals reversed the Appellate Division, and remanded the case back to the Tax Appeals Tribunal to apply the law as directed by the Court of Appeals.

WHY GAIED MATTERS

Gaied has received a lot of attention from state and local practitioners, taxpayers, and state representatives because it could establish a broader precedent for the definition of maintaining a permanent place of abode. In the case, the Division of Taxation argued that there is no requirement for a taxpayer to actually live at the property for it to be considered a permanent place of abode.¹

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The Court of Appeals has spoken: “[I]n order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have a residential interest in the property.”²

On remand, the Tax Appeals Tribunal is tasked with applying the permanent place of abode standard previously established in *In re Evans*³:

[T]he permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual’s relationship to the place.

Considering that in *Gaied* the Tax Appeals Tribunal applied *Evans* in its first decision in favor of the taxpayer, we can suspect that the same will happen again on remand. With all the back and forth, however, nothing should surprise us at this point.

GOING FORWARD: EVALUATING PERMANENT PLACES OF ABODE

The Court of Appeals reversal reinstated the *Evans* standard and put the law in more harmony with the Department of Taxation’s Nonresident Audit Guidelines. There are two key elements for evaluating a whether a taxpayer maintained a permanent place of abode:

1. The physical aspects of the dwelling; and
2. The taxpayer’s relationship to the dwelling.

Regarding physical aspects, the dwelling must be suitable for year-round use. A cottage suitable only for vacations would likely fall outside the definition.

A cottage suitable for year-round use but only used for vacations, however, may nevertheless be considered a permanent place of abode.

When considering the taxpayer’s relationship to the dwelling, the Department directs its auditors to apply a variety of factors, such as:

- Contributions to the dwelling, in money or otherwise
- Ownership or property rights in the dwelling
- Use of the dwelling or unfettered access
- Relationship with co-habitants of the dwelling
- Having own room or personal items at the dwelling
- Using the address of government or business purposes, such as to receive mail, for voter or car registrations or for phone service

No one factor is necessarily determinative, and they do not carry equal weight.

As of this writing, it is unclear when the Tax Appeals Tribunal will render its *Gaied* decision on remand. For now, Mr. Gaied can at least breathe a partial sigh of relief.

¹ *In re Gaied*, DTA. No. 821727, at 11 (N.Y. Tax App. Trib. 2011) (rehearing).

² *Gaied v. New York State Tax Appeals Tribunal*, No. 26, 2014 N.Y. Slip. Op. 01101, at 8 (N.Y. Feb. 18, 2014).

³ DTA No. 806515, at 11 (N.Y. Tax App. Trib. 1992).

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