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The expanding reach of New York's "resident individual" statute

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A New Jersey domiciliary was properly classified as a New York state and city statutory resident based on the maintenance of a city apartment for his elderly and ill parents, the New York State Tax Appeals Tribunal ruled on rehearing, despite the fact that the individual did not reside at the apartment and stayed only occasionally at the apartment and only at his parents' request. The tribunal reasoned that where a taxpayer has a legal right or relationship to and maintains property in the city, then the property is a permanent place of abode within the meaning of the statute and regulations. Accordingly, it is not necessary to look to the taxpayer's subjective use of the property, such as whether the taxpayer has sleeping quarters or stores personal effects at the property. *In re John Gaied*, N.Y. State Tax App. Trib., DTA NO. 821727 (6/16/2011)

The New York Tribunal recently ruled in the *John Gaied* case that an individual can have a permanent place of abode even though the individual does not reside at the property, thereby opening the door for a more inclusive interpretation of what constitutes a resident individual.

Background

For the tax years 2001, 2002, and 2003, John Gaied owned and maintained a multifamily residence in New York State, in which he maintained an apartment for his elderly and ill parents. During the same years, Gaied owned and worked at an



automotive service stations in Staten Island, and owned and resided at a home in New Jersey. Based on his New Jersey domicile, Gaied filed non-resident New York income tax returns, on which he indicated that he did not maintain living quarters in New York during the respective years. For the years at issue, Gaied claimed head of household status on his federal and state tax returns.

On audit, the Division of Taxation determined that the New York apartment that Gaied maintained for his parents constituted a "permanent place of abode" for Gaied. Based on that determination, the division found that Gaied was a statutory resident of New York and assessed tax.

Gaied challenged the assessment and argued that the apartment was not a "permanent place of abode" under New York state and city statute, regulations, and case law. Specifically, Gaied argued that the multifamily residence in which he maintained an apartment for his parents was held for investment purposes only. In addition, Gaied argued that he never lived at the apartment but would only stay at the New York property when his parents asked him to fulfill particular health needs. Gaied also argued that he did not have unfettered access to the apartment. He further asserted that there was no bed for him in the apartment and that he had no personal effects in the apartment.

The Division dismissed Gaied's assertions. Specifically, the Division argued that Gaied did not provide sufficient evidence that the property was held for investment as contended. The Division further asserted that pursuant to relevant statute, regulations, and controlling case law, there is no requirement that petitioner actually live at the subject property for it to be considered a permanent place of abode.

Statute and regulation at issue

New York state income tax is generally imposed on all resident individuals, where resident individual includes someone who is not domiciled in this state but maintains a permanent place of abode in New York state and spends in the aggregate more than 183 days of the taxable year in the state. N.Y. Sec. 605(b)(1)(B).

A regulation provides that a permanent place of abode means, "a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer." N.Y. Reg. 20 NYCRR 105.20(e)(1). The regulation also provides that "a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose."

Taxpayer wins then loses at Tax Appeals Tribunal

An administrative law judge ruled in favor of the Division, finding that Gaied's unfettered access to his ill parents' apartment established a permanent place of abode. On appeal, however, the Tax Appeals Tribunal reversed the decision, finding that because Gaied maintained very few personal effects at the apartment, did not have his own bedroom, and would only stay at the premises when requested by his parents due to their ill health, the apartment did not constitute a permanent place of abode.

Following the Tribunal's ruling, the Division filed a motion for reargument, in which it asserted that if a taxpayer has a *property right* in the abode, the abode *automatically qualifies* as a permanent place of abode. Upon reconsideration, the Tribunal agreed with the Division and reversed its previous decision, stating:

"We [previously] determined that petitioner did not maintain a permanent place of abode at the subject premises because he did not have his own bedroom or a bed, would only stay at the premises when requested due to his father's poor health, and did not keep any personal effects in the apartment. We have concluded upon further reflection that our [previous] decision is an improper departure from the language of the statute, regulations, and controlling precedent. A review of our decisions from both prior to and subsequent to our [previous] decision, indicates 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."

Tribunal distinguishes *Evans*

In its ruling, the Tribunal discussed in some detail its previous decision in *Matter of Evans*, as both Gaied and the Division of Taxation cited it in support of their arguments. *Matter of Evans*, 119 AD2d 840, N.Y. Tax App. Trib. (1993). In *Evans*, the Tribunal determined that a church rectory was a taxpayer's permanent place of abode, where the taxpayer lived part-time during the workweek with the permission of the church and generally returned to his country home during weekends. Further, the taxpayer regularly made contributions to the rectory's expenses, maintained clothing, personal items, and furniture at the rectory, and had a room for use during the week. The taxpayer did not generally pay for operating expenses (e.g. utilities or repairs) or costs of ownership (e.g. mortgage payments) while staying at the rectory.

In its ruling, the Tribunal stated "the permanence of a dwelling place...can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place." Specifically, given the totality of facts in *Evans*, the Tribunal ruled that it was necessary to look beyond the legal relationship of the property and taxpayer to the taxpayer's subjective use of the premises of the property. That is, even though the taxpayer had no legal right to the property, his relationship to and use of the rectory was such that it qualified as a permanent place of abode.

Drawing on the *Evans* ruling, Gaied claimed that to determine permanence it is necessary to look beyond his legal relationship to the abode and inquire into his use of the property. Because he maintained very few personal effects at the apartment, did not have his own bedroom, and would only stay when requested by his parents due to their ill health, the apartment did not constitute a permanent place of abode.

The Division of Taxation, on the other hand, asserted that a taxpayer's subjective use of the property is not determinative or necessary for purposes of establishing a permanent place of abode. Rather, if a taxpayer has a legal right or relationship to the property and maintains that property, then the property is a permanent place of abode. In such case, it is not necessary to look to the taxpayer's subjective use of the property.

The Tribunal ultimately agreed with the Division of Taxation's position, specifically ruling that "in the factual context of [the *Evans*] case, in which the taxpayer did not have a property right to the dwelling place, it was necessary to go beyond the physical aspects of the dwelling place...and inquire into the taxpayer's relationship to and use of the property." In the event that the taxpayer does not have a legal right or relationship to the property, however, then it is informative to look to the taxpayer's use of the property.

PwC observes

In short, the *Gaied* ruling affirms a limited reading of the *Evans* holding. In *Evans*, it was determined that a permanent place of abode may also exist where the taxpayer does *not* have a legal right or relationship to the property. In such case, the taxpayer's subjective use of the property was instrumental in determining whether a permanent place of abode is established. The *Gaied* case goes even further in expanding the reach of what constitutes a permanent place of abode: where a taxpayer has a legal right to the property, the taxpayer has a permanent place of abode.

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