



Decision from state's highest court favorable to nonresident taxpayers

DAVID KALL | TAX AND BENEFITS CHALLENGES | MAR 07, 2014

It is no secret that New York imposes one of the highest tax burdens on its taxpayers, especially its residents. These high tax rates make it beneficial for not only the extremely wealthy to avoid resident status, but also for less affluent taxpayers to do so where the facts and circumstances support nonresident status.

In the past, there have been several cases where multimillionaires who maintain homes in New York and spend 10 months in those homes each year still claim to be nonresidents. *See, e.g., Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530, 535 (1998). Even Actor Tom Hanks recently left a premiere of one of his movies early in order to avoid New York residency status. Due to the attractiveness of seeking or maintaining nonresident status, New York legislators enacted laws with the purpose of taxing individuals who are "really for all intents and purposes...residents of the state[.]" *Id.* However, these laws have at times been applied in ways which frustrate this purpose (and taxpayers).

New York Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, personal income tax on New York and New York City "resident individuals." There are two ways in which an individual may be taxed as a "resident." First, the individual will be taxed if his or her permanent and primary home is located in New York (i.e., he or she is domiciled in New York). N.Y. Tax Law § 605(b)(1)(A).

Second, taxes are imposed on a "statutory resident" or someone "who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than [183] days of the taxable year in the state." N.Y. Tax Law § 605(b)(1)(B).

It is this "statutory resident" test which was considered in the case of *Gaied v. N.Y. State Tax Appeals Tribunal*, No. 26, --- N.E.3d ---, (N.Y. Feb. 18, 2014).

Summary of facts and procedural background

In *Gaied*, during the relevant time period (tax years 2001 through 2003), Mr. Gaied was domiciled in New Jersey and owned an automotive service and repair business on Staten Island, New York and commuted to his business daily. In Nov. 1999, he purchased a multi-family apartment building near his business as a place for his elderly parents to live and as investment property. Mr. Gaied's parents moved into the apartment building shortly thereafter and continued to live in the building. Mr. Gaied paid the electric and gas bills for the apartment, as well as maintained a telephone number for the apartment in his name. Mr. Gaied claims to have never lived at the apartment, did not keep any clothing or personal effects there, nor did he have sleeping accommodations there. While he did have keys to the apartment, he claims he did not have unfettered access and only slept over on the couch on occasion when his parents requested his attention to their medical needs. Mr. Gaied rented the other two apartments in the building to tenants.

The New York Department of Taxation and Finance (the Department) audited Mr. Gaied's 2001 through 2003 nonresident tax returns. After the audit, the Department concluded that Mr. Gaied was a "statutory resident" of New York "because he spent over 183 days in New York City and maintained a 'permanent place of abode' at the Staten Island property during those years" and issued Mr. Gaied a Notice of Deficiency in the amount of \$253,062, plus interest. *Gaied*, slip op. at 3. Mr. Gaied challenged the assessment, conceding that while he did spend more than 183 days in New York, he did not maintain a "permanent place of abode" in New York.

The antecedent ruling to *Gaied* interpreted "'maintains a permanent place of abode' to mean that a taxpayer need not 'reside' in the dwelling, but only maintain it, to qualify as [a] 'statutory resident'" under the Tax Law.

New York Court of Appeals holding

After multiple appeals, the last two of which found for the state, Mr. Gaied's case reached the New York Court of Appeals, which is New York's highest court (Appeals Court).

As noted by the Appeals Court in *Gaied*, "[t]he Tax Law does not define 'permanent place of abode', but the 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.'" *Gaied*, slip op. at 7 citing 20 NYCRR 105.20(e)(1). The Appeals Court further noted that the regulations "provide that, by way of example, 'a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode.'" *Id.*

On this basis, the Appeals Court reasoned, considering the legislative history of the relevant statutes, that the "permanent residence" that the tax laws seek to evaluate must relate to the taxpayer himself and that such taxpayer must have a "residential interest" in the underlying property and that "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence." In Mr. Gaied's case, the Appeals Court found that he did not possess a residential interest.



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