

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

# COA overrules tax department's position on residency

Nearly five years ago, a well-known local businessman very publicly changed his residency to Florida. Although the New York Department of Taxation and Finance had already begun cracking down on the residency issue, this parting shot seems to have only strengthened the Tax Department's resolve to find residency whenever possible.

The Tax Department has taken extremely aggressive positions over the past five years, including its conclusion that interest in real property in New York is maintenance of a permanent place of abode for purposes of the statutory residency test. In *Gaied v. New York State Tax Appeals Tribunal*, 2014 WL 590486 (Feb. 18, 2014), the Court of Appeals ruled correctly that a property owner was not a New York resident solely because he owned a residential building in New York.

### Background

Petitioner John Gaied owned an automotive repair business on Staten Island, but maintained his domicile in New Jersey. Gaied commuted daily from New Jersey to his Staten Island business. He purchased a multi-family residential building on Staten Island, which was near his business. Gaied purchased the property as a residence for his elderly parents and as an investment property.

His parents moved in right away and relied on Gaied for support. Gaied claimed them as dependents and paid all the utilities, which Gaied maintained in his own name. Gaied never lived there, but occasionally slept on the couch to tend to his parents' medical needs when required. The other units were leased to unrelated tenants. Gaied reported all his income and expenses for the property on his tax returns. Gaied sold his New Jersey residence and stayed with an uncle in New Jersey for a period and, after additional renovations, Gaied moved into the Staten Island property.

### New York residency under the tax law

Section 601 of the Tax Law imposes personal income tax on "resident individuals." An individual may be a resident under either of the two definitions of "resident" found in Section

605(b). First, if the individual is domiciled in New York, then the individual is a resident. An individual is domiciled in New York if the individual's permanent and primary home is located in New York.



By **SCOTT D. SHIMICK**  
Daily Record  
Columnist

The second test defines a "statutory resident" as an individual that is not domiciled in New York, but maintains a permanent place of abode in New York and spends, in the aggregate, more than 183 days of the taxable year in New York. The Tax Law does not define "permanent place of abode." However, the regulations define "permanent place of abode" as "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer ..." It is the statutory residency issue that was brought before the Court of Appeals.

### History

Prior to moving to Staten Island, Gaied filed as a nonresident of New York. He was audited by the Tax Department and issued a Notice of Deficiency for \$253,062 in state and city income taxes, plus interest.

The Tax Department relied on Tax Law Section 605(b)(1)(B), claiming that Gaied was a "statutory resident" of New York.

Gaied sought a redetermination. Gaied conceded that he was in New York more than 183 days during each year for his business, but challenged the determination that he maintained a "permanent place of abode." The Administrative Law Judge sustained the deficiency and Gaied appealed. After initially reversing the ALJ, the Tax Appeals Tribunal allowed reargument by the Tax Department and upheld the ALJ determination. The tribunal relied on the taxpayer's property rights as his permanent place of abode.

Gaied brought an Article 78 proceeding, which resulted in the Third Department upholding the tribunal's ruling. The ruling was based on Gaied's free and continuous access to the property, storage of personal property at the property, and the ease of the commute to his place of business.

Two justices dissented, focusing on the legislative intent of

*Continued ...*

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

---

## *Continued ...*

the statutory residency rules. The dissent reasoned that the taxpayer's living arrangements should determine his permanent place of abode, concluding that the tribunal's decision that Gaied had a personal residential interest in the Staten Island building was "irrational and unreasonable."

## **Court of Appeals**

The Court of Appeals addressed the statutory residency issue, which requires the individual to maintain a permanent place of abode in New York and spend more than 183 days in the state. Because Gaied worked in New York, he conceded that he met the second part of this test. Therefore, the Court of Appeals focused on the definition of "permanent place of abode."

The tribunal interpreted the maintenance of a permanent place of abode to not require residency in the dwelling. The Court of Appeals noted that the statute does not require anything other than the permanent place of abode must be maintained in relation to the taxpayer.

The Court of Appeals reviewed the legislative history of the statute, which states the legislation's purpose is to prevent tax evasion by New York residents and which includes "living arrangements" as part of a permanent abode. Additionally, the Court of Appeals reviewed the regulations, which require a residential interest in the property and support Gaied's argument.

In reviewing whether the tribunal's interpretation comports

with the meaning and intent of the statute, the Court of Appeals concluded that there is no rational basis for the tribunal's interpretation. The Court of Appeals reversed and remanded the case to the tribunal.

## **Conclusion**

Thousands of New Yorkers retire and move to warmer, and more tax-friendly, states every year. Many of those maintain a home, cottage or cabin in New York, whether to enjoy the summers or to maintain a residence closer to family. The Tax Department has been very aggressive in challenging a change in residency, requiring proof of the 183 days away requirement.

Fortunately, for New Yorkers that move away, the Court of Appeals has checked the Tax Department's unreasonable challenge to the second element of the statutory residency test, the "permanent place of abode." Former residents should not only worry about the domiciliary tests, but should also be mindful of accidentally maintaining a permanent place of abode.

Despite the Court of Appeals' ruling, if the evidence does not clearly establish that a residence is no longer the permanent place of abode, the Tax Department may still claim statutory residency of the former New Yorker.

*Scott D. Shimick is an associate in Underberg & Kessler's Tax and Corporate & Business practice groups. He concentrates his practice in federal and state taxation, and civil and criminal tax matters.*