RECENT DECISION DRASTICALLY ALTERS NEW YORK'S STATUTORY RESIDENCY RULES

State & Local Tax Alert
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One of the more important residency issues we often see in Tax Department audits, concerns the "permanent place of abode" test. Under New York State's residency statutory test, a taxpayer who maintains a permanent place of abode and spends more than 183 days in New York can be taxed as a resident, regardless of where they "live" or where their home is. So the question of whether someone maintains a "permanent place of abode" is often a critical factor in residency audits. For years, the analysis was guided by the Tax Appeals Tribunal's decision in *Matter of Evans*, which required a fact-intensive analysis into the taxpayer's use and relationship to the particular dwelling in order to determine whether it was a "permanent" place of abode.

That's all about to change. In a decision released today, the Tribunal issued an unusual reversal of its own decision in *Matter of Gaied* that raises more questions than it answers. One thing's for sure: never have New York's residency rules been in greater disarray. For practitioners who deal in this issues on a regular basis, life is about to change.

In *Gaied*, the issue concerned whether an apartment owned by a taxpayer but maintained for his sick, elderly parents constituted a "permanent place of abode." Initially, the taxpayer lost at the administrative law judge level, with the judge ruling that a New Jersey domiciliary's access to his parents' apartment—though limited—was enough to justify resident taxation in New York (coupled with the taxpayer spending more than 183 days here). On appeal, the Tax Appeals Tribunal reversed, holding 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."

This decision made a lot of sense, and was consistent with prior Tribunal cases, including *Evans*. And in 99.9 percent of the cases, that fair and well-reasoned decision would have ended the matter. But the Tax Department took the unusual step of requesting re-argument. And in doing so, it posited a new and unusual argument: namely, that ownership (or property rights) transcends all other facts and circumstances. If a taxpayer has a property right in an abode, the Division argued that the abode automatically qualified as a "permanent" place of abode.

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To the everyday tax practitioner, this argument seemed ridiculous. Many taxpayers have ownership or possessory rights in properties and yet—because they allow other people to use their place, or they lease it out—don't qualify as "residents." But in a shocking reversal, the Tax Appeals Tribunal held that, under its new formulation of the permanent place of abode test, ownership or property rights are all that matter. Specifically, the Tribunal said:

"[W]here 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 taxpayers' subjective use of the premises."

The Tribunal also noted, in a footnote, that the requirement that a dwelling place have a bedroom or a bed is found nowhere in the case law or statute, stating that "the lack of a bedroom or bed would not preclude [a] premises from being deemed a permanent place of abode."

In issuing this decision, the Tribunal not only reversed itself, but it distanced itself from prior cases—and even from current Tax Department policy. And what does it mean for taxpayers? Although it's way too early to determine how the Department will apply the decision, under this new formulation of the statutory-residency test, if a taxpayer has *an*y property rights in a dwelling place in New York, it may not matter whether that taxpayer ever steps foot in the place. It may not matter whether that place even has a bed. And it may not matter if the taxpayer *never* uses the place as a residence.

For instance, parents who maintain an apartment for their children going to college in New York could be taxed as residents if their day counts exceed 183 days, regardless of whether they have any use of the place. What about a grown child who obtains a place for his parents to stay? Again, this grown child could be subject to New York resident taxation even if he never steps foot in the place. A landlord who rents out a place to a tenant? It's unclear whether the rules will now stretch that far. Potential troublesome situations abound.

How, might you ask, do three Tribunal members agree to issue such a decision? They didn't, actually. Only two of the Commissioners signed the decision. President Tully dissented, opining that the formulation of the case law in the Tribunal's initial decision was correct and justified.

And what of the Tax Department's policy in this area? For years, the Department relied on *Evans* for purposes of determining whether an abode was "permanent." Use mattered. Access mattered. Relationship mattered. The Department's own audit guidelines take a much broader view of the permanent place of abode test than that proclaimed yesterday by the Tribunal (or at least two members of the Tribunal) in *Gaied*.

Unfortunately we didn't draft this alert to provide lots of answers. The *Gaied* decision doesn't provide too many of those. But the case sure does create lots of questions, and raises even more concerns.