STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN J. AND LAURA BARKER	:	ORDER DTA NO. 822324
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2002, 2003 and 2004.	:	

Petitioners, John J. and Laura Barker, filed a motion, dated March 14, 2011, with the Tax Appeals Tribunal for reargument of the Tribunal's decision in this matter dated January 13, 2011. Petitioner appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Michelle M. Helm, Esq., of counsel).

An *amicus curiae* brief was filed by the Business Council of the State of New York, Inc. (Douglas J. Bohn, Esq., of counsel).

NOW, upon reading petitioners' affirmation and memorandum of law dated March 14, 2011 in support of its Motion to Reargue and the Division of Taxation's response dated April 14, 2011 in opposition to the motion, the *amicus curiae* brief dated May 10, 2011, and the Division of Taxation's and petitioners' responses to the *amicus curiae* brief, and due deliberation having been had thereon, the Tax Appeals Tribunal renders the following Order.

FINDINGS OF FACT

Petitioners contested a Notice of Deficiency asserting personal income tax against them as residents of New York. During the proceedings in this matter before the Administrative Law Judge, petitioners conceded that Mr. Barker spent more than 183 days in New York for each of

the tax years in issue, and the only issue presented was whether petitioners maintained a permanent place of abode in New York during the years at issue.

The Administrative Law Judge found that petitioners maintained a permanent place of abode in New York, rejecting petitioners' arguments that Mrs. Barker's parents' use of the house prevented them from exercising their legal rights to the residence and that the Napeague, New York house was not a permanent place of abode because the residence was, according to petitioners, not subjectively liveable for them year-round. The Administrative Law Judge found that petitioners' Napeague home is suitable or fit for full time habitation 12 months of the year, i.e., for other than vacations. It contains 1,122 square feet of interior living space and a 594 square foot wraparound deck. It contains three bedrooms, two full baths, a working kitchen, a living room with fireplace and hardwood floors. The home has heat fueled by oil, had electric and telephone service, cable television and internet access. Moreover, the Administrative Law Judge noted that the house is used year round by Mrs. Barker's parents, who operate a fishing charter business from the address. Thus, the Administrative Law Judge concluded that the home was suitable for uses other than vacations.

The Administrative Law Judge further found petitioners' reliance on ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840 [1993]) misplaced, noting that there was no question about the permanency of petitioners' relationship with the Napeague property. Petitioners purchased the property in 1997 and paid substantially all of the upkeep including the mortgage, maintenance costs, taxes and insurance throughout the audit period. As such, the Administrative Law Judge determined that petitioners maintained a permanent place of abode during the years at issue.

Petitioners filed an exception to the determination of the Administrative Law Judge arguing that the Administrative Law Judge erred by: (1) misconstruing the "permanent place of abode" analysis; (2) failing to consider the Napeague house as a camp or a cottage; and (3) upholding negligence penalties.

In ***Matter of Barker*** (Tax Appeals Tribunal, January 13, 2011), after a thorough review of the arguments presented on exception and the record of the proceeding before the Administrative Law Judge, we affirmed the determination of the Administrative Law Judge to the extent that petitioners were found to be New York residents who maintained a permanent place of abode in New York and spent more than 183 days in this state during the years at issue, and remanded the matter to the Administrative Law Judge on the issue of penalties.

Petitioners now bring this motion for reargument.

ARGUMENTS ON THE MOTION TO REARGUE

Petitioners allege that the Tribunal overlooked or misapplied the applicable law in the permanent place of abode context. Petitioners argue that our decision in ***Matter of Barker***, ***supra***, directly contradicts our decision in ***Matter of Gaied*** (Tax Appeals Tribunal, July 8, 2010) and misapplies and misapprehends our previous decisions in ***Matter of Evans, supra*** and ***Matter of Roth*** (Tax Appeals Tribunal, March 2, 1989). Petitioners contend that the decision in ***Matter of Barker***, ***supra***, cannot be reconciled with the decision in ***Matter of Gaied***, ***supra,*** because in the later case we engaged in an inquiry into the taxpayer's use of and relationship to the place, despite the taxpayer's ownership of the property, but in the former case, according to petitioner, we failed to make such an inquiry. Petitioners argue that the conflicting results between these two cases has caused confusion in the area of statutory residency. Petitioners further assert that ***Matter of Roth***, ***supra***, is not controlling here because the decision in that case only addressed the maintenance

prong of the permanent place of abode test, and the "permanence factor" was not at issue. Petitioners contend that in citing ***Matter of Roth***, the ***Barker*** decision ignores the "permanence" element of permanent place of abode.

The Division of Taxation (Division) argues that petitioner has not demonstrated that the Tribunal overlooked or misapprehended relevant facts or misapplied controlling principles of law, but merely disputes our interpretation of relevant precedent. The Division asserts that petitioners read the statement made in ***Matter of Barker***, ***supra***, that "[w]hile establishing a legal relationship may not necessarily end the analysis, no further discussion of ***Evans*** is required because petitioner conceded ownership of the Napeague property" out of context. When read in context, the Division contends, this statement does not mean that ownership is synonymous with permanence, and thereby in conflict with ***Matter of Gaied, supra,*** as petitioners argue, but instead means that permanence can be found even in those instances in which there is no legal right or relationship to the property. The Division further argues that petitioners inappropriately quote one sentence in the ***Barker*** decision, cited from ***Matter of Roth, supra***, that "[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it" in isolation, and that when read in the complete context of the ***Barker*** decision, the ***Roth*** quote was offered in amplification and clarification of the well settled rule that "defines a permanent place of abode as a dwelling that is (a) objectively suitable for year round living, and (b) over which the taxpayer maintains dominion and control - whether the taxpayer dwells there or not" (Division's response to petitioners' motion for reargument, p. 6).

OPINION

A motion to reargue is based on no new proof, seeking only to convince the court that it was wrong and ought to change its mind (Siegel, NY Prac § 254, at 383 [2d ed]). There is no

statutory authority for this Tribunal to reconsider its decisions and, therefore, our authority to do so as a quasi-judicial body is limited (***Matter of Trieu***, Tax Appeals Tribunal, June 2, 1994, ***confirmed*** 222 AD2d 743 [1995], ***appeal dismissed*** 87 NY2d 1054 [1996], ***Matter of Jenkins Covington, N.Y. v. Tax Appeals Trib.***, 195 AD2d 625 [1993], ***lv denied*** 82 NY2d 664 [1994]).

A motion to reargue is intended to affect a prior order or decision.

> A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law; its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . (***Foley v. Roche***, 68 AD2d 558 [1979], ***lv denied*** 56 NY2d 507 [1982]).

Petitioners' motion does not argue that the Tribunal misapprehended or overlooked relevant facts, but claims that we overlooked or misapplied the applicable law. The crux of petitioners' argument merely reasserts their arguments made earlier, that ***Evans*** requires a subjective view of petitioners' use of and relationship to the abode. The fact that we disagreed with the positions taken by petitioners in this case does not mean that we ignored or misapprehended the facts or the law. As its basis for reargument, petitioners rely on our decision in ***Matter of Gaied, supra,*** contending that it supports their interpretation of ***Evans***, and that the ***Barker*** decision is inconsistent. However, our July 8, 2010 decision in ***Matter of Gaied, supra,*** relied upon by petitioners, has been withdrawn and a new decision has been issued in ***Matter of Gaied*** (Tax Appeals Tribunal, June 16, 2011).

In the June 16, 2011 ***Gaied*** decision we stated 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" (***Id.***). Thus, the revised ***Gaied*** decision clarifies our position on permanent place of abode factors and

demonstrates that our decision in ***Matter of Barker***, ***supra***, is consistent with controlling precedent.

Moreover, contrary to petitioners' assertion, the ***Barker*** decision does not ignore the "permanence" element of permanent place of abode. We noted that the Administrative Law Judge properly considered the physical attributes of the Napeague dwelling in determining permanence and "reject[ed] petitioners' argument that the subjective use of a dwelling by a taxpayer is determinative of the permanent place of abode question. It is well settled that a dwelling is a permanent place of abode where, as it is here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling" (***Matter of Barker***, ***supra***).

We conclude that our decision in ***Matter of Barker***, ***supra,*** was reached after a thorough review of the entire record in the matter and the relevant law. The motion before us indicates no circumstances that would allow us to reconsider this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for reargument of John J. and Laura Barker is hereby denied.

DATED: Troy, New York
June 23, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner