STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN GAIED	:	DECISION DTA NO. 821727
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2001, 2002 and 2003.	:	

Petitioner, John Gaied, filed an exception to the determination of the Administrative Law Judge issued on August 6, 2009. Petitioner appeared by Duke, Holzman, Photiadis & Gresens, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Peter B. Ostwald, Esq., of counsel). Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on January 13, 2010 in Troy, New York. The Tax Appeals Tribunal issued a decision dated July 8, 2010.

The Division of Taxation filed a motion for reargument dated October 22, 2010, accompanied by a memorandum of law in support. Petitioner, appearing by Timothy J. Hennessy, Esq., filed a brief in opposition dated November 23, 2010. A brief *amicus curiae* in support of petitioner was filed on behalf of the New York Society of Certified Public Accountants by Paul L. Sinegal, Esq.

A motion for reargument of a decision of the Tax Appeals Tribunal is provided for in section 3000.16(c) of the Tax Appeals Tribunal's procedural rules. Unlike subsections (a) and

(b) of section 3000.16, which govern motions for reargument of a determination of an Administrative Law Judge before the filing of an exception with the Tax Appeals Tribunal, subsection (c) does not limit the ground upon which the Tax Appeals Tribunal may grant a motion for reargument of a Tribunal decision. Accordingly, the Tax Appeals Tribunal looked to the standards applied by the courts in similar circumstances and, finding that those standards had been met, granted the motion in an order and opinion dated February 24, 2011 (***see*** CPLR 2221[d][2]; ***Foley v. Roche***, 68 AD2d 558 [1979], ***lv denied*** 56 NY2d 507 [1982]; ***Matter of Stuckless***, Tax Appeals Tribunal, December 15, 2005; ***Matter of Schulkin***, Tax Appeals Tribunal, November 20, 1997).

On reargument, oral argument was held on April 13, 2011. Petitioner appeared at oral argument by Duke, Holzman, Photiadis & Gresens, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

After reviewing the entire record in this matter, the Tax Appeals Tribunal withdraws its decision dated July 8, 2010 and renders the following decision. President Tully dissents for reasons set forth in a separate opinion.

ISSUE

Whether petitioner was a New York State and New York City resident liable for State and City personal income taxes for 2001, 2002 and 2003 because he maintained a permanent place of abode in New York City and spent over 183 days in New York City during these years.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "4," "6," "8," "11," "12," "16," "17," "20" and "21," which have been modified. We

have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

We have modified finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> On November 18, 2002, petitioner, John Gaied, filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for the year 2001, indicating his address as Throckmorton Lane, Old Bridge, New Jersey (Old Bridge, New Jersey). On this return, petitioner reported wages from Repairs Plus and Ash Auto Corp., which amounts were allocated 100% to New York State. For the year 2002, petitioner filed a timely nonresident income tax return, indicating his address as Old Bridge, New Jersey. On the 2002 return, petitioner reported wages from Ash Auto Corp., which amount was allocated 100% to New York State. For the year 2003, petitioner filed a timely nonresident income tax return, indicating his address as 14 McFarland Avenue, Staten Island, New York. On the 2003 return, petitioner reported wages from Ash Auto Corp., which amount was allocated 100% to New York State. On each IT-203 filed for the years 2001, 2002 and 2003, petitioner responded "No" to the question posed of nonresidents in Item F: "Did you or your spouse maintain living quarters in New York State in [specific year]?"[1]

For the years 2001 through 2003, petitioner claimed head of household filing status and two dependent exemptions, for his parents, Nouh Gaied Abdelshied and Yvonne Ishak Abdelmessih, on his federal, New Jersey and New York State tax returns.

In each of the years 2001 through 2003, petitioner filed a federal Schedule E, which reported, among other items, income and associated expenses from rental real estate listed in Part 1 as a one-family home at 14 McFarland Avenue, Staten Island, New York (McFarland Avenue or MacFarland Avenue property).[2] With respect to the rental real estate listed in Part 1 of Schedule E, petitioner responded "No" to the question posed in item 2 of Part 1: "Did you or

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[1] We have modified this fact to more accurately reflect the record.

[2] An alternative spelling of MacFarland Avenue appears in many documents in the record.

your family use [14 MacFarland Avenue] during the tax year for personal purposes for more than the greater of: 14 days, or 10% of the total days rented at fair market value?"

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> On February 6, 2006, following an audit, the Division of Taxation (Division) issued to petitioner a Notice of Deficiency, Notice Number L-026598711-9, asserting additional New York State and City personal income tax due for the years 2001, 2002 and 2003 in the aggregate amount of $253,062.00, plus interest. Petitioner was determined to be a statutory resident of New York State and New York City for the years 2001, 2002 and 2003.[3]

Petitioner, born in 1965, emigrated to America in his early twenties. By 1991, he owned an automotive service station, Repairs Plus, located in Staten Island at 1581-1583 Hylan Boulevard. On or about April 25, 1997, petitioner purchased a second automotive service station, Ash Auto Corp., located in Staten Island at 1416 Hylan Boulevard. As owner and operator of Ash Auto, a 24-hour service station, petitioner was required to work long hours, including covering shifts when his employees failed to show up.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> In 1993 or 1994, petitioner purchased the Old Bridge, New Jersey residence. Petitioner's Old Bridge, New Jersey residence was located approximately 28 miles from his business, a 30 to 45 minute drive depending on traffic and the route taken.[4]

On November 29, 1999, petitioner purchased the MacFarland Avenue property, a multi-family residence, located in the same neighborhood as his Staten Island businesses, *i.e.*,

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[3] We have modified this fact to correct the date of the Notice of Deficiency.

[4] We have modified this fact to more accurately reflect the record.

approximately two miles from the businesses. The MacFarland Avenue property contained a one-bedroom basement apartment, and first and second floor two-bedroom apartments. A boiler in the basement heated the entire building. However, each apartment received separate metered electric and gas service.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The record includes limited documentation regarding the rental history of the MacFarland Avenue property from November 29, 1999 through the year 2003. Specifically, petitioner submitted a one-page tenant history for the three apartments; service account tenant listings for the basement, first floor and second floor metered electric and gas service at the MacFarland Avenue property; a letter and supporting documents from a tenant who resided in the basement apartment from October 1997 through April 2002; a one-page Champion Realtors rental agreement dated August 28, 2003; and three Blumberg preprinted standard form apartment leases. The record does not include any rental income and expense accounting ledgers, bank statements, or cancelled rent checks for any of the units during each of the years at issue. Petitioner submitted income tax returns with attached Federal Schedule E, reporting rental income and expenses from the aforesaid premises.[5]

At the time of the sale of the MacFarland Avenue property to petitioner, the seller occupied the first floor apartment and tenants occupied the basement and second floor apartments. The basement tenants continued their occupancy through April 2002, and the second floor tenants continued their occupancy until January 11, 2003.

During the remainder of the period at issue, except for the periods from May 2002 through August 2, 2002 and December 27, 2002 through April 7, 2003, various tenants occupied the basement apartment at the MacFarland Avenue property. The record does not include rental leases for all tenants listed on the basement apartment's electric and gas service account.

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[5] We have modified this fact to more accurately reflect the record.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> Review of the second floor electric and gas service account list indicates that service to George Armanious, petitioner's brother-in-law, began on January 15, 2003 and continues to the present. No lease for Mr. Armanious's rental of the second floor apartment was provided. Documents in the record indicate that George Armanious and Nermid Gaied Armanious filed a joint New York State nonresident income tax return for the year 2003, listing a New Jersey address.[6]

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> Petitioner's parents have occupied the first floor apartment since 1999. From November 29, 1999 through the present day, electric and gas service provided to the first floor apartment has been billed to and paid by petitioner. During the years at issue, petitioner maintained a telephone number in his name at the MacFarland Avenue address associated with the first floor apartment. At all relevant times, petitioner's mother and father exhibited no source of income and relied upon petitioner for 100% of their support. Petitioner would be called upon to provide physical support to his parents at least once every one or two months.[7]

Petitioner listed the MacFarland Avenue address as his address for all notices to be sent to the landlord in the MacFarland Avenue apartment leases in the record. A review of paragraph 11 of the apartment leases indicates that the landlord may enter the apartment to "repair, inspect, exterminate . . . and perform other work" that the landlord "decides is necessary or desirable." Such entry "must be on reasonable notice except in emergency."

Prior to and during the tax years at issue, petitioner was a domiciliary of New Jersey.

Petitioner admits he was in New York City more than 183 days during each year at issue. He worked long hours at Ash Auto, and was on call 24 hours a day because the service station

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[6] We have modified this fact by deleting the last sentence as being irrelevant.

[7] We have modified this fact to more accurately reflect the record.

was open 24 hours a day.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> Petitioner would occasionally spend the night at the first floor apartment where his parents lived. He would only stay when his parents would request it because he preferred to be at his New Jersey home. Petitioner testified that there was no bed, nor a bedroom for him at his parents' apartment and that when they did request that he stay, he would sleep on the couch. Petitioner did not keep clothing or personal possessions at his parents' apartment.[8]

We modify finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> Sometime in 2001, Repairs Plus closed. On July 31, 2001, petitioner's limited liability corporation purchased land located at 1583 Hylan Boulevard and leased it to a third party until its sale on December 27, 2002. As a result of this sale, petitioner reported a large capital gain on his 2002 federal income tax return. On or about December 12, 2003, petitioner sold the Old Bridge, New Jersey residence to satisfy the outstanding tax obligations for the year 2002. In 2004, petitioner put his furniture from the Old Bridge, New Jersey residence in storage in New Jersey. He stayed with an uncle in New Jersey until he renovated the boiler room of his MacFarland Avenue property to make an additional apartment in which he began residing in 2004. Documents in the record indicate that renovations took place in the basement of the MacFarland Avenue property in 2004 but they do not include any building permits for such renovations.[9]

On or before October 18, 1992, petitioner became a United States citizen and registered to vote in New York State. At that time, he resided on Fillmore Place in Staten Island, New York. New York City voter registration records indicate that petitioner voted in the general elections in 1992, 2000 and 2004. The voter registration records further indicate that petitioner's address was changed to MacFarland Avenue in 2004. Petitioner did not submit any New Jersey

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[8] We have modified this fact to more accurately reflect the record.

[9] We have modified this fact to more accurately reflect the record.

voter registration documentation.

The Division's records indicate that Albert Gaied, petitioner's brother, filed New York State resident income tax returns for the years 2001, 2002, 2003, and 2004, using the MacFarland Avenue address.

We modify finding of fact "20" of the Administrative Law Judge's determination to read as follows:

> At the hearing, petitioner testified regarding the MacFarland Avenue residence. The record includes the cover page from a March 2006 appraisal of the property, which indicates that this 3-family style residence contains 3,917 square feet of gross living area and consists of 16 rooms, 6 bedrooms, and 4 baths.[10]

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> Petitioner did not submit affidavits or present testimony from his brother, sister or brother-in-law regarding the MacFarland Avenue property.[11]

We make the following additional finding of fact.

> Petitioner keeps the keys to the MacFarland Avenue property apartments at the first floor apartment with his parents.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge sustained the Notice of Deficiency on the basis that petitioner maintained a permanent place of abode for his parents at the first floor apartment of the MacFarland Avenue property and "would on occasion stay overnight during the years at issue" (Determination, conclusion of law "E"). The Administrative Law Judge found that petitioner paid all of the utility bills and was the sole support for his parents. The Administrative Law

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[10] We have modified this fact to more accurately reflect the record.

[11] We have modified this fact to more accurately reflect the record.

Judge rejected petitioner's argument that the MacFarland Avenue property was purchased solely as an investment property, finding that petitioner failed to present evidence substantiating this claim.

Additionally, the Administrative Law Judge noted that petitioner claimed head of household filing status and dependent exemptions for his parents on his federal, New Jersey and New York income tax returns, and determined that such facts are indicative of the maintenance of a place of abode within the standard set forth in ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840 [1993]).

The Administrative Law Judge found that petitioner's claim that he did not have unfettered access to any of the individual apartments, including that of his parents, was incredible. The Administrative Law Judge reasoned that petitioner owned the MacFarland Avenue property, maintained the first floor apartment occupied by his dependent parents, and had a familial and 100% custodial relationship with his parents. Furthermore, the Administrative Law Judge noted that in 2004, petitioner moved into the MacFarland Avenue residence and continues to reside there to this day.

ARGUMENTS ON EXCEPTION

Petitioner argues that he did not maintain a permanent place of abode in New York during the audit period and that he would stay at the MacFarland Avenue property only when his parents asked him to fulfill particular health needs. Petitioner contends that he did not have unfettered access to the MacFarland Avenue apartment, but would only go there when requested. Petitioner asserts that there was no bed for him in his parents' apartment and that he was forced to sleep on the couch. Additionally, petitioner maintains that he did not keep any personal property in the apartment.

Petitioner asserts that because of other tax liabilities, he was forced either to sell his home in New Jersey or sell the MacFarland Avenue property and displace his parents. Petitioner argues that proof that the MacFarland Avenue property was not maintained for his use is shown by the fact that when he sold his New Jersey home in December 2003, he stayed with an uncle in New Jersey until he added an additional basement apartment in the MacFarland Avenue property.

In support of his argument, petitioner cites to ***Matter of Evans***, stating that "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" (***Matter of Evans***, ***supra***). Petitioner contends that, unlike the taxpayer in ***Matter of Evans***, he did not maintain clothing and other personal articles at the MacFarland Avenue property, did not have his own furniture for the dwelling, and did not have free and continuous access.

Petitioner further argues that the residence was maintained exclusively for his parents, and that under the Department of Taxation and Finance's Revised Manual for Nonresident Audits, dated September 5, 1997, a residence maintained by one individual but used exclusively by another should not be deemed a permanent place of abode for the individual who maintains it.

The Division argues that petitioner has not met his burden to show that he did not maintain a permanent place of abode accessible for his use at the MacFarland Avenue property during the years in question. The Division asserts that petitioner did not prove his allegation that the MacFarland Avenue property was an investment property because he did not have sufficient records to show that the property was purchased and held as an investment. Further, the Division notes that petitioner filed his federal and state tax returns as head of household, listing his parents as qualifying dependents. The Division also points out that other members of petitioner's family occupied apartments in the building, that he maintained a telephone number in his name in the

first floor apartment and, also, that he was enrolled as an active voter in New York during all of the years at issue.

The Division asserts that the record clearly shows that petitioner established and maintained an apartment for his parents at the MacFarland Avenue property and would stay overnight on occasion. Specifically, the Division notes that petitioner continually maintained the apartment that his parents occupied, continued to incur all expenses and paid all bills associated with its maintenance. Moreover, the Division points out that petitioner's relationship with his parents was wholly custodial; specifically, they had no source of income to pay rent or utilities and relied upon petitioner for 100% of their support, including daily items of care. The Division further argues that pursuant to the 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. As such, the Division contends that petitioner has not clearly and convincingly shown that he did not maintain a permanent place of abode in New York during the years 2001, 2002 and 2003.

OPINION

Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, New York State and New York City personal income tax on State and City "resident individuals." Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .,
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> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the

armed forces of the United States.[12]

There is no dispute that during the years at issue petitioner was domiciled in New Jersey. Additionally, petitioner concedes that he spent more than 183 days in New York City during the years 2001, 2002 and 2003. Thus, the sole issue to be addressed is whether petitioner "maintained a permanent place of abode" in New York.

The Tax Law does not include definitions of the terms "maintained" or "permanent place of abode." However, permanent place of abode is defined in the Division's regulations at 20 NYCRR (former) 105.20(e)(1), in part, as:

> A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, 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.[13]

In our prior decision dated July 8, 2010, we noted that the issue of maintenance of a permanent place of abode had been previously addressed in ***Matter of Evans, supra***. Since there is some disagreement between the parties about how to interpret and apply our decision in that case to the matter at hand, it is worthwhile to describe that case in detail, as well as its bearing on the issues presented here.

In ***Matter of Evans*** (***supra***) we viewed a church rectory in Manhattan as the taxpayer's

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[12] Administrative Code § 11-1705(b)(1)(B) contains an identical definition of statutory residency to that given above, except for the substitution of the term "city" for "state."

[13] The Regulation was amended in 2009 to remove the temporary stay exclusion. Petitioner concedes that the factual situation here does not fall within the temporary stay provision.

permanent place of abode, where the taxpayer, an attorney working in midtown, lived part-time at the invitation of the priest. The taxpayer made contributions to the rectory's household expenses and it was his dwelling place during his work week. The taxpayer typically returned to his country home and domicile in Pawling, New York on weekends and vacations. In determining whether the taxpayer "maintained" a place of abode, we noted that:

> [g]iven the various meanings of the word "maintain" and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the "variety of circumstances" inherent to this subject matter (***Id.***).

We opined that "one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise" (***Id.***). We rejected the taxpayer's argument that since he did not pay for many of the operating expenses of the dwelling, such as utilities or major repairs, or any costs of ownership such as mortgage payments, he was not "maintaining" the living quarters as required by the statute. Noting that, "[a]s there can be many financial or other arrangements that determine how the costs of a dwelling are paid for (such as where expenses are shared or provided by another, or where an individual's contribution to the household is not in the form of money), the nature of the expenses incurred in and of themselves cannot determine whether an individual is maintaining a place of abode in the city," we concluded that petitioner maintained the place of abode by making monetary contributions to the household, i.e. he paid one-half of the household expenses (***Id.***).

In determining whether the place of abode in ***Matter of Evans*** was "permanent," we rejected the taxpayer's argument that the place of abode must be owned, leased or otherwise based upon some legal right in order for it to be permanent. We stated that:

> the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, ***in this context***, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place (***Id.***, emphasis added).

Thus, in the factual context of that 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, i.e. bricks and mortar, and inquire into the taxpayer's relationship to and use of the property. We determined that under the totality of the facts in that particular case, wherein the taxpayer shared expenses, maintained clothing, personal items and furniture at the rectory, had a dedicated room and used the premises during the week, the taxpayer maintained a permanent place of abode, despite having no legal relationship to the property (***Id.***).

Petitioner contends that our decision in ***Matter of Evans*** stands for the proposition that to determine permanence, we must look *beyond* petitioner's legal relationship to the abode, and inquire into his use of the property. Petitioner asserts that because he did not live at the property or utilize it for daily access to his job, did not keep personal items at the property, and only stayed at the premises on occasion to provide care for his parents, he did not maintain a permanent place of abode as set forth in ***Matter of Evans*** (***supra***).

The Division, on the other hand, argues that there is no requirement that petitioner dwell in the abode for it to be considered permanent, citing ***Matter of Roth*** (Tax Appeals Tribunal, March 2, 1989). The Division asserts that petitioner's subjective use of the premises is not determinative for purposes of establishing a permanent place of abode where petitioner has a legal relationship to the property, continually maintains the premises and the property meets the physical attributes of an abode, i.e. it does not constitute a mere camp or cottage. The Division points to our decision in ***Matter of Barker*** (Tax Appeals Tribunal, January 13, 2011), in support

of its argument. In ***Matter of Barker***, decided after our July 8, 2010 decision in this matter, we addressed whether a vacation home owned by the taxpayers and frequently utilized by Mrs. Barker's parents was a permanent place of abode. We rejected the taxpayers' argument therein that in ***Matter of Evans*** we "adopted a subjective standard setting forth that permanence 'must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place'" and stated that "[the ***Evans***] holding stands solely for the proposition that a permanent place of abode may be found whether the taxpayer bears no legal right or relationship to the property. While establishing a legal relationship may not necessarily end the analysis, no further discussion of ***Matter of Evans*** is required because petitioner conceded ownership of the Napeague property" (***Matter of Barker***, ***supra***).

In our July 8, 2010 decision, we expanded the holding in ***Matter of Evans*** and viewed petitioner's use of the premises as a determinative factor, despite the fact that petitioner owned and continually maintained the premises. We 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. The July 8, 2010 decision imports, to some extent, an additional element to the definition of "permanent place of abode" that is not contained in either the statute or the regulations.[14] We have concluded upon further reflection that our July 8, 2010 decision is an improper departure from the language of the statue, regulations, and controlling

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[14] The plain language of the statute and regulation contains no requirement that to be deemed a permanent place of abode, a dwelling place must have a separate bedroom and bed. The regulation simply provides that "a mere camp or cottage, which is suitable and used only for vacations" or a barracks or other construction which does not contain "facilities for cooking, bathing, etc." will generally not be deemed a permanent place of abode (20 NYCRR 105.20[e][1]). One can easily envision a situation where a person maintains a studio apartment, with no separate sleeping area, but with cooking and bathing facilities. The lack of a bedroom or bed would not preclude such premises from being deemed a permanent place of abode.

precedent. A review of our decisions from both prior to and subsequent to our July 8, 2010 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 (***see People ex rel. Mackall v. Bates et al***, 278 AD 724 [1951]; ***Matter of Boyd***, Tax Appeals Tribunal, July 7, 1994; ***Matter of Roth***, ***supra***; ***Matter of Barker***, ***supra***). For the reasons stated herein, we conclude that our decision of July 8, 2010 was in error and is hereby reversed and withdrawn. We now turn to the merits of the case afresh.

Addressing first the issue of maintenance, the record clearly establishes that petitioner maintained the MacFarland Avenue property. Petitioner owned the property and paid expenses for the property's upkeep during the period at issue. He established and maintained an apartment on the first floor for his dependent parents, paid for all of the household expenses for his parents, and would stay there overnight on occasion. The utility bills and telephone bills for the first floor apartment were in petitioner's name and he paid these bills during the period at issue. Petitioner listed the MacFarland Avenue address as his address for all notices to be sent to the landlord in the MacFarland Avenue apartment leases in the record. Such factors establish that petitioner maintained the subject premises.

We reject petitioner's argument that the premises must be maintained for his own use. Such argument is in error and inconsistent with our holding in ***Matter of Boyd*** (***supra***) wherein we found that the taxpayer, who contributed over 50% for the household expenses for his mother's house, maintained a permanent place of abode, despite his assertion that he did not live there during his tenure in New York.

Moreover, petitioner has not established that the MacFarland Avenue property was

maintained exclusively for his parents. The record establishes that petitioner stayed overnight on occasion to care for his father, listed the address under his name for the utility and telephone bills, and listed the address as his on the other apartment leases. Additionally, although petitioner asserts that he did not have unfettered access to the apartment, the Administrative Law Judge found such allegation incredible. In addressing the issue of credibility, we have held that:

> the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (see, Matter of Berenhaus v. Ward, 70 NY2d 436, 522 NYS2d 478). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility and is free to differ with the Administrative Law Judge to make its own assessment, we find nothing in the record here to justify such action on our part (see, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809) (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992).

As the Administrative Law Judge noted, petitioner owned the MacFarland Avenue property and maintained the first floor apartment. Moreover, the apartment leases entered into between petitioner as landlord and other tenants of the MacFarland Avenue property indicate that the landlord may enter the apartment to "repair, inspect, exterminate . . . and perform other work" that the landlord "decides is necessary or desirable" and that such entry "must be on reasonable notice except in emergency." Petitioner testified that he kept the keys to the other apartments of the MacFarland Avenue property at his parents' apartment. It seems incredible that petitioner would not have unfettered access to the first floor apartment, where he stored the keys for the other apartments, which he might be required to enter for emergencies. As such, we find no reason to disturb the Administrative Law Judge's assessment of credibility.

Furthermore, petitioner has not met his burden of proving that the MacFarland Avenue property was maintained solely as an investment property. Petitioner stayed at the premises overnight on occasion. He established and maintained the apartment where his parents resided in

the MacFarland Avenue property. Other family members, including petitioner's sister, brother-in-law and brother resided at the MacFarland Avenue property during some portion of the audit period. Yet, despite the fact that petitioner's family members lived at the MacFarland Avenue property, on the federal Schedule E for the years 2001 through 2003, wherein petitioner reported income and expenses from rental real estate at the MacFarland Avenue property, petitioner responded "No" to the question posed in item 2 of Part 1 of the Schedule E: "Did you or your family use [14 MacFarland Avenue] during the tax year for personal purposes for more than the greater of: 14 days, or 10% of the total days rented at fair market value?" There is no evidence in the record that petitioner received rent payments from his brother, sister or brother-in-law, and he did not receive rent payments from his parents, for whom he provided total support. As such, petitioner's argument that the MacFarland Avenue property was maintained solely for investment purposes is rejected.

Addressing next whether the MacFarland Avenue property was a permanent place of abode, we note that a "permanent place of abode" includes "a dwelling place permanently maintained by the taxpayer, whether or not owned" by him and generally does not include "a mere camp or cottage, which is suitable and used only for vacations" or a barracks or other construction that does not contain "facilities for cooking, bathing, etc." (20 NYCRR 102.2[e][1]). We note, first, that the MacFarland Avenue property was clearly not a "mere camp or cottage" suitable only for vacations. Rather, it was a three family home, with cooking and bathing facilities in each unit. The first floor apartment maintained by petitioner, wherein his parents lived and he stayed on occasion, contained two bedrooms, a bathroom, kitchen, living room and dining room. As such, the MacFarland Avenue property clearly meets the physical attributes of a permanent place of abode.

We reject petitioner's argument that the MacFarland Avenue property was not a permanent place of abode because it was maintained for his parents and he would only stay there at their request to care for his father. As we have stated previously, "[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it" (***Matter of Roth***, ***supra***; ***see also Matter of Boyd***, ***supra***). Our prior decisions in ***Matter of Roth*** (***supra***) and ***Matter of Boyd*** (***supra***) are controlling on this point. In ***Matter of Roth***, we found that the New York apartment in question, which was suitable for dwelling and for which the taxpayer was the named lessee, was a permanent place of abode, regardless of whether the taxpayer dwelled there ***(Matter of Roth***, ***supra***). Likewise, in ***Matter of Boyd***, we held that a New York home, owned by the taxpayer's mother, for which he paid over 50% of the expenses, was a permanent place of abode for the taxpayer, despite his argument that he did not live there (***Matter of Boyd***, ***supra***). Here, similar to the taxpayers in ***Matter of Roth*** and ***Matter of Boyd***, petitioner permanently maintained the MacFarland Avenue property, which was suitable for dwelling, during the entire audit period. Accordingly, we find that the MacFarland Avenue property was a permanent place of abode.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Gaied is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of John Gaied is denied; and
4. The Notice of Deficiency dated February 6, 2006 is sustained.

DATED:Troy, New York
June 16, 2011

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

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

PRESIDENT TULLY dissenting:

I respectfully dissent for the reasons discussed below. I would affirm the Tribunal's decision in this matter, dated July 8, 2010. I offer the following discussion to clarify my dissent.

Tax Law § 605(b)(1) defines residents for purposes of the New York State personal income tax (Tax Law § 601). The statute defines residents as domiciliaries and individuals who both spend more than 183 days in New York and maintain a permanent place of abode in New York (Tax Law § 605[b][1][B]), which is not a camp or cottage (20 NYCRR 105.20[e][1]).[15] As petitioner conceded to spending more than 183 days within New York, the only question before this Tribunal is whether petitioner maintained a permanent place of abode within New York (Tax Law § 605[b][1][B]; 20 NYCRR 105.20[e][1]).

The Courts and this Tribunal have often addressed the language of maintenance and permanence in the context of statutory residency (***see e.g. Matter of Mercer v. State Tax Commn.***, 92 AD2d 636 [1983]; ***Matter of Stranahan v. State Tax Commn.***, 68 AD2d 250 [1979]; ***Babbin v. State Tax Commn.***, 67 AD2d 762 [1979]). ***Matter of Evans, supra***, stands as the principal case guiding outcomes in matters involving statutory residence. Therein, this Tribunal opined that, under Tax Law § 605(b)(1)(B), status as a resident, "for purposes of the personal income tax have long been based on the principle that the result 'frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals' (***Matter of Evans***, ***supra citing Matter of Newcomb***, 192 NY 238 [1908]).

We construed the "maintenance" language in Tax Law § 605(b)(1)(B) in a practical manner, generally referring to an individual doing whatever is necessary to continue one's living arrangements in a particular dwelling place (***Matter of Evans***, ***supra***). Similarly, we adopted a

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[15] This regulation defines a permanent place of abode as:
"a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such a facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode."

flexible, yet practical construction of the permanence prong of statutory residency. As stated in ***Matter of Evans*** (***supra***):

> With regard to whether a place of abode is "permanent" within the meaning of the statute, we do not agree with petitioner that the statute requires that the place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent. . . . In our view, the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place [footnote omitted]. For example, it seems clear that an apartment leased by one individual and shared with other unrelated individuals may be the permanent place of abode of those who are not named on the lease, given other appropriate facts. The Division's regulations (which are applicable to the city personal income tax [see 20 NYCRR 290.2]) make it clear that the physical attributes of the abode as well as its use by the taxpayer are determining factors in defining whether it is permanent. Thus, a "permanent place of abode" is defined generally as "a dwelling place permanently maintained by the taxpayer, whether or not owned by him . . ." (20 NYCRR 102[6][e]). A "mere camp or cottage, which is suitable and used only for vacations is not a permanent place of abode" (20 NYCRR 102[6][e]). Similarly, "any construction which . . . does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode" (20 NYCRR 102[6][e]).[16]

The taxpayer's ability to access the dwelling weighs heavily on the permanence prong of statutory residency (***see Matter of Knight***, Tax Appeals Tribunal, November 9, 2006 [apartment determined not to be a permanent place of abode because the individual did not possess keys to all the locks and did not contribute to maintenance]; ***Matter of Evans***, ***supra*** [a dwelling determined to be a permanent place of abode where a taxpayer had no property rights to the dwelling, but contributed to its maintenance and possessed unfettered access]; ***Stranahan v. State Tax Commn., supra*** [apartment held to be a permanent place of abode even though the taxpayer believed it to be only suitable for her vacations]).

I would find that the proper legal standards regarding "maintenance" and "permanent place of abode" were applied in the July 8, 2010 Tribunal decision. As petitioner conceded

[16] I note that amendments prior to this decision have removed the provisions regarding a temporary stay for the accomplishment of a particular purpose from the Division's regulations.

maintaining the first floor apartment at the 14 MacFarland Avenue address, I would find that the issue herein is properly framed as one of "permanence" where petitioner showed that the subject apartment at 14 MacFarland Avenue was maintained for his parents.

In the July 8, 2010 decision, we found the facts of this case to be the inverse of ***Matter of Evans*** (***supra***), wherein the Tribunal and Courts found that a taxpayer who had no property rights in New York City met the permanence language of statutory residency because he had unfettered access to and resided in the New York City dwelling. In the July 8, 2010 decision, we found that, although petitioner had property rights to the building itself, he did not maintain a "permanent" dwelling because he neither had unfettered access to, nor resided at the 14 MacFarland Avenue residence during the time at issue.

I would find that petitioner purchased the 14 MacFarland Avenue residence with the intent of providing his parents with an independent place to live. The record shows that petitioner, in fact, accomplished this goal by housing his parents in the two-bedroom, first floor apartment of the building. His lack of personal items and a bed in the first floor apartment support a finding that the apartment was used exclusively as his parents' residence. During the audit period, petitioner maintained his home in New Jersey and never lived at the MacFarland Avenue address. After the audit period and the sale of his New Jersey home, he created an apartment on the basement level of the MacFarland Avenue building.

During the years at issue, petitioner did not vote in New York. After the audit period, when petitioner created an apartment in the building, he registered from the MacFarland Avenue address.

I also would hold that petitioner's occasional stays at his parents' residence (***see*** Finding of Fact above), at their request for medical reasons, do not prove that he had unfettered access to the first floor apartment. The record shows that petitioner's parents both suffer from chronic illnesses, particularly his father, who suffered from breathing issues. The Courts have

acknowledged that involuntary presence within the State may not count towards calculations of statutory residency (***Stranahan v. New York State Tax Commn.***, ***supra*** at 254 [discussing involuntary presence]). Petitioner's stays with his parents when requested, for medical reasons, are clearly an analogous situation.

I note the novelty of this case against the typical facts indicating a taxpayer owning a second house or summer home (***see e.g. Schulman v. Tully***, 86 AD2d 705 [1982], ***lv denied*** 56 NY2d 885 [1982], ***lv denied*** 56 NY2d 507 [1982]; ***El-Tersli v. Commissioner of Taxation and Fin.***, 14 AD3d 808 [2005]; ***Matter of Barker***, Tax Appeals Tribunal, January 13, 2011 [wherein a taxpayer owned and maintained a vacation property that was also used by his parents]). This case may be distinguished from the foregoing because petitioner herein had no unfettered access to the apartment and surrendered dominion and control by permitting his parents to use the first floor apartment as their permanent residence, without limitation or caveat, to his own exclusion. This is evidenced by the finding of fact that petitioner had neither a bed nor property at his parents' apartment.

Accordingly, I find that the first floor apartment at issue here is wholly dissimilar from a summer or second home. However, it is similar to a child providing for the housing and care of his parents through a nursing home or assisted living community with, albeit, the notable distinction of the child possessing property rights to the parents' dwelling place. As remarked in ***Matter of Evans*** (***supra***), property rights are not determinative of permanence, and I would hold that petitioner has adduced sufficient evidence to prove that the first floor apartment at 14 MacFarland Avenue was not his permanent place of abode.

DATED: Troy, New York
June 16, 2011

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