STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN GAIED	:	ORDER & OPINION 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 Daniel Smirlock, 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 letter brief in opposition dated November 23, 2010.

ORDER AND OPINION

Section 3000.16(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Tribunal) sets forth the standards governing a motion to reargue. The Tribunal has previously addressed such motions in ***Matter of Stuckless*** (Tax Appeals Tribunal, December 15, 2005) and

Matter of Schulkin (Tax Appeals Tribunal, November 20, 1997, ***granting motion and modifying decision of April 10, 1997***). The standard applied to motions to reargue, as stated in ***Matter of Schulkin***, is as follows:

> 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 Matter of Trieu v. Tax Appeals Tribunal***, 222 AD2d 743, 634 NYS2d 878, ***appeal dismissed*** 87 NY2d 1054, 644 NYS2d 146, ***lv denied*** 88 NY2d 809, 647 NYS2d 714; ***Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal***, 195 AD2d 625, 600 NYS2d 281, ***lv denied*** 82 NY2d 664, 610 NYS2d 151; ***see also***, ***Evans v. Monaghan***, 306 NY 312). However, although our authority to reconsider may be limited, it is not prohibited (***see***, 20 NYCRR 3000.16[c] [wherein motions for reargument and orders thereon are specifically authorized]). Instead, we believe any reconsideration must be undertaken with great care and vigilance, and only in cases where a valid basis for doing so has been raised by the movant.
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> In ***Foley v. Roche*** (68 AD2d 558, 418 NYS2d 588, 593, ***lv denied*** 56 NY2d 507, 453 NYS2d 1025), the Court stated:
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> > [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.

In support of its motion, the Division of Taxation (Division) asserts that the Tribunal misapplied legal principles and misapprehended facts. The Division argues that the July 8, 2010 decision overlooked and failed to address the controlling cases interpreting "permanent place of abode" (Tax Law § 605[b][1][B]; New York City Admin Code §11-1705 [b][1][B]). Specifically, the Division quotes language from the Tribunal decision in ***Matter of Roth*** (Tax Appeals Tribunal, March 2, 1989) as follows:

> a 'permanent place of abode' includes a dwelling place permanently maintained by the taxpayer whether or not owned by him (20 NYCRR 102.2[e][1]). There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it (***see, Matter of Smith***, 68 AD2d 993, 994).

The Division asserts that the Tribunal misapplied the controlling principle of law underlying ***Roth***, and that the Tribunal's holding in ***Roth*** must be addressed and applied. The Division further states that this is an appropriate case for reargument because the Tribunal failed to consider or address existing precedent established under prior Tribunal decisions, such as ***Matter of Smith*** (***supra***), ***Matter of Roth*** (***supra***), ***Matter of Boyd*** (Tax Appeals Tribunal, July 7, 1994), and ***Matter of People ex rel. Mackall v. Bates*** (278 AD 724 [1951]). The Division contends the precedent established by these cases cannot be reconciled with the July 8, 2010 decision, and that consideration of the proper standards would produce a different result.

The Division further contends that the Tribunal misapprehended facts leading to a confusion of the central issue as permanence instead of maintenance. The Division presents several facts from the case, including that the 14 MacFarland Avenue property did not constitute a camp or cottage, and that petitioner did, in fact, stay at the apartment overnight. As such, the Division contends that the July 8, 2010 decision misinterpreted the facts of the case and misapplied the permanence factors found within ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840 [1993]) to the pertinent issue of maintenance.

In sum, the Division contends that the Tribunal should grant reargument in this matter to reconsider its alleged misapprehensions and misapplications of facts and law. It also argues that, at the least, the July 8, 2010 decision constitutes a departure from established precedent and that the Tribunal should grant reargument to clarify the change and its reasons for so doing (***see***

Matter of Field Delivery Serv., 66 NY2d 516 [1985]). The Division states that reargument should be granted in order to establish clarity as to what constitutes "maintenance" and "permanent place of abode" under Tax Law § 605(b)(1)(B) and New York City Administrative Code §11-1705(b)(1)(B).

Petitioner argues that the motion for reargument should be denied. In support of his opposition, petitioner discusses ***Matter of Roth*** and cites to the 2009 Audit Guidelines of the Division. Petitioner argues that the Division improperly relies upon ***Matter of Roth***, stating:

> In this case, your decision focused specifically on this "permanence" requirement, noting that "the physical attributes of an abode, as well as its use by the taxpayer, are determining factors in whether it is considered permanent." This case differs from ***Roth*** because ***Roth*** never discussed the permanence issue. The taxpayer in that case was a New York Domiciliary who used his New York abode at least once a week on an ongoing and continuous manner. ***Roth*** only involved the "maintenance" prong of this test (Letter Brief in Opposition, p. 2).

Petitioner's argument fails to address the allegations of issue confusion between "maintenance" and "permanence," and fails to address the Division's argument that the Tribunal's decision cannot be reconciled with established principles of law. Moreover, petitioner misplaces its reliance upon the 2009 Audit Guidelines because the document was neither created nor in force during the periods at issue, i.e., the years 2001, 2002, and 2003. The submission contains no other discussion of law or fact germane to whether the July 8, 2010 decision was based upon a legal oversight or a factual misapprehension.

Based upon the foregoing, we conclude that the Division has met the standard for granting a motion for reargument. We note the unique issues of fact within this case, as well as the need for clarity in the terms defining statutory residency. At oral argument, the parties shall be allowed to address the issues raised in the Division's motion, as restated below:

(I) Whether the proper legal standards regarding "maintenance" and "permanent place of abode" were applied to the facts of this case; and

(II) Whether the issue was properly framed as one of "permanence" where the petitioner posited that the subject apartment at 14 MacFarland Avenue was maintained primarily for his parents.

In accordance with standards for granting reargument, we also deem it appropriate for the parties to address the following issues not addressed in our July 8, 2010 decision, but germane to this matter:

(III) Whether the physical attributes of the 14 MacFarland Avenue apartment constituted a permanent place of abode;

(IV) Whether petitioner's parents had exclusive use of the 14 MacFarland Avenue apartment; and

(V) Whether petitioner's overnight stays at his parents' apartment qualified under former 20 NYCRR 105.23 as a temporary stay for the accomplishment of a particular purpose.

ORDERED that the motion for reargument of the Division of Taxation be, and hereby, is granted.

DATED:Troy, New York
February 24, 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