

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| JOHN GAIED | : | DETERMINATION 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 a petition 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.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 16, 2008 at 10:30 A.M., with all briefs to be submitted by February 17, 2009, which date began the six-month period for issuance of this determination. 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).

ISSUE

Whether petitioner was a New York State and New York City resident liable for City and State 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

1. 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 years 2002 and 2003, petitioner filed timely nonresident income tax returns, indicating his address as Old Bridge, New Jersey. On each return for such years, petitioner reported wages from Ash Auto Corp., which amounts were 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]?”

2. 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.

3. 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 MacFarland Avenue, Staten Island, New York (MacFarland Avenue property).¹ 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 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?”

¹ An alternative spelling of McFarland Avenue appears in many documents in the record.

4. On February 6, 2008, 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.

5. 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.

6. On an unspecified date, petitioner purchased the Old Bridge, New Jersey, residence. From 1996 through the years at issue, petitioner filed New York State nonresident income tax returns from New Jersey. Petitioner's Old Bridge, New Jersey, residence was located approximately 28 miles from his businesses, a 30 to 45 minute drive depending on traffic and the route taken.

7. 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., approximately two miles from the businesses. The MacFarland 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.

8. The record includes limited documentation regarding the rental history of the MacFarland Avenue property from November 29, 1999 through the years 2001, 2002 and 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 each of the units during each of the years at issue.

9. 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.

10. 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.

11. 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. Further review of the documents indicates that Mr. and Mrs. Armanious responded “No” to the question posed of nonresidents in Item F: “Did you or your spouse maintain living quarters in New York State in 2003?”

12. 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 including daily items of care.

13. 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.”

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

15. 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 was open 24 hours a day.

16. Petitioner admits that occasionally during the years at issue he would stay in the first floor apartment.

17. 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 his outstanding federal tax obligations for the year 2002. In 2004, petitioner moved into the MacFarland Avenue property, and continues to live there. Documents in the record indicate that renovations took place in the basement of MacFarland Avenue in 2004. However, the record does not include any building permits for such renovations.

18. 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 voter registration documentation.

19. 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.

20. At the hearing, petitioner gave sketchy testimony regarding the MacFarland Avenue residence. The record includes the cover page from a March 2006 appraisal of the MacFarland Avenue 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.

21. Petitioner did not submit any affidavits from his brother, sister or brother-in-law regarding the MacFarland Avenue property.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioner asserts that the Division has mischaracterized him as a statutory resident of New York because he owns investment property in New York and his parents occupied an apartment in the investment property during the years 2001, 2002 and 2003. Although he does not dispute that he was in New York City more than 183 days during each year at issue, petitioner claims that he was not a statutory resident during those years because he did not maintain a permanent place of abode accessible for his use in New York. Petitioner maintains that he purchased the MacFarland Avenue three-unit apartment building as an investment, and to provide an apartment for his parents. He points out that tenants were occupying the basement and second floor apartments at the time of his purchase of the MacFarland Avenue investment property, and the same tenants continued to reside in their respective units well into the years at issue. Petitioner maintains that, with the exception of a short period of time, both the basement and second floor apartments were rented to tenants during the remainder of the audit period. He claims that he did not have unfettered access to any of the apartments during the audit period because all apartment keys were kept in his parents' first floor apartment. Petitioner argues that he did not have a dedicated room to which he had free and continuous access, nor did he keep any personal articles or clothing in his parents' apartment during the period at issue. Petitioner maintains that if he did sleep at his parents' apartment, it was as a result of their specific request and due to his father's poor health. He further maintains that on those rare occasions that he did stay with his parents during the years at issue, he was forced to sleep on the couch. As such, petitioner requests the cancellation of the Notice of Deficiency.

23. The Division asserts that it correctly determined that petitioner was a statutory resident in the years 2001, 2002 and 2003 because he maintained a permanent place of abode accessible

for his use at the MacFarland Avenue property during those years. It maintains that petitioner's claim that his MacFarland Avenue residence was for investment purposes is not supported by the record. The Division points out that petitioner relies upon scarce documentation, his narrative testimony and a reconstructed summary, which is general in nature and lacks specificity to support his investment property claim. With respect to petitioner's claim that he did not have unfettered access to any of the apartments during the period at issue because he did not have keys to the apartments, the Division doubts that petitioner as owner and purported landlord would be without all necessary keys to his building. The Division asserts that the record clearly shows that petitioner established and maintained an apartment for his parents in the MacFarland Avenue building and would on occasion stay overnight. Specifically, petitioner continually maintained the apartment 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 him for 100% of their support including daily items of care. It further points out that at no point as part of his familial generosity did petitioner relinquish his property rights, control or maintenance responsibilities for the apartment he maintained at MacFarland Avenue. As such, petitioner has not clearly and convincingly shown that he did not maintain a permanent place of abode in New York City during the years 2001, 2002 and 2003.

CONCLUSIONS OF LAW

A. 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." An individual may fall within the definition of a resident as a domiciliary or as a "statutory resident," defined in Tax Law § 605(b)(1)(B) as someone:

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.

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.”

B. Permanent place of abode is defined in the regulations of the Commissioner of Taxation and Finance at 20 NYCRR 105.20(e)(1) 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.

C. Under Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B), a finding of residency requires that the taxpayer spent more than 183 days in New York State and City and maintained a permanent place of abode in New York during the years at issue.

Petitioner concedes that he spent more than 183 days in New York State and City during the years 2001, 2002 and 2003. There is, therefore, no issue regarding days spent in New York for the years 2001, 2002 and 2003.

D. The sole issue to be addressed on the question of statutory residency is whether petitioner “maintained a permanent place of abode” in New York during the years 2001, 2002 and 2003. This issue was addressed in *Matter of Evans* (Tax Appeals Tribunal, June 18, 1992, **confirmed** 199 AD2d 840, 606 NYS2d 404 [1993]) wherein the Tax Appeals Tribunal concluded:

Determinations of a taxpayer's status as a resident or nonresident individual 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 Newcomb*, 192 NY 238, 84 NE 950 at 954). Given 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. In our view, 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.

* * *

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. 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]). Moreover, a place of abode, whether in New York or elsewhere, 'is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose' (20 NYCRR 102[6][e]).

E. Petitioner contends that he did not maintain a permanent place of abode in New York State and City during the years 2001, 2002 and 2003. Rather, he asserts that he purchased the MacFarland Avenue multi-family residence in November 1999 solely as an investment, and the

building continued to be solely investment property during the years 2001, 2002 and 2003. Petitioner's proof that the MacFarland Avenue property was solely an investment property consisted of limited documentation (*see* Finding of Fact 8) and his vague testimony. He failed to produce any rental income and expense accounting ledgers, bank statements, or cancelled rent checks for each of the units during each of the years at issue. As such, he failed to prove his investment property claim. Moreover, it is clear from the record that petitioner established and maintained an apartment (the first floor apartment) for his parents in the MacFarland Avenue building and would on occasion stay overnight during the years at issue. The utility bills and telephone service for the first floor apartment maintained by petitioner for his parents all were in petitioner's name during the years at issue. Indeed, since November 29, 1999, electric and gas service for the first floor apartment has been billed to and paid by petitioner. Petitioner's parents exhibited no source of income and relied upon petitioner for 100% of their support including daily items of care during the years at issue. Additionally, petitioner claimed head of household filing status and dependent exemptions for his parents on his federal, New Jersey and New York State income tax returns for the years 2001, 2002 and 2003.² Such facts are indicative of the maintenance of a place of abode within the standard set forth in *Matter of Evans* (*see also Matter of Boyd*, Tax Appeals Tribunal, July 7, 1994).

F. As for petitioner's claim that he did not have unfettered access to any of the individual apartments, including his parents, in the MacFarland Avenue property, I find that claim to be incredible. Petitioner owned the MacFarland Avenue property and maintained the first floor

² To qualify as a head of household for federal tax purposes, an individual must not be married at the close of the taxable year, or be a surviving spouse, and must "maintain a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151" (IRC § 2[b][1][B]). Section 151 of the Internal Revenue Code provides an allowance for deductions for personal exemptions.

apartment occupied by his dependent parents. Furthermore, in 2004 petitioner moved into the MacFarland Avenue residence and continues to reside there to this day. Petitioner's reliance on *Matter of Knight* (Tax Appeals Tribunal, November 9, 2006) is misplaced. In *Knight*, petitioner occasionally stayed with his girlfriend, a successful investment banker, in a New York City apartment which she solely maintained. In the instant matter, petitioner owned the MacFarland Avenue multi-family residence; his relationship with his parents who occupied the first floor apartment he maintained during each of the years at issue was familial and 100% custodial. Accordingly, petitioner clearly maintained a permanent place of abode in New York State and City during the years 2001, 2002 and 2003 within the meaning of Tax Law § 605(b), Administrative Code § 11-1705(b)(1)(B) and 20 NYCRR 105.20(e)(1).

G. The petition of John Gaied is denied and the Notice of Deficiency dated February 6, 2008 is sustained.

DATED: Troy, New York
August 6, 2009

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE