STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **NELSON OBUS AND EVE COULSON** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2012 and 2013.	:	DECISION DTA NO. 827736

Petitioners, Nelson Obus and Eve Coulson, filed an exception to the determination of the Administrative Law Judge issued on August 22, 2019. Petitioners appeared by Greenberg Traurig, LLP (Glenn Newman, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. An amicus curiae brief in support of petitioners was filed by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). Oral argument was held via teleconference on July 23, 2020, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners' Northville, New York, home qualified as a "permanent place of abode" for purposes of Tax Law § 605 (b) (1) (B) during 2012 and 2013.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioners, Nelson Obus and Eve Coulson, husband and wife, are domiciled in the State of New Jersey.

2. Petitioner is a partner and Chief Investment Officer at Wynnefield Capital (Wynnefield) located in New York, New York.[1] Petitioner works primarily out of his office in New York City and, as such, was present within New York for over 183 days during each of the years in issue.

3. On or about December 8, 2011, petitioner purchased a home located in Northville, New York, for $290,000.00. The home is located more than 200 miles from his office. This home has two stories with five bedrooms and three bathrooms. The home has year-round climate control.

4. In addition to the main house, there is an attached apartment with a separate entrance and key. The apartment is occupied year-round by a tenant who had an existing rental agreement with the prior owners of the home. No rental or lease agreement was submitted into evidence, yet petitioner testified that the monthly rental amount was $200.00. Petitioner paid all of the expenses associated with the property including housekeeping, pest control, snow removal and yard maintenance, which expenses exceeded the amount of money he received monthly from his tenant. The National Grid account for electric service is in petitioner's name.

5. It is undisputed that petitioners use this home for vacation purposes only. Petitioner enjoys cross-country skiing in the winter months and attending the Saratoga Race Track in the summer. Although the parties do not agree with the specific numbers of days that petitioners spent at the Northville home, they spent no more than two to three weeks there. Petitioners contend it was even less.

6. Petitioners filed joint New York State nonresident income tax returns, forms IT-203, for each of the years at issue. Form IT-203 contains a question regarding whether petitioners maintained living

[1] Unless otherwise specified, "petitioner" refers to Nelson Obus.

quarters within New York State. Petitioners indicated that they did not maintain any living quarters within the State for either 2012 or 2013.

7. After an audit conducted by the Division of Taxation (Division), a notice of deficiency, assessment number L-044606507 (notice), dated April 11, 2016, was issued to petitioners asserting additional New York State income tax due in the amount of $526,868.00 plus interest and penalty for the years 2012 and 2013. Petitioners were assessed based upon the Division's finding that, since they maintained a permanent place of abode and were present within the State in excess of 183 days, they were liable as statutory residents for income tax purposes for the years 2012 and 2013.

8. Petitioners protested the notice by filing a timely petition with the Division of Tax Appeals on June 27, 2016.

9. A formal hearing was held on October 3, 2018. Both petitioners testified at the hearing; however, they did not submit any documentation into evidence.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by setting forth the relevant text of Tax Law § 605 (b), which defines resident individuals for purposes of the personal income tax. The Administrative Law Judge noted that the statute provides for imposition of the tax on individuals domiciled in New York (subject to exceptions not relevant here) and those not domiciled in New York who maintain a permanent place of abode and are present in the State for more than 183 days during the year. The Administrative Law Judge observed that because petitioners were domiciled in New Jersey and Mr. Obus was present in New York for more than 183 days during the tax years at issue, the question that remained was whether petitioners maintained a permanent place of abode in New York during that time.

The Administrative Law Judge next set forth the Division's regulation providing guidance on the statutory term "permanent place of abode." The Administrative Law Judge noted that petitioners' argument primarily took issue with the definition of this term in light of the Court of Appeals' holding in ***Matter of Gaied v New York State Tax Appeals Trib.*** (22 NY3d 592 [2014]), claiming that because the property was maintained for the use of another, their Northville home could not be deemed their own

permanent place of abode. The Administrative Law Judge compared the facts of ***Gaied*** with petitioners' and concluded that because the dwelling in question had fully separate living quarters for petitioners and their tenant, ***Gaied*** was distinguishable. Consequently, the Administrative Law Judge concluded that the Northville home was maintained by petitioners for their own use.

The Administrative Law Judge next considered petitioners' argument that their Northville home qualified for the exception from being considered a permanent place of abode under the Division's regulation as the home, according to petitioners, was used and suitable only for vacations. The Administrative Law Judge found petitioners' contention that a taxpayer's subjective use of a dwelling should be determinative of its status as a permanent place of abode to be without merit, stating that it was the physical characteristics of the home that make it suitable for year-round use. The Administrative Law Judge disagreed with petitioners' argument that the Division's regulations regarding a permanent place of abode were arbitrary and capricious and should be struck down as inconsistent with the statute. The Administrative Law Judge instead found that the regulation attempted to provide guidance as to what constitutes a permanent place of abode and did not impermissibly expand the meaning of the term beyond the meaning contemplated under the statute.

The Administrative Law Judge then addressed petitioners' argument that the application of Tax Law § 605 to them was unconstitutional in that it results in multiple taxation in violation of the Commerce Clause of the United States Constitution. The Administrative Law Judge rejected that argument, concluding that this argument had been considered and rejected by the Court of Appeals in ***Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*** (91 NY2d 530 [1998]), ***cert denied*** 525 US 931 [1998]. Notwithstanding, the Administrative Law Judge determined that the alleged constitutional infirmity did not result from an as-applied constitutional violation, but rather constituted a facial challenge to the statute, which lies beyond the jurisdiction of the Division of Tax Appeals.

The Administrative Law Judge thus denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioners present several arguments in support of their exception. First, petitioners allege that the Administrative Law Judge erred in concluding that petitioners qualified as statutory residents, because, according to petitioners, their Northville home does not qualify as a permanent place of abode in light of the Court of Appeals' holding in ***Gaied***. In furtherance of this argument, petitioners maintain that the Division's regulations regarding statutory residency are invalid to the extent that "permanent place of abode" is defined in terms of ownership and maintenance without consideration of the taxpayer's subjective use of the dwelling. Petitioners contend that the Administrative Law Judge erred in analyzing the physical attributes of petitioner's Northville home, as ***Gaied*** stands for the proposition that the correct analysis for determining whether a residence is "permanent" depends on a taxpayer's use of the dwelling rather than the physical characteristics of the dwelling. Petitioners also argue that New York's statutory residency statute is unconstitutional as applied to them in that it violates the Commerce Clause of the US Constitution (Art I, § 8) by failing the internal consistency test as applied in ***Comptroller of the Treasury of Maryland v Wynne*** (575 US 542 [2015]). Lastly, petitioners maintain that negligence penalties should be abated due to reasonable cause because petitioners' use of the Northville home was not consistent with the meaning of the term "permanent place of abode" as would be commonly understood.

The Division counters that the Administrative Law Judge properly determined petitioners to be statutory residents of New York because Mr. Obus was present in the State for the required number of days and maintained dominion and control over the Northville home during the tax years in question. According to the Division, the Administrative Law Judge correctly recognized the validity of the Division's regulation regarding a permanent place of abode after ***Gaied***, which the Division claims does not invalidate its regulation regarding permanency of a dwelling for purposes of Tax Law § 605 (b). The Division agrees with the Administrative Law Judge that petitioners' constitutional argument is a facial challenge to the statute and therefore beyond the jurisdiction of the Division of Tax Appeals to consider. In any case, according to the Division, Tax Law § 605 (b) (1) (B), under the Court of Appeals' holding in ***Tamagni***, does not implicate interstate commerce and thus the imposition of personal income tax on

petitioners did not violate the Commerce Clause of the US Constitution. Lastly, the Division argues that petitioners failed to bear their burden to show an entitlement to an abatement of penalties assessed against them

OPINION

We begin our decision with Tax Law former § 605 (b) (1)[2], which provides definitions of "resident" for purposes of the New York personal income tax imposed on New York residents under Tax Law § 601. The statute provides two bases for state tax residency: individuals domiciled in the State (Tax Law § 605 [b] [1] [A]) and individuals not domiciled in New York but who are present for more than 183 days and maintain a "permanent place of abode" in the State (statutory residence) (Tax Law § 605 [b] [1] [B]). Petitioners' status as New York statutory residents is at issue here.

There is no dispute that Mr. Obus was present in New York for at least 183 days in both 2012 and 2013. There is also no dispute that, by their continuing ownership and upkeep of the property, petitioners maintained the Northville home for the entire two-year period at issue (***see*** findings of fact 3 and 4; ***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992 ***confirmed*** 199 AD2d 840 [3d Dept 1993] [maintenance for purposes of statutory residency consists of "doing whatever is necessary to continue one's living arrangements in a particular dwelling place"]; 20 NYCRR 105.20 [a] [2] [a permanent place of abode must be maintained for "substantially all of the taxable year" to meet the statutory resident definition]).

Petitioners' disagreement with the determination of the Administrative Law Judge concerns her finding that petitioners' Northville home was a "permanent place of abode" within the meaning given that term in Tax Law § 605 (b) (1) (B).

[2] Tax Law § 605 (b) (1) (B) was amended in 2018 (L 2018, c 59, pt O, § 1). Such amendment did not make any changes relevant to the present matter. All references to Tax Law § 605 in this decision refer to the statute in effect during 2012 and 2013.

The Division has promulgated regulations with respect to New York residency for purposes of personal income tax, including the meaning of "permanent place of abode." The relevant regulation provides, in part:

> "A permanent place of abode means a dwelling place of a permanent nature 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 (20 NYCRR 105.20 [e] [1])."

Petitioners contend that the Division's proposed interpretation of the term "permanent place of abode" is no longer valid in light of the Court of Appeals' ruling in ***Matter of Gaied v New York State Tax Appeals Trib.*** In ***Gaied***, the taxpayer was domiciled in New Jersey and owned an apartment building in Staten Island, where he provided an apartment for his parents with whom he would occasionally stay overnight, although he kept no personal items at the apartment and only stayed overnight at his parents' request. Due to the taxpayer's commuting to his business in Staten Island on a daily basis, the taxpayer was also physically present in New York for greater than the 183 days required to be deemed a statutory resident. This Tribunal, after initially finding in favor of the taxpayer, reversed itself on reargument and held that the taxpayer qualified as a statutory resident because, according to prior decisions of the courts and the Tribunal, the statute only required a taxpayer to maintain a dwelling in order for it to be considered a permanent place of abode (***Matter of Gaied***, Tax Appeals Tribunal, June 16, 2011, citing ***Matter of Boyd***, Tax Appeals Tribunal, July 7, 1994 and ***Matter of Roth***, Tax Appeals Tribunal, March 2, 1989). That Tribunal decision was affirmed by the Appellate Division (***Matter of Gaied v New York State Tax Appeals Trib.*** 101 AD3d 1492 [3d Dept 2012]), but was subsequently reversed by the Court of Appeals (22 NY3d 592 [2014]).

The Court of Appeals held that there was no rational basis for the interpretation that mere maintenance of a dwelling was sufficient to qualify it as a permanent place of abode of a taxpayer for purposes of Tax Law § 605 (b) (1) (***id.*** at 598). The Court concluded that "[t]he legislative history of the statute, to prevent tax evasion by New York residents, as well as the regulations, supports the view that in

order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have a residential interest in the property" (***id.***).

In light of ***Gaied***, the question here presented is whether petitioners had a residential interest in their Northville home sufficient to sustain the Division's determination that their Northville home was a permanent place of abode for purposes of Tax Law § 605 (b) (1) (B). Petitioners argue that their infrequent, short stays at their Northville home for vacations, when compared to their use of their New Jersey home, were insufficient for such use to deem their Northville home to be a permanent place of abode. In their brief in support, petitioners focus on the meaning of the term "residence," setting forth a dictionary definition thereof and propose that common understanding of the term excludes short or infrequent stays like petitioners' use of their Northville home. Petitioners point out that, at all times during the tax years in question, they maintained a primary residence in New Jersey and thus contend that the Northville home was not a permanent place of abode.

We do not agree with petitioners that the Court of Appeals' holding in ***Gaied*** excludes use of a dwelling as a vacation home from the meaning of a "residential interest." First, we note that petitioners focus on the first part of the term the Court used in describing the requisite relationship between the dwelling and the taxpayer ("residential") to the exclusion of the second part of the term ("interest") in their discussion. Petitioners would have us construe "residential interest" simply by reference to the dictionary definition of "residence" ("[t]he act or fact of living in a given place for some time" [Black's Law Dictionary, 11th Ed. (2019)]), but the term "residential interest" cannot be given its full meaning without considering both constituent words as component parts of a single concept. "Interest" is defined as "[a] legal share in something; *all or part of a legal or equitable claim to or right in property . . .* [c]ollectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity" (Black's Law Dictionary, 11th Ed. [2019] [emphasis provided]). The Court's use of the term "residential interest" thus indicates a broader meaning. Indeed, the Court stated that the question of statutory residency should turn on whether a taxpayer "maintained living arrangements for *himself* to reside at the dwelling" (***Gaied*** at 594). Here,

petitioners had the right to reside in and maintained living arrangements at their Northville home and exercised that right, albeit sparingly, during the years at issue. Accordingly, we conclude that the Northville home was a permanent place of abode for statutory residency purposes.

Amicus curiae draws attention to our prior decision in ***Matter of Barker*** (Tax Appeals Tribunal, January 13, 2011), cited by the Administrative Law Judge in her determination below, and states that it was relied upon in error, as ***Barker*** is no longer controlling precedent after the Court of Appeals' holding in ***Gaied*** requiring a residential interest of the taxpayer to be found in a permanent place of abode. ***Barker*** exhibited a similar fact pattern as here, where the taxpayers were domiciled elsewhere but owned a vacation home in New York, which they would use sporadically. The vacation home had physical characteristics that enabled it to be used year-round, including heat, full kitchen, hot water and other amenities enabling such use, and we affirmed the Administrative Law Judge's determination that the home constituted a permanent place of abode based on its physical characteristics and the taxpayers' relationship to it. We agree with amicus curiae that to the extent that our prior decisions state that mere maintenance of a dwelling, without more, is enough to deem a dwelling to be a permanent place of abode (***see e.g. Matter of Roth***), such point of law is abrogated by the Court's holding in ***Gaied***.

Petitioners state that their case is distinguishable on the facts from our decision in ***Matter of Mays*** (Tax Appeals Tribunal, December 21, 2017) because in that case the taxpayer had no other home to return to while here petitioners continue to spend most of their time at their New Jersey home. We agree with the Division that petitioners here conflate elements of domicile and statutory residency analyses. While determining an individual's domicile may turn on a comparative analysis of time spent at the individual's various homes to determine a principal residence (***see e.g. Matter of Angelico***, Tax Appeals Tribunal, March 31, 1994; ***see also*** 20 NYCRR 105.20 [d] [4]), such a comparative analysis is inapplicable in the context of statutory residency, which applies to non-domiciliaries, such as is the case here. As we stated in ***Matter of Mays***, the analysis that should be employed in determining whether a taxpayer maintained a permanent place of abode includes the following:

> "The threshold question when examining whether a taxpayer maintained a permanent place of abode is whether the dwelling exhibits the physical characteristics ordinarily found in a dwelling suitable for year-round habitation. If answered in the negative, the dwelling is not a permanent place of abode. If answered in the affirmative, the question then becomes whether the taxpayer has a legal right to occupy that dwelling as a residence. If this question is answered in the affirmative, and if the taxpayer exercised that right by enjoying his or her residential interest in that dwelling, it can be concluded that the taxpayer maintained a permanent place of abode within the meaning of Tax Law § 605 (b) (1) (B)" (***Mays*** [internal citations and quotations omitted]).

Here, we agree with the conclusion reached by the Administrative Law Judge that petitioners' Northville home constituted a permanent place of abode. The dwelling exhibited physical characteristics making it suitable for year-round habitation. Petitioners owned the Northville home and stayed there occasionally for vacation purposes. We thus find that petitioners maintained a permanent place of abode in their Northville home by using it as a vacation home, thereby exercising their residential interest in the dwelling.

We now address petitioners' argument that the Division's regulations are invalid to the extent they define "permanent place of abode" in terms of ownership and maintenance of a dwelling without consideration of the nature of the taxpayer's use of the same (***see*** 20 NYCRR 105.20 [e] [1]). However, consideration is paid to subjective use through the regulation's camp or cottage exception given in the regulatory definition thereof: "[h]owever, a mere camp or cottage, *which is suitable and used only for vacations*, is not a permanent place of abode" (***id.*** [emphasis added]). The exception from being deemed a permanent place of abode rests squarely on both objective characteristics of the dwelling (suitability) and its subjective use by a taxpayer only for vacations (***id.***). Merely because a particular taxpayer may only use a dwelling for what appears to be vacation purposes and consider it suitable only for such purposes, such subjective consideration of suitability does not exclude the dwelling as a potential permanent place of abode (***see Stranahan v New York State Tax Commn.***, 68 AD2d 250, 253 [3rd Dept 1979]). We are also reminded of the Court of Appeals' acknowledgement that the regulations themselves provide for a requirement of a residential interest in a potential permanent place of abode ("[t]he legislative history of the statute, to prevent tax evasion by New York residents, *as well as the regulations*, supports the view that in order for a taxpayer to have maintained a permanent place of abode in New

York, the taxpayer must, himself, have a residential interest in the property" [***Matter of Gaied***, 22 NY3d at 598 (emphasis added)]). Consequently, we find that the regulation is not inconsistent with the statute and decline petitioners' request to find it invalid.

We also here consider petitioners' claim that Tax Law Law § 605 (b) (1) (B), as applied to them as non-domiciliaries of New York, violated the Commerce Clause of the US Constitution (Art I, § 8). Petitioners argue that the threat of double taxation renders imposition of New York's personal income tax on them unconstitutional in light of the Supreme Court of the United States' ruling in ***Comptroller of the Treasury of Maryland v Wynne*** (575 US 542 [2015]). ***Wynne*** stands for the principle that a state's personal income tax structure must be internally consistent with respect to interstate commerce (***id.***). Petitioners note in their argument that the application of the internal consistency test with regard to New York's statutory residency scheme would lead to the conclusion that Tax Law § 605 (1) (1) violates the dormant commerce clause. Thus, petitioners' argument constitutes a facial challenge. The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass facial constitutional challenges (***see Matter of Fourth Day Enters., Inc.***, Tax Appeals Tribunal, October 27, 1988).

Lastly, we address petitioners' argument that the penalties imposed by the Division in this matter should be abated due to reasonable cause, claiming that that their use of the Northville home was not consistent with the meaning of "permanent place of abode" as the term is commonly understood. The Division asserted negligence and substantial understatement of liabilities penalties (Tax Law §§ 685 [b] [1], [b] [2], [p]). Pursuant to Tax Law § 689 (e), petitioners have the burden of proof to show by clear and convincing evidence that the deficiency did not result from negligence or an intentional disregard of the Tax Law (Tax Law §§ 685 [b] [1] and [2]) and that the substantial understatement of tax was due to reasonable cause and not willful neglect (20 NYCRR 2392.1 [g] [1]). We find that petitioners have not borne their burden of proof that they acted without negligence or willful neglect. They claim that the term "permanent place of abode" does not carry the commonly understood meaning, implying that interpreting the term as they did was not negligent, but rather done in good faith. However, good faith alone is insufficient to establish reasonable cause for abatement of penalty (***see Matter of Campaniello***,

Tax Appeals Tribunal, July 21, 2016, ***confirmed*** 161 AD3d 1320 [3d Dept 2018]; ***see also Matter of Auerbach v State Tax Commn.***, 142 AD2d 390 [3d Dept 1988], ***lv denied*** 32 NY3d 913 [2019]). It is significant that petitioners reported that they did not maintain any living quarters in New York on their nonresident tax returns for the years here at issue. Such a denial is inconsistent with a finding of good faith and supports the imposition of negligence penalties (***Matter of Campaniello***). Moreover, willfulness does not require an intent to deprive the government of its money but only something more than accidental nonpayment (***Matter of Auerbach*** at 395). We conclude that petitioners have not shown by clear and convincing evidence that they are entitled to an abatement of penalties in this case.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Nelson Obus and Eve Coulson is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Nelson Obus and Eve Coulson is denied; and
4. The notice of deficiency dated April 11, 2016 is sustained.

DATED: Albany, New York
January 25, 2021,

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner