



Rosen Seymour Shapss Martin & Company LLP

Certified Public Accountants & Profitability Consultants

State and Local Tax New York Residency Redefined

Dear Clients and Friends of the Firm:

In New York State/City, an individual is deemed to be a resident for income tax purposes if he/she is either domiciled in New York State/City or if they are a statutory resident of New York State/City. A statutory resident is an individual who "maintains a permanent place of abode" in New York State/City and spends more than 183 days in the state/city. Two recent cases seem to have redefined what "maintains a permanent place of abode" means.

The NYS/NYC law does not define the term "permanent place of abode. However, this term is defined in the NYS regulations 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 as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode." (Italics added)

Many audits and subsequent cases turn on the fact as to one, whether the taxpayer's dwelling is a "place of abode" and second, whether the dwelling is "maintained by the taxpayer".

On January 13, 2011, the New York State Tax Appeals Tribunal, in a unanimous decision, *Matter of Barker*, concluded that the dwelling in question was "a permanent place of abode" even though the taxpayer's hardly used it.

The facts of this case were as follows. The taxpayers were domiciled in Connecticut with three young children. The husband commuted every day from his home in Connecticut to his job in New York City, thereby spending more than 183 days in New York State. The taxpayers purchased a three bedroom summer home in East Hampton. One bedroom was for themselves, one for their children and the third for his wife's parents who spent several days a week during the summer months and many weekends throughout the year there. The home was maintained year-round including all utilities. During the three audit years, the taxpayers spent just 19 days, 16 days and 18 days at the home.

Given the fact that the home was suitable for year-round use and that the taxpayer's maintained dominion and control over the home, the Tribunal, quoting their finding in an earlier case, Matter of Roth, stated "there is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it". Based on this, the Tribunal upheld the Administrative Law Judges ("ALJ") earlier decision in finding that the taxpayer's were statutory residents of New York State. They did, however remand the case back to the ALJ to determine whether the taxpayer's established reasonable cause for the abatement of penalties.

On the remand, the ALJ strongly noted that for the years in question, the taxpayers on their tax returns answered "No" to the question of whether they maintained living quarters in New York and then upon completing their audit questionnaire admitted that they maintained a summer home in the Hamptons. Based on this, the ALJ denied the taxpayer's request for penalty abatement.

The taxpayer's have filed a motion for reargument which has not yet been acted upon.

On the heels of this case now comes Matter of Gaed. The facts of this case are as follows. The taxpayer was domiciled in New Jersey and owned two automotive businesses in New York State/City which was about twenty eight miles/forty minute drive from his home. He was at the business daily thereby spending more than 183 days in New York State/City. Several years later, he purchased a multifamily residence in the same area as his businesses. It had a one-bedroom basement apartment, and first and second floor two bedroom apartments. While each apartment has separate metered electric and gas, there was a boiler in the basement which heated the whole building.

During the audit years, the taxpayer rented out two of the apartments to unrelated tenants. The third apartment was kept by the taxpayer to provide a home for his elderly parents for whom he was the caregiver as well as providing 10% of their financial support. The taxpayer paid all of the utility bills and testified that he occasionally stayed at the apartment overnight because of his parents' medical needs or at their request. Since there was no extra room, the taxpayer slept on a couch. He did not keep any personal belongings or clothing there and testified he purchased this dwelling as an investment. The taxpayer also filed as head of household on his tax returns. Late in the last audit year, the taxpayer sold his New Jersey home, put his furniture in New Jersey storage and moved in with an uncle in New Jersey until he completed a renovation of the boiler room which he began residing in a year later.

Based on these facts, the ALJ found that the taxpayer maintained a permanent place of abode and upheld the tax department's deficiency. The taxpayer appealed this ruling to the Tribunal. The Tribunal analyzed the facts and quoting from a precedent case, Matter of Evans, that "permanence must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place" reversed the ALJ decision. They found that while Gaed maintained the apartment, based on his use and relationship to the apartment, it was not his permanent place of abode.

In response, the tax department filed a motion for reargument, which while very rarely granted, was granted in this case. Two of their reasons for granting the motion were, "the need for clarity in the terms defining statutory residence" and that some of the "unique issues of fact" needed further analysis. The tax department's position was based on statement in a Tribunal decision, Matter of Roth where they stated, "there is no

requirement that the petitioner actually dwell in the abode, but simply that he maintain it." However, this statement conflicts with the standards provided in the Matter of Evans. It also conflicts with the tax department's 1997 nonresident audit guidelines which provide that residential property, such as a "house, condominium or apartment would not be considered a permanent place of abode if the individual never uses the property as a residence." The guidelines further state that "a residence that is maintained by one individual but use exclusively by another should not be deemed a permanent place of abode for the person who maintains it." The taxpayer argued that the Tribunal's original analysis under the standards provided in the Matter of Evans was proper and therefore it was not his permanent place of abode.

In reviewing some of their earlier decisions, the Tribunal stated, "where a taxpayer has a property right to the subject premises, it is neither necessary or appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer's subjective use of the premises." Based on this, the Tribunal reversed its prior decision and began a fresh look at the facts of the case.

Upon further analysis, the Tribunal found that the taxpayer clearly maintained the apartment. However, the Tribunal then examined whether he maintained the apartment as his permanent place of abode. In their earlier decision, the Tribunal states the "petitioner did not maintain a permanent place of abode at the subject premises because he did not have his own bedroom or a bed..." In their current analysis, the Tribunal in a footnote stated, "The plain language of the statute and regulation contains no requirement that to be a permanent place of abode, a dwelling place must have a separate bedroom and bed." The footnote continued, "The lack of a bedroom or bed would not preclude such premises from being deemed a permanent place of abode."

This new analysis resulted in a surprising reversal of their earlier decision and a two to one split decision in favor of the tax department. This reversal stands in stark contrast to prior case law and the tax department's own guidelines and policy and could lead to far fetched results. A common scenario is a parent who owns or leases a dwelling for their college age child. Another is an adult child owning or leasing a dwelling for an elderly or needy parent. Lastly, what about a taxpayer who owns a dwelling with the intent to rent it but is unable to secure a tenant?

It does not seem that this scenarios was within the intent of the tax department's policy or guidelines. Accordingly, it remains to be seen as to how far the tax department will stretch the application of this unfortunate decision.

Should you require any additional information on this matter, please feel free to contact Steven J. Eller at (212) 303-1051 or via email at seller@rssmcpa.com

Sincerely,
Rosen Seymour Shapss Martin & Company LLP

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