

TAX

New York Statutory Residency Test Reinterpreted

Court of Appeals issues taxpayer-friendly opinion on NY Tax Law §605(b)(1)(B)

By Barry C. Feldman

New York State and New York City each impose an income tax on resident individuals.¹ Residency can be established in either of two ways. If an individual is domiciled in New York, i.e., the taxpayer's permanent and primary home is located within the taxing jurisdiction (hereinafter "New York"), that individual is a New York resident for income tax purposes.² If the individual is not domiciled in New York, he could be taxed as a "statutory resident." Statutory residency may be established if the individual "maintains a permanent place of abode" in New York and spends more than 183 days of the taxable year in New York.³

On February 18, 2014, the New York Court of Appeals published its opinion in *Gaied v. New York State Tax Appeals Tribunal, et al*⁴ unanimously reversing a decision of the Tax Appeals Tribunal, which was adverse to the taxpayer. The Court of Appeals held that New York's "statutory resident" test for income taxation requires "some basis to conclude that the dwelling was utilized as the taxpayer's residence."

In *Gaied*, the taxpayer was a New Jersey domiciliary who purchased a multi-family apartment building on Staten Island in November, 1999, where he also owned and operated an automotive service and repair business. Mr. Gaied's stated intent in acquiring the building was twofold. First, he wished to provide a place to live for his elderly parents, whom he supported. Second, he wanted to hold the building as investment property. The taxpayer's parents lived in the first-floor apartment, while the remaining two apartments were rented to unrelated parties. Between 1999 and December, 2003, the taxpayer owned and lived in a residence in

New Jersey and commuted to Staten Island.

Mr. Gaied only stayed in his parents' apartment infrequently, when either of his parents was ill. He did not have a bed in the apartment, so he would sleep on the couch when he stayed there. In December, 2003, Mr. Gaied sold his New Jersey home. After the sale, he placed his belongings in storage and lived with his uncle in New Jersey, while he renovated the boiler room in the Staten Island property to create a fourth apartment, which he moved into in 2004.

The New York State Department of Taxation and Finance (the "NYSDTF") did not challenge any of the taxpayer's factual assertions other than whether he had unfettered access to the apartment. Rather, the NYSDTF took the position that how the Staten Island property was used by Mr. Gaied was irrelevant. Essentially, the NYSDTF asserted that the requirements for "statutory residency" are met when living quarters are permanent, capable of year-round use, and paid for by the taxpayer. The NYSDTF asserted that "a taxpayer need not actually dwell in the permanent place of abode, but only maintain it."

When the case was first brought before the Tax Appeals Tribunal, that body ruled in favor of the taxpayer, finding that the Staten Island property was not the taxpayer's place of abode so he could not be deemed a "statutory resident" for income tax purposes. The NYSDTF sought permission to reargue the case which was granted. On reargument, the Tax Appeals Tribunal, in a 2-1 decision, reversed its prior decision and held that the position they had first taken was not supported by law or precedent. It held that the taxpayer's use or non-use of the property was of



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no significance, that the statute utilized the word "maintain" so there was no statutory requirement that the taxpayer actually live on the property only that he maintain it. The taxpayer brought an Article 78 proceeding challenging this determination and the Appellate Division, 3rd Department, in a 3-2 decision, confirmed the decision of the Tax Appeals Tribunal, noting that the decision below was amply supported by the record.⁵

The court reversed the Appellate Division. On appeal, the Court of Appeals made reference to its opinion in *Matter of Tamagni v. Tax Appeals Trib. of State of N. Y.*⁶ where it had reviewed the legislative history of the residency statute. In *Matter of Tamagni, supra*, the court found that the residency statute was "intended to discourage tax evasion by New York residents." 91 NY2d at 535. The court, in *Gaied*, then noted that, "Our review is limited to whether [the interpretation below] comports with the meaning and intent of the statutes involved (*Matter of Siemens Corp. v. Tax Appeals Trib.*, 89 NY2d 1020, 1022 [1997])." It then held that there was no rational basis for the interpretation given the statute by the Tax Appeals Tribunal, as confirmed by the Third Department.

The court went on to note that the statute indicates that the term "permanent place of abode" must be referring to the place of abode of the taxpayer, given that the statutory intent was to prevent tax evasion by New York residents. The court acknowledged that the Tax Law does not define "permanent place of abode . . ." The decision then made reference to the legislative history of the statute which, according to the court, was designed to

prevent tax evasion by NY residents and thus supports the view that the taxpayer himself must have a residential interest in property to fall within the parameters of the statutory language regarding the maintenance of a permanent place of abode. Accordingly, in order for a taxpayer to be considered to have maintained a permanent place of abode, the taxpayer had to have a residential interest in the property personally. Since Mr. Gaied had no such personal residential interest in the property during the years in issue, he could not be deemed a "statutory resident" for income tax purposes.

The decision in *Gaied* changes the landscape in terms of the ability of taxpayers who work in New York but reside elsewhere to prove that they are not maintaining a "permanent place of abode" in New York. The decision places the onus of establishing New York residency on the NYSDTF by requiring the presentation of evidence that the taxpayer has a residential interest in property located in New York, rather than merely showing that the property on which the assertion is based was susceptible for use by the taxpayer as a permanent place of abode.

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1. See, NY Tax Law §601 and New York City Administrative Code §11-1701.
2. See, NY Tax Law §605(b)(1)(A).
3. See, NY Tax Law §605(b)(1)(B).
4. — NY3d —, 2014 NY Slip Op 01101 (2014). This opinion is uncorrected and subject to revision before publication in the Official Reports.
5. 101 AD3d 1492 (3d Dept 2012).
6. 91 NY2d 530 (1998).

PRACTICE MANAGEMENT

Improving Employee Performance and Building an Ownership Culture in Your Law Firm

By Allison C. Shields

Law firm managers often complain that employees and young associates aren't putting forth the effort the firm expects, or that they do not engage in certain behaviors or activities that the senior partners in the firm consider to be essential for the job or for that individual's career advancement. Is it that today's employees expect more for less? Are they all unwilling to invest in their own careers? Are young lawyers totally disengaged? Or does the firm play a role in these problems as well?

Be clear about expectations

One way law firms might be contributing to these problems is by failing to be clear about their expectations with employees. This process should start during the interview phase in more general terms, even before an employee is hired, but once hired, should be discussed in more detail and revisited often.

Many law firms still manage and evaluate employees using yearly performance reviews, but law firm associates and employees I have spoken with frequently tell me that they aren't even sure what will be covered in the performance review. Additionally, follow up after the review is

rare; no further action is taken on either side, and sometimes, the issues discussed during the previous year's review are not even brought up again in the current review. Outside of the review process, associates and law firm employees report that feedback is sparse or non-existent, and there is little, if any, time devoted to learning, growth and opportunities for advancement.

While your employees have obligations to the firm that need to be met, as the employer, you have obligations to your employees, too. One of these obligations is to be clear about your expectations, whether you think those expectations "should" go without saying or not. A second is to provide your employees with the resources and support they need to make it possible for them to meet those expectations. A third is to make your employees feel that they are important contributors to the firm and to the work you do for clients.

For example, has your firm:

- Outlined the skills and competencies required to perform the various jobs



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and functions in your office, and the different levels (ex: beginner, advanced, master) that should be attained before employees can be promoted?

- Performed skills assessments of your employees to determine what level of mastery they have achieved within their job function?

- Outlined the necessary steps that each employee should take in order to move to the next level?
- Been explicit about your expectations with each employee?
- Provided your employees with the tools and training required to meet those expectations?
- Given constant feedback - both good and bad - about their performance throughout the year - not just at the time performance evaluations are conducted?
- Asked your employees what their career goals and expectations are?
- Supported your employees in reaching their individual career goals?
- Provided opportunities for training and advancement - and made your employees aware of them?
- Communicated the importance of each

individual's job to the success of the firm and to individual client matters?

- Shared the outcome of individual client matters with the employees who worked on those matters and discussed what went right or wrong in each engagement and what could be improved in the future?

Law firm managers complain that their employees expect too much and give too little; they want their employees - particularly the attorneys - to have an "ownership mindset." They want the attorneys to think strategically, take a long-term view, and think about how their activities impact the firm as a whole. But while the rare employee might come to an ownership mindset on their own, without cultivation from the top (and sometimes in spite of the actions of those in management positions in the firm), more often than not, employees will need some support to develop the ownership mindset.

Jack Welch said, "When you become a leader, success is all about growing others." If you want your employees to have an ownership mindset, you need to build an ownership culture within your law firm.

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