New York's High Court Eases Residency Trap

by Mark E. Berg


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In this article, Berg writes that the New York Court of Appeals rejected conventional wisdom in *Gaied v. Tax Appeals Tribunal* and made the New York statutory residency rules more taxpayer friendly. Berg examines the decision's potential impact and suggests situations in which taxpayers should consider filing refund claims.

I. Introduction

Many people who live outside New York regularly commute there for work and as a result are physically present in New York for more than 183 days in a year. If an individual in that situation maintains a permanent place of abode (PPA) in New York for substantially all of the year, she will be treated as a statutory resident of New York for tax purposes for that year[1] and therefore generally will be subject to New York tax on all her income.[2]

The New York State Department of Taxation and Finance, with the approval of the New York State Tax Appeals Tribunal, has taken the view that a taxpayer's abode that has facilities ordinarily found in a year-round dwelling, such as cooking and bathing facilities and heat, and is available for use by the taxpayer as a dwelling — that is, the taxpayer has unfettered access to the abode — for substantially all of the year constitutes a PPA regardless of the amount of time the taxpayer spends there.[3] Indeed, the conventional wisdom has been that none of the taxpayer's New York days need be spent at the abode for the taxpayer to be considered a New York resident. That has meant that a taxpayer who spends more than 183 days at work in New York and who has, say, a beach house in the Hamptons or a *pied à terre* in New York City would be considered a New York resident even if he chose to spend little or no time there.

In *Gaied v. Tax Appeals Tribunal*, No. 26 (N.Y. 2014) (*Gaied V*), New York's highest court held that for a dwelling to be considered a taxpayer-maintained PPA, "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence" and that "the taxpayer must, himself, have a residential interest in the property." While the implications of *Gaied* beyond its specific facts are unclear, the decision appears to make it possible for an individual not domiciled in New York who spends more than 183 days there during the year and has unfettered access to a dwelling there, but does not spend much, if any, time at the dwelling or otherwise use it as his residence to claim that he is not a New York resident for that year. Some taxpayers who have filed tax returns as statutory residents of New York may wish to consider filing claims for refund for open years on the basis of *Gaied*.

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[1]N.Y. Tax Law section 605(b)(1)(B); N.Y.C. Admin. Code section 11-1705(b)(1)(B); 20 N.Y.C.R.R. section 105.20(a)(2).

By contrast, an individual who is domiciled in New York is with limited exceptions considered a New York resident. N.Y. Tax Law section 605(b)(1)(A); N.Y.C. Admin. Code section 11-1705(b)(1)(A).

New York state and city have identical tax residency rules, with the state rules referring to domicile, days spent, and permanent places of abode in the state and the city rules referring to domicile, days spent, and permanent places of abode in the city. The term "New York" will be used to refer to both New York state and city unless otherwise indicated.

[2]N.Y. Tax Law section 601(a)-(d); N.Y.C. Admin. Code section 11-1701. The maximum combined New York state and city tax rate is 12.696 percent. Some income that is not included in gross income for federal purposes, such as non-U.S. source, non-effectively connected income of an individual who is a nonresident of the United States, and

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treaty-exempt income, is not subject to New York state or city tax. *See* N.Y. Tax Law section 612(a); TSB-A-10(7)I.

[3]*See, e.g.*, TB-IT-690 (2011); New York State Department of Taxation and Finance, Income Franchise Field Audit Bureau, "Nonresident Audit Guidelines," at 50-58 (June 2012) (Audit Guidelines); *Matter of Barker*, DTA No. 822324 (N.Y. Tax App. Trib. 2011); *Matter of Roth*, DTA No. 802212 (N.Y. Tax App. Trib. 1989) ("There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it"); *Matter of Boyd*, DTA No. 808599 (N.Y. Tax App. Trib. 1994) (taxpayer who contributed more than 50 percent of the expenses of an abode that his mother owned and lived in held to have maintained the abode as a PPA).

II. PPA Before *Gaied*

To appreciate the implications of *Gaied*, some background is in order. As noted, a non-domiciliary of New York is considered a New York resident for a year if he maintains a PPA in New York and is present in New York for more than 183 days in that year. While the statute does not define PPA or prescribe in what manner or for what portion of the year a PPA must be maintained, 20 N.Y.C.R.R. section 105.20(e)(1) does:

> 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.

The regulations also provide that the PPA must be maintained "for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year),"[4] which generally means a period exceeding 11 months under the department's audit policy.[5]

In *Matter of Evans v. Tax Appeals Tribunal*, DTA No. 806515 (N.Y. Tax App. Trib. 1992), *confirmed*, 199 A.D.2d 840 (N.Y. App. Div. 3d Dept. 1993), the tribunal considered whether the taxpayer maintained the abode in question (a room the taxpayer exclusively occupied at a church rectory at the invitation of a friend, who was a priest at the church) and, if so, whether the abode was permanent. The tribunal, presuming that the State Legislature intended to use the word "maintain" in a practical way that did not limit its meaning to a particular use "so that the provision might apply to the 'variety of circumstances' inherent to this subject matter," held that "one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place," including "making contributions to the household, in money or otherwise."[6]

Although neither the taxpayer nor the priest had to pay rent or expenses, such as utilities or repairs, the tribunal held that the taxpayer's sharing of all household expenses that were not paid by the church, including food, cleaning supplies, and the cost of a weekly housekeeper, constituted his maintenance of the abode.

The tribunal in *Evans* held that the relevant inquiry for permanence encompasses both the physical aspects of the abode, such as whether it is suitable for year-round use and whether it has cooking and bathing facilities, and the taxpayer's relationship to and use of the abode. Factors relevant to the second aspect include whether the taxpayer owns or leases the abode, has free and continuous access to it, keeps clothing and other personal effects there, has a dedicated room there, and uses the abode to maintain convenient daily access to a full-time job.

On appeal, the appellate division confirmed that the taxpayer's sharing of household expenses together with his free and continuous access to the rectory and his keeping clothing and other personal items there were sufficient for the rectory to be considered a PPA he maintained, but it did not discuss maintenance and permanence as separate requirements.

In *Matter of Barker*, DTA No. 822324 (N.Y. Tax App. Trib. 2011), the taxpayers owned a beach house on Long Island where they and their children spent fewer than 20 days in each of the years at issue, although the house was suitable for year-round use. The parents of one of the taxpayers inhabited the house several days a week during the summer and on many weekends the rest of the year. The tribunal rejected the taxpayers' arguments that *Evans* always requires an inquiry into the taxpayer's use of the abode and that their limited use of the beach house precluded its being considered a PPA they maintained. It held that *Evans* stands only for the proposition that one need not own or lease the property in order to maintain a PPA there, finding the beach house to be a PPA because it was available for use by the taxpayers. "It is well settled that a dwelling is a permanent place of abode where, as it is here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling," the tribunal said.[7]

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[4]20 N.Y.C.R.R. section 105.20(a)(2).

[5]*See* Audit Guidelines, *supra* note 3, at 60-61; TB-IT-690, *supra* note 3; TSB-A-04(4)I (taxpayer who leased East Hampton house to a charity for three months, during which time the taxpayer had no access to or personal belongings in the house, did not have a PPA there for substantially all of the year).

[6]*Id.* The appellate division quoted that formulation of the maintenance standard with approval in *El-Tersli v. Commissioner of Taxation and Finance*, 14 A.D.3d 808, 810 (N.Y. App. Div. 3d Dept. 2005). Although the regulations provide that the abode must be permanently maintained by the taxpayer, the department has taken the view that "living quarters maintained for the taxpayer's primary use by another person, family member or employer" can be considered the taxpayer's PPA. *See* Audit Guidelines, *supra* note 3, at 57-58. The only case cited by the department in that regard is *Matter of Knight*, DTA No. 819485

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(N.Y. Tax App. Trib. 2006), which involved a taxpayer who was a 40 percent member of the limited liability company that owned the apartment and thus "bore a proportionate part of the expenses" thereof (and nonetheless was held not to have a PPA there).

[7]The appellate division has also found taxpayers to have maintained a PPA without spending much if any time at the abode. *See Smith v. State Tax Commission*, 68 A.D.2d 993 (N.Y. App. Div. 3d Dept. 1979); *Stranahan v. State Tax Commission*, 68 A.D.2d 250 (N.Y. App. Div. 3d Dept. 1979); *People ex rel. Mackall v. Bates*, 278 A.D. 724 (N.Y. App. Div. 3d Dept. 1951).

III. *Gaied*

A. Facts

John Gaied had a home in New Jersey and owned two automobile service stations in Staten Island, where he worked full time. In 1999 Gaied purchased a multifamily residence in Staten Island (the Staten Island Property) in the same neighborhood as his service stations. The Staten Island Property had three apartments, two of which were rented to tenants for almost all of the relevant period, although family members occupied one of the apartments for part of the time. The case involved only the third apartment, a two-bedroom apartment on the first floor.

Gaied's parents lived in the first-floor apartment from the time he acquired the Staten Island Property through the years at issue. Utilities for the apartment were billed to and paid by Gaied, who maintained a telephone number in his name there. Gaied's parents suffered from chronic illnesses, had no income, and relied on Gaied for 100 percent of their support. At least once every month or two, his parents would ask him to come to the apartment to provide physical support to them. Gaied would occasionally spend the night at the apartment (on the couch), but only when asked to do so, because he preferred to stay at his New Jersey home. Gaied had no bedroom or bed at the apartment and he kept no clothing or personal possessions there.

In December 2003 Gaied sold his New Jersey home. Rather than moving into the apartment, he put his furniture in storage and stayed with an uncle in New Jersey. During that time, Gaied renovated the boiler room in the basement of the Staten Island Property to create an additional apartment into which he moved in 2004. He voted in New York City general elections in 2000 and 2004 and used the address of the Staten Island Property as his address on his 2003 New York State nonresident tax return.

The department determined that Gaied was a resident of New York state and city in 2001, 2002, and 2003 and that he owed additional New York state and city personal income tax for those years. Gaied challenged that determination in the Division of Tax Appeals. The parties agreed that he was domiciled in New Jersey at all relevant times and was in New York City for more than 183 days in each of the years in issue, leaving as the sole issue whether he maintained a PPA at the apartment.

B. The ALJ's Determination in Favor of the Department (*Gaied I*)

Gaied argued that he met neither the maintenance nor permanence requirement for a PPA because he acquired the apartment for his parents' use, not his own, and as an investment; did not have unfettered access to the apartment; had no bed there; kept no personal property there; and did not move into the apartment when he sold his New Jersey home in 2003.

The administrative law judge held for the department, citing Gaied's limited documentation and vague testimony regarding his purported investment purpose for purchasing the Staten Island Property, his ties to the property such as paying the utility bills, and his move to the basement apartment of the Staten Island Property in 2004.[8] The ALJ also found incredible Gaied's claim that he did not have unfettered access to the apartment, given testimony that he kept in the apartment keys to the other apartments.

C. The Tribunal's Reversal of the ALJ's Determination (*Gaied II*)

Gaied filed an exception to the ALJ's determination seeking review by the tribunal, which unanimously reversed.[9] It distinguished *Evans*, in which the taxpayer stayed in a residence he did not own, on the ground that Gaied owned the apartment but did not have living quarters, a bedroom, or a bed there. Because Gaied stayed at the apartment only when required by his parents' medical issues, kept no clothing or other personal effects there, and did not move into the apartment when he sold his New Jersey home, the tribunal concluded that even if Gaied had keys and unfettered access to the apartment, he did not maintain a PPA there and therefore was not a New York state or city resident.

D. The Tribunal's Decision for the Department (*Gaied III*)

The department filed a motion for reargument, asserting that the tribunal overlooked and failed to address controlling cases that establish that a taxpayer need not dwell in an abode — that is, use it as her residence — to be considered as maintaining it. The tribunal granted the department's motion, and in a 2-1 decision withdrew its prior decision and held for the department.[10]

Largely on the basis of *Barker*, which the tribunal decided after *Gaied II*, the tribunal in *Gaied III* held that when "a taxpayer has a property right to the subject premises, it is neither necessary nor appropriate to look beyond the physical aspects of the dwelling place to inquire into the taxpayer's subjective use of the premises."

The tribunal found that the maintenance requirement was satisfied because Gaied owned the apartment, paid utilities and expenses for its upkeep, had unfettered access to it, stayed there on occasion, sometimes listed the address of the Staten Island Property as his address, and let members of his family use the other apartments in the building without paying rent.[11] Those facts led the tribunal to conclude that

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[8] *Gaied I*, DTA No. 821727 (N.Y. Div. Tax App. 2009). Given the ALJ's focus on the Staten Island Property as a whole, it is not clear whether the ALJ determined that Gaied's PPA was the first-floor apartment or the entire property.

[9] *Gaied II*, DTA No. 821727 (N.Y. Tax App. Trib. 2010). From the opinion, it is apparent that the tribunal scoured the record and added to the ALJ's findings of fact several important facts (all of which are included above) that supported Gaied's case.

[10] *Gaied III*, DTA No. 821727 (N.Y. Tax App. Trib. 2011).

[11] While not mentioned by the tribunal in its conclusions, the tribunal added to the ALJ's prior findings of fact in *Gaied I* and the

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Gaied did not establish that the Staten Island Property was maintained exclusively for his parents or as an investment property.

Regarding the permanence requirement, the tribunal noted that the apartment had the physical attributes of a PPA and cited prior decisions for the proposition that it is immaterial whether the taxpayer actually lives in the place of abode he maintains.[12]

In dissent, Commissioner James H. Tully Jr. argued that Gaied did not have a PPA because he did not live at, keep personal items at, or have unfettered access to the apartment, and because he stayed there only occasionally to take care of his parents at their request. Tully said he found Gaied's case "wholly dissimilar" from "the typical facts indicating a taxpayer owning a second house or summer home," because Gaied did not have unfettered access to the abode and "surrendered dominion and control by permitting his parents to use the [apartment] as their permanent residence, without limitation or caveat, to his own exclusion."[13]

E. The Appellate Division's Decision for the Department (*Gaied IV*)

On appeal, the appellate division in a 3-2 decision confirmed *Gaied III*.[14] Noting that the scope of review in a proceeding seeking review of a tribunal decision is limited to whether the tribunal's determination is supported by substantial evidence, the majority said that in determining whether a taxpayer maintains a PPA in New York, various factors and circumstances may be relevant, including "the extent to which the person challenging the assessment paid living expenses, supplied furniture in the dwelling, had a key, had free and continuous access to the dwelling, received visitors there, kept clothing and other personal belongings there, used the premises for convenient access to and from a place of employment, and maintained telephone and utility services there in his or her own name, as well as whether the premises were suitable for year-round use."[15]

The majority concluded that while a contrary conclusion by the tribunal would have been reasonable based on the evidence, the tribunal's determination was "amply supported by the record."

Two judges dissented, essentially on the same grounds Tully did in *Gaied III* (both dissents follow reasoning similar to that applied by the tribunal in *Gaied II*). They emphasized the longstanding rule that maintenance is defined as "doing whatever is necessary *to continue one's living arrangements* in a particular dwelling place," and recited the facts cited by the dissent in *Gaied III*.[16] The dissent also noted that the court "need not defer to the agency's determination because the statutory language is neither special nor technical."[17] It concluded that because Gaied demonstrated by clear and convincing evidence "that he did not live in the dwelling nor did he have any personal residential interest in that Staten Island property," the tribunal's determination in *Gaied III* was "irrational and unreasonable."

F. The Court of Appeals' Decision for the Taxpayer (*Gaied V*)

Gaied appealed. In a unanimous opinion, the New York Court of Appeals reversed the appellate division, saying:

> Petitioner John Gaied contends that the question should turn on whether he maintained living arrangements for *himself* to reside at the dwelling. We agree with petitioner and hold that in order for an individual to qualify as a statutory resident, there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence.[18]

Reviewing the legislative history of the statutory residence provisions, the court concluded that the provisions target "multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but . . . claim to be nonresidents." According to the court, the purpose of the provisions is to tax individuals who are "really and [for] all intents and purposes residents of the state" but "have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents." In short, "the statute is intended to discourage tax evasion by New York residents," the court said.[19]

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tribunal's findings in *Gaied II* that the taxpayer's 2003 New York State tax return indicated that his address was the Staten Island Property. However, because that tax return was filed in 2004, by which time Gaied lived in another apartment in the Staten Island Property, the significance of that fact vis-à-vis the first-floor apartment is unclear.

[12] *See, e.g., Roth*, DTA No. 802212 (taxpayer was a named lessee who did not live at the abode); *Boyd*, DTA No. 808599 (taxpayer contributed more than 50 percent of the expenses of an abode that his mother owned and lived in).

As with the ALJ's opinion, the numerous references in *Gaied III* to the Staten Island Property rather than the first-floor apartment, and specifically to the other apartments there, make it unclear whether the tribunal held that Gaied maintained a PPA at the apartment or at the Staten Island Property as a whole.

[13] Tully drew an analogy to the judicial doctrine that some days of involuntary presence in New York are not counted as New York days for purposes of the more-than-183-day test (see *Stranahan*, 68 A.D.2d at 254) and suggested that Gaied's stays with his parents at their request for medical reasons similarly should not be counted against him in determining whether he maintained a PPA in New York.

[14] *Gaied IV*, 101 A.D.3d 1492 (N.Y. App. Div. 3d Dept. 2012).

[15] *Id.* at 1493, *citing Schibuk v. Tax Appeals Tribunal*, 289 A.D.2d 718, 719-20 (N.Y. App. Div. 3d Dept. 2001), *lv. dismissed*, 98 N.Y.2d 720 (2002); *Evans*, 199 A.D.2d at 842; *Smith*, 68 A.D.2d at 994.

[16] *Gaied IV*, 101 A.D.3d at 1495(Malone, J., dissenting) (emphasis in original). The dissenting judges also stated that "EZPass records support the infrequency of [the taxpayer's] overnight stays in New York," a fact that does not appear in any of the other *Gaied* opinions.

[17] *Id.* at 1496 (citing *Evans*, 199 A.D.2d at 841).

[18] *Gaied V*, No. 26 (emphasis in original).

[19] *Id.* (quoting *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 535 (1998), *cert. denied*, 525 U.S. 931 (1998) (quoting Income Tax Bureau Mem., Bill Jacket, L.1922, ch. 425)).

Noting that the scope of its review was limited to whether the tribunal's interpretation of the provisions "comports with the meaning and intent of the statutes involved," the court concluded that there was "no rational basis" for the tribunal's interpretation, saying:

> Notably, nowhere in the statute does it provide anything other than the "permanent place of abode" must relate to the taxpayer. The legislative history of the statute, to prevent tax evasion by New York *residents*, as well as the regulations, support 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.

The court reversed and remitted the case to the appellate division with directions to remand to the tribunal "for further proceedings in accordance with this opinion."

IV. Observations

Putting aside for a moment the substantive issue of whether a taxpayer who does not actually live in a New York abode should be considered to maintain a PPA in New York, the court of appeals' rationale for its conclusion that there was no rational basis for *Gaied III* and *Gaied IV* is puzzling. The statute does not expressly provide that a taxpayer can be considered as maintaining a PPA in New York even if he does not actually live there, but it also does not preclude that interpretation. Further, the court's suggestion that the legislative purpose of preventing tax evasion by New York residents provides insight into the meaning of the term "permanent place of abode" seems circular, given that the PPA determination is itself part of the test for determining whether an individual is a New York resident. It is also difficult to see how the PPA regulations — which, like the statute, say nothing about whether the taxpayer must actually live in the abode — support the court's holding that the property must be used as the taxpayer's residence.

That being said, the court's conclusion that Gaied did not maintain a PPA in New York during the years in issue seems sensible and consistent with the statute. Although Gaied owned the apartment and paid all related expenses, he did not have a room, bed, or personal belongings there. Further, the apartment was used primarily by someone else; because it was Gaied's parents' home in which he was an occasional visitor — rather than the other way around — the court's finding that Gaied did not maintain a PPA there has the benefit of common sense.[20]

By holding that an abode must be used as the taxpayer's residence to be considered a taxpayer's PPA and that the taxpayer must have a residential interest therein, the court at the very least rejected the notion that a taxpayer who owns or leases an abode that is suitable for year-round use and to which he has unfettered access is necessarily considered to maintain a PPA there, regardless of his actual use of and the extent to which others occupy the abode. Thus, the court implicitly overruled cases holding to the contrary such as *Barker*. Presumably, future permanence inquiries will encompass both the taxpayer's legal relationship to and actual use of the abode (in addition to the physical aspects of the abode such as its dwelling facilities and suitability for year-round use).

The critical question for planning purposes is to what extent the principle the court established in *Gaied V* is limited to the facts in that case. That can perhaps be best explored by analyzing the spectrum of situations that raise the PPA issue. To focus the discussion exclusively on the PPA issue, it is assumed in each case that taxpayer A, like Gaied, is a non-domiciliary of New York who commutes to work in New York City and thus spends more than 183 days in New York City in the relevant year.

The critical question for planning purposes is to what extent the principle the court established in *Gaied V* is limited to the facts in that case.

> Case 1. A owns an apartment in New York City and rents it out to a third party under customary lease arrangements for a market rental for the entire year.

Even before *Gaied*, it was clear that when someone other than the taxpayer has exclusive use of an abode owned by the taxpayer under a lease or other rental arrangement, with the taxpayer having only the same right of entry that landlords customarily have, the abode is not considered a PPA maintained by the taxpayer.[21] Nothing about *Gaied* should change that conclusion.

> Case 2. Assume the same facts as Case 1 except that the tenant is a member of A's family, who pays a market rental to A for exclusive use of the apartment.

Before *Gaied*, the result would appear to have been the same as in Case 1, subject perhaps to additional scrutiny because of the family relationship. After *Gaied*, in which

[20] *Accord Matter of Moed*, DTA 810997 (N.Y. Tax App. Trib. 1995) (taxpayer who was permitted, on occasion and with prior notice, to stay in an apartment owned and occupied by his wife after their separation did not maintain a PPA there); *Knight*, DTA No. 819485 (taxpayer who had limited access to an apartment owned and occupied by his girlfriend did not maintain a PPA there); *see also* Audit Guidelines, *supra* note 3, at 53 ("a taxpayer may not necessarily have the requisite relationship to a dwelling which he owns if it can be shown

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that it is used *primarily* by others"); *Matter of Panico*, DTA No. 805810 (N.Y. Div. Tax App. 1990) (no PPA when the taxpayer's daughter and grandchild lived in the home owned by the taxpayer).

[21] *See, e.g., Matter of Hofler*, TSB-H-81(162)I; Audit Guidelines, *supra* note 3, at 53. Likewise, even if the abode is temporarily not rented out but is listed for rental and not converted to personal use by the taxpayer during that time, the abode should not be considered a PPA maintained by the taxpayer.

family members did not pay rent and the taxpayer had unfettered access to the apartment, A should not be considered to maintain a PPA at the apartment, particularly if A does not have a dedicated room or keep personal belongings at the apartment. Further, after *Gaied,* it does not appear to be particularly relevant whether A has the limited right of entry that landlords customarily have or instead has unfettered access to the apartment, so long as the family member is the primary occupant.

> Case 3. Assume the same facts as in Case 2 except that the family member does not pay rent.

This was the situation in *Gaied*, *Barker*, and *Boyd*. This situation also arises when, for example, individuals buy or rent an apartment for use by their children while attending college in New York. As with Case 2, *Gaied* says that even if A has unfettered access to the apartment, it should not be considered a PPA maintained by A if the family member is the primary occupant of the apartment, particularly if A does not have a room or keep personal belongings there, even if A occasionally visits or stays over. To the extent cases such as *Boyd* and *Barker* are inconsistent with that conclusion, they appear to have been overruled by *Gaied.*

> Case 4. Assume the same facts as in Case 3 except that the family member lives in the apartment for less than the entire year.

As noted, the regulations provide that a non-domiciliary must maintain a PPA for substantially all of the year to be considered a resident for that year, and the department generally interprets the phrase "substantially all" to mean more than 11 months. As a result, it would appear that so long as the apartment is principally occupied by a bona fide occupant other than the taxpayer for at least a month, the apartment should not be considered the taxpayer's PPA.

If the occupant is a family member who does not pay rent and who occupies the apartment for substantially less than the entire year, however, the situation will presumably be scrutinized to make sure that the occupancy is bona fide.[22]

> Case 5. A has a fully equipped beach house on Long Island that is suitable for year-round use as a dwelling. In the relevant year, A neither uses the house nor permits anyone else to use it (whether under a rental arrangement or otherwise), so the house is vacant for the entire year.

This is perhaps the most interesting scenario to consider in light of *Gaied.* As noted above, before *Gaied,* both the department and the tribunal took the view that when the taxpayer owns or leases and has unfettered access to an abode that has facilities ordinarily found in a year-round dwelling and is available for use as a dwelling for substantially all of the year, it is not particularly relevant whether and how much the taxpayer actually chooses to use the abode in determining whether the taxpayer has a PPA there.

However, A could cite *Gaied* for the proposition that because she did not set foot in the beach house during the relevant year, it cannot be considered a PPA, despite her unfettered access. She could base that position on the court of appeals' holding that for a taxpayer to be considered as maintaining a PPA there must be some basis to conclude that he used the dwelling as his residence and that he must have a residential interest in the property. She could further note that the tribunal in *Gaied II* and the appellate division in *Gaied IV* both treated the ALJ's skepticism regarding Gaied's access to the apartment as a finding of fact by the ALJ that he had unfettered access to the apartment. A could also point to the court's reference to the legislative history as an indication by the court that at least some of the taxpayer's New York days must be spent at the place of abode for the taxpayer to be deemed a resident.

It is possible that the department would resist such a broad reading of *Gaied V* and argue that it is limited to cases in which someone other than the taxpayer is living in the abode. The department could point to Tully's dissent in *Gaied III* (whose reasoning the court of appeals at least arguably adopted), which distinguished Gaied from the typical case of a taxpayer owning a second home or summer house because Gaied "surrendered dominion and control by permitting his parents to use the [apartment] as their permanent residence, without limitation or caveat, to his own exclusion."[23] By contrast, A did not surrender dominion or control to another, but instead merely chose not to visit her beach house.

There would be difficulties in attempting to limit *Gaied* to situations in which someone other than the taxpayer is the primary occupant of the dwelling. First, the court of appeals appears to have gone out of its way to avoid issuing such a limited ruling by using broad language and holding that for an abode to be considered a taxpayer's PPA it must be used as the taxpayer's residence and the taxpayer must have a residential interest therein. A appears to fail that standard in Case 5 even though she did not permit others to use the beach house.

Moreover, the court of appeals' remand order reinforces that the court meant exactly what it said. Had it intended to limit its holding to taxpayers who let others be the primary occupants of the abode, the court could simply have reversed the appellate division without directing the appellate division to remand the case to the tribunal for further proceedings in accordance with its opinion.

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[22] *See* Audit Guidelines, *supra* note 3, at 60-61 (the department's position is that a couple who rents an apartment in New York each year and sublets it to their son for the month of December each year is maintaining a PPA in New York because "they are maintaining the abode on a regular basis").

[23] *Gaied III*, DTA No. 821727 (Tully, Comm., dissenting); *see also Barker*, DTA No. 822234 (the tribunal found the taxpayers' dominion and control over the dwelling to be dispositive).

By remanding for further proceedings, the court was presumably directing the tribunal (or perhaps the ALJ on further remand from the tribunal) to conduct a broad-based inquiry into whether Gaied used the apartment as his residence and had a residential interest therein. That inquiry could examine whether he had a residence elsewhere, how often he used another residence compared with how often he used the apartment as his residence, the accommodations available to him at another residence compared with those at the apartment, and whether his accommodations at the apartment rose to a level that permitted him to use the apartment as his residence.[24] Were that type of inquiry to be applied to Case 5, it seems clear that A would not be considered as using the beach house as her residence and therefore that it would not be considered a PPA maintained by A.

> Case 6. Assume the same facts as in Case 5, except that A spends a small amount of time, say fewer than 20 days, at the vacation house or apartment during the year.

Arguably, the result in Case 6 should be the same as in Case 5. The determination under *Gaied* of whether A used the beach house as her residence should be the same whether she uses the place sparingly or not at all. Just as Gaied was found not to have used the apartment as a residence despite his unfettered access and occasional overnight stays there, A's limited and sporadic use does not seem to rise to the level of the residential interest required under *Gaied*, particularly in light of the regulations requiring that a PPA be maintained for substantially all of the taxable year.

V. Conclusion

For a commuter to New York (whether the state or city), the question of whether he maintains a PPA in New York for substantially all of the year may be of primary importance in determining whether his income from sources outside New York will be subject to New York tax. The New York Court of Appeals in *Gaied V* rejected the conventional wisdom, holding that for an individual who owns or leases a place of abode in New York that is suitable for use as a year-round dwelling and has unfettered access to the abode for substantially all of the year to be considered as maintaining a PPA there, he must use the dwelling as a residence and have a residential interest in the property.

While it is not possible to predict how *Gaied* will be applied in future cases, particularly when persons other than the taxpayer are not occupying the abode, the case could provide relief from the residency trap for those who work and have an abode in New York but do not spend considerable time at the abode. In light of *Gaied*, some taxpayers who previously filed tax returns as statutory residents of New York may want to consider filing claims for refund for open years. ☆

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[24] *See* N.Y. CPLR section 5613 (when reversing a determination of the appellate division, the court of appeals "shall remit the case to that court for determination of fact raised in the appellate division . . . when it appears or must be presumed that questions of fact were not considered by the appellate division").