STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN GAIED	:	DECISION 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 an exception to the determination of the Administrative Law Judge issued on August 6, 2009. 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).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was held on January 13, 2010 in Troy, New York.

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

ISSUE

Whether petitioner was a New York State and New York City resident liable for City and State personal income taxes for the years 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

We find the facts as determined by the Administrative Law Judge except for findings of fact “6,” “8,” “11,” “12,” “16,” “17” and “20,” which have been modified. We have also made an additional finding of fact and have deleted the Administrative Law Judge’s finding of fact “21” as not supported by the record. The Administrative Law Judge’s remaining findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

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]?”

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.

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?"

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.

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.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> In 1993 or 1994, petitioner purchased the Old Bridge, New Jersey residence, which was his residence throughout the period. From 1996 through the years at issue, petitioner filed New York State non-resident income tax returns from New Jersey. Petitioner testified at great length about the effort he made to make the Old Bridge house his "dream home." He redecorated the house and the home also contained a swimming pool and a Jacuzzi. His parents were living with him at his house in New Jersey but it was "kind of getting annoying in the end" because apparently his mother took over the kitchen and it was interfering

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

> with his lifestyle. Petitioner's Old Bridge, New Jersey residence was located approximately 28 miles from his business, a 30 to 45 minute drive depending on traffic and the route taken.[2]

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 Avenue 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.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The record includes limited documentation regarding the rental history of the MacFarland Avenue property from November 29, 1999 through the year 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. Petitioner submitted income tax returns reporting rental income from the aforesaid premises and the Division has not questioned the amounts of rental income listed thereon.[3]

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.

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[2] We have modified this fact to more accurately reflect the record.

[3] We have modified this fact to more accurately reflect the record.

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.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> 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.[4]

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> 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. Petitioner would be called upon to provide physical support to his parents at least once every one or two months.[5]

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 desireable." Such entry "must be on reasonable notice except in emergency."

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[4] We have modified this fact by deleting the last sentence as being irrelevant.

[5] We have modified this fact to more accurately reflect the record.

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

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.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> Because of his parents' medical needs, petitioner would occasionally spend the night at their first floor apartment. He would only stay when his parents would request it because he preferred to be at his New Jersey home. Petitioner testified that there was no bed, nor a bedroom for him at his parents' apartment and that when they did request that he stay, he would sleep on the couch. Petitioner did not keep clothing or personal possessions at his parents' apartment. Petitioner and his father testified regarding his father's serious health issues.[6]

We modify finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> 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 the outstanding tax obligations for the year 2002. In 2004, petitioner put his furniture from the Old Bridge, New Jersey residence in storage in New Jersey where it remained until the time of his testimony. He stayed with an uncle in New Jersey until he renovated the boiler room of his MacFarland Avenue property to make a small apartment in which he began residing in 2004. Documents in the record indicate that renovations took place in the basement of MacFarland Avenue property in 2004 but they do not include any building permits for such renovations.[7]

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.

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[6] We have modified this fact to more accurately reflect the record.

[7] We have modified this fact to more accurately reflect the record.

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.

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.

We modify finding of fact "20" of the Administrative Law Judge's determination to read as follows:

> At the hearing, petitioner testified regarding the MacFarland Avenue residence. The record includes the cover page from a March 2006 appraisal of the 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. Petitioner introduced a document that detailed the tenant history of the building.[8]

We make the following additional finding of fact.

> In 2002, petitioner had a serious car accident in Florida, which caused him to be in a Florida hospital for a month and spend extensive time in rehabilitation. Petitioner testified that he had a girlfriend in Florida.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge sustained the notice of deficiency dated February 6, 2008 on the basis that petitioner maintained a permanent place of abode for his parents at the first floor apartment of the MacFarland Avenue property and "would on occasion stay overnight during the years at issue" (Determination, conclusion of law "E"). The Administrative Law Judge concluded that petitioner paid all of the utility bills and was the sole support for his parents.

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[8] We have modified this fact to more accurately reflect the record.

Furthermore, the Administrative Law Judge noted that petitioner claimed head of household filing status and dependent exemptions for his parents on his federal, New Jersey and New York income tax returns. The determination states that "[s]uch facts are indicative of the maintenance of a place of abode within the standard set forth in ***Matter of Evans*** [Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840 (1993)]; (***see also Matter of Boyd***, Tax Appeal Tribunal, July 7, 1994)" (Determination, conclusion of law "E"). The Administrative Law Judge determined that petitioner's claim that he did not have unfettered access to any of the individual apartments, including that of his parents, was incredible. The Administrative Law Judge determined that petitioner owned the MacFarland Avenue property and maintained the first floor apartment occupied by his dependent parents. Furthermore, in 2004, the petitioner moved into the MacFarland Avenue residence and continues to reside there to this day.

ARGUMENTS ON EXCEPTION

Petitioner argues that he did not maintain a permanent place of abode in New York during the audit period and that he would stay at the apartment only when his parents asked him to fulfill particular health needs. There was no bed for him in the apartment and he was forced to sleep on the couch. Additionally, he did not keep any personal property in the apartment. Petitioner asserts that, because of tax liabilities, he was forced either to sell his "dream home" in New Jersey or sell his investment property in Staten Island and put his parents out of a home. In December 2003, he sold his New Jersey domicile and he paid the IRS and New York State the taxes he owed.

Petitioner argues that the proof that the Staten Island apartment was not for his use was that when he sold his New Jersey home in December 2000, he stayed with an uncle in New Jersey until an apartment was made in the rear basement section of the MacFarland Avenue

property. Petitioner argues that if he had access to his parents' apartment, he surely would have used it, rather than creating a new apartment in the rear of the basement.

In support of his argument, petitioner cites to the ***Matter of Evans*** (***supra***), which is also cited by the Division, stating that "the permanence of a dwelling place . . . can depend upon a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place." In ***Evans***, this Tribunal found for the Division because the petitioner therein had supplied items of furniture for the dwelling, he had free and continuous access to the building and he maintained clothing and other personal articles at the building. Petitioner states that none of such factors were present herein. Petitioner also cites the Department of Taxation and Finance's Revised Manual for Nonresident Audits, dated September 5, 1997, which states, "[a] residence that is maintained by one individual but used exclusively by another, should not be deemed a permanent place of abode for the individual who maintains it" (Exhibit "4," section 5B).

Petitioner claims that he has established that he did not maintain a permanent place of abode in New York because he did not have unfettered access to the MacFarland Avenue apartment, but would only go there when requested; he had no furniture or personal property there; nor was there a bed upon which he could sleep.

The Division argues that petitioner has not met his burden to show that he did not maintain a permanent place of abode accessible for his use at the MacFarland Avenue property during the years in question. The Division states that petitioner did not prove his allegation that the MacFarland Avenue property was an investment property because he did not have sufficient records to show that the property was purchased as an investment. Further, the Division states that petitioner filed his federal and State tax returns as head of household and also listed his

parents as qualifying dependents. The Division also points out that other members of his family occupied apartments in the building, that he maintained a telephone number in his name in the apartment and, also, that he was enrolled as an active voter.

The Division asserts that the record clearly shows that petitioner established and maintained an apartment for his parents at the MacFarland Avenue property and would on occasion stay overnight. Specifically, the Division noted that petitioner continually maintained the apartment that 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. The Division 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, the Division contends that 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.

OPINION

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.[9]

Permanent place of abode is defined in the Division's regulations at 20 NYCRR 105.20(e)(1) as:

> [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 (emphasis supplied).

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 City during the years 2001, 2002 and 2003. The sole issue to be addressed is whether petitioner "maintained a permanent place of abode."

This issue was addressed in ***Matter of Evans*** (***supra***), wherein we 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, 250). 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.

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[9] 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."

* * *

> 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 [footnote deleted]. 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]).

The Administrative Law Judge found that petitioner did not establish by clear and convincing evidence that he did not maintain a residence in New York City during the years in question. The decision was based on the fact that petitioner maintained the apartment for his parents and would, on occasion, when required for his parents' care, spend the night on their couch.

We reverse the determination of the Administrative Law Judge.

As stated in ***Evans***, the Division's regulations make it clear that the physical attributes of an abode, as well as its use by a taxpayer, are determining factors in defining whether it is considered permanent. The record establishes that petitioner did not have a bed or a bedroom in

his parents' apartment and he would stay there only when required because of his father's poor health. He did not keep any personal effects at the apartment. Moreover, after he lost his New Jersey home in December 2003, he did not move into his parents' apartment, but rather stayed with an uncle in New Jersey and then created a new apartment in the boiler room of the MacFarland Avenue property. The facts of this matter are the reverse of those in the ***Evans*** case. In that case, the petitioner stayed in a residence he did not own. Here, petitioner did not have a place to stay in a residence that he maintained for his parents.

The determination below relies heavily upon two facts found by the Administrative Law Judge. The first fact is that the taxpayer filed as a head of household. The second fact is that petitioner had unfettered access to his parents' apartment.

Under the regulations of the Internal Revenue Code, upon which New York Tax Law is based (***see***, Tax Law § 612), a taxpayer may qualify as the head of a household if he maintains a household for a dependent parent, even if the parent does not live in the taxpayer's household, provided he maintains a household for the parent by providing more than half the cost of maintenance of the parent's principal abode (***see,*** IRC § 2[b][1][B]), which allows parents to be maintained in their own apartment or as residents of a retirement home (***see, Kleinfelder v. Commissioner***, TC Memo 1956-282). Thus, we do not find that his filing status is determinative of whether petitioner maintained a permanent place of abode for purposes of Tax Law § 605(b)(1)(B).

The Administrative Law Judge also found incredible the testimony of petitioner that he did not hold the keys to the apartments in the MacFarland Avenue property, but rather that the keys were left in his parents' apartment. As such, the Administrative Law Judge found that petitioner had unfettered access to the apartment.

Even if petitioner held the keys, this would not compel the conclusion that the taxpayer maintained a permanent place of abode at the MacFarland Avenue property during the years in issue. Unlike the facts in the ***Evans*** case, petitioner did not have living quarters at his parents' apartment, nor a bedroom or a bed. That conclusion is supported by the fact that after petitioner lost his New Jersey home, he at first lived with an uncle and then created an apartment in the basement. As such, we find that petitioner did not maintain a permanent place of abode in New York City during the period in issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Gaied is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of John Gaied is granted; and

4. The notice of deficiency dated February 6, 2008 is cancelled.

DATED:Troy, New York
July 8, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner