STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **JOHN J. AND LAURA BARKER** | : | DECISION<br>DTA NO. 822324 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2002, 2003 and 2004. | : | |

Petitioners, John J. and Laura Barker, filed an exception to the determination of the Administrative Law Judge issued on November 19, 2009. Petitioners appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, 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. Oral argument, at petitioners' request, was heard on July 14, 2010 in Troy, New York.

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

## ***ISSUE***

Whether petitioners were New York State residents during the years in issue who maintained a permanent place of abode in this state and spent in the aggregate more than 183 days in this state in each of the taxable years in issue.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "24," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioners were Connecticut domiciliaries during the years 2002, 2003 and 2004 (the years in issue or the audit period). Petitioner John Barker grew up in the Bronx, New York, and petitioner Laura Barker was raised on the North Shore of Long Island, New York. They married in 1993 and had three children who were 9, 6 and 3 years of age during the audit period.

Mr. Barker was an investment manager for Neuberger Berman in New York City, working five long days a week, leaving the house around 6:00 A.M. and returning at approximately 7:00 P.M. In addition to his work schedule, he volunteered at a children's hospital three or four nights a month. His evenings and weekends were primarily devoted to coaching soccer and basketball and serving as a commissioner of his son's basketball league. Mr. Barker spent more than 183 days in New York State during the years in issue, and only those days set forth in the finding of fact below, were spent in Napeague, New York, their vacation home.

Likewise, Mrs. Barker maintained a busy schedule as a homemaker, substantiated by her diary or planner entries, revolving around the children's active school and social lives, and centered around their home in New Canaan, Connecticut.

While seeking a summer rental in the area of the Hamptons on Long Island in 1997, petitioners were confronted with costly rentals with monthly commitments. Therefore, when Mrs. Barker's mother informed petitioners of a property available in the nearby town of Napeague, New York, the option of purchasing was not dismissed out of hand. Ultimately, petitioners decided to purchase the property in Napeague for occasional family vacations.

Napeague is neither a township nor an official hamlet within a township, but is a low-lying strip of land stretching between the hamlets of Amagansett, six miles to the west, and Montauk, about ten miles to the east. This entire area is within the township of East Hampton. Napeague is isolated from the rest of the township by undeveloped park land on its east and west and by the Atlantic Ocean to its south and Napeague Harbor (part of Gardiner's Bay) to its north.

The only commercial area in Napeague is on Route 27, the Montauk Highway, and most of the businesses are seasonal, catering to summer residents and tourists. There are clam bars and seasonal hotels located on the highway. Grocery stores, drug stores and other businesses serving year-round residents are located in Amagansett and Montauk. The nearest hospital is located in Southampton, which can be an hour's drive in summer traffic. The residence has no mail delivery, town sewer or waste removal services.

The 2000 United States Census reflected that Napeague, New York, is a seasonal community, with a population of 223 and where about 105 of 624 housing units are occupied on a year-round basis. The census represented that approximately 82% of the housing units in Napeague were for seasonal, recreational or occasional use. By comparison, the 2000 Census provided that the town of East Hampton and the town of Southampton had 54% and 35% vacant housing units for seasonal use, respectively. In fact, many homes and businesses are boarded up and shut down for winter.

Petitioners' decision to purchase the Napeague property was influenced by Mrs. Barker's parents, Leonard and Fran Giarraputo, who brought the property to the attention of petitioners. It had been owned by a business associate of Mr. and Mrs. Giarraputo, and petitioners understood at the time that the Giarraputos would be using the property.

The Napeague area conformed to petitioners' expectations for the property in that it would be used for brief beach vacations during the summer months. As a child, Mr. Barker had vacationed in nearby Montauk and knew that the area was a beach destination that was fairly desolate in the winter months. Mrs. Barker's visit to the house in 1997 during the winter confirmed this impression, noting that she had to use her imagination to visualize what it would be like in summer.

Petitioners purchased the property on April 30, 1997 for $260,000.00, which petitioners considered a low price given its proximity to the ocean. Although the property had previously been a summer rental, petitioners made only minor improvements to the bathrooms and kitchen, while choosing to utilize the existing furniture, paneling, heating plant and windows.

During 2002, petitioners spent the following days at the Napeague dwelling: May 24-26; July 4-7; July 19-21; August 7-10; and August 28-September 1. In 2003, petitioners spent the following days at the Napeague house: June 20-22; July 3-6; July 18-20; August 9-10; August 28-30; and November 29. Finally, in 2004, petitioners spent the following days at the Napeague house: June 27-28 (Laura Barker only); July 1-4; July 23-25; August 31-September 4; and October 8-11. During the period in issue, petitioners did not spend any other full or partial days at the Napeague dwelling. Hence, petitioners' use of the home in Napeague was sporadic.

The insurance policy issued by New York Central Mutual Fire Insurance Company in effect for the years in issue indicates that the dwelling was insured for a total value of $228,800.00 with insurance for personal property of $145,000.00. There was also flood insurance on the property through Omaha Property and Casualty that provided total building coverage of $250,000.00. In addition, a renewal endorsement for the year April 2002 through April 2003 issued by the New York Property Insurance Underwriting Association, referenced as an "additional form" on page 2

of the New York Central Mutual policy for the same period, describes the property as "seasonal dwelling," even though this description is not used in any of the other policies submitted into evidence for the years in issue.

The Napeague dwelling was constructed in 1972 and contains approximately 1,122 square feet of living space and a 594 square foot wraparound wood deck. Although the dwelling appears to have three stories when viewed from street level, the ground level is a cinder block foundation, the interior of which serves as an unfinished basement. The remaining floors of the structure are a full first story and a loft-style second story. The first floor contains a small bathroom and a 10 by 11 foot bedroom with twin beds used primarily by Laura Barker's parents. In addition, the first floor contains a living room with fireplace and a working, galley kitchen. The small dining table extends into the living area and can accommodate four people, making it more convenient in good weather to utilize the deck for larger gatherings. The loft area on the second floor contains two bedrooms, one for petitioners and one for their children, both of which are about the size of the one on the first floor. Separating the second floor bedrooms is a bathroom. The photographs of the residence indicate, and Mr. Barker confirmed, that the home had hardwood floors.

Petitioners permitted Laura Barker's parents, Mr. and Mrs. Giarraputo, to use this house during the years in issue and they utilized it several days a week during the summer months and on many weekends the remainder of the year. Mr. Giarraputo operated a small-scale fishing charter business, which listed this house as its address and he maintained a post office box in the area, as well. He and Mrs. Giarraputo used the first floor bedroom when they stayed and sometimes arranged for repairs and improvements to the dwelling on behalf of petitioners. They installed cable for internet access, as well. The Giarraputos had friends in the area and displayed

beach and recycling permits on their car. In sum, the Giarraputos fully enjoyed their daughter's vacation home and took advantage of its proximity to their own home in Huntington, New York.

The Giarraputos' use of the home was so pervasive that petitioners called them before planning a stay in order to be sure that there was no conflict with visits by other family members or friends. Although petitioners acknowledge their ultimate dominion and control over the use of the property, they chose to allow the Giarraputos to have liberal use of the premises.

The house had heat, electric and telephone service, hot water, cable television and internet service, making it very habitable and comfortable year round, as evidenced by the fact that Mr. Giarraputo stayed there on many weekends from November through the middle of May. Petitioners, while conceding that the house could be lived in year round, found it more desirable for short stays.

Petitioners' Connecticut home is approximately 138 miles from the home in Napeague, often taking four hours to reach in traffic and longer when transporting their young children due to the necessity of frequent stops. These considerations limited petitioners' use of the property.

In addition to the travel issues, petitioners' schedules also limited the time available to use the Napeague home. Mr. Barker had a full work schedule in New York City during the week and was fully involved with the children's soccer and basketball endeavors on most nights and weekends. Mrs. Barker coordinated the educational, social and athletic lives of herself and her three children, which proved to be a full-time job. The demands placed upon petitioners by their hectic schedules required them to be in New Canaan, Connecticut, most of the year.

As a result, petitioners were only able to get to the Napeague home for short vacations and the home reflected this. The refrigerator was generally empty when they arrived, necessitating a

trip to the store for food. The beds were unmade and clothing was not stored there. If visiting in the winter, the outside shower would not be set up and the gas grill would be in the house.

Petitioners admitted that the Napeague home had all the amenities that would make it suitable for year round habitation, but lamented that, for their purposes and expectations, it was strictly suitable as a vacation home. The eating area was cramped for their family of five, and the frequent presence of the Giarraputos forced them to live in cramped quarters with their children on the second floor. Further, the open layout of the home and its lack of interior insulation permitted sound to travel easily, thereby adversely affecting privacy.

The occupancy of the premises by the Giarraputos for most of the summer made it difficult for petitioners to use the property whenever they wished or for more than brief visits. In fact, it was petitioners' custom to call the Giarraputos to see if there was room for petitioners for any given period. Although petitioners conceded that they could insist on use of their home, they did not feel comfortable forcing themselves on the Giarraputos.

During the summer, Napeague is basically a vacation or beach community and petitioners took full advantage of the seasonal recreational offerings. They rode bikes, spent time at the beach, played miniature golf, cooked out and frequented the many clam shacks. When the weather was uncooperative, petitioners had little to do except stay home and watch television, since the Napeague area offers tourists and visitors many outdoor activities that are best enjoyed in nice weather.

Napeague lies in a low-lying strip of land between two bodies of water with little altitude to rebuff the effects of storms, wind and water. In fact, the area is in a designated flood zone (hence the flood insurance mentioned above). Once, Mrs. Barker had weathered a particularly severe

storm with the children, which rattled windows and caused water to enter the home, despite the fact that petitioners had the roof replaced.

The home is heated by oil but lacks insulation between the interior walls (mentioned above with respect to noise). Its windows are single pane and are in need of some repair. However, the home was not shut down for winter because the Giarraputos used it from November to May.

We modify finding of fact "24" of the Administrative Law Judge's determination to read as follows:

> For each of the three years in issue, petitioners filed timely New York State nonresident income tax returns, forms IT-203. On each of the returns they answered "NO" to the question lettered "F," which asks: "Did you or your spouse maintain living quarters in New York State in [applicable year]?" On each return, immediately below question "F" appears the signatures of petitioners, as well as their tax preparer.[1]

In March 2005, the Division of Taxation began an audit of petitioners for the years 2002 and 2003, which was subsequently extended to cover the year 2004. Although the audit had initially focused on issues of domicile and statutory residency, the auditor ultimately focused only on the number of days spent in New York by petitioners and their maintenance of a permanent place of abode in the state. As recited in the stipulation of facts executed by the parties and incorporated into the finding of fact above, Mr. Barker spent more than 183 days in New York State and City during each of the three years in issue.

Understanding that Mr. Barker had spent more than 183 days in New York State and City during the years in issue, the auditor's chief focus was on the home in Napeague, which he determined was a permanent place of abode. This conclusion was reached based on information he collected from various sources during the audit. He discovered that the home was used all

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[1] We have modified finding of fact "24" to more accurately reflect the record.

year long by petitioners and their family members, and from his observation of photographs of the home, it appeared to him to be suitable for year round habitation. Credit card statements, utility and telephone bills, cable bills, and oil delivery charges further supported his conclusion that the home was suitable for year round living and was, in fact, utilized year round.

As a result of his findings and conclusions, the Division issued a consent to field audit adjustment, dated October 13, 2006, with respect to the years in issue. The additional tax determined to be due for each year was as follows:

| Period Ended | Additional Tax | Penalties | Interest | Total |
|---|---|---|---|---|
| 12/31/2002 | $126,913.00 | $36,712.00 | $35,352.00 | $198,977.00 |
| 12/31/2003 | 369,597.00 | 93,155.00 | 75,436.00 | 538,188.00 |
| 12/31/2004 | 111,650.00 | 40,766.00 | 14,908.00 | 167,324.00 |
| | | | | $904,489.00 |

The consent explained that the adjustments were made to petitioners' tax liability for the years in issue because they were statutory residents of New York during the period due to their maintenance of a permanent place of abode in Amagansett, New York and their failure to show by clear and convincing evidence that they spent less than 183 days of the tax year within New York State.[2] The consent also explained that penalties were asserted pursuant to Tax Law § 685(b)(1), (2) *and* (p) for negligence and substantial understatement of tax.

The Division issued to petitioners a Notice of Deficiency, dated May 8, 2008, which asserted additional income tax due of $608,160.00, penalties of $221,086.01 and interest of $226,602.04, for a total due of $1,055,848.05.

[2] This statement predated petitioners' concession that Mr. Barker spent more than 183 days of the tax year in New York State for each of the years in issue.

## *THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE*

The Administrative Law Judge conducted an extensive review of the record. Petitioners conceded that they spent over 183 days within New York State. Petitioners argued that Mrs. Barker's parents' use of the house prevented them from exercising their legal rights to the residence. The Administrative Law Judge rejected this argument because petitioners conceded that they retained ultimate dominion and control over their Napeague residence. Petitioners argued that the Napeague house was not a permanent place of abode because the residence was, allegedly, not subjectively liveable for petitioners year-round. The Administrative Law Judge rejected this argument because it was supported by neither law nor fact. Petitioners raised no argument for the abatement of the asserted penalties.

In light of the foregoing, the Administrative Law Judge sustained both tax and penalty within the determination.

## *ARGUMENTS ON EXCEPTION*

Petitioners take exception to all substantive portions of the determination. Petitioners raised substantially similar arguments as below, premised on the same facts, alleging that the Administrative Law Judge erred in applying the law. Specifically, they allege that the Administrative Law Judge erred by: (1) misconstruing the "permanent place of abode" analysis; (2) failing to consider the Napeague house as a camp or a cottage; and (3) upholding negligence penalties. The Division defends the determination by adopting the findings of fact and opinion of the Administrative Law Judge.

## *OPINION*

Tax Law § 601 imposes New York state personal income tax on "resident individuals." Tax Law § 605(b)(1) defines a "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or
>
> (B) 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 . . . .

In order to impose taxes as a resident individual, the person must have spent more than 183 days in New York State and maintained a permanent place of abode in New York State.

The parties agree that during the years at issue, petitioners were domiciled in Connecticut. Further, petitioners have never denied that they owned and maintained a dwelling in Napeague, New York, during the years at issue. Therefore, in order to conclude that petitioners were "resident individuals" required to pay New York personal income tax on their income from all sources, and not merely on their New York source income, the issue is whether petitioners maintained a *permanent place of abode* by their ownership and maintenance of the Napeague, New York, dwelling.

The Tax Law does not include a definition of the term "permanent place of abode." However, the regulation at 20 NYCRR former 105.20(e), in effect during the years at issue and unchanged in the current regulation, provides, in part, the following interpretation of this term:

> *Permanent place of abode*. (1) A permanent place of abode means 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.

We note that canons of construction applicable to statutes also apply to the construction of administrative rules (***see, Matter of Cortland-Clinton v. New York Dept. of Health***, 59 AD2d

228 [1977]). Terms should be defined in their "ordinary everyday sense" (***Matter of Automatique, Inc. v. Bouchard***, 97 AD2d 183, 186 [1983], ***citing Malat v. Riddell***, 383 US 569, 571 [1966]) and in a manner consistent with the "well settled legal meaning in the jurisprudence of the state" (***Matter of Moran Towing & Transp. Co. v. New York State Tax Commn***., 72 NY2d 166, 173 [1988], ***citing*** McKinney's Cons Laws of NY, Book 1, Statutes § 233).

Although petitioners conceded maintaining a house in New York, they contend that they are not resident individuals under Tax Law § 605(b)(1)(B) because the dwelling is not *their* permanent place of abode and is unsuitable to be used as such. The factual foundation for this argument is that they purchased the home for vacation use only, that it is only suitable to them as a vacation home and that, since they purchased it in 1997, and specifically during the years in issue, they have used it exclusively for vacations.

We reject petitioners contention that ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed Matter of Evans v. Tax Appeals Tribunal***, 199 AD2d 840 [1993]) supports their position. Specifically, petitioners contend that this Tribunal adopted a subjective standard by setting forth that permanence "must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place [footnote deleted]" (***Matter of Evans***, ***supra***). This holding stands solely for the proposition that a permanent place of abode may be found whether the taxpayer bears no legal right or relationship to the property. While establishing a legal relationship may not necessarily end the analysis, no further discussion of ***Evans*** is required because petitioner conceded ownership of the Napeague property.

We also reject petitioners' argument that the Administrative Law Judge erred by not considering the totality of the evidence in this case. In affirming the determination, we adopt the following language:

> An objective examination of petitioners' Napeague home reveals that it is certainly suitable or fit for full time habitation 12 months of the year, i.e., for other than vacations. It contains 1,122 square feet of interior living space and a 594 square foot wraparound deck. It contains three bedrooms, two full baths, a working kitchen, a living room with fireplace and hardwood floors. The home has heat fueled by oil, electric and telephone service, cable television and internet access. In fact, the house is used year round by Mrs. Barker's parents, who operate a fishing charter business from the address (Determination of the Administrative Law Judge, conclusion of law "F").

The foregoing paragraph clearly establishes that the Administrative Law Judge considered the physical attributes of the Napeague dwelling.

We reject petitioners' argument that the subjective use of a dwelling by a taxpayer is determinative of the permanent place of abode question. 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 (***see e.g.***, ***Matter of Roth***, Tax Appeals Tribunal, March 2, 1989; ***see also, Stranahan v. New York State Tax Commn.***, 68 AD2d 250 [1979]; ***People ex rel. Mackall v. Bates***, 278 AD 724 [1951]). As we stated in ***Roth***, "[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it" (***Matter of Roth***, ***supra***).

Petitioners' arguments that the Napeague home constituted a "camp or cottage" are rendered moot because we adopted the Administrative Law Judge's finding that the Napeague residence is objectively suitable for year-round habitation.

We remand this matter to the Administrative Law Judge to issue a supplemental determination to address whether petitioners established reasonable cause for the abatement of penalties imposed pursuant to Tax Law § 685(b)(1), (2) *and* (p). Specifically, we wish to know whether the record demonstrates a reasonable basis for petitioners' claim that they did not maintain a permanent place of abode within New York State as reflected on their tax returns for

the years in issue or whether petitioners' conduct was intentionally obfuscatory or wilfully negligent.

A remand will allow the issue to be more fully developed through the two stages of our tax appeals process.

> The fullest possible development of an issue occurs in our two-stage hearing/exception process when the Administrative Law Judge renders a determination on an issue stating a complete rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception. This two-stage process gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination. To the extent that an Administrative Law Judge does not address an issue explicitly raised by the parties in the proceeding or does not state a rationale for a conclusion that is reached, we are either deprived of this benefit or we must remand the case to obtain the Administrative Law Judge's opinion and the parties' responses to it (***see, e.g., Matter of Plymouth Tower Assocs***., Tax Appeals Tribunal, December 27, 1991; ***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, September 12, 1991). In either case, the hearing/exception process does not perform in its most effective and efficient manner (***Matter of United States Life Ins. Co. in the City of New York***, Tax Appeals Tribunal, March 24, 1994).

If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall be final for purposes of section 2016 of the Tax Law after the period for filing an exception to the determination on remand has expired.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John J. and Laura Barker is denied except with respect to the issue of whether petitioners have established reasonable cause for the abatement of the penalties imposed;

2. The determination of the Administrative Law Judge is affirmed except to the extent indicated in paragraph "1" above;

3. The petition of John J. and Laura Barker is denied except to the extent indicated in paragraph "1" above;

4. The Notice of Deficiency dated May 8, 2008 is sustained except to the extent indicated in paragraph "1" above; and

5. This matter is remanded for the issuance of a supplemental determination consistent with this decision.

DATED:Troy, New York
January 13, 2011

/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