

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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## SALT



### ► SUBJECT

**THE NEW YORK COURT OF APPEALS LIMITS THE SCOPE OF THE TERM “MAINTAINS A PERMANENT PLACE OF ABODE” FOR PURPOSES OF DETERMINING WHO QUALIFIES AS A RESIDENT FOR PERSONAL INCOME TAX PURPOSES.**

### ► SUMMARY

In *Matter of Gaied v. New York Tax Appeals Tribunal*, APL-2013-0038 (Feb. 18, 2014), the New York Court of Appeals (the state’s highest court) reversed a Tax Appeals Tribunal personal income tax decision and held that the taxpayer was not a “statutory resident” of New York because he did not “maintain a permanent place of abode” in the state. The court found that, while taxpayer may have owned and maintained a New York apartment where his elderly parents lived and paid the utility bills, he himself did not maintain it for his own use.

### ► DETAILS

#### THE ISSUE

An individual qualifies as a New York resident (or “statutory resident”), and pays New York income tax on income from all sources whether from within or without New York, if he/she maintains a permanent place of abode in New York and spends more than 183 days of the taxable year in the state.<sup>1</sup> A nonresident pays tax on New York source income only.<sup>2</sup> Because it was undisputed that Mr. Gaied spent more than 183 days in New York during the taxable years at issue (*i.e.*, 2001 through 2003) for purposes of working, the matter turned solely on whether he “maintained a permanent place of abode” in the state.

<sup>1</sup> N.Y. Tax Law § 605(b)(1).

<sup>2</sup> N.Y. Tax Law § 631(a).

### CONTACT:

#### WEST:

**ROCKY CUMMINGS**, Tax Partner  
415-490-3130 / rcummings@bdo.com

**PAUL MCGOVERN**, Tax Senior Director  
714-913-2592 / pmcgovern@bdo.com

#### NORTHEAST:

**JANET BERNIER**, Tax Partner  
212-515-5405 / jbernier@bdo.com

**MATTHEW DYMENT**, Tax Senior Director  
617-239-4130 / mdyment@bdo.com

**JONATHAN LISS**, Tax Senior Director  
215-636-5502 / jliss@bdo.com

#### SOUTHEAST:

**ASHLEY MORRIS**, Tax Senior Director  
919-278-1963 / amorris@bdo.com

#### ATLANTIC:

**JEREMY MIGLIARA**, Tax Senior Director  
703-770-0596 / jmigliara@bdo.com

#### CENTRAL:

**ANGELA ACOSTA**, Tax Senior Director  
248-688-3313 / aacosta@bdo.com

**NICK BOEGEL**, Tax Senior Director  
414-615-6773 / nboegel@bdo.com

**JOE CARR**, Tax Partner  
312-616-3946 / jcarr@bdo.com

**GENE HEATLY**, Tax Senior Director  
214-665-0716 / gheatly@bdo.com

**MARIANO SORI**, Tax Partner  
312-616-4654 / msori@bdo.com

**RICHARD SPENGLER**, Tax Senior Director  
616-776-3687 / rspengler@bdo.com

## THE FACTS

In 1999, the taxpayer, a New Jersey domiciliary, purchased a three-unit Staten Island, New York, apartment building. His elderly parents lived in one unit and he leased the two remaining units to tenants. The taxpayer paid the electric bills and maintained a telephone number for his parents' apartment, but he did not live in it at any time nor did he keep any clothing or personal effects there. He did stay with his parents at their request to attend to their medical needs, but he slept on a couch during his visits.

The taxpayer maintained a home in New Jersey, from which he would commute to his Staten Island job on a daily basis, but he sold his New Jersey home in December 2003 to satisfy a large federal tax obligation. Thereafter, he stayed with an uncle in New Jersey until he added an additional basement unit in the Staten Island apartment building. He began residing in the apartment building in 2004.

## THE HOLDING

The New York Court of Appeals held that, in order for the taxpayer to maintain a permanent place of abode in New York, the taxpayer himself must have had a residential interest (*i.e.*, maintained living arrangements) in the abode. This holding comports with the legislative intent of the statute, which is to prevent tax evasion by New York residents. In so holding, the court concluded that there was no rational basis for the Tax Tribunal's interpretation that the taxpayer need not reside in the dwelling, but only maintain it, to qualify as a statutory resident for purposes of personal income taxes.

## ► BDO INSIGHTS

According to the Division of Taxation and Finance and the Tax Appeals Tribunal, maintenance (*i.e.*, payment of utility bills, rent, *etc.*) of the dwelling for the required 183 days, without more, would have been enough to qualify a taxpayer as a New York resident.<sup>3</sup> Thus, the *Gaied* decision lands a blow to the Division's and the Tribunal's attempt to broadly interpret the term "maintains a permanent place of abode" to mean that a taxpayer need not even live in a dwelling to qualify as a resident. Further, it restores the residency test to its original intent - to tax as residents only those who reside in New York.

This Court of Appeals decision is good news for many non-New York residents who own or rent residences for their parents or grown children and often work in New York. They should not be deemed to be statutory residents under the holding of *Gaied*. However, the burden of proof remains on the owner or renter of the property to prove that the residence was not maintained in whole or part for his or her use.

<sup>3</sup> See *Matter of Gaied* (Tax Appeals Tribunal, June 16, 2011).

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