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New York Appeals Court Holds for Taxpayer in Significant Win on Residency

In a notable decision, on June 30, the New York Supreme Court Appellate Division held that a vacation home owned in upstate New York did not qualify as a "permanent place of abode" and so did not trigger statutory residency for the petitioners in New York State. [*Matter of Obus v. Tax Appeals Tribunal* (2022;NY Slip Op. 04206)] The case presents a substantial win for taxpayers and serves to provide some much-needed clarity on the issue as to whether and under what circumstances a taxpayer who maintains a vacation home in New York could qualify as a resident under the statutory residency test.

In a rare unanimous reversal of the lower Tax Appeals Tribunal, the Appellate Division held that a taxpayer must have actually used a dwelling as his residence in order to establish statutory residency; the mere fact that the taxpayer's vacation home had the physical attributes sufficient to make it suitable for year-round living was not enough. The Appellate Division found that the lower tribunal unreasonably focused on the objective characteristics of the vacation home rather than conducting a subjective analysis of the taxpayer's use of the dwelling.

New York tax law provides that a taxpayer is a resident of the state for income tax purposes if he or she is either (1) domiciled in New York or (2) considered a "statutory resident" of New York. In order to qualify as a statutory resident, one must "maintain a permanent place of abode" for substantially all of the year and spend "more than 183 days of the taxable year in the state."

In *Obus*, the petitioners were domiciled in New Jersey. However, the New York tax department questioned whether they were also statutory residents of New York. If so, the petitioners would be subject to tax in both New Jersey and New York on all of their income subject to credit on certain items such as income from wages. As Mr. Obus regularly worked in an office in New York City, it was evident that he had been present in New York for more than 183 days during the year. The issue was whether the petitioners maintained a "permanent place of abode" in New York State.

The dwelling at issue was a vacation home the petitioners owned in Northville, New York, a five-bedroom, three-bath home. The home was climate-controlled and therefore suitable for year-round use, so it was not within the regulatory exception for a "mere camp or cottage" suitable only for seasonal use. Obus and his family had used the dwelling for up to three weeks per year for skiing during the winter or visiting the racetrack in nearby Saratoga Springs in the summer. The home was located some 200 miles from New York City and so was not suitable for commuting to Obus' office. A year-round tenant occupied an attached apartment. Notably, the petitioners did not leave any personal effects in the home, instead bringing with them whatever personal effects they would need for each trip.

For the 2012 and 2013 tax years, the petitioners filed New York income tax returns as nonresidents. As a result of an audit, the New York tax department ultimately concluded that the petitioners were statutory residents and owed additional tax of $526,868, plus interest and penalties.

Upon appeal of the audit, a New York Division of Tax Appeals administrative law judge ruled that the vacation home did not meet the exception for a mere camp or cottage but constituted a permanent place of abode, finding that the home was suitable as a residence for year-round use. The judge rejected the petitioners' argument that the property was maintained for the use of another because a tenant lived in the house, stating that the tenant had fully separate living quarters.

On appeal of that determination, the New York Tax Appeals Tribunal held that the petitioners possessed a residential interest in the vacation home, and that was sufficient for a determination that the property was a permanent place of abode. The Tribunal's determination was based on its review of the objective facts, in particular that the house was equipped for year-round use.

On appeal, the Appellate Division disagreed, finding that the Tribunal unreasonably focused solely on the objective characteristics of the vacation home instead of conducting a subjective analysis of the taxpayers' use of the dwelling. As the Appellate Division stated, "To properly determine the taxpayers' residential interest, it is imperative to consider a variety of factors, including the nature and duration of the use."

The Appellate Division concluded that there were objective facts that would support the Tribunal's determination, specifically the family's free and continuous access to the house. However, there were substantial other facts establishing that the vacation home was not used as a permanent place of abode. The vacation home was used by the Obus family for only three weeks, at most, during each year; it was not close enough to New York City to be used for access to Obus' place of work; the home was occupied by a year-round tenant, who was informed of Obus' presence before his arrival; and the family did not keep any personal effects in the home but rather brought with them what they would need for each trip.

As the Appellate Division stated:

> the fact that it is not a "mere camp or cottage" does not mean that the Northville home necessarily constitutes a permanent place of abode, because the reference to a "mere camp or cottage" is just one example of circumstances where a dwelling will not constitute a permanent place of abode (see 20 NYCRR 105.20 [e] [1]). Thus, it was unreasonable for the Tribunal to focus solely on the Northville home's objective characteristics.

The Appellate Division's holding would appear to overrule or clarify certain earlier key decisions in New York on the same issue:

In *Matter of Barker* (2011), the lower New York Tax Appeals Tribunal held that a vacation home purchased in part for and used by the petitioners' parents could constitute a permanent place of abode for the petitioners, even though it was used by them only sporadically; all that was required was a review of the objective aspects of the abode. Yet in *Matter of Gaied* (2014), the New York Court of Appeals, the state's highest court, instead looked to the purpose of statutory residency, noting that the statutory residency provisions were designed to tax people who were in fact residents, so there must be evidence that the dwelling was in fact used by the taxpayer as a residence.

In *Gaied*, the Court of Appeals held that the mere maintenance of a dwelling was not sufficient for it to qualify as a permanent place of abode and that the taxpayer must have a residential interest in the property. The court ruled that a taxpayer who owned an apartment building in which he maintained a unit for his parents did not have a permanent place of abode in the state, because he kept no personal belongings in the unit and on occasion, when requested by his parents for health reasons, stayed overnight on a couch in the unit.

Following G*aied* and another decision [*Matter of Evans* (1993)], the Appellate Division in *Obus* found that the Tribunal unreasonably focused solely on the objective characteristics of the vacation home instead of conducting a subjective analysis of the taxpayer's use of the dwelling.

> it is imperative to consider a variety of factors, including the nature and duration of the use, which inherently involves a subjective analysis of the taxpayer's use. ... Thus, even though the Northville home could have been used in a manner such that it could constitute a permanent place of abode within the meaning of Tax Law § 605, because petitioners did not use it in this manner, it does not constitute a permanent place of abode, ... and a contrary finding by the Tribunal is inconsistent with the legislative intent underlying the statute. ... As such, it was inappropriate for the Tribunal to deem petitioners statutory residents of this state.

The Appellate Division concluded that "there must be a showing that the taxpayer has a residential interest in the property, which is a fact-intensive inquiry," and that there must be some basis to conclude that the dwelling is used as the taxpayer's residence for it to be considered a "permanent place of abode."

While *Obus* is certainly a taxpayer-friendly decision, one should keep in mind that the Appellate Division's decision was dependent on certain very specific facts. To the extent that any of these facts change, so too may the answer. The New York tax department will likely keep this in mind in future audits.

Authors



Justin M. Hannan
Partner

Boston, MA | (617) 345-4619

jhannan@daypitney.com



Emily Byrnes
Associate

Hartford, CT | (860) 275-0604

ebyrnes@daypitney.com