Obus—New York Court Relaxes Statutory Resident Definition

By Bruce D. Steiner

With a few exceptions, an individual who is domiciled in New York is taxed as a New York resident.[1] In addition, an individual who is not domiciled in New York but who maintains a permanent place of abode in this state and spends, in the aggregate, more than 183 days in New York is a statutory resident for that year.[2]

The regulations explain that:

> 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.[3]

The regulations further explain that "presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State."[4]

The language of the statute and regulations suggests that there need not be any connection between the taxpayer's presence in New York and his or her dwelling place in New York.

Thus, for example, in *In re Barker*,[5] the taxpayer lived in Connecticut and worked in Manhattan, but had a vacation home in the Hamptons where he stayed for about 20 days a year. In 2011, the Tax Appeals Tribunal held in favor of the Division of Taxation since the home was "permanent" (even though the taxpayer rarely used it).

The Court of Appeals opened a window to taxpayers in 2014 in *Gaied v. Tax Appeals Tribunal*.[6] Mr. Gaied lived in New Jersey, worked on Staten Island, and owned a three-family house in Staten Island. His parents lived in one apartment and unrelated tenants lived in the other two apartments. Mr. Gaied occasionally stayed with his parents. The Department of Taxation contended that the taxpayer need not actually dwell in a place of abode to maintain it. However, on appeal, the Court of Appeals held in favor of the taxpayer, saying that "the legislative history of the statute, to prevent tax evasion by New York residents, as well as the regulations, supports 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."

However, the decision left open the question as to whether the place of abode had to be connected to the taxpayer's New York employment. That issue arose in *Obus v. Tax Appeals Tribunal*,[7] decided on June 30, 2022.

Nelson Obus and Eve Coulson lived in New Jersey. Mr. Obus is a partner and the chief investment officer at Wynnefield Capital in Manhattan, which manages several funds that invest in small cap U.S. value stocks.

In 2011, Mr. Obus purchased a five-bedroom home in Northville, in Fulton County in the Adirondacks, more than 200 miles from his office, for $290,000. The house has an attached apartment with a separate entrance that was rented to a tenant for $200 per month.

Mr. Obus used the vacation home two to three weeks a year for cross-country skiing and to attend the Saratoga Race Track. Ms. Coulson only used the home twice since it was purchased. Nevertheless, as in *Barker*, the taxpayers owned their vacation home and could have stayed there at their leisure.

The Department of Taxation determined that the taxpayers were subject to New York resident income tax. As a result, they were liable for additional New York income tax of $526,868 for 2012 and 2013, in addition to interest and penalties. The Tax Appeals Tribunal sustained the determination. However, the Third Department reversed and held that the taxpayers were not subject to tax as New York residents.

Mr. Obus was present in New York for more than 183 days since he worked in Manhattan so the issue is whether his vacation home constituted a "permanent place of abode."

The court in *Obus* said that a camp or cottage (which the regulations give as an example of a dwelling that is not a permanent place of abode) is just one example of circumstances where a dwelling will not constitute a permanent place of abode.

The court noted that the vacation home was not used for access to Mr. Obus' job in Manhattan, nor was it suitable for such purposes given that it was more than four hours away. Moreover, the taxpayers did not keep personal effects there, but instead brought personal items with them during visits.

This decision creates some uncertainty in the law.

At one end of the spectrum are taxpayers who live outside New York City, work in Manhattan, and have apartments in Manhattan where they stay regularly.

At the other end of the spectrum are taxpayers such as Mr. Obus who live outside New York, work in Manhattan, and have vacation homes far from their office where they stay only occasionally. Under *Obus*, they are not residents, at least if they don't keep personal effects there.

What about taxpayers like Mr. Barker who live outside New York City, work in Manhattan, and have vacation homes in the Hamptons or the Catskills that are far enough from Manhattan to preclude daily commuting? It remains to be seen how the courts will rule in those cases. Will it matter how often they stay there? How is 20 days different from a few days? Will it matter whether they keep personal effects there?

The court's comment about the legislative history of the statute may be helpful. In this regard, the court said that:

> The Court of Appeals has explained that the legislative intent underlying Tax Law § 605 is to discourage tax evasion by residents of this state (*see Matter of Gaied v New York State Tax Appeals Trib.*, 22 NY3d at 597; *Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*, 91 NY2d 530, 535 [1998], *cert denied* 525 US 931 [1998]). Essentially, this statute "fulfils the significant function of taxing 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 [New York] as nonresidents."

If the key factor is whether taxpayers "are really and for all intents and purposes residents of the state but have maintained a voting residence elsewhere," then taxpayers like Mr. Barker shouldn't be considered residents.

What if the dwelling is near the taxpayer's office? If the purpose of the statute is to reach taxpayers who are "really and for all intents and purposes" residents, shouldn't the test be how often the taxpayer stays there? Why should it matter whether the dwelling is an apartment near the taxpayer's office or a house in the Hamptons, the Catskills or the Adirondacks?

On the other hand, as a practical matter, if the dwelling is an apartment near the taxpayer's office, the taxpayer is likely to stay there regularly. Otherwise, why would the taxpayer have acquired it? But there are often ways to show where the taxpayer stays. Cell phone records show the location of the nearest cell phone tower for each call. The location of the last call in the evening may show where the taxpayer spent the night.

Given the large amount of tax due for the two years involved, both Mr. Obus and Mr. Barker must have had substantial income from sources outside New York. Since they worked in New York, their income from their employment in New York would have been subject to tax in New York regardless of whether it was taxable as a New York resident. Perhaps some or all of Mr. Obus' income from was an allocation of investment income from Wynnefield Capital's funds.

This situation is most likely to occur in the case of commuters who live in other states, work in New York, and purchase vacation homes in New York.

It is of greatest concern to taxpayers whose home states have lower tax rates, and to taxpayers who cannot get a credit in one state for the tax payable to the other state.

The top income tax rate in New York is 10.9%. New York City also imposes an income tax, with a top rate of 3.876%.

The top income tax rate in neighboring states for 2022 is as follows:

Connecticut: 6.99%.

New Jersey: 10.75%.

Pennsylvania: 3.07%.

Rhode Island: 5.99%.

Vermont: 8.75%.

New York allows a credit for income taxes paid to another state on income earned in the other state. However, New York does not allow a credit for income taxes paid to another state on income not derived from sources in

the other state. Accordingly, an individual taxable as a resident of both New York and another state may be subject to double taxation on intangible income unless the other state allows a credit for the New York tax on the intangible income.

Connecticut allows a credit (up to a pro rata share of the Connecticut tax) for the tax imposed on a resident by another state or a political subdivision on income derived from sources therein. However, that would generally not apply to intangible income.

New Jersey allows a credit (up to a pro rata share of the New Jersey tax) for the tax imposed for the taxable year by another state or political subdivision of such state. Eligibility for the credit is not limited to income derived from sources in the other state. (There is an exception for certain S corporation income, and New Jersey and Pennsylvania have a reciprocal agreement with respect to certain earned income).

Since Mr. Obus was a New Jersey resident, if he were to be considered a statutory resident of New York, he could have taken a credit for the New York tax on his intangible income against his New Jersey tax, up to a pro rata share of his New Jersey tax.

Taxpayers in New Jersey who are concerned that they might be taxable as statutory residents in New York should file protective refund claims in New Jersey. They must do so within three years of payment.[8]

Mr. Barker, on the other hand, could not take a credit for the New York tax on his intangible income against his Connecticut tax.

The Pennsylvania statute allows a resident a credit (up to a pro rata share of the Pennsylvania tax) for any income tax imposed by another state. Taxpayers in Pennsylvania who are concerned that they might be taxable as statutory residents in New York should file protective refund claims in Pennsylvania. They must do so within three years of payment.[9]

Rhode Island allows a credit (up to a pro rata share of the Rhode Island tax) for the tax imposed on a resident by another state on income derived from sources therein. If a taxpayer is taxed as a resident of both Rhode Island and another state, Rhode Island will reduce its tax proportionately if the other state does likewise.

Vermont allows a credit (up to a pro rata share of the Vermont tax) for any income tax imposed by another state on income earned in the other state. In the case of a domiciliary of another state who is a statutory resident of Vermont, intangible income is treated as earned in the state of domicile (thus allowing a Vermont statutory resident a credit for his or her domiciliary state's tax), but only if the other state allows a similar credit to Vermont domiciliaries.

A domiciliary of Connecticut, Rhode Island or Vermont who is a statutory resident of New York will thus be subject to double tax on his or her intangible income.

A domiciliary of New Jersey or Pennsylvania who is a statutory resident of New York will receive a credit in his or her home state. However, the New York tax rates are substantially higher than the Pennsylvania tax rates. Whether the New York or the New Jersey tax rates are higher depends on the particular case. The top New York state rate of 10.9% is higher than the top New Jersey tax rate of 10.75%. However, the 10.9% bracket in New York only applies to taxable income over $25 million, whereas the 10.75% bracket in New Jersey applies to taxable income over $1 million. There are also differences in the deductions, exemptions and credits. New York City has its own income tax, with a top rate of 3.876% on taxable income over $50,000 (single) or $90,000 (joint). Yonkers also has its own income tax, equal to 16.75% of the New York state income tax.

Whether someone who works in New York, spends more than 183 days in New York, and purchases a vacation home in New York is a New York resident will now depend on the facts of the particular case.

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Endnotes

1 N.Y. Tax Law § 605(b)(1)(A).

2 20 N.Y.C.C.R. § 105.20(e)(1).

3 *Id.* § 105.20(e)(1).

4 *Id.* § 105.20(c).

5 Tax Appeals Tribunal DTA No. 822324 (2011), https://www.dta.ny.gov/pdf/archive/Decisions/822324.ord2.pdf?_ga=1.192731757.613545193.1397480304.

6 22 N.Y.3d 592, 983 N.Y.S.2d 757, 6 N.E.3d 1117 (2014), https://scholar.google.com/scholar_case?case=14069091553359604541&q=gaied&hl=en&as_sdt=4,216.

7 2022 N.Y. Slip Op. 04206, https://scholar.google.com/scholar_case?case=15217129282099378309&q=matter+of+obus&hl=en&as_sdt=4,215 (3d Dept. Jun. 30, 2022).

8 N.J.A.C. § 18:26-10.10.

9 72 Pa. Cons. Stat. Ann. § 10003.1(a).