Mays v. New York: A New Framework for an Old Test

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In this edition of Noonan's Notes, the authors herald a New York Tax Appeals Tribunal case in which the tribunal laid out the "permanent place of abode" test in a flowchart.

As regular readers of this column know (both of them), over the past few years we've been chronicling the ongoing battle in New York over its residency rules, and specifically involving the "permanent place of abode" (PPA) definition.[1] This isn't just because it gives us an excuse to talk about our win in the 2014 *Gaied* case, which was one of the first residency cases to reach New York's highest court.[2] It's also because, for practitioners, this issue has been at the forefront of many audits in the New York residency area. The meaning of the court's 2014 decision — and how it affects taxpayers — has been a constant source of debate in these audits.

Well, four years later, and in a case that really was pretty straightforward, New York's Tax Appeals Tribunal has weighed in on the debate. In *Matter of Mays*,[3] a case issued at the end of 2017, the tribunal for the first time outlined how it views the post-*Gaied* PPA test, and in doing so provided what we believe is extremely helpful guidance for taxpayers and the Department of Taxation and Finance (DTF) in interpreting this important residency test. And it even laid out the test in essentially a flowchart.

So in this article, we'll frame the debate, talk about the tribunal's analysis, and lay out that ever-so-cool flowchart.

Background

The issue here surrounds the category of New York residency called "statutory residency," whereby a person is taxable as a New York resident in any year that he maintains a "permanent place of abode" in the state and spends more than 183 days in the state.[4] Over the years, there had been a number of cases in which taxpayers argued that they did not maintain a PPA because they didn't own their place (*Matter of Evans*[5]), or because their place wasn't suitable for year-round usage (*Matter of Slavin*[6] and *Matter of Feldman*[7]), or because it was just vacation property (*Matter of Barker*[8]), etc.

[1] Timothy P. Noonan and Joshua K. Lawrence, "The Goods on *Gaied*: What It Means, From the Front Lines," *State Tax Notes*, May 19, 2014, p. 409; Noonan, "New York Tax Department's Response to *Gaied* Misses the Mark," *State Tax Notes*, July 21, 2014, p. 145; and Noonan and Daniel P. Kelly, "*Gaied v. New York*: 3 Years Gone," *State Tax Notes*, Mar. 6, 2017, p. 825.

[2] *Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014).

[3] *Matter of Mays*, Tax Appeals Tribunal, DTA No. 826546 (Dec. 21, 2017).

[4] N.Y. Tax Law section 605(b)(1)(B).

[5] *Matter of Evans*, 199 A.D.2d 840 (3d Dep't 1993).

[6] *Matter of Slavin*, Division of Tax Appeals, DTA No. 820744 (June 7, 2007).

[7] *Matter of Feldman*, Tax Appeals Tribunal, DTA No. 802955 (Dec. 15, 1988).

[8] *Matter of Barker*, Tax Appeals Tribunal (Jan. 13, 2011), *on remand* Division of Tax Appeals (Apr. 7, 2011), *rearg. denied* Tax Appeals Tribunal, DTA No. 822324 (June 23, 2011).

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But in *Gaied*, New York's Court of Appeals took a more direct pathway toward defining what it means to "maintain a permanent place of abode." The high court said that for a place to constitute a PPA, "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence."[9] The court also concluded that for a property to be a PPA, "the taxpayer must, himself, have a residential interest in the property."[10] To get there, the court looked to the legislative history of the statute, noting that the law was designed to tax those who "really and [for] all intents and purposes [are] residents of the state but have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents."[11]

Soon after *Gaied* was handed down, disagreements began between practitioners and the DTF as to what constitutes a "residential interest" in a dwelling. And the dispute has often centered on whether having the requisite residential interest means that the taxpayer must personally use the dwelling. To us, the answer was a resounding yes.[12] But the DTF has not exactly embraced this view. In its eyes, if a taxpayer owns a dwelling and no one else uses it, the dwelling is a PPA for the taxpayer.[13]

We've maintained that our view is not only consistent with the plain language of the court's *Gaied* ruling (when it said that the taxpayer must "use the place as a residence" to meet the test), but also with the legislative history laid out by the court as the basis of its decision. Indeed, if the statutory residency test is designed to tax people who "really live" in New York, it seems odd to suggest that someone who doesn't live in New York — who doesn't even spend a night in New York — can be a statutory resident!

Thankfully, it didn't take long — at least in "tax years" — for the Tax Appeals Tribunal to weigh in on the debate. This is where *Matter of Mays* enters the picture.[14]

Mays

The question in the case was whether the taxpayer maintained a PPA during the year 2011. In January 2011 the taxpayer moved into a furnished corporate apartment in New York City, where she lived for about four months. The corporate apartment was always intended to be temporary, and her employer covered all expenses as part of its relocation package. Plus, she had exclusive use of the corporate apartment for the duration of her stay. In June 2011 she moved into her fiancé's apartment, and lived there for the rest of 2011. Thus, between the corporate apartment and her fiancé's apartment, the taxpayer had a place in the city (and in fact lived in New York City) for basically the entire year.

All sides agreed that her fiancé's apartment qualified as a PPA, but she asserted that the corporate apartment was not, and advanced several arguments why. First, she argued that the corporate apartment could not qualify as a PPA because her stay there was temporary and thus not "permanent." The tribunal quickly disposed of this argument, noting that the "temporary stay" exception to the statutory residency test was eliminated in 2008.[15] Next, the taxpayer argued that even if the corporate apartment was a PPA, she did not maintain it since her employer paid the bills. But the tribunal rejected that argument as well on grounds that, under *Evans*, a taxpayer is deemed to "maintain" a dwelling by doing "whatever was needed in order to continue her living arrangements." The tribunal found this requirement was met because: (1) she continued her employment "from which the right to reside [in the dwelling] arose," (2) she had exclusive use of the dwelling for the duration of her stay, and (3) she could, and did, extend her stay by request. Finally, the taxpayer argued that the duration of

[9] *Gaied*, 22 N.Y.3d at 594.

[10] *Gaied*, 22 N.Y.3d at 598.

[11] Gaied at 597, *quoting Matter of Tamagni v. Tax Appeals Tribunal of New York*, 91 N.Y.2d 530 (1998), *quoting* Mem. of Income Tax Bureau, Bill Jacket, L. 1922, ch. 425 (internal quotations omitted).

[12] *See* Noonan and Kelly, *supra* note 1.

[13] *See* 2014 Nonresident Audit Guidelines at pp. 54-55 (examples 2 and 4).

[14] *Matter of Mays*, Tax Appeals Tribunal, DTA No. 826546 (Dec. 21, 2017).

[15] *See* TSB-M-09(2)I. There still may be a viable argument that since the law requires a "permanent" place of abode, the "temporary stay" rule is implicit in the definition. But that's an argument for a different article.

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her stays in the corporate apartment and her fiancé's apartment did not, in the aggregate, satisfy the requirement under 20 N.Y.C.R.R. section 105.20 of maintaining a dwelling for "substantially all of the taxable year." But the tribunal found this argument unavailing as well, citing the DTF's audit policy of defining the term "substantially all of the taxable year" to mean a period in excess of 11 months.

But if that's all that happened in the case, we wouldn't bother with another article. The tribunal's holding doesn't seem all that earth-shattering for those who practice in this area. Clearly, corporate apartments can qualify as PPAs. And the idea that two places can be bundled together to count as a PPA for one tax year also is a straightforward concept. As noted above, perhaps some hay could be made about whether a "temporary" place can be a *permanent* place of abode, but this seemed hardly the case to get into such a fight.

No, what's most interesting about *Mays* comes largely in the preamble, where the tribunal laid out a framework for determining whether a place constitutes a PPA, and provided much-needed guidance on the term "residential interest." We expect this framework could form the foundation of the PPA analysis for years to come. So let's get to it!

The *Mays* Flowchart

The confusion over the years on this PPA issue has been frustrating, and we've certainly been disappointed that the court's decision in *Gaied* failed to end the debate; in fact, it really just threw more gas on the fire! But in one sense it's understandable. Practitioners and DTF personnel were forced to wade through a variety of different cases and factual situations to come up with a framework for analyzing the rule. And the dichotomy between how the DTF had historically interpreted the rule against the legislative history made it even more difficult.

But in one paragraph, on page 8 of its decision, the tribunal seems to have coalesced all those rulings into an easy-to-use flowchart (*see* Figure). By laying out a series of yes-or-no questions, the tribunal has possibly laid the groundwork for analyzing PPA cases for years to come.

Here's how it works:

Step One. The first step in the analysis — or the "threshold question" per the *Mays* tribunal — is to determine "whether the dwelling exhibits the physical characteristics ordinarily found in a dwelling suitable for year-round habitation."[16] If answered no, the dwelling is not a PPA. If answered yes, proceed to Step Two.

Step Two. The next inquiry is "whether the taxpayer has a legal right to occupy that dwelling as a residence." If yes, proceed to Step Three. If no, proceed to Step Four.

Step Three. Having determined that the taxpayer has a legal right to occupy that dwelling as a residence, the inquiry turns to whether the taxpayer "exercised that right by enjoying his or her residential interest in that dwelling."[17] In outlining this "residential interest" step, the tribunal pointed to *Gaied*, explaining in a parenthetical that "even though the taxpayer owned a dwelling, he did not use it as such, and thus it did not qualify as his residence." If answered no, the dwelling is not a PPA. If answered yes, the dwelling is a PPA.

A quick sidebar here: this is really important! As outlined above, one of the most contentious issues post-*Gaied* was whether a "residential interest" meant that a taxpayer had to actually use the dwelling in order for it to be treated as a PPA. But the tribunal seems to have resolved the debate. First, as just noted, when outlining this step, the tribunal specifically equated usage of the dwelling with the residential interest test in its parenthetical explanation pointing to *Gaied*. Moreover, when answering the question whether Mays had a residential interest in her corporate apartment, the tribunal looked to her *actual usage* of the place as a defining factor:

> Because petitioner *actually resided* at the [corporate apartment, which] met the physical requirements of permanency, we conclude that petitioner also enjoyed a residential interest in the apartment at the Marc for the course of her stay there. [Emphasis added.][18]

[16] *Mays*, citing 20 N.Y.C.R.R. 105.20(e)(1).

[17] *Mays*.

[18] *Id.*

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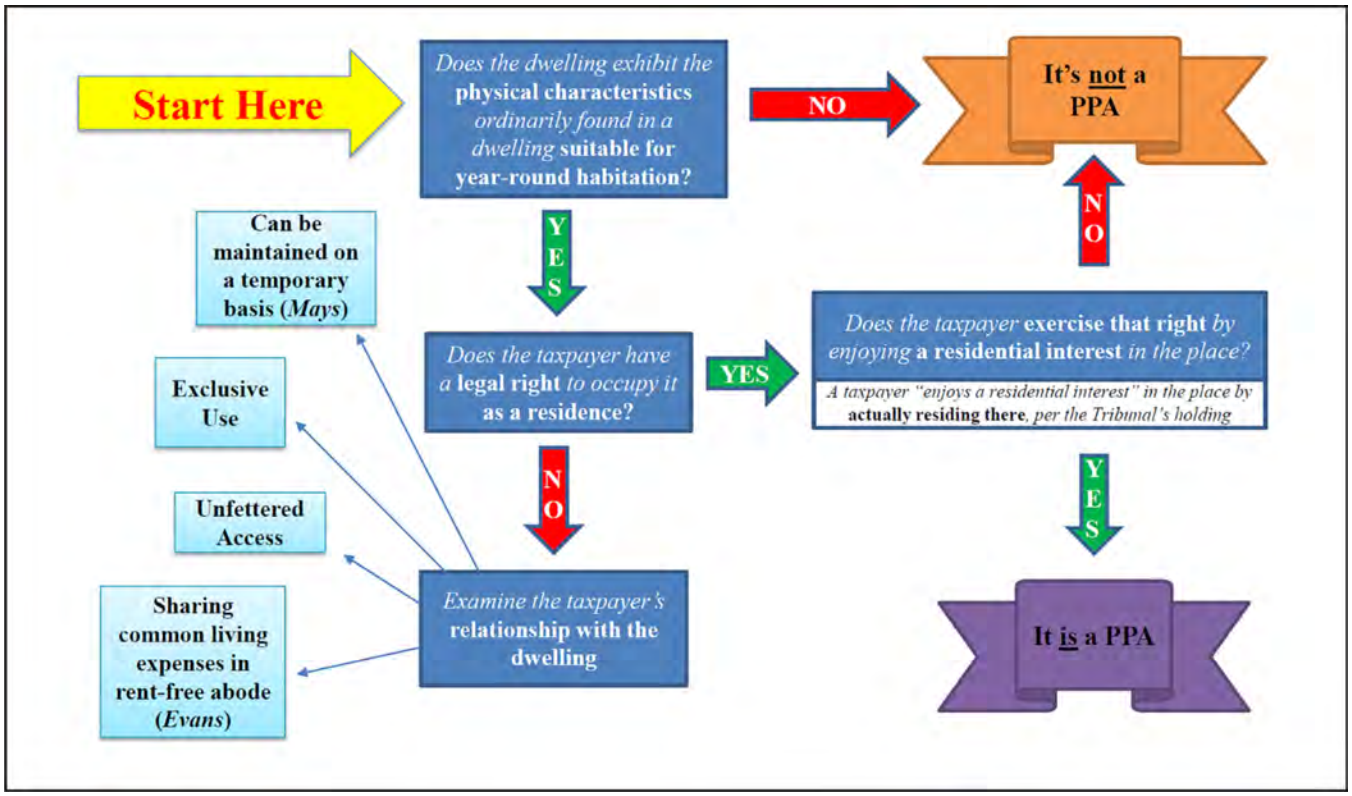

This likely doesn't settle the debate on how much usage creates a residential interest. Occasional usage of a place, consistent with a hotel or vacation residence, should not rise to the level of a residential interest, particularly when factoring in the legislative history relied on so heavily by the *Gaied* court. But at the very least, this explanation should establish, once and for all, that if the taxpayer doesn't use the place, there can be no residential interest. In any case, we digress. Back to the flowchart.

Step Four. We arrive at Step Four only if Step Two was answered no. Here, having determined that the taxpayer *lacked* a legal right to occupy that dwelling as a residence, "the analysis turns to factors indicating the taxpayer's relationship to the place."[19] The inquiry considers a variety of factors, such as whether the taxpayer has "unfettered access" to the dwelling and whether the taxpayer is maintaining the dwelling by "doing whatever is necessary to continue one's living arrangements" in the dwelling.

This would need to be determined on a case-by-case basis, but some examples emerge from *Mays* and earlier cases. For instance, in the case of housing supplied by one's employer, as in *Mays*, "doing whatever is necessary" would entail remaining employed by that employer. Thus, so long as the taxpayer continues her employment, she can be viewed as maintaining a corporate apartment as a PPA. Or in the case of rent-free accommodations, as in *Evans*, "doing whatever is necessary" could entail sharing common living expenses, such as food and housekeeping. Presumably, some of the other relationship factors that the DTF lists in its audit guidelines (such as keeping personal items in the dwelling, having keys, etc.) could fit in here too. But again, note that we only get to the employment of these factors at Step Four, or situations when the taxpayer has no legal interest in the dwelling.

So there you have it, in one easy-to-use, step-by-step flowchart. Will it answer every question about PPAs in future audits? Of course not. The tribunal was wise to note at the end of the decision an important aspect of residency cases: that "determinations of a taxpayer's status as a

[19] *Mays*, citing *Matter of Evans*, Tax Appeals Tribunal, June 18, 1992, *confirmed* 199 A.D.2d 840 (3d Dept. 1993).

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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.'"[20] So there's never going to be a cookie-cutter, one-size-fits-all approach to residency cases, and that's definitely a good thing. Still, this kind of guidance is critically important to lead us to more intelligent and consistent decisions around the PPA test.

Conclusion

Obviously, we're tax nerds, so we get excited about some pretty weird things. But we think this is something to be excited about. The struggle over the PPA definition has gone on for years, and even a decision by New York's highest court didn't end the debate. Now we may at least have a framework for this debate, and we're getting it from a pretty reputable (and precedential) source. That's not to say some lawyers will find a way to muddy the waters or shift the debate; isn't that why we all love lawyers? But for now at least, the tribunal has provided a framework to reexamine these cases, for both practitioners and, we hope, for the DTF. ■

[20] *Id., citing Matter of Newcomb*, 192 N.Y. 238 (1908) (internal citations omitted).

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