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Defining Permanent Places of Abode: Cases and Rulings

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During the late 1980's and early 1990's, a substantial portion of the litigation under the New York State and City Personal Income Taxes involved disputes regarding the residency of the petitioners. Many cases involved individuals who acquired homes in Florida or other low tax jurisdictions while retaining a home in New York. Those cases usually turned on whether the taxpayers were able to demonstrate that they had changed their domicile from New York to the location of their new home. Another significant category of cases involved individuals who maintained homes in New York City as well as homes outside the City in neighboring communities. Those cases generally involved persons who were concededly domiciled outside of New York and turned on whether the taxpayers demonstrated that they were not present in New York City for more than 183 days during the taxable year. Recent residency cases and rulings address situations where the issue is neither domicile nor the 183 day physical presence test. Rather they turn on whether the taxpayer has "maintained a permanent place of abode" in New York.

Residency Overview

A brief summary of the residency rules will help frame the issues. Individuals who are residents of New York State are subject to the New York State Personal Income Tax, in general, on their world-wide income.[1] Nonresidents are subject to tax only on certain categories of income (referred to as New York source income).[2] With certain exceptions described briefly below, an individual is classified as a resident of New York if either (i) the individual is domiciled in New York, or (ii) the individual both maintains a permanent place of abode in New York and is present in New York for more than 183 days during the taxable year (the "183-day rule").[3] The definition of permanent place of abode is also relevant to the two exceptions to the rule that classifies as residents persons domiciled in New York. First, an individual domiciled in New York who (i) maintains a permanent place of abode outside New York during the year, (ii) does not maintain a permanent place of abode in New York during the year, and (iii) spends fewer than 30 days in New York during the year is treated as a nonresident.[4] (This exception is usually referred to as the "30-day Exception".) A second exception covers individuals who are present outside the United States for 450 out of 548 days and do not maintain a permanent place of abode in New York where either they or their family spend over 90 days during the 548 day period.[5]

Until the last few years there was not much discussion of what is meant by "maintain a permanent place of abode". The term by its definition, encompasses two separate and distinct concepts. First, the property must itself constitute a permanent place of abode. Second, the property must be maintained by the taxpayer. Further, with respect to the 183-day rule, there is also a third requirement that the permanent place of abode be maintained for substantially all of the taxable year. Each of these parts of the definition has generated its own law and lore.

Physical Characteristics

A residence may constitute a permanent place of abode only if it is capable of being used as a residence throughout the year. Thus, the regulations provide that a "mere camp or cottage, which is suitable and used only for vacations, [or] a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing etc. will not ordinarily be considered a permanent place of abode."[6]

It is generally accepted that a residence that would under regular conditions constitute a permanent place of abode does not during periods when the place is uninhabitable, for example during periods when the property is under major construction or reconstruction.[7] On the other hand, it seems clear that unilateral actions by a taxpayer that makes a residence temporarily uninhabitable, (for example, turning off water and electricity in a house that will be closed during the winter) is not sufficient to cause the residence not to be a permanent place of abode.

A harder question involves apartments that have been effectively converted from residential use to commercial use. In some cases, someone using an apartment for business (for example, as a doctor's office) will make significant physical changes to the apartment including the removal of the kitchen and bathrooms.[8] In other cases, no work may be done to the apartment other than equipping the apartment with office furniture. Another difficult question relates to a residence which the taxpayer is no longer using for any purpose. In some cases, the residence will be stripped of furniture and belongings. In other cases, the residence may remain furnished in order to make it more attractive to potential buyers or renters.

The regulations, rulings and case law also attempt to distinguish between a place of abode that is maintained permanently and one that is maintained only temporarily. The definition in the regulations provides "a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose." Generally this exception has been utilized by persons living in New York while attending school[9] or by business executives temporarily assigned to work in New York.[10]

'Substantially All'

Another recent source of controversy has been the requirement that a permanent place of abode be maintained for "substantially all of the taxable year" in order that the taxpayer be subject to residency characterization under the 183-day rule. The New York State Department of Taxation and Finance District Office Residency Audit Manual elaborates on this provision, stating:

> For statutory resident purposes … substantially all the taxable year means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year.… Audit Division policy considers the "substantial part of a year" rule to be a general rule rather than an absolute rule. For example, suppose a couple rents an apartment in New York year after year, but each year they sublet the apartment to their son for the month of December…. [T]he Division's position is that this couple should properly be covered by the 183 day rule since they are maintaining the abode on a regular basis.[11]

Two recent authorities shed further light on this topic. In *Matter of Brodman*,[12] a divorcing couple kept a jointly owned apartment in NYC for 46 out of 52 weeks of 1996 without residing in it. For the remaining 6 weeks, the apartment was occupied by a family related to the husband as a favor, with the family taking over the direct operating expenses and costs of the apartment, including mortgage and maintenance fees, utilities, and the like, for those 6 weeks of occupation. Petitioners argued that 1) they did not "maintain" a permanent place of abode during the 6 weeks at issue, because their access to the apartment was restricted by the tenants' occupancy, 2) that the period of 46 weeks during which they did in fact maintain the apartment was not "substantially all of the taxable year". The ALJ found that petitioners did maintain a permanent place of abode, reasoning that petitioners' lack of access during the period of occupancy by guests was "simply a matter of choice," and reflected "essentially a concession in the nature of respect or normal understanding and courtesy, rather than any legal impediment" to access. In reality, the petitioners still had full control over who used the premises during the entire year at issue.

In contrast, the Department issued an Advisory Opinion[13] that a Connecticut domiciliary who spends three to five months each year in the house he owns in East Hampton, New York, will not be held to maintain the house for substantially all of the taxable year because he will donate use of the house for 3 months during the year to a local charity. The Department concluded the Opinion stating:

> However, even if the individual leases his or her house for a period of one month or more, the individual may be deemed to maintain a permanent place of abode for substantially all of the taxable year if the individual enters into such leases year after year on a recurring basis.

The most intriguing part of the statutory definition is the meaning of the word "maintain". It is also the basis of the recent case, *Patricia M. Gass*,[14] that touches upon the various issues. The petitioner in *Gass* is the archetypical sympathetic petitioner. She lived in India and elsewhere as a missionary for the United Church of Christ (the "Church") through 1983. She then moved to New York with her husband, a Minister, who took an executive position with the Church. After moving to New York, she obtained a Ph.D in public health from Columbia University and worked in the field of public health from 1988 through 1998. During that time Reverend and Mrs. Gass lived in an apartment on Riverside Drive in New York City which lease was conditioned on her husband's continued employment with the Church.

In 1998 Mrs. Gass agreed to return to India to become the Country Program Manager of EngenderHealth, an agency that provided family planning services. Her position lasted until 2001 at which point she returned to New York. Her compensation during 1999 and 2000 was $113,773 and $98,623 respectively, consisting of a $6,000 per month salary plus a housing allowance.[15] During the years at issue she filed tax returns separate from her husband who remained in New York. She spent 28 and 23 days in the United States during 1999 and 2000, respectively, including several days spent outside New York. When Mrs. Gass was in New York she stayed at the Riverside Drive apartment.

Mrs. Gass admitted that during the 15 years she lived in New York City she

became a New Yorker at heart and was found to be domiciled in the City. She argued that she was a nonresident of New York for income tax purposes due to the 450 out of 548 days exception. The ALJ noted that, to prove eligibility for this exception, she would need to satisfy the statutory requirement that she "does not maintain a permanent place of abode in New York at which her spouse is present for more than 90 days." The ALJ concluded that she met the requirements of the exception noting that the Riverside Drive apartment was maintained by her husband as his own place of abode. The ALJ concluded that since Mrs. Gass paid no rent or expenses on the apartment, she did not "maintain" it.

The ALJ contrasted Mrs. Gass' situation to that in *Matter of Donovan*[16] where the husband's apartment in New York was considered a permanent place of abode for his wife. In that case, the ALJ noted, each spouse contributed to the monthly maintenance fees and bills. The ALJ also cited *Matter of Moed*[17] for support where the Tax Appeals Tribunal ruled that a husband who was separated from his wife in fact (though not legally) was not considered to maintain her New York apartment. In that case, however, the Tribunal concluded that his wife not only paid the expenses of the apartment but also controlled his access to the apartment.[18] In this case, there appears to be no question as to Mrs. Gass' ability to use her husband's apartment whenever she was in New York.

In many cases, persons who pay for the cost of a residence are deemed not to maintain the residence. In addition to separated spouses, there are cases where parents' pay for the cost of an apartment for their child who is going to school in New York.[19] On the other hand, auditor's sometimes claim that someone residing outside New York should be deemed to maintain a permanent place of abode at the New York residence of someone with whom the person has a romantic relationship.[20] Consequently, it would be quite surprising to conclude that cost sharing is the only basis for finding that someone maintains a permanent place of abode. It is likely that the reasoning of *Gass* will be extremely limited.

1 Tax Law § 612(a).

2 Tax Law §§ 631(a) and (b).

3 Tax Law § 605(b)(1).

4 Tax Law § 605(b)(1)(A)(i). This exception could apply to someone previously domiciled in New York who has not yet established a domicile elsewhere.

5 Tax Law § 605(b)(1)(A)(ii).

6 20 NYCRR § 105.20(e)(1)

7 In *Matter of Martha Stewart*, NY Division of Tax Appeals, ALJ, DTA No. 816263, January 13, 2000 -- the Petitioner argued that her residence in East Hampton, New York was uninhabitable during the first few months of 1992, due to continued construction on the house. The ALJ concluded, however, that construction had been completed prior to the year at issue and that the residence was habitable by 1992.

8 In certain areas of New York City, there are also individuals who have removed their kitchens to obtain more livable square footage given that they eat out all the time anyway.

9 Groveman, (Advisory Opinion) TSB-A97(10)I, December 29,1997, Kaltenbacher-Ross, NY Division of Tax Appeals, ALJ, DTA No. 818499, May 29, 2003.

10 Banca Nazionale del Lavoro, (Advisory Opinion) NY TSB-A-98(10)I ; Mancone, (Advisory Opinion) NY TSB-A-98(11)I . The Department of Taxation and Finance has ruled that the temporary assignment exception applies only if the individual is assigned for a fixed and limited period, rather than an indefinite period. The Department has also held that the exception does not apply to corporate officers with general authority on the theory that those assignments are, by their nature, indefinite in scope. *See generally*, NY Dept. of Taxation and Finance, Nonresident Audit Guidelines, at section .5C.

11 NY Dept. of Taxation and Finance, Nonresident Audit Guidelines, at section .5B1.

12 NY Div. of Tax Appeals, ALJ Determination, DTA No. 818594, November 7, 2002

13 Marcum & Kliegman, LLP, (Advisory Opinion) NYTSB-A-04(4)I, July 6, 2004.

14 Division of Tax Appeals (Small Claims Determinations), DTA No. 819722, May 27, 2004.

15 Although not mentioned in the opinion, it seems clear that most of the income and housing allowance was or should have been excluded from taxable income under Internal Revenue Code section 911.

16 NY Tax Appeals Tribunal, DTA NO. 818803, June 19, 2003.

17 NY Tax Appeals Tribunal, DTA No. 810997, January 26, 1995.

18 In that case, Petitioner testified as to the existence of an informal separation agreement between the two, whereby monthly supplementary income payments were made by Mr. Moed to Mrs. Moed and whereby Mr. Moed would have limited access to stay in the apartment during trips to NYC, which he, in fact, made on about a monthly basis.

19 NY Dept. of Taxation and Finance, Nonresident Audit Guidelines, at section .5,B.,2.

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