

Alert

Maintaining Apartment for Parents Drags Out-of-State Resident Into New York Income Tax

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The New York Appellate Division recently affirmed a noteworthy case¹ involving a New Jersey taxpayer who lived in New Jersey and worked in New York. The taxpayer did not maintain any home or other living space for himself in New York and was not subject to tax in New York. This all changed, according to the New York tax authorities and now the New York Appellate Division, when the taxpayer purchased a three-unit residential property in New York. He rented out two units for investment purposes and moved his parents — who were dependent on him for their support — into the third unit. This loving act is what New York seized on.

Under New York law, a person whose domicile is outside of New York can only be treated as a tax resident if he meets a two-prong test: the person (i) must maintain a “permanent place of abode” in New York *and* (ii) must be physically present in New York on more than 183 days in the year. In the *Gaied* case, the taxpayer commuted to a job in New York so there was never a question that he met the 183-day requirement. The issue turned on whether his ownership of an apartment that his parents lived in constituted a “permanent place of abode.” Common sense dictates that it should not — but New York felt otherwise. The court was moved by the facts that the taxpayer allowed his parents to live in one of the rental units rent-free, their telephone and utility bills were in his name and he paid for these as well as other apartment expenses, he would occasionally spend the night at his parents’ apartment (sleeping on their couch) in order to assist his parents with their medical conditions and he had a key to the apartment giving him unfettered access. On these facts the Appellate Division upheld the Tax Appeals Tribunal’s determination that the taxpayer maintained a permanent place of abode in New York and, because the taxpayer was present in New York for more than 183 days of the year, was a New York resident for New York State income tax purposes.

This case should immediately raise issues for all non-New York residents who have more than 183 days of presence in New York and who buy or rent an apartment for their children, parents or other persons. The case is currently pending an appeal to the New York State Court of Appeals. The audit staffs of the New York State and City tax authorities, however, are already using this case to find more revenue by auditing property owners who commute to New York. Such individuals should take steps to avoid having their support of family members used against them. Suggestions include making gifts of occupancy costs to their children or parents so that the occupants can pay those costs themselves, putting utilities in their children’s or parents’ name(s) and entering into a lease or other document which provides that the property owner has no rights of access to the premises but may only enter as a guest of the residents.

If you maintain a living space in New York State or City for third parties — or if you are considering doing so — and you are not already a New York State or City tax resident, you should contact your attorney at Schulte Roth & Zabel to determine if you may be vulnerable to a residency claim.

¹ *Gaied v. New York State Tax Appeals Tribunal* (No. 513285, N.Y. Sup. Ct. App. Div., Dec. 27, 2012).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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