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New York State And City Residency Rules Create Tax Traps For The Unwary

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Is your client a resident of New York State for tax purposes? Under NYS Tax Law Section 605(b), a resident is defined as someone who is domiciled in New York State, or who maintains a "permanent place of abode" (PPA) and spends more than 183 days of the tax year in New York.

A recent case has redefined "permanent place of abode" for the purposes of determining statutory residency. The new definition eliminates one long-established way of determining if a residence is a permanent place of abode. But taxpayers and their counsel need to be careful. City and state residency rules remain complex, and they continue to lay many tax traps for the unwary.

The case in question is *The Matter of John Gaied v. Tax App. Trib.*, 2014 NY Slip Op. 1101 [N.Y. Ct. App. Feb. 18, 2014]. For decades, before the decision by the Court of Appeals, a residence was considered an abode if the taxpayer had a property right in it coupled with unfettered access. For example, you, a Connecticut resident, might buy your daughter a co-op in Manhattan. But if you worked in the city 240 days a year – far above the 183-day threshold – your ownership of the apartment would make you a New York State and City resident for tax purposes.

The *Gaied* decision changed the playing field. Gaied, a New Jersey resident, owned an auto body shop in Staten Island, where he also owned a property that was occupied by his parents as well as paying tenants. The Court of Appeals held that the Staten Island property was not a permanent place of abode for Gaied because he did not have a "residential interest" in it. In other words, "residential interest" has replaced "property right" as the threshold test for permanent place of abode.


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But these taxpayers as well as those with a "residential interest" need to be careful. State and City tax authorities are aggressive in trying to establish statutory residency, especially when it comes to high-net-worth individuals. A great deal of tax revenue is at stake – up to 12.46 percent tax imposed on one's worldwide income at the highest combined State and City rates. Taxpayers who are considered to have a permanent place of abode based on residential interest can try to challenge their taxability by contending that they are physically present in New York less than 184 days. This is where the traps come in. To establish that your physical presence fell below the 184-day threshold, you will need to present clear and convincing evidence for non-New York-present days. Generally this takes the form of a diary with extrinsic evidence (such as receipts for meals, gas or purchases, as well as E-ZPass statements) attached for each day you claim you were not physically present in New York.

Many taxpayers fail to keep these detailed diaries. Some keep them but fail to collect and attach the extrinsic evidence. True, it is time-consuming to collect and attach receipts to each page. But it is far more time-consuming to try to compile three years' worth of bank and credit card statements long after the fact – and that post-hoc evidence may not be as compelling.

The second closely related trap is that taxpayers fail to remember how the days test works. For tax purposes, part days count as much as full days. Any day when you are physically present in New York for any period of time counts as a full day for the 183-day test. Let's say that you live in Connecticut but stay over in your New York apartment because you are flying out of La Guardia the next day. The night before and the morning of your departure count as *two full separate days* for determining your residency. However, if you take a car service from Connecticut and back to a New York airport, neither day counts as a New York day.

Authorities can challenge taxpayers on other grounds than statutory residency – they can test for domiciliary status. But they prefer to challenge on statutory residency because the days test is more objective.

How should taxpayers and their counsel prepare for the risk of residency challenges? There are two main imperatives:

- Know the standards and know when clients are at risk. Be mindful of clients who might trigger an audit. Stay aware of the "part day equals full day" standard to make sure your clients are counting accurately.
- Insist on meticulous (and contemporaneous) record keeping, including extrinsic evidence.

Beyond that, keep in mind that the higher the client's net worth, the greater the audit risk.

Experienced counsel is likely to be aware of clients who may trigger an audit. Nevertheless, tax laws are complex, and a consultation with a tax professional can help identify potential issues where the quality of record keeping might fall short.

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