STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELSON OBUS AND EVE COULSON	:	DETERMINATION DTA NO. 827736
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2012 and 2013.	:	

Petitioners, Nelson Obus and Eve Coulson, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2012 and 2013.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on October 3, 2018. Petitioners, appearing by Greenberg Traurig (Glenn Newman, Esq., of counsel), filed a brief in support of their petition. The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), filed a brief in opposition to the petition. Petitioners filed a reply brief due on February 28, 2019 which date commenced the six-month time frame for issuance of this determination.

ISSUE

Whether petitioners maintained a permanent place of abode in Northville, New York, during the tax years 2012 and 2013.

FINDINGS OF FACT

1. Petitioners,[1] Nelson Obus and Eve Coulson, are domiciled in the State of New Jersey.

2. Petitioner is a partner and Chief Investment Officer at Wynnefield Capital (Wynnefield) located in New York, New York. Petitioner works primarily out of his office in New York City and, as such, was present within New York for over 183 days during each of the years in issue.

3. On or about December 8, 2011, petitioner purchased a home located in Northville, New York, for $290,000.00. The home is located more than 200 miles from his office. This home has two stories with five bedrooms and three bathrooms. The home has year-round climate control.

4. In addition to the main house, there is an attached apartment with a separate entrance and key. The apartment is occupied year round by a tenant who had an existing rental agreement with the prior owners of the home. No rental or lease agreement was submitted into evidence, yet petitioner testified that the monthly rental amount was $200.00. Petitioner paid all of the expenses associated with the property including housekeeping, pest control, snow removal and yard maintenance, which expenses exceeded the amount of money he received monthly from his tenant. The National Grid account for electric service is in petitioner's name.

5. It is undisputed that petitioners use this home for vacation purposes only. Petitioner enjoys cross-country skiing in the winter months and attending the Saratoga Race Track in the summer. Although the parties do not agree with the specific numbers of days that petitioners spent at the Northville home, they spent no more than two to three weeks there. Petitioners contend it was even less.

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[1] Petitioner Eve Coulson's name appears herein by virtue of having filed joint federal and New York State income tax returns with her husband, petitioner Nelson Obus. Unless otherwise specified, the use of petitioner shall refer to Nelson Obus.

6. Petitioners filed New York State nonresident income tax returns, forms IT-203, for each of the years at issue. Form IT-203 contains a question regarding whether petitioners maintained living quarters within New York State. Petitioners indicated that they did not maintain any living quarters within the State for either 2012 or 2013.

7. After an audit conducted by the Division of Taxation (Division), a notice of deficiency, assessment number L-044606507 (notice), dated April 11, 2016, was issued to petitioners asserting additional New York State income tax due in the amount of $526,868.00 plus interest and penalty for the years 2012 and 2013. Petitioners were assessed based upon the Division's finding that, since they maintained a permanent place of abode and were present within the State in excess of 183 days, they were liable as statutory residents for income tax purposes for the years 2012 and 2013.

8. Petitioners protested the notice by filing a timely petition with the Division of Tax Appeals on June 27, 2016.

9. A formal hearing was held on October 3, 2018. Both petitioners testified at the hearing, however, they did not submit any documentation into evidence.

CONCLUSIONS OF LAW

A. Tax Law § 605 (b) (1) (A) and (B) sets forth the definition of a New York State resident individual for income tax purposes.

A resident individual means an individual:

> "(A) who is domiciled in this state, unless (i) the taxpayer maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . or

> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State, namely (A) the domicile basis or (B) the statutory residence basis, i.e., the maintenance of a permanent place of abode in the state and physical presence in the state on more than 183 days during a given taxable year.

Since petitioners were domiciled in New Jersey during the audit years, the issue is whether petitioners are liable for New York State personal income tax on the statutory residence basis. As there is no dispute that petitioner was physically present within the State for more than 183 days, the sole issue in this case involves whether petitioners maintained a permanent place of abode in New York during 2012 and 2013.

C. Permanent place of abode is interpreted in the Division's regulations at 20 NYCRR 105.20 (e) (1), in pertinent part, as:

> "[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 (emphasis supplied)."

D. Petitioners frame their argument as whether their limited use of the Northville home, otherwise rented out during the year, constitutes a permanent place of abode. Petitioners rely on the Court of Appeals decision in ***Matter of Gaied v New York State Tax Appeals Trib.*** (22

NY3d 592 [2014]) to emphasize that, since their property was maintained for another's use, such residence does not qualify as a permanent place of abode for them.

In ***Gaied***, the facts demonstrated that the petitioner therein owned a multi-family apartment building in Staten Island that contained three rental units. Two of these units were rented out and the third unit was maintained by the petitioner for use by his parents. The petitioner was domiciled in New Jersey; however, he owned an automotive service and repair business on Staten Island and commuted daily from New Jersey. The Tax Appeals Tribunal (Tribunal) concluded that the petitioner was liable as a statutory resident based upon his presence within New York City for over 183 days and his maintenance of a permanent place of abode in Staten Island. The Tribunal based its decision on the fact that the petitioner had access to the permanent place of abode and maintained it for his parents. The Tribunal held that access was enough and there was no requirement that he actually reside there. The Tribunal was affirmed by the Appellate Division (***Matter of Gaied v New York State Tax Appeals Trib.***, 101 AD3d 1492 [3d Dept 2012]).

The Court of Appeals, however, disagreed and reversed. The court held, in pertinent part, that:

> "The Tax Tribunal has interpreted 'maintains a permanent place of abode' to mean that a taxpayer need not 'reside' in the dwelling, but only maintain it, to qualify as 'statutory resident' under Tax Law § 605 [b] [1] [B]. Our review is limited to whether that interpretation comports with the meaning and intent of the statutes involved [citation omitted]. Notably, nowhere in the statute does it provide anything other than the 'permanent place of abode' must relate to the taxpayer. The legislative history of the statute, to prevent tax evasion by New York residents, as well as the regulations, support the view that in order for a taxpayer to have maintained a permanent place of abode in New York, that taxpayer must, himself, have a residential interest in the property" (***Gaied***, at 598).

In this case, petitioners' argument that they maintained the residence for their tenant's use is rejected. Primarily, their tenant has his own separate living quarters and, as such, his occupancy does not affect the use by petitioners of their home. Petitioners purchased this home as a vacation home for their enjoyment of certain activities in the Northville, New York, area. ***Gaied*** simply does not apply to the facts of this case. Therefore, it is concluded that the Northville home is a permanent place of abode maintained by them for their use.

E. Petitioners also argue that the above-quoted regulation, interpreting a permanent place of abode, specifically excludes "a mere camp or cottage, which is suitable and used only for vacations." Moreover, petitioners assert that because they rented out the residence for 12 months of the year to their tenant and petitioners' use is limited to only vacations, then it cannot be determined that petitioners, in fact, maintained the home for substantially all of the year.

As set forth above, petitioners' tenant had separate living quarters and petitioners were at no point prevented from using the property for substantially all of the year for both 2012 and 2013. Moreover, petitioners paid all expenses related to the upkeep and maintenance of the property. Since petitioners maintained a permanent place of abode and were present within New York for more than 183 days each of the years in question, petitioners are properly taxable as statutory residents of New York for the years 2012 and 2013.

Petitioners appear to seek a subjective reading of the regulation and its definition of permanent place of abode. Petitioners urge that the language regarding "a mere camp or cottage, which is suitable and used only for vacations," describes their Northville home. However, the Northville home has five bedrooms and three bathrooms. It can and is used year round and, as such, is considered permanent. "It is well settled that a dwelling is a permanent place of abode

where, as it is here, the residence is objectively suitable for year round living" (***Matter of Barker***, Tax Appeals Tribunal, January 13, 2011). The fact that petitioners chose to use this home exclusively for vacations does not transform its characterization as a permanent place of abode.

F. Petitioners also object to the regulations and bulletins issued by the Division with respect to Tax Law § 605 on the basis that the regulations and bulletins are arbitrary and capricious. This argument is rejected.

The Division of Tax Appeals has authority to rule on the validity of regulations promulgated by the Division (***see*** Tax Law § 2006 [7]). Generally, such regulations are properly upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v Tully***, 79 AD2d 761 [3d Dept 1980], ***affd*** 54 NY2d 711 [1981) or erroneous (***Matter of Koner v Procaccino***, 39 NY2d 258 [1976]).

The regulation at 20 NYCRR 105.20 [e] [1], in interpreting the phrase *permanent place of abode,* provides guidance concerning certain living quarters maintained by a taxpayer that are not permanent in nature, where the property is not suitable for year-round use or does not contain cooking facilities or bathing facilities. The regulation provides guidance for determining what is considered permanent in order to be characterized as a permanent place of abode and, as such, is not expanding the application of Tax Law § 605, as petitioners assert herein.

Petitioners continue to rely on ***Gaied*** as support for their position. However, as set forth in conclusion of law D, the facts in ***Gaied*** are easily distinguishable from facts herein. Petitioners are attempting to equate the phrase *mere ownership of a residential property* to residence in that property. However, the facts of this case demonstrate that petitioners purchased the Northville home for their use throughout the year and maintained the property for their use.

G. Petitioners argue that the imposition of a resident income tax in these circumstances is unconstitutional as applied to them. Petitioners argue that taxation of them as statutory residents is unconstitutional under the dormant Commerce Clause of the United States Constitution because it leads to multiple taxation of their income. Specifically, petitioners assert that no credit is given for taxes paid to other states on income with no identifiable situs. As the Division points out, this argument has been rejected by the Court of Appeals in ***Matter of Tamagni v Tax Appeals Trib.*** (91 NY2d 530 [1998]), wherein the statute was upheld as constitutional (***see also Chamberlain v New York State Dept. of Taxation and Fin.***, 166 AD3d 1112 [3d Dept 2018], ***lv denied*** 32 NY2d 1216 [2019]). Moreover, petitioners' argument amounts to a facial challenge to the New York statutory residence provision and the Division of Tax Appeals lacks jurisdiction to consider facial validity challenges of statutes (***see Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

H. The petition of Nelson Obus and Eve Coulson is denied and the notice of deficiency, dated April 11, 2016, is sustained.

DATED: Albany, New York
August 22, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE