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Recent Opinion Holds Office Is Not a "Permanent Place of Abode"

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In our modern economy, some workers may feel that they practically live at the office. This sentiment pervades our culture sufficiently that one of these workers felt it necessary to get a ruling that he did not actually live in his office (even though he slept there three nights a week). In a recent advisory opinion, TSB-A-18(3)I (Aug. 29, 2018) (the "opinion"), the New York State Department of Taxation and Finance (DTF) ruled that a taxpayer's office was not a "permanent place of abode," and, therefore, the taxpayer was not a resident of New York for income tax purposes.

Home Away From Home

In the opinion, taxpayer (whose domicile was in Washington, D.C.) worked at an investment management firm on Long Island. Taxpayer oversaw the firm's securities and commodities trading activities, which included investments that traded during "European and Asian trading hours." Seemingly, because of both the distance from his domicile and the necessity of working during certain overnight hours, taxpayer typically slept on a Murphy bed in his 330-square-foot office on Monday, Tuesday, and Wednesday night each week. (A Murphy bed is a bed that is built and folds into a wall. In old TV and movie comedies, Murphy beds were used as props, either by falling down and knocking out one of the characters or by folding up and trapping someone in the wall.) Taxpayer maintained some work clothes and toiletries in his office.

Taxpayer used the office's common restroom and gym showers (shared with all other employees). Taxpayer ordered all of his meals to the office, as there was no cooking facility on site that was available for personal use. Taxpayer did not pay rent or otherwise offer any consideration to sleep in his office. Further, taxpayer's overnight use of his office was restricted to those nights that he was working and he was not permitted to bring guests into the office during those stays. Taxpayer did not receive any personal mail at office.

"Permanent Place of Abode"

N.Y. Tax Law §601 generally imposes tax on the income of individual "residents" of New York State. For these purposes, N.Y. Tax Law §605(b)(1) includes in the definition of resident an individual "who 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" (a "statutory resident"). As an alternative to statutory residence, an individual may also be a resident of New York State by virtue of his "domicile," a subjective inquiry. (Prior to April 12, 2018, the definitions of domiciliary and statutory resident were mutually exclusive; however, for dates on or after April 12, 2018, an individual can be both a domiciliary and a statutory resident.)

Although the statute offers no further definition for permanent place of abode, the regulations (at 20 N.Y.C.R.R. §105.20(e)) provide that "[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."

The regulations further state that "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." Most importantly, a place of abode may be maintained by a taxpayer even if the taxpayer uses the dwelling place sporadically or rarely so long as the taxpayer has the ability to use it whenever he wishes.

The opinion's holding—loosely, that an office is not a home—may seem obvious on the plain language of the regulations. However, dismissing the result of the ruling as foregone conclusion misses DTF's careful analysis of what constitutes a permanent place of abode. This analysis could be useful for taxpayers in less clear-cut cases.

Factors Considered

The first factor DTF examined was whether the office was "taxpayer's residence." For this factor, DTF looked to *Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014), which concerned a taxpayer who owned an auto repair shop on Staten Island. John Gaied owned a multifamily home near his auto

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repair shop; his parents occupied one unit and unrelated tenants occupied the other units. From time to time, Gaied would spend the night (sleeping on his parents' sofa) in order to assist with his parents' medical needs. He kept no personal effects at his parents' apartment.

The Court of Appeals rejected the Tax Appeals Tribunal's holding that to "maintain" a permanent place of abode (the language used in the regulations), one did not actually need to reside at that putative permanent place of abode. (That it, the definition of "maintain" is not met merely because the taxpayer owns a place of abode.) Further, the court held that a taxpayer himself (and not merely any person) must have a "residential interest" in the dwelling in order for it to be a permanent place of abode. The taxpayer in the opinion did not have a residential interest in his office (particularly given the absence of proper bathroom and kitchen facilities).

The second factor DTF examined was whether taxpayer had "free and continuous access" to the place of abode. For this factor, DTF looked to *Evans v. Tax Appeals Tribunal*, 199 A.D.2d 840 (3d Dept. 1993), and *Craig F. Knight*, DTA No. 819485 (N.Y. Tax. App. Trib., Nov. 9, 2006). In *Evans*, the Appellate Division held that a taxpayer had a permanent place of abode at the rectory of a church in Manhattan. The opinion noted that although John Evans had no legal right to stay in the rectory, he had free and continuous access to stay there since he had a key and could come and go as he pleased. The priest of the church of which the rectory was part was described in the opinion of the court as a friend of the taxpayer.

In contrast, in *Knight*, the Tax Appeals Tribunal determined that a taxpayer did not have a permanent place of abode in New York where he did not have free and continuous access to two separate dwellings (a "corporate apartment" and the apartment of his girlfriend) because "[i]n varying degrees, petitioner's ability to stay in these places was apparently subject to the sufferance of other people." Although the *Knight* taxpayer was part-owner of the business that leased the corporate apartment, his ability to use the apartment was (in part) subject to the apartment's use by his other co-owners or use by the business.

Additionally, the *Knight* taxpayer had only one of two keys necessary to unlock his girlfriend's apartment. That is, his girlfriend could deny him access to the apartment by locking the second lock. (The Tribunal notes that the second lock was a difficult-to-pick Medeco-brand lock.) In the opinion, the taxpayer did not have free and continuous access to his office; rather, his overnight access was limited to those times that he was working, and he was not permitted guests.

Although the opinion cites to *Evans* and *Knight* with respect to the free and continuous access factor, both of those cases also contain aspects going to residential interest. In *Evans*, the parish provided the apartment to the priest, and paid for all repairs and maintenance. However, Evans split the cost of other apartment expenses (food, cleaning supplies, etc.) with the priest. Taxpayer also provided some of his own furniture, and kept personal effects at the apartment. Notwithstanding the absence of rent (which was not required only because the parish provided the home), the Appellate Division held that this arrangement "had all indicia of a shared rental."

The taxpayer in *Knight*, on the other hand, seemingly had no residential interest in the corporate apartment and his girlfriend's apartment. First, he did not contribute (at least not materially so) to the costs of those apartments. (The Tribunal disregarded his indirect share of costs of the corporate apartment through taxpayer's ownership of the lessee business.) Second, taxpayer did not maintain "clothing, personal articles or furniture" in either apartment.

Conclusion

One additional aspect that DTF did not discuss in the opinion is that the taxpayer's arrangement was not one structured to avoid New York State income tax (which may have changed the outcome of the ruling). The Court of Appeals in *Gaied* noted that the reason for statutory residence was to prevent abuse from taxpayers who "for all intents and purposes [are] residents of the state," but manage to maintain domicile elsewhere. (Internal citations and quotation marks omitted.) This is to say that, while the opinion demonstrates a common sense approach and a careful application of the law, one could imagine, on audit, the state taking a position contrary to its conclusion in the opinion under slightly different facts.

For this reason, taxpayers should focus on the analysis of the ruling (and not merely its conclusion) to ensure that they have not inadvertently acquired a permanent place of abode in New York. Nonetheless, this ruling is helpful for other taxpayers who may find themselves, literally or figuratively, living at the office.