

Court Provides Tax Relief For Those With a Second Home in New York

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For years taxpayers who commuted to New York for work while owning a rarely used New York vacation home or pied-a-terre have been surprised to find themselves taxed as New York State and/or City residents. This often meant the taxpayer would be treated as an income tax resident in two states, with both states imposing income tax on passive income (interest, dividends, capital gains, etc.). The recent *Obus* decision should provide relief for such unfortunate taxpayers, and may even allow them to obtain a refund by filing an amended New York income tax return.

What Happened in *Obus*

Nelson Obus lived in New Jersey, but owned a vacation home in Northville, New York. Obus worked in New York City, more than 200 miles from Northville. The home had year-round climate control, but Obus used the property for less than three weeks a year. His wife, Mrs. Coulson, used the property even less.

Under New York Tax Law §605(b)(1), an individual is an income tax resident of New York if he or she is physically present in the state for more than 183 days and “maintains a permanent place of abode” (PPA). As is common in these types of cases, the only question was did this rarely used vacation home constitute a PPA.

The statute does not define a PPA, nor does it explain what is meant by “maintains.” While every case is fact specific, and this has been a frequently litigated issue, the view of the Department of Taxation and Finance (DOF), supported by the Division of Tax Appeals, has been expansive. For all intents and purposes if a property has a bathroom, a kitchen, heat, and you have the right to live in it for eleven months of the year, it’s a PPA.

In this case the DOF found the Northville vacation home was a PPA and the Division of Tax Appeals upheld that finding, meaning Mr. Obus was a New York income tax resident. Mr. Obus, however, continued his fight and, in June 2022, the Supreme Court Appellate Division (Third Department) ruled in his favor *In the Matter of Nelson Obus*, 206 A.D.3d 1511.

Specifically, a five-judge panel unanimously ruled that to be a PPA the property must actually be used by the taxpayer as a residence. The mere fact that it could be used as a residence (because it

had heat, cooking facilities, etc.) is not enough. “Significantly, there must be a showing that the taxpayer has a residential interest in the property, which is a fact-intensive inquiry.[...] The taxpayer must have utilized the dwelling as his or her residence; maintaining a dwelling that could be a permanent place of abode is not enough to establish status as a statutory resident.” *Obus* at 1513 (citations omitted).

DOF appealed this decision, but on February 9, 2023, the New York Court of Appeals refused to hear the case, officially ending this litigation and leaving *Obus* victorious. Because *Obus* did not use the Northville home as a residence, it was not a PPA, and he was not a New York resident.

New Definition of Permanent Place of Abode

Obus represents a dramatic shift in how PPA, and therefore New York income tax residence, is defined. Going forward the DOF will have to make a “fact-intensive inquiry” to determine if a taxpayer used a dwelling as a residence. Among the factors to be considered are (i) the amount of time the home is used, (ii) whether the home could be used to access the owner’s job, (iii) whether it was in fact used in that manner, (iv) whether the owner had unfettered access to the property, and (v) whether the owner maintained personal effects at the property.

This is not an exhaustive list. For example, in the future a court may consider how long the property was owned, whether the use of that property changed over time, the relationships a taxpayer has with neighbors or his/her involvement in community activities, and how the property is furnished.

While questions remain, taxpayers should celebrate the *Obus* decision. Going forward, to establish the existence of a PPA there will need to be a fact intensive inquiry into whether the taxpayer used the property as a residence, and therefore that person should be taxed as a New York resident. Time will tell how the DOF responds and whether a more equitable regime emerges.

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