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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF GAIED,

Appellant,

-against-

No. 26

NEW YORK STATE TAX APPEALS TRIBUNAL,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
January 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 26, the Matter  
2 of John Gaied v. New York Tax Appeal Tribunal.

3 Counselor, do you want any rebuttal time?

4 MR. NOONAN: Yes, Judge, two minutes?

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
6 ahead. You're on.

7 MR. NOONAN: May it please the court, my  
8 name is Timothy Noonan, counsel for Mr. Gaied in this  
9 case.

10 CHIEF JUDGE LIPPMAN: [Gay-ed], excuse me.

11 MR. NOONAN: [Gay-ed].

12 CHIEF JUDGE LIPPMAN: Okay, keep going.

13 MR. NOONAN: Your Honors, this is a case  
14 involving New York's residency rules, and one that  
15 has struck a chord, because of the unusual results it  
16 creates. It - - - the result is a taxpayer - - - a  
17 New Jersey taxpayer, who doesn't live or reside in  
18 New York, is being taxed as a New York resident for  
19 tax purposes.

20 CHIEF JUDGE LIPPMAN: Counsel - - -

21 JUDGE READ: But he does own the - - - he  
22 does own the property?

23 MR. NOONAN: He does own the property.

24 JUDGE READ: Isn't that enough?

25 MR. NOONAN: It is not enough, Judge, under

1 our view.

2 JUDGE READ: Why not?

3 MR. NOONAN: Well, under our view, Judge,  
4 the standard that was set forth - - - and it's on  
5 page 61 to 64 of the record - - - the test we think  
6 you should apply, Judge, is the test that was applied  
7 first by the Tax Appeals Tribunal in this case in its  
8 first decision.

9 CHIEF JUDGE LIPPMAN: What's the  
10 significance apropos what Judge Read is asking you,  
11 that it's in his name; it's clearly his house; he  
12 owns it.

13 MR. NOONAN: Sure, Judge. The - - - the  
14 significance is there's two factors. The test is  
15 whether or not he's maintaining a permanent place of  
16 abode. One factor is maintenance, and again this is  
17 the test set forth by the - - -

18 JUDGE SMITH: Well, if the question is - -  
19 -

20 JUDGE GRAFFEO: Is this the administrative  
21 law judge decision - - -

22 MR. NOONAN: No - - -

23 JUDGE GRAFFEO: - - - that you're talking  
24 about?

25 MR. NOONAN: - - - it's the Tax Appeals

1 Tribunal decision that was initially in favor.

2 JUDGE GRAFFEO: The first - - - the first  
3 Tribunal decision.

4 MR. NOONAN: The first Tribunal decision.  
5 So I started answering the question. So the question  
6 of whether or not someone owns it is relevant to the  
7 question of maintenance. Do they, you know, pay the  
8 living expenses? Do they do what's necessary to - -  
9 -

10 JUDGE SMITH: Is the question really  
11 whether he "maintains" a place of abode means  
12 maintains it for himself?

13 MR. NOONAN: Judge, I think so. I mean,  
14 and it gets to the second prong of the test, and  
15 that's the prong of the test that, again, the first  
16 tribunal also laid out, which was that the - - - the  
17 abode also has to be a permanent place of abode.

18 JUDGE READ: Well, what - - -

19 JUDGE GRAFFEO: What if you own two or  
20 three properties and you stay regularly in each one.  
21 Would that still - - -

22 MR. NOONAN: That would count - - -

23 JUDGE GRAFFEO: - - - meet your test as a  
24 statutory resident?

25 MR. NOONAN: Sure, yes. Under - - - under

1           that test, if someone - - - I mean, under - - -  
2           again, the view set forth by the first Tribunal, the  
3           permanent place of abode test looks to whether - - -  
4           looks to two things: does the taxpayer - - - well,  
5           what are the physical attributes of the dwelling, and  
6           how does the taxpayer use the dwelling?

7                        CHIEF JUDGE LIPPMAN: What - - - what about  
8           in this case where your immediate family lives there?

9                        MR. NOONAN: Well, the - - - the question  
10          is - - -

11                      CHIEF JUDGE LIPPMAN: Your parents live  
12          there - - -

13                      MR. NOONAN: Right.

14                      CHIEF JUDGE LIPPMAN: - - - you go to see  
15          them all the time. Taking care of them in the best -  
16          - - best sense of that. Can't be if you don't sleep  
17          there on a regular basis, no good?

18                      MR. NOONAN: No good, Judge, because the  
19          question again is whether this taxpayer is resident.  
20          The test is, do they maintain a permanent place of  
21          abode? A place of abode is a dwelling place. New  
22          York tax regulations describe it as a dwelling.

23                      CHIEF JUDGE LIPPMAN: If he lived there  
24          before, and then left, and he's left with this  
25          arrangement where he goes and takes care of his

1 parents. That's okay, right?

2 MR. NOONAN: That's - - - that's - - - I'm  
3 not sure, Judge; those aren't our facts.

4 CHIEF JUDGE LIPPMAN: It would probably - -  
5 - but he kept his residence even though he doesn't  
6 live there anymore?

7 MR. NOONAN: Well, the question is, does he  
8 maintain living arrangements for himself in a  
9 dwelling place sufficient to tax him as a resident?

10 CHIEF JUDGE LIPPMAN: And - - -

11 JUDGE GRAFFEO: And what does this record  
12 tell us? Does he spend overnights there on a regular  
13 basis?

14 MR. NOONAN: The record tells us that once  
15 every one or two months, he stayed overnight there  
16 when his parents asked him. That's clear in the  
17 record.

18 JUDGE PIGOTT: We're stuck - - - we're  
19 stuck with the facts as - - - as you were about to  
20 outline. I take it you - - - you prefer the  
21 rationale of the dissent in the - - - in the  
22 Appellate Division.

23 MR. NOONAN: I like the rationale of the  
24 dissent, yes, Judge.

25 JUDGE PIGOTT: Is it - - - does it address



1 the Tamagni case - - - again, this court hasn't  
2 interpreted the phrase "permanent place of abode"  
3 yet, but in the Tamagni case, this court looked at  
4 the reason why we have this statutory residency  
5 provision.

6 And it said - - - and there's legislative  
7 history right in the decision where the Tax  
8 Department went to the legislature and said, look, we  
9 have cases of millionaires who spend ten months of  
10 the year in their homes in New York, and yet they're  
11 able to avoid taxation, because they - - - they claim  
12 a domicile elsewhere.

13 So what this court said, and what the - - -  
14 what the legislature said back then is, this is to  
15 get at folks who really are residents, but yet  
16 they're able to claim domicile somewhere else, so  
17 they're not paying tax - - -

18 JUDGE GRAFFEO: What's our standard of  
19 review? Isn't this a substantial evidence case?

20 MR. NOONAN: Judge, it's not. It's - - -  
21 we need to get the standard right. The - - - the Tax  
22 Appeals Tribunal applied the standard that's been  
23 applied for twenty years, and that standard is  
24 looking to the legislative history - - - looking to  
25 the intent behind statutory residency. Does a



1 taxpayer have to have living arrangements in a  
2 dwelling - - -

3 JUDGE GRAFFEO: Well, that's - - - that's  
4 the Tribunal, but what's our standard of review of  
5 their decision?

6 MR. NOONAN: Of the Tribunal's decision?

7 JUDGE GRAFFEO: Yes.

8 MR. NOONAN: Yeah, I think the - - - the -  
9 - -

10 JUDGE GRAFFEO: Isn't it - - - isn't it  
11 substantial evidence?

12 MR. NOONAN: Well, Judge, what happened - -  
13 - I - - - no - - - Judge, I don't think so. I think  
14 what happened is, there was the initial Gaied  
15 decision, where they decided in favor of Mr. Gaied  
16 and applied the test, we think - - - we're asking  
17 this court to apply. Then there was a second  
18 decision that applied a different test. That was the  
19 wrong test. We have to get this test - - -

20 JUDGE SMITH: So you're saying - - - you're  
21 - - -

22 JUDGE GRAFFEO: You want us to examine the  
23 test itself.

24 MR. NOONAN: You have to get the test right  
25 first, and then, Judge, after that, it'll be easy. I

1 mean - - -

2 JUDGE SMITH: You - - - you say it's a pure  
3 question of law, then. There are no facts in  
4 dispute.

5 MR. NOONAN: I do - - - Judge, agreed. If  
6 - - - if you side with the respondent's view, we  
7 concede we lose. The respondent says you don't need  
8 to dwell in the abode; you only need to maintain it.  
9 We say that's inconsistent with residency. If you  
10 apply the test we're advocating, again, I - - - the  
11 test the initial tribunal applied, the - - - we're  
12 fine, because the initial tribunal already applied  
13 the facts of this case.

14 JUDGE SMITH: Now, under - - - under - - -  
15 as you read the Tribunal's decision, would it matter  
16 if Mr. Gaied never spent overnight at his parent's  
17 house? Would that change the result?

18 MR. NOONAN: No, it wouldn't matter.

19 JUDGE SMITH: And this - - - on their - - -  
20 on their rationale, could this house be in Buffalo?

21 MR. NOONAN: Sure, yeah. And, Judge, I  
22 mean - - -

23 JUDGE SMITH: And then - - - then - - -  
24 he'd be a New York resident because he - - - because  
25 he owned and maintained it.

1 MR. NOONAN: Correct, yes. That's - - -  
2 that's how - - - that's, you know, how far this  
3 interpretation by respondent goes, that no one needs  
4 to dwell - - -

5 CHIEF JUDGE LIPPMAN: What if you're  
6 closer, if you're not in Buffalo? If you're twenty-  
7 some-odd miles away - - - miles away, makes a little  
8 more difficult to - - -

9 MR. NOONAN: Yeah.

10 CHIEF JUDGE LIPPMAN: - - - to make that  
11 kind of - - - if you're in Buffalo, well, you know, I  
12 think it's a pretty obvious case.

13 MR. NOONAN: And Judge, you're performing  
14 exactly the type of facts and circumstances inquiry  
15 that we're saying is required here. That you do  
16 actually have to look at whether the taxpayer  
17 maintains living arrangements in the dwelling.

18 JUDGE GRAFFEO: Well, what was the  
19 renovation of the basement for? Was he making an  
20 apartment for himself?

21 MR. NOONAN: He was making an apartment for  
22 himself. So as the record reflects in 2000- - - - at  
23 the end of 2003, early 2004, he had - - - he had a -  
24 - - a different tax issue. He needed to come up with  
25 some funds. So he had to sell his New Jersey house,

1 and actually the first Tribunal noted this as a  
2 positive fact. He didn't move into his parent's  
3 apartment. He didn't move into one of the other  
4 apartments. He created a separate apartment in the  
5 basement by building a wall - - -

6 CHIEF JUDGE LIPPMAN: This was after the  
7 tax period in question?

8 MR. NOONAN: After the tax period in  
9 question, yes, Judge.

10 JUDGE SMITH: And he - - - and he - - - he  
11 admits that he became a resident in 2 - - -

12 MR. NOONAN: He's filed as a resident since  
13 2004.

14 JUDGE SMITH: - - - since 2004.

15 MR. NOONAN: Correct, Judge.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.  
17 You'll have your rebuttal time.

18 MR. NOONAN: Thank you, Judge.

19 CHIEF JUDGE LIPPMAN: Let's see what your  
20 adversary has to say.

21 MR. GOLDFARB: Good afternoon. May it  
22 please the court, this case came down to the weight  
23 of the evidence and credibility determinations.

24 CHIEF JUDGE LIPPMAN: Counsel, let me ask  
25 you a question. As - - - as I understand the - - -

1 the law here, if you spent 182 days in New York and  
2 you didn't have a permanent place of abode, you don't  
3 have to pay the - - - the taxes?

4 MR. GOLDFARB: You would not be deemed a  
5 statutory resident.

6 CHIEF JUDGE LIPPMAN: So - - - so what's  
7 the fairness? In this case, we have a guy who, by  
8 any standard, doesn't really live there, certainly  
9 not on any kind of a regular basis. And he has to  
10 pay taxes, but the guy who's there 182 - - - because  
11 he owns, in name, the building. But the guy who  
12 spends 182 days - - - or the person, and - - - and  
13 doesn't own a place, doesn't pay taxes? Does that  
14 seem fair to you?

15 MR. GOLDFARB: Your Honor, this is a  
16 statute that's designed to prevent tax evasion. And  
17 the legislature enacted what was - - -

18 CHIEF JUDGE LIPPMAN: But there's got to be  
19 some - - -

20 MR. GOLDFARB: - - - purely an objective  
21 test.

22 CHIEF JUDGE LIPPMAN: There's got to - - -  
23 excuse me. There's got to be some rhyme and reason  
24 to it. And what I'm saying to you - - - what makes  
25 sense is, if you don't really reside there, that's

1 the ultimate test, and no one who actually resides  
2 should have to - - - who doesn't actually reside - -  
3 - I can make sense of the statute if that's the test.

4 But if you're telling me that you have two  
5 people who don't reside there, and one spends 182  
6 days there, but doesn't own a place, and the other  
7 one, you know, owns a place, but doesn't spend near  
8 as much time or whatever it is, you know - - - you  
9 follow what I'm saying?

10 MR. GOLDFARB: I follow you, Your Honor.  
11 Let's - - - the plain language of the statute  
12 requires only that the taxpayer - - -

13 CHIEF JUDGE LIPPMAN: It doesn't - - -  
14 doesn't matter - - -

15 MR. GOLDFARB: - - - maintain - - -

16 CHIEF JUDGE LIPPMAN: - - - whether it's  
17 fair? Yeah, go ahead.

18 MR. GOLDFARB: Well, fairness needs to be  
19 addressed to the legislature. The statute only  
20 requires that the taxpayer maintain the abode and  
21 that it be available - - -

22 JUDGE SMITH: Does have to be, in your view  
23 - - -

24 MR. GOLDFARB: - - - for his use.

25 JUDGE SMITH: In your view, does it not

1 matter whose abode it is as long as he maintains it?

2 MR. GOLDFARB: It - - - it - - - it matters  
3 if it is available for his use. And he failed to  
4 prove that these three apartments were unavailable  
5 for his use during this audit period.

6 JUDGE SMITH: But you - - - but you say it  
7 is - - - it is essential that it be available for his  
8 use?

9 MR. GOLDFARB: Yes, the - - - the - - -

10 CHIEF JUDGE LIPPMAN: Even if - - - even if  
11 - - -

12 MR. GOLDFARB: - - - the Department - - -

13 CHIEF JUDGE LIPPMAN: Even if he never uses  
14 it?

15 MR. GOLDFARB: Yes, the Department and the  
16 Tribunal have reasonably - - -

17 JUDGE SMITH: So if he - - - if he - - - if  
18 he never spent a night in this house, it would make  
19 him a New York resident?

20 MR. GOLDFARB: If it was available for his  
21 use and - - -

22 JUDGE RIVERA: So - - -

23 MR. GOLDFARB: - - - he could not establish  
24 to the contrary.

25 JUDGE RIVERA: So - - - so if - - - if I

1 buy a home for my elderly parent - - - I - - - I live  
2 in New Jersey. I buy a home for my elderly parents  
3 in the Bronx, and I visit them 183 days. I never  
4 stay in that home. I stay somewhere else. I've got  
5 to pay the tax?

6 MR. GOLDFARB: No, if you can establish  
7 that you have maintained that property - - -

8 JUDGE RIVERA: Yeah.

9 MR. GOLDFARB: - - - exclusively for your  
10 parents' use, this statute will not apply.

11 JUDGE SMITH: But if Tribunal - - -

12 JUDGE RIVERA: So how would I do that?

13 MR. GOLDFARB: But the Tribunal reasonably  
14 found that petitioner did not establish that.

15 JUDGE SMITH: But if - - - but if Judge  
16 Rivera - - - if Judge Rivera's parents say you're  
17 welcome to stay overnight anytime you want, even if  
18 she never stays, then she's a resident?

19 MR. GOLDFARB: Not necessarily, Your Honor.  
20 This is weighing of the fact - - -

21 JUDGE SMITH: You're saying if it's  
22 available to you - - -

23 MR. GOLDFARB: - - - we have more than that  
24 here.

25 JUDGE SMITH: If she maintains the place,



1           it's available for her - - - for her use, what's - -  
2           - what's missing?

3                   MR. GOLDFARB: Well, the - - - that would  
4           be a facts and circumstances that could be weighed by  
5           the Tribunal, but we - - -

6                   JUDGE SMITH: Now - - - now suppose - - -

7                   MR. GOLDFARB: - - - have more here.

8                   JUDGE SMITH: Suppose the Tribunal weighs  
9           it against her, then you're saying she could be found  
10          to be a resident.

11                   MR. GOLDFARB: I don't think the mere fact  
12          that you would stay overnight with your parents would  
13          be sufficient here, but we have much more - - -

14                   JUDGE SMITH: Well, you have - - -

15                   JUDGE RIVERA: That would be - - -

16                   MR. GOLDFARB: - - - and I'd like to say  
17          what that is. The Tribunal found he had keys; he had  
18          unfettered access to the property, explicitly  
19          rejecting his credibility on this.

20                   JUDGE RIVERA: Except he says it's an  
21          investment property.

22                   MR. GOLDFARB: He says that.

23                   JUDGE RIVERA: One would hope the landlord  
24          would have keys.

25                   MR. GOLDFARB: Yes, that was only one

1 factor. Petitioner used the property as his mailing  
2 address on a number of documents during the audit  
3 period.

4 JUDGE ABDUS-SALAAM: So in Judge Rivera's  
5 example, she owns the building. Her parents live - -  
6 - live there. And there might be space for her, and  
7 they say, you can stay over; as long as she doesn't  
8 use it as her mailing address, or what else - - -

9 MR. GOLDFARB: Well, he was - - -

10 JUDGE ABDUS-SALAAM: - - - would that be  
11 her - - -

12 MR. GOLDFARB: - - - also registered to  
13 vote in New York during the years in issue. He had  
14 telephone and utilities billed in his name at this  
15 property. He stayed overnight at the property  
16 repeatedly throughout the audit period. And I think  
17 that the Tribunal was all - - -

18 CHIEF JUDGE LIPPMAN: But the Tribunal's  
19 decision says, we don't even get into subject of use.  
20 The things that you're talking about are enough. Do  
21 you buy that? That - - - that - - - I thought you  
22 just said if he never uses it, you know, or never has  
23 any connection to it, he can avoid the tax. In other  
24 words, if he never use - - -

25 MR. GOLDFARB: If he has no connection to

1 it, certainly, Your Honor.

2 CHIEF JUDGE LIPPMAN: They say - - - no.  
3 He owns the building; he, whatever it is - - - he has  
4 the mailbox in his name or whatever it might be, but  
5 he never, ever stays there, you know, never even a  
6 hint that he stays there. Does he pay tax or not?

7 MR. GOLDFARB: Yes, because if he has a  
8 mailbox - - -

9 CHIEF JUDGE LIPPMAN: So you don't - - -

10 MR. GOLDFARB: - - - in his name there, it  
11 is not exclusively for - - -

12 CHIEF JUDGE LIPPMAN: Then you - - - you -  
13 - - you don't look at - - - at - - - at the  
14 subjective use as the Tribunal - - -

15 MR. GOLDFARB: Well, you - - -

16 CHIEF JUDGE LIPPMAN: - - - that's your - -  
17 - that's the test, and where you disagree with your  
18 adversary is he says that's the wrong test.

19 MR. GOLDFARB: Well, the statute clearly  
20 sets forth an objective test. It's says you're in  
21 for over half the year in the state, physically  
22 present. You make - - -

23 JUDGE SMITH: But you say - - - by  
24 objective you mean that anyone can - - - it's a  
25 clear, bright line that anyone can figure out?

1 MR. GOLDFARB: Well, that's right, and - -  
2 -

3 JUDGE SMITH: Because a minute ago, you  
4 told me there were facts and circumstances the  
5 Tribunal could weigh, when I was asking about Judge  
6 Rivera's case.

7 MR. GOLDFARB: The Tribunal can weigh facts  
8 and circumstances to see whether the taxpayer has  
9 satisfied his burden to establish that this property  
10 was maintained exclusively for the use of third  
11 parties.

12 JUDGE PIGOTT: Do you agree with Mr.  
13 Noonan's statements about what the purpose of this  
14 statute is when it was first enacted, and as outlined  
15 in Tamagni?

16 MR. GOLDFARB: Yes, I do, and that's what  
17 the court said in Tamagni. You're - - - you're  
18 really trying to get people who are residents - - -

19 JUDGE PIGOTT: That are living outside the  
20 state and you want to make sure that they're - - -  
21 that they're paying their New York taxes.

22 MR. GOLDFARB: That's right, but the - - -

23 JUDGE PIGOTT: Does this appear to you to  
24 be the reverse now? Where there are people who are  
25 actually living in another state, you know, who are



1 inference here is that it was maintained, at least in  
2 part, to be available for his use. I think the  
3 Tribunal was entitled to - - -

4 JUDGE SMITH: No, well, you're - - - you're  
5 - - - you're really saying that on this record, part  
6 of the - - - a - - - even any part of the purpose of  
7 having that place was to give him a place to sleep?  
8 It doesn't look that way to me.

9 MR. GOLDFARB: Well - - -

10 JUDGE SMITH: And he - - - he - - - he says  
11 he hated sleeping there. He only did it when his  
12 parents begged him, and then he slept on the couch.

13 MR. GOLDFARB: He did say that, but the  
14 Tribunal rejected his credibility on certain issues.

15 JUDGE SMITH: I know - - - well, they  
16 didn't - - - they - - - they have - - - it's not just  
17 credibility. They have E-ZPass records. He went to  
18 a lot of trouble to go home to New Jersey every  
19 night, when he could have been going - - - going to  
20 this nearby place.

21 MR. GOLDFARB: But the fact is - - -

22 JUDGE SMITH: You're - - - you're saying  
23 this was his home? This was a place of abode for  
24 him?

25 MR. GOLDFARB: It doesn't have to be his -

1           - - his home necessarily. That statute - - -

2                   JUDGE SMITH: It has to be his - - - it has  
3 to be his residence, doesn't it?

4                   MR. GOLDFARB: But the statute contemplates  
5 that this taxpayer is going to have more than one  
6 residence. And it clearly - - -

7                   JUDGE SMITH: Yeah, well, so - - - many  
8 taxpayers do. But is this really a guy with two  
9 houses and this is - - - this is just - - - this was  
10 his pied-a-tier in - - - on Staten Island?

11                   MR. GOLDFARB: The fact is we really don't  
12 know because he didn't satisfy his burden of proof.  
13 There were three apartments here; each one could  
14 qualify as a permanent place of abode under the  
15 statute. His evidence of rental of the two  
16 apartments that his parents were not in was sketchy  
17 at best. And - - -

18                   JUDGE RIVERA: And does it matter if the -  
19 - - if the place of abode is for commercial purposes?  
20 He said he - - - he bought it for an investment.

21                   MR. GOLDFARB: If - - - if - - - if he had  
22 established that with clear and convincing evidence,  
23 he - - - he could have escaped this statute, but - -  
24 -

25                   JUDGE RIVERA: He paid - - -

1 MR. GOLDFARB: - - - based on this record -  
2 - -

3 JUDGE RIVERA: He paid taxes for it as an  
4 investment, did he not?

5 MR. GOLDFARB: He - - -

6 JUDGE RIVERA: Did he list it as an  
7 investment on his taxes, as a commercial property  
8 that he owned?

9 MR. GOLDFARB: He did list it, but as a  
10 matter of fact, he had no underlying books or records  
11 - - -

12 JUDGE SMITH: But are you say - - -

13 MR. GOLDFARB: - - - to substantiate - - -

14 JUDGE SMITH: Did the Tribunal find - - -

15 MR. GOLDFARB: - - - rental income or  
16 expenses.

17 JUDGE SMITH: Did the Tribunal find he was  
18 not really renting out those apartments? That this  
19 was all a fraud? That he was using them for his own  
20 purpose?

21 MR. GOLDFARB: Well, they - - - they did  
22 not find fraud.

23 JUDGE SMITH: Then what's - - - what's - -  
24 -

25 MR. GOLDFARB: What they found was - - -



1 JUDGE SMITH: What's the relevance of the  
2 sketchiness of the records, if - - - if everyone  
3 agrees there were tenants in there?

4 MR. GOLDFARB: Everyone does not agree that  
5 there were - - -

6 JUDGE SMITH: You say there weren't?

7 MR. GOLDFARB: - - - that there were  
8 tenants in there.

9 JUDGE SMITH: But you - - - you - - - you -  
10 - -

11 MR. GOLDFARB: He has proof that these  
12 rented to third parties was entirely deficient.

13 JUDGE SMITH: So you're saying - - - you're  
14 saying that on this record, the Tribunal could find  
15 or did find or he failed to disprove that these were  
16 empty spaces he was keeping there for when he wanted  
17 to sleep there?

18 MR. GOLDFARB: He failed to disprove that  
19 these apartments were unavailable for his use during  
20 this period.

21 CHIEF JUDGE LIPPMAN: Why, because he had -  
22 - -

23 MR. GOLDFARB: He had other family members  
24 staying there rent free - - -

25 CHIEF JUDGE LIPPMAN: Why, because he had

1 keys to them? Is that the key to this? If he has  
2 access to the keys, then that shows that - - - that  
3 it's - - -

4 MR. GOLDFARB: That's not determinative - -  
5 -

6 CHIEF JUDGE LIPPMAN: - - - it could be for  
7 his use - - -

8 MR. GOLDFARB: That's certainly one factor  
9 that the Tribunal weighed against him. But he also  
10 used it as a mailing address. He was registered to  
11 vote - - -

12 CHIEF JUDGE LIPPMAN: But isn't it likely  
13 that he would - - -

14 MR. GOLDFARB: - - - during the years in  
15 New York.

16 CHIEF JUDGE LIPPMAN: - - - if he owns it  
17 and his elderly parents are the - - - the ones who he  
18 bought it for? Isn't it likely he would use his  
19 address and - - -

20 MR. GOLDFARB: That's a matter for the  
21 Tribunal in weighing that evidence. But they also  
22 had other evidence here that he was using it as a  
23 mailing address - - -

24 CHIEF JUDGE LIPPMAN: You don't agree that  
25 - - - you don't agree that this is a matter of law?

1 MR. GOLDFARB: I - - - I think that the  
2 legal question here is just whether there is  
3 substantial evidence to support the Tribunal's  
4 determination that he maintained three permanent  
5 places of abode - - -

6 JUDGE SMITH: I'm - - - I'm sensing a  
7 disconnect.

8 MR. GOLDFARB: - - - that were available  
9 for his use.

10 JUDGE SMITH: The problem I'm - - - one of  
11 the problems I'm having is you - - - you seem to say  
12 this is a simple, objective test that - - - that the  
13 legislature wasn't worried about fairness. They were  
14 worried about drawing a nice, clear objective line,  
15 but when we press you about the facts, you  
16 essentially say the Tribunal can come out any way it  
17 wants.

18 MR. GOLDFARB: The - - - the statute  
19 contains an objective presumption, essentially. That  
20 it presumes if you maintain the abode, and you're - -  
21 - that it is available for your use, the Department  
22 and the Tribunal have reasonably interpreted - - -

23 JUDGE SMITH: Where - - - where does the  
24 statute - - -

25 MR. GOLDFARB: - - - the statute - - -

1                   JUDGE SMITH: Where does the statute say  
2 available for your use?

3                   MR. GOLDFARB: It doesn't. That's a  
4 reasonable - - -

5                   JUDGE SMITH: And it says - - - it says,  
6 "maintains an abode". Doesn't that have to mean  
7 either one of two things: either your abode or  
8 anyone's abode?

9                   MR. GOLDFARB: It - - - it - - - it has to  
10 mean an abode - - - I think it was intended to mean  
11 an abode that is available for your use.

12                   JUDGE PIGOTT: But it just doesn't - - - it  
13 doesn't make sense. It - - - it reads like if you  
14 intend to live in New York, we want to tax you. All  
15 right. But - - - but that - - - that - - - it  
16 doesn't follow that if - - - that if - - - if  
17 somebody buys a house for their parents and leaves it  
18 in their - - - in their name, that that's creating an  
19 abode for their use.

20                   MR. GOLDFARB: And I'm not contending that  
21 here. If - - - if petition - - - if the - - - if the  
22 facts and circumstances had indicated that this  
23 property was maintained solely for - - - exclusively  
24 for his parents' use. But it wasn't.

25                   JUDGE PIGOTT: Well, why did you get in so

1 much trouble with - - - with Judge Rivera's question  
2 about having - - - you know, having your parents in a  
3 home and just visiting them from time to time that  
4 you seem to think that - - - you know, you're going  
5 to be taxed as a New York resident for that.

6 MR. GOLDFARB: No, I - - - I - - - I'm  
7 sorry if - - - if - - - if I indicated that. I did  
8 not mean that.

9 JUDGE SMITH: Well, I think you said - - -  
10 you said if you added the fact that she's welcomed to  
11 stay overnight, even if she doesn't, you said that  
12 might do it for - - -

13 MR. GOLDFARB: No, I - - - I don't think  
14 so. The mere fact that you stay - - - children stay  
15 overnight with parents. But we have a lot more here.  
16 If I can just mention that - - -

17 CHIEF JUDGE LIPPMAN: Okay - - -

18 JUDGE ABDUS-SALAAM: Well, the lot more - -  
19 - the only thing that you're saying that I think is  
20 distinguishable from the situation where Judge Rivera  
21 was talking about is he has a voting - - - he's  
22 maintained that address as a voting residence,  
23 because if he owns the building and his - - - his  
24 parents are elderly, he doesn't want the bills for  
25 the building coming to his parents, who may not be

1           able to deal with them, so he uses the - - - his - -  
2           - that as his mailing address to get bills for that  
3           building.

4                       MR. GOLDFARB: Well, before I sit down, let  
5           me at least say what more we have, besides that.

6                       CHIEF JUDGE LIPPMAN: Fi - - - go ahead.

7                       MR. GOLDFARB: We have - - -

8                       CHIEF JUDGE LIPPMAN: Finish, counsel. Go  
9           ahead.

10                      MR. GOLDFARB: Thank you. We - - - we have  
11           - - - he - - - he had free, unfettered access. He -  
12           - - he used it as his mailing address. He was  
13           registered to vote. He stayed overnight at the  
14           property on many occasions. And I think that the  
15           Tribunal was also entitled to attach significance to  
16           the fact that this property was only two miles from  
17           his twenty-four hour business in New York, where he  
18           was called upon to be day and night - - -

19                      CHIEF JUDGE LIPPMAN: If he stayed over - -  
20           -

21                      MR. GOLDFARB: - - - and that justified an  
22           inference that - - -

23                      CHIEF JUDGE LIPPMAN: If he stayed over  
24           once or twice a month, is that your many times?  
25           That's enough?

1 MR. GOLDFARB: It was repeatedly throughout  
2 the years, but again, actually use is not required,  
3 but - - -

4 CHIEF JUDGE LIPPMAN: But repeatedly - - -  
5 assume it's once or twice a month. Enough?

6 MR. GOLDFARB: It's enough. In fact, it's  
7 not - - - not required. It's just required that he  
8 maintain an abode - - -

9 CHIEF JUDGE LIPPMAN: Okay, thank you,  
10 counsel.

11 MR. GOLDFARB: - - - available for his use.

12 CHIEF JUDGE LIPPMAN: Let's hear from - - -

13 MR. GOLDFARB: Thank you.

14 CHIEF JUDGE LIPPMAN: - - - the rebuttal  
15 from your adversary.

16 MR. NOONAN: Judge, Mr. Goldfarb makes a  
17 lot of the facts here, that if you just look at the  
18 facts. He wants to get out his facts. The Tribunal  
19 - - -

20 CHIEF JUDGE LIPPMAN: He says there's  
21 support in the record for what they found. You're  
22 saying the test is wrong. Is that your argument?

23 MR. NOONAN: The test is wrong, Judge.  
24 When - - - when - - - when it's - - - the Tribunal  
25 set forth the test that does require living

1 arrangements, which many of your questions to Mr.  
2 Goldfarb suggest might be the test, the Tribunal  
3 applied that test, and then applied it to the facts  
4 and came out in favor of Mr. Gaied. That - - -

5 JUDGE PIGOTT: One of the troubling things  
6 here is that voting that - - - that Mr. Goldfarb  
7 brings up. I mean, you're supposed to - - - you're  
8 supposed to live in New York to vote in New York, and  
9 - - -

10 MR. NOONAN: I understand, Judge. He - - -

11 JUDGE PIGOTT: How does that get explained?

12 MR. NOONAN: He - - - he used to live in  
13 New York in the early 1990s, and he moved. And like  
14 many people who move, he didn't change his voting.  
15 And in fact, if you look at the record, the address  
16 that's used in - - - for his voting registration in  
17 these years was his old address in Staten Island. So  
18 he wasn't - - -

19 JUDGE PIGOTT: Oh, so you're saying he  
20 didn't vote; he was just registered to vote.

21 MR. NOONAN: I think he voted in the year  
22 2000, before - - - not in these audit years.

23 JUDGE SMITH: But he - - - so he wasn't  
24 registered from the place of abode?

25 MR. NOONAN: Correct, he wasn't registered



1 from the MacFarland Avenue address. He was  
2 registered from his old address.

3 JUDGE ABDUS-SALAAM: So what do you say?  
4 The test, you say, is what? That it should be a  
5 subjective test, not a objective test, or - - -

6 MR. NOONAN: The test is, in order to  
7 determine whether or not an abode is - - - is a  
8 permanent place of abode, a permanent dwelling place,  
9 you need to take into account both the physical  
10 attributes of the place and the taxpayer's usage of  
11 the place, whether or not the taxpayer's living  
12 there. And Judges, that's been the test in New York  
13 for twenty-some years - - -

14 JUDGE PIGOTT: Does that mean that this - -  
15 - if we were to agree to you, it has to go back?

16 MR. NOONAN: Judge, I don't think so,  
17 because Gaied - - - the first Tribunal in Gaied  
18 already applied the - - - already applied that test.  
19 Really, I think, Judge, the answer is if you agree  
20 with me, you annul the Tribunal's second  
21 determination, because what the Tribunal took the  
22 very unusual step in thirty - - - in twenty-some  
23 years of the Tax Appeals Tribunal existing, they've  
24 only granted two of the arguments - - -

25 JUDGE RIVERA: So how much - - - so - - -

1 MR. NOONAN: - - - they - - - they change -  
2 - - they reversed the argument.

3 JUDGE RIVERA: So how much - - - how much -  
4 - -

5 CHIEF JUDGE LIPPMAN: The reargument was  
6 granted after the Appellate Division - - -

7 MR. NOONAN: No, Judge, that reargument was  
8 granted after their first decision. So the - - - the  
9 procedure was - - - it was first Tribunal decision  
10 where they found in favor of Mr. Gaied - - -

11 CHIEF JUDGE LIPPMAN: And what prompted  
12 that, as far as you know?

13 MR. NOONAN: The Tax Department made a  
14 motion to - - - to reargue and their basis for  
15 rearguing was you got the standard wrong. Not that  
16 you missed all these facts; that you got the standard  
17 wrong.

18 CHIEF JUDGE LIPPMAN: You say that they  
19 were wrong in saying the standard that they changed  
20 to was wrong.

21 MR. NOONAN: The standard was right.

22 CHIEF JUDGE LIPPMAN: Judge Rivera, go  
23 ahead.

24 JUDGE RIVERA: So how much - - - you  
25 mentioned the second prong being the use of the

1 place. Why - - - why can't they conclude that this  
2 particular use satisfies your standard?

3 MR. NOONAN: Well, that's - - - that's the  
4 - - - that's the facts and circumstances you - - -  
5 you know, we have to look at some - - - whether  
6 someone really lives here. That's one what residency  
7 is in the first place, anyways.

8 This court, a couple of months ago, in a -  
9 - - a pistol-permit case, talked about residency.  
10 And - - - and residency being, you know, someone - -  
11 - it's not the same as domicile, where someone has a  
12 permanent and primary home, but residency at least  
13 means some substantial connection evidenced by you  
14 living somewhere - - -

15 CHIEF JUDGE LIPPMAN: Your interpretation  
16 of the statutory language is that it means you really  
17 live here.

18 MR. NOONAN: Yeah, not as a - - - as a  
19 resident.

20 CHIEF JUDGE LIPPMAN: Yeah, I understand.

21 MR. NOONAN: Yeah, yes.

22 JUDGE GRAFFEO: Did you - - -

23 CHIEF JUDGE LIPPMAN: That's basically what  
24 you say the test - - - you interpret the statute to  
25 be - - - if you really live here, you get taxed.

1 While your adversary, I think, is arguing, if you  
2 maintain a place that you could conceivably use, you  
3 have to pay the tax.

4 MR. NOONAN: Yes, Judge, and I - - - we  
5 believe - - -

6 CHIEF JUDGE LIPPMAN: That - - -

7 MR. NOONAN: - - - that's the exact  
8 dichotomy and we - - -

9 JUDGE RIVERA: So let me ask you a  
10 question, going back to my hypothetical.

11 MR. NOONAN: Sure.

12 JUDGE RIVERA: So I buy that house for the  
13 elderly parents in the Bronx. I have a - - - an  
14 actual room in that house that is designated for me.  
15 My name is on the outside, but - - - and I want to  
16 stay there. I desire to stay there. But I'm so busy  
17 - - - remember, I said I live in Jersey - - - in  
18 Jersey that I never actually am able to stay at all  
19 in that room overnight. Taxed or not taxed?

20 MR. NOONAN: You're not taxed. You're not  
21 - - -

22 JUDGE RIVERA: I'm not?

23 MR. NOONAN: You're not taxed, because - -  
24 -

25 JUDGE RIVERA: Because I never stayed, even

1           though that's what I intended when I bought it, and  
2           my parents understand that. My name is on the door.

3                   MR. NOONAN: Residency is where you live.  
4           It's living there. In the - - -

5                   JUDGE RIVERA: It doesn't say "live"?

6                   MR. NOONAN: What's that?

7                   JUDGE RIVERA: Does the statute say "live"?

8                   MR. NOONAN: The statute says a permanent  
9           place of abode.

10                   JUDGE RIVERA: I maintain - - - does it say  
11           I have to actually stay there?

12                   MR. NOONAN: No, it's two tests.

13                   JUDGE RIVERA: I mean, that's the point,  
14           right?

15                   MR. NOONAN: It's "maintain" and a  
16           permanent place of abode. And an abode is a dwelling  
17           place. You have to dwell there; you have to live  
18           there.

19                   JUDGE ABDUS-SALAAM: But - - - but does it  
20           have to be for you? Or can it be for someone - - -

21                   MR. NOONAN: Absolutely, Judge, it has to  
22           be for you.

23                   JUDGE ABDUS-SALAAM: - - - like your  
24           parents or your wife or your child? You know, your  
25           child's away at school, you buy a house or an

1 apartment for the child.

2 MR. NOONAN: Judge, it has to be for you.

3 It - - - I mean - - -

4 JUDGE ABDUS-SALAAM: It has to be you - - -

5 not - - -

6 MR. NOONAN: - - - this - - - this is

7 residency - - -

8 JUDGE ABDUS-SALAAM: - - - not somebody - - -

9 -

10 MR. NOONAN: Not somebody else, because  
11 we're talking about taxing a person on all of their  
12 income - - - even though they pay tax in another  
13 state, taxing them on all their income in this state  
14 too. Looking to the legislative history: why do we  
15 have this in the first place? It's to tax people who  
16 really are residents - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel,  
18 thanks.

19 MR. NOONAN: Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you both.

21 Appreciate it.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Gaied v New York State Tax Appeals Tribunal, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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