STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HAROLD M. AND PEARL M. VEEDER	:	DECISION DTA No. 809846
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986 through 1989.	:	

Petitioners Harold M. and Pearl M. Veeder, 1 Harbourside Drive, Delray Beach, Florida 33483, filed an exception to the determination of the Administrative Law Judge issued on April 15, 1993. Petitioners appeared by Gerald N. Daffner, Esq. and Nathaniel H. Daffner, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioners filed a brief and the Division of Taxation filed a letter brief in opposition. Petitioners submitted a reply letter brief received August 27, 1993 which began the six-month period to issue this decision. Oral argument, requested by petitioners, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioners were residents of New York State as defined by section 605(b)(1) of the Tax Law as individuals not domiciled in the State of New York but who maintained a permanent place of abode in the State of New York and spent in the aggregate more than 183 days of each of the taxable years at issue in the State of New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners proposed 18 Findings of Fact. These findings substantially have been incorporated into the following findings to the extent they were not conclusory in nature, that they were based upon facts in the record and were relevant. The language was modified to conform to standard determination format and facts were elaborated upon where necessary for purposes of context and clarification.

On October 9, 1990, the Division of Taxation ("Division") issued to Harold M. Veeder and Pearl M. Veeder, petitioners herein, three notices of deficiency for personal income tax determined to be due following an audit of petitioners' income tax returns for the years 1986, 1987, 1988 and 1989. The first Notice of Deficiency was issued to Harold M. Veeder for the year 1986 and stated additional tax due of $3,433.61 and interest of $1,055.06 for a balance due of $4,488.67. The second Notice of Deficiency was issued to Pearl M. Veeder also for the year 1986 and set forth additional tax due of $4,646.32 and interest of $1,427.69 for a total amount due of $6,074.01. It is noted that each petitioner received separate notices of deficiency due to the fact that they filed under the category "Married Filing Separately on One Return" for the year 1986.

A third Notice of Deficiency was issued to both Harold M. Veeder and Pearl M. Veeder on October 9, 1990 which asserted additional income tax due for the years 1987, 1988 and 1989 as follows:

Tax Period Ended	Tax Amount Asserted	Interest Amount Asserted	Total Amount Due
12/31/87	$ 4,974.53	$1,140.61	$ 6,115.14
12/31/88	5,588.63	793.74	6,382.37
12/31/89	11,093.52	497.68	11,591.20
Totals	$21,656.68	$2,432.03	$24,088.71

The notices of deficiency were issued following a field audit of petitioners' records. The field audit began, per the auditor's log entries, on February 8, 1990. On February 9, 1990, the auditors sent petitioners a letter requesting them to execute a consent to extend the statutory period of limitation on assessment and also requesting a mutually convenient appointment time to examine petitioners' records for the years 1986, 1987 and 1988. Sometime before the audit

case was closed in August of 1990, the year 1989 was added to the audit period herein. The letter scheduling the appointment also asked petitioners to complete a form called "IT 460-A", Statement as to Residence. Finally, the appointment letter also requested that items on a sheet attached to said letter be available for examination by the auditor. Those items included all the records and workpapers used in the preparation of the Federal and State returns for the years in issue; copies of the 1986, 1987 and 1988 Federal tax returns and attachments; all cancelled checks and bank statements for each year; credit card bills and statements for each year; diaries and/or itineraries for each year; the result of any recent Federal audit; and documentation indicating the locations of rental property.

Pursuant to this request, petitioners submitted some bank statements, their tax returns, credit card bills and statements and various documentation from the state of Florida, such as declarations of domicile, voter registration identification cards, copies of Florida drivers licenses, a copy of a Florida vehicle registration certificate for their 1991 4-door Lincoln, insurance identification card, 1992-1993 membership card in the Benevolent and Protective Order of Elks, Delray Beach Lodge, 1987 Florida intangible personal property tax return and, as mentioned above, the IT-460-A, Statement as to Residence. Additionally, petitioners submitted closing statements with regard to the sale of their home at 2055 Northwest 9th Street, Delray Beach, Florida on November 22, 1989 and the purchase of their condominium at 1 Harbourside Drive, Delray Beach, Florida on March 25, 1988.

Petitioners were life-long residents of the State of New York until the year 1980, when Mr. Veeder attained the age of 65 and chose to retire from his business as a restaurateur, having operated Veeders Restaurant, located at 2020 Central Avenue, Albany, New York. The Veeders owned a home in the town of Colonie located at 265 Consaul Road, Colonie, New York, which they purchased in 1960, and which they continue to own to the present time. This home was their principal residence up until 1980.

Upon petitioners' retirement in the year 1980, they purchased a condominium in Pompano Beach, Florida, i.e., 201F Oceanside North, 3221 N.E. 8th Street.

In or about 1982, petitioners purchased a house in Delray Beach, Florida, located at 2055 Northwest 9th Street. They resided here until 1988 when they purchased a condominium at 1 Harbourside Drive, Delray Beach. The reason given for the move was that petitioners were no longer able to climb the stairs at their house on N.W. 9th Street.

Petitioners signed a declaration of domicile and citizenship indicating that they had changed their domicile to the State of Florida and that their residence as of the first of January 1982 was 201F Oceanside North, 3221 Northeast 8th Street, Pompano Beach, Florida. A second declaration of domicile was filed in 1990 which indicated that Harold Veeder had become a bona fide resident of the State of Florida in 1983 and that his residence on February 27, 1990 was 1 Harbourside Drive, Delray Beach, Florida. Also, petitioners registered to vote in Florida in October of 1983.

Petitioners stated in Form IT-460-A, Statement as to Residence, that they spent 193 days in Florida in 1986, 207 days in Florida in 1987, and 224 days in Florida in 1988. The source of this day count was alleged to have been a record kept by a gentlemen by the name of Phil Kileen, a neighbor and friend of petitioners who resided at 1 Harbourside Drive, Delray Beach, Florida. Mr. Kileen allegedly kept a record in a notebook of petitioners' comings and goings since he would look after their property while they were away. However, Mr. Kileen's record was not produced in evidence or at any time to the Division on audit. Neither petitioners nor their accountant, Nathaniel Daffner, who testified at hearing, kept a diary of petitioners' days spent at their Florida residence, but Mr. Veeder testified that he believed Mr. Kileen's account to be correct. Mr. Daffner testified that he believed, based on his recollection, that petitioners spent in excess of two-thirds of the years in issue in Florida. No other contemporaneous records on petitioners' whereabouts for the years in issue were presented.

On cross examination by the Division's attorney, Mr. Veeder was asked whether Mr. Kileen had kept a written record of the days when the Veeders were not in Delray Beach. Mr. Veeder replied, "I believe so" (Tr., p. 32.) Mr. Veeder was asked to describe the record and

only vaguely recalled it to be "like in a notebook" (Tr., p. 32). Further, Mr. Veeder did not know the purpose for which Mr. Kileen maintained such record (Tr., p. 32).

Petitioners utilized their 265 Consaul Road, Colonie, New York address home on their visits to the State of New York. Cancelled checks indicated that the house is maintained on a year-round basis including cable television and pool service (presumably summer only). Besides their Consaul Road property, Pearl M. Veeder was and is the owner of the real property on which Veeder's Restaurant is located at 2020 Central Avenue in the Town of Colonie, and petitioners collected rent from the restaurant each year in the audit period.

The United States corporation income tax return filed on behalf of Veeder's Restaurant Incorporated for the fiscal year ending October 31, 1986 indicates that Pearl Veeder owned 30% of the corporation's voting stock while Harold M. Veeder owned 40% of the corporation's voting stock. Thirty percent of the voting stock of the corporation was owned by their son, Bruce Veeder. It was explained that estate and gift tax considerations dictated a gradual gifting of the stock to the son over a number of years which would render the transfer tax exempt. During the years in issue, Mr. Nathaniel Daffner testified that approximately 1½% of the stock was transferred each year for the years 1986 through 1989. However, this transfer was not reflected on any of the New York or Federal corporation income tax returns filed for the fiscal years ended October 31, 1986, 1987, 1988 or 1989.

As stated above, petitioners held valid Florida driver's licenses. Pearl Veeder's Florida driver's license indicated a valid period beginning February 5, 1992 and ending June 13, 1998 while Harold Veeder's Florida driver's license indicates a period of validity between February 9, 1989 and 1995. During all of the years in issue, both petitioners held New York State drivers licenses as well. During the audit period, petitioners owned a Ford Bronco which was registered in the State of New York as well as a 1984 Renke pleasure boat and trailer, both of which were registered in New York as well.

Petitioners executed last wills and testaments in 1983, which declared Florida as their domicile and residence, but which were executed in New York State.

Petitioners also utilized services of professionals in New York during the audit period. Their long-time friend and accountant, Nathaniel Daffner, continued to be their accountant while they were residing in the State of Florida. Further, petitioners never chose to or utilized the services of a Florida physician during the audit period. Mr. Veeder did use a New York physician during this period, however.

During the audit period, petitioners maintained several bank accounts in the Albany, New York area, including accounts at the Manufacturer's Hanover Trust Company, Albany Savings Bank, "Northeastern" [sic] Bank, First National Bank of Scotia, Dime Savings Bank, Key Bank and Home and City Savings Bank. Petitioners maintained numerous accounts to properly insure their deposits with the Federal Deposit Insurance Corporation.

Petitioners also maintained a MasterCard through the Manufacturer's Hanover Trust Company, the statements for which were mailed to the 265 Consaul Road, Colonie address. Activity on this card during the years 1986 and 1988 indicated both New York and non-New York account activity.

Although some documentation in the record reflects a 265 Consaul Road mailing address, all mail directed to petitioners in New York was forwarded to the restaurant at 2020 Central Avenue where it was screened by petitioners' son and forwarded to petitioners in Florida when they resided there.

Mr. Veeder testified at hearing that it was his routine to visit the restaurant daily when he was in New York and to have coffee or talk to customers. However, he explained that he retired in 1980 and no longer worked at the restaurant.

As stated above, petitioners maintained cable television service for their New York home on a year-round basis, while cancelled checks indicated that they did not maintain such year-round service for their Florida home -- only for the months of January through March and October through December.

On direct examination by his representative, the following question and answer to Mr. Veeder were set forth on page 22 of the transcript:

> Q. "Did there come a time when you did make a determination [with respect to residency in the State of Florida]?"
>
> A. "After two years, to see if we liked it down there, then we consulted our accountant, and he said it would be a good thing to move down there and get our domicile and stay there."

Petitioners allegedly retained the house in Colonie for convenience -- a place to stay on their visits to New York.

Petitioners filed timely New York nonresident income tax returns for the years 1986, 1987, 1988 and 1989. After the notices of deficiency referred to above were issued, petitioners timely appealed to the Bureau of Conciliation and Mediation Services where it was determined that petitioners were domiciled in New York during the years in issue. Conferee Alan Roth stated in a letter to petitioners dated May 28, 1991, that:

> "The most important reason for deciding this [that petitioners were domiciled in the State of New York] is that the house in New York can be lived in at a moments notice. They could move everything back into the house in New York overnight. They have not abandoned their domicile here, they are just not here as often as they used to be."

Subsequent to this letter, conciliation orders were issued on July 12, 1991 sustaining the assessments. This appeal ensued.

OPINION

In the determination below, the Administrative Law Judge held that it is clear that petitioners, regardless of their domicile, are subject to tax as statutory residents of New York State pursuant to Tax Law § 605 (former [a]).

The Administrative Law Judge, in sustaining the three notices of deficiency, held that: 1) petitioners' home at 265 Consaul Road, Colonie, New York, owned and maintained by them since 1960, constituted a permanent place of abode, therefore, they do not qualify for treatment as nonresidents; 2) very little weight could be given to the testimony of both Mr. Veeder and Mr. Daffner as there was no substantiation to support such testimony; and 3) petitioners have

not sustained their burden of showing that they did not spend more than 183 days of each taxable year in issue within New York State.

On exception, petitioners argue, for protective purposes, that they were not domiciled in New York State during the years at issue and are, therefore, not residents of New York State as defined by Tax Law § 605(b)(1)(A), and "the evidence conclusively establishes that they were domiciliaries of Florida, and that the change in domicile to Florida occurred on or about September 19, 1982 (Exhibit 1)" (Petitioners' brief on exception, unnumbered p. 3).

Petitioners further argue that: 1) they clearly demonstrated their intention to establish domicile in Florida in 1982; 2) they did not spend more than 183 days of any taxable year in New York; 3) the Division's position is inconsistent and at odds with a 1993 District Office Audit Manual guideline to be used in determining domicile; and 4) the determination below must be reversed in view of the newly issued policy of the Division.

The Division argues that the domicile issue has been rendered academic by the Administrative Law Judge finding that petitioners were statutory residents of New York State for the years under audit. The Division contends that any further findings relating to the domicile issue should be made by the trier of the fact on remand to the Division of Tax Appeals due to the predominantly testimonial nature of the proof presented on the element of intent to change domicile.

The Division, in answering petitioners' argument relating to the audit guidelines that permit taxpayers to use secondary evidence where no diary is available, argues that uncorroborated testimony, whether written or oral, does not meet the burden imposed by 20 NYCRR former 102.2(c).

Finally, the Division argues that the Administrative Law Judge correctly applied the Tax Law, pertinent regulations and controlling case law to the facts of this case and any perceived disharmony between these authorities and the audit guidelines must be disregarded.

In reply, petitioners argue that based on documentary and testimonial evidence and the newly issued guidelines, they were not domiciliaries of New York State and submit that the guidelines must be complied with by the Division. Further, petitioners assert that had the new guidelines been available to the auditor, this case would not have been presented to the Division of Tax Appeals.

After reviewing the arguments presented to us on exception and the record before us, we find no basis for modifying the Administrative Law Judge's determination in any respect. With the exception of the question of the newly issued guidelines relating to the nonresident audit program, which question we will address herein, the Administrative Law Judge adequately and correctly addressed whether petitioners maintained a permanent place of abode in New York State and whether petitioners proved that they spent less than 183 days in New York State during each of the years at issue.

Petitioners' reliance on the Division's newly revised field audit guidelines to show that the audit method was improper is misplaced as the auditor could not have been expected to use guidelines not yet in effect at the time of the audit.

Even if the audit guidelines were applicable to the instant audit, petitioners have not shown any inconsistency between the guidelines and the audit. Contrary to petitioners' assertion, the guidelines do not indicate that the type of secondary evidence offered by petitioners, i.e., a statement as to residence signed by petitioners and corroborating testimony of petitioners and their accountant, would be acceptable proof of the time spent outside of New York State.

Instead, the audit guidelines state:

> "[i]f no diary or log is available, or to substantiate the entries in a diary, a taxpayer may be asked to provide credit card receipts, utility usage, an ATM access record, or other bank information to identify where the taxpayer was on a specific day. For example, a taxpayer might be asked to submit expense accounts or credit card receipts to demonstrate a presence in or out of New York. In addition, telephone bills may be requested to show the activity at a particular location. This activity could also be used to demonstrate a presence either in or out of New York" (State Tax Reporter - New York, Book 1, Primary Factors, Analysis of Taxpayer's Time During the Year, 1[d], p. 8211).

The record below is void of any such evidence which would demonstrate a presence in or out of New York State.

As previously stated, we find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Harold M. and Pearl M. Veeder is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Harold M. and Pearl M. Veeder is denied; and

4. The three notices of deficiency dated October 9, 1990 are sustained.

DATED: Troy, New York
January 20, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner