

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID J. AND LAURIE KNOEBEL : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 824117
York State and New York City Personal Income Tax under :
Article 22 of the Tax Law and the Administrative Code of :
the City of New York for the Year 2006. :

Petitioners, David J. and Laurie Knoebel, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Agency Building 1, Empire State Plaza, Albany, New York, on October 15, 2012 at 10:30 A.M., with all briefs submitted by March 22, 2013, which date began the six-month period for the issuance of this determination. Petitioners appeared by David G. Goldbas, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether petitioners have shown that they were not present in New York State and New York City for more than 183 days during 2006 and therefore not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-

1705(b)(1)(B).

FINDINGS OF FACT

1. On February 26, 2010 the Division of Taxation (Division) issued to petitioners, David J. Knoebel and Laurie A. Knoebel, a Notice of Deficiency, which asserted a deficiency of New York State and New York City personal income tax for the year 2006, as follows:

	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>
New York State	\$21,407.00	\$5,176.76	\$3,650.56
New York City	\$17,069.00	\$4,128.27	\$2,916.13

2. The Notice of Deficiency also asserted interest and penalties for negligence pursuant to Tax Law § 685(b)(1) and (2). The deficiency resulted from the Division’s conclusion that petitioners were subject to tax as residents of New York State and City for the year 2006 because they were present in New York City for 199 days and in New York State for 206 days.

3. During the audit, petitioners produced a large number of records including Citi credit card statements, M & T Bank records, phone records, bank statements, property tax statements, voter registration statements, voter history, income tax returns and federal schedules K-1 for a number of businesses. Petitioners did not maintain a business calendar or diary, and consequently, one was not supplied to the Division.

4. Petitioners filed a Nonresident and Part-Year Resident Income Tax Return for 2006 wherein they checked the no box on their return in response to the question regarding whether they maintained living quarters in New York State. The return was completed by petitioners’ accountant. The accountant knew about the apartment petitioners maintained in New York City and he also knew that petitioners were living in Pennsylvania. Mr. Knoebel did not direct his accountant to make this entry.

5. Petitioners have been married since 1976. They own a one-family frame house in Elysburg, Pennsylvania. In 2006, they lived together and voted in the Northumberland County Township. During the year in issue, petitioners filed Pennsylvania and federal income tax returns. Mr. Knoebel has been president of the Ralpho Township Library for about 18 years. Petitioners' motor vehicle was garaged in Pennsylvania, their insurance was purchased in Pennsylvania, they registered their vehicle in Pennsylvania and received medical care in Pennsylvania.

New York City days

6. During the year in issue, petitioners maintained and periodically used an apartment located on West 17th Street in Manhattan. Petitioners always traveled together when they went from Elysberg to New York City and back. Sometimes petitioners traveled to New York City and did not stay overnight at the apartment. However, this would be rare. A trip from Elysburg to New York City was about two and one-half hours.

7. Petitioners are the parents of two daughters, Anna Knoebel-Lyu and Tess Knoebel. During the year in issue, they lived in Brooklyn and worked in Manhattan. Petitioners' daughters found the West 17th Street apartment more attractive than their own apartments because it was larger, more comfortable and closer to their places of employment. Both daughters had use of the West 17th Street apartment without restriction.

8. Each daughter also received financial support from their parents in 2006. They were given cash and permitted use of a credit card. In 2006 Mr. Knoebel maintained a Citi Card AA Advantage account.

9. Ms. Knoebel-Lyu had her own keys to the apartment on West 17th Street and visited the apartment almost every week. If she was going to dinner, Ms. Knoebel-Lyu would have friends

meet her there. She would also have parties at the apartment or go to the apartment for a visit. She also spent time at the apartment for work purposes.

10. In their brief, petitioners modified the challenge raised at the hearing by focusing upon 18 days in 2006 wherein they questioned the Division's conclusion that they were present in New York City. The following is a list of the days in issue and a summary of the evidence in the record regarding petitioners' location on those days:

January 1. The Division concluded that petitioners were in New York City on this date because a telephone call was made from New York City to Elysburg. Ms. Knoebel-Lyu spent New Year's Eve 2005/2006 at her parent's residence on West 17th Street. She remembers that day because she and her husband threw a big party. Ms. Knoebel-Lyu's husband made a call to his parents in Irvine, California, at 12:08 A.M., and on January 1, 2006, Ms. Knoebel-Lyu made a call to her parents in Elysburg in order to wish them happy New Year. If her parents were spending the night in New York City, there would not have been any reason to place this call.

January 24. A statement from Citi shows a credit card purchase on January 24, 2006 from Charlie Mom Chinese in New York City. The purchase was made by Ms. Knoebel-Lyu. Mr. Knoebel was not in New York City on this day. Mr. Knoebel's recollection is supported by credit card charges at a post office and a Pizza Hut in Pennsylvania.

January 31. The Division concluded that petitioners were in New York City because there was a payment to the ACLU of New York on Mr. Knoebel's credit card account with Citi. There was also a purchase on January 31, 2006 from Pie by the Pound, which was an establishment that sold pizza. Pie by the Pound, was located near the West 17th Street apartment and the purchase was made by Ms. Knoebel-Lyu. The payment to the ACLU was made by computer from Pennsylvania. Other purchases on this day, which are reflected on the Citi

account, were made at Giant Food Stores, Sunoco, Bloom Party Center and Weis Markets in Pennsylvania. The purchases in Pennsylvania support Mr. Knoebel's testimony that he was in Pennsylvania on this day.

March 13. The Division considered this date as a New York City day on the basis of Pennsylvania phone records. However, there is no record of a call from New York City on this date. On March 13, 2006, Mr. Knoebel incurred several charges in Pennsylvania including at the Sunbury Animal Hospital, Harry's Grill, Sunoco Service Station, U.S. Post Office, and Weis markets. These are charges that would have been made by Mr. Knoebel or Mrs. Knoebel from a location in Pennsylvania.

April 10 and April 13. The Division regarded this time as days in New York City because calls were made from petitioners' apartment in New York City. On April 10, 2006 and April 13, 2006, petitioners invited their friends, Tina and David Haines, to use their West 17th Street apartment. Their home was in Kulpmont, Pennsylvania, and telephone records show a call to this location on these dates. Petitioners did not make these calls. The testimony of Mr. Knoebel on these points is supported by an affidavit by Tina and David Haines.

April 18. On April 18, 2006, Ms. Knoebel-Lyu stayed at the West 17th Street apartment with her sister Tess. Ms. Knoebel-Lyu remembers this occasion because on this day, Tess was bitten by a dog. In response to the dog bite, Tess called her uncle in Portland, Maine. Also, on this date, petitioners had three charges in Pennsylvania: the Pine Barn Inn and Restaurant, Weis Market and Sunoco Service Station.

May 5, 2006. The Division found that petitioners were in New York City because there was a call to Mexico from the apartment in New York City. In addition, an ATM at LaGuardia Airport was utilized. On this day, petitioners went to Mexico. They flew from LaGuardia and

returned to the same airport. Ms. Knoebel-Lyu used the 17th Street location while her parents were on vacation. When petitioners took trips they would usually drive straight to the airport from Elysburg although Ms. Knoebel-Lyu does not have a specific recollection of whether they followed this practice on May 5, 2006. The call to Mexico was made by petitioners' daughter Anna.

June 3. The Division considered this a day in New York City on the basis of an entry on a phone bill that showed that there was a telephone call *from* Pennsylvania to New York City. The call is reflected on petitioners' monthly billing. On this date, Mr. Knoebel's Citi card billings show a charge in Pennsylvania at Perkins Restaurant in Stroudsburg, Pennsylvania.

June 4. The Division concluded that petitioners made a telephone call from the New York City apartment. In fact, the call was made to New York City *from* Pennsylvania. In addition, a Citi credit card statement shows a charge from Original Italian Pizza in Elysburg.

June 22. The Division found that petitioners were in New York City on June 22, 2006 because there was a charge at Bed, Bath & Beyond. This charge was made by petitioners' daughter Anna. Petitioners know that they were in Pennsylvania because there was a charge at the Pine Barn Inn in Danville, Pennsylvania, and at the Medco Health Clinic in North Versailles, Pennsylvania.

July 26. The Division concluded that petitioners were in New York City because it thought that a call was made from New York City to Pennsylvania. This call was actually made from petitioners' home in Pennsylvania *to* New York City. Moreover, there was a charge by petitioners to Original Italian Pizza in Elysburg, Pennsylvania.

August 1. Relying upon Citi bank records, the Division found that petitioners were in New York City because there was a charge on a Citi card at the Indian Kitchen in New York City.

This charge was made by petitioners' daughter Anna. Other charges on the Citi card that support a finding that petitioners were in Pennsylvania include a Wal-Mart Super Center in Bloomsburg, Pennsylvania, and charges at a Sunoco Service Station in Elysberg.

September 25. The Division surmised that petitioners were in New York City based upon Citi card records showing a charge to the Long Island Railroad. Mr. Knoebel purchased tickets online from Pennsylvania using his Citi card in order to visit family during an upcoming religious holiday.

September 26. The Division concluded that petitioners were in New York City because there was a charge at Safran, Inc., which was a restaurant. This charge was made by petitioners' daughter Anna. Petitioners incurred credit card charges in Pennsylvania on this day including a charge at a Ruby Tuesday in Bloomsburg and a Sunoco Station in Elysburg.

November 21. The Division determined that petitioners were in New York City because of a charge on a Citi card charge at Safran, Inc. This charge was made by petitioners' daughter Anna. The Citi card also shows a purchase at the Sunoco Service Station in Elysburg, Pennsylvania, which supports petitioners' position that they were in Pennsylvania.

December 4. The Division found that petitioners were in New York City because there was a payment to WNYC Foundation. In fact, petitioners were in Pennsylvania. The charge relied upon by the Division was an automatic charge based upon a previous pledge. On this day, petitioners incurred the following credit card charges in Pennsylvania: Harry's Grill, Sunoco Service Station, Giant Food Stores and the U.S. Post Office.

December 16. The Division concluded that petitioners were in New York City because there were charges at Kyotoya and Bed, Bath & Beyond in New York City. These charges were

made by Ms. Knoebel-Lyu. On the same day, there were charges by petitioners at Original Pizza in Elysburg and Triplets Dinner in Stroudsburg, Pennsylvania.

Utica days

11. The Division found that petitioners were in Utica, New York, on eight days in 2006.

12. In 2006, Ms. Knoebel's mother, Ms. Goldbas, resided by herself in Utica in an apartment consisting of six rooms. The apartment had laundry facilities in the basement. In order to get to the first floor of the apartment, Ms. Goldbas was required to climb stairs.

13. In 2006, Ms. Goldbas needed assistance because she was suffering from poor health. She had pain in her back arising from an accident that occurred many years earlier. In order to cope with the back pain, Ms. Goldbas saw a physician who practiced pain management. She was also in pain in both legs from knee replacements. As a result of these difficulties, she needed help making a bed. Going to a grocery store was nearly impossible. In 2006, she also suffered from shortness of breath, which impeded her ability to walk any distance. On many occasions, she asked petitioners for assistance.

14. Petitioners went to Utica in 2006 in order to accommodate Ms. Goldbas's requests. When they were in Utica, they stayed at Ms. Goldbas's home on some occasions and, at other times, at a hotel. Petitioners traveled to Utica from Elysburg, Pennsylvania. When petitioners were in Utica, they did not spend any part of the day in New York City.

15. Ms. Goldbas could not consistently get help from anyone other than petitioners.

CONCLUSIONS OF LAW

A. Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, New York State and City personal income tax on State and City "resident individuals." A taxpayer may fall within the definition of a resident as a domiciliary or as a

“statutory resident.” The Tax Law defines a “statutory resident” as someone who, while not domiciled in New York, nevertheless maintains a permanent place of abode in this state and spends in the aggregate more than 183 days of the taxable year in this state¹ (Tax Law § 605[b][1][B]).² A permanent place of abode is defined in relevant part by the Division’s regulations,³ to include:

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 . . . (20 NYCRR 105.20[e][1]).

Here, the Division has not asserted that petitioners were domiciliaries of New York. In addition, it is undisputed that petitioners’ apartment on West 17th Street in New York City was a permanent place of abode. Accordingly, the only issue presented concerns the number of days spent in New York City and New York State.

B. In this case, the credible testimony presented by Mr. David Knoebel and Ms. Knoebel-Lyu, supported by credit card statements, telephone records and affidavits, establish, with the exception of May 5, 2006, clear and convincing evidence that they on each of the days enumerated above they were not in New York City. It follows that petitioners were not in New York City the requisite 183 days, and are not subject to New York City income tax.

¹Administrative Code § 11-1705(b)(1)(B) contains an identical definition of statutory residency to that given above, except for the substitution of the term “city” for “state.”

²With exceptions for military service not relevant here.

³ The Division’s regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code, and any reference to “New York State domicile, resident and nonresident in such regulations shall be deemed to apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable” (*see* 20 NYCRR 290.2[b]).

C. With regard to May 5, 2006, it is recognized that a day spent traveling “through New York to a destination outside of New York State” is not considered a day in New York City (20 NYCRR 105.20[c]). However, there is insufficient evidence in the record to support the conclusion that this regulation is applicable. Rather, the candid testimony regarding petitioners’ activity on this day is vague and does not preclude the possibility that petitioners stopped at the West 17th Street apartment and then proceeded on to the airport.

D. In reaching the forgoing conclusion with regard to New York City income tax, it is noted that the arguments raised by the Division have been considered and rejected. In particular, the Division’s reliance upon *Matter of Holt* (Tax Appeals Tribunal, July 17, 2008) is misplaced. *Holt* presented a situation where the documentary evidence was problematic. Among other things, the photocopying was of poor quality, handwritten entries were illegible, the calendar only contained a location entry only, and, in some instances, location entries, for certain days were scratched out and changed. Under the circumstances, the record did not have the credible substantiating detail to support the taxpayer’s claims. In this matter, the testimony was clearly supported by contemporaneous records of telephone calls and credit charges. It is also noted that petitioners have correctly pointed out that credible testimony alone is sufficient to establish whether a day was spent in New York City (*Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994, *rearg denied* Tax Appeals Tribunal, January 26, 1995). Significantly, there was a much longer time span between the testimony at the hearing and the years in issue in *Avildsen* than the corresponding time span in this matter. The suggestion in the Division’s brief that the decision to not offer testimony by Mrs. Knoebel is detrimental to petitioners case also lacks merit. There is no requirement that each petitioner testify in a statutory residency case. Further, Mr. Knoebel clearly explained that he and Mrs. Knoebel always traveled to New York City together.

E. Relying upon *Matter of Stranahan v. New York State Tax Commission* (68 AD2d 250 [1979]) and *Matter of Moed* (Tax Appeals Tribunal, January 26, 1995), petitioners argue that the days spent in Utica should not be counted as days in New York because petitioners were compelled to be there in order to care for the medical needs of Ms. Goldbas.

The authority relied upon does not support petitioners' position. The principle that the presence of certain shopping days in New York may not be counted toward statutory residence because there was no nexus between the New York place of abode and the New York employment was expressed by the administrative law judge in *Moed* and not by the Tribunal. Reliance upon this case is misplaced because the determinations of administrative law judges may not be cited as precedent (Tax Law § 2010[5]). There is currently no authority for the proposition that there must be a nexus between the presence in New York and the New York place of abode for a day in New York to be counted.

The court in *Stranahan* held that days spent in New York for the treatment of a serious illness should not be counted in determining whether a nondomiciliary is a resident for income tax purposes. Petitioners would expand this holding to include those who are in New York to provide care for someone who is ill. In my opinion, the holding in *Stranahan* cannot be expanded to this extent. If such a holding were adopted, then in any instance where a nondomiciliary with a permanent place of abode in New York visited an ill family member in New York questions would be raised regarding how sick that family member was, whether outside care was needed and whether there were reasonable alternatives to the nondomiciliary attending to the needs of the ill family member in New York. Delving into these issues would make administration of the rules regarding statutory residency impossibly cumbersome. Consequently, petitioners' request to expand *Stranahan* to include their circumstances is rejected. It follows that petitioners have not

established that they spent less than 183 days in New York State in 2006 and they are properly regarded as statutory residents.

F. Penalties were imposed for negligence (Tax Law § 685[b][1]) and negligence or intentional disregard of the Tax Law (Tax Law § 685[b][2]). In view of the fact that petitioners filed a return that failed to disclose an apartment in New York City and no reasonable explanation for the omission was presented, it is concluded that petitioners have not presented reasonable cause for the abatement of the penalties (*Matter of Eskioff*, Tax Appeals Tribunal, October 26, 2000).

G. The petition of David J. And Laurie Knoebel is granted to the extent of Conclusion of Law B and the asserted deficiency of New York City personal income tax is cancelled; except as so granted, the Notice of Deficiency dated February 26, 2010 is otherwise sustained together with such penalties and interest as are lawfully due.

DATED: Albany, New York
September 19, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE