

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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

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Petitioners, Harold M. and Pearl M. Veeder, 1 Harbourside Drive, Delray Beach, Florida 33483, filed a petition for redetermination of deficiencies or refund of personal income tax under Article 22 of the Tax Law for the years 1986 through 1989.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 7, 1992 at 1:15 P.M., with all briefs filed by October 15, 1992. Petitioners were represented 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).

ISSUE

Whether petitioners were residents of New York State as defined by section 605(b)(1) of the Tax Law as individuals domiciled in the State of New York, or 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

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:

<u>Tax Period Ended</u>	<u>Tax Amount Asserted</u>	<u>Interest Amount Asserted</u>	<u>Total Amount Due</u>
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	<u>11,093.52</u>	<u>497.68</u>	<u>11,591.20</u>
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 in Finding of Fact "1" 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.

#### CONCLUSIONS OF LAW

A. Tax Law § 605(former [a]) in effect for the years at issue, provided, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless

"(A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(2) who is not domiciled in this state but 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, unless such individual is in active service in the armed forces of the United States."<sup>1</sup>

B. In the instant matter, it is unnecessary to resolve the question of petitioners' domicile because it is clear that, regardless of their domicile, they are subject to tax as statutory residents of New York pursuant to Tax Law § 605(former [a]).

C. Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1) as follows:

"A permanent place of abode means a dwelling place permanently maintained by

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In 1987, the Tax Law was amended and the provision cited became part of Tax Law § 605(b). That section is applicable to the years 1987, 1988 and 1989 herein.

the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

It is not necessary that the taxpayer actually live in the abode in order for it to constitute a "dwelling place permanently maintained by the taxpayer" within the meaning of 20 NYCRR former 102.2(e)(1) (see, Matter of Roth, Tax Appeals Tribunal, March 2, 1989). It is concluded that

petitioners' home at 265 Consaul Road, Colonie, New York owned and maintained by petitioners since 1960 constituted a permanent place of abode within the meaning of Tax Law § 605(former [a]) and 20 NYCRR former 102.2(e)(1). Since petitioners maintained a permanent place of abode in New York, they can not qualify for treatment as nonresidents under Tax Law § 605(former [a][1]) (see, Matter of Shapiro, Tax Appeals Tribunal, July 3, 1991).

D. Having established petitioners maintenance of a permanent place of abode within New York State during the years in issue, the critical question becomes whether petitioners spent in the aggregate more than 183 days of the taxable year in the State of New York. The only evidence of days spent within and without the State of New York submitted by petitioners was testimony of Mr. Veeder and his accountant, Mr. Nathaniel Daffner. Mr. Veeder based his knowledge of days spent within and without the State of New York upon a record kept by a friend and neighbor of petitioners in Delray Beach, Florida, Mr. Phil Kileen. The Kileen record was never produced to the auditor (although requested) nor was it introduced into evidence at hearing. Mr. Veeder said he saw what looked like a notebook kept by Mr. Kileen but never indicated if he ever reviewed it. He stated that he "thought" the record indicated days when petitioners were not in Delray Beach but he admitted that he did not know the purpose for which Mr. Kileen maintained the record. Nathaniel Daffner testified that it was his recollection that the Veeders spent in excess of two-thirds of each year in issue in the State of Florida, but kept no diary or other record to substantiate this assertion.

The regulations of the Commissioner of Taxation provide, in part, as follows:

"Any person domiciled outside New York State who maintains a permanent



place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (20 NYCRR former 102.2[c]).

Mr. Veeder acknowledged that neither he nor his wife kept records of the days they spent in New York during the years in issue. Therefore, very little weight can be accorded his testimony or Mr. Daffner's without any substantiation. Without more, Mr. Veeder's reliance on a document he never reviewed or presented to the Division or to this forum was insufficient.

Therefore, even if petitioners were domiciled outside of New York State during 1986, 1987, 1988 and 1989, it is found that they maintained a permanent place of abode within the State of New York during the taxable years in issue and that they have not sustained their burden of showing that they did not spend more than 183 days of each taxable year in issue within the State of New York (Tax Law §§ 605[former (a)]; 689[e]; 20 NYCRR 3000.10[d][4]).

E. The petition of Harold M. and Pearl M. Veeder is denied, and the three notices of deficiency dated October 9, 1990 are sustained.

DATED: Troy, New York  
April 15, 1993

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE