

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petitions	:	
of	:	
<b>DONALD C. SMITH AND CAROL A. GROH</b>	:	DECISION
for Redetermination of Deficiencies or for Refund of New	:	DTA Nos. 810532
York State and New York City Income Taxes under	:	and 813342
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1986 through 1991.	:	

---

Petitioners Donald C. Smith and Carol A. Groh, One Annas Hope, P. O. Box 24290, St. Croix, U.S. Virgin Island 00824-0290, filed an exception to the determination of the Administrative Law Judge issued on May 8, 1997. Petitioners appeared by Robert Plautz, Esq. and Joseph Lapatin, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioners filed a brief a brief in support of their exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on January 28, 1998 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether petitioners were domiciliaries of the City and State of New York for the years 1986 through 1991 and were thus taxable as resident individuals.

II. Whether petitioners were statutory residents of the City and State of New York for the years 1986 through 1989 and were thus taxable as resident individuals.

III. Whether petitioners were entitled to claim a capital loss under Internal Revenue Code § 1231 upon the sale of 848 shares of stock held in a cooperative corporation which owned property at 212-214 East 77<sup>th</sup> Street, New York City in 1987.

IV. Whether the Administrative Law Judge erred in his conclusion of law “S” as to the proper amount of losses allowed from passive activities pursuant to Internal Revenue Code § 469 for the years 1988 and 1989.

V. Whether petitioners were entitled to Schedule E business expenses in connection with their rental real estate activities at Annas Hope in St. Croix for the years 1988 and 1989.

VI. Whether the Administrative Law Judge failed to rule on the issue of whether petitioners were entitled to deduct certain expenses in 1986 as ordinary and necessary business expenses in connection with management fees paid to Jon Siegel Management Co., Inc. and, if so, whether the Tax Appeals Tribunal is entitled to rule on same.

VII. Whether the Administrative Law Judge abused his discretion in not granting leave to reopen the record.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge’s findings of fact and the additional findings of fact are set forth below.

Petitioner Donald C. Smith was born in Fostoria, Ohio in the year 1929. In 1959, he graduated with a B.S. degree in architecture and in 1961 he received a masters degree in

architecture from the University of Pennsylvania. After graduating from the University of Pennsylvania he sought employment with Skidmore Owings & Merrill ("Skidmore"), one of the world's largest architectural firms. Skidmore was then and continues to be headquartered in Chicago, Illinois. Mr. Smith was hired by Skidmore in 1961 and was assigned to work in its New York City office. He began as a draftsman in that year, was elected a participating associate in 1963, an associate partner in 1965 and was made a full partner in 1969. Mr. Smith was a member of Skidmore's Partners Committee which directed the affairs of the firm. The meetings of the committee were held in Chicago, New York and San Francisco.

In the 1960s and early 1970s, Mr. Smith spent most of his time working for the firm either in New York or in Edmonton, Canada. In New York, he designed and built, among other projects, the General Insurance Company building in Greenwich, Connecticut and New York University's Business School in lower Manhattan. In Edmonton, he worked with a developer named Don Love in designing and building six major commercial towers of between 35 and 45 stories in the downtown area.

Petitioner Carol Groh was born in Grand Rapids, Michigan. She attended Hillsdale College in Michigan and later transferred to the Parsons School of Design in New York City. Ms. Groh graduated from Parsons in 1966 with a B.A. degree in environmental design. In 1968, she accepted employment as an interior designer in the New York City office of Skidmore Owings & Merrill. Petitioners met in 1972 while both were working for Skidmore in New York City, and were married in 1976.

In 1964, Mr. Smith purchased and resided at 211 East 62nd Street, New York, New York. He sold the property in March 1977. Petitioners' certified marriage license in 1976, as well as the

certified birth certificate of their first son, born in 1977, indicated their residence to be 251 East 51st Street, New York, New York. While the record is unclear as to when, if ever, petitioners disposed of the 51st Street apartment, the record is clear that, by January 1978, petitioners already owned and had telephone service at their apartment located at 175 East 62nd Street, New York, New York. The certified birth certificate of their second son born in 1981 listed their residence to be 175 East 62nd Street. Furthermore, it is undisputed that petitioners owned and maintained this apartment throughout the audit period.

In 1972, Don Love approached Mr. Smith to request that he join him in various projects concerning the construction and development of downtown Denver, Colorado. Mr. Smith accepted the offer because he saw a large amount of opportunity there. He requested that Skidmore open an office in Denver with himself as the partner-in-charge. Mr. Smith would serve as the architect in charge of design as well as the architect in charge of management and construction of the Denver office. In 1972, Mr. Smith and Ms. Groh started the Skidmore Denver office and by 1974, the office had 60 employees.

Initially, petitioners rented an apartment on Humboldt Street in Denver. In 1977, they purchased a home in Denver at 385 Gilpin Street which they sold approximately one year later. Following the sale of their house they again rented an apartment in Denver at 1077 Race Street. The apartment's square footage was 3,000 square feet.

During the mid-to-late 1970s, Mr. Smith began to work with another real estate developer in Denver named John Whitney. Mr. Smith designed and built two office buildings for Mr. Whitney in Denver, the 36-story Denver National Bank Building and the 47-story 17th Street Plaza. In 1976, Ms. Groh was forced to resign from Skidmore because the firm had a policy

against employees being married to partners. After resigning, she began developing her own interior design business and did the interior design work on the buildings for Mr. Love and Mr. Whitney. Ms. Groh did the interior design work on the same buildings on which Mr. Smith did the exterior and structural architectural design work. Ms. Groh also joined with another former employee of Skidmore's New York City office to form an interior design firm, GN Design Associates, Inc. ("GN Design"), initially located in an apartment on East 51st Street in Manhattan. The firm later moved its offices to a building located at 57th Street and Madison Avenue. The partnership was dissolved in 1988.

The 1986 corporate franchise tax return of GN Design, stated that it was a New York corporation which began doing business in New York in January 1979. Likewise, an article in the August 1987 edition of Working Woman magazine stated that GN Design was based in New York in January 1979. An article from Business Week for June 1988 stated that GN Design was located on Manhattan's East Side in 1979. Finally, an article in the Washington Post from January 1988 stated that "New York interior designer Carol Groh of GN Associates" had been named designer of the year.

During 1976, Mr. Smith was approached by Mr. Whitney to join him in the development of a two-block area in downtown Denver entitled the Tabor Center. The proposal was for Mr. Smith and Skidmore to be involved in the project not only as architects, but as financial partners as well. Skidmore rejected the offer as it wished to remain exclusively in the business of supplying architectural services. However, the firm did not have any objection to Mr. Smith, on his own, joining with Mr. Whitney on the project. Mr. Smith therefore joined Mr. Whitney, providing his architectural skills and \$25,000.00 in exchange for a 50% interest in Tabor Center.

This was the first of many projects which involved Mr. Smith, on his own, investing substantial sums of money and time in developing, designing and assisting in the management of commercial real estate ventures throughout the United States. Others included the following:

- a. 33 West Monroe Street, Chicago, Illinois - a 38-story office building in which Mr. Smith personally invested \$60,000.00.
- b. 46 North Michigan Avenue, Chicago, Illinois - a 46-story apartment building in which Mr. Smith invested \$250,000.00.
- c. 333 Bush Street, San Francisco, California - a 62-story building in which Mr. Smith invested \$50,000.00.
- d. Symphony Towers, San Diego, California - a 46-story office tower with a 450-room hotel in which Mr. Smith invested \$60,000.00.
- e. Pinehurst Apartments, Dayton, Ohio - an apartment complex in which Mr. Smith invested \$60,000.00.
- f. Riverside Apartments, Dayton, Ohio - an apartment complex in which Mr. Smith invested \$10,000.00.
- g. Highland Commons, Tampa, Florida - a 94-story office tower and shopping center in which Mr. Smith invested \$250,000.00.
- h. Valley Hill Associates, Tarrytown and Kew Gardens, New York - Mr. Smith invested \$250,000.00.
- i. 212-214 East 77th Street, New York, New York - an apartment building in which Mr. Smith invested \$950,000.00.

j. 22-24 West 69th Street, New York, New York - an apartment building in which Mr. Smith invested \$50,000.00.

k. 106 West 69th Street, New York, New York - an apartment building in which Mr. Smith invested \$250,000.00.

l. 345 Park Avenue, New York, New York - an office tower in which Mr. Smith brought the respective parties together as a joint partner with other partners of Skidmore.

After 1987, petitioners made no further business investments in New York City or State, generally limiting their investments to St. Croix and Denver, Colorado.

Ms. Groh was also actively involved in many of these projects. While Mr. Smith designed the buildings, she handled the interior designing and design work such as public space design for lobbies and tenant corridors in the apartment buildings. Ms. Groh would also specify and select the materials, finishes, furniture and fixtures associated with the interior requirements.

Both petitioners testified that, at the time of their marriage in 1976, they were domiciled in Denver, Colorado. Contrary to petitioners' testimony, the certified copy of the marriage license stated that Donald Smith's place of residence at the time of their marriage was 251 East 51st Street, New York, New York. Carol Groh's place of residence was listed as 251 East 51st Street, New York, New York.

Both Mr. Smith and Ms. Groh testified that they were married on a tall ship which was sailing on the high seas, out of the jurisdiction of New York State. Ms. Groh stated it was a legal marriage and that they did not have to memorialize their marriage in any way on land. Contrary to petitioners' testimony, the certified copy of the marriage license, as indicated in the portion of the license entitled "To Persons Performing Marriage Ceremony", stated that the officiant of said

ceremony was Gilbert Rabin, City Justice, and that he performed the marriage at his home in Yonkers, New York at 10:35 A.M. on July 17, 1976.

Petitioners testified that in 1977 they resided in the State of Colorado. During that year, petitioners' first son was born in New York City. Ms. Groh explained that during the first few months of the pregnancy she would speak to the doctor on the telephone to assure him that she was eating properly. As there was a Down's Syndrome child in Mr. Smith's family and Ms. Groh had become pregnant with her first child at a later age in life, she had amniocentesis performed at the Columbia Presbyterian Hospital in New York City in her 16th week of pregnancy. From this point forward, she would come to New York once a month to see her doctor, staying one or two days each visit. As the term of the child drew near, petitioners set up a date with their doctor in New York for the birth of their child. Ms. Groh was to fly to New York two days before the scheduled delivery date and stay with a friend in Manhattan. On the date chosen, delivery would be induced, and Ms. Groh would return to her friend's apartment after one or two days in the hospital. Following the birth of their child, Mr. Smith returned to Denver, Colorado or some other place of business. During the two to three days of recuperation spent at her friend's apartment, Ms. Groh was attended to by her mother and Mrs. Nellie Gomes, a nanny hired by petitioners immediately before the birth of their first child. After approximately one week of Ms. Groh's time spent in New York, Mr. Smith returned to New York and he, along with Ms. Groh, the baby and Mrs. Gomes returned to Denver. The birth of petitioners' second child was accomplished in much the same way.

Contrary to petitioners' testimony, the certified copy of the birth certificate of their first son stated that the mother's usual residence was 251 East 51st Street in New York City. The birth

certificate further stated that, pursuant to the Bureau of Vital Records, Department of Health, City of New York, the mailing address of the mother was "Mrs. Carol Smith, 251 East 51st Street, Apt. 20-M, New York, New York 10022."

Petitioners testified that in 1981, the year of the birth of their second son, they resided in the state of Colorado. Contrary to petitioners' testimony, Ms. Groh listed her usual residence on the birth certificate as being in New York City, but this time, her New York City address was the 175 East 62nd Street apartment. The birth certificate further stated that, pursuant to the Bureau of Vital Records, Department of Health, City of New York, the mailing address of the mother was, "Mrs. Carol Smith, 175 East 62nd Street, New York, New York 10021."

Mr. Smith testified that at the time he and his wife were in Denver, neither he nor his wife had a permanent place of abode in New York. Both petitioners confirmed on cross-examination that neither maintained a permanent place of abode in New York during the years that they were in Denver.

There was no documentation submitted, other than a letter from the state of Colorado concerning petitioners' filing of Colorado tax returns for the years 1976 through 1981, to establish that they resided in Colorado during any period of time. In fact, the letter does not state from which address petitioners filed their state returns. Although petitioners claimed to have moved to Colorado in 1974 and to have filed resident returns from 1974 through 1981, they did not file as residents of Colorado for either 1974 or 1975.

Mr. Smith testified that in 1981 the senior partners of Skidmore requested that he return to New York to become the partner-in-charge of the New York office. Mr. Smith decided to return to New York with one of the conditions being that he would have full access to Skidmore's

limousines and drivers for his and his family's daily needs. There were four Skidmore drivers assigned to the New York City office. This would allow petitioners and their sons to live outside New York City with easy access to work for petitioners and to school for the children within the City. Mr. Smith testified that in the winter of 1982 the whole family left Denver and moved back East.

In accordance with these plans, in December 1982, petitioners bought an eight-room, four-bath, two-car garage house located on Lake Mohawk in Sparta, New Jersey. The house was situated on one acre of land. The purchase price was \$190,000.00 and financing for the purchase was obtained from the National Community Bank, a local bank in Sparta. On April 4, 1983, petitioners moved the furnishings from their apartment in Denver to their house at 518 West Shore Trail, Sparta, New Jersey. However, petitioners filed as New Jersey residents for the entire 1982 tax year. The certified copy of the deed to the Sparta house listed petitioners' address as 175 East 62nd Street, New York, New York.

For approximately three years following the purchase of the Sparta house, petitioners made \$321,160.60 worth of improvements. The kitchen was gutted and expanded with all new equipment and appliances added. The outdoor porch was enclosed with a full glass wall and made into a ninth room. Petitioners moved the garage and the driveway from the back of the house to the side of the house, in the process creating an outdoor deck. An outdoor heated pool was added along with a trampoline. Petitioners also put in a new heating system and added central air conditioning.

According to petitioners, their home in Sparta was furnished with expensive and rare contemporary furniture and paintings. Among other items, it had paintings by Franz Klien and

Claes Oldenberg, the latter painting appraised in 1989 at \$70,000.00. The house also had Eskimo art work and furniture designed by Herman Miller. In addition, the house contained a dining room table designed by Ms. Groh.

Petitioners maintained a homeowners insurance policy for their house in Sparta with State Farm Fire Mutual Casualty Company, and it specifically included an additional rider for jewelry, furs and artwork in the Sparta house. There was no such rider for the apartment that they maintained in New York City at 175 East 62nd Street.

Immediately after moving to Sparta, Mr. Smith bought a Scorpion speed boat for water skiing on the lake that abutted their property. The boat was registered and moored in Sparta. In 1987, Mr. Smith traded in the Scorpion boat for a new 19-foot Master Craft inboard boat. The Master Craft was also used for water skiing on the lake and was registered and moored in Sparta.

During the audit period, Mr. Smith had a driver's license from the State of New Jersey. In 1987, Mr. Smith bought a new Chevrolet Blazer and registered it in New Jersey where it remained registered until 1992. All other vehicles owned by Mr. Smith during the audit period were registered in St. Croix. Ms. Groh's Jaguar was also registered in New Jersey. However, she maintained her New York State driver's license throughout the audit period.

Petitioners testified that their social and family life was centered in Sparta from 1982 through most of the audit period. The children's doctors were located in Sparta. With rare exception, every weekend was spent in Sparta. Each July 4th Holiday, a family reunion of Mr. Smith's relatives was held in Sparta. During the warm weather, weekends were spent water skiing and swimming in the pool. In the winter, the lake would freeze over and the children would ice skate and play hockey and sleigh ride on the local golf course. While the family lived

in Sparta, they did not go to Central Park, the movies, professional baseball or basketball games, museums, Broadway shows or the ballet in New York City. Petitioners were members of two country clubs in Sparta, the Lake Mohawk Country Club and the Lake Mohawk Golf Club. They were not members of any social clubs in New York.

Petitioners' sons attended The Allen-Stevenson School located in Manhattan from 1983 through 1992. The residence of record for petitioners' sons, as listed with the school, was 175 East 62nd Street from 1983 to the end of 1991. For the school years 1985-1986 and 1986-1987, Mr. Smith was co-chairman of the Parents Committee for the annual fund drive for The Allen-Stevenson School.

According to Mr. Smith, the children spent all of their nonschool days in Sparta during the years in question. While discussing his 1986 diary, Mr. Smith testified that he and his family stayed in Sparta every time that they had the chance. "That is our home and that is where our kids wanted to be and grow up in Sparta." Mr. Smith testified that from 1986 to 1991, he generally spent weekends in Sparta. Petitioners claimed that after 1985 Nellie Gomes spent 1 month in St. Croix and the remaining 11 months in Sparta, always staying with the children. Furthermore, Mr. Smith stated that "[m]y home in 1986 was in Sparta, New Jersey." These statements contrast with petitioners' original claim that they were domiciled in St. Croix beginning in 1985.

Petitioners' Exhibit "7" was described by Mr. Smith as follows:

Exhibit "7" is a series of six pictures marked A to F which illustrate the house in the wintertime, roughly '84; they were all taken at the same period of time. And it illustrates quite vividly the look of the house from the front, from the rear, from the yard and its relationship to the

lake and its improvements that we made in the early years to the house at 518 West Shore Trail after purchasing it in 1982.

With respect to photo B, the date on the back of the picture is March 1992.

Although there were several pictures depicting the outside of the New Jersey house, there were no photos of the interior of the house during the years 1984 through 1992.

In 1985, Mr. Smith began to consider his retirement from Skidmore. Skidmore had a mandatory retirement age of 65 but Mr. Smith planned on leaving in 1989 at age 60. In anticipation of retirement, he decided to begin developing new business opportunities that he would find both invigorating and challenging. To that end petitioners investigated the United States Virgin Islands for opportunities to build and develop property. On the island of St. Croix, petitioners paid \$1,000,000.00 in cash for an unimproved 13-acre beachfront parcel of land named Green Cay. The transaction occurred on August 9, 1985.

Following the purchase, Mr. Smith began to develop the Green Cay property. He cleared the land, installed a fresh water well, put irrigation lines into place and planned their beachfront house. Petitioners also began the process of subdividing a portion of Green Cay.

Approximately four months later, petitioners were shown another piece of property entitled Annas Hope. They immediately realized that while Green Cay was well suited for the purpose of developing residential sales, Annas Hope provided a better location for their personal residence. In addition, petitioners planned on renovating three of the four houses presently on Annas Hope which would mean starting a second business on St. Croix of renting luxury vacation units. On April 1, 1986, petitioners bought Annas Hope for \$1,060,000.00 in cash. It is noted that petitioners never resided at Green Cay.

Annas Hope is a 6-acre peninsula with a cliff 23 feet above sea level that juts out into the Caribbean Sea. Following the sale, petitioners tore down the one building that was at the point of the peninsula and began to convert the three remaining units into rental units.

Petitioners did extensive landscaping to the six acres of Annas Hope. They built a new road to the property and planted more than 2,000 sea grape trees, dozens of Christmas palms, hundreds of Hibiscus plants and many more plants including Alamanda and Bougainvillea. They also planted a small orange and grapefruit orchard. The cost for the landscaping performed by petitioners during the years 1986 through 1988 was approximately \$473,000.00. Petitioners never used the rental units for their own personal use, but instead resided in a home located at 35 Green Cay which they rented during their visits while their residence on Annas Hope was being completed. For instance, petitioners and their children went to St. Croix for the Christmas vacation of 1986, renting the 35 Green Cay home while they were there.

The house designed and built by petitioners is eight rooms with an interior floor space of 5,550 square feet and roof space of 7,000 square feet. Petitioners had a St. Croix construction company, Caribbean Construction Services & Associates, do the labor and supply the basic materials. Construction took almost two years to complete and construction costs for labor and miscellaneous materials from Caribbean Construction as of February 1988 were \$1,468,130.00. This amount did not include the \$491,710.00 paid directly by Scotiabank to Caribbean Construction for work and construction on the three rental units on Annas Hope, pursuant to a construction loan obtained by petitioners. Total payments made by petitioners to vendors of materials not purchased through Caribbean Construction was \$694,000.00. Included in the items purchased directly by petitioners were: 88 tons of Sardinian Grey Granite imported from

Italy and used for the walkways surrounding the houses; a flag pole specially equipped with a lightning preventer which neutralized the ions in the air during a storm; a seven-foot diameter butcher block table that measured six inches thick; 60 tons of Ming green marble imported from China and used on the interior floors and the bathrooms; a dining table measuring 15 feet square and 2 kitchen counters measuring 18 feet long, made of dark green Vermont marble; kitchen cabinets made of French ash; Iroka mahogany imported from Africa to make the interior gables of the house; and special glass and framing for the doors and windows which were needed because of the salt air on the peninsula. Petitioners' house on Annas Hope was first occupied by them in November 1987.

Petitioners hired Henry and June Bogdanik to manage the St. Croix property. The Bogdaniks had check-signing authority on two accounts with Chase Manhattan Bank: the Smith Groh, Inc. account and the Donald C. Smith account. The checks on both accounts were used to cover expenses arising out of the St. Croix property. In 1989, George Tyger replaced the Bogdaniks as manager.

The Green Cay property that petitioners purchased for \$1,000,000.00 was in its natural state at the time of the purchase. Immediately after the sale, petitioners began to develop it for sales of residential lots. Petitioners brought in bulldozers and heavy equipment, cleared the land, hired the Roe Win Construction Company in St. Croix to complete the major earth moving efforts and hired two full-time landscapers. They built an irrigation system with a stone container wall and plastic barriers to control the water runoff into the sea. They attempted to drill one well but it was dry, so they drilled a second well to irrigate future plantings. They built a pump house, brought in electricity, built a blacktop road and cleaned up the beach. By April

1987, petitioners had invested an additional \$821,000.00 in the Green Cay property over and above the original purchase price. On April 9, 1987, petitioners sold Green Cay for \$2,500,000.00.

During the audit period, petitioners maintained the apartment at 175 East 62nd Street in New York City. The parties agree that the 175 East 62nd Street apartment was a permanent place of abode during the audit period. Petitioners testified that the apartment was purchased in 1978 for \$140,000.00. The auditors also concluded that it was 1978 based on the fact that petitioners had a telephone line connected in that year. The renovations done to 175 East 62nd Street were completed in late 1982 or early 1983, and upon completion petitioners were issued a new share certificate. Petitioners testified that, when the renovations were completed, they did not sell the apartment for a variety of reasons. The real estate market was weak at this time and petitioners felt they would not get the amount of money they deserved. Mr. Smith also needed an office for his non-Skidmore business dealings which included meetings with potential landowners and clients, having a place to work and keep records and having a place for the part-time employees to work. These part-time employees were involved in developing plans, ordering materials and working with the contractors. Finally, petitioners found the apartment to be a comfortable place to stay overnight when they had business in Manhattan which kept them there late or when the weather made it difficult to return to Sparta.

The total square footage of the apartment after the renovations was approximately 3,000 square feet. The apartment had been totally gutted, including some of the exterior walls. In 1982, petitioners purchased the apartment next door, annexed a room and resold the remaining portion of that apartment. This room served as the children's bedroom. Petitioners testified that

the living room of the apartment was used as the office headquarters for Mr. Smith's business activities unrelated to Skidmore. The office contained a secretarial desk, computer, drafting board, conference table with chairs, file cabinets and other office equipment. Introduced into the record of this matter was the floor plan of the apartment and a series of nine pictures which depicted the interior of the apartment and the office equipment previously mentioned. The pictures also show petitioners' bedroom and a couch. What is not shown is the kitchen, the maid's room and the children's room. Mr. Smith testified that although Skidmore principals tolerated his outside real estate business activities, it was necessary for him to have an office outside of his Skidmore office because they did not want him to be performing his private business at their office. However, despite that testimony, there is no question that Mr. Smith billed his travel and entertainment expenses for his personal business through Skidmore expense accounts. Petitioners also testified that the family would sleep overnight in the apartment on those occasions when they might stay late in the City or there was inclement weather. According to petitioners, they averaged approximately three to four overnights in the apartment per month. The 175 East 62nd Street apartment was contracted for sale in 1991 for \$1,500,000.00 and the closing took place in 1992.

On October 9, 1990, the auditors visited the 175 East 62nd Street apartment with Mr. Smith and his representative. According to the auditors, Mr. Smith stated to them that he had moved out of the apartment in 1982. Several of the doors were locked, and the auditors were not shown the kitchen and the maid's room. After obtaining a copy of the apartment's floor plan from the cooperative manager, the auditors met again with Mr. Smith and were reshowed the apartment, including the kitchen and another bedroom.

Petitioners introduced six pictures into the record of this matter which, according to petitioners, show the furniture which was situated in their Sparta house. The pictures were taken in their Greenwich, Connecticut house after the Sparta house had been sold. However, it appears from the photographs of the interior of the Greenwich house and the photographs of the interior of the apartment on 175 East 62nd Street that the couch and some of the chairs are the same.

Petitioners received mail at their New York address during the years in question including their St. Croix real property tax bills for 1985, 1986 and 1987, their New Jersey real property tax bills, their Chase checking account statements, their Chase mortgage account statements, their National Community Bank (New Jersey) mortgage statements as well as their New Jersey United Telephone bills. All of petitioners' bank accounts and mortgages were with New York banks except for the mortgage on the Sparta house.

The auditor testified that the Sparta residence was a summer home as was demonstrated by the very low telephone bills during the winter months. Also, as indicated on petitioners' check #3265, dated August 16, 1984, written to Sears, it states that Mr. Smith's summer residence is 518 West Shore Trail in Sparta. As of the date when this particular check was written, i.e., August 16, Mr. Smith had a Colorado driver's license as is indicated on the reverse side of the check. However, on check #2494 which was dated April 9, 1983 and written to Sears, Mr. Smith displayed a New York driver's license number. Another indication that the Sparta home was a summer residence was the fact that, although petitioners closed on the property in December of 1982, their belongings were not shipped from their apartment in Denver to Sparta until April of 1983.

For the year 1986, the checks written for the monthly telephone bills for the New Jersey house were for the following amounts:

\$ 4.11 paid on 2/23/86	check #4117
\$ 44.54 paid on 4/21/86	check #4199
\$ 32.04 paid on 5/13/86	check #4238
\$ 52.09 paid on 6/23/86	check #4293
\$ 95.48 paid on 7/15/86	check #4337
\$138.62 paid on 8/19/86	check #4391
\$150.88 paid on 9/14/86	check #4429
\$ 63.41 paid on 10/15/86	check #4465
\$ 40.44 paid on 12/8/86	check #4543
\$ 64.49 paid on 12/22/86	check #4603

For the year 1986, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$ 57.03 paid on 2/1/86	check #4097
\$ 89.11 paid on 3/8/86	check #4141
\$ 54.60 paid on 4/6/86	check #4174
\$ 65.09 paid on 5/13/86	check #4229
\$ 81.46 paid on 6/4/86	check #4271
\$107.84 paid on 7/6/86	check #4317
\$111.54 paid on 8/5/86	check #4364
\$122.84 paid on 9/10/86	check #4414
\$228.97 paid on 10/1/86	check #4447
\$127.20 paid on 11/2/86	check #4494
\$100.74 paid on 12/8/86	check #4546
\$ 88.37 paid on 12/31/86	check #4638

For the year 1987, the checks written for the monthly telephone bills for the New Jersey house were for the following amounts:

\$ 16.72 paid on 4/1/87	check #4756
\$ 24.94 paid on 4/22/87	check #4786
\$ 36.82 paid on 5/24/87	check #4848
\$ 41.74 paid on 6/21/87	check #4918
\$ 54.64 paid on 7/21/87	check #4947
\$ 98.73 paid on 8/24/87	check #4996
\$109.49 paid on 9/18/87	check #5041

\$ 41.23 paid on 10/28/87	check #5100
\$ 15.87 paid on 11/14/87	check #5146
\$ 27.19 paid on 12/13/87	check #5215

For the year 1987, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$ 46.50 paid on 2/8/87	check #4698
\$ 72.72 paid on 3/5/87	check #4730
\$ 46.65 paid on 4/1/87	check #4757
\$ 89.23 paid on 5/1/87	check #4810
\$ 66.32 paid on 6/1/87	check #4879
\$114.30 paid on 7/20/87	check #4948
\$115.16 paid on 8/3/87	check #4978
\$ 83.27 paid on 9/2/87	check #5020
\$ 80.75 paid on 10/1/87	check #5057
\$122.04 paid on 11/4/87	check #5127
\$145.56 paid on 12/5/87	check #5171
\$120.01 paid on 12/31/87	check #5261

For the year 1988, the checks written for the monthly telephone bills for the New Jersey house were for the following amounts:

\$ 10.09 paid on 2/6/88	check #5307
\$ 36.33 paid on 2/19/88	check #5331
\$ 7.96 paid on 3/12/88	check #5384
\$ 21.36 paid on 4/23/88	check #5437
\$ 22.08 paid on 5/24/88	check #5468
\$ 55.64 paid on 6/13/88	check #5503
\$ 86.81 paid on 7/20/88	check #5560
\$104.51 paid on 8/16/88	check #5605
\$ 90.47 paid on 9/30/88	check #5658
\$126.94 paid on 10/16/88	check #5675
\$ 27.49 paid on 12/1/88	check #5751
\$ 37.31 paid on 12/31/88	check #5827

For the year 1988, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$101.98 paid on 2/6/88	check #5318
\$170.50 paid on 3/1/88	check #5368
\$125.23 paid on 4/8/88	check #5416
\$127.77 paid on 5/6/88	check #5454
\$ 85.66 paid on 6/13/88	check #5510
\$109.79 paid on 7/8/88	check #5541
\$ 68.81 paid on 7/30/88	check #5580
\$ 28.50 paid on 9/1/88	check #5626
\$ 78.57 paid on 10/2/88	check #5670
\$ 99.03 paid on 11/5/88	check #5706
\$106.07 paid on 12/11/88	check #5745
\$120.26 paid on 12/31/88	check #5812

For the year 1989, the checks written for the monthly telephone bills for the New Jersey house were for the following amounts:

\$ 25.37 paid on 2/13/89	check #5877
\$ 68.49 paid on 4/8/89	check #5936
\$ 85.52 paid on 4/23/89	check #5962
\$ 7.36 paid on 7/26/89	check #6099
\$ 95.21 paid on 8/20/89	check #6125
\$ 96.98 paid on 10/1/89	check #6186
\$ 11.99 paid on 10/25/89	check #6225
\$ 46.86 paid on 11/16/89	check #6258
\$ 12.00 paid on 12/15/89	check #6345

For the year 1989, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$145.50 paid on 2/13/89	check #5866
\$133.16 paid on 3/12/89	check #5908
\$107.94 paid on 4/8/89	check #5929
\$ 88.66 paid on 5/1/89	check #5986
\$102.05 paid on 6/3/89	check #6022
\$ 96.58 paid on 7/10/89	check #6081
\$ 71.28 paid on 8/20/89	check #6128
\$153.92 paid on 9/1/89	check #6154
\$ 50.62 paid on 10/6/89	check #6205
\$319.77 paid on 11/1/89	check #6236
\$188.31 paid on 12/3/89	check #6282
\$167.41 paid on 12/31/89	check #6365

For the year 1990, the checks written for the monthly telephone bills for the New Jersey house were not submitted into evidence.

For the year 1990, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$179.29 paid on 2/1/90	check #6407
\$ 97.30 paid on 3/10/90	check #6465
\$116.37 paid on 4/1/90	check #6494
\$105.92 paid on 5/1/90	check #6536
\$121.42 paid on 6/1/90	check #6569
\$114.75 paid on 7/90	check #6637
\$ 59.48 paid on 8/1/90	check #6669
\$ 77.24 paid on 9/1/90	check #6700
\$159.93 paid on 10/12/90	check #6773
\$159.28 paid on 10/20/90	check #6782
\$140.71 paid on 12/6/90	check #6832
\$133.45 paid on 12/31/90	check #6888

For the year 1991, the checks written for the monthly telephone bills for the New Jersey house were for the following amounts:

\$ 13.09 paid on 1/28/91	check #6919
\$ 12.82 paid on 3/1/91	check #6958
\$ 12.82 paid on 4/1/91	check #6996
\$ 14.33 paid on 4/28/91	check #7010
\$ 19.86 paid on 5/23/91	check #7048
\$ 37.34 paid on 6/15/91	check #7079
\$ 44.38 paid on 7/24/91	check #7103
\$109.50 paid on 9/1/91	check #7140
\$ 40.83 paid on 10/18/91	check #7190
\$ 22.00 paid on 12/23/91	check #7268
\$ 37.31 paid on 12/31/91	check #7282

For the year 1991, the checks written for the monthly telephone bills for the New York City apartment were for the following amounts:

\$ 94.74 paid on 2/10/91	check #6945
\$127.54 paid on 3/1/91	check #6953

\$108.92 paid on 4/1/91	check #6975
\$136.20 paid on 5/2/91	check #7029
\$191.29 paid on 6/9/91	check #7068
\$167.34 paid on 7/7/91	check #7098
\$ 95.77 paid on 7/31/91	check #7114
\$ 76.22 paid on 9/1/91	check #7141
\$ 78.08 paid on 10/1/91	check #7174
\$107.53 paid on 11/1/91	check #7211
\$130.52 paid on 12/20/91	check #7261

Mr. Smith confirmed that there was only one telephone line in the New Jersey home. The phone number was (201) 729-4252. Furthermore, Mr. Smith testified that the 175 East 62nd Street apartment had only one telephone. The phone number was (212) 935-5133.

During the years 1986 through 1991, petitioners traveled frequently in their respective businesses. In particular, Ms. Groh testified that she spent a great deal of time in Fairfield, Connecticut working for her major client, the General Electric Company. During these same years, their two young sons (ages five and nine in 1986) attended school in New York City at The Allen-Stevenson School on East 78th Street. According to petitioners' testimony, when the family was staying in Sparta, their daily commute did not necessarily follow the same pattern. For example, when both petitioners worked in New York City, the family, including their nanny, would commute from Sparta to New York City, a distance of approximately 50 miles, with Mr. Smith usually driving. On the days when Mr. Smith was out of town but Ms. Groh was required to go to New York City, she would drive into the City with the boys and the nanny. When neither petitioner was commuting into New York City, one of the drivers from Skidmore would pick up the boys and their nanny and drive them into the City.

Regardless of who drove in the morning, the boys would be dropped off at The Allen-Stevenson School. The family automobile would then be parked at the 62nd Street parking

garage. From there, Ms. Groh would usually walk to her office on 57th Street. Mr. Smith would either attend to his business at 175 East 62nd Street or be picked up by one of the Skidmore drivers and be driven to the office on 42nd Street. The nanny would always go to the apartment and either wait for the boys to come home from school or go to the school and get them. During the day she would do secretarial work in connection with petitioners' business projects and investments.

In the evening, according to petitioners, either the family returned in the family automobile or were driven in one of the Skidmore limousines. The Skidmore drivers were also used when Mr. Smith had to go to or return from one of the airports for business travel and when the entire family would be traveling to airports for trips to such places as St. Croix. Mr. Smith testified that either he or the whole family would travel directly from Sparta to the airport on these occasions.

Petitioners testified that beginning with the birth of their first child, their nanny, Nellie Gomes, lived with them in Denver, Colorado and later in Sparta, New Jersey. However, the 1987 form W-2 Wage and Tax Statements for both Camille O'Keefe, the daughter of Ms. Gomes, and Nellie Gomes list both of their addresses as 48-16 46th Street, Woodside, New York 11377. Camille O'Keefe took over as nanny in 1988 following the death of her mother. Petitioners testified that Ms. O'Keefe lived with them until 1991, when they determined that a nanny would no longer be required.

In an effort to establish the number of days petitioners spent in New York City and State during the years 1986 through 1989, petitioners introduced into the record of this matter eight books, four each for Mr. Smith and Ms. Groh. Each book consists of 12 monthly calendars

prepared in anticipation of this hearing. The days of the calendars are marked with locations and numbers. The locations are the places where petitioners claim to have spent that day. Dates left blank on the calendars are deemed to have been spent in New York City. The numbers indicate the page number of the backup material that follows the calendars. The backup documentation consists of copies of airline tickets, travel vouchers, credit card statements, passports and partnership minutes of Skidmore.

Also introduced was an affidavit from Daniel Friedman with reference to a copy of a portion of Mr. Friedman's business diary for the years 1986 through 1989. Mr. Smith supervised a major construction project for Skidmore in Hartford, Connecticut during 1986 through 1989. The project was known as 180 Allyn Street and was developed by Oakleaf Development Corporation, of which Mr. Friedman was the chairman. The project involved approximately \$265,000,000.00, with Skidmore receiving \$5,000,000.00 in fees. Petitioners also introduced an affidavit from Victoria Kahn who worked with Mr. Smith on a project to bring the Commodities Exchange to Harborside, New Jersey. During the years 1988 through 1990, Mr. Smith would travel to Harborside to work on the project.

During the period 1986 through 1990, Ms. Groh testified that she did a great deal of work for the General Electric Company headquartered in Fairfield, Connecticut. An affidavit of Thomas Noonan, head of the Engineering and Construction Operation for RECO (the Real Estate and Construction Operation) of the General Electric Company in Fairfield, Connecticut for the years 1986 through 1994 stated that he observed Ms. Groh approximately two days per week in Fairfield working on projects for the GE Company.

Mr. Smith did not submit contemporaneous diaries for the years 1986 and 1987 because they were destroyed in Hurricane Hugo. Mr. Smith did submit diaries for the years 1988 and 1989. Ms. Groh did not submit contemporaneous diaries for the year 1986 and the first ten months of 1987. Diaries were submitted by Ms. Groh for the last two months of 1987 and the years 1988 and 1989.

During the year 1986, Mr. Smith claimed to have spent 121 days in New York. There were 46 travel days in which petitioner was either departing from or arriving at a New York airport or railway station. Petitioner claimed 32 days outside of the State but there existed no documentation to support such claim. These days are January 9, 13, 17, 22, 27, 31, February 7, 27, March 6, 7, 31, April 7, 22, May 8, 9, June 4, 16, 27, July 1, 2, 21, 25, 30, August 1, 22, 26, October 24, November 7, 14, 18, December 5 and 10.

A review of purchases made by Mr. Smith for his business operations revealed additional New York City days as follows:

DATE	CALENDAR LOCATION	NYC RECEIPT LOCATION
1/16/86	Hartford	New York City
1/21/86	Hartford	Genovese
3/3/86	Morristown	New York City
3/11/86	Minneapolis/Edmonton	Lexington Hardware
5/30/86	Elizabeth/Sparta	New York City
7/5/86 (weekend)	Sparta	New York City
8/6/86	Chicago	New York City
8/23/86 (weekend)	Sparta	New York City
10/7/86	London	New York City
11/10/86	Hartford	Lamston's
12/7/86 (weekend)	Sparta	Jems Sounds
12/9/86	Hartford	Lamston's
12/14/86 (weekend)	Sparta	Jems Sounds

The monthly calendar contains the following conflicts between the location entered on the calendar and the location of the American Express charge receipts signed by Mr. Smith for that particular day:

DATE	CALENDAR ENTRY	CHARGE LOCATION
2/24/86	Hartford	NYC-AmEx
5/21/86	St. Croix	NYC-AmEx
8/13/86	Sparta	NYC-AmEx

Finally, there existed a receipt indicating that phone products were purchased from AT & T in New York City on December 19, 1996 as reflected by the American Express transaction date recorded therein. The monthly calendar indicated that Mr. Smith was in Hartford on that day.

For the year 1987, Mr. Smith stated that he was in New York City for 118 days. A review of documentation submitted for the purpose of substantiating certain business expenses indicated discrepancies between the monthly calendar and the cash register receipts and credit card information, as follows:

DATE	CALENDAR ENTRY	NYC RECEIPT LOCATION
1/4/87	St. Croix	A & P
1/9/87	Hartford	Bloomingdale's
1/29/87	St. Croix	Gristedes
2/4/87	Hartford	A & P
2/5/87	Boston	NYC
2/12/87	Philadelphia	NYC
2/18/87	Hartford	NYC
2/24/87	Hartford	Gristede's
3/11/87	Hartford	NYC
3/13/87	St. Croix	NYC
3/18/87	St. Croix	NYC
3/27/87	St. Croix	Bloomingdale's
4/4/87	Dayton	NYC
4/15/87	Hartford	Forbidden Planet
5/6/87	Hartford	AmEx transaction

5/10/87	St. Croix/Sparta	NYC
5/15/87	Elizabeth	Gasnick's Supply
5/19/87	Ft. Lee/Elizabeth	A & P
5/23/87 (weekend)	Sparta	Gristede's
6/10/87	Hartford	Pathmark Drugs
6/13/87 (weekend)	Sparta	Lazy Susan
6/25/87	St. Croix	Kentucky Fried Chicken
7/14/87	Hartford	Regents Fabrics
7/17/87	Morristown	NYC
7/31/87	Morristown	Bloomingtondale's
8/5/87	Hartford	Gristede's
8/7/87	Elizabeth/Sparta	Taxicab
8/24/87	Chicago	NYC
9/4/87	Chicago	NYC
9/8/87	St. Croix	Gristede's
9/12/87	St. Croix	Jems Sounds
9/14/87	Sparta	A & P
9/17/87	Hartford	Gristede's
9/23/87	Hartford	Sunnyside
9/28/87	Morristown	NYC
9/28/87		Presbyterian Hosp.
10/2/87	Hartford	Lighting Center
10/5/87	Morristown	Gristede's
10/6/87	Boston	NYC
10/14/87	Hartford	Gristede's
10/14/87		The Gap
10/30/87	St.Croix	Bloomingtondale's
11/2/87	Hartford	NYC
11/3/87	Hartford	AmEx receipt
11/16/87	Sparta	AmEx receipt
11/21/87	St. Croix	NYC
11/24/87	St. Croix	Gristede's
12/5/87 (weekend)	Sparta	Alexander's
12/16/87	Hartford	Lighting Center
12/19/87	St. Croix	NYC
12/21/87	St. Croix	Gristede's
12/29/87	St. Croix	NYC

Petitioner claimed 23 days outside of the City and State but there existed no documentation for such claim. These days are February 9, March 9, 12, April 8, 28, May 14, 20, June 2, 5, 16, 22, 24, July 3, 6, 7, 15, 23, August 12, 21, 27, September 16 and October 9. All except two of the

flights taken by Mr. Smith during 1987 departed from or arrived at either Kennedy or LaGuardia airports. There were 52 such departure and arrival days during the year.

For the year 1988, Mr. Smith admitted to being in New York City 136 days during the year. In addition, the following discrepancies existed between certain calendar entries on petitioner's monthly calendars and American Express receipts signed by Mr. Smith:

DATE	CALENDAR ENTRY	NYC AMEX RECEIPT
3/6/88	Aspen	Alo Alo
3/16/88	London	Water Club
5/4/88	Chicago	Spritzer & Fuhrmann
5/31/88	St. Croix	Sichuen Pavillin
6/12/88	Orlando	Sistina
6/15/88	Chicago	NY Helmsley Fiorella Ristorante
7/14/88	Chicago	Bruno
9/15/88	Washington	NY Helmsley/Bruno
9/16/88	Boston	Bruno
11/4/88	San Francisco	Arizona
11/18/88	Chicago	Alo Alo
12/2/88	London	Fortune Garden
12/13/88	Hartford	Willoughby's
12/16/88	Chicago	Agra Restaurant

Of these additional 14 days indicated to be within New York City by the signed American Express receipts, 13 of these days involved charges made either before departing from or after arriving in the City by airplane. Although petitioner consistently testified that it was his pattern to be driven directly to the airport from Sparta or directly to Sparta from the airport, it is obvious that his pattern of travel, as demonstrated by this documentation, was different from what was disclosed by Mr. Smith. There are also 41 additional travel days that were not included as New York City days in Mr. Smith's count analysis.

The following days are listed as non-New York days but do not have any backup documentation to support this claim: January 11, 18, 27, February 1, 22, March 15, 25, 26, 29, May 6, 23, June 24, July 1, August 22, 26, September 2, 9, October 17, 24, November 1, 16 and December 6.

For the year 1989, Mr. Smith indicated that he was in New York 145 days. In addition, the following discrepancies existed between the monthly calendar entries and certain American Express receipts signed by Mr. Smith:

DATE	CALENDAR ENTRY	AMEX RECEIPT-NYC
1/21/89 (weekend)	Sparta	Ranis Electronics
1/25/89	Hartford	Sichuen Pavillion
1/27/89	Chicago	Helmsley Hotel
9/29/89	St. Croix	Agra Restaurant
10/18/89	Toronto	Docks
10/27/89	St. Croix	La Hosteria <sup>1</sup>
10/29/89 (weekend)	St. Croix	Pancho Villa's
12/8/89	Chicago	Agra Restaurant

There existed other receipts which place Mr. Smith in New York City on days he indicated were spent in other locations:

DATE	CALENDAR ENTRY	NYC-RECEIPT
6/3/89 (weekend)	Sparta	Barnes and Noble
10/28/89 (weekend)	St. Croix	Pathmark Drugs
11/26/89 (weekend)	St. Croix	Receipt
11/27/89	Montreal	Lexington Luggage
12/2/89 (weekend)	Sparta	Genovese

---

<sup>1</sup>This receipt appears twice in the documents presented to establish certain business expenses for the year 1989. Mr. Smith indicated on one of the receipts that it represented a dinner with J. Hartman and on the other receipt, he states that it was a dinner with D. Thomas.

There were 34 travel days in which petitioner departed from or arrived at an airport located in New York City. In addition, there were 24 days which petitioner indicated were spent outside of New York but for which no substantiation of the location was provided. The 24 unsubstantiated days were as follows: January 17, 18, 23, 26, 28, February 6, 13, 16, March 9, April 26, May 25, June 23, July 3, 4, 5, 7, August 4, 11, 18, 25, October 11, 24, November 13 and 16.

For the year 1986, Ms. Groh indicated that she spent 141 days in New York City during the year. She had 26 travel days where she left from or arrived in New York City in relation to a trip claimed to have been taken outside the State. There were 69 days claimed to have been spent in Fairfield, Connecticut during the year, but no substantiation was offered. Finally, the following 17 days were claimed to have been spent outside New York City but documentation produced by petitioners indicated otherwise:

DATE	CALENDAR ENTRY	NYC-AMEX TRANSACTION
1/18/86 (weekend)	Sparta	Bloomingdale's
5/28/86	Fairfield	Bloomingdale's
		Fortune Garden
6/13/86	Sparta	Bloomingdale's
7/16/86	Fairfield	Bloomingdale's
7/30/86	Fairfield	Bloomingdale's
7/31/86	Fairfield	Bloomingdale's
8/5/86	Fairfield	Bloomingdale's
8/13/86	Fairfield	Doubleday Bookshop
8/14/86	Fairfield	FAO Schwartz
8/26/86	Fairfield	Bloomingdale's
9/12/86	Chicago	Bistro at Trump Tower
10/9/86	Nantucket	Bistro at Trump Tower
11/15/86 (weekend)	Sparta	Maxwell Plum's
		Paragon Athletic Goods
11/19/86	Fairfield	FAO Schwartz
11/22/86 (weekend)	Sparta	The Gap/Alo Alo

11/23/86 (weekend)	Sparta	Chaifteld's Ltd. DeMarchelier
12/7/86 (weekend)	Sparta	Lazy Susan

Ms. Groh conceded she spent 144 days in New York City during the year 1987. Ms. Groh was also in New York City on the following days as indicated by the American Express receipts from the following locations:

DATE	CALENDAR ENTRY	NYC AMEX RECEIPT
2/8/87 (weekend)	Sparta	Dolphin Seafood
5/6/87	Fairfield	Doubleday Bookshop
6/30/87	West Palm Beach	Bloomingdale's
9/12/87 (weekend)	Sparta	Ralph Lauren
11/11/87	Fairfield	Bloomingdale's
12/5/87 (weekend)	Sparta	Alexander's

Ms. Groh had 28 travel days in which she began and/or ended a trip within the State, and she had 63 calendar entries indicating days spent in Fairfield, CT without any documentation to support such entries.

During 1988, Ms. Groh conceded that she spent 137 days in New York City. She claimed to have spent 65 days in Fairfield, CT during the year, but did not submit any receipts which indicated such a presence. In addition, there were 27 travel days which were not counted as New York City days and 3 days for which there existed documentation that indicated the days should have been counted as New York City days. The 3 days are as follows:

DATE	CALENDAR ENTRY	NYC RECEIPT
2/6/88 (weekend)	Sparta	Toy Park
3/4/88	Aspen	Fiorella Restaurant(AmEx)
12/20/88	St. Croix	Sussex Wine

During 1989, Ms. Groh conceded that she spent 145 days in New York City. She claimed to have spent 64 days in Fairfield, CT during the year, but did not submit any documentation which indicated such a presence. In addition, there were 37 travel days where Ms. Groh departed from or arrived at a New York City airport which were not counted as New York City days and 3 days for which there existed receipts which indicated the days should have been counted as New York City days. The 3 days are as follows:

DATE	CALENDAR ENTRY	NYC RECEIPT
1/13/89	Orlando	Bistro at Trump Tower(AmEx)
6/5/89	Los Angeles	Nails by Josephine
9/16/89	Sparta	Mulholland Dr Cafe

The Division conceded that petitioners spent fewer than 184 days in New York (State and City) during each of the years 1990 and 1991. In the audit report, the auditor indicated that Mr. Smith spent his days during these two years as follows:

	<u>New York</u>	<u>New Jersey</u>	<u>St. Croix</u>	<u>Connecticut</u>	<u>Others</u>
1990	126	69	57	54	59
1991	143	84	38	60	40

Petitioners did not present any information as to their whereabouts during the years 1990 and 1991.

During 1986, petitioners paid \$50,355.00 in interest payments to the Union Chelsea National Bank of New York City in connection with a loan for business and investment activities as indicated by customer statements of account and paid \$2,549.00 to the Internal Revenue Service for interest on a tax liability for an earlier year, for a total of \$52,904.00.

During 1988, petitioners made interest payments in the following amounts: \$27,802.59 to Chase Manhattan Bank of New York City for a loan used to buy out Ms. Groh's partner in GN Associates, \$7,520.68 to Chemical Bank of New York City, \$1,760.20 to Maryland Bank and \$62,261.00 to Citytrust of New York City for loans used in connection with Mr. Smith's business activities in Tarrytown, New York and Denver, Colorado and \$43,200.00 to Pacific Savings Bank for a loan used in connection with petitioners' business activities in an apartment on North Michigan Avenue in Chicago, Illinois as indicated by promissory notes, a letter from Chase Manhattan Bank, records of interest paid and checks written to various banks.

Petitioners also made \$42,000.00 in interest payments to the Scotiabank of the Virgin Islands for a construction loan used in connection with petitioners' business activities in St. Croix based upon a letter from the bank and checks written to the bank.

For 1989, petitioners paid \$50,926.00 in interest to Chase Manhattan Bank and \$20,950.00 in interest to Citytrust in connection with their business activities. This is indicated by two records of interest paid from the Chase Manhattan Bank and an interest statement from Citytrust.

All interest discussed herein was claimed by petitioners on their Federal form 1040s, Schedule A, itemized deduction forms.

In 1988, petitioners received \$255,258.00 in interest income, \$2,366.00 in dividend income and \$112,487.00 in capital gain income. For 1989, petitioners received \$211,237.00 in interest income and \$6,061.00 in dividend income.

Petitioners claimed passive losses for 1987 through 1991 which were taken on their Federal Schedule E. The losses for 1987, 1990 and 1991 were allowed on audit while the losses

for 1988 and 1989 were disallowed. In a telephone conversation with petitioners' representative on November 22, 1994 and in a letter to the representative on November 23, 1994, the auditor indicated that the full amount of the passive losses for 1988 of \$47,782.00 and for 1989 of \$148,104.00 should have been allowed.

In addition to their house on St. Croix, petitioners conducted a business which rented the three units that are located on Annas Hope. The rental units were converted from the three buildings that were located on the property at the time petitioners bought Annas Hope in April 1986. The conversion work was done by Caribbean Construction Services & Associates at a cost of \$491,711.00 to petitioners and secured by a mortgage with Scotiabank. Starting in 1987, petitioners included their rental business in St. Croix on a Schedule E - Supplemental Income Schedule with their Federal income tax return, Form 1040. The Schedule E's were audited by New York State for the years 1987 through 1991. For the years 1987, 1990 and 1991, the auditors accepted the documentation produced by petitioners as to the income and expenses shown on the schedules. For the years 1988 and 1989, the auditor disallowed all the expenses listed on the Schedule E's related to petitioners' rental activity on St. Croix. During the course of the hearing, petitioners produced canceled checks for all of the expenses and Mr. Smith testified that the expenses were necessary in connection with the carrying on of the rental activity in St. Croix during 1988 and 1989.

Petitioners claimed certain unreimbursed business expenses on Statements 1 and 2 for the year 1986 and on Statement 1 for the years 1987 through 1991. The unreimbursed business expenses were divided equally between petitioners' Schedules A and E. Petitioners introduced

checks written on petitioners' personal checking accounts with New York City banks to support the expenses claimed.

As indicated by checks introduced into the record, all Sparta telephone and utility costs were taken as necessary and customary business expenses of the 175 East 62nd Street apartment on petitioners' 1986 Federal income tax return, Statements 1 and 2, and the 1987 Federal income tax return, Statement 1.

As indicated by checks introduced into the record, all Sparta telephone and utility costs were taken as necessary and customary business expenses of the 175 East 62nd Street apartment on petitioners' 1988 Federal income tax return, Statement 1 and their 1989 Federal income tax return, Statement 1.

As indicated by checks introduced into the record, the Sparta utility expense for the year 1990 was taken as a necessary and customary business expense of the 175 East 62nd Street apartment on petitioners' 1990 Federal income tax return, Statement 1.

As indicated by checks introduced into the record, the Sparta telephone expense for the year 1991 was taken as a necessary and customary business expense of the 175 East 62nd Street apartment on petitioners' 1991 Federal income tax return, Statement 1.

Mr. Smith testified that there was a television equipped with cable in the children's bedroom. As indicated by checks introduced into the record, petitioners took a full deduction as customary and necessary business expenses all the checks written to Manhattan Cable for years 1986, 1987, 1988, 1989 and 1990.

The expenses claimed by petitioners for the year 1986 in their business activities were allocated 10% to Ms. Groh (Statement 1) and 90% to Mr. Smith (Statement 2). The Statement

1 expenses for 1986 begin with a claim for utility expenses of \$185.00. In support, petitioners introduced into evidence copies of checks payable to Jersey Central, which is the utility which supplied electricity to the Sparta house. In support of their claim of \$8,751.00 in office supplies, petitioners introduced a series of checks totaling that amount. The notations on some of the checks indicated that they were written for the St. Croix properties. Petitioners' accountant was questioned at the hearing as to why he treated the unreimbursed business expenses in a manner that allocated them equally between Schedules A and E, and he responded only that that is how he reported the expenses. In addition, with respect to the expenses incurred by Ms. Groh, it was not explained why such expenses were not reported on the corporate tax return of GN Design. Petitioners presented checks totaling \$6,919.00 in support of the amount claimed as labor costs. No explanation was provided as to who received the checks and what their relationship was to petitioners' business activities. Business expenses for subscriptions to magazines and books for the New York office were claimed in the amount of \$2,821.00. Four of the checks submitted and paid to "Kimberly May" totaling \$468.00 were identical to checks submitted as labor costs. The travel expenses of \$5,187.00 and the entertainment expenses of \$7,669.00 claimed on the return were supported by 3 checks and 18 pages of petitioners' American Express Year-End Summary of Charges for 1986. Twelve checks written to "62nd Street East, Inc." for the monthly maintenance assessment for the New York City apartment totaling \$33,502.00 were introduced to establish the claimed maintenance expense of \$3,350.00. For the telephone expense of \$1,921.00, petitioners submitted 22 checks written to New York Telephone and United Telephone totaling \$1,921.00. Ms. Groh claimed 10% of this total as her expense.

Mr. Smith claimed his unreimbursed business expenses on Statement 2 of the 1986 return and allocated them 50% to Schedule A and 50% to Schedule E. Checks and American Express Year-End Summary of Charges for 1986 were submitted in support of the office supplies expense claimed of \$81,087.00. However, 13 of the checks totaling \$1,196.00 were written to "M. Fostnocht & Co.", M. Fostnocht being the woman who cleaned the Sparta house. Checks issued to "Griffith Floors" for \$800.00, "A-1 Peck Office Supplies" for \$852.24 and 4 checks issued to "Larry White Co." totaling \$1,400.00 did not contain the MIRC encoding which appears on the lower right hand corner of a check after it has been processed through the banking system. This encoding signifies that the amount of the check has been paid to the payee of the check. The MIRC encoding is the same number as the amount of the check.

Included in the expense claimed for utilities for the New York City apartment were checks written to New York Telephone of which Mr. Smith deducted 90%, the deduction of 90% of the Sparta utility bills in the amount of \$1,853.00, 100% of the Manhattan Cable expense in the amount of \$203.00 and 100% of the United Telephone of New Jersey bills in the amount of \$686.00.

Insurance expenses in the amount of \$9,279.00, entertainment expenses in the amount of \$15,317.00, maintenance expenses on the New York apartment in the amount of \$30,151.00 and travel expenses in the amount of \$16,932.00 were supported by copies of checks and the year-end summary charges from American Express in the appropriate amounts.

Six checks were submitted in support of the professional expense taken in regard to the 212-214 East 71st Street building in the amount of \$8,017.00. However, one check in the amount of \$2,592.00 was not cashed by any banking institution.

The documentation presented to establish the miscellaneous expenses of \$5,544.00 consisted of cash register receipts which did not identify the item purchased. In addition, the six file cabinets listed on an invoice from Sparta Stationery Plus, Inc. for \$838.52 were previously claimed as an office supply expense. In support of the labor expense in the amount of \$32,015.00, petitioners introduced a series of checks in that amount. However, seven checks totaling \$3,826.00 appeared more than once.

On their U.S. Individual Income Tax Return for 1987, petitioners claimed unreimbursed business expenses on Statement 1 and allocated the total 50% to Schedule A and 50% to Schedule E. Petitioners claimed a supplies expense of \$20,285.00 and submitted statements from Skidmore indicating reimbursable and nonreimbursable costs, American Express Year-End Summary Charges for 1987 and charge card statements from Chase Manhattan Bank and Chemical Bank of New York. The reimbursable cost statements from Skidmore totaled \$4,595.00.

Petitioners claimed \$28,666.00 in expenses for office supplies. In support of their claim, they submitted copies of checks with a handwritten notation next to the check as to its purpose. No invoices were submitted. Included among the checks is: one written to the "Postmaster" for the rental fee of the Sparta post office box, several checks with the notation that they are for cleaning services, two checks that are characterized as contributions, two checks written to Sparta Water Co., two checks written for a flag and a flagpole, checks written for window washing, and numerous checks with the notations that they were, for example, for kitchenware, glassware, fabric, bath blinds, towels and a bedroom lamp.

The checks submitted to substantiate the expenses for utilities included checks written to United Telephone of New Jersey, Jersey Central and Service Electric Co. (Sparta electric and utilities), Manhattan Cable, New York Telephone (\$1,152.57) and AT & T (\$359.12 for the purchase of telephones).

Checks addressed to various insurance companies in the amount of \$4,533.00 were submitted in support of the insurance expense taken. However, check #4854 in the amount of \$255.56 was not cashed by any banking institution.

Petitioners submitted checks and mortgage statements for professional fees and mortgage expense in the amounts of \$14,489.00 and \$14,268.00, respectively. Submitted in support of the labor expense was a series of checks totaling \$101,464.00, which was divided into three categories (office, labor, 212 East 77th St.) to arrive at the deducted figure of \$34,821.00. Thirteen of the checks were not MIRC-encoded. The total of these checks was \$1,790.00. Two of the checks that were cashed appear twice within the exhibit.

There are ten checks totaling \$1,284.00 written to Mrs. Fostnocht, the cleaner of the Sparta house. Under cleaning and maintenance, petitioners submitted checks in the amount of \$7,506.00 for the maintenance of the plants in the New York office.

For the entertainment and travel expenses, petitioners submitted checks and credit card statements in the amounts of \$25,293.00 and \$27,171.00, respectively. For the maintenance expenses of \$30,238.00, petitioners submitted checks addressed to "62nd Street East, Inc." and a check for payment of the garage rent totalling the amount claimed.

Invoices and cash register receipts were presented in an effort to support the claimed miscellaneous expenses of \$2,551.00. Many of the cash register receipts did not identify the

item purchased. Some of the many items that are listed on the cash register tapes included groceries, dinnerware, greeting cards, candles, party goods, coffee beans, two burgers, an order of french fries and two malts and a dinner at Kentucky Fried Chicken. No explanation was provided as to how these or any of the other items were related to petitioners' business activities. In addition, several of the checks written in payment of the invoices submitted in support of the miscellaneous expenses were previously submitted as office expenses and utility expenses, totalling \$781.21 and \$359.12, respectively. In support of the travel expenses, petitioners introduced computer printouts from Skidmore listing reimbursable expenses.

On their U.S. Individual Income Tax Return for 1988, petitioners claimed unreimbursed business expenses on Statement 1 and allocated the total 50% to Schedule A and 50% to Schedule E. Invoices, cash register receipts and checks were submitted in support of the office supplies expense claimed in the amount of \$29,566.00. Included in the documents submitted are receipts for the purchase of: Armor-all, aluminum foil, Crest toothpaste, Centrum vitamins, Insoles, an item at Kay-Bee Toy Store, a Mars candy bar, greeting cards, the annual post office box rental for the Sparta house, produce, a deli sandwich and a golf computer game. There are also numerous receipts that do not identify the item purchased. There are checks written to American Airlines, GN Associates and the Connecticut Broadcasting Co.

Checks introduced for supplies in the amount of \$44,241.00 include: a check in the amount of \$3,404.12 payable to Buccaneer Bay Landowners Association, check #5559 payable to Morgan-Francis Co. which is the company that sold the flagpole to petitioners for the St. Croix property, check #5295 to Fisher Skylights which is the company that petitioners contracted to do the lighting on their St. Croix house, check #1285 in the amount of \$5,000.00

written to K. Robert Najarian who was Ms. Groh's partner at GN Associates, four checks written to A. Lasley or Allison Lasley totaling \$5,238.61 and two checks totalling \$2,300.00 payable to A & S Landscaping. No explanation was provided as to how these checks related to supplies for petitioners' business activities.

Checks presented in support of the utility expenses in the amount of \$8,224.00 included: a check in the amount of \$1,298.00 payable to E. A. Lugo Co., the company which provided the audio-visual equipment for the St. Croix residence, twelve checks totalling \$1,533.47 written to Jersey Central for the monthly utilities of the Sparta house, twelve checks written to the United Telephone Co. in the amount of \$626.99, eleven checks written to Manhattan Cable totalling \$341.97 and twelve checks written to Madelyn Simon totalling \$3,045.34. One of the checks indicated that these were for maintenance.

Petitioners submitted checks totalling \$16,158.00 in regard to the insurance expense claimed. The checks contained five different insurance companies: State Farm, USAA, Chubb, Marshall & Sterling and Mutual Insurance Company of New York. Marshall & Sterling was the insurance company that issued the policy for the St. Croix property. State Farm was the insurance company that issued the policies for the Sparta home and the 1986 Chevrolet Blazer. There was no testimony concerning what the other three insurance companies insured.

Petitioners submitted checks equal to the amount of the expenses claimed for professional fees and payroll and other taxes totalling \$95,616.00 and \$3,500.00, respectively. Petitioners submitted checks totalling \$104,668.00 with regard to their claimed labor expense. However, check #5243 in the amount of \$1,298.80 was also presented in support of the utility expense; checks #1205, #1208, #1155, #1285, #1224, #1240, #1174, #1167, #1171, #5561 and #5732

totalling \$14,238.43 were also presented in support of supplies expense; and, checks #1164, #1156 and #1165 totalling \$2,773.60 were also presented in support of the office supply expenses. In addition, nine checks totalling \$1,155.00 were written to the Sparta housekeeper, Mrs. Fostnocht. No testimony was offered explaining who many of the payees named on the checks were and what services they performed for petitioners.

On their U.S. Individual Income Tax Return for 1989, petitioners claimed unreimbursed business expenses on Statement 1 and allocated the total 50% to Schedule A and 50% to Schedule E. Included in the checks submitted in support of the labor expenses in the amount of \$67,809.00 were five checks written to the Sparta housekeeper totalling \$440.00 and 32 checks written to Camille O'Keefe, who provided child care services, totalling \$35,700.00. In addition, check #6061 in the amount of \$150.00 and check #6322 in the amount of \$750.00 were not MIRC encoded and thus not cashed by any banking institution.

Year-end summary statements for various credit cards, checks and invoices were submitted to document the claimed business expenses in the amount of \$35,213.00. Included in the checks introduced in support of the \$3,071.00 in telephone expenses were two checks payable to the order of "Ship and Shore Power Systems" totalling \$995.00. On the memo portion of one of the checks, it is noted that the payment is for a deposit on a generator. In addition, there were nine checks totalling \$449.84 payable to United of New Jersey, the telephone company that provided service to the Sparta house. Petitioners claimed utility expenses in the amount of \$2,562.00 and submitted checks totalling that amount. However, 12 checks were written to Jersey Central and 3 to Sparta Utility. These checks totalled \$1,774.85. There also was included 12 checks payable to Manhattan Cable totalling \$401.17.

Petitioners claimed and submitted checks in the amount of \$3,983.00 for publications and supplies expenses. Petitioners claimed and submitted checks for maintenance and repair expenses in the amount of \$13,505.00 and professional fees in the amount of \$11,932.00.

Petitioners claimed \$40,828.00 in transportation expenses and introduced checks, Skidmore expense statements, year-end credit card statements and credit card receipts in support of their claim. Three checks written to reimburse Skidmore for the amounts on the expense statements were not MIRC encoded and therefore not cashed by any banking institution. The travel expenses covered by these checks totalled \$9,097.00. In addition, a fourth Skidmore expense statement shows travel expenses of \$1,395.40. Meals and entertainment expenses in the amount of \$22,491.49 ( $\$28,114.37 \times .80$ ) were supported by adding machine tapes totalling \$24,926.01, a Skidmore expense statement showing expenses of \$1,798.08 and an uncashed check and checks in the amount of \$1,390.28.

In support of office supply expenses in the amount of \$15,711.00, petitioners submitted checks, credit card summary statements, Skidmore expense statements with accompanying checks written to Skidmore, invoices and credit card statements. None of the checks which accompanied the Skidmore expense statements were cashed by a banking institution. The expenses claimed to be through Skidmore totalled \$5,122.80. An additional four checks, totalling \$2,834.84, were also not cashed by a banking institution.

General supplies expenses in the amount of \$11,026.00 were supported by checks, invoices and cash register receipts. Miscellaneous expenses were claimed in the amount of \$1,594.00 and checks in that amount were submitted. One of the checks was written to the Lake Mohawk Club in the amount of \$575.00. No testimony was offered as to why this would

qualify as a business expense for petitioners' real estate ventures. Petitioners claimed and submitted checks in the amount of \$2,166.00 for payroll taxes paid. Advertising expenses were claimed in the amount of \$950.00 and checks were presented in that amount. The memo on one check indicated it was written for "pillowcovers-cases/kware" while another check was written to Woolworth and two more were written to Bloomingdales. These four checks totalled \$360.00.

On their U.S. Individual Income Tax Return for 1990, petitioners claimed unreimbursed business expenses on Statement 1 and allocated the total 50% to Schedule A and 50% to Schedule E. Checks and other documentation were presented in support of the expenses claimed for maintenance of \$45,357.00, publications and supplies of \$1,739.00, miscellaneous of \$666.00, professional fees of \$23,559.00 and meals and entertainment of \$5,774.00. Labor expenses of \$40,913.00 were claimed and supported by checks in the same amount. Three checks totalling \$440.00 were issued to the Sparta housekeeper, Mrs. Fostnocht, and twelve checks totalling \$18,500.00 were written to the children's nanny, Camille O'Keefe.

Checks in the amount of the business expenses claimed were submitted, although one check in the amount of \$250.00 was not cashed by any banking institution as it was not MIRC encoded. Of the checks submitted in respect of the telephone expenses claimed of \$2,603.00, eleven were addressed to Jersey Central totalling \$1,138.00. All the checks introduced as support for the utility expense of \$883.00 were written to Manhattan Cable, George and Diane Zinkken or Robert Parry. These three individuals were not identified in the testimony of petitioners.

Included in the checks submitted for the claimed insurance expense of \$3,578.00 were checks written to State Farm, Chubbs Insurance and Carl Stecker & Associates. No explanation was provided as to what these various insurance companies insured. The claimed transportation expenses of \$16,548.00 were supported by checks, credit card statements, Skidmore expense statements, credit card receipts and travel agency statements. One check in the amount of \$465.00 was not cashed by a banking institution.

On their U.S. Individual Income Tax Return for 1991, petitioners claimed unreimbursed business expenses on Statement 1 and allocated the total 50% to Schedule A and 50% to Schedule E. Checks and other documentation were presented in support of the expenses claimed for maintenance of \$46,524.00, publications and supplies of \$957.00 and plants and plant maintenance of \$3,594.00. Federal miscellaneous income tax statements, forms 1099, for the year 1991 and checks were provided in support of the labor expense claimed of \$23,960.00. The total of the checks and the amount shown on the form 1099 in relation to Camille O'Keefe, the nanny of petitioners' children, was \$23,960.00.

Included in the documents submitted relating to the telephone expense claimed of \$1,678.00 were eleven checks written to United Telephone of New Jersey totalling \$364.00. Included in the checks submitted for the claimed insurance expense of \$2,023.00 were checks written to State Farm and USAA. No explanation was provided as to what these insurance companies insured. Three of the checks submitted in support of the claimed professional fees of \$32,846.00 had not been cashed by a banking institution. The three checks totalled \$9,566.00. Documentation submitted on behalf of petitioners in support of the transportation expenses claimed of \$15,294.00 included checks in the amount of \$4,239.00, adding machine

tapes totalling \$10,140.00 and hand-written notations with a total of \$915.00. The only documentation submitted in support of the meals and entertainment of \$4,286.00 were adding machine tapes. Included in the checks for the cleaning expense taken of \$5,146.00 were six checks totalling \$760.00 written to the Sparta housecleaner. Among the checks submitted with regard to the repairs expense of \$4,929.00 was a check written to Sparta Electric in the amount of \$431.62. Documentation submitted to substantiate the office supplies of \$9,028.00 were adding machine tapes totalling \$2,286.00 and invoices in the amount of \$6,742.00.

Mr. Smith was involved in the purchase and conversion of an apartment building located at 212-214 East 77th Street in New York City. Mr. Smith paid Jon Siegel Real Estate Management Co., Inc. fees in the amount of \$65,500.00 to manage the apartment building in 1986, as indicated by 18 checks written by Mr. Smith to Jon Siegel Management in 1986. These were ordinary and necessary fees in the operation of the apartment building. Petitioners claimed fees of \$69,835.00 on their 1986 Federal Schedule E form.

We find the following additional finding of fact.

The Offering Plan in evidence indicates that real property was purchased by petitioners on October 10, 1980 and that the corporation was created on September 21, 1981. The Plan itself, dated December 1, 1982, was amended at least four times, the last dated May 18, 1984. On its face, the Plan states that the "net purchase price of property to sponsor" was \$1,912,546.00 and petitioners take the position that this is their "fixed" basis for purposes of the sale of their stock. Although the Division's auditor, Ms. Glatt, requested proof of petitioners' cost of the property, she was never provided with same.

The cooperative offering plan to convert to cooperative ownership the premises located at 212-214 East 77th Street, New York, New York was declared effective in 1984. At the time of

the conversion, the cooperative corporation had a total of 1,340 shares, all owned by Mr. Smith. The total basis for those shares was claimed by petitioners to be \$1,912,546.00, as indicated by the prospectus for conversion, which resulted in a claimed cost per share at the time of conversion of \$1,427.27 ( $\$1,912,546.00 / 1,340$ ). Petitioner Smith sold 492 shares in 1984 and 1985, but none in 1986.

In 1987, Mr. Smith sold the remaining 848 shares in the cooperative corporation to Jon Siegel for a net total of \$623,267.00. On May 18, 1984, petitioners signed a legal instrument, a deed transferring 212-214 East 77th Street, New York, NY, on which their residence was listed as 175 East 62nd Street. As Mr. Smith claimed to have made \$78,541.00 in improvements in the building after its purchase, the sale resulted in a loss of \$665,598.00 ( $\$1,210,324.00$  [original basis of \$1,427.27 per share X 848 shares] + \$78,541.00 in improvements = \$1,288,865.00 - \$623,267.00). Subtracting the recaptured depreciation of \$185,675.00 from the loss resulting from the sale of the shares results in a total loss of \$479,923.00 on the sale of the shares of the cooperative corporation of the premises located at 212-214 East 77th Street. Petitioners claimed a loss on the sale of the 848 shares relating to the premises located at 212-214 East 77th Street in the amount of \$506,349.00 on their Federal Form 4797, Gains and Losses From Sales or Exchanges of Assets Used in a Trade or Business and Inventory Conversions, filed with their 1987 returns.

At the hearing, petitioners submitted into evidence the closing statement at the time of conversion in 1984, the prospectus for conversion and the closing statement at the time of sale in 1987. The original closing statement at the time of purchase in 1981 was marked as an exhibit but was not offered into evidence. In addition, the auditor testified that she did not see

the closing statement for petitioners' purchase of this property and such information was needed in order to determine a basis in the property.

On September 19, 1989, the island of St. Croix sustained a hurricane with winds in excess of 200 miles per hour. Hurricane Hugo devastated most of St. Croix including Annas Hope. In landscaping alone, petitioners lost 150 palm and other trees, plants and shrubs. Salt water entered the engine of petitioners' water truck, destroying the truck. The fence around the property was blown down, the winds broke the glass windows and doors of their home and rental units, and the ocean waters entered the home and rental units. The winds and water destroyed much of the furniture and the records relating to Mr. Smith's real estate activities which had been transferred to the office in the house on St. Croix from the New York City office.

Repairs to the property were done by Caribbean Construction Services & Associates, the company which had originally been involved in the construction of Annas Hope. The company estimated the cost of the damage done by the hurricane to the rental units and the landscaping to be \$1,021,600.00, to the petitioners' residence to be \$1,206,550.00 and to the loss of rents and use to be \$2,228,150.00. The actual cost of the repairs to the house was \$945,750.00 and the actual cost of the repairs to the rental units was \$798,839.00, as indicated by the repair invoices of Caribbean Construction Services & Associates. Dorchester Insurance Company reimbursed petitioners \$765,000.00 for the losses sustained by petitioners' house and Cigna Insurance Company reimbursed petitioners \$353,598.00 for the losses sustained by the rental units, as established by correspondence and checks from the insurance companies. This resulted in petitioners' sustaining a net loss of \$180,750.00 to their house and a loss of \$445,241.00 to the

rental units. It is noted that the insurance coverage maintained by petitioners did not cover the loss to the landscaping, trees or plants.

Petitioners filed a casualty loss claim with their Federal Form 1040 for 1989, accompanied by a Federal Form 4684 - Casualties and Thefts. They did not file a separate form 4684 for each item claimed as a loss in Hurricane Hugo but instead included the total cost of the repairs for the damaged property and the amounts received as insurance reimbursement on the one form 4684. Petitioners used the actual cost of the repairs to the house and rental units as their cost or other basis in completing the form, resulting in casualty losses of \$180,750.00 to the house and \$445,241.00 to the rental units. On audit, the entire casualty loss was denied.

Petitioners filed their Federal US Individual Income Tax Returns, Forms 1040, for the years 1979, 1980 and 1981 from Denver, Colorado, for the years 1982, 1983 and 1984 from Sparta, New Jersey and the years 1985 through 1991 from St. Croix, Virgin Islands. Between 1985 and 1991, petitioners did not file resident tax returns in any of the 50 states. Any state return filed during those years was filed as a nonresident of such state.

Petitioners filed state tax returns as residents in the following jurisdictions: Colorado: 1976-1981; New Jersey: 1982-1984 and a part-year in 1985. Petitioners did not file tax returns with the State of New Jersey for tax years 1986, 1987, 1990 and 1991. While petitioners did file returns for tax years 1988 and 1989, such returns reflected no income.

Petitioners filed 1986 and 1987 New York State nonresident income tax returns on July 13, 1987 and June 1, 1988, respectively. On the 1986 return they claimed charitable contributions in the amounts of \$13,320.00 to The Allen-Stevenson School and \$8,921.00 to the

Christ Church. On the 1987 return they claimed charitable contributions in the amounts of \$10,020.00 to The Allen-Stevenson School and \$2,760.00 to the Christ Church.

In support of the 1986 Allen-Stevenson School contribution, petitioners submitted seven checks which were written to the school. However, only three of the checks had been cashed, and one of the cashed checks, in the amount of \$7,630.00 and dated August 5, 1986, was a tuition check as testified to by Mr. Smith. The remaining two checks totalled \$2,540.55.

Petitioners also presented copies of three letters from The Allen-Stevenson School to petitioners thanking them for their gifts of \$500.00 to the Tuition Raffle, \$2,500.00 to the Annual Fund and \$10,000.00 for the Campaign for Continuing Excellence. The letter relating to the Annual Fund gift in the amount of \$2,500.00 concerns the check in the same amount. A publication put out by The Allen-Stevenson School also indicates petitioners' donation of \$2,500.00. For the year 1987, petitioners submitted three checks totalling \$8,500.00 in support of their charitable contribution deduction to the Stevenson School. Mr. Smith testified that two of the checks totalling \$6,000.00 were "just given to Allen Stevenson". The remaining check in the amount of \$2,500.00 was paid to the annual fund drive.

No documentation was presented concerning the claimed contributions to the Christ Church.

On October 19, 1990, petitioners executed a Consent Extending Period of Limitation for Assessment of Personal Income Taxes Under Articles 22 and 30 of the Tax Law. The consent extended the period of limitation for the period January 1, 1986 through December 31, 1986 to April 15, 1991.

On May 2, 1992, January 14, 1993 and December 29, 1993, petitioners executed three consents extending period of limitation for assessment of personal income taxes under Articles 22 and 30 of the Tax Law. The consents extended the period of limitation for the period January 1, 1988 through December 31, 1988 to April 15, 1995.

On January 14, 1993 and December 23, 1993, petitioners executed two consents extending period of limitation for assessment of personal income taxes under Articles 22 and 30 of the Tax Law. The consents extended the period of limitation for the period January 1, 1989 through December 31, 1989 to April 15, 1993.

On May 25, 1994, petitioners executed a consent extending period of limitation for assessment of personal income taxes under Articles 22 and 30 of the Tax Law. The consent extended the period of limitation for the period January 1, 1990 through December 31, 1990 to April 15, 1995.

On July 31, 1990, the Division of Taxation ("Division") issued to petitioners a Statement of Personal Income Tax Audit Changes for the year 1986 asserting additional New York State and City personal income tax due in the amount of \$108,763.41 and \$37,992.55, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement indicated that petitioners had been determined to be domiciliaries of New York State and City and that the following claimed expenses had been disallowed: unreimbursed employee business expenses incurred by Ms. Groh in maintaining an apartment in New York City in the amount of \$35,074.00; Schedule A miscellaneous expenses incurred by Mr. Smith in the amount of \$151,259.00; Schedule A interest expenses paid to the Union Chelsea National Bank and the Internal Revenue Service ("IRS") in the amount of \$52,904.00; charitable contributions made to The Allen-Stevenson

School in the amount of \$13,320.00; Schedule E miscellaneous expenses in the amount of \$69,835.00; and partnership expenses incurred to maintain an office in the amount of \$151,259.00, for a total amount disallowed of \$473,651.00.

On the same date, the Division issued a Statement of Personal Income Tax Audit Changes for the year 1987 asserting additional New York State and City personal income tax due in the amount of \$199,709.67 and \$86,052.31, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement indicated that petitioners had been determined to be domiciliaries of New York State and City and that the following items had been disallowed: Schedule A office expenses in the amount of \$157,524.00; the claimed loss incurred upon the sale of the 848 shares in the cooperative corporation located at 212-214 East 77th Street in the amount of \$506,349.00; business expenses allocated to partnership income in the amount of \$174,434.00; and Schedule E travel expenses related to the cooperative corporation at 212-214 East 77th Street in the amount of \$11,087.00, for a total amount disallowed of \$849,394.00.

On February 15, 1991, the Division issued to petitioners a Notice of Deficiency asserting New York State and City personal income tax due in the amount of \$432,517.95, plus interest and penalty, for the years 1986 and 1987.

On June 10, 1994, the Division issued to petitioners a Statement of Personal Income Tax Audit Changes for the year 1988 indicating additional New York State and City personal income tax due of \$105,215.58 and \$44,253.77, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement indicated that petitioners had been determined to be domiciliaries of New York State and City. In addition, the statement indicated that itemized deductions had been disallowed in the amount of \$413,929.00, consisting of miscellaneous

itemized deductions of \$216,863.00, charitable contributions of \$56,522.00 and investment interest expense of \$140,514.00, and Schedule E income had been increased by \$449,209.00 as the result of the disallowance of certain passive losses.

On the same date, the Division sent a Statement of Personal Income Tax Audit Changes for the year 1989 indicating additional New York State and City personal income tax of \$112,619.93 and \$48,604.99, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement noted that petitioners had been determined to be domiciliaries of New York State and City. In addition, the statement indicated that Schedule E income had been increased by \$431,787.00, business casualty losses in the amount of \$445,241.00 had been disallowed in full and \$423,026.00 in itemized deductions had been disallowed as follows: miscellaneous itemized deductions of \$218,185.00, charitable contributions of \$22,673.00, investment interest expense of \$71,990.00 and personal casualty losses of \$110,178.00.

On October 13, 1994, the Division issued to petitioners a Notice of Deficiency asserting additional New York State and City personal income tax due in the amount of \$296,659.27, plus interest and penalty, for the years 1988 and 1989.

On July 27, 1994, the Division issued to petitioners a Statement of Personal Income Tax Audit Changes for the year 1990 asserting additional New York State and City personal income tax due of \$68,661.68 and \$42,606.91, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement noted that petitioners had been determined to be domiciliaries of New York State and City. In addition, the statement indicated that unreimbursed business expenses claimed on petitioners' Schedules A and E had been disallowed in the amounts of \$109,074.00 and \$130,864.00, respectively.

On the same date, the Division sent a Statement of Personal Income Tax Audit Changes for the year 1991 indicating additional New York State and City personal income tax due of \$34,839.49 and \$27,170.51, respectively, plus interest and penalty (Tax Law § 685[b], [p]). The statement noted that petitioners had been determined to be domiciliaries of New York State and City. In addition, the statement indicated that unreimbursed business expenses claimed on petitioners' Schedules A and E had been disallowed in the amounts of \$118,110.00 and \$128,563.00, respectively, and a claimed casualty loss in the amount of \$12,961.00 had been disallowed in full.

On October 13, 1994, the Division issued to petitioners a Notice of Deficiency asserting New York State and City personal income tax due in the amount of \$173,278.59, plus interest and penalty, for the years 1990 and 1991.

We find the following additional finding of fact.

On February 15, 1996, petitioners filed a motion to reopen the record for the purpose of submitting four exhibits. In an order dated May 2, 1996, after due deliberation and consideration, the Administrative Law Judge held that it would not be proper or consistent with Tribunal precedent to allow the introduction of the exhibits. Petitioners appealed the Administrative Law Judge's order.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge held that petitioners were domiciled in New York during the years in issue based upon their intent as manifested in their actions and testimony and an analysis of the number of days they spent in New York. In the alternative, the Administrative Law Judge found that even if petitioners had demonstrated that they were not domiciled in New York, they maintained a permanent place of abode here and spent more than 183 days here

during each of the years 1986 through 1989. Critical to the Administrative Law Judge's finding was his analysis of travel days and his conclusion that petitioners failed to establish that travel days were strictly days spent outside of New York.

The Administrative Law Judge determined that petitioners' fundamental right to due process was not denied by the failure of the Division to produce the auditors that conducted the audit from 1988 through 1991 since the Division is not required to do so. Further, he found their contention that the notices were not supported by "substantial evidence" as required by the State Administrative Procedure Act to be without merit, given the field audit report, audit workpapers, documentation obtained from petitioners by the auditors and the income tax returns filed for the years in issue, which allowed the Administrative Law Judge to determine that the audits and notices issued had a rational basis.

With regard to the contested charitable contributions, the Administrative Law Judge followed the guidelines set forth in the Treasury regulations concerning proper substantiation and allowed \$13,040.05 in 1986 and \$2,500.00 in 1987.

The Administrative Law Judge examined the casualty losses sustained in 1989 due to Hurricane Hugo and found losses, net of insurance proceeds, of \$445,241.00 for losses to the home in St. Croix and \$180,750.00 for losses to the rental units on St. Croix. These losses were allowed for the year 1989.

Passive losses claimed by petitioners on their Schedule E for 1988 and 1989 were conceded by the Division and allowed by the Administrative Law Judge.

The capital loss claimed by petitioners on the sale of their 848 shares in a cooperative apartment at 212-214 East 77<sup>th</sup> Street in New York City was disallowed in full by the

Administrative Law Judge because petitioners were unable to substantiate their basis in the property.

The Administrative Law Judge performed an exhaustive review of Internal Revenue Code § 162 deductions for ordinary and necessary expenses incurred in carrying on a trade or business for each of the years in issue. Based upon the requirements for finding allowable expenses as set forth in *Commissioner v. Lincoln Sav. & Loan Assoc.* (403 US 345, 29 L Ed 519), the Administrative Law Judge systematically analyzed each of the claimed expenses and the substantiation therefor, granting and denying expenses based upon whether the item was paid or incurred during the taxable year; whether it was used to carry on any trade or business; whether it was an expense; and whether it was necessary and ordinary.

The Administrative Law Judge denied all claimed business expenses related to the apartment located at 175 East 62<sup>nd</sup> Street in New York City since petitioners were held to be domiciliaries of New York.

Following the Federal statutory provisions for the deduction of investment interest, the Administrative Law Judge concluded that petitioners were entitled to the investment interest deductions claimed in 1988 and 1989.

The Administrative Law Judge also sustained penalties assessed pursuant to Tax Law § 685(b) and (p), citing the discrepancies between days claimed to have been spent outside of New York and documentation to the contrary and the discrepancies between claimed expenses and contradictory documentation as well as contradictions between testimony and documentation. Additionally, the Administrative Law Judge noted the claim of certain deductions where the items were clearly not eligible for same.

By way of summary, the Administrative Law Judge listed the following items to which petitioners were entitled (if they were found to be domiciliaries of New York):

1986:	Charitable contributions: \$13,040.05 Business expenses (Statement 1): \$22,128.00 Business expenses (Statement 2): \$65,863.00
1987:	Charitable expenses: \$2,500.00 Business expenses: \$66,953.00
1988:	Passive losses: \$47,782.00 Business expenses: \$99,116.00 Investment interest expense: \$140,544.00
1989:	Passive losses: \$148,104.00 Business expenses: \$85,332.00 Investment interest expense: \$71,990.00 Net casualty losses: \$625,991.00
1990:	Business expenses: \$85,926.00
1991:	Business expenses: \$57,047.00

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners argue that the Administrative Law Judge found that petitioners' family and social life was centered in Sparta, New Jersey and that this was tantamount to a finding that petitioners had a "range of sentiments, feelings and permanent association" because social and family activities are inseparable from such sentiments and feelings. Petitioners argue that the Administrative Law Judge incorrectly interpreted the law as it applied to the facts in this case. However, petitioners also disagree with the Administrative Law Judge's reliance

on certain facts over others in concluding that petitioners were domiciled in New York, such as petitioners' children attending school in New York City, business ties to New York, time spent in New York, maintenance of a New York apartment and receipt of important documents at their New York address. Petitioners believe that their activities in Sparta, New Jersey were more probative of their intent, such as family reunions, sled riding, water skiing, keeping pets and going to the movies with the children.

Petitioners also argue that the Administrative Law Judge did not adequately analyze their business ties, which they contend indicate extensive investments in Denver and St. Croix during the audit period. Given the money spent and profits earned in these locations compared with petitioner Smith's New York ties to the firm of Skidmore, Owings and Merrill during the years in issue, petitioners believe that the totality of their business activities was outside of New York and that this should have been considered by the Administrative Law Judge.

In addition, petitioners contend that the maintenance of a New York apartment should not have been so heavily weighted by the Administrative Law Judge since it was not income producing and since the focus of their home building and purchases took place outside of New York during the audit period.

With regard to the issue of statutory residence, petitioners argue that the Administrative Law Judge incorrectly concluded that they were New York residents during 1986, 1987, 1988 and 1989. Petitioners believe that their testimony, travel records and corroborating affidavits prove that they were not in New York in excess of 183 days per year. Petitioners believe that the Administrative Law Judge erroneously relied upon unsigned American Express receipts, travel days and undocumented days as a basis for finding that petitioners were in New York on

more than 183 days during the years in issue, while not giving proper weight to petitioners' testimony and diaries.

Petitioner Groh claims that her lack of a diary for 1986 and part of 1987 hinders her documentation of her whereabouts but other testimony and affidavits and documentation for subsequent years reveal an insignificant number of conflicts given her frequent travel.

Petitioners argue that the Administrative Law Judge erred in concluding that they failed to prove entitlement to a capital loss in 1987 on the sale of stock in 212-214 East 77<sup>th</sup> Street, Inc. on the grounds that they did not prove the basis in the property owned by the cooperative corporation. Petitioners contend that they tried to enter the original closing statement for the property into the record but the Administrative Law Judge did not allow it into the record. Further, petitioners do not believe that the closing statement is relevant or necessary given the cooperative offering plan in the record which sets forth the net purchase price to the sponsor (petitioner Donald Smith) and, therefore, satisfactorily established the basis for the property and justified the 1987 capital loss.

Petitioners also argue that the Administrative Law Judge erred in failing to rule on certain claimed ordinary and necessary business expenses for 1988 and 1989 related to rental properties and request that the Tribunal review the issue *de novo*, make additional findings of fact and rule on the issue. Petitioners also ask for a *de novo* review of the claimed ordinary and necessary business expenses for management fees incurred with respect to petitioners' interest in the cooperative apartment at 212-214 East 77<sup>th</sup> Street, which were found as facts by the Administrative Law Judge but not ruled upon in his conclusions of law.

In addition, petitioners claim that the Administrative Law Judge erred in not allowing their passive losses incurred in 1988 and 1989. Specifically, petitioners argue that the Administrative Law Judge agreed that they should have received the full value of their claimed losses, but did not provide for the proper amount of the losses in his determination.

Finally, petitioners appeal the order of the Administrative Law Judge, dated May 2, 1996, which denied petitioners' motion to reopen the record for the purpose of entering further evidence. Petitioners believe that the failure of a witness to testify prevented them from entering some of the exhibits in their possession because said exhibits had been reserved for production on cross examination. Petitioners also note that the motion was made soon after the hearing and argue that the Division would have had ample time to respond to the documents and that the Administrative Law Judge abused his discretion in not allowing the submission of the documents, especially since other documents were submitted after the hearing, albeit with the permission of the Administrative Law Judge.

The Division maintains that the Administrative Law Judge properly dealt with each of the issues before him. Specifically, the Division highlighted the Administrative Law Judge's finding of serious flaws in petitioners' testimony as borne out by documentary records and legal documents, the information for which was supplied by petitioners themselves. Apart from this credibility issue, the Division notes that petitioners misquoted the record and the findings of the Administrative Law Judge to their advantage.

### ***OPINION***

With respect to the issue of domicile, we affirm the determination of the Administrative Law Judge for the reasons set forth therein and find that he adequately and completely dealt

with the issue. We disagree with petitioners' contention that the Administrative Law Judge found as fact that petitioners' social and family life was centered in Sparta during the audit period. Although the Administrative Law Judge stated that petitioners "testified" to this, he neither found it as a fact nor made it one of his conclusions.

Central to his finding that petitioners were domiciled in New York during the audit period was petitioners' lack of credibility. Time and again the Administrative Law Judge cited instances where testimony was contradicted by documentary evidence, including their own audit questionnaire. Further eroding confidence in their claims to a New Jersey domicile were the Administrative Law Judge's observations of the seasonal use of the Sparta property, references to said property as a summer address and the utility usage patterns there. Petitioners' children, ages five and nine in 1986, attended school in New York City during the entire audit period when they were allegedly domiciled in New Jersey and St. Croix, but school records indicate a New York City address for 1986 through 1991. The Administrative Law Judge also found that petitioners spent at least twice as much time in New York City than they did in either St. Croix or Sparta, New Jersey from 1986 through 1989. The last fact's importance was underscored by the recent Appellate Division case of *Matter of Buzzard v. Tax Appeals Tribunal* (205 AD2d 852, 613 NYS2d 294), wherein the Court noted that it was "most" significant that the petitioners spent more time in New York than in Florida during the years in issue (*Matter of Buzzard v. Tax Appeals Tribunal, supra*, 613 NYS2d, at 295).

Mr. Smith was a partner in charge of the New York City office of Skidmore during the years in issue and Ms. Groh's career was centered in New York City as well. Throughout the audit period, petitioners claimed business deductions from their activities in New York City.

The Administrative Law Judge stated that such “active” business ties indicated a failure to abandon one’s domicile citing *Matter of Kartiganer* (Tax Appeals Tribunal, October 17, 1991, *confirmed Matter of Kartiganer v. Koenig*, 194 AD2d 879, 599 NYS2d 312) and we agree.

This conclusion was further buttressed by the fact that petitioners continuously held themselves out as New York City residents during the years in issue on various administrative and legal documents including, but not limited to, their marriage license, children’s birth certificates, a deed, children’s school records, a real property transfer tax return, Ms. Groh’s driver’s license, closing documents for the sale of shares in a cooperative corporation by petitioners in 1987, the use of a New York City mailing address for important documents, the maintenance of checking and mortgage accounts in New York City and the use of a New York City address on their checks for the entire audit period. American Express accounts for both Mr. Smith and Ms. Groh indicate that the statements were sent to their business addresses in New York City.

The Administrative Law Judge determined that petitioners had never abandoned their domicile in New York City, i.e., that they never demonstrated the necessary “intent” to change coupled with the acquisition of a new residence. There is no dispute that petitioners purchased houses in Sparta, New Jersey and in St. Croix and that these residences were very expensive, but cost is not determinative, intent is.

The words from *Matter of Newcomb* (192 NY 238) still ring true: “[n]o pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing” (Id. at 251). The issue of domicile has always turned on the union of intention and residence, *animus et factus*. One without the other is insufficient. In the instant matter, petitioners certainly acquired new residences outside of New

York City, but they have not demonstrated “an absolute and fixed intention to abandon one [domicile] and acquire another” and that their acts confirmed their intention (*Matter of Newcomb, supra*, at 251).

The Administrative Law Judge carefully traced the residences of petitioners from the 1970's to the 1990's and determined that they had never abandoned their New York City domicile, despite their declarations to the contrary. Based upon our review of the record, we must agree. We stated in *Matter of Silverman* (Tax Appeals Tribunal, June 8, 1989) that while certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual's “general habit of life.” In the instant matter, that general habit of life demonstrates that petitioners were domiciliaries of New York City during the audit period who failed to prove that they changed their domicile.

Belying a change of domicile to New Jersey in 1983 were the many factors cited by the Administrative Law Judge, including the forwarding of bills for the house to petitioners' New York City address, the seasonal spike in utility usage and attendance at a New York City school by both of petitioners' children for all of the audit years.

Likewise the Administrative Law Judge rejected petitioners' claim of a change of domicile to St. Croix in 1985, when petitioners had no residence there, and then again in 1987 based upon the same pattern of life exhibited in 1983 when petitioners claimed the change of domicile to New Jersey. In addition, between 1986 and 1989 petitioners spent at least twice as much time in New York than in either St. Croix or New Jersey.

Based upon the entire record, the Administrative Law Judge determined that petitioners were domiciled in New York City and had not changed their domicile during the audit period.

In addition, the Administrative Law Judge gave very little weight to petitioners' testimony given the numerous inconsistencies with documentation in the record and, based on the record in this matter, we are not disposed to disturb his judgment of credibility, although mindful of our authority to do so given extraordinary circumstances (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992).

We are not persuaded by petitioners' lure to "follow the money." Although petitioners' business interests were many, extensive and varied, such investments did not affect their general habit of life which we believe the record establishes was centered in New York City. It is undisputed that petitioners had many private business projects outside of their primary employment and that those endeavors were economically significant. However, the numerous factors discussed by the Administrative Law Judge make it clear that New York City was a constant in petitioners' lives during the years in issue, around which all else orbited. They never abandoned their New York City apartment and continuously and consistently listed it as their permanent address on legal documents, had important mail sent there and maintained their banking institutions there. Their successful professional careers were rooted there as were their professional identities. Despite frequent job-related travel, it was to New York that they ultimately returned, not to their retreats in Sparta, New Jersey or St. Croix. Their children attended school in New York City, indicating that petitioners chose to have their family life focused in New York City as well. In fact, the activities cited by petitioners as constituting "living" in New Jersey are vacation activities, not the usual routines followed by persons dealing with everyday concerns.

For these reasons, on the issue of domicile, we affirm the determination of the Administrative Law Judge and his analysis of the statutes, regulation and case law as applied to the facts of this case.

In addition, we find, as did the Administrative Law Judge, that petitioners were statutory residents of New York City during 1986, 1987, 1988 and 1989 and affirm his determination on this issue for the reasons set forth therein.

Tax Law § 605(b)(1)(B) (former § 605[a][2]) defined a resident individual as one not domiciled in the State but one who maintains a permanent place of abode in the State and spends more than 183 days here. Petitioners bear the burden of proving that they did not spend in excess of 183 days in New York and that they did not maintain a permanent place of abode here (Tax Law § 689[e]). Petitioners' primary proof were calendars prepared for the litigation and, therefore, not contemporaneously recorded documents. Some documentation and petitioners' testimony were offered to corroborate the statements in the calendars, but not nearly enough to meet their burden of demonstrating that they spent less than 184 days in New York during the years 1986 through 1989.

The Administrative Law Judge exhaustively analyzed the evidence presented for each of the disputed years, including receipts, calendar entries, testimony, travel documentation and affidavits, and determined that petitioners spent in excess of 183 days in New York for each of the years 1986, 1987, 1988 and 1989. Although disputed by petitioners, travel days where the only claimed reason for being in New York was to board a mode of transportation, were considered days spent in New York where the Administrative Law Judge found receipts for purchases in New York on those same days. Such contradictions diminished the weight that the

Administrative Law Judge attributed to testimony to the contrary and he refused to accept such days as spent outside of New York. Stated more succinctly, the Administrative Law Judge found petitioners' testimony was not credible in light of the contradictory documentary evidence. We believe the Administrative Law Judge exercised his discretion reasonably given the number of times days claimed to have been non-New York travel days were demonstrated to have been days spent in New York and we defer to his judgment as the trier of fact and his finding of credibility or lack thereof. As we stated in *Matter of Spallina (supra)*:

Specifically, we note that the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (citation omitted). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility and is free to differ with the Administrative Law Judge to make its own assessment, we find nothing in the record here to justify such action on our part (*see, Matter of Stevens v. Axelrod*, 162 AD2d 1025, 557 NYS2d 809).

For these reasons, we find that the Administrative Law Judge completely and adequately analyzed and determined the issue of statutory residency and we affirm his determination thereon for the reasons set forth therein.

Petitioners contend that the Administrative Law Judge erred in concluding that they failed to prove that they incurred a capital loss in 1987 under Internal Revenue Code ("IRC") § 1231 upon the sale of 848 shares of stock in a cooperative corporation of which petitioner Smith was the sponsor. The Offering Plan in evidence indicated that real property was purchased by petitioner on October 10, 1980 and that the corporation was created on September 21, 1981. The Plan itself, dated December 1, 1982, was amended at least four times, the last dated

May 18, 1984. On its face, the Plan states that the “net purchase price of property to sponsor” was \$1,912,546.00 and petitioners take the position that this is their “fixed” basis for purposes of the sale of their stock. The Division contends that basis cannot be determined without proof of petitioners’ purchase price of the property and its auditor, Ms. Glatt, testified that she realized this and requested proof of petitioners’ original purchase price but was never provided the information. The Administrative Law Judge noted that a document purported to be the original closing statement was marked for identification by petitioners but never offered into evidence. He concluded that under IRC § 1012 basis was determined by cost. Since petitioners did not enter any proof of cost, they did not meet their burden.

Petitioners’ argument fails because the stock they initially received pursuant to the Plan of Conversion was arbitrarily valued by them, using several factors, including cost of the real property, expenses and desired profit. Without an original cost figure, the Division had no way of verifying the ultimate loss claimed by petitioners, who purchased the real property in their own name in 1980, created a corporation in 1981 of which they were the controlling stockholders and officers, and then transferred the property to the corporation which was then converted to cooperative ownership. The sale price of the shares set forth in the Offering Plan was a creation of petitioners and, therefore, cannot be accepted as their basis in the property without further proof of their cost.

As for petitioners’ claim that the Administrative Law Judge refused to admit the closing statement marked Petitioners’ Exhibit 242 for identification, our review of the record indicates that said exhibit was never offered and the Administrative Law Judge made no ruling on its

admissibility. For these reasons, we affirm the Administrative Law Judge's disallowance of the capital loss.

Although petitioners agree with the Administrative Law Judge's conclusion that their passive losses for 1988 and 1989 should be allowed in full, they disagree with the exact amount of the losses set forth in the decision. The Administrative Law Judge had no evidence before him in the record which explained how the Division reached its modification of the loss deductions set forth in the Schedule Es or the forms 8582 for the years 1988 and 1989 other than the auditor's notation in his log, dated November 22, 1994. That notation provided that the Division was allowing the "full passive loss amounts" for 1988 and 1989, but then stating amounts which did not comport with the schedules or forms. No further explanation appears in the record.

Based upon the evidence in the record, we cannot support the Administrative Law Judge's conclusion regarding the amounts of the "full passive losses" allowed by the auditor. We direct the Division to accept those amounts set forth on the forms 8582 for 1988 and 1989 and to make any resultant adjustments to the Schedule Es, if any.

Further, petitioners argue that if full passive losses are granted they are entitled to the Schedule E rental real estate expenses for 1988 and 1989 included in the calculation of those loss figures. We agree. By accepting the full amount of the passive losses, the Division implicitly accepted the value of the expenses which were used to determine the passive losses.

Petitioners argue that the Administrative Law Judge failed to rule on a disallowed ordinary and necessary business expense taken by petitioners on Schedule E for 1986 in the amount of \$69,835.00. Although the Administrative Law Judge found as a fact that petitioners

had paid management fees to the Jon Siegel Real Estate Management Co., Inc. in the sum of \$65,500.00 and that such fees were ordinary and necessary business expenses within IRC § 162, he failed to rule whether the Division's disallowance of the expense was proper.

We have long recognized the value of our two-stage review process in the fullest possible development of an issue (*Matter of United States Life Ins. Co. in the City of New York*, Tax Appeals Tribunal, March 24, 1994) and have remanded cases where we believed that an Administrative Law Judge did not address an issue raised by the parties or failed to state a rationale for a conclusion reached (*see, Matter of West Valley Nuclear Serv. Co.*, Tax Appeals Tribunal, December 11, 1997). However, in this case, where the Administrative Law Judge discussed and determined the issue in the facts but failed to include it in his conclusions, we are comfortable in deciding the issue *de novo* since both parties had an opportunity to present evidence, testimony and briefs on the issue. Further, the Division did not specifically object to its allowance or the Administrative Law Judge's findings of fact on exception and the Administrative Law Judge's omission of the allowance from his conclusions appears to have been mere oversight. We believe that the Administrative Law Judge adequately set forth his rationale for his conclusion (albeit in his facts), satisfying concerns raised in our prior decisions where remand was found to be the appropriate remedy. Therefore, we hold that petitioners are entitled to the expense deduction to the extent of the proof they offered, or \$65,500.00, as set forth on their Schedule E for 1986 and found by the Administrative Law Judge to be allowable ordinary and necessary business expenses pursuant to IRC § 162.

Petitioners raised the issue in their exception regarding the Division's disallowance of Schedule A interest in the sum of \$52,904.00 for the year 1986. However, petitioners

specifically conceded the disallowance in their petition filed February 25, 1992 and the issue properly was not addressed by the Administrative Law Judge and will not be addressed herein.

Finally, we affirm the Administrative Law Judge's refusal to reopen the record after 10 days of hearing and every opportunity to offer evidence into the record. We have stated on many occasions that the hearing process must be both final and defined in order to maintain a fair and efficient hearing system and that the submission of evidence after the record is closed deprives an adversary of its right to question the evidence on the record (*Matter of Byram*, Tax Appeals Tribunal, August 11, 1994; *Matter of Jenkins Covington, N.Y.*, Tax Appeals Tribunal, November 21, 1991, *affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal*, 195 AD2d 625, 600 NYS2d 281, *lv denied* 82 NY2d 664, 610 NYS2d 151; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Petitioners had 10 days of hearing and the record was held open for other submissions. We agree with the Administrative Law Judge that the evidence petitioners wanted to enter after the record was closed was not newly discovered evidence, discoverable with due diligence or unavailable during the 10 days of hearing. In light of our prior decisions, we find that the Administrative Law Judge did not abuse his discretion in refusing to reopen the record in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donald C. Smith and Carol A. Groh is granted to the extent that 1) their passive losses for the years 1988 and 1989 are granted as well as the Schedule E expenses incurred in connection with the rental real estate activity connected with Annas Hope for the same years and 2) the management fees paid to Jon Siegel Management Co., Inc. in the sum of

\$65,500.00 and taken as an ordinary and necessary business expense on Schedule E for the year 1986 are granted. In all other respects the exception is denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but in all other respects is sustained;

3. The petitions of Donald C. Smith and Carol A. Groh are granted to the extent set forth in the determination of the Administrative Law Judge and in the modifications set forth in paragraph "1" above, but in all other respects are denied; and

4. The notices of deficiency, dated February 15, 1991 and October 13, 1994, are modified in accordance with the determination of the Administrative Law Judge and this decision, but in all other respects are sustained.

DATED: Troy, New York  
July 23, 1998

\_\_\_\_\_  
/s/Donald C. DeWitt  
Donald C. DeWitt  
President

\_\_\_\_\_  
/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

\_\_\_\_\_  
/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner