STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD H. AND CARLA E. EVANS	:	DECISION DTA NO. 813539
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1991.	:	

Petitioners Richard H. and Carla E. Evans, c/o Huizenga Entertainment Group, 200 S. Andrews Avenue, 6th Floor, Fort Lauderdale, Florida 33301, filed an exception to the determination of the Administrative Law Judge issued on April 17, 1997. Petitioners appeared by Kenneth T. Zemsky, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply. Oral argument was heard at petitioners' request on December 10, 1997 in New York, New York.

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

ISSUE

Whether consideration received by a nonresident under the terms of a departure agreement with his employer constituted New York source income.

FINDINGS OF FACT

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

Petitioners, Richard H. Evans and Carla E. Evans, timely filed a 1991 New York State Nonresident and Part-Year Resident Income Tax Return (form IT-203).[1] They were residents of Connecticut during all periods relevant to this determination.

On the 1991 return, petitioner reported Federal wage income of $1,514,832.00 and New York wage income of $388,347.00. Petitioner's calculation of the New York amount was explained in two attachments to the return. Petitioner subtracted $1,026,456.00 from the Federal amount claiming that this represented a "payment of future contract rights". The remainder, $488,376.00, was allocated in and out of New York using the formula provided in Schedule A of the return. Petitioner reported 217 working days in 1991. From this, he subtracted 48 Saturdays and Sundays and 3 holidays, resulting in 166 total days worked in the year. He claimed 34 days worked outside of New York yielding 132 days worked in New York. Total wages of $488,376.00 were multiplied by a fraction, the numerator of which was 132 and the denominator of which was 166. This calculation resulted in the New York amount of $388,347.00. A Wage and Tax Statement attached to petitioner's return shows that in 1991 that he received wage income from Madison Square Garden Corporation ("MSG") of $1,514,832.00.

By letter dated August 5, 1993, the Division of Taxation ("Division") informed petitioner that his 1991 return was under review by the Division. Additional information was requested

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[1]Carla E. Evans is included as a named party because petitioners filed a joint return and a petition in both of their names; however, almost all of the relevant facts pertain to Mr. Evans alone. Accordingly, where the term petitioner is used in this determination, it should be understood to refer to Mr. Evans.

from petitioner, including: petitioner's dates of employment with MSG; a list of days worked outside New York State or New York City; the nature of services performed outside of New York State or New York City and the locations where those services were performed; a list of days worked at home and the reason work was performed at home; and the dates of each nonworking day claimed by petitioner other than Saturdays and Sundays. The Division also requested copies of petitioner's 1988, 1989 and 1990 income tax returns. The Division did not ask petitioner to explain or clarify his claim that a portion of the amount shown on his W-2 form as Federal wage income was in fact a lump-sum payment for the cancellation of future contract rights.

Petitioner's accountant responded to the Division's requests in a letter dated October 8, 1993. The requested copies of petitioner's 1988, 1989 and 1990 tax returns were enclosed. The Division was told that petitioner was employed by MSG from January 1, 1991 through August 5, 1991. The Division was also informed that petitioner had moved to Tennessee and placed his personal records in storage. For this reason, petitioner requested additional time to answer the questions asked by the Division and to assemble the necessary documentation.

The Division decided that it had all the information it needed to arrive at a determination of petitioner's 1991 New York State and New York City income. It accepted petitioner's allocation of income, but included the full amount of petitioner's Federal wage income, $1,514,832.00, in the New York amount and recalculated petitioner's tax liability accordingly. This resulted in a New York State tax deficiency of $55,856.00 and a New York City tax deficiency of $3,320.00.

The Division issued a Notice of Deficiency to petitioners, Carla E. Evans and Richard H. Evans, dated December 13, 1993, asserting a 1991 deficiency of New York State and New York City income tax of $59,176.04 plus interest.

Petitioner was chief executive officer of MSG, a Delaware corporation, from January 1, 1987 through August 5, 1991. When he was first hired, petitioner and MSG entered into a four-year employment contract, dated October 29, 1986, which was to commence no later than January 1, 1987. Petitioner's base salary under the contract began at $350,000.00 and increased to $410,000.00 by the fourth year of the contract. Petitioner was entitled to bonus payments under certain circumstances, and petitioner was included in all of the parent corporation's existing employee benefit plans such as group life insurance, hospitalization, medical, pension and similar benefits. Petitioner was granted stock options in the stock option plan of MSG's parent corporation, Paramount Communications, Inc. ("Paramount"), under section 4 of the contract which states:[2]

> In consideration of the Executive entering into this Agreement, options will be granted as of the Commencement Date to the Executive to purchase 25,000 shares of G+W's Common Stock pursuant to G+W's 1984 Stock Option Plan. Such options shall become exercisable in accordance with the terms of such Plan, in each case on and after the anniversary date of the grant, at the rate of 6,250 shares per year, on a cumulative basis, beginning one year from the date of grant.

Section 7 of the 1986 contract covered the parties' agreement with respect to termination of employment. In case of termination because of death, physical impairment or mental

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[2]The employment contract between petitioner and MSG indicates that the parent corporation was Gulf+Western, Inc. Petitioner testified that the parent corporation was Paramount Communications, Inc. and other documents in evidence establish this fact. From this, I surmise that Paramount succeeded G+W Entertainment Group. References to Gulf+Western in the 1987 employment contract shall be deemed to refer to Paramount.

impairment, petitioner, or his estate, was entitled to salary accrued and payable to the date of termination plus a proportionate share of the bonus that would have been paid in the year the termination occurred. Paramount reserved the right to terminate petitioner for cause, defined as a material breach of the employment contract, including neglect of duties, refusal to perform duties reasonably assigned, abuse of office, malfeasance or conviction of a felony. If this right was exercised, Paramount was obligated to pay petitioner only salary accrued and payable to the date of termination.

Until April 1991, petitioner reported to the chairman and chief executive officer of Paramount, Martin Davis. Since petitioner's employment contract with Paramount was to expire on December 31, 1990, he began negotiating a new contract with Mr. Davis and Donald Orsman who was then counsel for Paramount. Those negotiations lasted from the summer of 1990 through the fall of that year. In approximately October 1990, petitioner and Mr. Davis came to an agreement on a five-year contract. Elements of that agreement were subsequently submitted to the Paramount Communications compensation committee for its approval.

The agreement reached by petitioner with Mr. Davis was never reduced to writing; however, petitioner believed that certain elements of the contract were approved by the compensation committee. He asked Kenneth Munoz, general counsel for MSG, to review the minutes of the compensation committee. Mr. Munoz reported that he had done so and the agreement had been approved. In addition, petitioner remembers being congratulated on his new contract by a member of the compensation committee. Petitioner was certain that the agreement had been accepted by Paramount because elements of that agreement were implemented. Mr. Orsman instructed Mr. Munoz to increase petitioner's salary to $500,000.00 annually, effective

January 1, 1991, and petitioner's salary was increased. Also, a stock option for 75,000 shares of additional stock was issued.

In April 1991, Paramount appointed a new president and chief operating officer, Stanley Jaffee. Petitioner then began reporting to Mr. Jaffee rather than Mr. Davis. The relationship between the two men was not a good one, and in August 1991 they mutually agreed that it would be preferable for Mr. Evans to terminate his employment with MSG.

Petitioner, advised by his attorney Harold Rubin, negotiated the terms of his departure with Mr Jaffee. In return for his resignation, he was first offered a sum of money which he considered inappropriate. He and Mr. Rubin then reminded Mr. Jaffee that petitioner and Paramount had negotiated a five-year employment agreement beginning in January 1991. Shortly thereafter, Paramount agreed to pay petitioner an amount approximately equal to what he would have received in compensation over a period of four years at an annual salary of $500,000.00 per year. Petitioner believed that Paramount would not have paid him the amount that it agreed to if it were not for the existence of a prior employment contract.

Petitioner, MSG and Paramount then entered into a written agreement, dated August 9, 1991 (the "Departure Agreement"). The relevant portions of the Departure Agreement provide as follows.

> WHEREAS, MSG wishes to assure itself of the consulting services of Evans for the period and upon the terms and conditions provided in this Agreement, and Evans is willing to provide such services for said period and upon said terms and conditions;
>
> NOW, THEREFORE, in consideration of the premises and of the mutual covenants and undertakings set forth herein, the parties covenant and agree as follows:

1. Forthwith upon the execution of this Agreement, MSG shall pay to Evans the sum of $1,026,456.00 less appropriate withholding deductions.

* * *

3. Evans shall and hereby does resign from the position of President and Chief Executive Officer of MSG and from any other office he may hold within MSG or Paramount or on MSG's or Paramount's behalf. Evans shall be reassigned as a consultant on a non-exclusive basis through December 31, 1992.

4. Evans shall continue to be paid at his current annual salary rate of $500,000.00 per year, payable in accordance with MSG's normal payroll practices, through December 31, 1992. In the event of Evans' death prior to January 1, 1993, the payments in this paragraph 4 shall be made to Evans's estate. Evans shall not be eligible for, and shall have no right to receive, any (i) bonus award or payments under the Paramount Corporate Annual Performance Plan or the Paramount Long Term Performance Plan or (ii) future stock awards under the 1989 Paramount Stock Option Plan (or any successor plan).

5. With respect to employee benefits under this Agreement, Evans shall be entitled to receive only (i) individual and dependent medical and dental insurance One Plus Medical/Dental Plan; (ii) the continuation of his life insurance coverage under the Paramount Life Insurance Plan; and (iii) continued service in the Paramount Retirement Plan. . . . Effective January 1, 1993, Evans' eligibility for all benefit programs shall cease and neither MSG nor Paramount shall have any further obligation to Evans with respect to any employee benefits expect [sic] for such rights that may have vested on or before December 31, 1992 . . . .

6. In the event Evans commences employment elsewhere during the term of this Agreement, Evans' individual and dependent medical and dental insurance under the One Plus Medical/Dental Plan and life insurance coverage shall terminate as soon as he becomes eligible to participate in such other employer's health and insurance plans. All other terms and conditions of this Agreement shall remain in effect until the expiration or termination of this Agreement.

* * *

> 7. Evans' outstanding stock options for 50,000 shares (Options Nos. 1901 and 1902) shall remain in effect, pursuant to the 1989 Paramount Stock Option Plan, until December 31, 1992. On December 31, 1992 all outstanding stock options shall terminate. Evans shall have no right, title or interest in any other stock options.
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> 8. Upon the expiration or termination of this Agreement, the distribution of any vested and accrued employee benefits that Evans has obtained under the Paramount Retirement Plan, Savings Plan or Employee Stock Ownership Plan shall be made pursuant to the terms and conditions of the applicable plans.
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> 13. (a) Except as specified in subparagraph (b) hereof, Evans hereby irrevocably releases, remises and forever discharges MSG, Paramount and their respective subsidiaries and affiliates, and the officers, directors, employees, agents [sic] attorneys and representatives of each of them (in their capacity as such) from any and all promises, agreements, contracts, losses, claims, demands and causes of action arising prior to the date of this Agreement, including, without limiting the generality of the foregoing, any and all claims for compensation, benefits, severance pay, bonuses, stock rights, rights in any stock option or bonus plan, and any other benefits or form of compensation which Evans alleges he is entitled to arising out of or relating to his employment relationship with MSG.
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> 19. It is understood that this Agreement is a compromise of disputed claims and that the payments and agreements herein set forth are not to be construed as admissions of liability upon the part of any party, and that all liability is expressly denied.

Paramount and petitioner agreed to the wording of a press release announcing his departure from MSG, and both agreed not to release other communications concerning the Departure Agreement to the media. The press release states: "Richard H. Evans has resigned as

president and chief executive officer of Madison Square Garden, it was announced today by Paramount Communications, Inc." No other details of the Departure Agreement were released.

MSG, Paramount and petitioner agreed not to make disparaging statements about one another in any context in which it could reasonably be foreseen that the statement, or the substance of the statement, would be published in the media. In addition, MSG and Paramount agreed not to make such statements about petitioner in connection with any prospective employment, although they were permitted, in the exercise of their professional judgement, to provide prospective employers with their assessment of petitioner's skills.

Petitioner provided no services to MSG or Paramount after August 1991. His appointment as a consultant to MSG was apparently intended to enable him to retain the medical insurance and other benefits mentioned in paragraph 6 of the Departure Agreement.

During the period in which petitioner was president of MSG, he put in place a severance policy for senior level employees, not under contract to MSG. That policy called for the payment of six months pay plus one week of pay for every year of service. If a contract employee left MSG under the terms of a mutual agreement, as petitioner did, MSG would fulfill the terms of the existing contract.

Petitioner pointed out that if he had been compensated under the terms of the MSG severance policy he would have received approximately seven months pay or approximately $291,666.00. Under the Departure Agreement, he received a salary of $488,376.00, plus a lump-sum payment of $1,026,456.00, in 1991 and an additional $500,000.00 payable in accordance with MSG's normal payroll practices through December 31, 1992, for a total amount paid to him of $2,014,832.00. In addition, petitioner received medical, dental and life insurance benefits

through December 31, 1992. Petitioner stated in his testimony that Paramount had no grounds for dismissing him, since under his employment contract he could only be terminated for cause as defined in his contract.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In determining whether the lump-sum payment in the amount of $1,026,456.00 is New York source income, the Administrative Law Judge reasoned that it must be established what consideration petitioner gave for his right to receive the lump-sum payment. To answer this inquiry, the Administrative Law Judge focused on the terms of the Departure Agreement entered into between petitioner, MSG and Paramount on August 9, 1991.

The Departure Agreement provided for petitioner to receive the lump-sum payment at issue as well as payment of his annual salary of $500,000.00 through December 31, 1992. In addition, petitioner received medical, dental and life insurance benefits and remained enrolled in Paramount's retirement plan through December 31, 1992. Moreover, petitioner's outstanding stock options for 50,000 shares remained in effect until December 31, 1992.

The Administrative Law Judge found that the consideration given by petitioner in return for the payments was stated in the agreement. Petitioner released Paramount from "all promises, agreements, contracts, losses, claims, demands and causes of action . . . arising out or relating to his employment relationship with MSG" (Exhibit "3", ¶ 13). The Administrative Law Judge determined that this provision did not establish that petitioner had a contracted right to future employment as argued by petitioner. The Administrative Law Judge reasoned that this provision merely proved that petitioner had legal claims relating to his employment which claims he gave up when executing the Departure Agreement. Therefore, the Administrative Law Judge

concluded that the only reasonable inference that can be drawn from the facts was that the lump-sum payment was paid in settlement of legal claims related to petitioner's employment.

The Administrative Law Judge next addressed the question of whether petitioner, in fact, had a valid contract right to future employment at the time the Departure Agreement was executed. The Administrative Law Judge found that petitioner did not have a valid contract right based upon the express language contained in paragraph 19 of the agreement in which Paramount denies all liability. The Administrative Law Judge stated that petitioner failed to place into evidence anything to establish that there was a valid contract. The Administrative Law Judge specifically stated that petitioner's testimony, accompanied by the submission of four affidavits, failed to prove the existence of the contract in light of the language contained in the Departure Agreement.

Thus, the Administrative Law Judge found that the consideration given by petitioner in exchange for the lump-sum payment was his relinquishment of any claims that he might have had against Paramount relating to his employment relationship with MSG. Since a legal claim, like a contract right, is a form of intangible personal property, the income received by petitioner to settle his claim was subject to Tax Law § 631(b)(2). Accordingly, the burden of proof was upon petitioner to establish the nature of his claim against Paramount. The Administrative Law Judge stated that petitioner argued that the claim was for continued employment at the agreed upon salary. However, the Administrative Law Judge concluded that petitioner did not show that the claim was not connected to or derived from New York employment. Therefore, the Administrative Law Judge held that the payment was properly characterized as New York source income by the Division.

In addition to the issue concerning the lump-sum payment, the Administrative Law Judge stated that the facts suggested that petitioner relinquished his right to exercise certain stock options. The Administrative Law Judge noted that petitioner had outstanding stock options for 50,000 shares at the time the Departure Agreement was executed and he agreed that those options would remain in effect until December 31, 1992 and would then terminate. The Administrative Law Judge stated that whether the stock options were granted under the older written contract (Exhibit "1") or the later oral agreement is not known. However, the Administrative Law Judge noted that there is no doubt that stock options are a form of compensation and are considered to be New York income if granted during the course of employment in New York (***Matter of Donahue v. Chu***, 104 AD2d 523, 479 NYS2d 889). Thus, the Administrative Law Judge reasoned that if petitioner exchanged the right to exercise stock options granted in connection with his New York employment for a lump sum, that lump sum would be derived from or connected to New York sources. Thus, the Administrative Law Judge determined that this point must be decided against petitioner since he failed to shoulder the burden of proof to show that the consideration given for the lump-sum payment was not connected to an activity or occupation carried on in New York. Thus, the Administrative Law Judge sustained the Notice of Deficiency issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner argues that he, in fact, met his burden of proof in this case. Petitioner asserts that he offered evidence of credible testimony, the actions of the parties to the contract, documentary evidence as well as third party affidavits in support of his position that he had a valid contract right. Petitioner contends that upon his separation from MSG, a payment was

made to him in exchange for his relinquishment of that right. Petitioner relies on ***Matter of McSpadden*** (Tax Appeals Tribunal, September 14, 1994) for the proposition that the lump-sum payment for extinguishing future contract rights is intangible in nature. Therefore, since petitioner is a nonresident individual of New York, he argues that such payment is not sourced to New York.

In opposition, the Division argues that petitioner failed to demonstrate that he had a binding employment contract at the time the Departure Agreement was executed. The Division emphasizes that petitioner had nothing in writing to establish such a contract and the testimony presented at hearing did not support petitioner's allegations. Therefore, since petitioner did not have a contract for employment, the Division states that he was an at-will employee who had no right to future employment.

The Division further argues that even if petitioner had proved the existence of a valid contract, he failed to show that the services contracted for would not have been performed in New York. In response to petitioner's reliance on ***McSpadden***, the Division states that in that case, the Tribunal considered the question of whether the contract rights of the petitioner therein would have been exercised in New York. The Division asserts that the Tribunal found that the petitioner had not made a promise to work in New York and, thus, it was concluded that the evidence did not support the conclusion that the petitioner would have performed his services in New York. The Division argues that petitioner misstates the proposition in ***McSpadden*** when he suggests that the case asserts that a lump-sum payment for the relinquishment of a future right to employment is never derived from New York sources. The Division agrees with the conclusion of the Administrative Law Judge that the case law establishes that a payment to extinguish a right

to future employment is subject to tax if the payment is "derived from or connected with New York sources " (Tax Law § 631[b][2]; ***cf***., ***Matter of Brophy***, Tax Appeals Tribunal, December 7, 1995).

The Division argues that the four affidavits submitted by petitioner fail to support his argument. The Division claims that the affidavits are void of any meaningful information as they are both vague and uncertain. Accordingly, the Division agrees with the Administrative Law Judge that little weight should have been given to them. Since petitioner failed to sustain his burden of proof in this case, the Division argues that it properly concluded that petitioner's lump-sum payment was taxable as New York source income and it argues that the Notice of Deficiency should be sustained.

OPINION

The crux of this matter involves whether, in fact, petitioner established that the lump-sum payment received was not derived from or connected with a New York source. Tax Law § 631 provides that New York source income of a nonresident individual includes income or gain derived from or connected with New York sources including income derived from a business, trade, profession or occupation carried on in New York. As pertinent to our discussion herein, Tax Law § 631(b)(2) states that:

> [i]ncome from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

As noted by the Administrative Law Judge, in ***Matter of Laurino*** (Tax Appeals Tribunal, May 20, 1993), we held that in determining whether income is derived from or connected with New York sources, the following inquiry must be made:

> it is necessary to identify the activity upon which the income was secured or earned . . . . Thus, in making this determination, the consideration given by petitioner in exchange for the right to the income at issue is the controlling factor.

We agree with the Administrative Law Judge that petitioner has failed to prove that the lump-sum payment was not derived from or connected to New York sources.

Petitioner argued both before the Administrative Law Judge and on exception to us that the facts of this case are on all fours with the facts in ***Matter of McSpadden*** (***supra***). We disagree. In ***McSpadden***, the petitioner received a lump-sum payment in the amount of $1,850,000.00 for the relinquishment of his contractual rights under an employment contract with his employer, DFS. Specifically, petitioner and DFS entered into a termination agreement dated May 25, 1988 which stated that both parties agreed to a complete satisfaction of the petitioner's remaining employment contract, which was to run through December 31, 1990, in exchange for the payment to the petitioner of salary and benefits due the petitioner through May 31, 1988, plus a lump-sum payment in the amount of $1,850,000.00. In this case, there was no specific language terminating a contract that was to expire at some future date. In fact, as noted by the Administrative Law Judge, paragraph 19 of the Departure Agreement herein stated as follows:

> [i]t is understood that this Agreement is a compromise of disputed claims and that the payments and agreements herein set forth are not to be construed as admissions of liability upon the part of any party, and that all liability is expressly denied (Exhibit "3," ¶ 19).

This language contained in paragraph 19 of the agreement certainly can be distinguished from the language contained in the ***McSpadden*** termination agreement. In ***McSpadden***, both parties readily acknowledged that an employment contract existed for the period July 1, 1987 through December 31, 1990. In the case before us, petitioner has failed to demonstrate that he had a valid contract with future rights to employment with Paramount. Therefore, petitioner was unable to establish that the lump-sum payment he received from Paramount was for his relinquishment of future employment.

Moreover, at the hearing in this matter, petitioner testified that there existed minutes from the compensation committee meeting which included statements concerning the existence and validity of his alleged employment contract that was negotiated in the fall of 1990. Petitioner's representative asked the Administrative Law Judge to keep the record open after the conclusion of the hearing so that he could submit the minutes into evidence (Tr., p. 65). The minutes were never submitted. Therefore, the evidence in the record to support petitioner's case is petitioner's employment contract that expired on December 31, 1990, petitioner's testimony and the four affidavits submitted. We agree with the Administrative Law Judge that this evidence fails to demonstrate the existence of a valid employment contract for any period subsequent to December 31, 1990.

Despite petitioner's protestations otherwise, the burden of proof in this case clearly falls on petitioner. As the facts demonstrate, the Division received petitioner's case for audit through a Federal match program. The auditor reviewed petitioner's tax returns and concluded that the lump-sum payment was not for a relinquishment of future employment, but rather, was payment characterized as severance pay or termination pay. As such, the auditor believed that the

payment related to prior services rendered by petitioner and, thus, was taxable to New York. Therefore, it was petitioner who was required to show that the payment was not derived from or connected to a New York source. However, he failed to do so.

Although petitioner has alleged continuously throughout this proceeding that he has, in fact, sustained his burden of proof in this case, petitioner, nonetheless, requested at oral argument that this case be remanded to the Administrative Law Judge in order for him to fully develop the record that he alleges he was prevented from developing during the hearing by the Administrative Law Judge's failure to allow petitioner's representative to conduct a thorough cross-examination of the Division's auditor as well as the Administrative Law Judge's failure to allow petitioner to secure testimony of three of his witnesses by deposition (Oral Argument Tr., pp. 13, 25-27). We find these arguments completely without merit.

In our review of the transcript, it is clear that petitioner's representative was in no way prohibited from cross-examining the auditor (***see***, Tr., pp. 22-35). With respect to being provided an opportunity to have deposition testimony taken of certain witnesses, the Administrative Law Judge properly stated at the hearing that, in an administrative proceeding, the use of depositions is reserved for preserving testimony (Tr., pp. 67-68; ***see also***, 20 NYCRR 3000.6[c]). Furthermore, petitioner waited until the conclusion of the hearing to ask the Administrative Law Judge to provide him with the opportunity to secure depositions (Tr., p. 67). As set forth in the Tribunal's Rules of Practice and Procedure, a party who wishes to secure a deposition shall file an application pursuant to 20 NYCRR 3000.6(c) for an order of an Administrative Law Judge authorizing such party to take a deposition for the purpose of perpetuating his own testimony or that of any other person. Clearly, petitioner never filed an

application with the Administrative Law Judge to allow him to take depositions nor has he demonstrated the need for depositions in this matter. After a thorough review of this record, we conclude that petitioner had his opportunity to present his case fully at the formal hearing in this matter. Therefore, we refuse to remand this matter to give petitioner a second opportunity to present his case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard H. and Carla E. Evans is denied;

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

3. The petition of Richard H. and Carla E. Evans is denied; and

4. The Notice of Deficiency dated December 13, 1993 is sustained.

DATED: Troy, New York
June 4, 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