

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EMANUEL V. AND ANNE GIUFFRE	:	DECISION
	:	DTA NO. 816764
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Years 1991 through 1994.	:	

Petitioners Emanuel V. and Anne Giuffre, 2732 27th Court, Jupiter, Florida 33477, filed an exception to the determination of the Administrative Law Judge issued on July 6, 2000. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara Russo, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on March 13, 2002 in New York, New York.

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

ISSUES

I. Whether the Division of Taxation properly determined that petitioners were New York domiciliaries for the years at issue and, thus, were taxable as resident individuals for such years.

II. Whether petitioners maintained a permanent place of abode in the State of New York and spent in the aggregate more than 183 days within New York during the years at issue.

III. Whether petitioner Emanuel V. Giuffre's long-term disability income was properly subject to New York State personal income tax for the years at issue.

IV. Whether the long-term disability payments received by petitioner Emanuel V. Giuffre from his former employer were in lieu of Workers' Compensation benefits and, thus, are not subject to New York State personal income tax.

V. Whether petitioners are entitled to a refund of New York State personal income tax for the years at issue resulting from mortgage interest charges which were not paid by petitioners but which were recovered by the mortgagee at the time of foreclosure of the mortgage.

FINDINGS OF FACT

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

Pursuant to an audit of Emanuel V. and Anne Giuffre ("petitioners") which commenced in October 1995, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes for each of the years 1991 through 1994. For 1991, additional tax in the amount of \$1,048.43, plus penalty and interest, was asserted for a total amount due of \$2,147.59. For 1992, the Division asserted a deficiency of \$4,454.80, plus penalty and interest, for a total due of \$8,490.67. For the 1993 tax year, additional tax in the amount of \$4,251.07, plus penalty and interest, for a total of \$7,581.06 was found to be due and for 1994, the Division asserted a tax deficiency of \$4,279.89, plus penalty and interest, for a total amount due of \$7,025.33.

A letter of explanation was attached which stated, in part, as follows:

As you have not established by clear and convincing evidence that you intended to change your domicile from New York to Florida, you are considered New York State residents for income tax purposes. As residents you are subject to tax on all income regardless of the source.

Alternatively, if it is decided that you are not domiciled in New York State, you are being held as statutory residents of New York based upon the following:

1. You continued to maintain a permanent place of abode, located at 26 Miller Farms Dr, Miller Place, New York.
2. You have not established through adequate records that you did not spend more than 183 days of the tax years in 1991, 1992, 1993, or 1994 in New York.

On January 15, 1998, the Division issued a Notice of Deficiency to petitioners as follows:

Tax Year	Tax	Interest	Penalty	Total Due
1991	656.40	340.55	385.54	1,382.49
1991*	392.03	203.39	232.34	827.76
1992	3,973.52	1,684.00	2,135.76	7,793.28
1992 *	481.28	203.96	258.66	943.90
1993	3,829.29	1,305.39	1,891.54	7,026.22
1993 *	421.78	143.79	208.34	773.91
1994	3,858.11	945.19	1,711.52	6,514.82
1994 *	421.78	103.33	187.10	712.21
TOTALS	14,034.19	4,929.60	7,010.80	25,974.59

* New York City personal income tax deficiencies

By a Conciliation Order (CMS No. 165843) dated July 31, 1998, the Division's Bureau of Conciliation and Mediation Services canceled the New York City personal income tax deficiencies (and all interest and penalties imposed thereon), but sustained the New York State personal income tax deficiencies as well as penalty and interest for each of the years at issue.

Accordingly, the total tax remaining at issue is \$12,317.32, plus penalty and interest computed at the applicable rate.

Petitioners last filed as New York residents for the tax year 1990. On several occasions beginning in October 1995, the Division's auditor, Norman Greene, sent letters to petitioners in which he requested documentation to substantiate their claimed nonresident status. Letters were sent to and received by petitioners at both their Florida and New York addresses. Initially, the auditor requested that petitioners complete a questionnaire as well as furnish copies of Federal returns with schedules and wage and tax statements (forms W-2) for the years 1991 through 1993 (the tax year 1994 was later made a part of the audit). Thereafter, the auditor asked petitioners to submit a schedule of days in and out of New York for the years 1991 through 1994 as well as supporting documents such as bank statements, canceled checks, credit card and charge account statements and receipts, airline tickets, medical bills and utility bills.

Petitioner Emanuel V. Giuffre supplied the auditor with a completed residency questionnaire and copies of petitioners' Federal income tax returns for the years at issue. Later, he furnished the auditor with some bank statements and canceled checks. Mr. Giuffre submitted many documents which the auditor had not requested such as declarations of domicile from the State of Florida, Florida driver's licenses and automobile registrations and bills and credit card invoices from purchases made in Florida.

Emanuel V. Giuffre and his wife, Anne Giuffre, were both born and raised in the New York City metropolitan area and, admittedly, continued to live in the State of New York until June 1, 1991 at which time they contend that they moved to Jupiter, Florida and changed their domicile to the State of Florida. They married in 1959 and had three children (and six

grandchildren), all of whom lived in the State of New York during the years at issue. Petitioner Emanuel V. Giuffre's father lived in New York until his death in late 1995 or early 1996. Mr. Giuffre was quite involved in the care of his brother who has Down's syndrome and also lives in New York. In 1960, Mr. Giuffre began his employment with the Metropolitan Life Insurance Company ("Met Life") as an agent. He was promoted to sales manager in 1964 and to district sales manager in 1972.

On July 24, 1986, Mr. Giuffre was injured in an automobile accident. Shortly after the accident and while he was out of work as a result of this accident, an auditor in Mr. Giuffre's district office began an investigation which resulted in the termination of 12 sales representatives in his office. The termination of these sales representatives occurred on the day following a visit to the office by Mr. Giuffre. Apparently, the sales representatives felt that Mr. Giuffre's visit was the cause of their termination and they went to the auditor who persuaded them to incriminate Mr. Giuffre, their district manager. Met Life thereafter reinstated the 12 sales representatives and on October 6, 1986, terminated Mr. Giuffre. The termination letter stated that the action was being taken without prejudice to any disability benefit to which he might be entitled under the company's Insurance and Retirement Program.

From 1986 through the present, petitioner Emanuel V. Giuffre received long-term disability payments from Met Life due to a job-related post-traumatic stress disorder.¹ In 1987, Mr. Giuffre commenced an age discrimination lawsuit against Met Life. He incurred nearly \$200,000.00 in legal fees until the suit was ultimately dismissed in 1996.

¹ The gross amount of petitioner Emanuel V. Giuffre's monthly benefit was \$12,105.43 until August 1987 at which time it was reduced to \$8,646.74.

In June 1991, the first of four attorneys who represented petitioner Emanuel V. Giuffre in his age discrimination lawsuit against Met Life obtained a judgment against petitioner for legal fees in the sum of \$20,811.09 and in September 1991, requested that Met Life place a restraint on all future disability payments made to petitioner in excess of \$400.00 per month. Thereafter, Met Life commenced to withhold a total of \$21,908.43 from petitioner's disability income for the months of November and December 1991 and the months of January, February and April 1992. Eventually, petitioner was able to obtain a court order in June 1992 which directed Met Life to turn over these sums to petitioner. However, for approximately seven or eight months, petitioner received just \$400.00 per month disability income.

In 1988, petitioners sold their house in Huntington, New York and purchased a house at 26 Miller Farms Drive, Miller Place, New York.² In May 1988, petitioners obtained a mortgage in the principal sum of \$180,000.00 from the Chase Home Mortgage Corporation ("Chase"). The house at 26 Miller Farms Drive had three bedrooms and two and one-half bathrooms. On October 30, 1986, petitioners purchased a two-bedroom townhouse in Jupiter, Florida for \$70,000.00. Petitioners rented out the townhouse for several years prior to 1991. Petitioners bought new furniture for the Florida townhouse; they did not bring their furniture from their Miller Place home which remained for use by their children who continued to live there until the foreclosure sale.

By 1991, petitioners owed, in addition to the legal fees relating to Mr. Giuffre's lawsuit against Met Life, over \$100,000.00 on 13 credit cards and \$200,000.00 on other loans. Because

² The record is not clear on the actual purchase price of the Miller Place house. The auditor testified that petitioner Emanuel V. Giuffre told him that the house cost \$250,000.00. At the hearing, Mr. Giuffre did not controvert the auditor's testimony.

of the interest on these debts, petitioners' expenses now exceeded Mr. Giuffre's disability income.

As a result of these financial difficulties, in April 1991, petitioners decided that they would put their New York house up for sale and move to their townhouse in Jupiter, Florida. There is no evidence in the record to substantiate that petitioners attempted to sell their Miller Place, New York house.

Petitioners made no mortgage payments after October 1991. In September 1992, Chase commenced a foreclosure action against petitioners and on June 7, 1994, a judgment of foreclosure and sale was entered. While there were apparently a number of dates set for the foreclosure sale, it was not until January 22, 1997 that the actual foreclosure sale occurred. As of the date of the foreclosure sale, petitioners owed \$292,861.90. The property was sold to Chase Manhattan Mortgage Corporation f/k/a Chase Home Mortgage Corporation and was further assigned to Federal National Mortgage Association for the sum of \$213,750.00.

After her divorce in 1988, petitioners' daughter, Donna Giuffre Jones, and her daughter (petitioners' granddaughter), Danielle, moved into petitioners' Miller Place house where they continued to reside until Donna remarried on October 21, 1996. Petitioners' son, Paul Giuffre, also resided at this house until his marriage in October 1995. Donna Giuffre Jones and her brother shared the utility expenses of the house and also shared whatever additional expenses were necessary to maintain the house.

Petitioner Emanuel V. Giuffre admitted to visiting New York two or three months in any one year, and he admitted that his wife, petitioner Anne Giuffre may have visited more frequently. When petitioners would return to New York, they would almost always stay at the

Miller Place house. After their daughter Donna moved out of the house in October 1996, petitioners returned to New York and resided in the Miller Place house until the foreclosure sale in January 1997.

Petitioners went to Florida just prior to June 1, 1991. Relatives in Florida informed petitioners that they should declare Florida to be their domicile in order to avail themselves of the Florida Homestead Exemption. Accordingly, petitioner Emanuel V. Giuffre executed a Florida Declaration of Domicile on September 9, 1991 and petitioner Anne Giuffre executed a Florida Declaration of Domicile on November 2, 1991.

Petitioner Emanuel V. Giuffre obtained a Florida driver's license on September 12, 1991; petitioner Anne Giuffre obtained one on May 14, 1992. In late 1991 and early 1992, petitioners also obtained Florida certificates of title and vehicle registrations for their automobiles. Petitioner Emanuel V. Giuffre obtained a Disabled Person Parking Permit from the State of Florida on March 31, 1994.

Petitioners were not registered to vote in either New York or Florida. No evidence regarding social or religious contacts (e.g., church affiliations, membership in social or charitable organizations) was presented herein.

Petitioner Emanuel V. Giuffre chose to change his domicile on June 1, 1991, "Because I was having financial difficulties and if and when I was going to be forced into bankruptcy some day, I wanted to make sure that I was a Florida domicile [sic]." (Transcript, p. 256.)

Mr. Giuffre felt compelled to change his domicile to Florida, "Because we were looking to eventually permanently move to Florida, permanently [sic], maybe still come back to New York." (Transcript, p. 257.)

On their 1991 Federal income tax return, petitioners reported interest income from: Roslyn Savings Bank, North Fork Savings Bank, Fidelity New York, Chase Home Mortgage Corp. and Dime Savings Bank. All of these banks are New York banks; no interest income reported on the Federal return was from a Florida bank.

On their 1992 Federal income tax return, petitioners again reported interest income from Fidelity New York, Roslyn Savings Bank and North Fork Savings Bank.

For 1993, interest income was reported on petitioners' Federal return from North Fork Bank and Roslyn Savings Bank as well as from Sun Bank, a Florida bank. Interest was also reported from Signet (the record did not disclose the whereabouts of Signet).

On their 1994 Federal return, petitioners again reported interest from North Fork Bank (\$703.00) and from Signet (\$46.00).

When asked to provide records documenting days in and out of New York for the years at issue, petitioner Emanuel V. Giuffre provided the auditor with statements and canceled checks from Sun Bank of Florida in November 1997, which was near the end of the audit. The auditor also issued subpoenas to various banks in an attempt to ascertain petitioners' whereabouts during each of these years. Subpoenas were issued to: North Fork Bank, Roslyn Savings Bank, Dime Savings Bank of New York, Citicorp Credit Services, Inc., Citibank NA, Citicorp Diners Club, Inc., National Credit Group, Chase Manhattan Bank, Preferred Master Charge, A Advantage and Ford Citibank Visa. Only a few of the entities to which subpoenas were issued did, in fact, respond with records. The auditor also wrote to Sun Bank (a subpoena could not be issued because it was located in Florida), but it refused to provide him with petitioners' records. However, as previously noted, petitioner Emanuel V. Giuffre did provide the auditor with some

bank records from Sun Bank. Based upon the records received as a result of the subpoenas and those provided by Mr. Giuffre, the auditor prepared schedules of days in and out of New York for each of the years 1991 through 1994.

The auditor's examination of the records provided resulted in the following:

	1991	1992	1993	1994
New York	234	86	24	236
Florida	21	89	29	8
Other	1			3
Unknown		9		
TOTAL	256	184	53	247

The auditor acknowledged that all days other than those found to be New York or Florida days should have been designated as "unknown."

At the close of the audit in November 1997, the auditor prepared an audit summary which stated, among other things, as follows:

Taxpayers were asked for documentation (cancelled checks, credit card statements, frequent flyer statements, etc.) to establish their whereabouts during the period 1991 through 1994. Taxpayers stated that they had no receipts, saw no reason to keep them and virtually were unable to prove their presence in or out of New York. In an effort to be fair and make it easy for the taxpayers, we offered to accept receipts from 1995 or 1996 and use them as a basis for the years in issue. Taxpayers said 1995 & 1996 were not representative years because they were in New York most of the time - their New York home was being foreclosed by the bank in December 1996 and they were, supposedly, occupied moving their possessions.

Based upon the replies received from the subpoenas issued by the auditor to obtain bank and credit card records, he arrived at the following revised calculation of days in and out of New York:

	1991	1992	1993	1994
New York	235	93	24	236
Florida	3	57	29	8
Other	1	-	-	3
Unknown	126	216	312	118
TOTAL	365	366	365	365

For the year 1991, petitioner Emanuel V. Giuffre presented the auditor with a schedule of Florida receipts for the months of November and December 1991. Although there was no documentation to support the charges on the schedule, he was given credit for each as a day spent in Florida.

For 1992, there was little documentation available to the auditor. Based upon a computer printout of automated teller machine (ATM) transactions from Dime Savings Bank and from Sun Bank ATM withdrawals, the auditor determined that petitioners were in New York for several weeks in January 1992, for most of August and September, late October and November and early December. Their presence in Florida was established in late January and early February, late March and for periods from mid-April through mid-May, late July and for a few days in October. Petitioners reported interest income from Dime Savings Bank on their 1991 Federal income tax return, but reported no interest from Dime Savings Bank for any of the subsequent years at issue. Mr. Giuffre attributed interest from Dime Savings Bank to a second mortgage on the Miller Place property with this bank.

For 1993, there was less documentary proof available to the auditor. There were a few Sun Bank ATM withdrawals in both New York and Florida as well as a couple of Ford Citibank Visa statements indicating purchases in both states.

For 1994, Ford Citibank Visa statements were utilized by the auditor as well as ATM withdrawals (Sun Bank and North Fork Bank) in both New York and Florida. Purchases in Indiana on March 18 and a California purchase on July 13 were indicated by Ford Citibank Visa statements. No Florida presence was documented until mid-September. There were New York ATM withdrawals and Visa purchases throughout October. There was a Sunbank ATM withdrawal in Florida on November 14 and Ford Citibank Visa statements showing New York purchases in late November and early December.

Bank statements from Sun Bank in Florida were provided to the auditor for all of the years at issue. Petitioners were credited with a Florida day whenever an ATM withdrawal was made in Florida.

In December 1995, petitioner Emanuel V. Giuffre responded to the auditor's request by submitting a completed residency questionnaire. Question 39 asked for the total amount of nonworking days spent in New York. Petitioner's response was: 120 days in 1991; 15 days in 1992; 20 days in 1993; 20 days in 1994; and 50 days in 1995 (this year is not at issue in this proceeding). Mr. Giuffre admitted that in determining the number of nonworking days that he spent in New York, "It was clearly an estimate, because I had to put a figure in. I didn't have the slightest idea how many days." (Transcript pp. 265, 266.)

In response to the Division's Demand for a Bill of Particulars in which the Division asked petitioners to specify each day during the years at issue that petitioner Emanuel V. Giuffre spent

no part of within the State of New York or, in the alternative, to specify each day that he spent any part of within the State, Mr. Giuffre filed a response in which he stated that he never kept a daily diary of his whereabouts during the years 1991 through 1994 because he did not think it was necessary. A search of his records located some cash receipts which he maintains would place him in the State of Florida as follows: 45 days in 1991; 137 days in 1992; 36 days in 1993; and 11 days in 1994. Mr. Giuffre states in his response to the Demand for a Bill of Particulars that if one was to add the auditor's unknown days (which petitioner assumes were deemed to be non-New York days) to the dates for which he has receipts placing him in Florida, it would have been impossible for him to have been in New York for more than 183 days in any of the years at issue.

The auditor determined that petitioners received mail at their Miller Place house during all of the years at issue. He obtained a letter in 1997 from the U.S. Postal Service which indicated that petitioners were receiving mail at their Miller Place address. In addition, an investigator made a field visit and spoke to a neighbor at 28 Miller Farms Drive (petitioners' home was at 26 Miller Farms Drive) who stated that petitioners were observed at the 26 Miller Farms Drive residence on a daily basis. In response, petitioner Emanuel V. Giuffre stated that it was his son and daughter who received mail at 26 Miller Farms Drive and that the neighbors who stated that they observed petitioners were new to the neighborhood and did not know the petitioners.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by reviewing the pertinent provisions of the Tax Law and the extensive case law concerning the issues of domicile and statutory residency. After weighing all the facts of this case, the Administrative Law Judge

concluded that petitioners still maintained their domicile in New York throughout the audit period. In reaching his conclusion, the Administrative Law Judge noted that formal declarations, such as the execution of a Florida Declaration of Domicile and obtaining Florida driver's licenses, have been held to be less persuasive than the informal acts representative of a person's general habit of life (*see, Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989).

In this case, the Administrative Law Judge acknowledged that petitioners did execute certain documents and forms which stated therein that petitioners had changed their domicile to Florida. However, in reviewing the entire record in this matter, the Administrative Law Judge found that petitioners never abandoned New York State in their hearts and in their informal actions. The Administrative Law Judge noted that petitioners continued to reside in the Miller Place home, they spent a majority of their time within New York State, their family with whom they were very close lived in New York and, most strikingly, petitioner Emanuel Giuffre's testimony and argument in his briefs indicated that the move to Florida was based upon financial decisions that needed to be made rather than his intention of abandoning New York State as his domicile.

Petitioners next argued that the Miller Place home was not a permanent place of abode since petitioners stopped paying their mortgage beginning in November 1991 and that their children who stayed at the Miller Place home during certain periods throughout the audit period were responsible for paying the utilities. However, as noted by the Administrative Law Judge, petitioners were never prevented from staying at the house, they continued to own the house, their furniture remained in the home and despite not paying their mortgage, their access to the home was not compromised throughout the audit period. Accordingly, the Administrative Law

Judge determined that petitioners continued to maintain the Miller Place home and such home was a permanent place of abode.

With respect to petitioners presence within and without New York State during the four audit years, the Administrative Law Judge concluded that petitioners were unable to demonstrate through testimony and documentary evidence that they were outside of New York for more than 183 days in any given audit year. Additionally, the Administrative Law Judge concluded that the home in Miller Place was continually maintained by petitioners throughout the audit period. Thus, the Administrative Law Judge stated that, even if petitioners were not held to be domiciled within New York, they would properly be taxable pursuant to Tax Law § 605(b)(1)(B) as resident individuals.

The next two issues addressed by the Administrative Law Judge involved certain long-term disability payments received by petitioner from his former employer. Petitioner argued that the long-term disability payments that he received from his former employer were not subject to taxation because such income was not earned income. After discussing the Federal and State statutes on the issue, the Administrative Law Judge determined that petitioner was not entitled to exclude his disability payments from his income because his Federal adjusted gross income exceeded the maximum allowed for exclusion. Additionally, petitioner claimed that he was entitled to a deduction of \$15,600.00 for each of the years in issue because his former employer paid to him payments that really should have been paid under a Workers' Compensation benefit and, although his payments were not characterized as such, his former employer's mistake on this should not prevent him from taking the deduction. The Administrative Law Judge dismissed this claim as unsubstantiated.

The final issue addressed by the Administrative Law Judge was whether petitioners were entitled to take a mortgage interest deduction for the years in question even though no mortgage interest was paid by petitioners until the foreclosure action took place in 1997. Petitioners allege that once the house was sold and the mortgage interest in the amount of \$106,000.00 was paid out of the foreclosure proceeds in 1997 that they should be allowed to deduct a pro rata share of the \$106,000.00 over the six years wherein they failed to pay their mortgage. The Administrative Law Judge rejected this argument explaining that since petitioners are cash basis taxpayers, there is no authority which allows such taxpayers to deduct, on the returns for prior years, interest paid in a subsequent year. Thus, the Administrative Law Judge denied the petition in its entirety.

ARGUMENTS ON EXCEPTION

Petitioners continue to maintain the same arguments that were made to the Administrative Law Judge. Petitioners claim that they have submitted more than enough evidence to demonstrate a change of domicile to Florida in June of 1991. Petitioners assert that making a change to Florida for financial reasons is proof of their intent to abandon New York as their domicile: “[t]his was why we were forced to relocate in [F]lorida, even though we did not want to leave ouer [sic] family, but we had no choice” (Petitioners’ brief in support, p. 4). Petitioners continue to assert that they filed a Declaration of Domicile in Florida, obtained driver’s licenses and applied for the Florida Homestead exemption. Petitioners state that such actions are proof of their intention to make Florida their home and are more important than the fact that petitioners’ children and grandchildren reside in New York and that they have bank accounts in New York.

Petitioners still maintain that the Miller Place house was not a permanent place of abode since they did not pay any money towards the maintenance of the property despite their ownership thereof. Moreover, petitioners claim that they have submitted substantial documents to demonstrate that they were not present in New York for more than 183 days for any of the years at issue in this case. Petitioners dismiss much of the Division's evidence by stating that the documents only prove their whereabouts on a certain number of days and that such proof clearly falls short of establishing petitioners' presence within New York for the requisite number of days during each of the audit years.

With respect to the long-term disability payments, petitioners again state that such income is properly subject to Federal income tax since petitioner Emanuel V. Giuffre did not pay any premiums for the policy, however, such payments are not subject to New York State personal income tax. Furthermore, petitioners allege that since his former employer never followed up and processed his claim through Workers' Compensation, such payments were made to him in lieu of a Workers' Compensation benefit and, as such, should be excluded from taxation. Lastly, petitioners reiterate that they should be allowed to take the mortgage interest deduction that they paid upon foreclosure in 1997 by proration over the preceding six years if they are found to be liable for New York State personal income tax for the audit years at issue.

In opposition, the Division states that the Administrative Law Judge properly determined that petitioners failed to sustain their burden of proof to establish that they had changed their domicile from New York to Florida or that they were not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B). Moreover, the Division agrees with the Administrative Law Judge's conclusion that the Division properly included the long-term disability payments as income and

that petitioners were not entitled to a mortgage interest deduction for any of the years in issue. The Division also argues that the submission of certain documentary material by petitioners with their brief in support of their exception should be prohibited. Therefore, the Division respectfully requests that the determination of the Administrative Law Judge be sustained in its entirety.

OPINION

We begin by addressing petitioners' attempt to submit additional documents into the record of this case at this point in the proceedings. We have long held that the submission of evidentiary material by any party to a proceeding subsequent to the closing of the record is inappropriate. "If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record" (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Thus, we reject the evidence submitted by petitioners with their brief.

After reviewing the record and the determination of the Administrative Law Judge, we can find no reason to modify his determination in any respect. Since the Administrative Law Judge adequately and correctly dealt with the issues, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Emanuel V. and Anne Giuffre is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Emanuel V. and Anne Giuffre is denied; and

4. The Notice of Deficiency, dated January 15, 1998, as modified by Conciliation Order
CMS No. 165843, is sustained.

DATED: Troy, New York
September 12, 2002

/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