STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMANUEL V. AND ANNE GIUFFRE	:	DETERMINATION 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 a petition 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.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on June 2, 1999 at 10:30 A.M., with all briefs to be submitted by January 14, 2000, which date began the six-month period for the issuance of this determination. Petitioner Emanuel V. Giuffre appeared *pro se* and for his wife, Anne Giuffre. The Division of Taxation appeared by Barbara G. Billet, Esq. (Gary Palmer, Esq., of counsel).

***ISSUE*S**

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

II. Whether, for the years at issue, petitioners maintained a permanent place of abode in the State of New York and spent, in the aggregate, more than 183 days in New York during such years and were, therefore, properly taxed as resident individuals.

III. Whether petitioner Emanuel V. Giuffre's long-term disability income was properly subject to the 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 are, therefore, 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

1. 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.

2. 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

3. 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.

4. 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. Guiffre 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.

5. Emmanuel V. Guiffre and his wife, Anne Guiffre, 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. Guiffre 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 manger in 1972.

6. On July 24, 1986, Mr. Guiffre 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. Guiffre'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. Guiffre. Apparently, the sales representatives felt that Mr. Guiffre's visit was the cause of their termination and they went to the auditor who persuaded them to incriminate Mr. Guiffre, their district manager. Met Life thereafter reinstated the 12 sales representatives and on October 6, 1986, terminated Mr. Guiffre. 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.

7. From 1986 through the present, petitioner Emanuel V. Guiffre received long-term disability payments from Met Life due to a job-related post-traumatic stress disorder.[1] In 1987, Mr. Guiffre 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.

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,

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

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.

8. 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 of the interest on these debts, petitioners' expenses now exceeded Mr. Guiffre'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

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

no evidence in the record to substantiate that petitioners attempted to sell their Miller Place, New York house.

9. 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.

10. 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.

11. 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.

12. Petitioner Emanuel V. Giuffre chose to change his domicile in 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.)

13. 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).

14. 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.

15. 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."

16. 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

17. 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.

18. 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.

19. 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.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioners' position may be summarized as follows:

a. As of June 1, 1991, they became domiciliaries of the State of Florida. To substantiate his claim that petitioners became domiciliaries of Florida after June 1, 1991, petitioner Emanuel V. Giuffre submitted the following:

(1) Documents relating to his proceeding in the United States Bankruptcy Court for the Southern District of Florida under Chapter 7 of the Bankruptcy Code commenced in January 1992. Petitioner maintains that in order to bring the proceeding in Florida, a debtor was required to be a Florida resident for six months. However, no statutory authority was provided to substantiate this claim;

(2) A copy of petitioners' real estate tax bill for 1992 on which they were granted a Florida Homestead Tax exemption. Mr. Giuffre maintains that in order to

qualify for this exemption, the property owner had to be a Florida resident for one year;

(3) Declarations of domicile, Disabled Person Parking Permit from the State of Florida, Florida driver's licenses, automobile registrations and certificates of title (***see***, Finding of Fact "11");

(4) Correspondence from Met Life dated December 16, 1991 which was addressed to petitioner Emanuel V. Giuffre at 2732 27th Court, Jupiter, Florida;

(5) Various telephone and utility bills as well as some invoices and credit card receipts indicating a Florida presence during portions of the years at issue; and

(6) A letter from Met Life to petitioner Emanuel V. Giuffre dated December 15, 1995 which states: "You currently reside in the state of Florida. This has been your state of domicile since June 1, 1991. We have been sending your monthly benefit, through Electronic Funds Transfer, to the Sun Bank in Jupiter, Florida since June 1991."

b. As to the issue of whether petitioners were statutory residents of New York , i.e., whether they maintained a permanent place of abode in New York and spent, in the aggregate, more than 183 days in New York during each of the years at issue, petitioners claim:

(1) Because they did not make any mortgage payments after November 1991 and did not pay the utility bills, they could not have been "maintaining" the Miller Place house;

(2) Since they resided at Miller Place for only limited periods each year, it was, therefore, being maintained during a temporary or limited period of time for a particular purpose. Since the mortgage was being foreclosed, petitioners had to be

prepared to vacate at any time (several sales had been scheduled and had been postponed prior to the actual sale in January 1997). A form 1099-A issued by the Federal National Mortgage Association which purchased the mortgage from the prior mortgagee (Chase Home Mortgage Co.) listed thereon the date of lender's acquisition or knowledge of abandonment as "06/05/95" which petitioners contend means that the mortgagee considered the house abandoned on that date. Since there were earlier notices of foreclosure sale, the earliest one which was dated June 18, 1993, the bank considered the house abandoned as of that date;

(3) The bank records obtained by the auditor pursuant to subpoenas do not have any signatures. Petitioner Emanuel V. Giuffre contends that some of the transactions were made by his daughter or his wife who had access to these accounts. The signatures on the Diner's Club credit card were scribbled and were not his signatures;

(4) In his brief, Mr. Giuffre contends that his receipts place him in Florida for 45 days in 1991, 147 days in 1992, 41 days in 1993 and 60 days in 1994. In an attempt to show a continued Florida presence, he has added "days blocked in Florida" (he determined 130 of these in 1991, 134 in 1992, 60 in 1993 and 201 in 1994). In his respond to the Division's Demand for a Bill of Particulars, Mr. Giuffre attempted to establish his presence in Florida by adding days deemed "unknown" by the auditor to days for which he has receipts placing him in Florida, thereby asserting that 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.

c. Petitioner Emanuel V. Giuffre's long-term disability benefits, paid to him from 1987 through 1999 by his former employer, Met Life, is not taxable because it was not earned income. In support of his position, he submitted an article from the Summer 1996 *Washington Watch* entitled, "Can States Tax the Retirement Income of Former Residents?"

d. Petitioners contend that the long-term disability payments received by Mr. Giuffre from his former employer were in lieu of Workers' Compensation benefits. Mr. Giuffre states that Met Life failed to submit a Workers' Compensation claim on his behalf and also misinformed him by stating that since he was already receiving long-term disability benefits, he was not entitled to Workers' Compensation benefits as well. On September 27, 1996, petitioner Emanuel V. Giuffre submitted a claim for Workers' Compensation benefits, but the case was held to have been time barred (petitioner claims that he is appealing this ruling). Petitioner asserts that he is entitled to deduct $15,600.00 (the amount he claims he was entitled to as a Workers' Compensation benefit) from his taxable income for each of the years at issue. On that basis, Mr. Giuffre amended his 1994, 1995 and 1996 Federal income tax returns. He received a refund for 1995, but was denied a refund for these other years.[3] He states that if he is found to be liable for New York State tax for the years 1991 through 1994, $15,600.00 of his income should be excluded and, since he never filed returns for those years, his claims should not be time barred.

---

[3] The evidence submitted by petitioner is unclear. A notice from the Internal Revenue Service dated May 18, 1998 indicates a refund of $4,865.00 was granted for 1995. However, attached is a copy of an amended return for 1996 on which a claim for refund in the amount of $4,683.00 was made. It is also unclear why the Internal Revenue Service denied petitioner's claims for refund for 1994 and 1996 (as he states in his brief). Furthermore, the Notice of Decision of the Workers' Compensation Board which was attached to the amended return and the Internal Revenue Service notices states only: "I find prima facie medical evidence for exacerbation of pre-existing post-traumatic stress disorder (12/12/86 report of Dr. Levine). Case is continued."

e. Petitioner Emanuel V. Giuffre claims that on the date of the foreclosure sale, the mortgagee recouped $106,123.00 in interest.[4] Petitioner divided this amount by six years (the interest ran from November 1, 1991 through January 22, 1997, the date of the foreclosure sale) and now claims that, in essence, he paid $17,687.00 per year in mortgage interest which, in the event he is found to be liable for New York State income tax, he should now be able to claim as a deduction for each of the years 1991 through 1994.

21. In response, the Division contends:

a. Petitioners failed to prove, by clear and convincing evidence that they moved to Florida with the bona fide intention of making Florida their fixed and permanent home. There was no showing of a lifestyle change and no evidence of severing old ties to New York and establishing new ties to Florida. The documents presented by petitioners are "formal declarations" which are less persuasive than their general habits of life.

b. Petitioners maintained a permanent place of abode in New York. They were the titled owners of the 26 Miller Farms Drive house and there has been no showing that they lacked free and continuous access to the house in any respect. They also failed to prove that they spent fewer than 184 days in New York in each year. Mr. Giuffre's calculations of days spent in and out of New York were mere estimates since he admittedly did not keep a diary or other detailed records of his whereabouts.

c. Petitioners' long-term disability benefits are subject to Federal income tax by virtue of IRC § 105(a). Tax Law § 612(c)(3-b)(1) pertains to the modification for disability income which reduces Federal adjusted gross income for State purposes. The New York

[4] A review of the Referee's Report of Sale dated January 21, 1997 reveals that the actual amount of interest was $97,445.64.

State disability income exclusion is computed on form IT-221. Because Mr. Giuffre's adjusted gross income exceeds $20,200.00 for each year at issue, his entire disability income is subject to New York State personal income tax.

d. As to Mr. Giuffre's contention that $15,600.00 of his long-term disability income should be treated as "in lieu" of Workers' Compensation benefits and not subject to New York State personal income tax, the Division states that there has been no showing made that the Internal Revenue Service accepted petitioners' argument nor has there been any showing of how they arrived at the figure of $15,600.00.

e. Petitioners' claim that they are entitled to an interest deduction for the amount of interest recouped by the mortgagee pursuant to the foreclosure sale must fail. Even if it can be found that this interest was paid by petitioners, it was paid in the year of the foreclosure sale which was 1997. There is no authority for taking a 1997 interest payment as a deduction in earlier years.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines a resident individual as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . or
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

B. While the Tax Law does not contain a definition of "domicile," a definition is provided in the Division's regulations (20 NYCRR 105.20[d]) which states as follows:

> *Domicile*. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.
>
> * * *
>
> (4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.

C. The distinction between domicile and residency was explained many years ago by the Court of Appeals in ***Matter of Newcomb's Estate*** (192 NY 238, 250):

> Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

It is well established that an existing domicile continues until a new one is acquired and the burden of proof to show a change in domicile rests upon the party alleging the change (***id***). Whether there has been a change of domicile is a question "of fact rather than law, and it

frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (***id.*** at 250). It is frequently stated that the test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***Matter of Bourne***, 181 Misc 238, 41 NYS2d 336, 343, ***affd*** 267 App Div 876, 47 NYS2d 134, ***affd*** 293 NY 785); ***see***, ***Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138).

While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (***see, e.g., Gray v. Tax Appeals Tribunal***, 235 AD2d 641, 651 NYS2d 740 ***confirming Matter of Gray***, Tax Appeals Tribunal, May 25, 1995; ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989); (2) continued business activity in New York (***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995; ***Matter of Angelico***, Tax Appeals Tribunal, March 31, 1994); (3) family ties in New York (***Matter of Gray***, ***supra***; ***Matter of Buzzard***, Tax Appeals Tribunal, February 18, 1993, ***confirmed*** 205 AD2d 852, 613 NYS2d 294); (4) continuing social and community ties in New York (***Matter of Getz,*** Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (***Matter of Trowbridge***, 266 NY 283, 289: ***Matter of Gray, supra; Matter of Getz, supra***).

D. In the present matter, each petitioner executed a Florida Declaration of Domicile and obtained Florida driver's licenses and vehicle registrations and certificates of title for their vehicles. Petitioner Emanuel V. Giuffre obtained a Disabled Person Parking Permit from the State of Florida (although it was obtained nearly three years after allegedly changing his domicile to Florida). In reviewing the acts of a taxpayer alleging a change in domicile, formal

declarations have been held to be "less persuasive than the informal acts of an individual's general habit of life" (***Matter of Silverman, supra***, ***citing Matter of Trowbridge***, ***supra***).

Petitioner Emanuel V. Giuffre admitted in his brief that relatives in Florida alerted them to the fact that they should declare their domicile to be Florida in order to take advantage of the Florida Homestead Tax Exemption. In fact, a review of all of the evidence presented by petitioners reveals that the move to Florida and the filing of formal declarations of domicile were done strictly for financial reasons. There is no indication that petitioners intended to sever their New York ties or that they possessed the requisite intent to make Florida their fixed and permanent home. In his brief, petitioner Emanuel V. Giuffre stated that:

> "[O]ur financial situation continued to get worse. In April 1991, my wife and I decided, that although we did not want to leave our family, the only logical thing for us to do was to put the N.Y. house up for sale, and move to our townhouse in Florida." (Petitioners' brief, p.2.)

Petitioners were both born and raised in the New York City metropolitan area. Their three children and six grandchildren lived there as well. Mr. Giuffre's father lived in New York until his death in late 1995 or early 1996. His brother who was afflicted with Down's syndrome lived in New York during the years at issue. Petitioners retained their home in Miller Place, New York. While they allege that they were trying to sell this house, there has been no proof to substantiate that allegation. Although they did not make any mortgage payments on the house after October 1991, two of their children (and one granddaughter) continued to occupy the house for an additional five years. Whenever petitioners visited New York, they stayed at the Miller Place house. While the parties do not agree on the amount of time spent by petitioners in New York during the years 1991 through 1994, their visits to New York were considerable in number throughout this period and thereafter. After Donna Giuffre Jones vacated the Miller Place house in October 1996, petitioners returned and resided in the house until the foreclosure sale.

The townhouse in Jupiter, Florida cost considerably less than the Miller Place, New York house and was less spacious. Petitioners did not take any of their furniture from their Miller Place house to Florida. While it could be argued that they left the furniture to be used by their children, such an argument seems incredible if petitioners truly intended to make the Florida townhouse their permanent home.

Petitioners produced no evidence of any social or religious ties to the Jupiter, Florida community. They did not register to vote in Florida. They joined no organizations in Florida. While bank accounts at the Sun Bank in Florida were utilized by petitioners, they continued to maintain accounts at New York banks (Roslyn Savings Bank, Fidelity New York and North Fork Savings Bank).

In summary, petitioners' declaration of a Florida domicile seems to be motivated strictly by an attempt to gain all financial benefits accorded by Florida law to its domicilliaries. As previously noted, petitioner Emanuel V. Giuffre admitted that, based upon advice from relatives, petitioners declared Florida to be their domicile to avail themselves of the Florida Homestead Exemption. While there is nothing inherently improper in what petitioners did by declaring a Florida domicile, this record contains no evidence whatsoever to show an intent to give up their New York domicile or to acquire a new domicile in Florida. Accordingly, it must be found that petitioners continued to be domicilliaries of New York during the years 1991 through 1994.

E. Since it has been determined that petitioners were New York domicilliaries during the years at issue, I will address the issue of whether petitioners may be taxed as resident individuals based upon a showing that they maintained a permanent place of abode in New York and spent, in the aggregate, more than 30 days of each of the years at issue in New York.

Petitioners contend that they maintained no permanent place of abode in New York by virtue of the fact that they stopped making mortgage payments on the Miller Place house after October 1991 and paid no utility payments either (they allege that the utility payments were made by their children who continued to reside in the house for a number of years until shortly before the foreclosure sale).

20 NYCRR 105.20(e)(1) provides that:

> [a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities . . . for cooking, bathing, etc., will generally not be deemed a permanent place of abode.[5]

Clearly, petitioners' house in Miller Place, New York was a permanent place of abode. It was not a camp or cottage suitable only for vacation. Despite their argument to the contrary, this house was not a temporary dwelling place by virtue of the fact that they were subject to eviction, at any time, by the bank which had instituted a foreclosure action. Therefore, a determination of whether petitioners maintained a permanent place of abode in New York turns on the definition of "maintains."

In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 340, 606 NYS2d 404), the Tribunal was asked to decide the meaning of the phrase "maintains a permanent place of abode." The Tribunal noted that the term "maintain" is not defined in the pertinent statute or regulation and, accordingly, examined the legislative history of the statutory language. It concluded:

---

[5] Prior to January 29, 1992, the applicable regulation was 20 NYCRR 102.2(e)(1) which contained the identical language as cited herein.

> Given the various meanings of the word 'maintain' and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the 'variety of circumstances' inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise. (***Matter of Evans, supra***)

A few years before its decision in ***Evans***, the Tribunal, in applying the phrase "permanently maintained" in 20 NYCRR former 102.2(e)(1) stated: "The operative words of the regulation are 'permanently maintained' which the petitioner does through his continued ownership of the house . . . ." (***Matter of Feldman***, Tax Appeals Tribunal, December 15, 1988.)

Despite their failure to make mortgage payments after October 1991, petitioners continued to own the Miller Place house until the foreclosure sale in January 1997. Their furniture remained at the house, two of their children and one of their grandchildren lived in the house throughout the entire period at issue and petitioners, themselves, stayed in the house during their visits to New York. Therefore, it is hereby determined that petitioners maintained a permanent place of abode in New York during the years 1991 through 1994.

For 1991, petitioners acknowledge that they did not move to Florida until June 1st; therefore, they spent more than 30 days in New York during that year. As indicated in Finding of Fact "10", petitioners acknowledge spending at least two or three months per year in New York during the remaining years at issue. Accordingly, it is determined that petitioners were properly subject to the New York personal income tax as resident individuals pursuant to Tax Law § 605(b)(1)(A).

F. It must be noted that even if it was determined that petitioners changed their domicile to Florida in June 1991, they would still be taxable as resident individuals pursuant to Tax Law §

605(b)(1)(B). This is true because, as heretofore noted, petitioners maintained a permanent place of abode in the State and spent, in the aggregate, more than 183 days of each of the years at issue in New York.

20 NYCRR 105.20(c) provides that:

> Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Department of Taxation adequate records to substantiate the fact that such person did not spend more than 183 days of such tax able year within New York State.[6]

Admittedly, petitioners kept no diary of their whereabouts during the years 1991 through 1994. A taxpayer is not required to specifically account for his whereabouts on every day of the period in question *if* he can establish a "pattern of conduct" from which his location may be determined for any particular day (***Matter of Kern,*** Tax Appeals Tribunal, November 9, 1995, ***confirmed Matter of Kern v. Tax Appeals Tribunal***, 240 AD2d 969, 659 NYS2d 140). These petitioners have not established any "pattern of conduct" from which their location can be determined. In fact, based upon what little documentation was made available to the auditor either from the responses to his subpoenas or by Mr. Giuffre (***see***, Finding of Fact "17"), it is clear that there was no "pattern of conduct."

While it is true that credible testimony can be sufficient to meet a taxpayer's burden to establish that he was not present in New York for more than 183 days (***see***, ***Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994), that credible testimony is wholly absent in this matter. Even if petitioner Emanuel V. Giuffre's records were to be accepted in total (***see***, Findings of Fact "14", "17" and "18"), his days spent in Florida were 45 in 1991, 137 in 1992, 36 in 1993

[6] Prior to January 29, 1992, the applicable regulation in effect was 20 NYCRR 102.2(c) which contained similar language.

and 11 in 1994. While the number of Florida days credited to petitioners actually decreased after the auditor received replies from the subpoenas which he issued, even if his earlier calculation was utilized (***see***, Finding of Fact "15"), petitioners were found to have spent 234 days in New York in 1991 and 236 days in New York in 1994. In 1992, petitioners were given credit for 89 days in Florida and 86 days in New York (this was later changed to 57 and 93, respectively). For 1993, only 53 days could be documented, with 29 found to have been spent in Florida and 24 days in New York.

Accordingly, even if it had been determined that petitioners changed their domicile to Florida in 1991, they have failed to substantiate that they did not spend more than 183 days in New York during any of the years at issue.

G. Petitioner Emanuel V. Giuffre contends that the long-term disability income which he received during each of the years at issue from Met Life's retirement and insurance program is not earned income and, therefore, is not subject to the New York State personal income tax. Mr. Giuffre admits that this income is subject to Federal tax because the premiums were paid by Met Life and not by him. In support of his position, he offered into evidence an article from the Summer 1996 edition of *Washington Watch*. The subject of the article, writtern by Robert C. Pozen, general counsel and a managing director of Fidelity Investments, is the Pension Income Taxation Limits Act which generally prohibits any state from taxing the retirement income of a nonresident of that state.

Petitioners' argument is totally without merit. First, the Pension Income Taxation Limits Act applies to any retirement payment received after December 31, 1995. The years at issue in this proceeding are 1991 through 1994. The Act, therefore, is not applicable herein. In addition, the Act relates to retirement income, not disability income such as that received by Mr. Giuffre.

Petitioners' argument that Mr. Guiffre's long-term disability income is not earned income and is, therefore, not subject to the New York personal income tax is likewise without merit. Internal Revenue Code § 105(a) states:

> *Amounts Attributable to Employer Contributions*. — Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.

One of the modifications which reduces Federal adjusted gross income is in Tax Law § 612(c)(3-b)(i) which provides for the subtraction of the following:

> Disability income included in federal gross income, to the extent that such disability income would have been excluded from federal gross income pursuant to the provisions of subsection (d) of section one hundred five of the internal revenue code of nineteen hundred fifty-four had such provisions continued in effect for taxable years commencing after December thirty-first, nineteen hundred eighty-three as they were in effect immediately prior to the repeal of such subsection. Notwithstanding the foregoing, the sum of disability income excluded pursuant to this paragraph, and pension and annuity income excluded pursuant to paragraph three-a of this subsection, shall not exceed twenty thousand dollars.

Internal Revenue Code § 105 (former [d][2]) limited the disability income exclusion to $100.00 per week. Internal Revenue Code § 105(former [d][3]) reduced this exclusion, dollar for dollar, by the amount by which a taxpayer's adjusted gross income exceeded $15,000.00.

For New York State purposes, the disability income exclusion is calculated on form IT-221. The instructions for this form state as follows:

> *Limit on Exclusion* — Generally, the most a person can exclude is $5,200. This exclusion goes down, dollar for dollar, by any amount over $15,000 on line 7. That line shows your federal adjusted gross income.
>
> Generally, no exclusion is left if line 7 is:
> — $20,200 or more, and one person could take the exclusion; or
> — $25,400 or more, and both husband and wife could take the exclusion.

For each of the years at issue, petitioner's adjusted gross income was considerably more than $20,200.00. Accordingly, petitioner was not entitled to an exclusion for the long-term disability income which he received from the insurance plan of his former employer, Met Life.

H. Petitioner Emanuel V. Giuffre contends that he should be entitled to a deduction in the amount of $15,600.00 for each of the years at issue. This amount, he maintains, was "in lieu" of Workers' Compensation benefits which he failed to receive due to the failure of Met Life to submit a claim therefor. $15,600.00 is the amount which petitioner claims he would have been entitled to had the proper claim for Workers' Compensation benefits been filed.

On September 27, 1996, Mr. Giuffre submitted a claim for Workers' Compensation benefits, but the case was held to have been time barred.[7] Petitioner claims that he is appealing this ruling. He alleges that he is entitled to deduct $15,600.00 (the amount to which he states that he was entitled as a Workers' Compensation benefit) for each of the years at issue. He, therefore, amended his 1994, 1995 and 1996 Federal income tax returns. He received a refund for 1995 (a notice from the Internal Revenue Service dated May 18, 1998 indicates that a refund of $4,865.00 was granted for 1995), but was denied a refund for the other years. Petitioner also submitted a copy of an amended return for 1996 on which he claimed a refund in the amount of $4,683.00 based upon a reduction of adjusted gross income of $15,600.00. It is unclear from the evidence presented as to why the Internal Revenue Service granted the refund for 1995 but denied the claims for other years.

There has been no showing by petitioner that he was eligible to receive Workers' Compensation for any of the years at issue (the refund for 1995 was subsequent to the years

[7] Workers' Compensation Law § 28 provides that the right to claim compensation shall be barred unless a claim is filed within two years after the accident.

which are the subject of this proceeding). Absent such evidence, it must be found that petitioner did not sustain his burden of proof pursuant to Tax Law § 689(e) to show entitlement to a credit or refund of New York State personal income tax for the years 1991, 1992, 1993 or 1994 based upon the allegation that his long-term disability payments were in lieu of Workers' Compensation.

I. Finally, petitioner Emanuel V. Giuffre claims that he is entitled to a New York State personal income tax deduction in the amount of $17,687.00 for each of the years 1991 through 1994 for interest recouped by the mortgagee at the time of the foreclosure sale on January 22, 1997. The actual amount of interest was $97,445.64 and not $106,123.00. Petitioner arrived at the $17,687.00 amount by dividing the total interest which he claims was $106,123.00 by 6 which is the number of years he contends the interest was charged (actually, the interest was charged for the period November 1, 1991 through January 22, 1997 which is slightly more than 5 years).

Petitioner's contention is without merit. Internal Revenue Code § 163 provides a deduction from taxable income for all interest paid or accrued within the taxable year on indebtedness. Pursuant to Tax Law § 615(a), the New York itemized deduction of a resident individual (petitioners have heretofore been found to be New York residents for the years at issue) means the total amount of his deductions from Federal adjusted gross income as provided in the Internal Revenue Code with certain modifications not applicable in this case.

Petitioners are cash basis taxpayers. There is no statutory authority which permits a cash basis taxpayer to deduct, on the returns for prior years, interest paid in a subsequent year.

J. The petition of Emanuel V. Giuffre and Anne Giuffre is denied and the Notice of Deficiency issued to petitioners by the Division of Taxation on January 15, 1998, as modified by Conciliation Order CMS No. 165843, is sustained.

DATED: Troy, New York
July 06, 2000

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE