

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Richard F. & Juanita M. Hoener	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1975.	:	

State of New York  
County of Albany

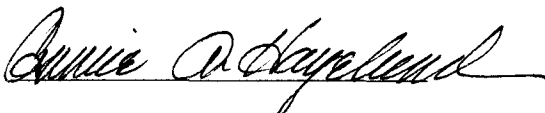
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Richard F. & Juanita M. Hoener, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard F. & Juanita M. Hoener  
6 Terrace Dr.  
Huntington Station, NY 11746

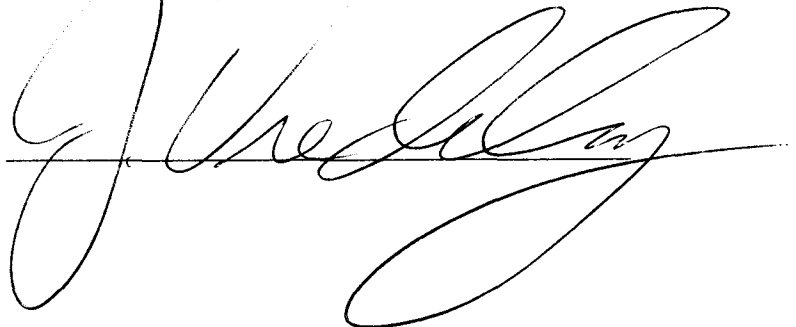
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
26th day of November, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

November 26, 1982

Richard F. & Juanita M. Hoener  
6 Terrace Dr.  
Huntington Station, NY 11746

Dear Mr. & Mrs. Hoener:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RICHARD F. HOENER AND JUANITA M. HOENER	:	DECISION
for redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1975.	:	

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Petitioners Richard F. Hoener and Juanita M. Hoener, 6 Terrace Drive, Huntington Station, New York 11746, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975 (File No. 26473).

A small claims hearing was held before Carl P. Wright, hearing officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 4, 1981 at 2:45 P.M. Petitioner Richard F. Hoener appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether during 1975 petitioners were residents of New York State for income tax purposes.

II. Whether petitioners were entitled to claim a resident tax credit for income taxes imposed on interest income and a retirement pension by the State of Ohio.

FINDINGS OF FACT

1. Petitioners, Richard F. Hoener and Juanita M. Hoener, timely filed a New York State Income Tax Resident Return for 1975. On Schedule C of this return, petitioners deducted retirement income from the United States Civil

Service Commission of \$12,714.10 and interest income of \$3,338.92 which was taxed in the State of Ohio.

2. On August 19, 1976, the Audit Division issued a Statement of Audit Changes against petitioners, proposing additional personal income tax of \$2,367.04 plus interest of \$69.45 for a total due of \$2,436.49. The Statement was issued on the grounds that petitioners were residents of New York State and were taxable on income received from all sources. Therefore, the retirement pension and the interest were disallowed as improper modifications.

On September 21, 1976, petitioners paid the tax and interest as shown on Statement of Audit Changes dated August 19, 1976 in full without giving consent to the findings.

3. On September 22, 1976, petitioners filed a New York State Claim for Resident Tax Credit. Attached thereto was a copy of an Ohio individual income tax return for 1975 and a copy of check payable to the order of Treasurer of State of Ohio. The Audit Division gave no credit for the taxes paid to the State of Ohio.

4. On February 28, 1977, petitioners filed an amended New York State Income Tax Nonresident Return for 1975 excluding the retirement pension and interest income from the New York State income. The return was filed on the grounds that petitioners were not domiciliaries of New York since they were in New York State for a temporary stay for the accomplishment of a particular purpose and thereby did not maintain a permanent place of abode. The petitioners took a credit on this return for the aforementioned payment of \$2,436.49.

5. On June 27, 1977, petitioners were issued a Notice of Disallowance in the amount of \$2,436.49. This Notice was issued based on the filing of the amended return.

6. Petitioner, Richard F. Hoener while residing in Dayton, Ohio responded to a Fairchild Industries Inc. (company) employment advertisement for test engineers. Petitioner applied for the position of A-10 Static Test Program Engineer. This program was planned and is still being performed in Dayton, Ohio. However, the company after evaluating its requirements and petitioner's qualifications insisted that he accept the position in the A-10 Fatigue Test Program. This program was planned and is still being performed by the company in its Farmingdale, New York facility. Petitioners were moved by Fairchild Industries Inc. to New York State for the duration of the Fatigue Test Program. Petitioners resolve to return to Dayton, Ohio when petitioner Richard F. Hoener's assignment is completed. At the time petitioner Richard F. Hoener accepted the assignment it was anticipated that it would take two years to complete. However, when petitioner came to New York, it was foreseen that problems could delay the program.

The A-10 Fatigue Test Program encountered problems and certain Air Force changes and for these reasons it has not been completed as of the hearing date.

7. At the time of the hearing, petitioners maintained a furnished residence in Kettering, Ohio. They maintain an Ohio telephone and bank accounts. Petitioners had a will drawn in the State of Ohio and maintain a safe deposit box in the State of Ohio. Petitioners have routine dental work performed in Dayton, Ohio. Petitioner Richard F. Hoener possesses an Ohio Professional Engineer License and has not applied for a New York license. When on vacation, petitioners return to the State of Ohio.

8. Petitioners, after arriving in New York State, could not find suitable rental quarters. Therefore, they bought a house for both living and investment purposes. They opened a bank account in New York and voted in New York State

general elections. Petitioners have registered their cars in New York State. During the year at issue, petitioners resided in New York State for the entire year.

9. During the year at issue, the funds at issue did not physically enter New York State.

#### CONCLUSIONS OF LAW

A. That the domicile of the petitioners is the State of Ohio since their intention is to remain in New York State only until petitioner Richard F. Hoener's assignment is completed. However, petitioners' maintained a permanent place of abode within New York State since petitioner Richard F. Hoener's assignment was indefinite in duration during the year at issue. This is based on the fact that variable contingencies were too great to foresee the approximate time the assignment would be concluded, thereby his assignment to his employer's New York facility could not be considered to be for a fixed or limited period in accordance with 20 NYCRR 102.2(e).

B. That any person domiciled outside the State who maintains a permanent place of abode within the State during any taxable year and spends an aggregate of more than 183 days of such taxable year within the State shall be a resident of New York State for income tax purposes even though he may not be deemed a resident for other purposes (Section 605(a)(2) of the Tax Law). That as resident individuals for income tax purposes, petitioners' New York adjusted gross income is the same as their federal adjusted gross income as modified (Section 612 of the Tax Law).

C. That petitioners are not entitled to a resident credit since section 620(c) of the Tax Law and 20 NYCRR 121.3(d) provide that said credit is allowable only for income tax imposed by another jurisdiction upon compensation for

personal services performed in the other jurisdiction, income from a business, trade or profession carried on in said jurisdiction, and income from real or tangible personal property situated in the other jurisdiction. Generally, the credit is not allowed for tax imposed by another jurisdiction upon income from intangibles.

D. That New York State residents for income tax purposes are subject to New York State personal income tax on income from intangible personal property (including interest income and retirement pension) derived from or connected with sources outside New York State, in accordance with section 611(a) of the Tax Law and 20 NYCRR 115.1.

E. That the petition of Richard F. Hoener and Juanita M. Hoener is denied and the Notice of Disallowance issued June 27, 1977 is sustained.

DATED: Albany, New York

NOV 26 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER