

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 Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1975 & 1976. :
_____ :

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, 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
3901 Lefevre Dr.
Kettering, OH 45429

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of July, 1984.

David Parchuck

Juanita M. Hoener
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Richard F. & Juanita M. Hoener
3901 Lefevre Dr.
Kettering, OH 45429

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
RICHARD F. HOENER AND JUANITA M. HOENER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refunds of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioners, Richard F. Hoener and Juanita M. Hoener, 3901 LeFevre Drive, Kettering, Ohio 45429, filed petitions for redetermination of a deficiency or for refunds of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976 (File No. 37596).

On November 13, 1983, petitioners filed a waiver of small claims hearing and consented to submission of this matter to the State Tax Commission. The following decision is rendered upon the file as presently constituted.

We note that petitioners filed perfected petitions (pursuant to 20 NYCRR 601.5) for tax years 1975 through 1981; however, the record herein does not disclose any Notice(s) of Deficiency or Notice(s) of Disallowance having been issued to petitioners for tax years 1977 through 1981 nor the filing of any petition(s) (pursuant to section 689 of the Tax Law) in reference thereto. Therefore, we will address the perfected petitions only as they relate to tax years 1975 and 1976 and make no decision for any subsequent year.

ISSUES

I. Whether, during the year 1976, petitioners were domiciled in New York and either maintained a permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York, and were thus resident individuals under Tax Law section 605(a)(1).

II. Whether petitioners timely filed a claim for refund for 1975 when no mention of said claim was made during their prior administrative hearing.

III. Whether petitioners timely filed a claim for refund for 1976.

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 February 26, 1977, they filed an amended return for said year on Form IT-203, New York State Income Tax Nonresident Return. On November 26, 1982, the State Tax Commission rendered a decision for 1975 as to petitioners' resident status and their claim for resident tax credit in which it was held that petitioners were domiciled in the State of Ohio but were residents of New York State by virtue of section 605(a)(2) of the Tax Law.

2. Petitioners timely filed a New York State Income Tax Resident Return for 1976 showing their address as 6 Terrace Drive, Huntington Station, New York. On April 12, 1977, they filed another 1976 return, this time on Form IT-203, New York State Income Tax Nonresident Return, showing an overpayment of \$4,386.76.

3. On September 26, 1977, the Audit Division issued a Statement of Audit Changes to petitioners on the grounds that they were New York State residents for the entire year 1976 and that the estimated tax claimed on their nonresident return exceeded the amount actually paid by them. Said statement proposed personal income tax of \$1,702.81, the amount shown due on their resident return, plus interest of \$232.56, for a total due of \$1,935.37. Accordingly, on September 26, 1977, a Notice of Deficiency was issued asserting personal income tax of \$6,089.57, plus interest. The "Consent to Findings" section of said notice contained the following statement: "(1)ess payment of \$4,386.76

made by refund and redeposited under Deposit Serial Number 9018963. Balance still due \$1,935.37". On October 13, 1977, the Audit Division advised petitioners that the Notice of Deficiency had been withdrawn since credit was not allowed for a \$1,702.81 payment made with the filing of their resident return.

4. Petitioner Richard F. Hoener was employed by Fairchild Industries, Inc. ("Fairchild") during the years at issue. Petitioner was moved from Dayton, Ohio to New York State by Fairchild to work in a position in the "A-10 Fatigue Test Program". The assignment, which began in 1974, was expected to last two years; however, due to problems encountered and to changes made by the Air Force, it was scheduled to continue into 1980.

5. In their letter addressed to the State Tax Commission, a copy of which was submitted with their petition,¹ signed on May 31, 1979, and received by the Audit Division on June 6, 1979, petitioners asserted the following:

"We have maintained our home in Ohio.

We have maintained our Dayton, Ohio Telephone listing.

We have all of our routine dental work performed in Dayton.

I have maintained my Ohio Professional Engineers License E-017272, and I have not applied for a New York license.

We have every intention of returning to Ohio when my current commitment is completed."

The petition filed by petitioners for refund of their tax paid stated as follows:

1. The tax in question is the Personal Income Tax.

¹ A petition is filed, pursuant to section 689 of the Tax Law, in response to a Notice of Deficiency or a Notice of Disallowance and is not to be confused with the Perfected Petition (mentioned in Finding of Fact "6") which is filed pursuant to section 601.5 of the Rules of Practice and Procedure.

2. The tax in question is for the taxable years(s) or period(s) 1975 and subsequent years.
3. The total amount of tax paid for each year is 1975-\$4,673.07, 1976-\$7,153.39, 1977-\$7,423.06, 1978-\$7,053.27.
4. Refund of \$2,418.41 (75) is requested. Notice of Disallowance was dated 27 June, 1977.

6. On December 6, 1980, petitioners filed Form IT-113X, Claim for Credit or Refund of Personal Income Tax, for 1975 and 1976, showing an overpayment of \$614.85 based on a change of election from married filing jointly to married filing separately. On June 7, 1982, they filed a petition for the refund amounts asserted in Form IT-113X. The Audit Division denied said claims on the ground that they were not timely. On February 27, 1981, petitioners filed a perfected petition claiming refunds of personal income tax for each of the years 1975 through 1980 on the ground that they were not residents of New York State. On March 24, 1981, a second perfected petition was received for the years 1975 through 1981 on the ground that the "Income Tax Bureau issued a notice of disallowance in full before all the facts in the case were presented to the Bureau". Said petition asserted a claim for refund only for 1975. On July 6, 1983, a third perfected petition was received claiming refunds of personal income tax for each of the years 1975 and 1976 on the ground that at the time the Audit Division issued its notice of disallowance in full, a petition was still active. Petitioners did not file Form IT-113X or amended personal income tax returns showing claims for refunds for years 1977 through 1981.

7. Petitioners moved to New York State on February 22, 1974. The perfected petition submitted by petitioner Richard F. Hoener in July of 1983 showed his address to be 6 Terrace Drive, Huntington Station, New York 11746, which was

the address on his 1974 New York State resident return. The record indicates that petitioners moved back to Ohio sometime between the filing of the perfected petition in July of 1983 and September of 1983.

CONCLUSIONS OF LAW

A. That any evidence or arguments petitioners wished to raise concerning their resident status or filing election during 1975 should appropriately have been presented during their prior administrative hearing (Matter of Richard F. and Juanita M. Hoener, State Tax Comm., Nov. 26, 1982). If petitioners were dissatisfied with the result of that hearing, their recourse was to institute a proceeding under Article 78 of the Civil Practice Law and Rules. Their claim for refund for 1975 is therefore denied.

B. That section 102.2(d) of the Personal Income Tax Regulations provides:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he 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 his fixed and permanent home there..." 20 NYCRR 102.2(d).

We previously determined that petitioners were domiciled in the State of Ohio during 1975 (see Finding of Fact "1", supra). The record herein does not show that petitioners' circumstances concerning their domicile have changed from 1975 to 1976. Accordingly, they remained domiciled in Ohio during 1976.

C. That any person domiciled outside the State who maintains a permanent place of abode within the State during any taxable year and spends in the aggregate 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) of the Tax Law and 20 NYCRR 102.2). Accordingly, petitioners were resident individuals of New York

during 1976, and their New York adjusted gross income is the same as their federal adjusted gross income with certain modifications not applicable herein (section 612 of the Tax Law).

D. That petitioners timely filed a petition on June 6, 1979, for the amount asserted in their claim for refund as shown on their 1976 nonresident return filed on April 12, 1977; however, the basis for said claim is the same as Issue "I" in this proceeding and has been answered by Conclusions of Law "B" and "C", supra. Therefore, petitioners' claim for refund, based on a change of domicile, and their petition for refund are denied.

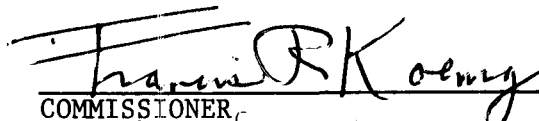
Petitioners' claim for refund for 1976 filed on Form IT-113X on December 6, 1980, which was based upon a change of election, is denied since (1) said claim constituted an additional claim for refund based upon a dissimilar ground than that set forth in their petition for refund dated June 6, 1979 (see Treas. Reg. §301.6402-2[b][1]); and (2) said claim was not filed within the three year period prescribed in section 687(a) of the Tax Law.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER