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## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determinations*  
*A-Z*  
*Fenley, John M.*  
*and*  
*Eileen A.*

TO: Commissioners Murphy and Macduff

FROM: V. P. Molineaux, Hearing Officer

SUBJECT: John M. and Eileen A. Fenley

In the Matter of the Petition for  
Redetermination of Deficiency of  
Personal Income Tax Under Article 22  
of the Tax Law for the Year 1962

Petitioners filed a petition for redetermination for 1962, but are United States Government employees in Lagos, Nigeria and would be unable to attend a hearing in New York. Their letter of July 28, 1965 states that there is nothing to add to the statements of the petition and previous correspondence. The amount involved would not justify their hiring a representative to appear at a hearing when presumably such representative would be in possession of no greater information than we have available. If the proposed determination vacating the notice of deficiency is acceptable, there would be no need for a hearing.

The issue is one of residence.

Petitioners owned a home in California and one in Ithaca, New York, where the husband was on the faculty of the New York State Colleges. In July of 1961 petitioners took employment with USAID/Nigeria and left New York. They did not return to New York but sold their home in Ithaca in July 1962. Their official United States residence with the United States Government is at their home in California where they took home leave from Nigeria in 1963. Petitioners state that this residence had been re-established upon their departure from New York.

Due to the ownership of the house in Ithaca which they rented for the period after their departure, up until the time of the sale, they filed resident returns for all of 1961 and half of 1962. On their resident return they reported their salary income received from employment outside of New York State for the period January 1, 1962 up to July 1, 1962. The statement of audit changes was issued to reflect the salary income earned during the entire year on the ground that the taxpayers, who were not present in New York during such year, nevertheless, were domiciled in this State, maintained a permanent place of abode therein, and maintained no permanent place of abode outside.

A serious question arises as to whether or not the taxpayer

was domiciled in New York during the year 1962 or, for that matter, during 1961 for which year resident returns were filed and paid. There is some evidence in the file to disclose that the California domicile was never abandoned, and that the California home was always maintained by the taxpayers as a permanent place of abode. Moreover, it is difficult to conceive how the New York house which was rented out during all of 1962 up to the date of sale could be deemed a permanent place of abode in this State. Were the taxpayer at a hearing, the facts could lead to the conclusion that the taxpayers were nondomiciliaries and nonresidents of the State during 1962 and possibly 1961, and entitled to a refund, were applications for such refund timely filed.

Even if the taxpayers could be deemed domiciled in this State, there is a strong likelihood that the evidence would disclose that a change of domicile and residence took place upon their departure from New York.

For the reasons set forth above, I have prepared a proposed determination for your review cancelling the notice of deficiency.

/s/

VINCENT P. MOLINEAUX  
Hearing Officer

September 21, 1966 (Sept. 23, 1966)

MS:cp

Enc.

/s/

M. Schapiro  
Approved

/s/

S. HECKELMAN  
Approved

STATE OF NEW YORK  
STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION  
OF

JOHN M. AND EILEEN A. FENLEY

FOR REDETERMINATION OF DEFICIENCY OF  
PERSONAL INCOME TAX UNDER ARTICLE 22  
OF THE TAX LAW FOR THE YEAR 1962

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John M. and Eileen A. Fenley having filed a petition for redetermination of deficiency of personal income tax under Article 22 of the Tax Law for the year 1962 (File No. 2-8897098), and the record having been duly examined and considered,

The State Tax Commission hereby finds:

- (1) That the petitioners filed a resident income tax return for the year 1962 on which the amount shown to be due was paid; that the said return claimed a termination of residence for income tax purposes on July 1, 1962.
- (2) That on October 8, 1964 the State Tax Commission issued a statement of audit changes based upon residence of petitioners for the entire year of 1962.
- (3) That petitioners left the State of New York in July 1961, did not return, and are now employed by the United States Government in Lagos, Nigeria.
- (4) That for the year in question petitioners maintained no permanent place of abode in the State of New York, did maintain a permanent place of abode outside of New York and spent less than thirty days of the taxable year in this State.
- (5) That petitioners were not residents of the State of New York for the year 1962.

Based upon the foregoing findings, the State Tax Commission hereby

**DECIDES:**

That the statement of audit changes adjusting the petitioners' New York State personal income tax for the year 1962 is incorrect, that the petition for redetermination is granted, and the notice of deficiency for such year is hereby cancelled and revoked.

Dated in the City of Albany the 26th day of September , 1966.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PRESIDENT**

/s/

JAMES R. MACDUFF

**COMMISSIONER**