New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(6)I
Income Tax
September 6, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I991228B

On December 28, 1999, a Petition for Advisory Opinion was received from The Limited Stores, Inc., Three Limited Parkway, Columbus, Ohio 43230.

The issues raised by Petitioner, The Limited Stores, Inc., are:

1. Whether the lump sum distributions from the Nonqualified Plan, described below, to distributees who have terminated their employment with the Limited, Inc. or its affiliates and who are nonresidents and nondomiciliaries of New York State and/or New York City are exempt from the personal income tax imposed pursuant to Article 22 of the Tax Law ("State PIT") and the New York City nonresident earnings tax imposed pursuant to Title 11, Chapter 19 of the New York City Administrative Code as authorized by Article 2-E of the General City Law ("City NET").

2. Whether Petitioner is required to withhold State PIT or New York City personal income tax imposed pursuant to Title 11, Chapter 17 of the New York City Administrative Code as authorized by Article 30 of the Tax Law ("City PIT") from distributions from the Nonqualified Plan, described below, that are made to employees of those affiliates of The Limited, Inc. that do not have an office or transact business in New York State.

3. Whether Petitioner, with regard to distributions made to employees of affiliates of The Limited, Inc. that have an office or transact business in New York State, (a) is required to withhold State PIT, City PIT or City NET from distributions from the Nonqualified Plan, described below, to employees who state that they are New York residents, and (b) is entitled to rely upon affidavits it receives from employees regarding their state of residence in determining whether it is required to withhold State PIT, City PIT or City NET from such distributions.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a wholly-owned indirect subsidiary of The Limited, Inc. Effective August 1, 1971, Petitioner adopted The Limited Stores, Inc. Savings and Retirement Plan, a qualified deferred compensation plan for certain employees of The Limited, Inc. and its affiliates. Various profit sharing plans of The Limited, Inc. were merged into this plan, effective as of January 1, 1992, and the plan was amended, restated and renamed The Limited, Inc. Savings and Retirement Plan ("the Qualified Plan"). A First Restatement of the Qualified Plan was adopted effective January 1, and April 2, 1992, in order to make certain changes in the design of the Plan. A Second Restatement of

the Qualified Plan was adopted effective as of January 1, 1992, to make certain changes to the Qualified Plan and to incorporate the amendments made to the Qualified Plan by the First Restatement.

The Internal Revenue Service has issued a Determination Letter, dated January 30, 1995, ruling that the Qualified Plan provides for retirement income that is income from a qualified trust under section 401(a) of the Internal Revenue Code of 1986, as amended ("IRC"), that is exempt from taxation under section 501(a) of the IRC.

Petitioner has also adopted a nonqualified deferred compensation plan for certain of its employees, The Limited Stores Supplemental Retirement Plan, which was amended and restated effective January 1, 1989. Effective January 1, 1992, The Limited Stores Supplemental Retirement Plan was succeeded by The Limited Supplemental Retirement Plan (the "Nonqualified Plan").

The Nonqualified Plan supplements and incorporates various definitions and provisions of the Qualified Plan. The Nonqualified Plan provides deferred compensation that is retirement income in excess of the limits imposed by sections 401(a)(17) and 417 of the IRC. Petitioner states that the Nonqualified Plan is a plan described under section 3121(v)(2)(C) of the IRC.

All post-termination distributions from the Nonqualified Plan are to be made to participants whose employment by The Limited, Inc., or its affiliates has been terminated for not less than 30 days. All distributions from the Nonqualified Plan are made in lump sum payments. Section 3.4 of the Nonqualified Plan states that "[t]he Employer [Limited Service Corporation and its affiliates that are participating employers under The Limited, Inc. Savings and Retirement Plan] will not, establish any reserve of assets to provide funds for payments under the [Nonqualified] Plan. The interests of Participants and Beneficiaries under the [Nonqualified] Plan will be solely those of general creditors of the Employer."

Discussion

Issue 1

Section 114(a) of Title 4 of the US Code, as added by Public Law 104-95, January 10, 1996, and applicable to amounts received after December 31, 1995, provides that "[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State)." Section 114(b)(1) of Title 4 of the US Code defines the term "retirement income" as any income from, among other things:

> (I) any plan, program, or arrangement described in section 3121(v)(2)(C) of [the IRC], if such income –
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> (i) is part of a series of substantially equal periodic payments ... or

> (ii) is a payment received after termination of employment under a plan, program, or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations imposed by 1 or more sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of [the IRC] or any other limitation on contributions or benefits in [the IRC] on plans to which any such sections apply.

Section 3121(v)(2)(C) of the IRC defines a "nonqualified deferred compensation plan" as any plan or any arrangement for the deferral of compensation other than a plan described in section 3121(a)(5) of the IRC (generally, ERISA or "qualified plans").

Pursuant to section 114 of Title 4 of the US Code, New York State may not impose State PIT on the retirement income of a nonresident or nondomiciliary individual after December 31, 1995. In this case, the Nonqualified Plan is a plan or arrangement as described in section 3121(v)(2)(C) of the IRC, and the lump sum distributions from such plan meet the requirements of section 114(b)(1)(I)(ii) of Title 4 of the US Code. Therefore, for purposes of State PIT, the lump sum distributions from the Nonqualified Plan received by nonresidents of New York State will be treated as retirement income as defined in section 114(b) of Title 4 of the US Code.

Accordingly, the lump sum distributions from the Nonqualified Plan, to distributees who have terminated their employment with The Limited, Inc. or its affiliates, and are nonresidents and nondomiciliaries of New York State, are exempt from State PIT pursuant to section 114(a) of Title 4 of the US Code.

The City NET was administered by New York State. However, effective July 1, 1999, Article 2-E of the General City Law was repealed (L. 1999, Ch. 5; City of New York v State of New York, 94 NY2d 577). Accordingly, the City NET is repealed, and the question regarding the lump sum distributions from the Nonqualified Plan to distributees who are nonresidents and nondomiciliaries of New York City is moot.

Issue 2

Section 671(a) of the Tax Law provides that "every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year." (Emphasis added.)

Accordingly, pursuant to section 671(a) of the Tax Law, Petitioner is not required to withhold State PIT from distributions from the Nonqualified Plan that are made to employees of affiliates of

The Limited, Inc. that do not have an office or transact business in New York. Likewise, the withholding of City PIT is not required from such distributions to employees of affiliates of The Limited, Inc. that do not have an office or transact business in New York City.

Issue 3

Section 671(a) of the Tax Law provides that "every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages ...." (Emphasis added.)

Section 171.3(a) of the Personal Income Tax Regulations provides that payments which are considered wages for federal income tax withholding purposes are also wages for purposes of withholding New York State personal income tax.

Section 31.3401(a)-1(b) of the Treasury Regulations provides that, for federal income tax purposes, in general, pensions and retirement pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403 of the Internal Revenue Code. If a nonqualified deferred compensation plan provides for an unfunded and unsecured promise to make payments at some future point in time, payments from the plan are subject to federal income tax withholding when they are received by the employee. (See, e.g. Rev Rul 82-176, 1982-2 CB 223; Rev Rul 77-25, 1977-1 CB 301.)

Section 35.3405-1(Q&A– A-21) of the Treasury Regulations provides that:

> A-21. Q. An employer maintains a nonqualified deferred compensation plan such as a supplemental executive retirement ("top hat") plan. Payments under the plan are made in the form of a single sum payment at retirement. Amounts paid at retirement are includible in income as compensation in the year received. Must the payor withhold on these amounts according to the rules in section 3405?
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> A. No. Section 3405(d)(1)(B)(i) provides that a designated distribution on which withholding is required does not include amounts that are wages without regard to the rules of section 3405. Therefore, withholding on payments that are includible in income as compensation are based on the rules for withholding on wages contained in section 3402.

In this case, the Nonqualified Plan is a nonfunded plan, and it is assumed that the distributions to the participants from such Nonqualified Plan are wages pursuant to sections 31.3401(a)-1(b) and 35.3405-1(Q&A–A-21) of the Treasury Regulations.

Accordingly, pursuant to sections 671(a) of the Tax Law, Petitioner is not required to withhold State PIT from distributions from the Nonqualified Plan that are made to employees of affiliates of The Limited, Inc. that do have an office or transact business in New York where the employees are nonresidents of New York State, because such distributions are not taxable under State PIT. (See Issue 1 above.) Since the City NET is repealed, the question regarding the withholding of City NET from such distributions that are made to employees who are nonresidents of New York City is moot.

However, the provisions of section 114 of Title 4 of the US Code, which exempts the retirement income of a nonresident or nondomiciliary individual after December 31, 1995 from State PIT do not apply to a resident individual of New York State or New York City. Accordingly, pursuant to section 671(a) of the Tax Law, withholding of State PIT is required by Petitioner from distributions from the Nonqualified Plan that are made to employees of affiliates of The Limited, Inc. that have an office or transact business in New York State, where the employees are residents of New York State. Likewise, withholding of City PIT from distributions from the Nonqualified Plan that are made to employees who are residents of New York City is required by Petitioner for purposes of the City PIT.

Pursuant to section 171.6(b)(5) of the State PIT regulations, an employer must withhold State PIT from all wages paid to an employee who is a nonresident of New York State that performs services partly within and partly without New York State, unless there is filed with the employer a *Certificate of Nonresidence and Allocation of Withholding Tax* on Form IT-2104.1, or unless the employer maintains adequate current records to accurately determine the amount of wages from New York State sources. Petitioner may rely on a Form IT-2104.1 - New York State Certificate of Nonresidence and Allocation of Withholding Tax and a Form IT-2104.2 - City of New York Certificate of Nonresidence , respectively, that it receives from an employee of an affiliate of The Limited, Inc. to determine that an employee is not a resident of New York State or New York City, respectively, in determining whether it is required to withhold State PIT and City PIT, respectively, from the distributions from the Nonqualified Plan that are made to such employee.

DATED: September 6, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.