

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-08(3)I  
Income Tax  
October 3, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I080508A

On May 8, 2008, a Petition for Advisory Opinion was received from Mark Kresge, P.O. Box 702, Buffalo, New York 14201-0702.

The issue raised by Petitioner, Mark Kresge, is whether compensation received by an individual who is a citizen of the United States and resident of Canada for services performed in New York for the Consulate General of Canada in New York, as a diplomatic mission of a foreign country, is considered New York source income for personal income tax purposes.

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

Petitioner is a citizen of the United States. Petitioner established his domicile in Ontario, Canada and maintains a permanent residence in Canada. He is not domiciled in the United States and does not maintain a place of abode in the United States. He is employed by the Consulate General of Canada and commutes daily from Canada to the chancery of the Consulate General of Canada in Buffalo, New York. The services rendered are solely in the discharge of functions of a governmental nature for Canada. Employment taxes and estimated personal income taxes are paid directly by Petitioner to the Internal Revenue Service and to New York State.

Petitioner is considering acquiring Canadian citizenship, while keeping his United States citizenship.

**Applicable law and regulations**

Section 601(e) of the Tax Law imposes a personal income tax for nonresidents of New York State, and provides, in part:

Nonresidents and part-year residents. (1) General. There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual . . . a tax which shall be equal to the tax base multiplied by the New York source fraction.

(2) Tax base. The tax base is the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b), (c), (d) and (m) of section six hundred six, as if such nonresident or part-year resident individual . . . were a resident subject to the provisions of part II of this article.

(3) New York source fraction. The New York source fraction is a fraction the numerator of which is such individual's . . . New York source income determined in accordance with part III of this article and the denominator of which is such individual's New York adjusted gross income determined in accordance with part II of this article. . . .

Section 605(b) of the Tax Law provides, in part:

Resident, nonresident and part-year resident defined.

(1) 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 . . . 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.

(2) Nonresident individual. A nonresident individual means an individual who is not a resident or a part-year resident.

Section 607(a) of the Tax Law provides:

General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. . . .

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

\* \* \*

(B) a business, trade, profession or occupation carried on in this state; or . . . .

### **Opinion**

Petitioner is not domiciled in New York State and does not maintain a permanent place of abode in New York. Accordingly, Petitioner is a nonresident for New York State personal income tax purposes. See section 605(b) of the Tax Law. Section 601(e) of the Tax Law imposes a personal income tax on the taxable income derived from New York sources of a nonresident individual. The tax is equal to the tax computed as if the nonresident individual were a New York State resident for the entire year, reduced by certain credits, and then multiplied by the income percentage (i.e., New York source fraction). The numerator of the fraction used to compute the income percentage is the nonresident individual's New York source income. The denominator of the fraction used to compute the income percentage is the nonresident individual's New York adjusted gross income from all sources for the entire year.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual includes income entering into his or her federal adjusted gross income that is derived from or connected with New York sources. Income from New York sources includes income attributable to an occupation carried on in New York.

Since the compensation in this case is attributable to services performed by Petitioner solely in New York State, it is considered New York source income for personal income tax purposes to the extent that the income is included in Petitioner's federal adjusted gross income.

Accordingly, if, pursuant to the tax treaty between the United States and Canada, Petitioner's income is included in his federal adjusted gross income, then Petitioner's compensation in this case attributable to services performed by Petitioner solely in New York State will be considered New York source income for personal income tax purposes. Conversely, if, pursuant to the tax treaty between the United States and Canada, Petitioner's income is not included in his federal adjusted gross income, then Petitioner's compensation in this case attributable to services performed by Petitioner solely in New York State will not be considered New York source income for personal income tax purposes. This Opinion does not address whether the income received by Petitioner for the discharge of functions of a

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governmental nature for Canada is included in federal adjusted gross income or exempt from federal personal income tax pursuant to the treaty between the United States and Canada.

DATED: October 3, 2008

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.