



## **Advisory Opinion: TSB-A-24(6)I**

Petitioner [ REDACTED ] (“petitioner”), a member of the New York Air National Guard, has asked whether money earned while engaged in homeland defense activities during the coronavirus pandemic under Title 32 of the United States Code may be excluded from his New York taxable income.

We conclude that these monies may be excluded.

### **Facts**

Petitioner is a member of the New York Air National Guard. Petitioner performed Full time National Guard Duty services in New York under § 502(f) of Title 32 of the United States Code (“USC”) as part of New York state’s coordinated response to the coronavirus pandemic during tax years 2020 and 2021. This response also included the Governor’s declaration of a disaster emergency pursuant to Executive Order 202 on March 7, 2020. Petitioner’s pay for his Air National Guard services is included in his federal adjusted gross income for those tax years.

### **Analysis**

For state income tax purposes, Tax Law § 612(c) sets forth certain items that are subtracted from federal adjusted gross income to determine New York adjusted gross income. Among these items is Tax Law § 612(c)(8-b) which provides a subtraction for:

(8-b) Income received by an individual who is a member of the New York state organized militia [including the New York Air and Army National Guard], as such term is defined in subdivision one of section two of the military law, as compensation for performing active service within the state pursuant to either (i) state active duty orders issued in accordance with subdivision one of section six of the military law or (ii) active service of the United States pursuant to federal active duty orders, for service other than training, issued in accordance with title 10 of the United States code.

Petitioner’s active service orders were issued pursuant to USC Title 32. However, service in accordance with Title 10, as referred to in subparagraph (ii) above, differs from service under Title 32. Title 32 provides a Governor with a vehicle to employ National Guard members in homeland defense activities authorized by the President or federal Secretary of Defense. See 32 USC § 502(f). Title 32 service primarily is state active duty and includes active service in “Full-Time National Guard Duty”. See National Guard Fact Sheet, Army National Guard (FY2005), available at <https://www.nationalguard.mil/About-the-Guard/Army-National%20Guard/Resources/News/ARNG-Media/FileId/137011/>. “Full-time National Guard Duty” means training or other duty, other than inactive duty, performed by a member of the National Guard. Id. Title 32 allows the Governor, with the approval of the

President or the Secretary of Defense, to order a member to duty for operational homeland defense activities in accordance with the United States Code. Id.

Under 32 USC § 902 the “Secretary of Defense may provide funds to a Governor to employ National Guard units or members to conduct homeland defense activities that the Secretary determines to be necessary and appropriate for participation by the National Guard units or members, as the case may be.”

By contrast, Title 10 service is performed for the federal government. Because Petitioner’s orders were pursuant to Title 32, subparagraph (ii) of Tax Law § 612(c)(8-b) does not apply in this case.

Title 32 also provides that “[n]othing in this chapter shall be construed as a limitation on the authority of any unit of the National Guard of a State, when such unit is not in Federal service, to perform functions authorized to be performed by the National Guard by the laws of the State concerned.” 32 USC § 907. The laws of New York pertaining to the ordering of the National Guard into service are set forth in Article 6 of the Military Law (NYML).

Subparagraph (i) of Tax Law § 612(c)(8-b) above applies if Petitioner’s service within the State is considered active service pursuant to state active-duty orders issued in accordance with NYML § 6.1. This part of the NYML provides as follows:

6. Ordering organized militia into active state service. 1. The governor shall have power, in case of invasion, disaster, insurrection, riot, breach of the peace, or imminent danger thereof, to order into the active service of the state for such period, to such extent and in such manner as he may deem necessary all or any part of the organized militia. Such power shall include the power to order the organized militia or any part thereof to function under the operational control of the United States army, navy or air force commander in charge of the defense of any area within the state which is invaded or attacked or is or may be threatened with invasion or attack.

Under the NYML, “active service” and “active duty” mean “military duty in or with a force of the organized militia (not including the inactive national guard and not including the New York guard when in an inactive status) ..., either in a full-time status or in a part-time status, depending upon the conditions under which the duty is performed”. NYML § 1.6. The forces of the organized militia include the air national guard. NYML § 1.9.

Nowhere in NYML § 6.1 is federal Title 32 service excluded from the active-duty service for the state. Though the New York national guard can perform separate duties for the governor, as contemplated by 32 USC § 907, this does not mean that Title 32 service is not active-duty service performed in the service of the state. Title 32 service requires federal approval and can receive federal funding (see 32 USC § 902), but that does not mean that it is not performed in service of, and at the direction of, the Governor for purposes of NYML § 6.1. As indicated above, Petitioner was ordered by the Governor to perform active services as a National Guard member in response to the emergency disaster presented by the coronavirus pandemic.

Petitioner’s Title 32 service falls within Tax Law § 612(c)(8-b)(i) as service performed pursuant to “state active-duty orders issued in accordance with subdivision one of section six of the military law,” and income earned therefrom thus is excluded from computing New York adjusted gross income.

Dated: April 24, 2024

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**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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.