NEW YORK STATE | Department of Taxation and Finance
Office of Counsel

TSB-A-24(9)I
Income Tax
April 24, 2024

Advisory Opinion: TSB-A-24(9)I

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] ("Petitioner"). Petitioner asks 1) how much compensation, if any, should be sourced to New York State and New York City ("NYS/NYC") in taxable year 2018, for bonus compensation received by Petitioner in February 2019, for services performed in 2018 when Petitioner was a NYS/NYC part-year resident; and 2) how much compensation, if any, should be sourced to NYS/NYC in 2018, for restricted stock units granted to Petitioner when Petitioner was a nonresident of NYS/NYC, but vested when Petitioner was a resident of NYS/NYC.

The compensation related to the bonus and vested restricted stock units received in February 2019 should be sourced to NYS/NYC and included on Petitioner's Form IT-201 for the 2019 taxable year.

Facts

Prior to October 2018, Petitioner was domiciled and resided outside of the United States and did not work in NYS or NYC. In October 2018, Petitioner became a tax resident of New York City ("NYC") and worked exclusively in New York State ("NYS") and NYC. Petitioner was employed by one company during this time period.

As part of Petitioner's compensation plan for 2018, Petitioner was entitled to receive a cash payment bonus. The bonus amount was determined at the end of the 2018 calendar year and was based on Petitioner's 2018 performance. The bonus was paid to Petitioner in February 2019.

In February 2019, Petitioner also received compensation for restricted stock units that were granted in 2016, 2017 and 2018, when Petitioner did not reside in NYS/NYC. The restricted stock units had a three-year vesting period as described below.

- For the 2016 restricted stock units, one-third of the total amount vested during 2017, one-third vested during 2018 and one-third vested in 2019. Petitioner received reportable compensation for these stock units in February 2017, 2018, and 2019.

- For the 2017 restricted stock units, one-third of the total amount vested during 2018, one-third vested during 2019 and one-third vested in 2020. Petitioner received reportable compensation for these stock units in February 2018, 2019, and 2020.

- For the 2018 restricted stock units, one-third of the total amount vested during 2019, one-third vested during 2020 and one-third will vest in 2021. Petitioner received reportable compensation for these stock units in February 2019, 2020 and 2021. Petitioner's employer withheld both NYS and NYC income taxes on the entire February 2019 bonus and stock unit compensation.

An Award Agreement given to Petitioner by her employer relating to the restricted stock units (and any related dividend equivalents) states that the units shall be earned and payable in three (3) equal annual installments if Petitioner remains employed with her employer and its subsidiaries through each of the payment dates. The units become earned and payable to Petitioner in accordance with the amount and dates in the Award Agreement. If Petitioner's employment terminates prior to any of the above payment dates, then any unearned restricted stock units (and any related dividend equivalents) shall become earned and payable, or be canceled, depending on the reason for termination as enumerated in the Award Agreement. For example, if the Petitioner dies, the units will become immediately earned and payable. If Petitioner is terminated for cause, any units not yet earned and payable are canceled as of that date. There are also performance-based cancellation provisions where the award, or parts of that award, may be canceled; for example, where the aggregate profit and loss attributable to an individual's activities are negative. Further, the Award Agreement states that the Stock Plan is established voluntarily and is discretionary in nature and may be altered, amended, suspended or terminated at any time.

Petitioner's year-end compensation statement for the bonus award and the restricted stock units states: "The final amount of each incentive component that you will be entitled to receive (if any) will only be determined on the date of payment of the company in its sole discretion. Your receipt of awards is contingent on you remaining actively employed through the grant date or applicable payment date. If you give or receive notice to terminate your employment before the applicable grant date or payment date, you will not be considered to be an active employee. The company determines the amount of each compensation component and may revise or terminate any incentive plan in its sole discretion...." he value of the restricted stock units was included in Petitioner's federal taxable income in the year the units vested.

The questions asked in this Opinion relate only to Petitioner's 2018 and 2019 taxable years.

Analysis

A taxpayer who moves into NYS or NYC during the taxable year and has a change of resident status during the year is considered to be a part-year resident. Tax Law § 605(a)(5). In general, part-year residents are taxed on all income reported on the individual's federal income tax return for the period he or she is a resident of NYS/NYC and on their NY source income for the period the individual is not a resident of NYS/NYC, with adjustments for accruals. Tax Law §§ 601, 638(a) & 639.

Under the accrual rules, if an individual changes status from nonresident to resident, he or she shall, regardless of his or her method of accounting, accrue to the period of nonresidence any items of income, gain, loss or deduction accruing prior to the change of status, other than items derived from or connected with New York sources, if not otherwise properly includable or allowable for NY income tax purposes for such period, or a prior taxable year under his or her method of accounting. Tax Law § 639(b); 20 NYCRR 154.10(e). Also, no item of income, gain, loss or deduction accrued under Tax Law § 639(b) up to the time a taxpayer changes his or her residence will be taken into account in determining tax for any subsequent taxable year. Tax Law § 639(c); 20 NYCRR 154.10(f). The accrual rules also apply to changes in NYC residency. Tax Law § 1307(c); NYC Admin. Code § 11-1174(c)(2). There are exceptions to the accrual rules where a taxpayer changes resident status, files a bond or other satisfactory security acceptable to the Commissioner and agrees to report

the accruable amounts in one or more subsequent taxable years, as if the taxpayer had not changed his or her residence status. Tax Law § 639(d).

In determining when an item of income accrues under Tax Law § 639, New York follows relevant federal tax law. *See Matter of Blanco v. Commissioner,* 282 A.D.2d 896 (3rd Dep't 2001) *lv. denied,* 96 N.Y.2d 719 (2001). Treas. Reg. § 1.461-1(a)(2)(i) provides that under an accrual method of accounting a liability is incurred and is generally taken into account for federal income tax purposes, in the taxable year in which: (1) all the events have occurred that establish the fact of the liability; (2) the amount of the liability can be determined with reasonable accuracy; and (3) economic performance has occurred for the liability (collectively, the "all events test"). In *Matter of Blanco et al., v. Commissioner of Taxation and Finance*, 282 A.D.2d 896, 897 (3d Dep't 2001) *lv. denied*, 96 N.Y.2d 719 (2001), citing 26 CFR 1.446-1(c)(1)(ii)(A), the Appellate Division stated that "[u]nder an accrual method, income is to be included for the taxable year when all the events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy."

Therefore, if Petitioner changed tax status from nonresident to resident in calendar year 2018, Petitioner would accrue any non-NY source income that, under an accrual accounting method, would be reportable at the time of the residence change in 2018, even if the income would be received after the taxpayer moved into NYS/NYC in 2018. An example of this would be a bonus earned when the taxpayer was a nonresident that was "fixed and determinable" in 2018 before the taxpayer changed her tax residency to NYS/NYC. *See* Instructions for Forms IT-260 and IT-260.1 Change of Resident Status – Special Accruals. Also, in any subsequent taxable year, any bonus accrued in 2018 that was "fixed and determinable" before the taxpayer changed her tax residency to NYS/NYC would be excluded in determining Petitioner's NYS/NYC personal income tax. Tax Law § 639(b).

1. Bonus Compensation

In this case, Petitioner had discussions with her employer regarding bonus compensation for the 2018 taxable year. The compensation plan provided that a bonus payment would be determined at the end of the 2018 calendar year based on Petitioner's performance for the entire 2018 calendar year. Also, Petitioner's year-end compensation statement for 2018 states that the bonus would be determined on the date of payment of the bonus by the Company in the Company's sole discretion and be contingent on Petitioner remaining actively employed through the applicable payment date. Therefore, at the time Petitioner's NY tax status changed from nonresident to resident in October of 2018, all of the events required to fix the right to receive the bonus, including Petitioner's performance for the entire 2018 calendar year and Petitioner remaining employed with the company as a condition to receive the bonus, were not "fixed" or earned at that time. Furthermore, the amount of the bonus was not "determinable" at the time of Petitioner's change in residency in October 2018, because the bonus amount was based on her entire performance for the 2018 taxable year, which ended three months after she became a NYS/NYC resident. Therefore, the bonus was not an accrued item within the meaning of Tax Law § 639 that is required to be included in income on Petitioner's 2018 tax return.

When the bonus compensation was subsequently paid in February 2019, Petitioner's tax status was a NYS/NYC resident. As a NYS/NYC resident, Petitioner is required to report on her NY personal income tax return all the income reported on

Petitioner's federal income tax return for the period she is a resident of NYS/NYC, and all that income, including the bonus compensation, will be taxed.

2. Restricted Stock Units

As stated above, Petitioner was granted restricted stock units in 2016, 2017 and 2018 and with respect to each grant of units, one-third of the units vested and were payable to Petitioner in February 2019.[1] Tax Law § 638(c) requires part-year residents who have been granted stock options, restricted stock or stock appreciation rights and who have performed services within NY during the grant period to allocate to NYS the income attributable to these items according to the rules and regulations prescribed by the Commissioner. Tax Law § 638(c). Regulation 20 NYCRR 154.6 states that where an individual changes resident status during the taxable year, the amount of NY source income from compensation received from stock options, stock appreciation rights or restricted stock, in the taxable year that such income is included in the individual's Federal adjusted gross income, is dependent on the individual's resident status at the time that the compensation is recognized for Federal income tax purposes. Generally restricted stock units are included in federal income tax when vested.[2]

The NYS tax treatment of stock options, restricted stock, and stock appreciation rights for taxable years beginning on or after January 1, 2006, is described in TSB-M-07(7)I. The Technical Services Memo, on page 7 *Part-year residents,* states:

"When an individual changes resident status during the taxable year, the amount of New York source income from compensation received from stock options, restricted stock or stock appreciation rights in the taxable year that is included in the individual's federal gross income…is dependent on the individual's resident status at the time the compensation is recognized for federal income tax purposes. If the compensation is recognized during the resident period, the entire amount of compensation recognized for federal income tax purposes is included in New York source income. If the compensation is recognized during the nonresident period, the amount includable in New York source income is determined using an allocation method previously described under the heading, *Nonresidents.*"

The Memo also states that in the case of a change of resident status for NYC during the taxable year, the amount of NYC compensation received from stock options, restricted stock, or stock appreciation rights in the taxable year that is included in the individual's federal gross income . . . s also dependent on the individual's resident status at the time that the compensation is recognized for federal income tax purposes. If the compensation is recognized during the NYC resident period, the entire amount of the compensation recognized for federal income tax purposes . . . is includible in NYC source income.

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[1] Restricted Stock Units are unsecured, unfunded promises to pay cash or stock in the future and are considered nonqualified deferred compensation subject to IRC §§ 3121(v)(2), 451 and 409A. Typically, one Restricted Stock Unit represents one share of actual stock. Restricted Stock Units generally are not taxable at grant if they meet the requirements of, or otherwise are exempt from, IRC §§ 451 and 409A. Generally, a taxable event does not take place until the vesting of the Restricted Stock Unit. In addition, Restricted Stock Units are not considered property for purposes of IRC § 83 since no actual property has been transferred and, therefore, an IRC § 83(b) election (a provision under the IRC that gives an employee the option to pay taxes on the total fair market value of restricted stock at the time of granting) cannot be made with respect to the grant of a Restricted Stock Unit. https://www.irs.gov/businesses/corporations/equity-stock-based-compensation-audit-techniques-guide

[2] Id.

However, if the compensation is recognized during the nonresident period, the compensation is not subject to NYC tax. *Id.*

As relevant here, Petitioner received reportable compensation related to the restricted stock units in February 2018 and February 2019. The February 2019 compensation was recognized for federal income tax purposes after Petitioner became a NYS/NYC resident and must be included in Petitioner's NYS/NYC source income.

Dated: April 24, 2024

/s/
Brian J. McCann
Principal Attorney

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.