

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-92 (10) I
Income Tax
October 26, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I920513D

On May 13, 1992, a Petition for Advisory Opinion was received from Mark Silverman and Pamela Lynch, 152 Marshall Ridge Road, New Canaan, Connecticut 06840,

The issue raised by Petitioners, Mark Silverman and Pamela Lynch, is whether a payment pursuant to an agreement not to compete constitutes income taxable for New York State Personal Income Tax purposes when received by a nonresident.

Petitioner Mark Silverman filed a joint tax return with his spouse, Petitioner, Pamela Lynch, for 1987. Since the issue raised herein relates to an item of income which is solely that of Mark Silverman, hereinafter all references to Petitioner shall refer to Mark Silverman alone.

Petitioner has been employed by Variety, Inc. (hereinafter "Variety"), from 1979 until the present. Variety consists of the weekly magazine "Variety" which is published in New York and the daily newspaper "Daily Variety" founded in 1933 and published and circulated by a subsidiary of Variety primarily in Los Angeles, California. In addition, Variety maintains news bureaus and subsidiaries in London, Rome, Munich, Paris, Madrid, and Australia. Variety filed New York State Franchise Tax returns, and in 1985, 1986 and 1987, reported issuer's allocation percentages of 31.12%, 23.21% and 52.08%, respectively.

Variety magazine was founded by Petitioner's great-grandfather, Sime Silverman, in 1905 and had been owned by the Silverman family from the magazine's founding until October 9, 1987, when the Silverman family sold all of their interest in the magazine to Reed Publishing (USA), Inc. (hereinafter "Reed").

At the time of sale to Reed, Syd Silverman, Petitioner's father, owned 5,474 shares of the 7,578 shares issued and outstanding of Variety. The remaining shares were equally divided among four trusts established by Petitioner's father for the benefit of his children. Thus, on the date of sale, the trust for the benefit of Petitioner owned 526 shares of Variety stock, which was sold to Reed as part of the sale of the Silverman family interests. The trust was terminated concurrently with the stock sale, and the capital gain from the stock sale was reported to Petitioner by the trust as income, and thereafter on Petitioner's 1987 Federal and Connecticut tax returns. The capital gain is not taxable for New York purposes, and its taxability is not at issue herein.

The agreement by which the Silverman family sold their interest to Reed consisted, in relevant part, of a Stock Purchase Agreement between Reed, Syd Silverman and the Silverman trusts, Non-Competition Agreements between Variety,

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Reed, and each member of the Silverman family, and employment agreements, which include their own separate non-compete provisions (with different effective dates and terms), between Variety and each of the Silverman family members.

In consideration of Petitioner's agreement not to compete with Reed or Variety for a period of five years, Petitioner received a payment of \$1,200,000 in 1987 (hereinafter "Payment"). Petitioner has never been a corporate officer or director of Variety or any of its subsidiaries, and has never exercised, either individually or with others, control over the affairs of Variety at any point in time prior to the sale. At the time of the sale, Petitioner was the Special Sections Editor of Variety magazine.

Petitioner's non-competition agreement provides, in pertinent part, that:

WHEREAS, [Petitioner] has heretofore been employed by [Variety] in a key executive capacity and has otherwise made substantial contributions to the success of [Variety] and its subsidiaries; and

WHEREAS, [Petitioner] enjoys extensive and high-level contacts with customers and prospective customers of [Variety] and its subsidiaries, is widely known in the industry and has heretofore had access to confidential and proprietary information of [Variety] and its subsidiaries at the highest level; and

WHEREAS, the Silverman family founded the business of [Variety] and its subsidiaries in 1905 and has been continuously and closely associated with such business since that date, so that there is a widespread and substantial association of the Silverman family name with the business of [Variety] and its subsidiaries throughout the entertainment industry

At the time of sale Petitioner was, and still is, a resident of the state of Connecticut. Petitioner was a New York State resident up until October, 1985, when he married Pamela Lynch and the couple established their first home in Greenwich, Connecticut. Prior to his marriage, Petitioner resided at his parents' home in White Plains, New York. Petitioner has been a Connecticut resident from the date of his marriage to the present.

Petitioner received the following amounts as compensation during the year of sale and the years preceding:

	Total Salary	California Salary	Other Non-NY
1984	\$43,525	\$11,440	\$
1985	52,525	26,504	
1986	59,450		7,305
1987	58,460		9,703

For the taxable year ended December 31, 1987, Section 631(a) of the Tax Law provided that the New York taxable income of a nonresident individual is the individual's New York adjusted gross income less the individual's New York deduction and New York personal exemption.

For taxable year ended December 31, 1987, section 632(a) of the Tax Law provided that the New York adjusted gross income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income derived from or connected with New York sources.

For taxable year ended December 31, 1987, section 632(b)(1)(B) of the Tax Law provided that items of income, gain, loss and deduction derived from or connected with New York sources are those items attributable to a business, trade, profession or occupation carried on in New York State.

For taxable year ended December 31, 1987, section 131.4(a) of the Personal Income Tax Regulations (hereinafter "Regulations") provided:

(1) The New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his Federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in New York State.

(2) A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity

For taxable year ended December 31, 1987, section 131.4(c) (now section 132.4(c)) of the Regulations provides that:

If personal services are performed within New York State, whether or not as an employee, the compensation for such services includible in Federal adjusted gross income constitutes income from New York State sources, regardless of the fact that (1) such compensation is received in a taxable year after the year in which the services were performed, or (2) such compensation is received by someone other than the person who performed the services.

The consideration received in exchange for an agreement not to compete constitutes income includible in adjusted gross income for federal income tax purposes. An agreement not to engage in an occupation or undertaking that would conflict with the business interests of the buyer constitutes the surrender of an intangible asset, property right or right of value directly connected with the sale of the business. Lionel E. and Maxine Gordon, Adv Op Comm T & F, January 29, 1991, TSB-A-91(2)I.

Herein, the agreement not to compete states that Petitioner was employed by Variety in a key executive capacity and that he has made substantial contributions to the success of Variety and that he had extensive and high-level contacts with customers and prospective customers of Variety and is widely known in the industry and had access to confidential and proprietary information of Variety at the highest levels.

Therefore, Petitioner's agreement not to engage in an occupation or undertaking that would compete with the business interests of Reed and Variety is directly connected with the sale of the business, and the Payment Petitioner received with respect to such agreement derives its significance and value from Petitioner's personal services and is, therefore, income derived from or connected with a business, trade, profession or occupation carried in New York State pursuant to section 632(b)(1)(B) of the Tax Law and section 131.4(a) and (c) of the Regulations. For taxable year ended December 31, 1987, section 632(c) of the Tax Law and section 131.4(b) of the Regulations provided that when personal services are performed both within and without New York State the portion of the compensation attributable to such services performed within New York State must be determined pursuant to the Regulations.

For taxable year ended December 31, 1987, sections 131.15 through 131.22 of the Regulations were designed to apportion and allocate to New York State, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. For taxable year ended December 31, 1987, section 131.23 of the Regulations provides that where the methods provided under sections 131.15 through 131.22 of the Regulations do not so allocate and apportion such items, the Commissioner of Taxation and Finance may require a taxpayer to apportion and allocate those items under such method as he prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation.

Sections 131.15 through 131.22 of the Regulations do not specifically provide a method of allocating and apportioning the Payment Petitioner received from the non-competition agreement where Petitioner is not separated from service. However, section 131.20 provides an allocation formula where an employee who performed services both within and without New York State is separated from service and thereafter receives a pension or other retirement benefit. The definition of "other retirement benefit" for purposes of section 131.20 of the Regulations encompasses items which are substantially similar in nature

