

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

TSB-A-93 (2) I  
Income Tax  
April 2, 1993

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I921230A

On December 30, 1992, a Petition for Advisory Opinion was received from Francis Fitzherbert-Brockholes, 66 Gresham Street, London EC2V 7LB England.

The issue raised by Petitioner, Francis Fitzherbert-Brockholes, is whether guaranteed payments made by a New York partnership to a nonresident alien partner for services rendered outside the United States is included in New York taxable income of such nonresident alien partner.

Petitioner is a citizen, domiciliary and resident of the United Kingdom. He has no place of abode in New York. He is a partner of a New York partnership engaged in the practice of law. He is a resident partner of the firm's London office and accordingly, performs all of his services as a lawyer outside of the United States. In consideration of his agreement to be assigned to the firm's London office indefinitely, the firm has agreed to provide guaranteed payments of certain amounts which are fixed each year by separate letter agreement. Such guaranteed payments qualify as such under section 707(c) of the Internal Revenue Code of 1986 (hereinafter "IRC") and accordingly, are deducted by the firm before determining the amount of net income distributable to partners. As a partner, Petitioner is credited with his distributive share of such net income of the partnership. The amount of the partnership's net income from New York sources as a percentage of its worldwide net income varies from year to year; for the years 1988-1990 such New York percentage was approximately 80%. Petitioner included in his New York personal income tax returns his share of the partnership's net income from New York sources.

Section 601(e) of the Tax Law imposes a personal income tax for each taxable year on a nonresident individual's taxable income which is derived from sources in New York State. The tax is equal to the tax computed as if the individual were a resident, reduced by certain credits and multiplied by a fraction, the numerator of which is the individual's New York source income and the denominator of which is the individual's federal adjusted gross income.

Section 632(a)(1) of the Tax Law provides, in pertinent part, that

[i]n determining New York source income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss or deduction entering into his federal adjusted gross income .... (emphasis added).

Section 632(b) of the Tax Law provides, in pertinent part, that "[i]n determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which (1) characterizes payments to the partner as being for services or for the use of capital .... "

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Section 632(d) (1) of the Tax Law provides that the character of partnership items for a nonresident partner is to be determined under section 617(b) of the Tax Law which provides that the character for New York income tax purposes shall be the same as for federal income tax purposes.

In Webster v Tully, 56 NY2d 532, the Court of Appeals held that in applying the provisions of section 632(a) of the Tax Law, New York source income does not include an item that is not includible in federal adjusted gross income for federal income tax purposes, unless the inclusion is permitted by a modification contained in section 612(b) of the Tax Law.

Accordingly, if the amount of a guaranteed payment received by a nonresident partner is not includible in federal adjusted gross income, such amount would not be includible in New York source income. However, if part or all of the amount of a guaranteed payment received by a nonresident partner is includible in federal adjusted gross income, such includible amount would also be includible for New York State personal income tax purposes to the extent that the partnership's income is derived from New York sources.

Herein, if the guaranteed payment made by a New York partnership to a nonresident alien partner, such as Petitioner, is includible in the partner's federal adjusted gross income, the amount of such payment multiplied by the percentage of the partnership's income derived from New York sources for that taxable year would be includible in the partner's New York source income, which is the numerator of the tax allocation fraction contained in section 601(e) of the Tax Law. The total amount of the payment includible in the partner's federal adjusted gross income would be includible in the denominator of such tax allocation fraction. However, if the guaranteed payment received by the nonresident alien partner is not includible in the partner's federal adjusted gross income, such payment would not be includible in the denominator of the tax allocation fraction and would not be includible in the partner's New York source income, which is the numerator of the tax allocation fraction.

DATED: April 2, 1993

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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