

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

TSB-A-99(4)I
Income Tax
June 30, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I990226D

On February 26, 1999, a Petition for Advisory Opinion was received from Lopez Edwards Frank & Co., LLP, 70E Sunrise Highway, Valley Stream, New York 11582-0547.

The issue raised by Petitioner, Lopez Edwards Frank & Co., LLP, is whether certain wages are deemed to be from New York sources where an individual continues to be employed by his New York based employer after his move to Wyoming.

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

An individual, a stock broker employed by one of the major brokerage houses based in New York City, worked in his employer's office and resided in Westchester County at the time the Petition was submitted. Petitioner indicated that the individual intended to sell his residence on or about March 1, 1999 and move to Wyoming on or about June 1, 1999.

The individual's employer does not have an office nearby, in Wyoming, from which he can work. Thus, he will be working out of his new home. He is not planning to return to the New York office at all after his move and will not perform services for his employer within New York State. He will communicate by telephone and fax with the New York office and with his customers.

Assume for purposes of this question that he has effectively changed his domicile to Wyoming. Further assume that the use of his Wyoming home is for his convenience, and not a change in location out of business necessity.

Discussion

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 computed as if the individual were a resident, reduced by certain credits, and apportioned to New York by the New York source fraction, the numerator of which is the individual's New York source income and the denominator of which is the individual's New York adjusted gross income.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual includes 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.

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Section 631(b)(1)(B) of the Tax Law provides that items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York State.

Section 132.4(b) of the Personal Income Tax Regulations provides that:

[t]he New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into [the individual's] Federal adjusted gross income, but only if, and to the extent that, [the individual's] services were rendered within New York State. Compensation for personal services rendered by a nonresident individual wholly without New York State is not included in [the individual's] New York adjusted gross income, regardless of the fact that payment may be made from a point within New York State or that the employer is a resident individual, partnership or corporation. Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 132.16 through 132.18 of this Part. (emphasis added)

In the Matter of Linsley v Gallman, 38 AD2d 367, affd 33 NY2d 863, the petitioner retired from his position as an executive of a New York investment banking corporation, because of poor health, and moved to Connecticut. He and the corporation entered into an agreement under which he was to perform advisory services for it for five years following his retirement. While he did not have to come into New York, he was available for telephone consultation. The Court held that since he performed no services in New York for the income in question and did not maintain an office or place of business in New York, the income was not received from a source in New York. (See also, Matter of Hayes v State Tax Commn, 61 AD2d 62.)

In this case, the individual is a stock broker employed by a major brokerage house based in New York and worked in his employer's New York office. It is assumed that the individual moved to Wyoming and changed his domicile to Wyoming on or about June 1, 1999. The individual will work out of his home in Wyoming, and will communicate with the New York office and his customers by telephone and fax. Petitioner states that the individual will do this for his convenience, not out of necessity for his employer.

When the individual moved to and changed his domicile to Wyoming on or about June 1, 1999, the individual became a nonresident of New York. The individual will not return to the New York office after he moved to and changed his domicile to Wyoming and will not perform any services for his employer within New York State after such change. Accordingly, pursuant to Linsley, supra, after the individual moved to and changed his domicile to Wyoming, the individual's

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income related to such employment, pursuant to section 631(b)(1)(B) of the Tax Law and section 132.4(b) of the Personal Income Tax Regulations, will not constitute income from New York sources. Further, pursuant to section 601(e) of the Tax Law, such employment will not make the individual subject to New York State personal income tax under Article 22 of the Tax Law after he moved to and changed his domicile to Wyoming on or about June 1, 1999.

DATED: June 30, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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