

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-14(2)I
Income Tax
August 20, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1130416A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether wages he receives as a Foreign Service member assigned by the United States Department of State to the United States Mission to the United Nations (USUN) in New York City is New York source income.

Facts

Petitioner states he is a member of the Foreign Service and received orders to work for up to three years at the USUN in New York City. Petitioner notes that his “home of record” is not in New York State, but in the State of Florida and he intends to return to his Florida home permanently when his career with the Foreign Service ends. Petitioner and his spouse reside in an apartment in New York City that was leased by the USUN for their sole use during the pendency of Petitioner’s assignment with the USUN, pursuant to a Lease and Corporate Sole Occupancy Rider.

Analysis

Petitioner asks whether the wages he receives from USUN are New York source income subject to New York State personal income taxes. He contends that because he is a member of the Foreign Service and is only in New York on a temporary basis, his wages should not be subject to tax by New York State, similar to the treatment of military compensation received by nonresidents stationed in New York. The Tax Law specifically exempts that military compensation from tax. *See* Tax Law § 631(e). There is no similar provision in the Tax Law applicable to members of the foreign service. Further, federal law does not preclude States from taxing foreign service members and provides that career foreign service members “...shall not represent to the income tax authorities of the District of Columbia or any other State or locality that they are exempt from income taxation...” *See* 22 USCA § 3941(d). Thus, there is no statutory exemption for wages paid to foreign service members under state tax law.

If a person is a nonresident of New York, he or she is subject to tax on the portion of his or her items of income, gain, loss and deductions that enter into the person’s federal adjusted gross income (FAGI), to the extent that such items are derived from or connected with New York State sources. *See* Tax Law § 631(a). Income from New York sources includes income attributable to a business, trade, profession or occupation carried on in New York. *See* Tax Law § 631(b)(1)(B). This includes compensation paid to a nonresident individual for personal services rendered within New York State if the compensation is included in the individual’s FAGI. *See* 20 NYCRR § 132.4(b). Thus, if Petitioner is taxed as a nonresident in New York, his wages for his work at the USUN are subject to tax.

However, based on the information provided, Petitioner may be a statutory resident of New York State and New York City for personal income tax purposes. Tax Law § 605(b) defines a New York resident to include an individual “who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.” See Tax Law § 605(b)(1)(B). The definition of “resident” for New York City purposes is provided under the New York City Administrative Code § 11-1705(b), and is identical in substance to that for New York State income tax purposes. Petitioner did not provide sufficient information to determine whether he was present in the State for more than 183 days in any taxable year.

The Personal Income Tax Regulations provide that “[a] permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse.” 20 NYCRR § 105.20(e)(1); see also *Matter of Evans*, 199 AD2d 840 (3d Dep’t 1993). Such dwelling place must be maintained by the taxpayer for substantially all of the taxable year. See NYCRR § 105.20(a)(2). The apartment in New York City rented for Petitioner’s and his spouse’s sole occupancy would qualify as a permanent place of abode. However, Petitioner did not provide sufficient information to determine whether he maintained a permanent place of abode within the State for substantially all of the taxable year.

Although Petitioner submits that he is a domiciliary of Florida, Petitioner would be subject to New York State and New York City personal income taxes on all of his income if he is deemed a New York statutory resident. However, if Petitioner is not deemed to be a New York statutory resident, he would be subject to New York income tax only on his New York source income.

DATED: August 20, 2014

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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.