

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

TSB-A-81 (3) I
Income Tax
May 26, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I810328A

On March 26, 1981, a Petition for Advisory Opinion was received from Robert E. Clausi, 3 Azalea Terrace, Cos Cob, Connecticut 06807.

The issue raised is the proper treatment of paid holidays, sick leave and vacation days of a non-resident who performs services for an employer both within and without New York, for purposes of the Personal Income Tax imposed under Article 22 of the Tax Law.

The New York adjusted gross income of a non-resident individual, the starting point in determining his tax due under Article 22 of the Tax Law, includes the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income which are "derived from or connected with New York Sources." Tax Law, §632(a).

Section 632(c) of the Tax Law provides that:

"If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

The Regulations issued in accordance with the foregoing provide, in relevant part, that

"If a nonresident employee ... performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed both within and without the State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York sources, are similarly determined. However, any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity - as distinguished from convenience - obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay." 20 NYCRR 131.16.

Salary paid for non-working days is a form of wage continuation wherein payment is made in respect of work performed throughout the year on working days. It is therefore appropriate to treat, for example, 2/3 of the payment for non-working days as derived from New York sources where 2/3 of the individual's working days were spent in New York.

Accordingly, in making the allocation of Petitioner's wages and salary income to New York State no account is to be taken of paid, non-working days.

DATED: May 22, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau