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

TSB-A-84 (3) I
Income Tax
October 8, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. I830830A

On August 30, 1983 a Petition for Advisory Opinion was received from Frederick E. and Annis L. Dimmitt, 2126 Cheri Court, Fort Wayne, Indiana 46933.

The issues raised by Petitioners are (1) the proper treatment, for purposes of the personal income tax imposed under Article 22 of the Tax Law, of paid sick leave and vacation days of a nonresident who performs services for an employer wholly within New York, and (2) the proper computation of the Federal marriage penalty deduction when the spouse with the lesser wages works entirely without New York State.

Petitioners are husband and wife who maintain both their domicile and residence in Indiana. During 1981, wife, an employee of the Veterans Administration, accepted a transfer to Bath, New York. Although she resided in temporary government quarters while in New York, wife maintained her permanent residence and domicile in Indiana with husband. Wife retired effective September 6, 1982. Her 1982 wages through September 6 represented payment for days worked in New York, as well as for accrued sick leave and vacation (most of which was earned during her employment in Indiana). Wife resided in Indiana during the periods of sick leave and vacation. Husband's 1982 wages were earned entirely in Indiana.

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

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

> "The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State ... Where the personal services are performed within and without New York State, portions of the compensation attributable to the services performed within New York State must be determined in accordance with Sections 131.16 through 131.18 of this Part." 20 NYCRR 131.4(b).

Section 131.18(a) of the Regulations further provides that:

> "If a nonresident employee . . . performs services for his employer both within and without [the] State, his income derived from New York State 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. . . . In making the allocation provided for in this section, no account is taken of non working days, including Saturdays, Sundays, holidays days of absence because of illness or personal injury, vacation, or leave with or without pay." 20NYCRR 131.18(a).

In making the above allocation, only actual working days are considered. 20 NYCRR 131.18(a). As expressly provided in the regulations, holidays, sick leave, and vacation days are not deemed to be working days outside New York State for purposes of allocation of income, even if the employee is not within New York State for the dates paid. Cf., Clausi, State Tax Commission Advisory Opinion, May 22, 1981, TSB-A-81(3)-I; Fleisher, State Tax Commission, August 17, 1979, TSB-H-79-(156)-I. Rather, salary paid for non-working days is a form of wage continuation for work performed during the year on working days. Such payments constitute regular earnings as an employee even though taxpayer did not actually render any services for compensation. Howell, State Tax Commission, September 28, 1979, TSB-H-79-(215)-I.

In the present case, all wife's 1982 working days were entirely within New York State. Although Section 131.18(a) of the Regulations outlines the method of allocating income when an employee works both within and without the State, the nature of the regulation mandates its application to employees working wholly within New York as well. That is, under this computation the portion of income allocable to New York varies inversely with the number of days worked without New York during the tax year, so that income becomes wholly taxable once the taxpayer has no working days outside the State during the tax year. In such situation, exactly as is the case with respect to tax years during which work is performed both within and without New York, income received as sick pay or vacation pay is allocated in accordance with the taxpayer's work experience during the tax year or other applicable period, wholly without consideration of when the right to receive such sick pay or vacation pay may have been acquired. Further as Petitioner is presumably a cash basis taxpayer, sick pay and vacation pay are taxed when paid despite the fact that they may have been earned in a prior year and in a different state. Wages may only be accrued based on when earned rather than when actually paid in a situation where an individual changes status from resident to nonresident or vice versa. Tax Law, §654(c). In the present case, however, this special accrual may not be made as Petitioners did not change their state of residence.

Second, for Federal tax purposes, married couples filing a joint return are allowed a deduction based on the qualified earned income of the spouse with the lesser earned income. I.R.C., §221(a). To determine New York adjusted gross income for non-residents, New York adopts as a starting point that part of Federal adjusted gross income "derived from or connected with New York sources. Tax Law, §632(a)(1). In the present case husband is the spouse with the lesser qualified income. Since all of his 1982 income was earned in Indiana,

the deduction as calculated in accordance with §221(a) of the Internal Revenue Code is not "derived from or connected with New York sources," as required by §632(a)(1) of the Tax Law. Thus, the deduction is not allowable in determining their New York adjusted gross income.

DATED: August 7, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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