

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

TSB-A-86 (6) I
Income Tax
May 27, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I860203B

On February 3, 1986, a Petition for Advisory Opinion was received from Richard C. Thompson, 4265 Congress Street, Fairfield, Connecticut 06430.

The issue raised is the correct method of allocation of compensation received by Petitioner.

Petitioner, a nonresident of the State of New York, was an advertising sales manager for a business magazine. His total compensation was based upon net advertising revenues generated by worldwide sales made by company sales people and autonomous sales representatives all of whom were supervised by Petitioner. Petitioner's compensation was in the form of a monthly draw against commissions earned on worldwide sales. Petitioner questions whether he has the option of allocating his compensation on the basis of "days in, days out" of New York State or on the basis of sales made within and without New York State.

Section 131.17 of the personal income tax regulations provides that "[I]f the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other employee depend directly upon the volume of business transacted by him, his items of income, gain, loss and deduction (other than deductions entering into the New York itemized deduction) derived from or connected with New York State sources include that proportion of the net amount of such items attributable to such business which the volume of business transacted by him within New York State bears to the total volume of business transacted by him within and without New York State." (emphasis added). 20 NYCRR 131.17.

Section 131.18(a) of the personal income tax regulations provides, in part, that "[I]f a nonresident employee (including corporate officers, but excluding employees provided for in section 131.17 of this Part) performs services for his employer both within and without New York 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 New York State bears to the total number of working days employed both within and without New York 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 New York 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 131.18.

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Petitioner's compensation is based upon the amount of sales made by the individuals under his supervision. Thus, his compensation depends directly upon the volume of business transacted by other individuals. Inasmuch as Petitioner's compensation does not depend directly upon the volume of business transacted by him, the provisions of regulation section 131.17 do not apply for purposes of the allocation of Petitioner's compensation. Dalenz v. State Tax Commission 9 A.D. 2d 599 (1959).

Petitioner's compensation must be allocated with reference to where he performed his services for his employer. Accordingly, Petitioner is required to allocate his compensation pursuant to the rules set forth in regulation section 131.18 based upon days worked within and without New York State. Petitioner is not allowed any option regarding the method of allocation of his income.

DATED: May 27, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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