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

TSB-A-96 (5) I
Income Tax
December 17, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I960620A

On June 20, 1996, a Petition for Advisory Opinion was received from Metro-North Commuter Railroad Company, 347 Madison Avenue, 19th Floor, New York New York 10017.

The issue raised by Petitioner, Metro-North Commuter Railroad Company, is how the application of the Amtrak Reauthorization and Improvement Act of 1990 (the "Act") affects employees traveling to more than one state during the course of their employment. Specifically, the meaning of the term "regularly assigned" and the types of occupations and work schedules covered by the Act are at issue.

Federal Public Law 101-322, the Act, amended various provisions of Title 49 of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of the Act amended section 11504(a) of Title 49 of the United States Code with regard to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under Subchapter I of Chapter 105 of Title 49. The Interstate Commerce Commission was abolished by Federal Public Law 104-88, the ICC Termination Act of 1995, effective January 1, 1996. The provisions of former section 11504(a) of Title 49 of the United States Code are now contained in section 11502(a) of Title 49 of the United States Code. Section 11502(a) states, in pertinent part, that:

> No part of the compensation paid by a rail carrier ... to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence .... (emphasis added)

Section 132.11(b) of the Personal Income Tax Regulations provides that, pursuant to the above provision, the compensation paid to an employee by an interstate rail carrier for performing the employee's regularly assigned duties in two or more states does not constitute income derived from New York State sources even though the employee performs services in New York State.

Petitioner requests an opinion as to whether the employees in the following scenarios are covered by section seven of the Act:

Scenario 1. Certain employees of Petitioner report to work in one state, then ride a train to a work location in another state. As an example: an employee whose crew base is in Connecticut, but who is instructed to perform flagging service (protection for train movements in the vicinity of a construction site) at a construction site in New York State on a continuing daily basis for the duration of the construction project. In such a case, the employee reports to work at the crew base in Connecticut. At this location he or she signs the register, reviews bulletin orders containing information and instructions and compares his or her watch with the company's standard clock.

These three tasks are job requirements. Next, the employee takes a specific train, as directed by a supervisor, to the location of the construction project. (Per a requirement of the Federal Railroad Administration, Petitioner directs the means of transportation and, if by train, the specific train to be used.) He or she works at the New York construction site for a specified number of hours and then travels by train back to the crew base in Connecticut. The employee is compensated at the same hourly rate for the period beginning at the time he or she reports to the crew base in Connecticut in the morning and ending the time he or she reports back to the Connecticut crew base at the end of the day. A portion of that time represents the flagging service at the construction site in New York State and the balance represents the time signing in, checking his or her watch against the company clock, and reviewing current bulletin orders and other information at the crew base in Connecticut and travel time between the Connecticut crew base and the New York construction site.

Scenario 2. Pursuant to collective bargaining agreements, Petitioner's engineers and conductors are required to "pick" new assignments for on-train service at least once every six months. Accordingly, there are situations where a non-New York State resident works for six months on the Harlem or Hudson Line, located entirely within New York State, and then works for the following six months on the New Haven Line, which entails regular operations in both New York and Connecticut. The conductors and engineers are required to pick new assignments every six months on one of the three lines, Harlem, Hudson or New Haven. If an employee is qualified on a particular line, he or she must take a familiarization trip at least once a year on that particular line in order to maintain his or her qualifications on the line.

Scenario 3. Petitioner maintains what is referred to as the "Grand Central Terminal Extra List" in connection with assignment of the conductors and engineers on that list. The individuals on that list are subject to call to assignment at any time on any of Petitioner's rail lines. The individuals on the GCT Extra List must maintain their qualifications on all three Metro-North lines at all times. This maintenance of qualifications is a condition of being listed on the GCT Extra List. Throughout the year, the individuals on the GCT Extra List will probably hold many jobs, possibly on all of the three lines.

If an employee of Petitioner is not a resident of New York State for personal income tax purposes under section 605(b)(1) of the Tax Law, and such employee is paid compensation for regularly assigned duties performed in New York State and one or more other states in accordance with the Act, the compensation paid on or after July 6, 1990 does not constitute income derived from New York State sources and is not subject to New York State income tax, even though the employee performed services in New York State.

Three Advisory Opinions were previously issued to Petitioner addressing the applicability of section seven of the Act to Petitioner's employees. Those Advisory Opinions were issued on March 18, 1991, TSB-A-91(3)I; April 28, 1993, TSB-A-93(3)I; and October 19, 1993, TSB-A-93(11)I, respectively. Those opinions stated that the determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states is a factual matter not susceptible of determination in an advisory opinion. However, those opinions also stated that when applying the provisions of the Act for New York State income tax purposes, an employee is considered to be performing "regularly assigned" duties in more than one state if the employee's job description requires the employee to perform services in at least two states on a systematic basis regardless of the percentage of time spent at each location. If an employee has no standard route and is assigned duties in more than one

state on a random basis, that employee is not considered to be performing "regularly assigned" duties in more than one state.

The principles established in those opinions previously issued to Petitioner also apply to Petitioner's employees in this case. In Scenario 1, an employee whose crew base is located in Connecticut performs flagging service at a construction site in New York. The assigned duties of performing flagging service, whether considered "regularly assigned" or "randomly assigned", require that the employee perform services in only one state, New York. The fact that the employee signs in, reviews bulletin orders and compares his or her watch with thecompany's clock at the crew base before going to the employee's assigned location, as directed by the employee's supervisor, does not change the assignment of the employee's duties to perform flagging service at the construction site in New York.

In Scenario 2, the employees who are engineers and conductors are "regularly assigned" duties on a systematic basis. That is, the duties are assigned every six months when the employee "picks" the new assignment. When the employee "picks" or is assigned to on-train service on the New Haven line, the employee will be regularly assigned duties in more than one state. With respect to employees assigned to the Harlem or Hudson lines, the employee will not be regularly assigned duties in more than one state. However, if an employee, who is regularly assigned to the Harlem or Hudson line, is required to take a familiarization trip on the New Haven line in order to maintain his or her qualifications on that line, the employee is regularly assigned duties in more than one state for the day that the employee is assigned to on-train service on the New Haven line.

In Scenario 3 of this case, the employees who are conductors and engineers on the GCT Extra List are subject to assignment at any time on any of Petitioner's rail lines and "will probably hold many jobs" throughout the year. The fact that these employees may be assigned to a job on any of the rail lines does not necessarily mean that these employees have regularly assigned duties in more than one state. The determination of whether an employee is regularly assigned duties in more than one state is based on the job description for each of the particular jobs that the employee is assigned. As in Scenario 2, the employee is regularly assigned duties in more than one state when the employee is assigned to on-train service on the New Haven line. However, the employee is not regularly assigned duties in more than one state when the employee is assigned to on-train service on the Hudson or Harlem line.

In all the scenarios above, it must be remembered that the determination of whether an employee is performing "regularly assigned" duties in more than one state is based on the job description of the employee's assignment describing the services the employee is being compensated for by Petitioner. If the job description of the employee's assignment requires the employee to perform services (other than incidental tasks) in at least two states on a systematic

basis regardless of the percentage of time spent at each location, the employee is considered to be performing "regularly assigned" duties in more than one state. If the job description does not require the employee to perform services (other than incidental tasks) in more than one state on a systematic basis, that employee is not considered to be performing "regularly assigned" duties in more than one state.

Accordingly, with respect to New York nonresident employees of Petitioner referred to in Scenarios 1, 2 and 3 above who are assigned duties in only one state, the employees do not meet the requirements of section seven of the Act exempting the employees from New York State income tax on the compensation paid for these duties. However, the employees in Scenarios 2 and 3 who are assigned to on-train service duties on the New Haven line, are performing regularly assigned duties in both New York State and Connecticut and will meet the requirements of section seven of the Act exempting the employees from New York State income tax on compensation paid for these duties. The compensation paid on and after July 6, 1990 to those employees who do not meet the requirements of section seven of the Act for duties performed in New York State constitutes income from New York sources pursuant to section 631(b) of the Tax Law. Such compensation is subject to New York State income tax and New York withholding requirements.

The determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts". Tax Law, §171.Twenty-fourth; 20 NYCRR 2376.1(a).

It should be noted, that New York nonresident employees who receive compensation subject to New York State income tax are required to file Form IT-203, Nonresident and Part-Year Resident Income Tax Return, and report to New York any items of income derived from or connected with New York sources.If tax is not required to be withheld, estimated tax is required to be paid.

DATED: December 17, 1996

s/John W. Bartlett
Deputy Director
Technical Services Bureau

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