

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

TSB-A-98(10) I
Income Tax
September 10, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I980618B

On June 18, 1998, a Petition for Advisory Opinion was received from Banca Nazionale Del Lavoro, 25 West 51st Street, New York, New York 10019.

The issue raised by Petitioner, Banca Nazionale del Lavoro, is whether an individual is deemed to be a resident of New York State under section 605(b) of the Tax Law for the duration of the individual's temporary assignment to work in New York State.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a multinational bank which operates a branch at the above address. Petitioner maintains a program whereby employees of other Italian branches are temporarily transferred to the branch in New York City. The term of the assignment is open ended and is usually renewed on a year to year basis.

The employee is accompanied by his/her family and they reside in an apartment in the City of New York under a lease with a term of 2 years or less. Petitioner provides the security deposit and pays the monthly rent which is included in the employee's salary along with the associated taxes. The employee is granted a net salary which is paid every month and which is grossed up for taxes.

Every transferred employee elects to be covered by Italian social security taxes in lieu of United States social security under the Totalization Agreement between the United States and Italy. It is the intent of the employee to return to Italy and not rely on United States social programs.

The transferred employees are not covered by a United States pension plan, but under the pension plan existing in Italy. The employees also receive annual incentive pay as determined under incentive plans existing in Italy. Additionally, the transferred employees continue to participate in Italian benefits programs.

Although the branch has on site management, the ultimate decision as to the transferred employee's status and location is determined by the head office in Italy.

It is customary for the transferred employee to maintain his home or permanent abode in Italy during his/her United States tour of duty. This is the main reason why the employee's United States housing cost is paid and grossed up for taxes; otherwise, the employee would suffer duplicate housing costs.

The objective of the transferred employee's United States tour of duty is to enlarge the employee's knowledge of multinational banking. It is customary

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for the employee to be returned to another Italian branch or transferred to another country's branch upon completion of his/her assignment.

For the past 10 years, 25 individuals have been transferred to the United States. Of this amount, 15 have been transferred outside the United States. Of the remaining 10, the date of arrival is as follows: 1998 - 1; 1997 - 3; 1996 - 1; 1994 - 3; 1993 - 1; and 1988 - 1. Of the 15 that have departed the United States, 11 were in the United States less than 5 years while 4 were in the United States for more than 5 years.

Discussion

Section 605(b)(1)(B) of the Tax law provides that a "resident individual" includes an individual who is not domiciled in New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than 183 days of the taxable year in New York State, unless the individual is in active service in the armed forces of the United States.

Section 605(b)(2) of the Tax Law provides that a "nonresident individual" means an individual who is not a resident or a part-year resident.

Section 105.20(e)(1) of the Personal Income Tax Regulations ("Regulations") defines a "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. However, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to the individual's employer's New York State office for a fixed and limited period, after which the individual is to return to the individual's permanent location. If the individual takes an apartment in New York State during this period, the individual is not deemed a resident, even though the individual spends more than 183 days of the taxable year in New York State, because the individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on the individual's income from New York State sources including such individual's salary or other compensation for services performed in New York State. However, if the individual's assignment to the individual's employer's New York State office is not for a fixed or limited period, the individual's New York State apartment will be deemed a permanent place of abode and the individual will be a resident if the individual spends more than 183 days of the year in New York State. For a place of abode to be deemed not permanent, the stay in New York must be temporary (i.e., for a fixed and limited period) and the stay must be for the accomplishment of a particular purpose.

Section 105.20(e)(1) of the Regulations contemplates that the term "temporary" means a fixed and limited period as opposed to a stay of indefinite duration. An employee's stay in New York will be presumed to be temporary (i.e. the presence in New York is for a fixed and limited period) if the duration of the stay in New York is reasonably expected to last for three years or less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically

expected to last for more than three years, even if it does not actually exceed three years.

Section 105.20(e)(1) of the Regulations contemplates that the phrase "particular purpose" means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions. For example, an individual working in California is assigned to New York to install a piece of equipment. Once the equipment is installed, the individual returns to California. That assignment would be for a particular purpose.

In general, an assignment to New York for general duties, such as to be an executive of the company, a sales manager or a production line worker, would not constitute a particular purpose since these positions involve more generalized goals. This would be true even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess. For example, a salesman with years of experience in a particular product line of the company is assigned to New York as the sales manager because New York sales are weak with regard to that product. It is expected that the individual will devote substantial efforts towards improving those sales. However, being a sales manager still constitutes general duties as opposed to a particular purpose, since it is the general goal of every company to sell its products.

In this case, an individual employed by Petitioner is assigned to the New York office under a program whereby employees of other Italian branches are temporarily transferred to the New York branch with the objective "to enlarge the employee's knowledge of multinational banking". These duties are general in nature with general goals and conclusions. In addition the term of the individual's assignment is open ended. Therefore, the individual's stay in New York State is not for a fixed and limited period and is not for the accomplishment of a particular purpose as contemplated by section 105.20(e)(1) of the Personal Income Tax Regulations. Accordingly, the individual's place of abode in New York State constitutes a permanent place of abode.

Section 105.20(a)(2) of the Personal Income Tax Regulations provides that a resident individual includes any individual who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

The Department of Taxation and Finance Income Tax Nonresident Audit Guidelines dated July 25, 1997, page 38, provides that for this purpose, the phrase "substantially all of the taxable year" means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th for the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, the individual would not be a statutory resident despite

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spending over 183 days in New York. Since the individuals in these two examples did not maintain their permanent places of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year.

In this case, the individual acquires a permanent place of abode in New York State when the individual leases an apartment in New York City and maintains a permanent place of abode in New York as long as the individual leases the apartment. Where the individual does not maintain the permanent place of abode in New York for substantially all of taxable year, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the Personal Income Tax Regulations, the individual is not considered to be a resident individual for that taxable year. However, where the individual does maintain a permanent place of abode in New York State for substantially all of a taxable year and the individual spends in the aggregate more than 183 days of the taxable year in New York, the individual is a resident individual for that taxable year, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the Personal Income Tax Regulations.

For all years that the individual has New York source income and is not treated as a resident individual, the individual is taxable as a nonresident individual of New York.

DATED: September 10, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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