

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(2)I
Income Tax
April 27, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I030829B

On August 29, 2003, a Petition for Advisory Opinion was received from Marano Distante Crombie LLC, c/o Michael J. Crombie, CPA, 445 Broadhollow Road, Suite 400, Melville, New York 11747.

The issues raised by Petitioner, Marano Distante Crombie LLC, are:

1. In year one, whether an individual who works at a Connecticut office of a corporation which also has a business location in New York is required to file a New York nonresident personal income tax return for the year because he comes into New York for business meetings.
2. If the answer to issue 1 is yes, is he required to allocate his wages to New York State on a full day or part of a day basis?
3. In year two, whether an individual who leaves his Connecticut job and commences employment in New York City on January 1 and purchases an apartment in New York is required to file a New York nonresident personal income tax return for the year.
4. If the answer to issue 3 is yes, is he required to allocate his wages to New York State on a full day or part of a day basis?
5. In year three, whether an individual who maintained an apartment in New York City and spent less than 183 days in New York is allowed to file a New York State nonresident personal income tax return and allocate his wages to New York State on a full day or part of a day basis, or is required to file as a resident of New York and report all of his wages for the year.
6. Whether an individual who maintained an apartment in New York City would be required to file as a resident of New York State if he spent more than 183 full or part days in New York but less than 50 nights in the apartment.

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

An individual is a foreign national and is a resident of Connecticut. The individual files a Connecticut resident personal income tax return reporting his worldwide income. He is married, owns a home in Connecticut, and his children attend school in Connecticut. He possesses a

Connecticut driving license, and his vehicles are registered in Connecticut. The individual has a *green card* and is a permanent resident of the United States.

In year one, the individual works at the Connecticut office of the corporation which has business locations in several states, including Connecticut and New York. The individual's wage and tax statement (W-2) indicates that all wages are Connecticut source income. The individual often drives into New York State one or two days each week for management meetings and business functions. During these trips, he is representing the Connecticut office of his employer. The operations in Connecticut are entirely separate and distinct from the New York operations. His functions do not have anything to do with the New York operation. His visits involve working a full day or part of a day while in New York State. He does not maintain a residence in New York. However, on rare occasions, when attending a breakfast meeting or when going to the airport for a business trip, he stays in New York overnight at a hotel. The individual files a Connecticut resident personal income tax return reporting all of his income.

In year two, the individual leaves his Connecticut based job and commences a new job in New York City on January 1 of such year. The new job requires considerable overnight travel out of state. The individual commutes from his residence in Connecticut to New York City each day. Most evenings, when working in New York City, he returns to his home in Connecticut. However, on occasion, he stays in New York overnight at a hotel. In September of such year, the individual purchases an apartment located in New York City. The apartment is purchased primarily as an investment. The apartment is uninhabitable and requires extensive work in the form of repairs and improvements. The individual does not reside in the apartment at any time during the year. The individual files a Connecticut resident personal income tax return reporting all of his income.

In year three, the work on the individual's New York City apartment is completed during January. The individual continues to work in New York City and travel outside of New York for business purposes. The individual continues to maintain his residence in Connecticut. He also uses his New York City apartment less than 50 nights during the year. The apartment is not rented out at any time during the year. The individual expects to work in New York at least 100 days and travel outside of New York for business purposes 130 days during the year. He expects to be in New York less than 183 full or part days during the year.

Applicable law and regulations

Section 7701(b)(1) of the Internal Revenue Code (IRC) provides, in part:

(A) Resident alien. An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence. Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test. Such individual meets the substantial presence test of paragraph (3).

(iii) First year election. Such individual makes the election provided in paragraph (4).

Section 301.7701(b)-1(b)(1) of the Treasury Regulations provides:

Green card test. An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.

Section 601(e) of the Tax Law imposes a personal income tax on nonresidents and part-year residents of New York State, and provides, in part:

Nonresidents and part-year residents. (1) General. There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual ... a tax which shall be equal to the tax base multiplied by the New York source fraction.

(2) Tax base. The tax base is the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b), (c), (d) and (m) of section six hundred six, as if such nonresident or part-year resident individual . . . were a resident subject to the provisions of part II of this article.

(3) New York source fraction. The New York source fraction is a fraction the numerator of which is such individual's ... New York source income determined in accordance with part III of this article and the denominator of which is such individual's New York adjusted gross income determined in accordance with part II of this article. . . .

Section 605(b) of the Tax Law provides, in part:

Resident, nonresident and part-year resident defined. (1) Resident individual. A resident individual means an individual:

* * *

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

(2) Nonresident individual. A nonresident individual means an individual who is not a resident or a part-year resident.

* * *

(5) Part-year resident individual. A part-year resident individual is an individual who is not a resident or nonresident for the entire taxable year.

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, ... and

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources....

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(B) a business, trade, profession or occupation carried on in this state; ...

Section 651(a) of the Tax Law provides, in part:

General. On or before the fifteenth day of the fourth month following the close of the taxable year, an income tax return under this article shall be made and filed by or for:

(1) every resident individual (A) required to file a federal income tax return for the taxable year, or (B) having federal adjusted gross income for the taxable year, increased by the modifications under subsection (b) of section six hundred twelve, in excess of four thousand dollars, or in excess of his New York standard deduction, if lower, or (C) subject to tax under section six hundred two, or (D) having received during the taxable year a lump sum distribution any portion of which is subject to tax under section six hundred three;

* * *

(3) every nonresident or part-year resident individual having New York source income for the taxable year, determined under part III of this article, and having New York adjusted gross income for the taxable year, determined under part II of this article, in excess of the taxpayers's New York standard deduction, or subject to tax under section six hundred two, or having received during the taxable year a lump sum distribution any portion of which is subject to tax under section six hundred three; ...

Section 105.20 of the Personal Income Tax Regulations (Regulations) defines resident individual and provides, in part:

(a) *General.* An individual may be a resident of New York State for personal income tax purposes, and taxable as a resident, even though such individual would not be deemed a resident for other purposes. As used in this Subchapter, the term *resident individual* includes:

(1) all persons domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and

(2) any individual (other than an individual in active service in the Armed Forces of the United States) 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.

* * *

(c) *Rules for days within and without New York State.* In counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have

available for examination by the Department of Taxation and Finance adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State.

* * *

(e) *Permanent place of abode.* (1) A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, 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 such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such 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 such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State.

Section 132.4(b) of the Regulations provides, in part:

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, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections [132.17 through 132.19] of this Part.

Section 132.18 of the Regulations provides, in part:

(a) If a nonresident employee (including corporate officers, but excluding employees provided for in section 132.17 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 State 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.

Opinion

For federal personal income tax purposes, a foreign national who meets the green card test is considered a resident alien. As a resident alien, an individual must follow the same federal tax laws as a United States citizen. In this case, the individual is domiciled in Connecticut, maintains a residence in Connecticut, files a resident personal income tax return with Connecticut, and works within and without New York State.

Section 601(e) of the Tax Law imposes a personal income tax on the taxable income which is derived from New York sources of a nonresident individual. The tax is equal to the tax computed as if the individual were a New York State resident for the entire year, reduced by certain credits, and then multiplied by the income percentage (i.e., New York source fraction). The numerator of the fraction used to compute the income percentage is the individual's New York source income. The denominator of the fraction used to compute the income percentage is the nonresident's New York adjusted gross income from all sources for the entire year.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident is the sum of the items of income, gain, loss and deduction entering into federal adjusted gross income derived from or connected with New York sources and any New York addition and subtraction modifications under section 612(b) and (c) of the Tax Law that relate to income derived from New York sources.

In issue 1, the individual, domiciled in Connecticut, is working out of his office in Connecticut and commutes one or two days each week to New York State for work in year one. His visits involve working a full day or part of a day while in New York State. On occasion, the individual stays overnight at a hotel located in New York State. The individual is a nonresident of New York State who receives income from New York sources attributable to an occupation carried on within New York State. Therefore, a nonresident personal income tax return is required to be filed for the year pursuant to section 651(a)(3) of the Tax Law.

In issue 2, since the nonresident individual received compensation for personal services rendered both within and without New York State, pursuant to section 132.18 of the Regulations the individual must allocate the total amount of wages received from his employer to determine an amount that represents services rendered within New York State. The income derived from New York sources includes that proportion of the total compensation for services rendered as an employee which the total number of full working days and part working days employed within New York State bears to the total number of full working days and part working days employed both within and without New York State. Therefore, the taxpayer is required to allocate his wages to New York on both a full day basis and part of a day basis.

In issue 3, the individual, domiciled in Connecticut, starts a new job in New York City on January 1 of year two. The individual commutes to New York City each day from his Connecticut residence. The visits involve working a full day or part of a day while in New York State. The job requires considerable overnight travel outside of New York State. On occasion, the individual stays overnight at a hotel located in New York State. In September of the second year, the individual purchases an apartment located in New York City primarily for investment purposes. The apartment is uninhabitable and requires extensive work in the form of repairs and improvements. The individual does not reside in the apartment at any time during the year.

To be considered a resident of New York State pursuant to section 605(b)(1)(B) of the Tax Law and section 105.20(a)(2) of the Regulations, a non-domiciliary individual would have to maintain a permanent place of abode in New York for substantially all of the taxable year and spend in the aggregate more than 183 days in the taxable year in New York State. In counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purposes of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside 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 spending over 183 days in New York. Since the individual did not maintain a permanent place of abode in New York for more than 11 months, the individual would not be considered a resident of New York State for any part of the year.

In this case, the individual acquired an apartment in September of the second year. Since the individual does not maintain the permanent place of abode in New York for substantially all of the taxable year, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the

Regulations, the individual is not considered to be a resident individual for that taxable year. However, since the nonresident individual received income from New York sources attributable to an occupation carried on within New York State, a nonresident personal income tax return is required to be filed for the year pursuant to section 651(a)(3) of the Tax Law.

In issue 4, since the nonresident individual received compensation for personal services rendered both within and without New York State, pursuant to section 132.18 of the Regulations the individual must allocate the total amount of wages received from his employer to determine an amount that represents services rendered within New York State. The income derived from New York sources includes that proportion of the total compensation for services rendered as an employee which the total number of full working days and part working days employed within New York State bears to the total number of full working days and part working days employed both within and without New York State. Therefore, the taxpayer is required to allocate his wages to New York on both a full day basis and part of a day basis.

In issue 5, the nonresident individual, domiciled in Connecticut, continues to work at his New York City based job and travel outside of New York for business purposes. The work on the New York City apartment is completed during January. He uses the apartment less than 50 nights during the year. The individual expects to work in New York at least 100 days and travel outside of New York for business purposes 130 days. He expects to be in New York less than 183 full and part days during the year.

As previously discussed in issue 3, to be considered a resident of New York State, an individual would have to maintain a permanent place of abode in New York for substantially all of the taxable year and spend in the aggregate more than 183 days in the taxable year in New York State. In this case, the work on the apartment was completed in January of the third year and the individual uses the apartment less than 50 nights during the year. As such, the individual maintains a permanent place of abode in New York State for substantially all of the third year. Since the individual does not spend more than 183 days in New York State for the year, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the Regulations the individual is not considered to be a resident individual for such year. However, since the nonresident individual received income from New York sources attributable to an occupation carried on within New York State, a nonresident personal income tax return is required to be filed for the year pursuant to section 651(a)(3) of the Tax Law.

The compensation received by the individual for personal services rendered both within and without New York State, pursuant to section 132.18 of the Regulations, must be allocated to determine the total amount of wages received from his employer that represents services rendered within New York State. Wages allocated to New York State include compensation paid for services rendered within New York State for full and part working days.

In issue 6, the individual maintained a permanent place of abode in New York State for substantially all of the year. If he spends more than 183 days in the taxable year in New York State,

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a resident personal income tax return would be required to be filed for the year pursuant to section 651(a)(1) of the Tax Law, and the individual would be subject to New York State personal income tax as a resident for the taxable year, regardless of whether the individual spends less than 50 nights in his apartment during the taxable year.

DATED: April 27, 2004

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