

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

TSB-A-04(5)I
Income Tax
September 21, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I040506A

On May 6, 2004, a Petition for Advisory Opinion was received from Gerard Altieri, 35 Highridge Road, Hartsdale, New York 10530.

The issue raised by Petitioner, Gerard Altieri, is whether certain income received is subject to New York State personal income tax and the withholding of tax.

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

As a fireman, Petitioner was injured in a job related accident and received a letter of disability from his physician. As a result of his disability, Petitioner has been reassigned to desk duties. At the end of the tax year, Petitioner receives a Wage and Tax Statement, federal Form W-2.

Applicable law and regulations

Section 601 of the Tax Law imposes a tax for each taxable year on the New York taxable income of every resident individual.

Section 607(a) of the Tax Law provides, in part:

General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required....

Section 611(a) of the Tax Law provides:

General. The New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions, as determined under this part.

Section 612 of the Tax Law provides, in part:

(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

* * *

(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

* * *

(3-b)(i) Disability income included in federal gross income, to the extent that such disability income would have been excluded from federal gross income pursuant to the provisions of subsection (d) of section one hundred five of the internal revenue code of nineteen hundred fifty-four had such provisions continued in effect for taxable years commencing after December thirty-first, nineteen hundred eighty-three as they were in effect immediately prior to the repeal of such subsection. Notwithstanding the foregoing, the sum of disability income excluded pursuant to this paragraph, and pension and annuity income excluded pursuant to paragraph three-a of this subsection, shall not exceed twenty thousand dollars.

Section 671(a)(1) of the Tax Law requires employers to withhold tax from wages, and provides:

Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year. The method of determining the amount to be withheld shall be prescribed by regulations of the commissioner, with due regard to the New York withholding exemptions of the employee and the sum of any credits allowable against his tax.

Section 3401(a) of the Internal Revenue Code (IRC) provides, in part:

Wages. For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash;...

Opinion

Section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means the individual's federal adjusted gross income with the modifications specified in such section 612. Section 612(c)(3-b)(i) contains a subtraction modification for certain disability income included in federal adjusted gross income that would have been excluded under IRC section

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105(d) prior to its repeal. A taxpayer is eligible for this subtraction modification if the taxpayer is not yet 65 years of age at the end of the tax year, the taxpayer retired on disability and the taxpayer is permanently and totally disabled when the taxpayer retired. An individual is permanently and totally disabled if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. (See former IRC section 105(d).)

In this case, Petitioner has a disability, but since Petitioner has been reassigned to desk duty, Petitioner is not permanently and totally disabled and is not yet retired. Accordingly, wages received by Petitioner are not eligible for the disability income subtraction under section 612(c)(3-b)(i) of the Tax Law. Therefore, pursuant to section 612(a) of the Tax Law, wages paid in connection with Petitioner's reassignment to desk duty that are included in Petitioner's federal adjusted gross income are included in New York adjusted gross income subject to New York State personal income tax. In addition, pursuant to section 671 of the Tax Law, these wages are taxable wages paid to Petitioner and are subject to New York State's withholding of tax.

DATED: September 21, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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