

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(11)I
Income Tax
September 22, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I090210B

The petition asks whether payments made in respect of termination of [REDACTED] employment contract with the [REDACTED] constitute New York source income.

We conclude that the payments in respect of the termination of Petitioner's employment contract do not constitute New York source income.

Facts

Petitioner is a professional sports player, carries a foreign passport, and is a domiciliary of X-Country. Petitioner has always maintained a permanent home in X-Country and currently lives in X-Country. Petitioner has also represented X-Country in the Olympics for each of the 1998, 2002, and 2006 Winter Olympics, and he has also played for X-Country's professional sports team throughout his career. Additionally, during the 2004-2005 season, Petitioner returned to X-Country and played for a professional sports team, the team for which he currently plays.

In 1993, Petitioner left X-Country to play professional sports with a team in another country, by which he was employed from the 1993-1994 through the 2000-2001 seasons. In June 2001, the professional sports team traded Petitioner to a team located in New York. Petitioner was a restricted free agent at this time, which meant that if he were to continue playing professional sports, he could play for and negotiate a new contract only with the New York team. He negotiated a 10-year contract with the New York team, which began with the 2001-2002 season.

Petitioner's employment with the New York professional sports team continued through the 2006-2007 season. In Petitioner's final season with the New York professional sports team he missed 24 of the regular season games due to injury. As a result of this and other performance issues, at the end of the 2006-2007 season the New York professional sports team exercised its buy-out option in June 2007. Petitioner returned home to X-Country in July 2007.

Section 13 of the Employment contract provides the New York professional sports team with an option to buy out Petitioner's contract and terminate Petitioner's employment as follows:

(i) "[t]he [New York professional sports team] . . . at its option . . . may terminate this Contract . . . after the notice of intention to exercise Buy-Out option is given;"

(ii) "[i]f [New York professional sports team] elects to terminate this Contract pursuant to Section 13, it shall be obligated to pay [Petitioner], in equal monthly installments, beginning October 1st next following the date on which the termination is effective . . . to be paid in full during a period of twice the remaining years of the contract . . . an amount equal to 2/3 of the total fixed amount of [Petitioner's] league salary . . . for the unexpired fixed term . . . of this Contract;" and

(iii) “[u]pon receipt of the notice of termination [Petitioner] shall immediately be a free agent . . . and shall no longer be obligated to perform under this Contract.”

Pursuant to the Buy-Out Notice, dated June 15 2007, signed by the New York professional sports team’s General Manager and addressed to Petitioner and others, the New York professional sports team terminated Petitioner’s employment contract. Pursuant to the agreement, the New York professional sports team also agreed to pay Petitioner a certain sum in consideration for the termination of the employment contract. This amount was to be paid over the remaining years of the employment contract. As a result of the buy-out agreement, Petitioner relinquished his right to employment with the team for the remaining term of the employment contract. Petitioner did not provide services to the team as a professional player for the 2007-2008 season, but instead provided full-time services as a professional player for the 2007-2008 season to a professional sports team in X-Country. Petitioner also states in the petition that the total number of days he spent in New York State was no more than 158 days during 2007.

Analysis

Tax Law §631(a) defines the New York source income of a nonresident individual as follows:

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. . .

Petitioner is a professional athlete and the Tax Law Regulations provide specific rules for determining the New York source income of a nonresident individual who is a member of a professional athletic team. Tax Law Regulation §132.22(b)(4)(i) defines the term “total compensation for services rendered as a member of a professional athletic team” as the total compensation received during the taxable year for services rendered:

(a) from the beginning of the official pre-season training period through the last game in which the team competes or is scheduled to compete during the taxable year; and

(b) during the taxable year on a date which does not fall within the aforementioned period (e.g., participation in instructional leagues, the “Pro Bowl” or promotional “caravans”).

Such compensation shall include, but is not limited to, salaries, wages, bonuses as described in subparagraph (ii) of this paragraph, and any other type of compensation paid during the taxable year to a member of a professional athletic team for services performed in that year. *Such compensation shall not include strike benefits, severance pay, termination pay, contract or option year buy-out payments, expansion or relocation payments, or any other payments not related to services rendered for the team.* (Emphasis Added)

Petitioner relinquished his right to employment with the New York professional sports team and, in accordance with the terms of the buy-out agreement signed by the parties, he was to receive payments from the team for the remaining term of the employment contract. As Tax Law Regulation §132.22(b)(4)(i) states that termination pay, or contract or option year buy-out payments, are not compensation for services rendered as a member of a professional athletic team, the buy-out payments in

respect of termination of Petitioner's employment contract are not New York source income or subject to New York withholding.

DATED: September 22, 2009

/S/

Jonathan Pessen
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.