

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

TSB-A-90 (6) I  
Income Tax  
April 16, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1891204A

On December 4, 1989, a Petition for Advisory Opinion was received from Arthur R. Rosen, Morrison & Foerster, 1290 Avenue of the Americas, New York, New York 10104.

The issue raised by Petitioner, Arthur R. Rosen, is what categories of income, based on the hypothetical facts presented, are included in New York taxable income of a resident individual who is a nonresident alien for federal income tax purposes.

Mr. Y is a citizen of country A (not the United States). He has lived and worked in New York, has been employed by the New York office of Company G, and has established his domicile in New York. Before the end of 1989, Mr. Y intends to leave the United States and move to foreign country B. He will do consulting work for Company G in various countries throughout the world. From time to time, he will come to New York for short periods of time to meet with Company G executives. During 1990, Mr. Y will spend more than 30 days in New York. He will retain the apartment he owns in New York. While he believes he will cease to be a New York domiciliary, he may not be able to establish that fact. Accordingly, he may continue to be treated as a resident of New York for personal income tax purposes. He will be present in the United States for less than 183 days in 1990, and he will be a nonresident of the United States for federal income tax purposes for 1990, although his tax home for federal income tax purposes may remain in New York.

During 1990, Mr. Y expects to receive the following kinds of income:

1. Consulting fees for services performed in the United States.
2. Consulting fees for services performed in countries B and C.
3. Dividends from stock in United States corporations.
4. Dividends from stock in alien corporations.
5. Interest on deposits held in a United States bank account.
6. Capital gain on the sale of corporate stock.

Section 605(b)(1) of the Tax Law defines the term "resident individual" as an individual:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state., or

(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 ....

Section 102.2(d)(1) of the Income Tax Regulations provides that, in general, domicile is the place which an individual intends to be such individual's permanent home - the place to which the individual intends to return whenever such individual may be absent.

Section 102.2(d)(2) of the Income Tax Regulations provides that a domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time.

Section 102.2(d)(3) of the Income Tax Regulations states that "domicile is not dependent on citizenship; that is, an immigrant who has permanently established his home in New York State is domiciled here regardless of whether he has become a United States citizen or has applied for citizenship."

It is well established that to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present. (Minsky v Tully, 78 AD2d 955.) Residence without intention or intention without residence, is of no avail.(49 NY Jur 2d, Domicile and Residence, § 9; see Matter of Newcomb, 192 NY 238.)

Section 102.2(b) provides that:

Any person domiciled in New York State is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the requirements in paragraph (1) or all three requirements in paragraph (2) of this subdivision:

(1) For a specific taxable year all three of the following requirements are met:

(i) he maintains no permanent place of abode inside New York State during such year;

(ii) he maintains a permanent place of abode outside this State during such entire year; and

(iii) he spends in the aggregate not more than 30 days of the taxable year in this State; or

(2) For a specific taxable year beginning after December 31, 1977, all three of the following requirements are met:

(i) within any period of 548 consecutive days he is present in a foreign country or countries for at least 450 days;

(ii) during such period of 548 consecutive days he is not present in New York State for more than 90 days, does not maintain a permanent place of abode in this State at which his spouse (unless such spouse is legally separated) or minor children are present for more than 90 days; and

(iii) during any period of less than 12 months, which would be treated as a separate taxable period pursuant to Part 148 of this Subchapter, and which is contained within such period of 548 consecutive days, he is present in New York State for a number of days which does not exceed an amount which bears the same ratio of 90 as the number of days contained in such period of less than 12 months bears to 548.

As long as an individual who is domiciled in New York State continues to meet the requirements of either paragraph (1) of paragraph (2) of this subdivision, he will be considered a nonresident of New York State for income tax purposes. However, if for any taxable year he fails to meet those conditions, he will be subject to New York State personal income tax as a resident for that year. Where an individual domiciled in New York State claims to be a nonresident for any taxable year, the burden is upon him to show that during that year he satisfied the requirements set forth in paragraph (1) or paragraph (2) of this subdivision.

Herein, it has not been established that Mr. Y changed his domicile. Therefore, since Mr. Y has established his domicile in New York State, Mr. Y's domicile remains in New York State. In addition, Mr. Y is maintaining his permanent place of abode in New York State and will spend more than 30 days in New York State in 1990. Accordingly, Mr. Y is a resident of New York State even though he is considered a nonresident alien for federal income tax purposes.

Section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual is the individual's "federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

Section 62 of the Internal Revenue Code (hereinafter "IRC") defines "adjusted gross income" of an individual as gross income minus certain enumerated deductions.

Section 872 of the IRC states that gross income of a nonresident alien individual "includes only -

(1) gross income which is derived from sources within the United States and which is not effectively connected with the conduct of a trade or business within the United States, and

(2) gross income which is effectively connected with the conduct of a trade or business within the United States."

Therefore, for federal income tax purposes, Mr. Y would have effectively connected income consisting of consulting fees for services performed in the United States and United States source not effectively connected income consisting of dividends from stock in United States corporations, interest on deposits held in a United States bank account and capital gains on the sale of United States corporation stock.

However, section 871(i) of the IRC provides that for a nonresident alien individual, no tax shall be imposed on amounts consisting of interest on deposits, if such interest is not effectively connected with the conduct of a trade or business within the United States.

Section 871(a)(2) of the IRC provides that net capital gains derived from sources within the United States, but not connected with the conduct of a trade or business derived in the United States, are subject to tax if a nonresident alien individual is present in the United States 183 days or more in the aggregate during the taxable year.

Accordingly, for purposes of section 61(a) of the Tax Law, Mr. Y's federal adjusted gross income would include his consulting fees for services performed in the United States and the dividends from stock in United States corporations. There is no modification contained in section 612 of the Tax Law to include the United States source not effectively connected income that would be exempt for federal income tax purposes, that is, the interest on deposits held in a United States bank and the net capital gains from the sale of United States corporate stock.

In conclusion, as a resident of New York State, Mr. Y's New York adjusted gross income pursuant to section 612 of the Tax Law would include the items included in Mr. Y's federal adjusted gross income; that is, his consulting fees for services performed in the United States and the dividends from the stock in United States corporations.

TSB-A-90 (6) I  
Income Tax  
April 16, 1990

It should be noted that if Mr. Y's actual income in 1990 is different than his anticipated income, Mr. Y's New York adjusted gross income would include all items of income included in federal adjusted gross income as determined herein, and modified as required by section 612 of the Tax Law.

DATED: April 16, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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