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

TSB-A-95 (6) I
Income Tax
August 3, 1995

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I950113A

On January 13, 1995, a Petition for Advisory Opinion was received from Heath Shuler, P.O. Box 10228, Knoxville, Tennessee 37939.

The issue raised by Petitioner, Heath Shuler, is whether, for purposes of Article 22 of the Tax Law, he can calculate his 1994 New York source income by allocating his pre-season and regular season football wages separately, basing each on the ratio of games played in New York to games played everywhere.

Petitioner is a nonresident of New York State. He is a resident of Tennessee. Petitioner is a rookie professional football player and is a member of the Washington Redskins. The Redskins played four pre-season and 16 regular season games during the 1994 calendar year. One of the pre-season games was played in Buffalo, New York. None of the regular season games were played in New York State.

Petitioner states that he was compensated separately for the pre-season and the regular season. According to the NFL Collective Bargaining Agreement (Article XXXVII, Section 3), rookie players are to receive pre-season compensation of $500 per week. Petitioner states that this represents his total compensation for the pre-season. Petitioner's regular season salary of $950,000 was paid over the course of the regular season, commencing with the first regular season game. Petitioner also received a $2,000,000 signing bonus. Petitioner also received $214.29 for his participation in the Washington Redskins May mini camp.

Pursuant to section 631(c) of the Tax Law, "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [Commissioner of Taxation and Finance], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

Section 132.18(a) of the Personal Income Tax Regulations ("Regulations") provides, in part, that:

> [i]f a nonresident employee ... 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.

For the taxable year at issue, section 132.23 of the Regulations provides, in part, that:

> [s]ections 132.15 through 132.22 of this Part are designed to apportion and allocate to New York State, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. Where the methods provided under those sections do not so allocate and apportion those items, the [Department] may require a taxpayer to apportion and allocate those items under such method as it prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation.

The allocation of income pursuant to section 132.18 of the Regulations, based on days worked within and without New York State during the year, does not result in a fair and equitable allocation of income earned by a professional football player for services rendered as such. Nathaniel and Patricia Moore, Adv Op Comm T & F, February 14, 1989, TSB-A-89(2)I.

In accordance with Nathaniel and Patricia Moore, supra, nonresident professional athletes are required to allocate their income from the performance of services on the basis of games played within and without New York State pursuant to section 131.23 of the Regulations. See, Matter of Roy H. and Linda White, Dec St Tax Comm, February 14, 1979, TSB-H-80(93)I; Matter of Kareem Abdul Jabbar, Dec St Tax Comm, April 9, 1982, TSB-H-82(76)I; Matter of Cleon 3ones and Angela 3ones, Dec St Tax Comm, February 6, 1985, TSB-H-85(33)I. For the taxable year at issue, the policy enunciated in such Advisory Opinion and New York State Tax Commission Decisions applies equally to all nonresident professional team athletes regardless of the sports in which they are engaged and regardless of whether their teams are based within New York or outside of New York.

Accordingly, for taxable year 1994, Petitioner's income from the performance of services derived from New York sources is determined on the basis of games played within and without New York State pursuant to section 631(c) of the Tax Law and section 131.23 of the Regulations.

Section one of Petitioner's NFL Player Contract provides that the term of the contract "covers 8 football seasons, and will begin on the date of execution or March 1, 1994, whichever is later, and end on February 28 or 29, 2001, unless extended, terminated, or renewed as specified elsewhere in this contract". Petitioner's NFL Player Contract was executed on August 3, 1994.

Section two of such contract provides that the "[c]lub employs Player as a skilled football player. Player accepts such employment... Player will report promptly for and participate fully in Club's official mandatory mini-camp(s), official preseason training camp, all club meetings and practice sessions, and all pre-season, regular season, and post-season football games scheduled for or by Club .... "

Section five of such contract provides that, as compensation "[f]or performance of Player's services and all other promises of Player, Club will pay Player a yearly salary as follows: $950,000 for the 1994 season ... In addition, Club will pay Player ... such additional compensation, benefits, and reimbursement of expenses as may be called for in any collective bargaining agreement in existence during the term of this contract."

Section six of such contract provides that with respect to payment, "[u]nless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise; Player will be paid 100% of his yearly salary under this contract in equal weekly or bi-weekly installments over the course of the applicable regular season period, commencing with the first regular season game played by Club in each season."

Accordingly, pursuant to Petitioner's NFL Player Contract, executed August 3, 1994, Petitioner is compensated on a yearly basis, and, pursuant to sections two and five of such contract, Petitioner's total compensation for the performance of services includes his regular season salary and his pre-season compensation that is determined under Article XXXVII, Section 3 of the NFL Collective Bargaining Agreement. The fact that, pursuant to section six of such contract, Petitioner's pre-season compensation is paid during the pre-season pursuant to Article XXXVII, Section 3 of the NFL Collective Bargaining Agreement and his regular season compensation is paid during the regular season is irrelevant.

Therefore, for purposes of section 631(c) of the Tax Law and section 131.23 of the Regulations, the portion of Petitioner's total compensation for the performance of services that is derived from New York sources is determined on the basis of the total number of games played within and without New York State for the taxable year.

With respect to Petitioner's $2,000,000 signing bonus, there are not enough facts herein to determine whether such signing bonus is includable in his total compensation for the performance of services allocable as New York source income. However, if the signing bonus was payable separately from the salary and any other compensation terms under Petitioner's contract; and if the signing bonus is nonrefundable; and if the payment of such signing bonus was not conditional upon Petitioner playing any games for the club or even making the team, such receipt of the signing bonus would not be connected with the subsequent performance of Petitioner's contract in New York State and is not considered to be allocable as New York source income under section 631(c) of the Tax Law. (See, Matter of Gordon Clark v NYS Tax Comm, 86 AD2d 691 (1982).)

With respect to the $214.29 Petitioner received for his participation in the Washington Redskins May mini camp, such compensation was not paid pursuant to his NFL Player Contract executed August 3, 1994 for services rendered under such contract and is not considered to be compensation allocable as New York source income under section 631(c) of the Tax Law.

It should be noted that section 132.23 (on and after January 1, 1995, renumbered as section 132.24) of the Regulations provide, in part, that:

> [a] nonresident individual may submit an alternative method of apportionment and allocation with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. The proposed method must be fully explained in the taxpayer's New York State nonresident personal income tax return. If the method proposed by the taxpayer is approved by the [Department], it may be used in lieu of the applicable method under sections 132.15 through 132.22 of Part.

However, the determination of whether an alternative method of apportionment and allocation of Petitioner's pre-season and regular season

compensation would be permitted or required is a factual matter that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts". §17l. Twenty-fourth; 20 NYCRR 2376.1(a).

It should also be noted, that for taxable years beginning on or after January 1, 1995, a new section 132.22 of the Regulations sets forth new prescribed rules for allocation of compensation received by nonresident professional athletes.

DATED: August 3, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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