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

TSB-A-95 (7) I
Income Tax
August 29, 1995

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I950323A

On March 23, 1995, a Petition for Advisory Opinion was received from Susan Byrne Montgomery, 3212 Beverly Drive, Dallas, Texas 75205.

The issue raised by Petitioner, Susan Byrne Montgomery, is whether a bonus paid to Petitioner during the portion of calendar year 1990 in which Petitioner was a nonresident of New York is allocable proportionately to the resident and nonresident periods for purposes of Article 22 of the Tax Law.

Petitioner received, as compensation, a salary of $X in 1990. In addition to her regular salary, Petitioner also received a bonus of $Y determined at the end of 1990, based on Petitioner' s performance and the profitability of the company. Petitioner was a resident of New York State until her change of residence on February 28, 1990. The bonus was not determinable on February 28, 1990.

Petitioner's only office during the resident period, January i to February 28, 1990, was in New York City. Petitioner worked entirely within New York State during the resident period, except for four days. After the change of residence, Petitioner continued her employment and received wage income for services performed both within and without New York State on behalf of her employer.

Petitioner filed as a part-year resident of New York State in 1990 on Form IT-203, reporting as a New York State resident from January 1, 1990 to February 28, 1990 and as a nonresident of New York State from March 1, 1990 to December 31, 1990.

For calendar year 1990, section 638(c)(1) of the Tax Law provided:

> [i]f an individual changes his[her] status from resident to nonresident he[she] shall, regardless of his[her] method of accounting, accrue to the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly entering into his [her] federal adjusted gross income for such portion of the taxable year or a prior taxable year under his [her] method of accounting.

Pursuant to this provision, a taxpayer who changes his or her status from resident to nonresident is required to include in the resident portion of his or her taxable year any income which has accrued before the date of the taxpayer's change of residence regardless of whether the taxpayer is a cash basis or accrual basis taxpayer.

For calendar year 1990, section 148.10(a) [now section 154.10(a)] of the Personal Income Tax Regulations states that:

> [w]here the resident status of an individual ... changes from resident to nonresident ... in computing New York taxable income ... for the resident period, such individual ... must include all items required to be included if a Federal income tax return were being filed for the same period on the accrual basis, together with any other accruals such as deferred gain on installment obligations which are not otherwise includible or deductible for Federal or New York State income tax purposes ....

Section 1.451-1 of the Treasury Regulations provides the general rule for determining the taxable year that income is included in gross income for Federal income tax purposes, and is instructive in determining whether income has accrued within the meaning of section 638(c) of the Tax Law. Such section 1.451-1(a) states, in part, that:

> [g]ains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting. Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. Therefore, under such a method of accounting if, in the case of compensation for services, no determination can be made as to the right to such compensation or the amount thereof until the services are completed, the amount of compensation is ordinarily income from the taxable year in which the determination can be made.

In R. W. Kaszubinski, Adv Op St Tax Comm, May 1, 1984, TSB-A-84(2)I, it was held that where an amount to be received under a private annuity contract subsequent to the close of the resident period is contingent upon the date of death of the annuitant, such amount can not in fact be determined with reasonable accuracy at the close of the resident period and is accordingly not accruable under the Federal rule. It is therefore not subject to the special accrual provision contained in section 654(c)(1) (subsequently section 638(c)), of the Tax Law. See, Matter of John S. Litherland, Dec St Tx Comm, August 22, 1972.

Herein, Petitioner received a bonus of $Y determined at the end of 1990, based on Petitioner's performance and the profitability of the company. Pursuant to section 1.451-1(a) of the Treasury Regulations, and R.W. Kaszubinski, supra, all of the events that fix the right to receive the bonus of $Y had not occurred and the amount thereof could not be determined with reasonable accuracy on February 28, 1990. Accordingly, pursuant to section 638(c) of the Tax Law, in effect for taxable year 1990, and section 148.10(a) [now section 154.10(a)] of the Personal Income Tax Regulations, no portion of the bonus of $Y is accruable for Petitioner's resident period of January 1, 1990 through February 28, 1990. The entire bonus is includable in Petitioner's nonresident period.

Section 631(c) of the Tax Law provides that where a business, trade, profession or occupation is carried on partly within and partly without New York State by a nonresident of New York State, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under the regulations of the Commissioner of Taxation and Finance.

For calendar year 1990, section 131.4(b) [now section 132.4(b)] of the Personal Income Tax Regulations states that:

> 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[her] Federal adjusted gross income, but only if, and to the extent that, his[her] 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 131.16 through 131.18 [now sections 132.16 through 132.18] of this Part.

For calendar year 1990, section 131.18(a) [now section 132.18(a)] of the Personal Income Tax Regulations states that:

> If a nonresident employee ... performs services for his[her] employer both within and without New York State, his[her] income derived from New York State sources includes that proportion of his[her] 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 ....

In Union Carbide Corporation, Adv Op St Tax Comm, May 22, 1981, TSB-A-81(8)I, it was held that when an employee receives an award or bonus while a nonresident of New York State, such award or bonusis derived from or connected with New York sources if the services for which the award or bonus is paid were performed in New York State.

Herein, Petitioner's bonus of $Y determined at the end of 1990 was based on Petitioner's performance and the profitability of the company for the entire calendar year of 1990. Pursuant to section 631(c) of the Tax Law, section 131.4 [now section 132.4] of the Personal Income Tax Regulations and Union Carbide Corporation, supra, Petitioner's bonus is derived from New York State sources to the extent that Petitioner's services were performed in New York State. Therefore, when determining the portion of the bonus that is attributable to Petitioner's services rendered within New York State pursuant to section 131.18(a)[now section 132.18(a)] of the Personal Income Tax Regulations, the total number of working days employed within New York State and employed within and without New York State are computed based on the entire calendar year 1990.

DATED: August 29, 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.