

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

TSB-A-98(11) I
Income Tax
September 10, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I980618C

On June 18, 1998, a Petition for Advisory Opinion was received from Roberto Mancone, 120 East 71st Street, New York, New York 10021.

The issue raised by Petitioner, Roberto Mancone, is whether he is deemed to be a resident of New York State under section 605(b) of the Tax Law for the duration of his temporary assignment to work in New York State.

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

Petitioner is an employee of the New York branch of Banca Nazionale del Lavoro ("BNL"). Petitioner was born on January 31, 1967 in Manza, Italy. He is an Italian citizen and domiciled in Napoli, Italy.

Petitioner is allowed to work under a working visa. He was originally employed by BNL in December of 1990 in their Italian branch in Reggio Emilia. He was transferred to their Italian branch in Como in 1992 and their Padova branch in 1993.

In December of 1993, Petitioner transferred to the New York branch for a three month training program. From March to July 1994, he was in Varese. July and August 1994, he was in New York in a management training program for a new assignment in Chicago, and was transferred to BNL's Chicago branch in September 1994. He remained at the Chicago branch until July 1997, and was transferred to the New York branch to cover the position of Senior Lending Officer within the Commercial Division effective August 1, 1997 to date.

Petitioner is part of a Bank exchange program where employees of other branches are transferred to the United States. The term of the assignment is open ended and is usually renewed on a year to year basis. Historically, the BNL program Petitioner is involved with has usually resulted in a termination of United States status within 5 years.

Petitioner elected to be covered by Italian social security rather than United States social security, as his intent is to return to his Italian domicile. Petitioner continues to be covered by BNL's Italian (head office) pension plan and benefits program.

Petitioner rented an apartment under a one year lease effective October 1, 1997 through September 30, 1998. The lease is renewable on mutual agreement. BNL posted the security deposit and pays the monthly rent which is included in Petitioner's salary along with the associated taxes. Petitioner is granted a net salary which is paid every month and which is grossed up for taxes.

Petitioner continues to own his two bedroom condo in Via Aureliana 54 35036 Montegrotto Terme, Italy to which he intends to return when his assignment is terminated.

Discussion

Section 605(b)(1)(B) of the Tax law provides that a "resident individual" includes an individual who is not domiciled in New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than 183 days of the taxable year in New York State, unless the individual is in active service in the armed forces of the United States.

Section 605(b)(2) of the Tax Law provides that a "nonresident individual" means an individual who is not a resident or a part-year resident.

Section 105.20(e)(1) of the Personal Income Tax Regulations ("Regulations") defines a "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. However, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to the individual's employer's New York State office for a fixed and limited period, after which the individual is to return to the individual's permanent location. If the individual takes an apartment in New York State during this period, the individual is not deemed a resident, even though the individual spends more than 183 days of the taxable year in New York State, because the individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on the individual's income from New York State sources including such individual's salary or other compensation for services performed in New York State. However, if the individual's assignment to the individual's employer's New York State office is not for a fixed or limited period, the individual's New York State apartment will be deemed a permanent place of abode and the individual will be a resident if the individual spends more than 183 days of the year in New York State. For a place of abode to be deemed not permanent, the stay in New York must be temporary (i.e., for a fixed and limited period) and the stay must be for the accomplishment of a particular purpose.

Section 105.20(e)(1) of the Regulations contemplates that the term "temporary" means a fixed and limited period as opposed to a stay of indefinite duration. An employee's stay in New York will be presumed to be temporary (i.e. the presence in New York is for a fixed and limited period) if the duration of the stay in New York is reasonably expected to last for three years or less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years.

Section 105.20(e)(1) of the Regulations contemplates that the phrase "particular purpose" means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and

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conclusions. For example, an individual working in California is assigned to New York to install a piece of equipment. Once the equipment is installed, the individual returns to California. That assignment would be for a particular purpose.

In general, an assignment to New York for general duties, such as to be an executive of the company, a sales manager or a production line worker, would not constitute a particular purpose since these positions involve more generalized goals. This would be true even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess. For example, a salesman with years of experience in a particular product line of the company is assigned to New York as the sales manager because New York sales are weak with regard to that product. It is expected that the individual will devote substantial efforts towards improving those sales. However, being a sales manager still constitutes general duties as opposed to a particular purpose, since it is the general goal of every company to sell its products.

In this case, Petitioner was assigned to the New York office under a program whereby employees of other Italian branches are temporarily transferred to the New York branch with the objective "to enlarge the employee's knowledge of multinational banking". From December 1993 to March 1994 Petitioner was in New York for a three month training program. During July and August 1994 Petitioner was in New York for management training for his new assignment in Chicago. From August 1997 to date Petitioner is assigned to the New York office as a Senior Lending Officer in the Commercial Division. These specific duties of Petitioner are general in nature with general goals and conclusions. In addition, the term of Petitioner's assignment is open ended. Therefore, Petitioner's stay in New York State is not for a fixed and limited period and is not for the accomplishment of a particular purpose as contemplated by section 105.20(e)(1) of the Personal Income Tax Regulations. Accordingly, Petitioner's place of abode in New York State constitutes a permanent place of abode.

However, section 105.20(a)(2) of the Personal Income Tax Regulations provides that a resident individual includes any individual who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

The Department of Taxation and Finance Income Tax Nonresident Audit Guidelines dated July 25, 1997, page 38, provides that for this purpose, the phrase "substantially all of the taxable year" means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th for the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, the individual would not be a statutory resident despite spending over 183 days in New York. Since the individuals in these two examples did not maintain their permanent places of abode in New York for more than 11

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months, the individuals would not be considered residents of New York State for any part of the year.

In this case, it is not clear from the facts presented whether Petitioner maintained a place of abode in New York State from December 1993 to August 1994, when he was assigned to the Chicago branch. Petitioner did acquire a permanent place of abode in New York State when he leased an apartment in New York City on October 1, 1997 and will maintain the permanent place of abode in New York as long as Petitioner leases the apartment. However, it appears that Petitioner did not maintain a permanent place of abode in New York for substantially all of the taxable year and spend, in the aggregate, more than 183 days of the taxable year in New York for taxable years 1993, 1994 or 1997. Therefore, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the Personal Income Tax Regulations, it appears that Petitioner would not be considered to be a resident individual for taxable years 1993, 1994 and 1997. If Petitioner does maintain a permanent place of abode in New York State for substantially all of taxable year 1998 or any future taxable year, and Petitioner spends, in the aggregate, more than 183 days of such taxable year in New York, Petitioner will be a resident individual for that taxable year or years, pursuant to section 605(b)(1) of the Tax Law and section 105.20(a)(2) of the Personal Income Tax Regulations.

For all years that Petitioner has New York source income and is not treated as a resident individual, Petitioner is taxable as a nonresident individual.

DATED: September 10, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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