

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, subsection (g) of section 631, subsection (c) of section 638, and subsection (a) of section 697 of the Tax Law; and Section 3 of Part N of Chapter 62 of the Laws of 2006, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act in the absence of the Commissioner of Taxation and Finance, hereby proposes to make and adopt the following amendments to the New York State Personal Income Tax Regulations under Article 22 of the Tax Law, as published in Subchapter A of Chapter II of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, such amendments to read as follows:

Section 1. The heading note for Part 132 of such regulations is amended to read as follows:

“Note:” Except for [section] sections 132.19 and 132.24, this Part does not reflect amendments to the Tax Law made by the Tax Reform and Reduction Act of 1987 (Chapter 28 of the Laws of 1987) and certain other amendments.

Section 2. Sections 132.24 and 132.25 of such regulations are renumbered to be sections 132.25 and 132.26, respectively, and a new section 132.24 is added to read as follows:

Section 132.24 Stock options, stock appreciation rights and restricted stock (Tax Law, section 631(g))

(a) “General.” A nonresident individual has New York source income from compensation received from stock options, stock appreciation rights or restricted stock if at any time during the allocation period the nonresident individual performed services in New York State for the corporation granting such options, rights

or stock (“grantor”). A nonresident individual’s New York source income from compensation received from stock options, stock appreciation rights or restricted stock is realized when the income is realized for federal income tax purposes and is reportable to New York State in the taxable year that the income is included in the individual’s federal adjusted gross income.

(b) “Computation of New York source income.” New York source income from stock options, stock appreciation rights or restricted stock is the amount determined by multiplying the compensation by the New York workday fraction for the applicable allocation period.

(c) “Definitions.” For purposes of this section:

(1) “Compensation” means the amount of compensation income attributable to stock options, stock appreciation rights or restricted stock that is required to be included in federal gross income for the taxable year. In the case of statutory stock options (Internal Revenue Code, sections 422 and 423), the amount of income recognized for federal income tax purposes may be reported as a capital gain, and in such case, the amount of the capital gain that is compensation is limited to the amount that is the lesser of:

(i) the difference between the option price and the fair market value of the stock at the time the option is exercised; or

(ii) the gain (but not the loss) actually recognized for federal income tax purposes at the time the stock is sold.

(2) “New York workday fraction” is a fraction the numerator of which is the number of days worked within New York State during the allocation period and the denominator of which is the number of days worked both within and without New York State during the allocation period. See section 132.18 of this Part for more information about what constitutes a working day within New York.

(3) “Allocation period” is:

(i) in the case of statutory stock options (Internal Revenue Code, sections 422 and 423), nonstatutory stock options that do not have a readily ascertainable fair market value at the time of grant, and stock appreciation rights,

“(a)” the period of time from the date of grant to the date on which all service-related conditions for exercise of the option or right have been satisfied (the date that the option or right is vested) or, if the option or right is vested at the time of grant, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year of the grant, or

“(b)” for a taxable year beginning in 2006, if elected by the individual, the period of time from the date of grant to the earliest of the date that the option or right is exercised, the date that the individual’s services terminate, or the date that the compensation is recognized for federal income tax purposes;

(ii) in the case of nonstatutory stock options that have a readily ascertainable fair market value at the time of grant (Internal Revenue Code, section 83(a)) and restricted stock where an election under section 83(b) of the Internal Revenue Code is made, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year the option was granted or the restricted stock was received; or

(iii) in the case of restricted stock where an election under section 83(b) of the Internal Revenue Code is not made, the period of time from the date that the stock was received to the earliest of the date that the stock is substantially vested (transferable or not subject to substantial risk of forfeiture), the date that the individual’s services terminate, or the date that the stock is sold, except that, with respect to the portion of the compensation related to the stock that is attributable to dividends paid on the stock, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year that such dividends were received.

In all cases, the allocation period may span multiple years and may include New York State resident periods.

(d) “Examples.”

“Example 1:” On April 1, 2007, Company B compensates employee S with a grant of nonstatutory stock options that do not have a readily ascertainable fair market value when granted. The stock options permit S to purchase 10,000 shares of Company B stock for \$5 per share. The stock options do not become exercisable unless and until S performs services for Company B (or a related company) for the next 5 years. S continues to work for Company B for the next 15 years. From April 1, 2007 through March 31, 2011, S is a New York State nonresident who works within and without New York State. S’s workdays within New York State during this time period total 720 days, and S’s workdays both within and without New York State for this time period total 960 days. From April 1, 2011 to August 15, 2013, S continues to be a nonresident of New York State, but during this time period, only performs services for Company B outside New York State. From April 1, 2011 to March 31, 2012 (the date that the options become exercisable), S has a total of 240 working days, all of which were services performed outside New York State. On August 15, 2013, S exercises the options when the stock is worth \$12 per share. S recognizes \$70,000 in compensation for federal income tax purposes $((\$12-\$5) \times 10,000)$ in 2013. S’s allocation period for computing New York source income is the 5-year period between the date of grant (April 1, 2007) and the date that the stock options become exercisable (March 31, 2012) because, as of that date, S has performed all services necessary for exercise of the options. The services performed after the date that the stock options became exercisable are not taken into account in allocating the compensation from the stock options. Therefore, S’s New York workday fraction for the 5-year allocation period is $720/1200$, and \$42,000 of the \$70,000 compensation recognized in 2013 is New York source income in 2013 $(720/1200 \times \$70,000 = \$42,000)$.

“Example 2:” Same facts as in “Example 1” except that the options granted were statutory stock options and the stock is sold on September 17, 2014, for \$11 per share. From August 16, 2013 to September 17, 2014, S continues to be a New York State nonresident who performs no services in New York State. In this situation, S recognizes a capital gain for federal income tax purposes of \$60,000 $((\$11-\$5) \times 10,000)$ when the stock is sold in 2014. S’s compensation is limited to \$60,000 since the \$60,000 gain is less than the \$70,000 difference between the option price and the fair market value at the time of exercise $((\$12-\$5) \times 10,000)$. S’s allocation period for computing New York source income is the 5-year period between the date of grant (April 1, 2007) and the date that the stock options became exercisable (March 31, 2012) because, as of that date, S has performed all services necessary for exercise of the options. Therefore, S’s New York workday fraction is 720/1200, and \$36,000 of the \$60,000 compensation recognized in 2014 is New York source income in 2014 $(720/1200 \times \$60,000 = \$36,000)$.

“Example 3:” Same facts as in “Example 2” except that the stock sells for \$14 per share. In this situation, S recognizes a capital gain for federal income tax purposes of \$90,000 $((\$14-\$5) \times 10,000)$ when the stock is sold in 2014. S’s compensation is limited to \$70,000, the difference between the option price and the fair market value at the time of exercise $((\$12-\$5) \times 10,000)$, and \$42,000 of the \$70,000 compensation recognized in 2014 is New York source income in 2014 $(720/1200 \times \$70,000 = \$42,000)$. The \$20,000 increase in the value of stock after the exercise date is considered investment income, and is not New York source income for S.

Section 3. Section 132.25 of such regulations is amended to read as follows:

Section 132.25 Other methods of allocation.

Sections 132.15 through [132.23] 132.24 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] 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. 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] Department, it may be used in lieu of the applicable method under sections 132.15 through [132.22] 132.24 of this Part.

Section 4. A new section 154.6 of such regulations is added to read as follows:

Section 154.6 Stock options, stock appreciation rights and restricted stock (Tax Law, section 638(c))

(a) Where an individual changes resident status during the taxable year, the amount of New York source income from compensation (see section 132.24(c)(1)) received from stock options, stock appreciation rights or restricted stock, in the taxable year that such income is included in the individual's federal adjusted gross income (as either ordinary income or capital gain income), is dependent on the individual's resident status at the time that the compensation is recognized for federal income tax purposes.

(b) If the compensation is recognized during the resident period, the entire amount of compensation recognized for federal income tax purposes is includable in New York source income. In the case of statutory stock options (Internal Revenue Code, sections 422 and 423), the entire amount of gain or loss recognized for federal income tax purposes (both the compensation element and any appreciation in the value of the stock after the exercise date) is includable in New York source income.

(c) If the compensation is recognized during the nonresident period, the amount includable in New York source income is determined using the allocation methods described in section 132.24 of this Title.

Section 5. These amendments shall apply to taxable years beginning on or after January 1, 2006.

Dated: Albany, New York
October 10, 2006

Barbara G. Billet
Executive Deputy Commissioner of Taxation
and Finance