

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

TSB-A-81 (8) I
Income Tax
August 26, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. 1810304B

On March 4, 1981, a Petition for Advisory Opinion was received from Union Carbide Corporation, 270 Park Avenue, New York, New York 10017.

The Petitioner requests an Advisory Opinion with respect to its obligation to withhold New York income tax from awards and bonuses paid to employees for services performed during the preceding year under circumstances whereby certain employees were employed in New York for all or a portion of such preceding year but were neither residents of New York nor employed in New York at the time the awards and bonuses were paid.

Union Carbide Corporation has established an employee incentive compensation plan which provides annual cash bonuses to certain corporate officer and employees. The payment of incentive bonuses under this plan depends upon the attainment of corporate earnings goals, the rank of each officer or employee within the organization and his rated performance.

For those not eligible for incentive bonuses, there is a special recognition award program. Each recognition award is given for a year's outstanding performance on the job or for one or more significant contributions. The granting of recognition awards is totally discretionary. Ordinarily, recognition awards are not given to the same employee in successive years.

Under both plans, the awards and bonuses are of necessity awarded and paid in the year following the year in which the services were performed. No right to receive an award or bonus vests in any officer or employee during the year in which the services were performed. No officer or employee knows during that year whether he will receive an award or bonus or how much such an award will be.

Some officers or employees who are neither residents of New York nor employed in New York at the time of payment of the awards and bonuses were employed in New York during all or a portion of the year for which the awards or bonuses are given.

Inasmuch as the officers and employees first become entitled to receive and do receive the awards and bonuses in the year succeeding the year in which the services were performed, the awards and bonuses are included in federal adjusted gross income in that succeeding year. (Internal Revenue Code, § 451).

Section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual is his federal adjusted gross income, as defined in the Internal Revenue Code, with specified modifications not relevant here.

Section 632(a) of the Tax Law provides that the New York adjusted gross income of a non-resident is the net amount of items of income, gain, loss and deductions entering into his federal adjusted gross income which are derived from or connected with New York sources.

Thus, the residence of the officers and employees at the time of payment of the awards and bonuses is determinative. The residence of the officers and employees at the time services were rendered is irrelevant.

Accordingly, since the officers and employees are non-residents at the time of payment of the awards and bonuses, the awards and bonuses are included in their New York adjusted gross income to the extent derived from or connected with New York sources.

The awards and bonuses are derived from or connected with New York sources if the services for which the awards and bonuses are paid were performed in New York. If such services were performed only partly in New York, the awards and bonuses are allocated, pursuant to the provisions of Section 131.16 of the Personal Income Tax Regulations (20 NYCRR 131.16), based upon services performed within and without New York. The place of employment of the officers and employees at the time of payment is irrelevant.

Section 671 of the Tax Law provides that every employer maintaining an office or transacting business within this State and making payment of any wages taxable under the personal income tax to a resident or non-resident individual is required to deduct and withhold New York personal income tax from employee wages in an amount substantially equivalent to the tax reasonably estimated to be due on the employee's wages received during the taxable year.

Section 160.3 of the Personal Income Tax Regulations (20 NYCRR 160.3) provide, in part as follows: "Payments which are considered wages for Federal income tax withholding purposes are also wages for purposes of New York State income tax withholding." For Federal income tax purposes, wages mean all remuneration for services performed by an employee for his employer, unless expressly excepted by section 3401(a) of the Internal Revenue Code (26 U.S.C. 3401). The awards and bonuses paid under Petitioner's two plans are not excepted by section 3401(a). Additionally, bonuses are specifically included in wages subject to federal withholding by Federal income tax regulations. (26 CFR 31.3401(a)(1)(a)(2)). Furthermore, bonuses have been held to be wages in the year received and subject to withholding in such year, under the Internal Revenue Code. (Rev. Rul. 69-649, 1969-2CB 106 and Rev. Rul. 70-471, 1979-2CB 199).

It should be noted that section 160.6 of the Personal Income Tax Regulations (20 NYCRR 160.6) makes special provision for determining the amount of tax to be withheld on wages paid to non-residents. Additionally, section 160.4(b) of the Personal Income Tax Regulations (20 NYCRR 160.4) makes special provision for determining the amount of tax to be withheld on supplemental wages, including bonuses.

The Petitioner is therefore advised that under the circumstances stated in the Petition:

- 1) awards and bonuses will be considered income of a non-resident;
- 2) withholding, if any, is required in the year when the awards and bonuses are paid;

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- 3) the awards and bonuses should be included entirely in New York adjusted gross income if all services for which the awards and bonuses were paid were performed in New York. The awards and bonuses must be allocated within and without New York to the extent the services for which the awards and bonuses were paid were performed within and without the State; and
- 4) the amounts to be withheld should be computed pursuant to the provisions of sections 160.4(b) and 160.6 of the Personal Income Tax Regulations (20 NYCRR 160.4; 20 NYCRR 160.6).

DATED: May 22, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau