1960

Nonresident Personal Income Tax: A Comparative Study in Eight States

Michael B. Solomon

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol29/iss1/3

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
NONRESIDENT PERSONAL INCOME TAX: A COMPARATIVE STUDY IN EIGHT STATES

MICHAEL B. SOLOMON

A majority of the states tax the income of nonresidents. The vexing question today is how the states should strike the balance between the ever-increasing need for revenue and the demand by nonresidents for fair treatment. Mr. Solomon examines the methods eight states have employed or proposed in striking this balance.

PROVISIONS for the taxation of nonresident income can be found in the tax laws of almost every state imposing a personal income tax. The object of such a tax is to reach income derived from sources within the taxing state. Its justification lies in the police protection, social services, and favorable economic climate which the taxing state affords the nonresident.

The taxation of nonresidents, particularly wage earners, has become prevalent in the last decade because urban centers have extended across state lines. Where these urban centers extend into states which impose a personal income tax, double taxation can be easily avoided by reciprocity provisions in the respective tax laws. However, a difficult problem is presented when a nonresident earns his livelihood in an income taxing state but resides in a state which relies on the property tax as its major source of revenue. Finding a mutually acceptable solution to this problem will test the ingenuity of the executive and legislative leaders of the states involved.

* Member of the New York Bar.


This article compares the nonresident personal income tax structures of eight states, and emphasizes the way in which each state has struck a balance between the ever-increasing need for revenue and the demand by nonresidents for fair treatment.

In selecting the eight states, a regional distribution has been sought as well as substantive representation. Four states are treated in the East—New York, Delaware, Vermont, and Massachusetts; in the mid-West, three—Iowa, Wisconsin, and Minnesota; in the far West—California. In every state except New York the case material is scarce. In the absence of judicial decisions, the regulations promulgated by the state tax commissions have been taken as the authoritative interpretations of the tax laws.

CONSTITUTIONAL PROBLEMS

The constitutional assault on the taxation of nonresident income was made in *Shaffer v. Carter*\(^3\) and *Travis v. Yale & Towne Mfg. Co.*\(^4\) With one exception,\(^5\) these cases settled all constitutional objections in favor of the taxing state.

In *Shaffer v. Carter*, the taxpayer was an Illinois resident engaged in oil and gas operations in Oklahoma. He had purchased, developed, and operated a number of oil and gas leases, and owned outright certain oil-producing land in Oklahoma. For the year 1916, the taxpayer's net income from these operations exceeded $1,500,000. The Oklahoma taxing authority imposed and sought to enforce against the taxpayer a tax on his entire net income. He challenged the tax, and the case reached the Supreme Court of the United States.

Speaking for the Court, Mr. Justice Pitney answered the taxpayer's contentions seriatim. First, Oklahoma had jurisdiction in a due process sense to tax a nonresident on net income derived from sources within the state:

That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement.\(^6\)

The Court then dealt with the equal protection and the privileges and immunities arguments. The taxpayer contended that the tax on residents was purely personal and was measured by income, while the tax on non-

\(^3\) 252 U.S. 37 (1920).
\(^4\) 252 U.S. 60 (1920).
\(^5\) The discriminatory exemptions against nonresidents were struck down in *Travis v. Yale & Towne Mfg. Co.*, supra note 4.
\(^6\) 252 U.S. at 50.
residents was essentially a tax on property and business within the state
to which the resident was not subjected. The Court was "unable to
accept this reasoning. It errs in paying too much regard to theoretical
distinctions and too little to the practical effect and operation of the
respective taxes as levied. . . ." 7

The taxpayer further contended that the provisions in the tax law
permitting residents to deduct losses wherever incurred while allowing
nonresidents to deduct only those losses incurred within the state was
an unconstitutional discrimination. But the Court held that the dis-
tribution was neither arbitrary nor unreasonable. Since the state taxed
residents on income derived from all sources, it allowed them a cor-
responding deduction. Similarly, a nonresident who was taxed only on
his income from Oklahoma sources was allowed deductions incurred
within the state and related to the production of that income.

The contention that the Oklahoma tax imposed an undue burden
on interstate commerce was summarily dismissed by the Court. Since
the tax was imposed on net income, not gross receipts, it "is plainly
sustainable even if it includes net gains from interstate commerce." 8

Finally, the Court refused to pass on the question of enforcement be-
cause all of the taxpayer's property in Oklahoma was income-producing. 9

In *Travis v. Yale & Towne Mfg. Co.*, a Connecticut corporation doing
business in New York employed residents of Connecticut and New Jer-
sey against whom New York sought to impose a net income tax. The
company sought to enjoin enforcement of the tax. The Supreme Court,
following *Shaffer v. Carter*, affirmed the two basic propositions which
emerged from that case: (1) a state may constitutionally tax nonresidents
on net income derived from sources within that state, 10 and (2) it may
limit the deductions of nonresidents to those related to the production
of taxable income. 11

But the Court also considered the constitutionality of two other provi-
sions of the New York Tax Law.

Section 362 exempted from taxation of residents $1,000, if single,
$2,000, if married, and $200 for each dependent. 12 A nonresident had
no similar exemptions. The Supreme Court affirmed the holding of the
district court 13 that this section violated the privileges and immunities

7. Id. at 56.
8. Id. at 57.
9. It is now held that a tax lien may be enforced against any property of a taxpayer
10. See, e.g., N.Y. Tax Law § 363(3).
11. See, e.g., N.Y. Tax Law § 360(11).
clause. The discrimination against nonresidents was unreasonable and substantial. "Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference."\(^{14}\)

The rationale which supports the limitation of nonresident deductions to those related to taxable income cannot be applied to exemptions. Personal exemptions have no relation to the amount of the taxpayer's expenditures or the source of his income; they are flat rate deductions. It is therefore unreasonable to allow personal exemptions to residents while denying them to nonresidents.\(^{15}\)

Section 366 required every "withholding agent" (including all employers) to deduct and withhold a stated percentage from all salaries, wages and other compensation for personal services payable to nonresidents.\(^{16}\) The taxpayer contended that this method of enforcement violated the privileges and immunities clause because it applied only to nonresidents. The Court held that this contention "is unsubstantial.... Nor has complainant on its own account any just ground of complaint by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfill the duty of deducting and withholding the tax."\(^{17}\)

The result of *Yale & Towne* is to add two propositions to those announced in *Shaffer v. Carter*: (1) a state must afford nonresidents and residents the same personal exemptions, and (2) it may constitutionally adopt a system of withholding at the source for nonresidents only.

**New York**\(^{18}\)

New York imposes a tax "upon and with respect to the entire net income and net capital gains ... from all property owned and from every

---

14. 252 U.S. at 80. As a result of this holding N.Y. Sess. Laws 1919, ch. 627, § 362, was amended by N.Y. Sess. Laws 1920, ch. 191, § 362, to extend the exemption to any taxpayer.

15. This raises a question of classification. Presumably, if a state were to classify personal exemptions as deductions and limit nonresident deductions to those related to the production of taxable income, a court would nevertheless apply the ruling of *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).


17. 252 U.S. at 76.

18. In 1960, New York revised its personal income tax law. It adopted the provisions of the federal code relating to the determination of income for federal income tax purposes, stating that this revision would "(1) simplify preparation of state income tax returns by taxpayers, (2) improve enforcement of the state income tax through better use of information obtained from federal income tax audits, and (3) aid interpretation of the state tax law through increased use of federal, judicial and administrative determinations and precedents." N.Y. Sess. Laws 1960, ch. 563, § 1.

The new tax provisions, which are embodied in article 22 of the Tax Law (N.Y. Tax
business, trade, profession or occupation carried on in this state by natural persons not residents of the state. . . .”

A resident includes:

(1) a domiciliary, except one maintaining a permanent residence only outside the state and spending no more than thirty days of the taxable year within the state, and

(2) a nondomiciliary who “maintains a permanent place of abode within the state and spends in the aggregate more than one hundred eighty-three days of the taxable year within the state. . . .”

In the calendar year 1957, this tax reached 201,252 non-residents, producing a New York income of approximately $1,514,160,000. Taxes due were $38,506,000. Of this sum, $24,262,000 was attributable to persons living in New Jersey, and $9,006,000 to Connecticut residents.

As part of its original tax structure, New York allowed a tax credit to nonresidents based on reciprocity. The credit has been continued substantially unmodified, and it is allowed against that part of the New York tax imposed on income which is also taxable in the state of residence. The purpose of this credit is to avoid double taxation of non-

---

Law §§ 601-83), apply only to taxable years ending on or after December 31, 1960. The former provisions, which are embodied in article 16 of the Tax Law (N.Y. Tax Law §§ 350-35), continue in effect until January 1, 1961. N.Y. Sess. Laws 1950, ch. 563, § 5. This article will refer to the provisions of article 16, with the corresponding references to article 22. Where appropriate, reference will be made to the Internal Revenue Code of 1954.

19. N.Y. Tax Law § 351. The schedule of rates in this section provides with respect to net income a sliding scale from 2% on the first thousand to 10% on income in excess of $15,000; with respect to net capital gains, a sliding scale from 1% on the first thousand to 5% on amounts in excess of $15,000.

N.Y. Tax Law § 601 imposes a tax upon the “New York taxable income of every individual, estate and trust.” The schedule of rates in N.Y. Tax Law § 602 provides a scale from 2% on the first thousand to $380 plus 10% of the excess over $15,000.


21. Letter from Chester B. Pond, Director of the Research and Statistics Bureau, Dept. of Taxation and Finance, to the author, April 22, 1959. The figures are taken from the department’s study of 1957 calendar year incomes.

22. N.Y. Tax Law § 363(1).

23. Originally, reciprocity was based on the nonresident’s state granting a substantially similar credit to residents of New York. It was later extended to states which exempted outright the income of New York residents. Under N.Y. Tax Law § 363, residents of the following states may claim credit: California, Delaware, Iowa, Kentucky, Maryland, Montana, North Carolina, Oregon (for periods up to December 31, 1959), South Carolina, Vermont, Virginia, and the District of Columbia. Prior to 1955, New York allowed residents of Massachusetts a credit because Massachusetts did not tax nonresidents. In 1955, Massachusetts imposed a personal income tax on nonresidents, but did not provide for a credit reciprocal to the New York credit.

resident income.  However, it has failed because Connecticut and New Jersey have not enacted a personal income tax.

A. Gross Income

Residents of New York are taxed on gains, profits, and income derived from all sources within and without the state. However, the tax base of a nonresident is considerably narrower. The Tax Law provides that the gross income of a nonresident includes only the gross income derived from New York sources. In addition, the following categories of nonresident income are specifically excluded from taxation: (1) income from corporate dividends, even though such dividends are received from a New York corporation having its sole offices in New York; (2) interest on bank deposits, although paid by a New York bank; (3) interest on bonds, notes, or other interest-bearing obligations, although paid by New York corporations; (4) income from pensions or annuities, and (5) profits made on the sale of securities within New York by one "other than a dealer." These exclusions, as the Supreme Court noted in *Travis v. Yale & Towne Mfg. Co.*, appear to be designed to preserve the preeminence of New York as a financial center. However, they are probably required by the New York Constitution.

26. "Finally, the most important weakness in the position of nonresidents who complain about the New York State tax stems from the fact that neither New Jersey nor Connecticut have a State income tax. If our neighboring states imposed an equal or higher tax than New York, their residents would not have to pay any New York income tax." Tannenwald Report, note 106 infra, at 3. The answer made by New Jersey and Connecticut representatives is that New York cannot legislate for another state and that some accommodation must be made within the present framework.
30. Ibid.
33. N.Y. Tax Law §§ 351, 632(d), which provide: "[A] nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property for his own account." See Regs., art. 415, 1 CCH State Tax Rep. N.Y. ¶ 17-433.
34. 252 U.S. 60, 81 (1920).
35. N.Y. Const. art. XVI, § 3, which provides that intangible personal property not
However, these exclusions do not apply to the extent to which the income is derived from a business, trade, profession, or occupation carried on within the state and subject to taxation under article 16 of the Tax Law.36

Broadly speaking, there are two major sources of nonresident income: compensation received from personal services rendered within the state, and income from a trade or business carried on within the state. These two sources of income will be treated below.

The gross income of a nonresident not engaged in a business, trade, profession, or occupation on his own account includes compensation for personal services rendered within the state.1 There is usually no problem of apportionment because nonresident employees who earn a salary in New York work there throughout the taxable year. For those employees, including corporate officers, who perform services within and without the state, earnings are allocated on a pro rata basis of working time.38

Taxability has always been determined by the place where the taxpayer performs his services rather than by the type of work performed or the nature of the employer’s business and income.53 Thus, in People ex rel. Troy v. Graves,40 the salary of a nonresident taxpayer was based on the net profits which his corporation earned from all states in which it did business, even though he performed all of his services within New York State. The court, holding that his gross income included his total compensation, refused to allow him to include only that part of his income equal to the proportion which the earnings of the corporation within the state bore to its total earnings.

When the taxpayer is engaged in a business,41 the portion of income employed in carrying on any business shall be deemed for tax purposes to be located at the domicile of the owner.

38. Regs., art. 452, 1 CCH State Tax Rep. N.Y. ¶ 17-442, provides: "Gross income of all nonresident employees (including corporate officers) except those provided for in article 451 [i.e., salesmen], includes that portion of the total compensation for services which the total number of working days employed within the state bears to the total number of working days employed both within and without the State of New York. Allowable deductions must be apportioned on the same basis."
41. “Business” is used herein to include business, trade, profession, or occupation, in contradistinction to rendering personal services as an employee. See Regs., art. 415, 1 CCH State Tax Rep. N.Y. ¶ 17-433.
subject to New York taxation will depend on whether the business is carried on (a) solely within the state, (b) solely without the state, or (c) both within and without the state. The factors that enter into a determination of these three questions are considered below.

A business is "carried on" within the state by a nonresident if he "occupies, has, maintains, or operates deskroom, an office, a shop, a store, a warehouse, a factory, an agency, or other place where his affairs are systematically and regularly carried on. . . ." If the business is carried on solely within the state, the entire gross income of the taxpayer is allocable to New York. But the difficult question is determining when a business is carried on exclusively within the state.

The Tax Commission early adopted the position that it is not the place where the services are rendered which determines taxability but the place from which the business is systematically and regularly carried on. The New York court applied this ruling in Carpenter v. Chapman to a New Jersey resident who was licensed to practice law and who maintained an office solely in New York. He contended that he was entitled to apportion his professional income from practice before federal courts and commissions outside the state. The court rejected his contention, holding that his entire professional income was allocable to New York. The court stressed the fact that the taxpayer's right to practice outside the state was based solely on his admission to the New York Bar, all services performed elsewhere being incidental to the practice maintained in the state. Also emphasized was the fact that the taxpayer's only office was in New York.

Peripheral contacts outside the state do not alter taxability if the taxpayer's business is carried on solely within the state. For example, it makes no difference that he or his representative travels outside the state for the purpose of buying, selling, financing, or performing any

44. It is the determining factor when compensation for personal services is involved. See Regs., art. 452, 1 CCH State Tax Rep. N.Y. ¶ 17-442.
47. Presumably, if the taxpayer were a member of the District of Columbia Bar, admitted on motion to the New York Bar, the court would allow him to allocate income earned in the District, even though his sole office was in New York. It is submitted that the taxpayer's membership in the New York Bar was decisive, the court distinguishing People ex rel. Stafford v. Travis, 231 N.Y. 339, 132 N.E. 109 (1921), and People ex rel. Monjo v. State Tax Comm'n, 218 App. Div. 1, 217 N.Y. Supp. 669 (3d Dep't 1926), with the comment: "The practice of law is quite a different activity from that of ordinary business." 276 App. Div. at 636, 97 N.Y.S.2d at 314.
duties in connection with the business or makes sales to or performs services for persons located outside the state. The taxpayer's entire gross income is still allocable to New York.

In People ex rel. Lunnis v. Graves, the taxpayer was a New Jersey resident employed on a commission basis as a sectional representative for an Ohio corporation. His territory reached beyond the boundaries of New York, but his only office was located in New York City. Three salesmen, employed and paid by the taxpayer, operated out of this New York office. It was the taxpayer's function to supervise the solicitation of orders throughout the East, all of which were subject to confirmation by his employer in Ohio.

The taxpayer contended that New York could tax only that portion of his commissions received upon orders for goods sold and shipped within the state. The Tax Commission found that the taxpayer carried on his business solely in New York. Therefore, it imposed a tax on all commissions, disregarding the destination of the goods sold. The court affirmed, holding once again that taxability depends on whether the taxpayer carried on a business in New York.

If a business is "carried on" solely outside the state, no part of the taxpayer's gross income is allocable to New York. This is so even though the nonresident or his representative travels within the state for the purpose of buying, selling, financing, or performing any duties in connection with the business or makes sales to or performs services for persons located within the state.

When the taxpayer maintains offices within and without the state from which he conducts regular and systematic business, a court may easily find that he is carrying on business in both states. A more difficult case is presented where the taxpayer conducts foreign business through agents.

An early case dealing with a foreign agent involved a Connecticut resident engaged in retailing cotton. He maintained an office in New York City where he kept samples of cotton goods on hand. He employed traveling salesmen in Europe, South America, and Australia, some of whom maintained offices in his name. The salesmen solicited orders and sent them to the taxpayer for approval. If the orders were approved, they were then sent to a manufacturer outside New York. Upon completion of the goods, the manufacturer would send the cloth to the taxpayer, who transshipped it to the purchaser. Some of the taxpayer's

foreign agents accepted orders by his authority, and these sales were consummated upon acceptance.

The taxpayer argued that his entire net income was not allocable to New York. The court agreed and remanded the case to the Comptroller to determine what part of the sales were consummated abroad. He was directed to adjust the taxpayer's net income from such sales according to the proportionate amount of business done in purchasing and forwarding the goods in the state and making sales outside the state.

The court appeared to base its holding on a finding that some sales were consummated outside New York. Indeed, this reasoning was followed five years later in People ex rel. Monjo v. State Tax Comm'n. Such a rationale would not be supportable today. Both decisions, however, are supportable on the ground that the taxpayer maintained foreign offices from which his agents regularly and systematically conducted business. It is noteworthy that in both cases the court remitted to the taxing authority the problem of making a proper allocation of income. Similarly, the legislature has authorized the Tax Commission to prescribe by rule proper methods of apportionment.

The general standard enunciated by the Tax Commission, once it is found that a nonresident carries on business within and without the state, is one of apportionment "on a fair and equitable basis, in accordance with approved methods of accounting." If the books of the taxpayer are kept so as to regularly disclose the proportion of his business income derived from New York sources, the Tax Commission may permit him to use this method of apportionment. If the books of the taxpayer do not adequately disclose income derived from New York sources, the tax will be calculated by use of the "three factor method." It is always open to any taxpayer to submit an alternative basis of apportionment for the Commission's approval.

---

53. It is expressly precluded by Regs., art. 455, 1 CCH State Tax Rep. N.Y. ¶ 17-412.
54. N.Y. Tax Law § 632(c).
56. Teague v. Goodrich, 4 App. Div. 2d 984, 167 N.Y.S.2d 820 (3d Dep't 1957). See Regs., art. 457(c), 1 CCH State Tax Rep. N.Y. ¶ 17-416, where the "three factor method" is described. In brief, it is

\[
N.Y. \text{ net income} = \frac{\text{N.Y. tangible property}}{\text{Total tangible property}} + \frac{\text{N.Y. wages}}{\text{Total wages}} + \frac{\text{N.Y. sales}}{\text{Total sales}} \times \frac{\text{Total net income}}{3}
\]

B. Deductions

While nonresidents are allowed the same exemptions as residents, their deductions are limited to items connected with taxable income from New York sources. Such a system allows a nonresident taxpayer business expenses to the extent that they are connected with a business carried on within the state. For example, a nonresident conducting a business or profession in New York can deduct from gross business income interest paid or accrued on business obligations, real estate, and other taxes paid on business property, business casualty losses, gasoline taxes paid on business vehicles, and all other business expenses deductible by a resident.

The discriminatory tax treatment of nonresidents is found in the laws, regulations, and cases dealing with nonbusiness or personal expenses. For example, a resident is allowed the following nonbusiness deductions: (1) taxes paid, (2) interest paid on nonbusiness obligations, (3) bad debts, (4) casualty losses, (5) life insurance premiums paid up to an amount of $150, (6) medical expenses on a limited basis, (7) alimony payments, and (8) contributions to New York charities. Each of these deductions is either wholly denied to nonresidents or is allowed on only a limited basis. Whether or not there is a legal or other basis for this discrimination is a question which must be explored through a separate analysis of each of these deductions.

59. N.Y. Tax Law § 362 was amended following Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920), to give nonresidents the same exemptions as residents. The amended section was sustained in People ex rel. Stafford v. Travis, 231 N.Y. 339, 132 N.E. 10 (1921). See N.Y. Tax Law § 636.

60. N.Y. Tax Law §§ 360(11), 633-35. Under N.Y. Tax Law §§ 360(18), 634, a nonresident taxpayer may elect to deduct an amount equal to 10% of his gross income, or $1,000, whichever is less, in lieu of all deductions otherwise allowable. This standard deduction is allowed even though a nonresident taxpayer may not otherwise itemize his nonbusiness deductions.


64. N.Y. Tax Law §§ 360(7), 615(a); Int. Rev. Code of 1954 § 166.

65. N.Y. Tax Law §§ 360(6), 615(a); Int. Rev. Code of 1954 § 165(c)(3).

66. N.Y. Tax Law §§ 360(16), 615(d).


70. The following analysis was suggested by the Federal Bar Ass'n of New York, New Jersey and Connecticut, Report on New York State Taxation on Intra-State Income of Non-Residents (1953).
1. Taxes

Taxes may be divided into two categories: those paid in connection with tax-exempt property and those not so connected. The general rule respecting the first group is the same for both residents and nonresidents: deductions are disallowed for "taxes paid or accrued in connection with the ownership of property, current income from which is not required to be included in gross income."71

This rule precludes the allowance of deductions for nonresident real estate taxes paid out on out-of-state residences or other taxes paid in connection with out-of-state property. Such taxes would include those paid on the purchase and/or sale of such out-of-state property, customs duties and excise taxes paid thereon. The rule further precludes a deduction for taxes paid on the purchase and/or sale of tax-exempt intangibles by a nonresident.

In the case of taxes paid but not related to tax-exempt property, there appears to be no reason for differentiating between residents and nonresidents, because the relevant property is not tax-exempt to either class. This category includes sales taxes for nonbusiness purchases of tangible property having an actual situs within the state, for meal services, or for gasoline.72 It includes Social Security taxes paid on domestics' pay,73 and customs duties and excise taxes paid on other tangible property located within the state.74 The Tax Commission wholly denies each of these deductions to nonresidents.75

2. Interest

The general rule, applicable to both residents and nonresidents, disallows deductions for interest paid or accrued in connection with the ownership of real or personal property, the current income from which is not required to be included in gross income.76 The application of this rule supports the Tax Commission's position that interest paid on mortgages on out-of-state residences is not deductible by a nonresident, since the income from the rental or gain from the sale of such property could not be included in his gross income.77

73. Regs., art. 141, 1 CCH State Tax Rep. N.Y. ¶¶ 16-041, 16-039.78.
77. "Indeed, if these deductions were permitted, a nonresident who owns and rents property located outside New York and derives income from it would reap an affirmative advantage; he would get the tax benefit from deducting the real estate taxes and the interest on the mortgage against his other income without having to pay tax to New York on the rent." Tannenwald Report, note 106 infra, at 5.
Interest on personal loans is in the same category as taxes paid in connection with tax-exempt property. Thus, if a nonresident obtains a loan to purchase an automobile in New York, the interest he pays should be deductible in full or on some apportioned basis. However, if the personal loan is to purchase tangible property located in another state, or intangible property wherever located, the interest paid should not be deductible because current income from such property need not be included in a nonresident’s gross income. The Tax Law does not make these distinctions. It denies the deduction for interest paid on non-business obligations because it is not “connected with income arising from sources within the state.”

3. Bad Debts

A nonresident may not deduct personal bad debts from gross income, although a resident may. The basis for this distinction is that a bad debt deduction should not be allowed unless the recovery of the same is includable in gross income. In the case of a nonresident, the recovery of a bad debt would yield income from an item of intangible property (the debt) and so would not be includable in his gross income.

4. Casualty Losses

The existing law limits the deduction of casualty losses of a nonresident to those connected with real property located in New York or tangible personal property having an actual situs there. Again, the basis for this distinction is that a nonresident is taxed only on income from property having an actual situs within the state.

5. Life Insurance Premiums

While residents are allowed a deduction for life insurance premiums paid up to an amount of $150, nonresidents are denied any similar deduction. This discrimination finds support in the general principle that no deduction should be allowed where income from the relevant property is tax-exempt.

Life insurance proceeds payable upon death are not taxable to a resident or nonresident, while cash surrender proceeds are taxable to a resident to the extent they exceed paid-in premiums. In the case of

79. See also Regs., art. 418, 1 CCH State Tax Rep. N.Y. § 17-452 (1945).
80. 2 P-H State & Local Tax Serv. N.Y. ¶ 57530.40.
a nonresident, however, such proceeds are not includable in gross in-
come because they constitute income from intangible property.\textsuperscript{82} Exclud-
ing the tax consideration, a strong argument can be made that this
deduction, which is limited to begin with, is in the nature of a personal
expense which applies to all of the taxpayer's activities in his state of
residence or elsewhere, and, therefore, should be allowed in full or on an
apportioned basis.\textsuperscript{83}

6. Medical Expenses

Goodwin v. State Tax Comm'\textsuperscript{n}\textsuperscript{84} denied medical deductions to a non-
resident on the theory that such expenses "were made by him in the
course of his personal activities, which must be regarded as having taken
place in . . . the State of his residence."\textsuperscript{85} Those who disagree with this
reasoning argue that "medical expenses are to be regarded as related
to all of the taxpayer's activities, wherever engaged in, and that, in
effect, his medical expenditures are made in part in an effort to enable
the taxpayer to continue to be income-producing, without regard to where
the income may be produced."\textsuperscript{86} But even some of the critics of the
Goodwin decision would not allow the nonresident to deduct medical
deductions for his entire family, since such a provision "would unduly
extend the scope of the deduction to expenditures that are wholly ex-
traneous to New York State."\textsuperscript{87}

7. Alimony Payments

Periodic alimony payments made by a resident spouse are deductible
without regard to whether they are includable in the gross income of
the other spouse.\textsuperscript{88} Such payments are deductible by nonresidents only
if they are includable in the recipient's New York income.\textsuperscript{89}

Although the Goodwin case provided some justification for the com-
plete denial of this deduction to nonresidents, the New York Legislature
has made a policy decision to encourage the payment of alimony. This
policy, however, does not support the preferential treatment accorded
residents.

\textsuperscript{82} N.Y. Tax Law §§ 359(3), 632(b).
\textsuperscript{83} The fact that the deduction is limited also argues against its apportionment.
\textsuperscript{84} 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dep't 1955), aff'd mem., 1 N.Y.2d 680,
\textsuperscript{85} Id. at 701, 146 N.Y.S.2d at 180.
\textsuperscript{86} Federal Bar Ass'n of New York, New Jersey and Connecticut, op. cit. supra note
70, at 11.
\textsuperscript{87} Id. at 12.
\textsuperscript{88} N.Y. Tax Law § 360(17). But see N.Y. Tax Law 615(a); Int. Rev. Code of 1954
§ 215.
\textsuperscript{89} N.Y. Tax Law §§ 360(17), 635(a)(2).
8. Charitable Contributions

Contributions to charitable institutions are deductible by nonresidents only if the donees are organized or operated under New York laws, and the deduction for gifts to governments is limited to those made to New York State and its political subdivisions. This law operates to deny nonresidents deductions for contributions to their own state and to local charities outside New York.

In addition, the present law tends to discriminate against the low income nonresident, since the high income nonresident can form a family foundation under the New York Membership Corporation Law and thereby obtain deductions for all of his contributions to the foundation. The foundation may then distribute funds to a local charity in the nonresident’s home state. However, this preferential treatment is somewhat minimized because most national charities would be deemed to be “organized and operated” under New York law and the contributions would be deductible by nonresidents. Therefore, discrimination which does exist relates only to local charities. This may be supported on the theory that local contributions confer only local benefits.

9. Conclusion

The first five deductions have been analyzed from a tax standpoint. In each case, the overriding consideration is that no deductions should be allowed in connection with property the income from which is tax-exempt. The last three deductions pose different problems because they are in no way related to income-producing property. No general principle of tax law supports or condemns the existing discrimination. Primary consideration is given to the policies sought to be encouraged by the allowance of the deduction. The discrimination must stand or fall in this light.

The Goodwin case provided an opportunity to review the policies underlying the deduction for real estate taxes, interest on mortgages, medical expenses, and life insurance premiums. There the taxpayer was a New Jersey resident practicing law in New York. His entire income for 1951 was earned within the latter state. He claimed and was allowed deductions for expenses connected with the production of his income, e.g., bar association dues, subscriptions to legal periodicals, entertainment and automobile expenses. He was unsuccessful in claiming de-
ductions for real estate taxes paid on his New Jersey home, interest on his home mortgage, medical expenses, and life insurance premiums.

Goodwin conceded that the latter deductions were not "connected with income arising from sources within the state," but he challenged the constitutionality of section 360 as applied to nonresidents on the basis of the privileges and immunities clause. In rejecting the constitutional objections, the court took the opportunity to reconsider the underlying rationale of *Shafer v. Carter.* The decisive question, it said, was whether the factor of residence had a sufficient connection with the allowance of these deductions to justify a classification on the basis of residence. It found such a connection, reasoning that the expenditures, since related to personal activities, were associated with the place where the taxpayer resided. It therefore was the province of the home state to allow deductions for them. "It happens that New Jersey has no Income Tax Law but this does not warrant the petitioner's shifting the allowance for these expenditures, which are intimately connected with the State of his residence, to New York State."

However, the court also stated that:

It may well be that, if the question were reconsidered today in the light of the subsequent extension of state income tax laws and if all the considerations here canvassed were brought before the Supreme Court, a different decision might be reached as to the validity of the distinction between residents and nonresidents with respect to the allowance of personal exemptions [deductions].

After affirmance by the court of appeals, the Supreme Court refused to reconsider the issue, dismissing the appeal for want of a substantial federal question.

C. Enforcement

New York enforces its net income tax against nonresidents by a system of withholding at the source. Every "withholding agent" must

---

95. *286 App. Div. at 701, 146 N.Y.S.2d at 180.* The court also rejected an argument that the personal deductions were in the nature of exemptions and therefore unconstitutional under *Travis v. Yale & Towne Mfg. Co., 252 U.S. 60* (1920). The court pointed out that exemptions are allowed as a flat rate deduction without regard to the taxpayer's expenditures. Exemptions affect the tax rate, while deductions do not.
96. *Id. at 703, 146 N.Y.S.2d at 181-82.*
99. The constitutionality of such a system, as applied only to nonresidents, was upheld in *Travis v. Yale & Towne Mfg. Co., 252 U.S. 60* (1920).
100. *N.Y. Sess. Laws 1919, ch. 627, § 350(10),* said that a withholding agent included, among others, all individuals, corporations, associations, and partnerships having control, receipt, custody, disposal of payment of interest, rent, salaries, wages, premiums, annuities, and taxable income. This was amended in 1959 to include only "employers." *N.Y. Tax*
at each payroll period deduct and withhold from all compensation earned by a nonresident for personal services rendered within the state an amount substantially equivalent to that prescribed by the tax rate scale. The withholding agents are then required to make quarterly returns of the amounts withheld to the Tax Commission.

D. Proposed Changes

Any change which may modify the discriminatory tax treatment accorded nonresidents must come from the legislature. On January 16, 1958, Assemblyman John R. Brook introduced a bill "to amend the tax law, in relation to deductions of nonresident taxpayers." The bill contained three proposals: (1) repeal of the parenthetical clause in section 360(6) which limits casualty losses of nonresidents, (2) repeal of that part of section 360(10)(d) which limits the charitable deductions of nonresidents, and (3) repeal of section 360(11) which limits nonresident deductions to those related to income from New York sources. The bill was referred to the Committee on Ways and Means and was killed there. Its aim was to afford nonresidents the same deductions as residents; it was the most extreme position which could be taken and one which no state has adopted.

Meanwhile, in January 1958, following a meeting of the Governors of New York, New Jersey, and Connecticut, Governor Averell Harriman of New York appointed Theodore Tannenwald to represent him in a discussion of the nonresident tax problem with representatives of the other two states. Following these discussions, Mr. Tannenwald released a report in which he recommended that nonresidents be given the right to allocate deductions and exemptions in the proportion that the taxable income from New York sources bore to total income from all sources. The New Jersey and Connecticut representatives com-

---

101. Before 1959, the New York regulations provided that where the taxpayer filed a certificate of New York residence with the withholding agent, no deduction or withholding was required. N.Y. Sess. Laws 1919, ch. 627, § 366. In 1959, however, the state extended the withholding system to its own residents. N.Y. Tax Law § 366.
104. N.Y. Assembly No. 1489 (1958).
106. The report [herein cited as Tannenwald Report] was in letter form addressed to Governor Harriman, dated December 3, 1953.
107. The Tannenwald Report further recommended that, in the event this proposal was
mented favorably on Tannenwald's proposal to allocate deductions but stated that "personal exemptions . . . similarly allocated is a step backward [and] is probably unconstitutional."

Negotiations among the three states continued after Governor Nelson A. Rockefeller's inauguration in 1959. At the new Governor's insistence, a major study of the nonresident tax problem was begun and a report released in December 1959. The report generally recommended that nonresidents be allowed the same nonbusiness deductions as residents "but that such deductions, the optional standard deduction, if claimed, and personal exemptions be allowed to nonresidents in the proportion of their New York income to income from all sources." The estimated revenue loss would be offset by increased revenue resulting from improved tax enforcement.

Comments on this report followed quickly from the New Jersey and Connecticut representatives. The major point made by these critics was that there existed a gross disparity between the services which New York provided to nonresidents and the tax which it imposed on them.

not acceptable, nonresidents be allowed to deduct charitable contributions and medical expenses to the same extent as residents.


110. Nonresident Tax Study Committee, Report on Taxation of Nonresidents by New York State 48 (1959). The report further recommended that, for administrative reasons and to protect the business climate of New York, tax credits continue to be allowed in full. In addition, the Committee urged, at pp. 47-49, that:

(1). the tax liability of highly paid nonresidents who are in the state for only a short period of time be vigorously enforced;
(2). the Dep't of Taxation and Finance be authorized to require nonresidents to file copies of their federal income tax returns in Albany and verify itemized nonbusiness deductions;
(3). any change in the allowance of nonbusiness deductions be made available to residents of states which have become parties with New York to a compact or reciprocal legislation embodying the following:
   a) provisions for the exchange of names and addresses of residents of party states working in other states;
   b) provisions permitting each party state to bring appropriate actions in the courts of other party states to collect taxes;
   c) provisions for permissive withholding of New York State personal income tax by New York firms in the case of residents of New York working in other states.

111. Staff and Consultants to Connecticut and New Jersey, Report on Non-Resident Taxation by New York (December 21, 1959). This report was submitted by Roswell Magill and William C. Warren.

112. The report concludes, at p. 19, that at least 56% of New York expenditures are
Governor Rockefeller's position was more moderate than the report he had commissioned. He recommended the following:

(1) that nonresidents be allowed the full standard deductions, exemptions, and tax credits;

(2) that nonresidents earning all or substantially all of their income from New York sources be allowed to claim itemized deductions in full;

(3) that nonresidents earning income from sources both within and without the state be allowed to prorate itemized deductions in the proportion that New York income bears to total income;

(4) that the above three proposals be conditioned upon the nonresident's state making available to New York information concerning New York residents who work there and permitting permissive withholding of New York taxes on their wages.\textsuperscript{113}

A bill incorporating the Governor's recommendations was introduced in the State Assembly by John R. Brook\textsuperscript{114} and in the State Senate by Dutton S. Peterson.\textsuperscript{115} Walter J. Mahoney, the Senate Majority Leader, refused to permit the bill to be reported out of committee unless some tax relief was granted to residents. In view of his position, Mr. Brook did not press for passage in the Assembly\textsuperscript{116} and the 1960 legislative session closed with the administration's unkept promise of nonresident tax relief.

With the failure of the New York Legislature to pass a nonresident tax relief program, talk of retaliatory legislation was heard in Trenton and Hartford.\textsuperscript{117} The Governors of Connecticut and New Jersey were cool to such suggestions because they believed that a retaliatory tax levied on New York residents working in their states would be unconstitutional.\textsuperscript{118} However, New Jersey was not entirely silent. On May 1, 1960, Governor Meyner made public an ingenious proposal which would not reduce the tax burden of New Jersey residents but would divert tax dollars from Albany to Trenton. On May 2, 1960, this bill\textsuperscript{119} was introduced in the New Jersey State Assembly.

The preamble to the bill recites the existence of a transportation crisis with respect to persons living in one state and employed in another:

\textsuperscript{113} N.Y. Times, Jan. 27, 1960, p. 1, col. 4, at 20, col. 2.
\textsuperscript{114} N.Y. Assembly No. 3829 (1960).
\textsuperscript{115} N.Y. Senate No. 3158 (1960).
\textsuperscript{116} Letter from Assemblyman John R. Brook to the author, April 25, 1960.
\textsuperscript{117} N.Y. Times, Apr. 28, 1960, p. 37, col. 1.
\textsuperscript{118} N.Y. Times, April 29, 1960, p. 19, cols. 6-7.
\textsuperscript{119} N.J. Assembly No. 65 (1960).
and the need for funds to provide adequate transportation facilities for these commuters. A "temporary emergency tax" is then levied on:

1. the income of residents derived from sources "within a critical area State" other than New Jersey;\(^{120}\) and

2. the income of individuals derived from sources "within this State" and who are residents of another "critical area State."\(^{121}\)

A "critical area State" includes New Jersey and "such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is . . . a critical transportation problem. . . ."\(^{122}\) A "critical transportation problem" is said to exist between New Jersey and a bordering state when there is such number of daily commuters between said States as to create a severe peak-load demand requiring facilities and services, by any means or mode of transportation far in excess of those needed for normal travel outside of usual commuter hours, caused by carrying on of activities in 1 of the States by persons residing in another, from which activities such persons derive income or gain from sources within the State other than in which they reside. . . . [W]henever the aggregate number of persons, residing in each of such States who are employed . . . in the other, exceeds 100,000, that fact reasonably indicates that a critical transportation problem exists.\(^{123}\)

Under these definitions, the only state to which the bill can apply is New York.

The remainder of the bill is patterned after the New York personal income tax law. The diversion of tax dollars from New York to New Jersey is accomplished by the operation of the respective reciprocity tax credit provisions. Under the tax credit clauses of the New Jersey bill\(^{124}\) and the New York Tax Law,\(^{125}\) the 150,000 New Jersey residents who work in New York would claim a credit against their New York tax which would equal the amount of that tax, since the only income taxable by New Jersey would be the same as that taxable by New York. The estimated 70,000 New Yorkers who work in New Jersey would likewise claim a credit against the New Jersey tax.\(^{126}\) It is estimated that the enactment of this bill by New Jersey would cost New York between 27 and 40 millions in tax dollars per year.\(^{127}\)

---

\(^{120}\) N.J. Assembly No. 65, § 2(a) (1960).

\(^{121}\) N.J. Assembly No. 65, § 2(b) (1960).

\(^{122}\) N.J. Assembly No. 65, § 5(a) (1960).

\(^{123}\) N.J. Assembly No. 65, § 5(b) (1960). No. 65, § 20 (1960) provides that all taxes collected are earmarked solely for rain and highway transportation and improvement.

\(^{124}\) N.J. Assembly No. 65, § 16 (1960).

\(^{125}\) N.Y. Tax Law §§ 363(1), 640.

\(^{126}\) New York residents working in New Jersey, however, will have to pay some tax to New Jersey because deductions are allowed only to the extent that New York allows them to nonresidents. N.J. Assembly No. 65, § 35 (1960).

The proponents of the bill argue that it has economic justification because it places the tax burden upon those who use interstate facilities to commute to and from New York and New Jersey. However, under the present language of the bill, non-commuters with income-producing investments in a "critical area State" are also subject to the levy. Moreover, the bill does not alleviate the existing burden on New Jersey residents which representatives of that state claim inequitable on economic grounds.

The constitutional validity of the bill is also in doubt. The precise question is whether the classification of this particular commuter segment of the New Jersey and New York population for taxation is reasonable within the meaning of the equal protection clause of the fourteenth amendment. Proponents of the bill point to the great latitude usually accorded a state in classifying taxes. Nevertheless, if the bill is enacted, it must be able to withstand a court test.

In addition, the possibility exists, although remotely, that New York would withdraw the reciprocity provision so far as it applies to New Jersey. More realistic, perhaps, is the possibility that the Tax Commission would take the position that the tax credit provision was intended to apply only if the nonresident's state had enacted a statewide personal income tax or statewide tax measured by income, whether gross or net.128

Despite the doubts enumerated herein as to the legal and economic justifications for this bill, it was passed by the New Jersey State Assembly on May 6 and sent to the State Senate, which recessed until September 12, 1960.

**DELAWARE**

Delaware imposes a tax129 on the net income of every nonresident:130 (1) to the extent that he receives income as compensation for personal services131 rendered in the state as an employee, and/or (2) to the extent

---

128. A difficulty with this argument may be presented by the language of the revised article, providing a credit for "any income tax" levied by the state of residence. N.Y. Tax Law § 640(a).


130. A nonresident is any person other than a resident. A resident includes: (1) any natural person domiciled in the state, except a person who, though domiciled in the state, maintains no permanent place of abode within the state, but maintains one without the state while spending in the aggregate not more than 30 days of the taxable year within the state; (2) any natural person who maintains a permanent place of abode within the state and spends in the aggregate more than seven months of the taxable year within the state. Del. Code Ann. tit. 30, § 1101 (Supp. 1958).

that he derives "net profits from a profession, vocation, business, trade or commerce conducted in the State. . ." Every nonresident taxpayer is allowed a credit against his tax for taxes paid to any other state; the credit is based on reciprocity.133

There is no statutory provision for apportionment of a nonresident's income and deductions, but the specific instructions in the nonresident return provide that: (1) deductions from compensation for personal services are allowable for the expenses of travel, meals, lodging, and entertainment incurred in connection with the employer's business, and (2) only items of deduction properly connected with the conduct of a business in Delaware shall be entered.134

Nonresident employees are subject to withholding at the source of compensation for personal services rendered in Delaware.135

VERMONT

Vermont imposes a tax136 with respect to net income "from all property owned and from every business, trade, profession, or occupation carried on in this state by natural persons not residents of the state; provided, however, that interest, dividends, and gains from the sale or exchange of property shall be excluded from gross income except to the extent that such interest, dividends and gains are part of income from such business, trade, profession or occupation."137 To eliminate taxation of the same income by Vermont and the state of residence, a tax credit based on reciprocity is allowed to nonresidents.138 Vermont enforces its nonresident tax provisions by a system of withholding at the source.139

134. Form 200-NR, Nonresident Instructions, Specific Instructions (1)-(2), CCH State Tax Rep. Del. ¶ 16-032.
136. The schedule of rates provides a sliding scale from 2% on the first thousand to $220 plus 7.5% of the excess over $5,000. Vt. Stat. Ann. tit. 32, § 5641 (1958).
138. Vt. Stat. Ann. tit. 32, § 5647 (1958). A nonresident may credit the tax payable to Vermont with that proportion of the tax payable to his state of residence as Vermont income subject to tax bears to income subject to tax in his state of residence. Thus, if a New York resident has a net income of $10,000, $2,000 of which is taxable in Vermont, the Vermont tax is reduced by an amount equal to a fifth of the New York tax.
There are no statutory provisions for the allocation of income and deductions of nonresidents.\textsuperscript{140} However, by administrative rule of the Vermont Commissioner of Taxes, nonresidents for the year 1958 and subsequent years will be required to itemize deductions only on the basis of those apportionable and attributable to Vermont income realized. The actual procedure has not yet been worked out because the rule was just put into effect.\textsuperscript{141} Presumably, this rule means that Vermont will deny to nonresidents such nonbusiness deductions as medical expenses and casualty losses.

The general paucity of statutory provisions and rules dealing with nonresident income undoubtedly reflects the lack of any real problem.

\textbf{Massachusetts}

In 1955, Massachusetts for the first time imposed a tax on the net income of nonresidents.\textsuperscript{142} The tax is levied on the “business income” of nonresidents derived from sources within the state,\textsuperscript{143} but this includes income from professions, employment, trade, or business, and transactions entered into for profit except transactions in intangible property.\textsuperscript{144} The tax therefore breaks down into one levied on: (1) compensation for personal services rendered within the state, and (2) net profits from any business, trade, or profession carried on in Massachusetts. A credit is extended to residents of Massachusetts for taxes due other states on income received or accrued from sources in such states.\textsuperscript{145} No similar credit is afforded nonresidents.

Taxability of compensation for personal services is determined by the place where the services are rendered.\textsuperscript{146} For example, if an employee

\textsuperscript{140} Vt. State Ann. tit. 32, § 6003 (1958) authorizes the Commissioner of Taxes to make rules and regulations necessary to implement the tax law. No formal regulations, however, have been promulgated. Instructions and other explanatory matter accompanying the forms have been issued.

\textsuperscript{141} Letter of William E. Hogan, Director of Taxes, to the author, December 8, 1959.


\textsuperscript{146} Because the nonresident income tax provisions are recent, there is a paucity of
works full time in a Massachusetts factory and is a resident of New
Hampshire, he will be taxed on his full salary earned in the Massachusetts
factory. This is so even though the factory may be a branch of a larger
enterprise having its headquarters in New Hampshire and actually pay-
ing the New Hampshire resident by check from this main office.147

The same principle would seem to apply to an officer of a corporation.
For example, if a corporate executive devotes full time to a job
centered in Boston but works weekends at his Rhode Island home on
company business, his full salary will be taxable in Massachusetts.148
Moreover, the Commissioner appears to put weekend work of this kind
in the same class as occasional trips on company business149 and business
trips made at irregular intervals150 outside the state.

There are no statutory provisions for apportionment of compensation
for personal services. But the Commission adopted a ruling in 1955,151
supplemented by a regulation,152 which clearly states what methods of
allocation a nonresident taxpayer is to employ. Employees and corporate
officers must allocate their income on a pro rata basis of working time,153
salesmen, on a pro rata basis of mileage or volume of business.154 In any
case, a nonresident taxpayer employed by a corporation doing business
within and without the state, whose salary is based on the entire net
profits of the corporation, but who performs all his services within the
state, must allocate his total salary to Massachusetts.155

When a nonresident taxpayer carries on156 a profession, trade, or busi-

153. If the employee or officer is compensated on an hourly, weekly, or monthly rate,
division is made according to the proportion of Massachusetts working time to total
¶ 16-501.15.
154. If the salesman is compensated on a mileage basis, then division is made according
to the proportion of Massachusetts mileage to total mileage. If compensation is based on
the volume of business transacted, then division is made according to the proportion of
business transacted within Massachusetts to the total volume of business transacted. Regs.,
156. A nonresident “carries on” a business in Massachusetts when he “occuples, has,
maintains, or operates a deskroom, an office, shop, a store, a warehouse, a factory, an
ness within Massachusetts, taxability is determined by the place where he systematically and regularly conducts his affairs. Taxable business income includes not only net business profits but also rents and gains derived from the sale of Massachusetts realty and tangible personal property having a situs in Massachusetts. Royalties from patents and copyrights and gains from the sale of mineral and extractive rights are subject to taxation to the extent to which they are attributable to Massachusetts. For example, if a patent holder domiciled in New York licenses a Massachusetts corporation to make use of his invention within that state, the income received by the licensor is attributable to Massachusetts sources.\(^{157}\)

Rules governing apportionment of business income have been promulgated by the Commission.\(^{158}\) If the taxpayer's principal place of business is within the state, his entire net income is allocable to Massachusetts even though he or his agent buys and sells outside the state and performs services for persons located outside the state.\(^{159}\) The same principle applies so as to exclude from Massachusetts taxation all business income when the taxpayer's principal place of business is located outside the state.\(^{160}\) The rule which applies to professional income appears to be a combination of the rules determining taxability of compensation for personal services and business income: Even if a professional person is not regularly engaged in carrying on his profession in Massachusetts, he must include in his income the entire amount of fees received for services performed within the state on behalf of clients.\(^{161}\)

When the taxpayer carries on a business within and without the state and his books clearly indicate which portion of his income is derived from Massachusetts sources, he may apportion net income on that basis.\(^{162}\) Otherwise, the taxpayer must use a formula which is similar to New York's "three factor method."\(^{163}\)

Nonresidents are entitled to the same deductions as residents,\(^{164}\) except that they are limited to that portion of each deductible item asso-

---

\(^{157}\) Ibid.
\(^{158}\) Regs., § 6(d), 1 CCH State Tax Rep. Mass. ¶ 16-503.
\(^{160}\) Ibid.
\(^{161}\) Ibid.
\(^{162}\) Regs., § 6(d), 1 CCH State Tax Rep. Mass. ¶ 16-503. Of course, this is subject to the Commission's approval.
\(^{163}\) Ibid.
associated with the production of taxable income within the state.\textsuperscript{165} Allowable deductions are apportioned on the same basis as taxable income.\textsuperscript{166}

Originally there were no provisions in the Massachusetts tax law for withholding at the source any compensation paid to nonresident employees. Employers were only required to file information returns which enabled the Commissioner to collect nonresident taxes.\textsuperscript{167} But every nonresident having income in excess of $2,000 from a profession, trade, or business within Massachusetts was obliged to file a return.\textsuperscript{168} In the event a nonresident failed to file, the Commissioner was authorized to estimate his taxable income and impose a tax on a gross basis (without allowance for deductions and exemptions).\textsuperscript{169}

However, these provisions were short-lived. On February 6, 1959, Governor Furcolo signed into law a state-wide withholding bill retroactive to January 1, 1959.\textsuperscript{170}

**IOWA**

Iowa imposes a tax\textsuperscript{171} on that part of the taxable income of any non-resident which is derived from Iowa sources, including property owned and any business, trade, profession, or occupation carried on within the state.\textsuperscript{172} A nonresident\textsuperscript{173} is every person not domiciled\textsuperscript{174} or not maintaining a permanent place of abode in Iowa.\textsuperscript{175}

A nonresident is taxed on income from personal services to the extent that such services are rendered within the state. Taxability is determined by the place where the services are performed, and apportionment is made on the basis of the number of working days spent within the state.\textsuperscript{176} In the case of a corporation doing business within the state,

\begin{itemize}
\item \textsuperscript{165} Mass. Ann. Laws ch. 62, § 5A(c) (Supp. 1959).
\item \textsuperscript{171} Iowa is one of the few states that has not exercised its taxing jurisdiction to the constitutional limit with respect to both residents and nonresidents. Iowa Code § 422.8(1) (1958), while imposing a tax on a resident's income from whatever source derived, provides for the allocation of income from business carried on in another state having similar tax provisions. The schedule of rates in Iowa Code § 422.5 (1958) provides for a sliding scale from .75% on the first thousand of net income to 3.75% on the fifth thousand and above.
\item \textsuperscript{172} Iowa Code § 422.5 (1958). See Reg. 22.5-1, CCH State Tax Rep. Iowa ¶ 10-204.
\item \textsuperscript{173} A nonresident is every individual not a resident. Iowa Code § 422.4(12) (1958).
\item \textsuperscript{174} Reg. 22.5-2, CCH State Tax Rep. Iowa ¶ 10-062.
\item \textsuperscript{175} Iowa Code § 422.4(8) (1958).
\item \textsuperscript{176} Reg. 22.8(2)-2, CCH State Tax Rep. Iowa ¶ 12-408. In the case of salesmen, whose compensation depends on the volume of business transacted, an allocation is made on the
the compensation of a nonresident for services rendered to management is taxable only to the extent that it pertains to personal services performed within the state.\footnote{177}

If a nonresident carries on a business, trade,\footnote{178} profession, or occupation both within and without the state, apportionment is made according to the taxpayer's books, provided they accurately disclose net income from Iowa sources. Otherwise, net income is apportioned in the ratio that Iowa gross sales bear to total gross sales.\footnote{179} With the exception of stocks, bonds, notes, and other evidences of indebtedness, taxability of income from intangible property does not necessarily depend on a finding that the property has a business situs\footnote{180} in Iowa. It is sufficient that the income arises from the use of such property within the state.\footnote{181}

Until 1955, deductions from gross income were allowable to nonresidents only to the extent that they were connected with income arising from Iowa sources.\footnote{182} Since then, the Commissioner has adopted a more lenient position. If a nonresident has income from both within and without the state, he may allocate his itemized deductions in the ratio basis of volume of sales made in Iowa over total volume. Allowable deductions are apportioned on the same basis.

\footnote{177} Reg. 22.8(2)-3, CCH State Tax Rep. Iowa \S 12-409.

\footnote{178} Reg. 22.8-1(a), CCH State Tax Rep. Iowa \S 10-071, defines "carrying on trade or business" to mean a regular and systematic course of transactions; activity carried on with a fair degree of permanency and continuity. This does not include an isolated or casual transaction, but it does extend to a profession and the renting of property.

\footnote{179} Iowa Code \S 422.8(2) (1953). See Reg. 22.8(2)-4, CCH State Tax Rep. Iowa \S 12-410.

\footnote{180} Reg. 22.8(2)-6, CCH State Tax Rep. Iowa \S 12-414, which defines business situs for intangibles. If the intangibles are employed as capital in the state, or if the possession and control of the property has been localized in connection with a business carried on in Iowa so that its substantial use and value attach to and become an asset of the business in Iowa, the property has a business situs within the state. For example, if a nonresident has an Iowa branch office and bank account on which his agents can draw to pay expenses in connection with branch business, the account has a business situs in Iowa. If intangible property of a nonresident acquires a business situs in Iowa, the entire net income from such property, including taxable gains from its sale, regardless of where the sale is made, is income from Iowa sources.

\footnote{181} Ibid. Income of nonresidents derived from rentals, royalties for the use of, or privilege of using within the state, patents, copyrights, secret processes, formulas, goodwill, trademarks, franchises, and like property is taxable, whether or not such property has a business situs in Iowa. Income arising from the use of such property within the state is income from Iowa sources. For example, if a nonresident patent holder licenses X to manufacture and sell his invention in Iowa, royalties payable to the licensor are taxable in Iowa.

\footnote{182} The statutory standard is found in Iowa Code \S 422.9(4) (1953). A nonresident is permitted to deduct only such portion of the total itemized deductions "as is fairly and equitably allocable to Iowa under the rules and regulations prescribed by the state tax commission."
that Iowa adjusted gross income bears to adjusted gross income reported for federal income tax purposes.\textsuperscript{183} This is substantially the same proposal that has been recently considered in New York.\textsuperscript{184}

A nonresident is allowed a reciprocal credit for taxes paid on Iowa income to his state of residence.\textsuperscript{185} The tax is enforced by a system of withholding at the source\textsuperscript{186} which is similar in substance to those already described.

\textbf{Wisconsin}

The Wisconsin taxing statute broadly differentiates between income derived from a business and income derived from personal services. Income from a business not required to be apportioned follows the situs of the business from which it is earned.\textsuperscript{187} Likewise, rental income from real property, royalties from tangible personal property, income from the operation of any farm, mine, or quarry or from the sale of real and tangible personal property follows the situs of the property. All other income, including royalties from patents, income derived from personal services, professions, vocations, land contracts, mortgages, stocks, bonds, and other securities or from the sale of similar intangible personal property follows the residence of the recipient.\textsuperscript{188}

The singular effect of these provisions is that a nonresident\textsuperscript{189} escapes

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{183} Reg. 22.9-13, CCH State Tax Rep. Iowa \S\ 12-420. For example: X, a nonresident, has a 1955 federal adjusted gross income of $12,000, his Iowa income being $6,000. His federal income tax return showed itemized deductions for contributions, interest, taxes, medical expenses, and miscellaneous expenses in the amount of $4,500, of which $150 was for paid Iowa income taxes. The ratio of his Iowa income to his federal adjusted gross income was 50%. Therefore, 50% of the total expenses of $4,500, less $150, would be $2,175. This is the portion of the nonresident's total deductions deductible in computing his Iowa taxable income for the year 1955.
\item\textsuperscript{184} See note 107 supra.
\item\textsuperscript{185} Iowa Code \S\ 422.18 (1958). There is also a small credit against the tax itself, which applies to both residents and nonresidents: single persons, $15; dependents, $7.50; married couples and heads of household, $30. Iowa Code \S\ 422.12 (1958).
\item\textsuperscript{186} Iowa Code \S\ 422.16(1)-(3) (1958). See Reg. 22.16(1), CCH State Tax Rep. Iowa \S\ 13-153.
\item\textsuperscript{188} Wis. Stat. Ann. \S\ 71.07(1) (Supp. 1960). In State ex. rel. Manitowoc Gas Co. v. Tax Comm'n, 161 Wis. 111, 152 N.W. 848 (1915), the purchase of a bond by a nonresident taxpayer, even though the loan was secured by a trust deed on property situated within the state, was held not to constitute doing business. Therefore, the interest paid to the taxpayer on the bond was not taxable by Wisconsin.
\item\textsuperscript{189} Wis. Stat. Ann. \S\ 71.01(1) (Supp. 1960) provides: "Every natural person domiciled
\end{enumerate}
\end{footnotesize}
taxation on income from personal services rendered within the state. Whether a nonresident earns income from a business or from personal services becomes the crucial inquiry. The legislature has not provided a statutory definition for either term. Consequently, the task of classification has devolved upon the court.

In Wiik v. Department of Taxation, the taxpayer was a nonresident employed by a foreign corporation engaged in the construction business. In 1942, the taxpayer contracted with the corporation to supervise a construction project at a Wisconsin military camp. He was to receive five per cent of the net profits earned by the corporation on the project, with a guaranteed minimum amount per month. The court held that the taxpayer's income was compensation for personal services and therefore not taxable by Wisconsin. The percentage of profits provision did not change his status from employee to coadventurer.

However, in a similar case, the court found that a nonresident taxpayer hired to supervise a construction job in Wisconsin did derive his income from a business carried on within the state. The distinguishing feature of this case was an agreement that the taxpayer was to obtain fifteen per cent of the profits or absorb fifteen per cent of the losses. In the opinion of the majority, sharing in both profits and losses made him a coadventurer. The dissent pointed out that the taxpayer never contributed any capital or owned any interest in the property, equipment, or other assets of the corporation.

While the use of capital has been employed by the Tax Commission as a test in determining whether a taxpayer was engaging in a business or rendering personal services, it has not been used as a test in classifying the activities of a particular taxpayer employed by a firm avowedly engaged in a business. In the latter case, it is the nature of the services performed and the compensation paid which are the determinative factors.

Once it is determined that the taxpayer is engaged in a business, Wisconsin may tax him only on that portion of his income derived from business within the state. The amount of income attributable to Wisconsin may be determined by an allocation based on separate ac-

---

190. 249 Wis. 325, 24 N.W.2d 685 (1946).
192. See 1 CCH State Tax Rep. Wis. ¶ 11-503.50.
counting where appropriate.\textsuperscript{194} In all other cases, apportionment is made on the basis of an arithmetic average of three factors.\textsuperscript{195} The regulations indicate that related deductions are apportioned in the same manner.\textsuperscript{196}

The Wisconsin Income Tax Law does not require withholding at the source; only information returns must be filed.\textsuperscript{197} Provisions for a nonresident tax credit are also lacking. However, the nonexistence of a credit is a disadvantage more than equalized by the exemption of non-business income from taxation.

\section*{MINNESOTA}

Minnesota's nonresident\textsuperscript{198} income tax provisions may be divided into four parts: (1) income from labor or personal services, (2) income from tangible property which has a situs in the state, (3) income from intangible property, and (4) income from a trade or business.

The net income of every nonresident from compensation for labor and personal services is assignable to Minnesota "if, and to the extent that, the labor or services are performed within it; all other income from such sources shall be treated as income from sources without this state."\textsuperscript{199} Income from personal services includes income from the performance of physical or mental labor "where the capital or the labor of others employed in the enterprise is not the material income producing factor. Salaries, wages, commissions and fees are considered to be derived from personal services."\textsuperscript{200}

\begin{itemize}
  \item[194.] Rule 2.41, 1 CCH State Tax Rep. Wis. \textsuperscript{f} 11-514.
  \item[195.] Rule 2.42, 1 CCH State Tax Rep. Wis. \textsuperscript{f} 11-526. The taxpayer must deduct from total net income such part, less related expenses, as follows the situs of property or residence of the recipient. The remaining net income is apportioned to Wisconsin on the basis of a ratio obtained by taking the arithmetic average of (a) the tangible property ratio (all property used by the taxpayer in his Wisconsin business over the total), (b) the manufacturing cost ratio (cost of goods sold, wages, overhead in Wisconsin over the total), and (c) the sales ratio (all sales made in Wisconsin over the total). Rule 2.45, 1 CCH State Tax Rep. Wis. \textsuperscript{f} 11-531, provides for apportionment in special cases.
  \item[196.] See Rules 2.41-42, 1 CCH State Tax Rep. Wis. \textsuperscript{f} 11-514, 11-526.
  \item[197.] Wis. Stat. Ann. \textsuperscript{f} 71.10(1) (1957).
  \item[198.] Minn. Stat. Ann. \textsuperscript{f} 290.01(7) (1947) defines a resident as any individual domiciled in Minnesota or maintaining an abode there during any portion of the taxable year and not having a domicile elsewhere. See also Reg. 2001(7), 1 CCH State Tax Rep. Minn. \textsuperscript{f} 10-062. Domicile means bodily presence in one place, coupled with an intent to make such place one's home. Miller v. Commissioner of Taxation, 240 Minn. 18, 59 N.W.2d 925 (1953).
  \item[199.] The schedule of rates in Minn. Stat. Ann. \textsuperscript{f} 290.06(2)(a) (Supp. 1959) provides for a sliding scale from 1\% on the first $500 to 10.5\% on amounts over $20,000. Subsection 2(b) provides for an alternate tax if the taxpayer's adjusted gross income is less than $10,000.
  \item[200.] Reg. 2003(2), 1 CCH State Tax Rep. Minn. \textsuperscript{f} 10-204.
Income and gains from tangible property not employed in the taxpayer's business are assignable to Minnesota if such property has a situs within the state. If the taxpayer's business consists primarily of holding tangible property for the collection of income, such income is also assignable to Minnesota provided the property has a situs in the state. If income from intangible personal property is assignable to the taxpayer's domicile except where it is used in the taxpayer's business and that business does not consist primarily of holding such property for the collection of income.

If a trade or business is conducted wholly within the state, the entire net income is assignable to Minnesota. If it is conducted wholly outside the state, no part of the net income is assignable to Minnesota. Business transacted by Minnesota concerns in other states, through traveling salesmen or correspondence, is regarded as Minnesota business. Income derived from goods manufactured within and sold outside the state may constitute Minnesota business. Sales are made in Minnesota if made through offices, agencies, branches, or stores within the state, regardless of the buyer's location or the destination of the goods sold. Income derived from a construction project is assignable to Minnesota provided the project has a situs within the state.

Deductions are allowed in the above cases to the extent that they are connected with and allocable to income assignable to Minnesota. Non-business expenses are deductible in the proportion that the taxpayer's gross income from sources within the state bears to his gross income.

---

201. Minn. Stat. Ann. § 250.17(2) (Supp. 1959). Reg. 2017(2)(a), 1 CCH State Tax Rep. Minn. ¶ 12-408, provides that income from tangible property, whether real or personal, includes income from the sale, rental, or operation of such property. Where the taxpayer's trade or business does not consist primarily of holding property for the collection of income, such income is apportioned according to Minn. Stat. Ann. § 290.19 (1947). Property is situs where it is physically located.


205. Ibid.

206. Ibid.

207. Ibid.


from all sources. Thus, Minnesota strikes a balance between the demand for revenue and the burden placed upon nonresidents.

Net income from a business or trade carried on partly within and partly outside Minnesota is apportioned according to a "three factor method." The taxable net income of such a business is computed by deducting from gross income wherever derived those deductions which are connected with or allocable against such income. It would seem that under this scheme the taxpayer loses that percentage of nonbusiness deductions allowable in cases where income is not derived from interstate business. Minnesota would be constitutionally justified in not allowing nonbusiness deductions to nonresidents, but it remains questionable whether there is a reasonable basis for the difference in treatment accorded them by the present statute.

Instead of allowing flat rate deductions from net income for personal exemptions, Minnesota allows a direct credit against the tax. Even though this results in a uniform application of benefits instead of a reduction in net income which is then subject to the tax rate, these credits must be apportioned by nonresidents in the proportion that gross income from Minnesota sources bears to total gross income. This apportionment formulas are afforded insurance and investment companies.


Minn. Stat. Ann. § 290.19(1)(1)(a)-(c) (1947) apportions net income from a business consisting of manufacture and sale of personalty within or without Minnesota according to the following formula:

\[
\frac{\text{Minn. sales}}{\text{Total sales}} + \frac{\text{Minn. tangible property}}{\text{Total tangible property}} + \frac{\text{Minn. payroll}}{\text{Total payroll}} = \% \text{ to Minn.}
\]

A ceiling is placed on the percentage assignable to Minnesota. Minn. Stat. Ann. § 290.19(1)(1)(d) (1947). The formula for all other cases is as follows:

\[
\frac{\text{Minn. gross receipts}}{\text{Total gross receipts}} + \frac{\text{Minn. tangible property}}{\text{Total tangible property}} + \frac{\text{Minn. payroll}}{\text{Total payroll}} = \% \text{ to Minn.}
\]

Minn. Stat. Ann. § 290.19(1)(2)(a) (1947). Subdivision (b) of this section provides for an alternate formula or a separate accounting.

Minn. Stat. Ann. § 290.06(3) (Supp. 1959) provides, among others, these credits: unmarried individual, $10; married individual or head of household, $30; for dependent, $14; individuals over 65 or blind, $10.

ment requirement is in direct conflict with *Yale & Towne*. Although Minnesota exemptions are in the form of direct tax credits, the reasons given by the Supreme Court for invalidating the flat rate discriminatory exemptions in *Yale & Towne* certainly seem applicable. Why no taxpayer has contested this provision is probably explained by the small sum involved.

Minnesota allows a nonresident no credit for income taxes paid to his state of residence. Provisions for withholding at the source were repealed in 1944.\textsuperscript{216} What remains is a requirement for filing information returns.\textsuperscript{217}

**CALIFORNIA**

California imposes a personal income tax on the taxable income of nonresidents from sources within the state.\textsuperscript{218} A nonresident is every person other than a resident,\textsuperscript{219} and a resident includes (a) every individual who is in the state for other than a temporary or transitory purpose,\textsuperscript{220} and (b) every individual domiciled\textsuperscript{221} in the state who is outside the state for a temporary or transitory purpose.\textsuperscript{222} The result is that

216. Minn. Laws 1945, ch. 604.
218. Cal. Rev. & Tax. Code § 17041(a). The schedule of rates in this section provides for a scale from 1\% on the first $2,500 of taxable income to 5\% upon a taxable income of $15,000, plus 7\% of income in excess of that amount. Cal. Rev. & Tax. Code § 17043 provides for an alternate levy on adjusted gross income less than $5,000.
220. Regs. 17013-15(e), 1 CCH State Tax Rep. Cal. ¶ 15-063 provides that a temporary or transitory purpose includes passing through one state on the way to another, a brief rest or vacation, the completion of a particular transaction, the performance of a particular contract, and the fulfillment of a particular engagement which requires the taxpayer's presence for a short time. However, Cal. Rev. & Tax. Code § 17016 provides that every individual who spends more than nine months of the taxable year within California is presumed to be a resident. This presumption can be overcome by evidence that the taxpayer was in the state for a temporary or transitory purpose. In *Appeal of Woolley*, 1 Cal. Tax Cas. 12393 (S.B.E. July 19, 1951), a taxpayer who spent more than nine months of the taxable year in California was held to be a nonresident when he lived in a hotel on a weekly basis and maintained a permanent place of abode without the state.
221. Regs. 17013-15(c), 1 CCH State Tax Rep. Cal. ¶ 15-071 defines domicile in accordance with the general rule, i.e., concurrence of the fact of residence and the intent to remain at that residence indefinitely.
California taxes some nondomiciliaries as residents and some domiciliaries as nonresidents.\textsuperscript{223} In the latter situation, California, like Delaware and New York,\textsuperscript{224} has not extended its taxing jurisdiction to the constitutional limit.

The gross income of a nonresident taxpayer includes only the gross income from sources within the state.\textsuperscript{225} Income from California sources include (1) income from real or tangible personal property located in the state,\textsuperscript{226} (2) income from a business, trade, or profession carried on within the state,\textsuperscript{227} (3) compensation for personal services performed within the state,\textsuperscript{228} (4) income from stocks, bonds, notes, bank deposits, and other intangible personal property having a business or taxable situs within the state,\textsuperscript{229} and (5) rentals or royalties from the use, among others, of patents and copyrights having a business or taxable situs within the state.\textsuperscript{230}

There are no substantive statutory provisions for the allocation or apportionment of nonresident income, but the Franchise Tax Board has promulgated rules for the apportionment of such income in the regulations defining income from sources within the state.\textsuperscript{231} These rules provide for apportionment of income on substantially the same basis as those of New York.\textsuperscript{232} There are very few cases dealing with allocation of business income because most noncorporate income is from property and personal services. Where the problem of allocation of business income does arise, it may be solved by separate accounting or by the allocation of sales to the office at which they were consummated.\textsuperscript{233}

Deductions are allowed a nonresident taxpayer only to the extent that they are connected with the taxable income arising from sources within the state. Proper apportionment and allocation of deductions with respect to sources of income within and without the state is for the most part determined by regulations prescribed by the Franchise Tax Board.\textsuperscript{234}

\textsuperscript{224} Compare the restrictions on taxing nonresident domiciliaries in New York, text accompanying note 20 supra, and Delaware, note 130 supra, with the absence of such limitations in the other states studied, particularly at notes 142, 189, and 198, supra.
\textsuperscript{225} Cal. Rev. & Tax. Code § 17951.
\textsuperscript{226} Regs. 17211-14(c), 2 CCH State Tax Rep. Cal. § 17-416.
\textsuperscript{227} Regs. 17211-14(d), 2 CCH State Tax Rep. Cal. § 17-418.
\textsuperscript{228} Regs. 17211-14(e), 2 CCH State Tax Rep. Cal. § 17-420.
\textsuperscript{229} Regs. 17211-14(f), 2 CCH State Tax Rep. Cal. § 17-422.
\textsuperscript{230} Ibid.
\textsuperscript{231} Regs. 17211-14(a)-(f), 2 CCH State Tax Rep. Cal. § 17-412-17-422.
\textsuperscript{232} For income from personal service, see note 38 supra. For business income, see note 41 supra.
\textsuperscript{234} Cal. Rev. & Tax. Code § 17301.
However, the tax law itself contains three specific provisions: (1) taxes or licenses paid or secured to the state or its political subdivisions are deductible by a nonresident even though not connected with California sources,\(^{235}\) (2) contributions and gifts are deductible by a nonresident only if made to California organizations, to the state or to any political subdivisions thereof for exclusively public purposes, or to the Vocational Rehabilitation Fund,\(^{236}\) and (3) alimony or separate maintenance payments, deductible by a resident, are not deductible by a nonresident husband.\(^{237}\)

In computing net income from a business, trade, or profession carried on within the state, a nonresident is entitled to the same deductions as a resident:\(^{238}\) (a) all ordinary and necessary business expenses, (b) interest on obligations incurred to finance or carry on a business, (c) taxes or licenses imposed for the privilege of engaging in business, or imposed on property used in business, (d) debts which become worthless or are charged off during the taxable year and losses arising out of the conduct of the business, and (e) depreciation and depletion sustained with respect to property used in business.

A nonresident may also deduct interest on the purchase price of any property located within the state and theft and casualty losses of property located within the state.\(^{239}\) Losses from intangible property are deductible only if the property has acquired a business or taxable situs in California.\(^{239}\)

A nonresident is allowed a credit for taxes paid to his state of residence on income also taxed in California.\(^{240}\) The credit is based on reciprocity and it only comes into play if the other state does not allow its residents a deduction for net income taxes paid to California.

---


\(^{236}\) Cal. Rev. & Tax. Code § 17303.


\(^{238}\) The deductions are enumerated in Cal. Rev. & Tax. Code § 17202. See Regs. 17381-82(1)(a)-(e), 2 CCH State Tax Rep. Cal. ¶ 17-437. If the nonresident conducts a business both within and without the state, and reports gross income from the entire business in accordance with Regs. 17211-14(d), 2 CCH State Tax Rep. Cal. ¶ 17-418, all deductions relevant in determining net income from a trade or business may be taken as if the business were conducted by a resident. Regs. 17381-82(2), 2 CCH State Tax Rep. Cal. ¶ 17-437.


\(^{240}\) Regs. 17381-82(4), 2 CCH State Tax Rep. Cal. ¶ 17-437. Intangible personal property has a business situs in the state if it is employed as capital in the state, or possession and control of the property has been localized in connection with a business, trade, or profession in the state, so that its substantial use and value attach to and become an asset thereof. Regs. 17211-14(f)(3), 2 CCH State Tax Rep. Cal. ¶ 17-422 (1969).

There are no provisions for a general withholding of taxes at the source.\textsuperscript{242} However, the regulations do require withholding of taxes when payments are made to a nonresident in excess of his personal deductions.\textsuperscript{243}

CONCLUSION

The constitutional issues involving the taxation of nonresident income were settled by the Supreme Court in \textit{Shaffer v. Carter} and \textit{Travis v. Yale & Towne Mfg. Co}. From these cases,\textsuperscript{244} four propositions emerge: (1) a state has jurisdiction in a due process sense to tax a nonresident on net income derived from sources within the taxing state; (2) a state may limit the deductions of a nonresident to those related to the production of taxable income; (3) a state must afford a nonresident the same flat rate exemptions as a resident; and (4) a state may adopt a system of withholding at the source for only nonresidents.

Within the constitutional framework announced by these two cases, the legislature of any state has great latitude in which to work. To bring the legislative problems into perspective, assume that state X has decided to adopt a personal income tax. It is proposed that part of the new tax law include provisions dealing with nonresident income. If the X Committee on Ways and Means were to study the tax structures of the eight states discussed herein, it would find that there are six common problems which must be considered.

First, the term “nonresident” must be defined. The relevant sections in the eight statutes begin with a short statement that a nonresident is every natural person other than a resident. It is followed by a more comprehensive definition of “resident” which varies from one state to another. A resident can be one or more of the following persons: (1) a domiciliary, the term “domicile” retaining its common law meaning; (2) a nondomiciliary who maintains a permanent place of abode within the state, and/or who spends in the aggregate more than a specified number of days within the state; and (3) a nondomiciliary who is in the state for other than a temporary or transitory purpose, the phrase “temporary or transitory purpose” being defined to include vacationing.

\textsuperscript{242} Cal. Rev. & Tax. Code § 18805 authorizes the Franchise Tax Board to prescribe regulations for withholding at the source.

\textsuperscript{243} Regs. 18805-10(a), 2 CCH State Tax Rep. Cal. § 18-155. The amount to be withheld is prescribed by Regs. 18805-10(c), 2 CCH State Tax Rep. Cal. § 18-162. Cal. Rev. & Tax. Code § 18401 requires nonresidents to file a return even though all or a part of the tax has been withheld at the source.

\textsuperscript{244} The opinion in \textit{Goodwin v. State Tax Comm'n}, 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dep't 1955), aff'd mem., 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203, appeal dismissed, 352 U.S. 805 (1956), indicates that the principles announced in the above two cases are firmly entrenched.
and the completion of a particular transaction. Every state uses domicile as the basic test for residence. The extent to which the other two tests are used, including any limitations thereon, depends upon how wide a net the legislature has spread to catch nondomiciliary revenue.

Second, the base of the tax must be considered. What income-producing activities of nonresidents shall the tax reach? In each of the states examined, with the exception of Wisconsin, which has its own peculiar provisions, a tax has been imposed on income from (1) personal services performed within the state, and (2) a business, trade, profession, or occupation carried on within the state. Minor variations exist in the extent to which the tax reaches income from intangible property and casual transactions within the state.

Third, allowance of deductions must be considered. In six of the eight states, deductions are allowed to the extent that they are related to the production of taxable income in the taxing jurisdiction. Thus, nonbusiness expenses are not deductible by nonresidents on any basis. Only Iowa and Minnesota provide for an apportionment of personal expenses, and, in the latter case, it is on a limited basis. No state allows nonresidents the same deductions as residents.

Fourth, an allocation of income is necessary where the taxpayer either performs services or carries on a business within and without the taxing state. With the exception of Wisconsin, which does not tax nonresident income derived from personal services, apportionment is made on the basis of the number of working days spent or the volume of sales made within the taxing state. Where the taxpayer is engaged in interstate business, apportionment is made on the basis of separate accounting where feasible. In most other cases, an arithmetic average of three factors is employed. The taxpayer may also petition the Commissioner for permission to use any other method. All that is required is that the allocation be fair.

Fifth, the legislature must consider whether a nonresident should be allowed a credit for taxes paid on the same income to his state of residence. Massachusetts, Wisconsin and Minnesota do not allow such a credit, but the five states which do, base it on reciprocity. As in other areas where jurisdiction to tax, if exercised to its constitutional limits, may produce double taxation, accommodation has been sought through reciprocal legislation. But if the nonresident’s home state does not have a personal income tax, a reciprocal tax credit will not alleviate his tax burden.

Finally, attention must be given to enforcement of the tax. Minnesota and Wisconsin do not provide for withholding at the source. Six states do. The advantages of a withholding system have been apparent since fed-
eral withholding was adopted. It not only assures a regular flow of revenue during the tax year, but it also makes tax evasion more difficult. Against these advantages must be weighed the cost of instituting and administering such a system, but the experience with federal withholding should offset these latter considerations.

A brief recapitulation of these six problems serves to emphasize that the constitutional issues in the taxation of nonresident income are not the live ones. The solution of current problems rests entirely with the legislature.