

JUNE 6, 1962

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1962—No. 1

DEAR MR. KERVICK:

You have requested our opinion with respect to certain questions which have arisen in connection with "The Emergency Transportation Tax Act," Chapter 32, Laws of 1961. These questions have arisen as a result of the enactment of Chapter 70, Laws of 1962 and as the result of the recent accord between the State of New Jersey and the State of New York concerning the application of income tax laws of both states. Specifically, you have asked whether New Jersey residents earning income in or derived from sources within the State of New York are subject to the Personal Income Tax Law of New York; if so, whether such New Jersey residents are required to file returns and pay taxes to the State of New Jersey under The Emergency Transportation Tax Act. The opinion of the Attorney General is required under section 6(b) of L. 1962, c. 70 as the basis for relevant regulations which may be enacted by the Division of Taxation.

The New York Personal Income Tax Law imposes a tax upon the "taxable income" of "a resident individual" with respect to income earned anywhere (McKinney's New York Tax Law, §§ 611 through 616). A tax is also imposed by this law upon the "taxable income" of a "nonresident individual" with respect to income "derived from or connected with New York sources" (McKinney's New York Tax Law, §§ 631, 632). This latter provision by its terms is applicable to a resident of New Jersey earning income within the State of New York.

These provisions of the New York law are unquestionably a valid exercise of that State's taxing powers. The plenary power of a state to levy an income tax upon its own residents is undoubted. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S. Ct. 556 (1932); *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S. Ct. 466 (1937); *Opinion to the Governor*, 170 A. 2d 908 (R.I. Sup. Ct. 1961).

It has also been long recognized that a state has the power to tax nonresidents upon their income derived from property or activities within the taxing state. In *Shaffer v. Carter*, 252 U.S. 37, 50, 51, 40 Sup. Ct. 221, 224, 225 (1920), the United States Supreme Court confirmed the power of a state to impose a tax upon incomes of nonresidents earned from sources within the state:

"In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. * * * 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. * * *”

In *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), the United States Supreme Court considered specifically the question of the validity of the New York State income tax as imposed upon incomes of nonresidents. While holding that the New York Income Tax Law (Laws of New York, 1919, c. 627) discriminated against nonresidents in that it denied to nonresidents a personal exemption granted to residents, the Court recognized the essential validity of the income tax upon nonresidents. It stated:

“That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled * * *.” 252 U.S. at p. 75, 40 S. Ct. at p. 230.

An issue involving the question of discrimination between residents and nonresidents subject to the New York Personal Income Tax Law was considered in *Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S. 2d 172 (App. Div. 1955), *aff'd*, 150 N.Y.S. 2d 203, 133 N.E. 2d 711 (Ct. of App. 1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805, 77 S. Ct. 47 (1956). Specifically involved was a New Jersey resident working in New York. The New York Court affirmed the principles enunciated in the *Travis* and *Shaffer* cases. The validity and scope of the New York income tax as applied to New Jersey residents was affirmed recently in *Tremble v. Bragalini*, 15 App. Div. 2d 208, 222 N.Y.S. 2d 107 (App. Div. 1961).

It is clear, therefore, that without regard to The Emergency Transportation Tax Act of New Jersey, the explicit terms of the New York Personal Income Tax Law and pertinent court decisions do subject New Jersey residents earning income in the State of New York to the New York State income tax.

The tax liability of New Jersey residents to the State of New York was affected significantly, however, by the enactment of The Emergency Transportation Tax Act of the State of New Jersey on May 29, 1961. This law imposed a tax upon every resident of New Jersey, who was not a resident of “another critical area state,” based upon income derived from sources “within a critical area state” other than New Jersey. L. 1961, c. 32, § 2(a). A similar tax was imposed upon and with respect to the entire income derived from sources within New Jersey by persons who were not residents of this State and who were residents of “another critical area state.” L. 1961, c. 32, § 2(b). The Act defined “Critical area State” to mean 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, as of January 1 of any year, a critical transportation problem in respect to the transporta-

tion of persons and property interstate." L. 1961, c. 32, § 5(a). The Act contained a legislative finding as to when "a critical transportation problem" may arise in connection with interstate transportation between New Jersey and bordering states (L. 1961, c. 32, § 5(b)) and further provided that the State Highway Commissioner shall certify to the State Treasurer his findings with respect to the existence of such a "critical transportation problem" and "the identity of any states" which constitute such a "critical area state." L. 1961, c. 32, § 5(c). Since the inception of The Emergency Transportation Act, the State Highway Commissioner has, in accordance with its terms and pursuant to the standards set forth therein, certified that the State of New York is a "critical area state," thus bringing New York residents working in New Jersey and New Jersey residents working in New York within the ambit of the Act.

When the Emergency Transportation Act was enacted, the New York Personal Income Tax Law then afforded nonresidents a credit against taxes payable to the State of New York based upon any income tax imposed by another state of which the taxpayer was a resident. This credit was not allowed unless the state of which the taxpayer was a resident either granted a substantially similar credit to residents of New York or imposed an income tax on its own residents with respect to income earned in New York and exempted from taxation the income of New York residents. (McKinney's New York Tax Law, § 640(a), (c)). Under Section 16 of The Emergency Transportation Tax Act, as amended by L. 1961, c. 129, § 9, nonresidents of New Jersey were accorded a credit substantially similar to that provided by Section 640 of the New York Personal Income Tax Law. Thus, New Jersey residents earning income in New York and otherwise subject to the New York income tax could, under the New York law, claim the credit against the New York income tax based upon the tax imposed by New Jersey under The Emergency Transportation Tax Act.

In addition, The Emergency Transportation Tax Act provided that every taxpayer subject to tax "in some other jurisdiction" for income "derived from sources within such other jurisdiction," who was taxable under The Emergency Transportation Tax Act and who had in such other jurisdiction been subject to deduction and withholding for the purpose of crediting such amounts to the payment of the tax of such other jurisdiction, could satisfy his obligation to pay the New Jersey tax by executing an assignment to the State of New Jersey of his claim for refund of money so paid, deducted or withheld on account of the taxes of such other state. L. 1961, c. 32, § 19.

Thus, by the interaction of Sections 16 and 19 of the New Jersey Emergency Transportation Tax and Section 640 of the New York Personal Income Tax, a New Jersey resident, otherwise taxable by the State of New York on income earned in New York, would be entitled to make a claim for refund because of the credit against his New York income taxes attributable to his New Jersey tax liability; and such a New Jersey resident could satisfy his tax liability to New Jersey by assigning to New Jersey this claim for a refund of moneys paid, deducted or withheld by the State of New York on account of the New York personal income tax.

This result was changed, however, when on January 15, 1962, the New York State Legislature enacted Chapter 2, 1962 Laws of New York. This statute repealed Section 640 of the New York Personal Income Tax Law. By this repeal of Section 640, a New Jersey resident working in New York could no longer claim a refund of any taxes paid, deducted or withheld by the State of New York based upon a credit for income taxes paid to the State of New Jersey. Since the credit was elim-

inated and no refund could be claimed, Section 19 of The Emergency Transportation Tax Act, providing for an assignment of such a refund claim to the State of New Jersey, became nugatory. The repeal of Section 640 still obtains. Thus, at the present time, New Jersey residents earning their incomes in the State of New York continue to be subject to the New York Personal Income Tax Law. Since such residents are no longer entitled to any offsetting credits attributable to the New Jersey income tax, they must file their New York tax returns and pay in full their New York income taxes.

The question remains whether New Jersey residents otherwise liable for the New York income tax are subject to The Emergency Transportation Tax Act of New Jersey. Recent executive action taken by both New York and New Jersey and the enactment of Chapter 70 of the Laws of 1962 by the New Jersey State Legislature lead to the conclusion that such New Jersey residents are not required to file returns or pay taxes to New Jersey under The Emergency Transportation Tax Act.

On May 6, 1962, the State of New York and the State of New Jersey, by their respective Governors, issued publicly the following executive statement:

"Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.

"Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.

"Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

"In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

"The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

"The Governors stated that they are taking this action in the interest of promoting inter-state cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the

program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will."

Thus, the State of New York will allow its residents earning incomes in New Jersey a credit against their New York personal income taxes based upon the taxes paid by such residents to the State of New Jersey under The Emergency Transportation Tax Act. This executive decision gives recognition to Section 2(b) of The Emergency Transportation Act imposing a tax upon persons not residents of the State of New Jersey, but residents of "another critical area state" whose incomes are derived from sources within the State of New Jersey. The decision, likewise, recognizes Section 620 of the Personal Income Tax Law of New York, as recently amended by Section 2, Chapter 2, 1962 Laws of New York, allowing to residents of New York a credit against taxes otherwise due "for any income tax imposed for the taxable year by another state * * * upon income both derived therefrom and subject to tax."

Another problem which was resolved concerned the validity of the repeal of Section 640 insofar as it was intended to apply retroactively. In the enactment of Chapter 2, 1962 Laws of New York, the New York State Legislature made the repeal of Section 640 and the elimination of the tax credit to which New Jersey residents would have been entitled expressly retroactive to cover all taxable years from and after January 1, 1961. A question arose as to the validity of the retroactive application of this New York law to cover the taxable year commencing on or after January 1, 1961 since the statutory elimination of the credit was enacted in 1962. Reflecting the executive accord between the states, the State of New Jersey determined not to contest the validity of New York's repeal of Section 640 with respect to its retroactive features.

Following this executive action, the New Jersey State Legislature, on June 5, 1962, enacted Chapter 70 of the Laws of 1962, which is now effective and which was made expressly retroactive to all taxable years including taxable years of less than 12 months beginning on or after January 1, 1961. This statute relieves New Jersey residents paying income taxes to the State of New York from any tax liability under The Emergency Transportation Tax Act. The statute accomplishes this by amending Section 16 of The Emergency Transportation Tax Act to provide that a New Jersey resident shall be allowed a credit against the tax otherwise due under the New Jersey law for any income tax imposed for the taxable year by another "critical area state" upon income earned within the "critical area state" which is subject to the New Jersey tax. L. 1962, c. 70, § 4.

At this juncture it is pertinent to observe that Section 620 of the New York Personal Income Tax Law and Section 16(B) of The Emergency Transportation Tax Act, as amended, given specific effect and implemented by the executive accord between the two states, recognize the right of resident taxpayers of each state respectively to claim income taxes paid to the state where income is earned as a credit against the taxes which would otherwise be due the state of residence. The granting of such a credit against state income taxes has been upheld. *Miller v. McColgan*, 17 Cal. 2d 432, 110 P. 2d, 419, 134 A.L.R. 1424 (Sup. Ct. 1941); see also: *Burnham v. Franchise Tax Board*, 172 Cal. App. 2d 438, 341 P. 2d 833 (Dist. Ct. of App. 1959); *Keves v. Chambers*, 209 Ore. 640, 307 P. 2d 498 (Sup. Ct. 1957); *Cook v. Walters Dry Goods Co.*, 212 Ark. 485, 206 S.W. 2d 742 (Sup. Ct. 1947).

L. 1962, c. 70 further provides relief by amending Section 19 of The Emergency Transportation Tax Act. This section had required the assignment by New Jersey residents to the State of New Jersey of their claims for refunds of tax moneys paid to the State of New York. As amended, Section 19 still provides that New Jersey residents may satisfy their obligations to pay the New Jersey tax by assigning and transferring to the State of New Jersey their claims for refunds of tax moneys paid to and held by another taxing state. L. 1962, c. 70, § 6. It is now provided, however, that if any residents or class of residents of the State of New Jersey, who are taxable under The Emergency Transportation Tax Act, are liable for a tax upon the same income by "another critical area state" and are thereby entitled to the credit allowed by Section 16(B) of the Act against the tax otherwise due, and if the credit would be substantially sufficient in amount to offset such taxes, such New Jersey residents may be relieved from filing any returns under The Emergency Transportation Tax Act. Specific authorization to excuse the filing of returns shall be made by regulation of the Division of Taxation based upon an opinion of the Attorney General of this State indicating the residents or class of residents who might be relieved from the filing requirements of The Emergency Transportation Tax Act. L. 1962, c. 70, § 6(b).

Accordingly, we advise you that New Jersey residents earning their income within the State of New York, at the present time, are subject to the New York Personal Income Tax Law and are not entitled to any credit or offset against that tax by virtue of any tax liability under New Jersey law; that since such New Jersey residents are liable for and must pay the tax imposed by the State of New York under its Personal Income Tax Law, which tax is substantially similar in amount to that of New Jersey, such New Jersey residents are entitled to credit their New York income taxes against their tax liability to the State of New Jersey under The Emergency Transportation Tax Act. Therefore, by an appropriate regulation promulgated by the Division of Taxation, such New Jersey residents who actually pay the income taxes imposed by the State of New York may be relieved from filing any tax returns with the State of New Jersey.

Very truly yours,

ARTHUR J. SILLS
Attorney General

By: ALAN B. HANDLER
Deputy Attorney General

AUGUST 23, 1962

HONORABLE FREDERICK M. RAUBINGER
Commissioner, Department of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1962—No. 2

DEAR COMMISSIONER RAUBINGER:

You have asked whether local boards of education are empowered by statute to enter into contracts with an educational television station to receive programs