

TAX APPEAL BOARD FOR THE STATE OF DELAWARE

DOROTHY A. FLYNN,)	
)	
Petitioner,)	
)	
v.)	Dkt. No. 1504
)	
DIRECTOR OF REVENUE)	
)	
Respondent.)	

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R Director, Esq., Vice-Chairman, and Regina Dudzic, Cynthia L. Hughes and Joan M. Winters, CPA, Members

Richard M. Zimny, CPA, for Petitioner.

John S. McDaniel, Esq., Deputy Attorney General for Respondent.

DECISION AND ORDER

The issue before the Board is whether the respondent Director of Revenue properly denied a claim for refund filed by petitioner Dorothy A. Flynn. For the reasons set forth below, we find that the Director of Revenue properly denied Ms. Flynn’s requested refund.

In 2009, Ms. Flynn was a Pennsylvania resident employed by Bank of America. Ms. Flynn was a Senior Vice President with the bank and her regular place of business in 2009 was located in Wilmington, Delaware. The bank required Ms. Flynn to work from her Wilmington office, although occasionally it would permit Ms. Flynn to work from home to attend to the needs of her children (e.g., illness, school holidays, etc.). The bank did not require Ms. Flynn to work from home, it just permitted her to do so. Ms. Flynn states that she worked from her Pennsylvania home on 23 days in 2009. She worked from her Wilmington office on all other work days in 2009. Ms. Flynn contends that she should not have to pay Delaware income tax on

the income she earned on the 23 days she worked from her Pennsylvania residence and that she is entitled to a refund of all Delaware income taxes paid on such income. The Director of Revenue disagrees, seeks to tax the income Ms. Flynn earned during those 23 days, and asks this Board to deny Ms. Flynn's requested refund.

In this context, determining how much tax a non-resident owes Delaware involves two basic steps. First, non-residents of Delaware determine the amount of income tax they owe Delaware as if they were residents of the state. 30 *Del. C.* § 1121. Second, so that Delaware taxes only that portion of the non-resident's income that was earned in Delaware, the tax liability determined in the first step is multiplied by a fraction, the numerator of which is the taxpayer's "modified Delaware source income" and the denominator of which is the taxpayer's "Delaware adjusted gross income." *Id.* "Modified Delaware source income" is that part of the taxpayer's federal adjusted gross income (with certain modifications not relevant to these proceedings) that the individual derives from sources within Delaware. 30 *Del. C.* § 1122.

Section 1124 of Title 30 addresses whether a non-resident's income is sourced from Delaware. In pertinent part, it provides:

Income and deductions having source within this State. -- Items of *income*, gain, loss and deduction *derived from*, or connected with, *sources within this State are those items attributable to*:

- (1) *Compensation*, other than pensions, as an employee in the conduct of the business of an employer, *for personal services*:
 - a. Rendered in this State, or
 - b. *Attributable to employment in this State and not required to be performed elsewhere*

30 *Del. C.* § 1124(b) (emphasis added). Schedule W to the Delaware Individual Non-Resident Income Tax Return explains how the provisions of Section 1124(b) are applied, and provides:

If income of non-resident taxpayers derived from Delaware sourced employment includes income earned while working outside of the State of Delaware, an allowance will be permitted for those days worked outside of the State. The allowance will be equivalent to the ratio of days worked outside of the State versus the total number of Delaware sourced employment working days. Any allowance claimed must be based on necessity of work outside the State of Delaware in performance of duties for the employer, **as opposed to solely for the convenience of the employee.** *Working from an office out of your home does not satisfy the requirements of "necessity" of duties for your employer and is considered for the convenience of the employee unless working from home is a requirement of employment with your employer.*

Schedule W (bold in original, italics added).

Ms. Flynn filed a Delaware Individual Non-Resident Income Tax Return for 2009 (the "Return"). Ms. Flynn's Return showed an overpayment of Delaware Personal Income Tax of \$1,571, which Ms. Flynn requested be refunded to her. Of this amount, \$404 was attributable to Ms. Flynn's claim that she did not have to pay tax on income earned for the 23 days she worked at her residence. The Director of Revenue denied Ms. Flynn's claimed refund for the \$404, but allowed the remainder. Ms. Flynn then protested the denied refund and this appeal followed.

We have reviewed the relevant legal authority, the facts, and the parties' arguments in this case and find in favor of the Director of Revenue in this matter. The language of the applicable statutes, as explained in Schedule W, is clear on its face and mandates that, in order for income earned outside this state by a non-resident taxpayer principally employed in this state not to be included in Delaware sourced income, the taxpayer's employer must have required the taxpayer to work outside the state. Here, there was no requirement that Ms. Flynn work outside the state on the 23 days she worked at her Pennsylvania residence. Rather, she worked in Pennsylvania as a matter of convenience for herself so that she could attend to the needs of her

children. As a result, the income Ms. Flynn earned during those 23 days is subject to tax by Delaware and her claim for refund is denied.

SO ORDERED this 14th day of September, 2011.

Regina C. Dudley

Cynthia L. Hughes

R. R. M. M.

Paul C. S. B.

Jean M. Winter