



STATE OF ARKANSAS
**Department of Finance
and Administration**

REVENUE LEGAL COUNSEL

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February 20, 2020

[REDACTED]

Re: Legal Opinion No. 20200203

Dear [REDACTED]

This is in response to your email dated January 24, 2020 to Mr. Joel DiPippa, Senior Counsel with the Arkansas Department of Finance and Administration (“DFA”). Your email requested the issuance of a legal opinion regarding questions involving one of your clients. That request was forwarded to me for response.

Your email presented the following facts for consideration:

I am asking for an opinion as to whether or not a new client of mine has to pay Arkansas income tax. The taxpayer in question is a Systems Analyst (computer programmer) for the [REDACTED]. She worked on campus until the middle of 2017 when she moved to Washington state. She has continued working for the [REDACTED] and doing the exact same work but now works remotely from her home in Washington state.

Your letter does not disclose the identity of your client and therefore I cannot issue a binding legal opinion upon which your client may rely. Under Arkansas Gross Receipts Tax Rule 75(A), a seller may rely upon a legal opinion issued by the Department only if the opinion is specifically addressed to him or her, or is tendered by a customer of the seller to whom the legal opinion is addressed, and only to the extent that all material facts relative to the sale or transaction in question are contemplated by the legal opinion request and the legal opinion.

If your client wishes to obtain a binding legal opinion and is willing to disclose her identity, you or your client may submit to our office a written request for a supplemental opinion detailing your client’s identity as well as any additional facts helpful to a determination. Upon receipt of a qualifying request for a binding legal opinion, I would be happy to prepare a supplemental opinion upon which your client may rely.

LAW:

The authority of a state to impose income tax on its residents is well settled. The United States Supreme Court addressed this question stating:

That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S. Ct. 466 (1937).

Equally well settled is the authority of a state to impose its income tax on income derived by a nonresident from sources within the taxing state. The Court stated:

Just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may .. levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state or their occupations carried on therein. *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920).

However, a state's authority to levy an income tax on a nonresident is more limited than the levy of an income tax on residents. As seen above, jurisdiction to tax the income of a nonresident extends only to income from the nonresident's property owned within the taxing state and the nonresident's business, trade, or profession carried on in the taxing state. The income tax may only be imposed on the income of the nonresident derived from those sources.

The more difficult question arises in determining the source of the nonresident's income. In *State Taxation, Vol. II*, Professors Walter Hellerstein and Jerome Hellerstein explain:

It is important to recognize that the states' power to tax nonresidents' income is not limited by a narrow or technical view of 'source' that requires identification of specific in-state activities that produce particular streams of income that may be said to have their 'source' in the state.

Instead, a state's taxation authority is described as follows:

A State is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protections which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. *Wisconsin v. JC Penney Co.*, 311 U.S. 435, 61 S. Ct. 246 (1940).

This same concept was stated by the Court more simply by stating that the controlling question is whether the State has given anything for which it can ask a return. *See International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435, 64 S. Ct. 1060 (1944).

Arkansas Code Annotated § 26-51-202 imposes an income tax on the entire net income from all property owned and from every business, trade, or occupation carried on in this state by individuals. In accordance with this provision of state law, your question requires a determination whether your client's income results from a business, trade, or occupation carried on in this state. Additionally, it is necessary to determine whether the state of Arkansas has provided any opportunities, protections, or benefits for which it can ask a return, and which satisfy limits imposed by the United States Constitution.

RESPONSE:

For the reasons more fully explained below, your client is required to file Arkansas income tax returns and pay tax on that portion of their income from her Arkansas employment.

Your client's job activities are such that they can be performed from any location. The opportunities, protections, and benefits offered by the State of Arkansas; however, allow your client to earn income from her employment with the State of Arkansas. Arkansas provides an education system for its citizens that gives rise to the need for the [REDACTED] and for Systems Analysts to provide programming services for the [REDACTED]. Arkansas provides various protections and benefits for employees of Arkansas employers including job protections, employee rights, unemployment compensation, and other similar benefits. Your client benefits from the protections and opportunities afforded her as a public employee under the laws of the state of Arkansas.

The facts you presented reveal that the State of Arkansas has given something for which it can ask a return. *See Wisconsin v. JC Penney Co., supra*. Accordingly, the imposition of Arkansas income tax on your client complies with United States Constitutional requirements.

Arkansas Code Annotated § 26-51-202 levies the Arkansas income tax on the income received by a nonresident from an occupation carried on within Arkansas. Your client is carrying on an occupation in the state of Arkansas, albeit from an out-of-state location. Although your client performs her work duties in Washington state, those activities impact computer systems and computer users in Arkansas at the [REDACTED]. Those activities constitute the conduct of an occupation in this state.

DFA is mindful that *Cook v. Ayers et al.*, 214 Ark. 308, 215 S.W.2d 57 (1976) appears to limit Arkansas income tax levies on non-residents; however, that holding is distinguishable from the situation you have presented. In *Ayers*, the Secretary-Treasurer and the President of an ice company both challenged the assessment of Arkansas income tax on their compensation from their employment activities. The Secretary-Treasurer and the President were both residents of Tennessee who served as officers of a corporation organized in Delaware with its principal offices in Memphis, Tennessee. The corporation operated several ice manufacturing plants in Arkansas.

In the performance of her duties, the Secretary-Treasurer performed 100% of her work in Tennessee and received no other income other than her salary from the company. The President spent an average of six days each month in Arkansas supervising operations at various ice plants in this state and had income from his salary with the corporation as well as income from other business activities outside Arkansas.

The Arkansas Supreme Court held that, based on these facts, it was unclear that the tax levy was intended to extend to the taxpayer's income. The Court stated that the Secretary-Treasurer's duties were not sufficiently connected to Arkansas and the President's duties were incidental to his Tennessee employment. Accordingly, the Court held that the presence of doubt regarding whether the General Assembly intended the income tax to extend to the income of these individuals must be resolved against the tax levy.

The facts you presented are different than those presented in *Ayers*. Your client is employed by an Arkansas employer rather than an out of state employer that conducts a portion of its business in Arkansas. Your client's day to day work duties are directly tied to the maintenance and manipulation of computer systems in Arkansas at that employer's in-state location. Those job duties directly impact the ability of the [REDACTED] to carry out its mission and purpose.

Although your client is performing her job duties from a physical location in Washington, she is carrying on an occupation in Arkansas. Accordingly, the income she earns from the conduct of that occupation is subject to Arkansas income tax.

This opinion is based on the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion.

Sincerely,

John Theis
Revenue Legal Counsel