

Ruling 92-13

Vermont Department of Taxes

Date: December 7, 1992

Written By: Mary L. Bachman, Attorney for the Department

Approved By: Joyce H. Errecart, Commissioner of Taxes

You have requested a formal ruling that the wages paid to nonresidents employed as mechanics by [Company] in [Town], Vermont are exempt from the Vermont Individual Income Tax by operation of 49 U.S.C. § 11504. Because the conditions of the mechanics' employment do not meet all of the requirements of that section, the wages paid to them with respect to services performed within Vermont are not exempt from Vermont income tax. This ruling relies on your letter of October 27, 1992, and our conversation of November 9, 1992.

Facts: You represent [Clients] hereinafter referred to as "your clients". Your clients are all residents of New Hampshire. They are all employed by [Company] at the terminal in [Town], Vermont as mechanics. Your clients report to the [Town] terminal and perform the majority of their work there. All scheduled maintenance of the employer's trucks is performed at the [Town] terminal. As a requirement of their employment as mechanics, your clients are on call to travel to locations in Massachusetts, New Hampshire and sometimes New York to repair broken down vehicles. They perform work out-of-state on an "as needed" basis.

The main office of [Company] in [Town, State] has discontinued withholding Vermont Income Tax on your clients for 1992.

Ruling: The Vermont individual income tax is imposed upon the "Vermont income" earned or received in that taxable year by every individual, estate and trust. 32 V.S.A. § 5822. The Vermont income of a nonresident individual includes "wages, salaries, commissions or other income ... received with respect to services performed within this state". The wages received by your clients with respect to services performed in Vermont are subject to the Vermont income tax, unless exempt by federal law. You ask for a ruling that 49 U.S.C. § 11504 provides such an exemption. That statute states in relevant part: "(b)(1) No part of the compensation paid by a motor carrier providing transportation subject to the jurisdiction of the Commissioner under subchapter II of chapter 105 of this title or by a motor private carrier to an employee who performs regularly assigned duties in 2 or more States as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence. (2) In this subsection "employee" has the meaning given such term in section 204 of the Motor Carrier Safety Act of 1984 (49 APP.U.S.C. § 2503)."

49 U.S.C. § 2503(2) defines "employee" to include: "(A) an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle); (B) a mechanic; (C) a freight handler; and (D) any individual other than an employer; who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or any political subdivision of a State who is acting within the course of such employment."

Mechanics are employees for purposes of section 11504. However, for their wages to be exempt they must also meet the other requirements of section 11504: they must perform regularly assigned duties in two or more states as such an employee and they must perform those services with respect to a motor vehicle. The latter requirement is clearly met. Whether the former requirement is met depends upon whether the out of state work is regular.

The legislation does not define "regular". When a statute does not define a term, it must be given its ordinary and commonly accepted meaning, *Russello v. United States*, 78 L.Ed.2d 17, 104 S.Ct. 296 (1983); *Vincent v. Vermont State Retirement Board*, 148 Vt.531, 536 A.2d 419 (1987), and a dictionary may be referred to in determining the sense in which a word is employed. *Cortland-Clinton, Inc. v. New York State Department of Health*, 59 A.D.2d 228, 399 N.Y.S.2d 492 (1977). "Regular" is defined by the American Heritage Dictionary, Second College Edition, as meaning: "1. Customary, usual, or normal. 2. Orderly or symmetrical. 3. Conforming to set procedure, principle, or discipline. 4. Methodical; well-ordered. 5. Occurring at fixed intervals; periodic. 6. Constant; not varying..."

Bearing in mind that exemption statutes are to be construed strictly against the party claiming the benefit thereof, see *In re Middlebury College Sales and Use Tax*, 137 Vt. 28, 400 A.2d 965 (1979), the wages paid to your clients with respect to services performed in Vermont are not exempt from Vermont income tax by virtue of 49 U.S.C. § 11504 because your clients are not employees who perform regularly assigned duties in two or more states. Your clients work out of state in response to an unplanned occurrence, the breakdown of one of the company's trucks. Their out of state assignments do not occur at fixed intervals, but rather are dictated by happenstance. Although your clients may anticipate that over the course of the year they may be called upon to perform duties outside of Vermont, the timing of these assignments does not conform to a set schedule or procedure. It is possible that they will not work out of state at all. Since neither the dates nor the fact of such assignments is a certainty, it is apparent that such assignments are not methodical, well-ordered or occurring at fixed intervals. While such assignments may not be unusual or abnormal, they are contingent on an unscheduled event. Being "on call" and assigned "as needed" does not equate to performing "regularly assigned duties". Moreover, the contemplated beneficiaries of this legislation were drivers and pilots, the very nature of whose work involves movement in interstate commerce. See S. Rep. No. 91-1261, 91st Cong. 2nd Sess. (1970). There is no indication that Congress intended to extend this tax exemption to classes of employees whose work is performed basically in one place.

Since your clients are subject to Vermont income tax on their wages, their employer is obligated to withhold on such wages. 32 V.S.A. § 5841(a).

This ruling is issued solely to your firm and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.