STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DALE A. ADAMS** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2016, 2017 and 2018.	:	DETEMINATION DTA NO. 850026

Petitioner, Dale A. Adams, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2016, 2017 and 2018.

A formal hearing by videoconference was held before Kevin R. Law, Administrative Law Judge, on September 21, 2023, with all briefs to be submitted by February 9, 2024, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se at the hearing and by Pryor Cashman, LLP (Michael P. Dunworth, Esq., of counsel), on the briefs. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner's motion to admit additional evidence after the hearing record was closed should be granted.

II. Whether income from the vesting of restricted stock units should be sourced to New York using a grant to vesting allocation methodology.

III. Whether dividend income earned by a nonresident New York taxpayer from a

deferred compensation plan and reported on federal forms W-2, wage and tax statement, is subject to taxation.

FINDINGS OF FACT

1. On or about May 28, 2020, petitioner, Dale A. Adams, was selected for an audit by the Division of Taxation (Division) for the tax period January 1, 2016 through December 31, 2018 (audit period).

2. Petitioner had previously been audited by the Division for the tax years 2011 through 2015. During the previous audits, the Division determined that petitioner had changed his domicile from New York to Connecticut on November 1, 2013. In 2018, he moved to Nashville, Tennessee.

3. During the audit period, petitioner was employed by Omnicom Management, Inc. (Omnicom), and filed New York State nonresident income tax returns for each of those years reporting wage income, bonus income, dividend income and income from the vesting of restricted stock units from Omnicom. In addition to those sources of income, petitioner also had income from other sources not at issue herein.

4. During the audit, petitioner provided a breakdown of his W-2 income for each of the years under audit. As is relevant herein, the following income from Omnicom was reported on forms W-2 issued to petitioner during the years 2016, 2017 and 2018:

Year	Wages	Bonus	Restricted Stock Units	Dividends
2016	$900,000.00	$4,000,000.00	$2,187,568.00	$636,760.00
2017	$900,000.00	$2,000,000.00	$2,692,066.00	$626,230.00
2018	$900,000.00	$2,000,000.00	$1,750,031.00	$669,360.00

5. On his filed tax returns for the years in issue, petitioner allocated wages to New York based upon a New York wage allocation of days worked in New York to total days worked.

Petitioner allocated bonus income based upon the workday allocation in the year the bonus was paid.

6. During his employment with Omnicom, Omnicom issued to petitioner restricted stock units of its common stock in accordance with various iterations of restricted stock unit agreements and accompanying grant notices. Contained within the Division's audit file is a copy of Omnicom Group Inc., 2013 Incentive Award Plan Restricted Stock Unit Agreement (2013 RSU Agreement). In accordance with the 2013 RSU Agreement, and various grant notices, petitioner was granted restricted stock units by Omnicom. Each restricted stock unit entitled petitioner to one share of Omnicom common stock upon vesting. Pursuant to the grant notices, 20% of the restricted stock units vested on the first anniversary date of the respective grant notice, and 20% each year thereafter. Pursuant to the 2013 RSU Agreement, petitioner was not entitled to dividends or any of the rights or privileges of a stockholder of Omnicom stock until the RSUs were fully vested. If petitioner was no longer employed with Omnicom, petitioner's unvested restricted stock units were forfeited. However, if petitioner were to die, the unvested RSUs would automatically vest and become nonforfeitable. In the event that the petitioner were to become permanently disabled, the unvested RSUs would vest and become nonforfeitable on a pro rata basis of the amount of days that have lapsed in the period. Petitioner sourced his income from the vesting of restricted stock units based upon the workday allocation in the year that the restricted stock units vested.

7. Petitioner also received dividend income from his ownership of Omnicom common stock. Petitioner did not treat any of the dividend income from his ownership of Omnicom common stock as New York source income subject to tax.

8. Upon audit, petitioner provided calendars and schedules with supporting

documentation detailing his total working days during each year and his total days spent working in New York during each year. The parties have agreed that petitioner's New York wage allocation was 38.70%, 34.53% and 18.14%, during 2016, 2017 and 2018, respectively.

9. The Division's auditors determined that bonus income paid by Omnicom during the years in question to petitioner should have been sourced to New York based upon the workday allocation in the year prior to the year of receipt of the bonus. Division's auditors relied on their understanding that the bonus was paid based on the prior year's performance and approved in March of the following year. As support for its conclusion, the Division referenced a copy of the "Senior Management Incentive Plan of Omnicom Group, Inc.," which the Division felt confirmed its treatment of the bonus income.

10. The Division also made adjustments to the sourcing of petitioner's income from Omnicom's restricted stock units that vested in 2016, 2017 and 2018, using a date of grant to date of vesting allocation methodology, as set forth in the Division's regulations at 20 NYCRR 132.24.

11. The Division also asserted tax on dividend income reported on his forms W-2 on the basis that this was part of petitioner's compensation package and should be properly allocated to New York and subject to tax based upon the workday allocation in the year of receipt.

12. On January 28, 2021, the Division issued notice of deficiency, notice number L-052803051, asserting additional tax and interest against petitioner reflecting these adjustments. Penalties were not asserted.

13. Petitioner testified at the hearing in this matter. Petitioner explained that he was retired from Omnicom, but during the audit period he was the Chief Executive Officer of one of Omnicom's divisions, Diversified Agency Services. Petitioner indicated that he did not have an

employment contract with Omnicom nor was he a participant in the Senior Management Incentive Plan of Omnicom Group, Inc., which the Division's auditors had relied upon. Petitioner further added that the bonus payments received from Omnicom were 100% discretionary and not guaranteed.

14. Submitted into the hearing record as Exhibit 7 was Omnicom Group Inc., Omnicom Management Inc., Restricted Stock Unit Deferred Compensation Plan (RSU Deferred Comp Plan). Pursuant to the terms of the RSU Deferred Comp plan, a grantee of Omnicom restricted stock units could elect to defer receipt of his or her restricted stock units that would then be administered by the RSU Deferred Comp Plan. Petitioner testified that the dividends, as reported on his forms W-2 during the years in issue, were paid out of this plan and the restricted stock units from where the dividends had emanated were substantially vested. It was petitioner's position that this dividend income was not attributable to a business, trade or profession carried on in New York because the common stock that triggered these dividends had long since vested.

15. Petitioner submitted an unsworn letter, dated May 26, 2021, from Michael J. O'Brien, Omnicom's then Executive Vice President, General Counsel and Secretary, addressed to the Division referencing petitioner's audit. The letter stated that petitioner was not a participant in Omnicom's senior management incentive plan and further stated that the bonus income paid to petitioner by Omnicom was purely discretionary on the part of Omnicom. The letter also stated that petitioner did not have a contractually guaranteed bonus.

16. Petitioner presented the testimony of Louis Januzzi, Omnicom's current Senior Vice President and General Counsel who confirmed the statements made by Mr. O'Brien in the May 26, 2021 letter. Mr. Januzzi indicated that petitioner did not have an employment contract with

Omnicom nor were his bonuses contractually guaranteed. Mr. Januzzi also corroborated that the dividend income at issue stemmed from restricted stock that had vested.

17. At the conclusion of the hearing and prior to a briefing schedule being set, petitioner was afforded the opportunity to keep the hearing record open for the submission of additional evidence. Petitioner indicated that he did not wish to avail himself of that opportunity. After the briefing schedule was set, the parties were again told that once the hearing record was closed, no further documentary evidence would be considered in rendering a determination and were asked if either wished to submit anything further. Both parties indicated that they did not have any further exhibits. At that point, the hearing record was closed.

18. Following the hearing in this matter, petitioner retained Pryor Cashman, LLP, to represent him. Along with petitioner's brief in support, petitioner filed a motion to admit additional evidence. Accompanying the motion was the affirmation of attorney Michael Dunworth along with an affidavit of petitioner and three additional exhibits that petitioner sought to include as part of the record.

19. By letter dated December 11, 2023, the Division objected to the submission of additional evidence.

20. By letter dated December 13, 2023, the administrative law judge advised the parties that petitioner's motion to admit additional evidence would be addressed in the determination.

CONCLUSIONS OF LAW

A. The first issue to be addressed is whether to grant petitioner's motion to admit additional evidence into the hearing record after same had been closed. Accompanying petitioner's brief in support in this matter was a motion to admit additional evidence, along with petitioner's affidavit and three additional exhibits. Nearing the conclusion of the hearing,

petitioner was given multiple opportunities to keep the hearing record open to submit addition evidence. Both parties were cautioned that once the hearing record was closed, no additional evidence would be considered. Petitioner acknowledged that he understood and did not avail himself of this opportunity. In addressing analogous situations, the Tax Appeals Tribunal (Tribunal) has established a firm policy of not allowing the submission of evidence after the record is closed. Specifically, in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991), the Tribunal stated as follows:

> "In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (internal citations omitted)."

Based upon this articulated policy, petitioner's motion to admit additional evidence is denied. The additional evidence has not been considered in rendering the instant determination.

B. Turning to the merits, section 601 (e) (1) imposes tax on nonresident individuals from New York sources. The tax imposed upon the nonresident is equal to the tax imposed upon a New York resident for the full year, reduced by certain credits, and then multiplied by the New York source fraction (***see*** Tax Law § 601 [e] [2], [3]).[1] The tax is determined by applying the appropriate graduated rate in Tax Law § 601 (a) through (c) to the taxpayer's total income from all sources less any statutory deductions, exemptions or credits (***see*** Tax Law §§ 606; 611 [a]). The taxpayer's total income is derived from "New York adjusted gross income" (Tax Law § 611

[1] The New York source fraction, in turn, is equal to the individual's New York source income divided by the individual's New York adjusted gross income from all sources for the entire year (Tax Law § 601 [e] [3]). A nonresident individual's New York source income is defined by Tax Law § 631 (a) (1) and (2) and consists of the sum of the items of income, gain, loss and deduction entering into Federal adjusted gross income derived from or connected with New York.

[a]), which is determined by reference to the taxpayer's "federal adjusted gross income as defined in the laws of the United States for the taxable year . . ." (Tax Law § 612 [a]). In turn, the New York source fraction is equal to the individual's New York source income divided by the individual's New York adjusted gross income from all sources for the entire year (***see*** Tax Law § 601 [e] [3]). A nonresident individual's New York source income is defined by Tax Law § 631 (a) (1) and (2) as "the net amount of items of income, gain, loss, and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources[.]"

C. In this case, the Division conceded that the total amount of income designated as bonus income was properly allocated to New York by petitioner using his workday allocation in the year of receipt. Therefore, the only income amounts that remain in dispute are income from the vesting of restricted stock units and dividend payments reported on petitioner's federal form W-2 during the years in issue.

With respect to restricted stock units granted to nonresidents, Tax Law § 631 (g) provides as follows:

> "A nonresident taxpayer who has been granted statutory stock options, restricted stock, nonstatutory stock options or stock appreciation rights and who, during such grant period, performs services within New York for, or is employed within New York by, the corporation granting such option, stock or right, shall compute his or her New York source income as determined under rules and regulations prescribed by the commissioner."

D. The Division's regulations at 20 NYCRR 132.24 provide that a "nonresident individual has New York source income from compensation received from stock options, stock appreciation rights or restricted stock if at any time during the allocation period the nonresident individual performed services in New York State for the corporation granting such options[.]" "Allocation period" means:

> "in the case of restricted stock where an election under section 83(b) of the Internal Revenue Code is not made, the period of time from the date that the stock was received to the earliest of the date that the stock is substantially vested (transferable or not subject to substantial risk of forfeiture), the date that the individual's services terminate, or the date that the stock is sold, except that, with respect to the portion of the compensation related to the stock that is attributable to dividends paid on the stock, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year that such dividends were received" (20 NYCRR 132.24 [c] [3] [iii]).

The allocation period may span multiple years (***see*** 20 NYCRR 132.24 [c] [3]). Such stock option compensation is reportable to New York in the tax year that the income is included in federal adjusted gross income (***see*** 20 NYCRR 132.24 [a]).

E. Here, although restricted stock units are not specifically mentioned, restricted stock units clearly fall within the ambit of the regulation. Restricted stock units, like stock options, stock appreciation rights and restricted stock, are a form of equity-based compensation (***see Guiry v Goldman, Sachs and Co.***, 31 AD3d 70 [1st Dept 2006]). There is no clear distinction that justifies sourcing income from the vesting of restricted stock units differently than income from the vesting of restricted stock. Although petitioner advocates for use of the workday allocation in the year of receipt as a more equitable allocation method, the justification is lacking other than it would result in less tax due in his specific case. Accordingly, petitioner's arguments are rejected.

F. With respect to the dividend income, both petitioner and Omnicom's general counsel provided uncontroverted testimony that the stock that generated such dividends had vested at the time the dividends were issued. Both witnesses' testimony is deemed credible. There is nothing in the Division's audit file, nor did the Division provide any witness testimony or citations to the hearing record, to support the conclusion that this dividend income was earned as a result of a business, trade or profession carried on in New York. That being the case, this

income is clearly not taxable to a nonresident taxpayer (***see Matter of Pardee v State Tax Commn***., 89 AD2d 294 [3rd Dept 1982]). Therefore, the Division is directed to modify the notice of deficiency accordingly.

G. The petition of Dale A. Adams is granted in accordance with conclusion of law F and, in accordance with concessions of the Division (***see*** conclusion of law C), but is otherwise denied, and the notice of deficiency, dated January 28, 2021, as modified, is sustained.

DATED: Albany, New York
August 8, 2024

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE