

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], [REDACTED], (“Petitioner”), asks how to calculate the portion of withdrawals from his Individual Retirement Account (“IRA”) that is eligible to be subtracted from federal adjusted gross income (“FAGI”) in determining New York adjusted gross income (“NYAGI”) under Tax Law § 612(c)(3)(ii) where the IRA was funded solely and exclusively with Federal Thrift Savings Plan (“TSP”) funds contributed by the Federal government and Petitioner relating to Petitioner’s services as a federal employee.

We conclude that the distributions from Petitioner’s IRA that were funded with contributions from Petitioner’s TSP account qualify for the subtraction modification under Tax Law § 612(c)(3)(ii) to the extent that the distributions represent a return of the amount rolled over. Other IRA and retirement plan distributions to Petitioner that do not qualify for the exclusion under Tax Law § 612(c)(3)(ii) above may qualify for the \$20,000 subtraction modification under Tax Law § 612(c)(3-a) to the extent that the other IRA and retirement account distributions are included in Petitioner’s federal adjusted gross income (“FAGI”) and otherwise meet the requirements of Tax Law § 612(c)(3-a).

**Facts**

Petitioner was employed by the Navy and is a member of the Federal Employees’ Retirement Service (FERS). FERS is a 3-part retirement package available to federal employees under which the employees are eligible after retirement for a basic annuity, Social Security and distributions from a TSP. A TSP, established by 5 USC § 8437, is a retirement savings and investment plan and is treated for tax purposes as a trust under IRC § 401(a). As a defined contribution plan, the TSP offers the same types of savings and benefits to federal employees that many private corporations offer their employees under IRC § 401(k) plans. *See* 5 USC § 8440. The account may include contributions made by the account owner and the account owner’s federal employer and the earnings associated with those contributions, as well as funds transferred to the TSP account from an account owner’s nongovernmental retirement account and its associated earnings. *See* TSB-A-15(6)I. During Petitioner’s employment, contributions were made to Petitioner’s TSP account by Petitioner and

Petitioner's federal employer relating to his services with the Navy. No funds were transferred from another governmental or nongovernmental retirement account to the TSP. Petitioner has retired and has funded an IRA using the funds in his TSP account. In a future taxable year, when petitioner is a New York resident<sup>1</sup>, he plans on taking distributions from the IRA.

### **Analysis**

Tax Law § 612(c)(3)(ii) provides a subtraction modification for “pensions to officers and employees of the United States of America...or any agency or instrumentality of any one of the foregoing, to the extent includible in gross income for federal income tax purposes.” The term “pension” is not defined in Article 22 of the Tax Law. However, Tax Law § 607 provides that any term used in Article 22 shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Payments paid from a qualified pension plan within the meaning of IRC § 401 would constitute a pension within the meaning of Tax Law §§ 612(c)(3) and 612(c)(3-a). See TSB-A-94(1)(I) and TSB-A-01(1)(I).

Tax Regulation 20 NYCRR 112.3(c)(1)(i)(b) provides that pensions and other retirement benefits (including but not limited to annuities, interest, and lump sum payments) paid to an employee of the United States, including its agencies, that are included in FAGI, relate to services performed as a public employee, and all or a portion of which are actually contributed by the Federal government, shall be subtracted from FAGI in determining the NYAGI of a resident individual. Accordingly, any distributions to Petitioner from his TSP account relating to his employment at the Navy that were funded by contributions from Petitioner and the Navy are attributable to Petitioner's employment with the Federal government and will qualify for the subtraction modification under Tax Law § 612(c)(3)(ii) to the extent the distributions are included in Petitioner's FAGI.

In this case, Petitioner funded an IRA exclusively with funds rolled over from his TSP account. When Petitioner receives distributions from the rollover IRA, only the portion of the distribution that represents the rollover contribution from the TSP will qualify for the subtraction modification under Tax Law § 612(c)(3)(ii). See TSB-A-09(7)I; cf. *Matter of Kane*, Tax Appeals Tribunal, December 21, 2016. Therefore, if this portion of the distribution is included in Petitioner's FAGI when Petitioner computes his NYAGI, it will qualify for the income subtraction modification. However, distributions of any gain or income earned from the rollover IRA will not be considered to be attributable to Petitioner's

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<sup>1</sup> Petitioner presently resides in Maryland and plans on moving to New York in the future.

TSP, and will not qualify for the subtraction modification under Tax Law § 612(c)(3)(ii). *Id.* These latter distributions may be eligible for the \$20,000 subtraction modification provided by Tax Law § 612(c)(3-a) to the extent the other requirements of that provision are satisfied. *See* TSB-A-09(7)I; TSB-A-02(5)I.

One acceptable method of determining the portion of a distribution that is a return of the rollover contribution from the TSP and allowed to be subtracted from petitioner's FAGI in determining NYAGI is to multiply the amount of the distribution by a fraction. The numerator of the fraction is the TSP rollover contribution and the denominator of the fraction is the current value of the IRA before the distribution. The product is the amount that will qualify for the full subtraction modification under Tax Law § 612(c)(3)(ii). As discussed above, the portion of the distribution that does not qualify for the subtraction modification under Tax Law § 612(c)(3)(ii) may qualify for the \$20,000 income subtraction modification under Tax Law § 612(c)(3-a). Further, the portion of the distribution that is deemed to be a return of the TSP rollover contribution reduces the balance of the TSP rollover contribution in the IRA when Petitioner determines how to allocate any future distributions he receives. *See* TSB-A-10(6)I; TSB-A-15(3)I.

DATED: October 27, 2020

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.