New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (9) I
Income Tax
December 24, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I960506A

On May 6, 1996, a Petition for Advisory Opinion was received from Richard Hoffman, c/o Hoberman, Miller & Co., PC, 226 W. 26th Street, New York, New York 10001.

The issue raised by Petitioner, Richard Hoffman, is whether estate income, consisting of retirement benefits, that is distributed to nonresident beneficiaries of the estate is subject to tax under Article 22 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

The decedent was 73 years old and a Bronx County resident when she died. During her lifetime, she worked for a non-government company in New York State where she was able to accumulate various retirement benefits, with the estate as beneficiary. These retirement benefits amounted to $349,000 at the time of her death. Prior to her death, the decedent was receiving benefits from her pension and the Voluntary Employee Contribution Account. Prior to her death, $287,000 of the pension benefits was rolled over directly to an IRA account. After her death, in 1995, the $349,000 was distributed to the estate. The estate distributed these retirement benefits to the beneficiaries. All of the beneficiaries are nonresidents of New York State.

For federal income tax purposes, on form 1041, the estate's federal distributable net income included as "pension income" the $349,000 distribution to the beneficiaries. This amount was characterized for federal estate tax purposes on form 706 as follows:

Flexible Premium Annuity	$ 16,000
Voluntary Employee Contribution Account	20,000
Distribution from IRA ($287,000 of pension benefits received before death rolled into IRA)	313.000
Total Pension Income	$349,000

Section 601(e) of the Tax Law imposes a personal income tax for each taxable year on a nonresident individual's taxable income which is derived from sources in New York State. The tax is equal to the tax computed as if the individual were a resident, reduced by certain credits and multiplied by the New York source fraction, the numerator of which is the individual's New York source income and the denominator of which is the individual's New York adjusted gross income.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income that is derived from or connected with New York sources, including the individual's share of estate income, gain, loss and deduction, determined under section 634 of the Tax Law.

Section 634(a) of the Tax Law provides that the share of a nonresident beneficiary of any estate, under section 631(a), in estate income, gain, loss and deduction from New York sources is determined as follows:

> (1) Items of distributable net income from New York sources. There shall be determined the items of income, gain, loss and deduction, derived from or connected with New York sources, which enter into the definition of federal distributable net income of the estate ... for the taxable year ... Such determination of source shall be made in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual.
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> (2) Addition or subtraction of modifications. There shall be added or subtracted (as the case may be) the modifications described in section six hundred eighteen, to the extent relating to the items of income, gain, loss and deduction derived from or connected with New York sources as determined under paragraph one of this subsection. No modification shall be made under this subsection which has the effect of duplicating an item already reflected in the definition of federal distributable net income.
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> (3) Allocation among beneficiaries.
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> (A) The amounts determined under paragraphs one and two shall be allocated among the beneficiaries (and including, solely for the purpose of this allocation, among the estate ... and resident beneficiaries) in proportion to their respective shares of federal distributable net income.
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> (B) The amounts so allocated shall have the same character under this article as for federal income tax purposes ....

Section 631(b)(1)(B) of the Tax Law provides that items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York State.

Section 631(b)(2) of the Tax Law provides that income from intangible personal property, including annuities, dividends, interest and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in New York State.

Section 132.4(d) of the Personal Income Tax Regulations provides the following:

> **Pensions or other retirement benefits constituting an annuity. (1)** General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to [the individual's] former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State...
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> (2) Definition...
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> (v) In the case of a pension or other similar benefit paid to a nonresident beneficiary of a deceased employee:
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> (a) where the employee died after retirement, if the pension or other retirement benefit [the individual] was receiving constituted an annuity, payments to [the individual's] beneficiary ... will constitute an annuity ....

In this case, pursuant to section 132.4(d) of the Personal Income Tax Regulations, if the retirement benefits the decedent received from the item characterized as the "Voluntary Employee Contribution Account" constituted an annuity when received by the decedent, this item will constitute an annuity when received by a nonresident beneficiary of the decedent's estate. An item that constitutes an annuity is not taxable for personal income tax purposes and is not included in New York source income or New York adjusted gross income of a nonresident beneficiary.

However, if the benefits received by the decedent from the "Voluntary Employee Contribution Account" did not constitute an annuity when received by the decedent, the benefits would have been treated as compensation for personal services performed in New York State and would have been taxable for personal income tax purposes. Therefore, the amounts received by a nonresident beneficiary for these benefits that are included in the beneficiary's federal adjusted gross income are income derived from or connected with New York sources for purposes of section 631 of the Tax Law.

The decedent did not receive any retirement benefits from the item characterized as the "Flexible Premium Annuity" before her death. Therefore, the benefits from this account do not constitute an annuity pursuant to section 132.4(d) of the Personal Income Tax Regulations. Accordingly, the benefits from the Flexible Premium Annuity distributed to the estate do not constitute an annuity when received by a nonresident beneficiary of the decedent's estate. These benefits are treated as compensation for personal services performed in New York State and are taxable for personal income tax purposes. Therefore, the amounts received by a nonresident beneficiary for these benefits that are included in the beneficiary's federal adjusted gross income are income derived from or connected with New York sources for purposes of section 631 of the Tax Law.

The distributions from an individual's IRA while a nonresident of New York are included in the individual's federal adjusted gross income and are included in the individual's New York adjusted gross income as an item of income derived from or connected with New York sources to the extent that the individual's contributions to the IRA are attributable to services performed within New York State. (See, John E. Ormsby, Adv Op Comm T &F, July 14, 1994, TSB-A-94(10)I; Robert Vincent Smith, Adv Op St Tax Comm, March 7, 1986, TSB-A-86(3)I; and Richard W. Kaszubinski, Adv Op St Tax Commn, April 16, 1984, TSB-A-84(1)I.)

In this case, when the distribution from the decedent's IRA was distributed to the decedent's estate, as the beneficiary of the IRA, the distribution retained its character as an IRA distribution. Where the estate distributes this income to a beneficiary of the estate, the estate is treated as a conduit for federal income tax purposes. Therefore, the income that is taxable to the beneficiary (i.e. the IRA distribution) retains the same character that it had in the hands of the fiduciary. Pursuant to section 634(a)(3)(B) of the Tax Law, the income distributed to the beneficiary of the estate has the same character for New York State income tax purposes as for federal income tax purposes.

Accordingly, in this case, the item characterized as "Distribution from IRA" is attributable to services performed within New York State by the decedent and is taxable for personal income tax purposes. This income when received by a nonresident beneficiary of the decedent's estate that is included in the beneficiary's federal adjusted gross income is income derived from or connected with New York sources for purposes of section 631 of the Tax Law.

Pursuant to section 631(a) of the Tax Law, New York source income is the income derived from or connected with New York sources as modified by the modifications contained in section 612(b) and (c) of the Tax Law that relate to this income.

Section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Personal Income Tax Regulations provide for a modification reducing federal adjusted gross income for certain pension and annuity income. Section 112.3(c)(2) provides that:

> (i) Pension and annuity income not subject to the modification [for pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the federal government] and not in excess of $20,000, received by an individual may be subtracted in determining New York adjusted gross income providing [that certain] conditions are met ...
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> (ii) Distributions from an [IRA] ... will qualify for the pension and annuity income modification ...
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> (iv) (a) Where a beneficiary receives a payment which qualifies as a pension or annuity created by the decedent, such payment will come within the definition and meaning of 'pension and annuity' as defined in this paragraph. If the decedent was qualified to receive a pension or annuity and was 59 1/2 years of age or over at the time of such decedent's death, the beneficiary will be entitled to the same pension and annuity income modification that the decedent would

have been entitled to regardless of the age of the beneficiary.

(b) If the deceased has more than one beneficiary, the $20,000 pension and annuity income modification must be allocated among the beneficiaries in the same ratio as the distribution is shared so that the total pension and annuity income modification of all beneficiaries does not exceed $20,000 in the aggregate.

In this case, if the decedent's pension benefits qualified for the $20,000 pension and annuity income modification under section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Personal Income Tax Regulations, the decedent's estate, as the beneficiary receiving the pension benefits, would be allowed to make the modification. The modification is allowed in computing the estate's fiduciary adjustment under section 619 of the Tax Law. Each beneficiary's share of the fiduciary adjustment is then determined based upon their share of the federal distributable net income of the estate. Each beneficiary, in computing his or her New York State nonresident tax, would include his or her share of the fiduciary adjustment in computing New York adjusted gross income as if a resident (the denominator of the income percentage). In addition, the amount of the fiduciary adjustment that is attributable to items derived from New York sources is included in computing New York source income (the numerator of the income percentage).

If only a portion of the items to which the fiduciary adjustment relates is derived from New York sources, only that portion of the fiduciary adjustment would be included in each beneficiary's New York source income. For example, if in this case all three pension distributions qualify for the pension and annuity exclusion, but only the IRA distribution is derived from New York sources, then only 89.7 percent (313,100/349,000) of each beneficiary's share of the fiduciary adjustment for the pension exclusion would be includible in computing New York source income.

In conclusion, pursuant to section 601(e) of the Tax Law, in this case each nonresident beneficiary has New York source income for tax year 1995 and is subject to personal income tax under Article 22 of the Tax Law. Pursuant to section 631(a) of the Tax Law, the New York source income of each nonresident beneficiary includes the beneficiary's share of the estate income, gain, loss and deduction, as determined under section 634 of the Tax Law.

For purposes of section 634(a)(1) of the Tax Law, the items of income, gain, loss and deduction included in federal distributable net income of the estate for taxable year 1995, that are derived from or connected with New York sources include the "pension income" distribution of $349,000 except, to the extent that the Voluntary Employee Contribution Account constitutes an annuity under section 132.4(d) of the Personal Income Tax Regulations, and to the extent the $20,000 subtraction modification contained in section 612(c)(3-a) of the Tax Law is allowed under section 631(a) of the Tax Law.

DATED: December 24, 1996

s/John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.