

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(4)I
Income Tax
July 11, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I991213B

On December 13, 1999, a Petition for Advisory Opinion was received from William J. Gedale and Kathrin S. Brown, 399 Riversville Road, Greenwich, Connecticut 06831.

The issue raised by Petitioners, William J. Gedale and Kathrin S. Brown, is whether, pursuant to Federal Public Law 104-95, a pension distribution received by a nonresident of New York State in 1995 is exempt from New York source income under section 631 of Article 22 of the Tax Law.

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

The Petitioners, nonresidents of New York, received a pension distribution in 1995. For purposes of this Advisory Opinion, it is assumed that Petitioners are not domiciliaries of New York State and that the pension distribution is not an annuity and constitutes New York source income under section 631 of the Tax Law, unless exempt pursuant to Federal Public Law 104-95.

Discussion

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual is the sum of the following: (1) the net amount of items of income, gain, loss and deduction entering into the individual's 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, and (2) the portion of the modifications described in section 612(b) and (c) of the Tax Law which relate to income derived from New York sources.

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

Section 132.4(d) of the Personal Income Tax Regulations provides that 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. 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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However, section 114(a) of Title 4 of the US Code, as added by Public Law 104-95, January 10, 1996, and applicable to “amounts received after December 31, 1995”, provides that “[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).” Section 114(b)(1) of Title 4 of the US Code defines the term “retirement income” as any income from certain specifically enumerated plans.

Accordingly, pursuant to section 114 of Title 4 of the US Code, New York State may not impose personal income tax under Article 22 of the Tax Law on retirement income, as defined in section 114, that an individual, who is not a resident or domiciliary of New York State, receives after December 31, 1995. Petitioner asserts that this provision should apply, retroactively, to retirement income received in 1995. However, the effective date provision is explicit; the Federal preemption applies to “amounts received after December 31, 1995.” Therefore, even assuming that it would otherwise qualify as “retirement income” under section 114 of Title 4 of the US Code, the pension distribution received by Petitioners in 1995 would not be excluded pursuant to section 114(a) from New York source income as computed under section 631 of the Tax Law for taxable year 1995.

It is noted that additional information submitted by Petitioners refers to a pension distribution received in 1996. This distribution might be excluded from New York source income computed under section 631 of the Tax Law for taxable year 1996, provided it otherwise qualifies under section 114(a) of Title 4 of the US Code.

DATED: July 11, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

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