

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

TSB-A-07(3)I
Income Tax
April 13, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I061017A

On October 17, 2006, a Petition for Advisory Opinion was received from Carol C. Markman, CPA, Feldman, Meinberg & Co. LLP, 6900 Jericho Turnpike, Suite 312, Syosset, New York 11791.

The issue raised by Petitioner, Carol C. Markman, is whether an individual who is one of two beneficiaries of a decedent's Individual Retirement Account (IRA) is entitled to a \$20,000 pension and annuity income exclusion pursuant to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the New York State Personal Income Tax Regulations (Regulations) if:

1. the other beneficiary of the decedent's IRA is a nonresident of New York State and receives annual distributions from the IRA; or
2. the other beneficiary of the decedent's IRA is a nonresident of New York State and elected to take a lump-sum distribution in a prior year resulting in no distribution possible in the current year.

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

An individual is a beneficiary of her father's individual retirement account (IRA) and, as a beneficiary, is entitled to one-half of her father's IRA. Prior to the end of the first distribution year, separate IRA accounts were established for the beneficiaries by direct transfers of funds. The annual distribution from the IRA is greater than \$20,000. The individual's brother is also a beneficiary of the decedent's IRA and, as a beneficiary, is entitled to the other half of his father's IRA. The decedent's age would have exceeded 59½ at the time when a distribution is made to his beneficiaries. The individual is 45 years of age and her brother is 50 years of age. The individual's brother is a nonresident of New York State.

Applicable law and regulations

Section 612(a) of the Tax Law provides:

General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

Section 612(c) of the Tax Law provides, in part:

Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

* * *

(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes. However, the term "pensions and annuities" shall also include distributions received by an individual who has attained the age of fifty-nine and one-half from an individual retirement account or an individual retirement annuity, as defined in section four hundred eight of the internal revenue code, and distributions received by an individual who has attained the age of fifty-nine and one-half from self-employed individual and owner-employee retirement plans which qualify under section four hundred one of the internal revenue code, whether or not the payments are periodic in nature. Nevertheless, the term "pensions and annuities" shall not include any lump sum distribution, as defined in subparagraph (A) of paragraph four of subsection (e) of section four hundred two of the internal revenue code and taxed under section six hundred three of this article. Where a husband and wife file a joint state personal income tax return, the modification provided for in this paragraph shall be computed as if they were filing separate state personal income tax returns. Where a payment would otherwise come within the meaning of the term "pensions and annuities" as set forth in this paragraph, except that such individual is deceased, such payment shall, nevertheless, be treated as a pension or annuity for purposes of this paragraph if such payment is received by such individual's beneficiary.

Section 112.3(c)(2) of the Regulations provides, in part:

(i) Pension and annuity income not subject to the modification referred to in paragraph (1) of this subdivision and not in excess of \$20,000, received by an individual may be subtracted in determining New York adjusted gross income providing the following conditions are met:

(a) the pension and annuity income must be included in Federal adjusted gross income;

(b) the pension and annuity income must be received in periodic payments (except where otherwise provided in this paragraph);

(c) the pension and annuity income must be attributable to personal services performed by such individual, prior to such individual's retirement from employment, which arises from either an employer-employee relationship or from contributions to a retirement plan which are tax deductible under the Internal Revenue Code (e.g., individual retirement account (IRA) or self-employed retirement (Keogh)); and

(d) such individual receiving the pension and annuity income must be 59 ½ years of age or over.

(ii) Distributions from an individual retirement account (IRA) or a self-employed retirement plan (Keogh) will qualify for the pension and annuity income modification whether such distributions are periodic payments or a lump sum distribution. However, the modification referred to in this paragraph will not be allowed for a lump sum distribution from a self-employed retirement plan (Keogh) if the Federal special 5-year averaging method of determining the Federal income tax due on such lump sum distributions is elected (see section 603 of the Tax Law and Part 103 of this Title for provisions relating to determining the New York State separate tax on the ordinary income portion of a lump sum distribution where the special 5-year averaging method has been elected for Federal income tax purposes).

(iii) Where a husband and wife each receives a pension or annuity and each qualifies for the pension and annuity income modification as described in subparagraph (i) of this paragraph, then each spouse shall compute his or her own pension and annuity income modification as if separate Federal income tax returns were filed. The combined pension and annuity income modification may not exceed \$20,000 for each spouse. Each spouse may not claim any unused portion of the other spouse's modification.

(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. The beneficiary will be entitled to the same pension and annuity income modification that the decedent would have been entitled to, had such decedent continued to live, 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.

(v) Where an individual claims a disability income modification under paragraph (3) of this subdivision, the combined amount of the disability income modification and the pension and annuity income modification cannot exceed \$20,000.

(vi) Pension and annuity income not included in New York State adjusted gross income (*e.g.*, railroad retirement benefits) may not be included in the computation of the pension and annuity income modification.

Opinion

Section 612(c)(3-a) of the Tax Law provides that payments received from an individual retirement account, to the extent includible in gross income for federal income tax purposes but not in excess of \$20,000 a year, may be allowed as a subtraction modification from federal adjusted gross income when computing New York adjusted gross income if certain conditions are met. Pursuant to section 112.3(c)(2)(iv) of the Regulations, when a beneficiary receives a payment that qualifies as a pension or annuity created by a decedent, the beneficiary will be entitled to the same pension and annuity income modification that the decedent would have been entitled to had such decedent continued to live, regardless of the age of the beneficiary. If the decedent has more than one beneficiary, the \$20,000 annual 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 annually.

Accordingly, in the present case, regardless of the age of the beneficiaries or whether the individual's brother, who is a nonresident, receives annual distributions or elects to take a lump-sum distribution in a prior year resulting in no distribution possible in the current year, each beneficiary is entitled to an allocation of the \$20,000 annual pension and annuity income modification in the same ratio as the distribution is shared. Since both beneficiaries received one-half of their father's IRA account, the annual \$20,000 pension and annuity income modification is allocated by the same ratio. Accordingly, with respect to the inherited IRA, the individual and her brother are each entitled to an annual \$10,000 pension and annuity income exclusion pursuant to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Regulations. Pursuant to section 612(c)(3-a), if at age 59 ½ the individual receives her own pension or annuity, her total subtraction modification may not exceed \$20,000 annually.

It is noted that the filing instructions for Form IT-150, *Resident Income Tax Return* (short form) and Form IT-201, *Resident Income Tax Return* (long form), provide, in part, that "the pension and annuity income exclusion of the decedent that you are eligible to claim as a beneficiary must first be reduced by the amount subtracted on the decedent's New York State personal income tax return, if any."

DATED: April 13, 2007

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