

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-10(6)I
Income Tax
July 13, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I100504A

Petitioner [REDACTED] (“Petitioner”) asks whether a distribution from an Individual Retirement Account (IRA) established by means of a tax-free rollover of amounts received from the State University of New York Optional Retirement Program may be subtracted from federal adjusted gross income when computing New York adjusted gross income. We conclude that, because the retirement payments are attributable to his employment with the State of New York, distributions from the IRA that represent a return of the rollover amounts will be exempt from New York State taxation pursuant to section 612(c)(3)(i) of the Tax Law. We further conclude that distributions in excess of the amounts rolled over into the IRA may be subtracted in computing New York adjusted gross income, but only up to \$20,000.

Facts

Petitioner is retired from the State University of New York (SUNY) and receives a pension that is funded under the Optional Retirement Program (ORP). The ORP is an employer sponsored qualified pension plan. All payments received from the ORP accumulation will be paid to him as a result of his employment with SUNY. Petitioner began taking the minimum distribution payments from the ORP when he reached 70 ½ years of age. Petitioner now intends to transfer the funds from his pension accumulation to a new IRA.

Analysis

Article 16, section 5 of the New York State Constitution provides that “all salaries, wages and other compensation except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation.” Pensions paid to officers and employees of this state, its subdivisions and agencies, to the extent includable in gross income for federal income tax purposes, are exempt from personal income tax pursuant to section 612(c)(3)(i) of the Tax Law. In this case, distributions received by Petitioner under the ORP constitute pension and other retirement benefits paid to a public employee that are constitutionally exempt from taxation.

In *Albert Zelony*, Adv Op Comm T&F, July 24, 2002, TSB-A-02(5)I, it was concluded that when a taxpayer rolls over his or her New York State pension benefits to an IRA, the amount received from the rollover IRA that represents a return of the pension contribution is not subject to New York personal income tax. Any other amounts received other than a return of the pension contribution, including any other contributions to the IRA account or any interest or other type of gain and income earned, could be subtracted pursuant to Tax Law §612(c)(3-a) in computing New York adjusted gross income, but only up to \$20,000. (See also *Lawrence Faraone*, Adv Op Comm T&F, TSB-A-09(9)I)

Similarly, *Joseph W. Martiney*, Adv Op St. Tax Commn, November 24, 1980, TSB-H-80-(523)I, held that the distributions from an IRA established by means of a tax-free rollover of amounts received in the form of a pension from New York State, or a subdivision or agency thereof, represent a nontaxable return of principal to the extent that the distributions represent a return of the pension funds “rolled over” into the IRA.

With respect to distributions of any gain or income earned from any rollover IRA account established by Petitioner, since the earnings would not be attributable to the ORP, interest or any other type of gain or income earned is not exempt from New York State taxation pursuant to Article 16, section 5 of the New York State Constitution and section 612(c)(3)(i) of the Tax Law.

Therefore, when Petitioner receives a distribution from the IRA, Petitioner must determine the portion of the distribution that is a return of the rollover contribution and the portion that is either a return of other contributions or the gains or income earned by the IRA. The amount that will qualify for the income subtraction modification under Tax Law §612(c)(3)(i) is determined by multiplying the amount of the distribution by a fraction, the numerator of which is the rollover contribution and the denominator of which is the current value of the IRA before the distribution.

Further, the portion of the distribution that is deemed to be a return of the rollover contribution reduces the balance of the rollover contribution in the IRA. In the next taxable year, when determining the portion of a distribution that is a return of the rollover contribution to the IRA, Petitioner must use the most recently computed balance of the rollover contribution in the numerator.

Accordingly, pursuant to Tax Law section 612(c)(3)(i), Petitioner is allowed to subtract from federal adjusted gross income the portion of his rollover IRA distribution that is attributable to the ORP rollover contribution, provided that the distribution amount is included in his federal adjusted gross income. Further, any gain or income earned from the rollover IRA is included in determining Petitioner's New York taxable income to the extent the gain or income, when added to any other pension and annuity income he may have, exceeds the \$20,000 subtraction modification provided for in Tax Law section 612(c)(3-a).

DATED: July 13, 2010

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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