

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

TSB-A-11(10)I
Income Tax
November 17, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I110614B

The Department of Taxation and Finance received a Petition for Advisory Opinion from the [REDACTED]. Petitioner asks whether distributions from a nonqualified deferred compensation plan to two nonresident former employees are subject to the personal income tax only in the states in which the former employees currently reside. We conclude that the distributions from Petitioner's nonqualified deferred compensation plans (the Plans) are exempt from New York State income tax withholding, because a federal statute prohibits the imposition of state income taxes on retirement income of an individual who is not a resident or domiciliary of such State.

Facts

Petitioner maintains several nonqualified deferred compensation plans for its former employees, including two employees who are the subject of this Advisory Opinion. Prior to their retirement, the employees performed services for Petitioner in New York and deferred a part of their earnings into Petitioner's Supplemental Deferred Compensation Plan (the Plan). Upon retiring, each of the employees at issue established a domicile outside of New York and began receiving distributions from the Plan.

The Plan provided retirement, disability, and termination benefits for its participating employees, as well as a death benefit payable prior to termination. The Plan also allowed a participant to elect early withdrawals prior to termination, to specify the amount, and subsequently to elect to change the payment amount and/or the payment date for that early withdrawal. Discretionary hardship distributions were also provided for in the Plan.

During their employment with Petitioner, the employees were allowed to designate one of three forms of payments from the Plan from which retirement distributions would occur after their termination:

- In up to ten annual installments, as designated by the Participant; or
- In a single lump-sum payment; or
- In a combination of a partial lump-sum payment and up to ten annual installments, as designation by the Participant.

Once a form of payment was chosen, the Petitioner and each employee entered into a Participation Agreement that contractually locked in the choice. Under certain circumstances prior to retirement, the employee was allowed to change his payment form designation, but the

election was irrevocable after retirement. Both employees at issue in this Advisory Opinion entered into Participant Agreements specifying that their respective annual benefit payments would be paid over a 10-year period of time. When payments commenced, Petitioner did not withhold New York State income taxes from these distributions under the belief that the distributions qualified for a state income tax exemption provided in federal law.

Analysis

Section 114(a) of Title 4 of the U.S. Code provides that no state may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State. “Retirement income” under 4 U.S.C.S. §114(b)(1)(I) means any plan, program, or arrangement described in IRC §3121(v)(2)(C), if such income is part of a series of substantially equal periodic payments (not less frequently than annually) made for (i) the life or life expectancy of the recipient or (ii) a period of not less than 10 years.¹ IRC §3121(v)(2)(C) defines a “nonqualified deferred compensation plan” as any plan or other arrangement for deferral of compensation other than a plan described in IRC §3121(a)(5) (generally, ERISA or “qualified” plans). The Plan appears to fit within the definition of a “nonqualified deferred compensation plan.” For purposes of this Advisory Opinion, we will assume that Petitioner’s Plan is a plan described in IRC §3121(v)(2)(C).

In order to qualify as “retirement income” under 4 U.S.C.S. §114, the Plan must also make distributions as part of a series of substantially equal periodic payments (made not less frequently than annually) for the life or life expectancy of the recipient...or a period of not less than 10 years. The employees at issue in this Advisory Opinion both elected in their respective Participation Agreements to take annual distributions from the Plan as part of a series of substantially equal installment payments made over a 10-year period. Thus, we conclude that the payments conform to the definition of “retirement income” under 4 U.S.C.S. §114(b)(1)(I). As such, they are not subject to New York State income taxes and New York State income tax withholding.

DATED: November 17, 2011

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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.

¹ 4 U.S.C.S. §114(b)(1)(I).