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

TSB-A-13(7)I
Income Tax
May 23, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I120409A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether certain supplemental retirement benefits received after the age of 59 ½ ("Plan Distributions") and after separation from employment constitute "pensions and annuities" and therefore qualify for the $20,000 income subtraction pursuant to Tax Law section 612(c)(3-a).

We conclude that, because the Plan distributions qualify as pension income, the $20,000 income subtraction under Tax Law section 612(c)(3-a) is allowable.

Facts

Petitioner submits the following facts in connection with his Petition: Petitioner was employed by American Express Company ("Employer") from 1984 to August 2007, when he retired at the age of 56. Petitioner was a participant in the American Express Retirement Restoration Plan, formerly known as the Supplemental Retirement Plan (the "Plan"). The Petition submitted by Petitioner confirms that the Plan is a nonqualified deferred compensation plan for Federal income tax purposes. In October 2005, Petitioner elected to receive his supplemental retirement benefits from the Plan in fifteen annual installments. Petitioner retired in August of 2007. The first installment payment under the plan was made in July, 2008.

In July, 2011 (and after Petitioner had turned 59½), the installment payment received pursuant to the Plan equaled $23,394.60. This payment was reported by Employer on IRS Form W-2 Box 1 (Wages, Tips or Other Compensation) and Box 11 (Non-Qualified Plans). Petitioner requests confirmation of the New York tax treatment of amounts received under the Plan following the date on which he turned 59 ½.

Analysis

Section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual is the individual's Federal adjusted gross income ("FAGI") with the modifications specified in section 612. Up to $20,000 of income that is included in FAGI due to distributions from pensions and annuities that are not subject to the subtraction modifications provided by Tax Law section 612(c)(3) (and not relevant to the facts here) are eligible for the subtraction modification provided by Tax Law section 612(c)(3-a) if the taxpayer is at least 59½, the distributions are "periodic payments attributable to personal services performed by such

individual prior to his retirement from employment and which arise from an employer-employee relationship." (Tax Law §612[c][3-a]). (*See also* Regulations 20 NYCRR §112.3(c)(2)(i)(a-d)).

An individual's FAGI is computed by calculating federal gross income less federal deductions (Internal Revenue Code §62). Under the IRC, gross income includes "[c]ompensation for services, including fees, commissions, fringe benefits, and similar items." (IRC §61[a][1]). The Treasury Regulations interpret IRC section 61(a)(1) to include, among other things, wages, "retired pay of employees, pensions, and retirement allowances." (*See*, 26 CFR §1.61-2[a][1]). Thus, although not wages, the Plan distributions are part of FAGI and are taxable unless subject to a New York subtraction modification.

Section 612(c)(3-a) provides a subtraction modification of up to $20,000 for compensation included in FAGI if (1) the recipient has attained the age of fifty-nine and one-half, (2) the money is paid in periodic payments, and (3) the money is attributable to personal services performed by the recipient for his or her employer prior to retirement. Since the amounts subject to this inquiry (i.e., payments received after July, 2011 and after the date on which Petitioner attained the age of 59 ½) were only paid after Petitioner's separation from service to Employer and are paid to Petitioner annually in the month of July, the distributions received by Petitioner from the Plan constitute "pensions and annuities" income within the purview of Tax Law §612(c)(3-a). As such, these payments are eligible for the subtraction modification afforded by that section in an amount not to exceed $20,000. The fact that the employer reported the payments as wages does not change this conclusion. *See* TSB-A-10(1)I.

DATED: May 23, 2013

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.