

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-20(12)I
Income Tax
October 27, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether payments he received from his former employer's Executive Deferred Salary Plan (EDSP) and Deferred Incentive Compensation Plan (DIC) (the "Nonqualified Deferred Compensation Plans") after he retired and became a nonresident of New York State will constitute New York source income subject to New York State personal income tax.

We conclude that the distributions from his Nonqualified Deferred Compensation Plans will not be subject to New York State personal income tax because a federal statute prohibits states from imposing income taxes on retirement income of an individual who is not a resident or domiciliary of such state.

Facts

Petitioner retired in 2014 and became a resident of California on March 31, 2014. Prior to his retirement, Petitioner was a resident of New York State. He was employed in New York State by a company ("Employer") that maintained the Nonqualified Deferred Compensation Plans for the benefit of Petitioner and other employees to provide retirement benefits in excess of the contribution limitations imposed on the Employer's 401(k) plan. For purposes of this opinion, we will assume that the Nonqualified Deferred Compensation Plans are nonqualified plans described in Internal Revenue Code (IRC) § 3121(v)(2)(C).

Petitioner made compensation deferrals into the Nonqualified Deferred Compensation Plans. The Nonqualified Deferred Compensation Plans' documents state that each deferral account shall be "unfunded, unsecured, and non-assignable and shall not be a trust for the benefit of the participant." Payment of deferred amounts under the Nonqualified Deferred Compensation Plans' documents are payable only after termination of Petitioner's employment with Employer. During 2015, Petitioner received payments from the Nonqualified Deferred Compensation Plans totaling \$497,055.16. That amount consisted of a \$236,324.49 lump sum payment and an additional \$260,730.67 as part of a series of installment payments to be paid over 10 or more years. In 2015, Employer issued to Petitioner a W-2 showing his correct California residence address and reporting the total amount of the distributions from the Nonqualified Deferred Compensation Plans for federal purposes. The total amount of the distributions was also reported on the State W-2 copy, and New York State income taxes were withheld.

Analysis

4 USC § 114(a) 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. The term “retirement income” includes any income from qualified plans, including IRC § 401(k) plans. *See* 4 USC § 114(b)(1)(A)-(H). 4 USC § 114(b)(1)(I) provides that the term “retirement income” also includes income from any plan, program, or arrangement described in IRC § 3121(v)(2)(C) if such income “(i) is part of a series of substantially equal periodic payments (not less frequently than annually which may include income described in subparagraphs (A) through (H) made for ... (II) a period of not less than 10 years, or (ii) is a payment received after termination of employment and under a plan, program, or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations ...” set forth in various sections of the IRC applicable to certain qualified plans, including §§ 401(a)(17) and 401(k). IRC § 3121(v)(2)(C) defines the term “nonqualified deferred compensation plan” as any plan or other arrangement for deferral of compensation other than a plan described in § 3121(a)(5) (generally ERISA or “qualified” plans).

The payments from Petitioner’s Nonqualified Deferred Compensation Plans in 2015 after Petitioner retired and moved out of New York State qualify as distributions of “retirement income” under 4 USC § 114(b)(1)(I). As such, they would not be subject to New York State tax.

Petitioner has raised the issue of whether those distributions constituted New York source income insofar as they were funded by contributions to the Nonqualified Deferred Compensation Plans pursuant to and during the tenure of his employment in New York State. For 2015, Petitioner’s employer withheld New York State income tax on the amount of the distributions and reported the amount of the distributions on the State portion of Petitioner’s W-2 form. If the distributions were New York source income, they would be subject to New York State income tax under the accrual rules.

Tax Law § 639(a) requires individuals who change their status from New York resident to nonresident to accrue to their resident period any items of income, gain, loss or deduction accruing prior to their change of residency. In determining when an item of income accrues for this purpose, New York courts and the Department have generally relied on Federal law, specifically the “all events” test expressed in Treas. Reg. § 1.446-1(c)(ii)(A). As summarized by the Appellate Division, “[u]nder an accrual method, income is to be included for the taxable year when all the events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy.” *See Matter of Blanco v. Commissioner*, 282 A.D.2d 896 (3rd Dep’t 2001), *lv. denied*, 96 N.Y.2d 719 (2001). The Department’s Publication 88, addressing accruals, notes: “If you had a right to receive income without restrictions or contingencies at or before the date of the change in residence, this income would be accruable at the time you changed your residence, even if the income is actually received after you move out of New York State.” *See* Department of Taxation and Finance Publication 88,

General Information for New York State Nonresidents and Part Year Residents, page 15. The instructions to the Department's Form IT-225-I mirror Treas. Reg. § 1.446-1 and state that income accrues when the right to receive income is fixed and the amount becomes fixed and determinable. Form IT-225-I, Addition Modification A-115, page 5.

Petitioner had no fixed right to receive any amount of income from his Nonqualified Deferred Compensation Plans until after he retired, when he was no longer a resident of New York. The documents of his Nonqualified Deferred Compensation Plans specified that payment of deferral amounts are payable only after termination of Petitioner's employment with Employer. Furthermore, the Nonqualified Deferred Compensation Plan documents stated that each account shall be "unfunded, unsecured, and non-assignable and shall not be a trust for the benefit of participant." The Plan document also provided that payments of deferred allotments shall be made in annual installments commencing April 1, or as soon thereafter as is practicable, of the year following the year in which the participant's employment with Employer terminated. The amount of Petitioner's account could not be determined with reasonable accuracy prior to his retirement because the account was adjusted at regular intervals and the amount of income the Petitioner would be eligible to receive continued to change until the proceeds were distributed after Petitioner retired and moved out of state. Thus, we conclude that Petitioner is not subject to New York State or City income tax on distributions from this account in 2015.

DATED: October 27, 2020

/S/

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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.