

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

TSB-A-20(7)I
Income Tax
September 29, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I170324A

The Department of Taxation and Finance (“Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether two different series of periodic distributions made to a former employee pursuant to a nonqualified deferred compensation plan qualify as “retirement income” under 4 USC § 114(b)(1)(I) and, if so, whether the distributions from each series are subject to New York State income tax withholding if the former employee is a nonresident.

We conclude that each series of payments made by Petitioner conforms to the definition of “retirement income” under 4 USC § 114(b)(1)(I). Therefore, if the former employee is not a New York resident when the deferred compensation payments are distributed by Petitioner, the payments would not be subject to New York State income tax withholding.

Facts

Petitioner is a large retailer with locations throughout the United States. Petitioner makes payments of various types of compensation to its employees, including payments from deferred compensation plans. Petitioner will make two series of substantially equal annual payments to a former employee over a ten year period representing deferrals of that former employee’s annual salary and bonus payments. The first series of payments relate to the former employee’s post-2004 deferred compensation. In October 2016, Petitioner made the first distribution of ten substantially equal deferred compensation payments to the former employee, with additional payments to be made each subsequent October through October 2025.

Petitioner, under a separate schedule, will also distribute to the same former employee additional deferred compensation relating to the employee’s pre-2005 deferred compensation by making substantially equal periodic payments over a 10 year period starting in October 2017 and ending October 2026. Both income streams are subject to and compliant with the deferred compensation rules under Internal Revenue Code (IRC) § 409A.¹

Analysis

Tax Law § 671(a) and 20 NYCRR 171.1 require that every employer maintaining an office or transacting business within New York State and making payment of any wages taxable under the personal income tax must deduct and withhold from the employee’s wages an amount of tax substantially equivalent to the New York State personal income tax reasonably estimated to be due

¹ IRC § 409A rules bar employees from accelerating the payment of deferred compensation and restrict the timing of initial compensation deferral elections and subsequent payment deferral elections. The failure to follow these rules cause an employee’s deferred compensation (and related investment earnings) to be taxable when the failure occurs or, if later, when the compensation is not subject to a substantial risk of forfeiture, and subjects the taxable compensation to a 20% penalty plus interest.

resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his or her wages received during the calendar year. Tax Law § 674(a) and 20 NYCRR 174.1 require that every employer required to deduct and withhold taxes from wages under the personal income tax must file a New York State withholding tax return and pay over the taxes required to be deducted and withheld.

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. For purposes of Section 114, "retirement income" includes income from 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. 4 USC § 114(b)(1) (I). 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). For purposes of this opinion, we will assume that Petitioner's deferred compensation plan is a nonqualified plan as described in IRC § 3121(v)(2)(C).

Assuming Petitioner's plan is a "nonqualified plan" as described in IRC § 3121(v)(2)(C), it must be determined if the income from the plan is part of a series of substantially equal periodic payments (not less frequently than annually) made for the life or life expectancy of the recipient, or for a period of not less than 10 years. If so, the payments qualify as "retirement income" under 4 USC § 114(b)(1)(I). In this case, the projected payment streams for both the pre-2005 and post-2004 deferred compensation plans would be distributed to the former employee in substantially equal annual payments over a 10-year period. Thus, we conclude that the payments would qualify as "retirement income" under 4 USC § 114(b)(1)(I). Therefore, these payments would not be subject to New York State income tax if the former employee is not a New York resident when the payments are made. Also, since the payments would not be subject to New York State income tax, such payments would not be subject to withholding tax under Tax Law § 671(a) or the reporting requirements under Tax Law § 674.

DATED: September 29, 2020

/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.