New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-98(4)I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I980106A

On January 6, 1998, a Petition for Advisory Opinion was received from Marie Douglas, 129 Bay Ave East, Hampton Bays, New York 11946.

The issue raised by Petitioner, Marie Douglas, is whether an IRA (Individual Retirement Account) distribution may be subtracted from federal adjusted gross income when computing New York adjusted gross income for personal income tax purposes under Article 22 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner's spouse had been employed by the New York City Police Department. He had submitted his retirement papers, but died before any payment had been made to him. Distribution of his entire pension benefit was made to Petitioner who promptly rolled it into a new IRA rollover account. No other contributions or rollovers have ever been made to this account. The only additions to the account is the income earned on the principal for the account.

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."

Section 612(a) of the Tax Law defines New York adjusted gross income of a resident individual as the individual's federal adjusted gross income with certain modifications. Section 612(c)(3)(i) of the Tax Law and section 112.3(c)(1) of the Personal Income Tax Regulations contain a subtraction modification for pensions to officers and employees of New York State, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes. Section 112.3(c)(1)(i)(*a*) of the Personal Income Tax Regulations provides that this includes pensions and other retirement benefits (including, but not limited to, annuities, interest and lump sum payments) paid to a public officer or public employee or the beneficiary of a deceased public officer or deceased public employee of New York State, its political subdivisions or agencies.

In Joseph W. Martiney, Adv Op St Tax Commn, November 24, 1980, TSB-H-80-(523)I, it was 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, represents a nontaxable return of principal to the extent that the distribution represents a return of the pension funds "rolled over" into the IRA. To the extent that the distribution represents interest, or any other type of gain earned in the account, such portion would be subject to tax.

Section 612(c)(3-a) of the Tax Law was added in 1981, applicable for taxable years commencing on or after January 1, 1982. This section and section 112.3(c)(2) of the Personal Income Tax Regulations provide that pension and annuity income not subject to the modification referred to section 612(c)(3) of the Tax Law and section 112.3(c)(1) of the Personal Income Tax Regulations and not in excess of $20,000, received by an individual may be subtracted in determining New York adjusted gross income providing the following conditions are met:

(a) the pension and annuity income must be included in federal adjusted gross income;

(b) the pension and annuity income must be included in periodic payments, except that distributions from an IRA or Keogh will qualify for the pension and annuity income modification whether such distributions are periodic payments or a lump sum distribution;

(c) the pension and annuity income must be attributable to personal services performed by such individual, prior to such individual's retirement from employment, which arises from either an employer-employee relationship or from contributions to a retirement plan which are tax deductible under the Internal Revenue Code (*e.g.*, IRA or Keogh); and

(d) such individual receiving the pension and annuity income must be 59 ½ years of age or over.

In this case, Petitioner's spouse's New York City pension benefit is exempt from New York State personal income tax pursuant to section 5 of Article 16 of the New York Constitution. Assuming that Petitioner received her spouse's pension benefit distribution as the beneficiary, the pension benefit is exempt from New York State taxation pursuant to section 612(c)(3)(i) of the Tax Law and section 112.3(c)(1)(i)(*a*) of the Personal Income Tax Regulations.

Like Martiney, supra, when Petitioner receives distributions from the rollover IRA account, only a portion of the distribution is exempt. Assuming the distributions Petitioner receives from the rollover IRA account are included in her federal adjusted gross income, the portion of a distribution from the rollover IRA account that represents the amount of the pension benefit that was rolled over into the IRA (the contribution), is a return of the pension contribution and is exempt for New York State purposes pursuant to section 612(c)(3)(i) of the Tax Law and section 112.3(c)(3)(i)(*a*) of the Personal Income Tax Regulations. Such portion of the IRA distribution would be subtracted from federal adjusted gross income when computing Petitioner's New York adjusted gross income. However, unlike Martiney, supra, pursuant to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Personal Income Tax Regulations, the balance of the distribution from the rollover IRA account that represents any other amount in the rollover IRA account, including any other contributions or interest or any other type of gain or income earned, may not be subject to tax. If Petitioner has reached the age of 59 ½ years of age, such amount may be added to Petitioner’s other pension and annuity income, if any, that meets the conditions of section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the

Regulations for purposes of computing the $20,000 pension and annuity income modification. The total, but not in excess of $20,000, would be allowed as a subtraction from federal adjusted gross income when computing Petitioner's New York adjusted gross income. Any excess would be subject to tax and would not be allowed as a subtraction from federal adjusted gross income when computing Petitioner's New York adjusted gross income.

/s/
DATED: March 24, 1998 John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.