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

TSB-A-98(6)I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I980305A

On March 5, 1998, a Petition for Advisory Opinion was received from Anne G. Kramer, 130 East 75th Street, New York, New York 10021.

The issue raised by Petitioner, Anne G. Kramer, is whether section 612(c)(3-a) of the Tax Law permits two $20,000 pension income exclusions on a married filing joint return for 1997 where one spouse dies during the year and both spouses were over 59 ½ years of age.

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

Before Petitioner's husband died on April 20, 1997, he earned $20,704 on three TIAA annuity contracts that named Petitioner as successor beneficiary upon his death under the joint and survivor annuity election. Petitioner then earned $41,408 on the same three TIAA annuity contracts as successor beneficiary from the date of his death through December 31, 1997.

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-a) of the Tax Law contains a modification for pension and annuity income, other than pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the federal government.

Section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Personal Income Tax Regulations ("Regulations") provide that pension and annuity income not in excess of $20,000, received by an individual, may be subtracted in determining the individual's 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 received in periodic payments (except distributions from an individual retirement account [IRA] or self-employed retirement plan [Keogh]);

(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 ("IRC") (*e.g.*, IRA or Keogh); and

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

Section 112.3(c)(2)(iii) of the Regulations states that:

> [w]here a husband and wife each receives a pension or annuity and each qualifies for the pension and annuity income modification as described in subparagraph (i) of this paragraph, then each spouse shall compute his or her own pension and annuity income modification as if separate Federal income tax returns were filed. The combined pension and annuity income modification may not exceed $20,000 for each spouse. Each spouse may not claim any unused portion of the other spouse's modification.

Section 112.3(c)(2)(iv)(*a*) of the Regulations states that:

> [w]here a beneficiary receives a payment which qualifies as a pension or annuity created by the decedent, such payment will come within the definition and meaning of 'pension and annuity' as defined in this paragraph. If the decedent was qualified to receive a pension or annuity and was 59 ½ years of age or over at the time of such decedent's death, the beneficiary will be entitled to the same pension and annuity income modification that the decedent would have been entitled to regardless of the age of the beneficiary.

Pursuant to section 112.3(c)(2)(iii) of the Regulations, Petitioner, on the joint return, could be allowed a subtraction modification of up to $40,000, only if Petitioner and her spouse <u>each</u> received his or her <u>own</u> pension or annuity that qualifies for the pension and annuity income modification. In that case, each spouse would be entitled to his or her own $20,000 modification, but one spouse could not claim any unused portion of the other spouse's modification. However, in this case, Petitioner is not receiving her own annuity, rather she is receiving her spouse's annuity as the beneficiary.

It is assumed that, at the time of his death, Petitioner's spouse was receiving a payment that qualified as an annuity pursuant to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Regulations. Therefore, pursuant to section 112.3(c)(2)(iv) of the Regulations, Petitioner, as the beneficiary, is "entitled to the same pension and annuity income modification that the decedent would have been entitled to". This means that, if he had lived through the entire year, Petitioner's spouse would have been entitled to a subtraction modification of $20,000 for 1997. Since Petitioner did not have her own qualifying pension or annuity in 1997, pursuant to section 112.3(c)(2)(iii) of the Regulations, Petitioner is not entitled to an additional $20,000 subtraction modification for 1997. Therefore, pursuant to section 112.3(c)(2)(iv) of the Regulations, the qualifying annuity subtraction modification will be limited to $20,000 on the joint return for 1997. However, Petitioner, as the beneficiary of her spouse's annuities, will be allowed a subtraction modification of up to $20,000 in each future taxable year that she continues to receive her spouse's annuities.

It should be noted that if Petitioner's spouse's TIAA annuities are attributable solely to employment as a public employee of New York State, its political subdivisions or agencies (for example, the State University of New York), then Petitioner's spouse's annuity income and Petitioner's annuity income

received as beneficiary, to the extent included in gross income for federal income tax purposes, would be excludable under section 612(c)(3)(i) of the Tax Law for purposes of computing New York adjusted gross income. Section 612(c)(3)(i) of the Tax Law and section 112.3(c)(1)(i)(*a*) of the Regulations contains a modification reducing federal adjusted gross income for pension and annuity income that is paid to a public officer or a public employee or the beneficiary of a deceased public officer or deceased public employee of New York State, its political subdivisions or agencies. If only a portion of the TIAA annuities are attributable to employment as a public employee of New York State, its political subdivisions or agencies, then that portion of Petitioner's spouse's annuity income and Petitioner's annuity income received as beneficiary, to the extent included in gross income for federal income tax purposes, would be excludable under section 612(c)(3)(i) of the Tax Law, and the remainder of the annuity income would qualify for the $20,000 exclusion under section 612-(c)(3-a) of the Tax Law.

DATED: May 19, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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