

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

TSB-M-78-(2)-I  
May 26, 1978

Opinion of Special Counsel  
Withholding of New York State Tax on Pensions & Annuities

April 24, 1978

Dear

The situation involving a request for withholding of State income tax from pensions of employees of \_\_\_\_\_ has been brought to my attention by Assistant Counsel to the Lieutenant Governor, Mr. Ronald Sinzheimer. I have been furnished a copy of correspondence between you and \_\_\_\_\_ in which a request by employees of \_\_\_\_\_ to have State income tax withheld from pension payments was denied on the grounds that there was no contractual basis for this. Mr. Sinzheimer has informed me that Federal taxes are being withheld from pensions by the Corporation but that State taxes are not being withheld despite the fact that the appropriate State form, "Annuitant's Request for Income Tax Withholding" IT-2104P, was filed.

With regard to withholding taxes from annuities and pensions, New York State Tax Law and regulations parallel the Federal Internal Revenue Code and regulations. Section 3402(o) of the Internal Revenue Code provides for withholding tax on any payment of an annuity where the annuity is includible in the individual's gross income and there has been a request that the annuity payment be subject to withholding. The term annuity as used in this section is defined to include pensions, and payments of annuities or pensions are to be treated as if they were a payment of wages by an employer to an employee for a payroll period. Federal regulation section 32.1 prescribes the mechanics and the proper forms to be utilized in putting this section into operation. This regulation states in part, "Upon receipt of request under this section the payer of the annuity with respect to which such request was made shall deduct and withhold the amount specified in such request . . .". (emphasis added)

Section 671(b)(1)(B) of the New York State Tax Law is the corresponding State statute providing for withholding of tax from pension payments, and the statutory language contained therein is virtually identical to section 3402(o) of the Federal Internal Revenue Code. New York regulation section 160.7 provides the procedure for making a request that a pension payment be subject to withholding and specifies the forms to be used. This regulation section states, in part, "... any payment of an annuity made after December 31, 1970, by a payer maintaining an office or transacting business in this State, to an individual to the extent includible in such individual's New York adjusted gross income, shall be treated as if it were a payment of wages by an employer to an employee for a payroll period, if at the time the payment is made a request that

such annuity be subject to withholding of income tax under this Part is in effect." Regulation section 160.7 further states that the provisions of the Federal Internal Revenue Code and its applicable regulation, shall apply for New York tax purposes to the manner of making a request, when it takes effect, its duration and termination as well as to the meaning of various Federal terms.

A request to deduct and withhold State income tax on pension payments should be made on State form IT-2104P entitled "Annuitant's Request For Income Tax Withholding". Once a request is properly made and the statutory prerequisites are met, a payer has no discretion to refuse withholding, and he is mandated to commence withholding within the time limits prescribed for in the State Tax Commission regulation.

The requirement to withhold tax from pension payments need not be part of a consensual agreement between an employer and an employee. In refusing to withhold, is not in compliance with New York Tax Law and would be subject to the penalties provided for in Article 22 of the Tax Law.

In summary, in my opinion  
above to withhold State income tax.

should comply with the request described

Very truly yours,

SAUL HECKELMAN  
Special Counsel