

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(8)I
Income Tax
October 12, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I100419B

The petition asks whether the in-service distributions that [REDACTED] (Petitioner) received from the Federal Employees' Retirement System qualify for the income subtraction modification under Tax Law §612(c)(3)(ii).

We conclude that the in-service distributions Petitioner received from the Federal Employees' Retirement System qualify for the income subtraction modification under Tax Law §612(c)(3)(ii).

Facts

Petitioner is a US Postal employee and is a participant in the Federal Employees' Retirement System. Petitioner requested and received an in-service hardship distribution of \$125,000 from the Federal Employees' Thrift Savings Plan. The Thrift Savings Plan is part of the Federal Employees' Retirement System and is funded by contributions from both the employer and the participating employees.

Analysis

Tax Law §612(c)(3)(ii) provides a subtraction from federal gross income of *pensions* to officers and employees of the United States of America, ... or any agency or instrumentality of any one of the foregoing, to the extent includible in gross income for federal income tax purposes (emphasis added). Regulation 22 NYCRR 112.3(c)(1)(i)(b), which explains the income subtraction under Tax Law §612(c)(3)(ii), states that "pension and other retirement benefits (*including but not limited to*) annuities, interest and lump sum payments paid to a public officer or public employee of the United States ... or any agency or instrumentality of any one of the foregoing" (emphasis added). Additionally, §110 of the Retirement and Social Security Law, which covers the state employees' retirement system, provides that "the right of a person to a pension, a pension-providing-for-increased-take-home-pay ... *any other benefit*... [A]re hereby *exempt from any state or municipal tax*, except the estate tax..."(emphasis added).

While Tax Law §612(c)(3)(ii) states that pensions of officers and employees of the United States of America are to be subtracted from federal adjusted gross income in determining New York adjusted gross income, Retirement and Social Security Law §110 exempts *optional benefits* paid from a New York State employees' retirement system from state tax. Therefore, according to §110 of the Retirement and Social Security Law, if a New York State employee were to receive an in-service distribution from the retirement system, the benefit would not be subject to New York State tax.

Retirement and Social Security Law §110 only addresses the tax treatment of benefits paid from a New York State Employees' Retirement system, and Petitioner is a federal employee. Federal law, however, requires similar treatment of federal retirement benefits. In *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, (1989), the United States Supreme Court held that states that exempt pensions of their own employees from income taxes must provide a similar exemption to employees of the federal government. The Court relied on 4 USC §111 which states that, "[t]he United States consents to the taxation of pay and compensation for personal service as an officer or employee of the United States ... by a duly constituted

taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.” Id. at 813-814. Because distributions from the New York State Employees’ Retirement System are exempt from State income tax, the Court’s decision in *Davis* requires the same treatment of Petitioner’s in-service distributions from the Federal Employees’ Retirement System. Accordingly, the in-service distributions to Petitioner from the Federal Employees’ Thrift Savings Plan qualify for the income subtraction modification under Tax Law §612(c)(3)(ii).

DATED: October 12, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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