

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

TSB-A-13(5)I  
Income Tax  
April 8, 2013

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I120515A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether a lump sum settlement received by a nonresident from a nonqualified supplemental employee retirement plan (“SERP”) and Deferred Compensation Plan pursuant to an order of bankruptcy is exempt from New York State personal income tax.

We conclude that, for New York State personal income tax purposes, the lump sum payment received by a nonresident in settlement of his SERP and Deferred Compensation Plan is treated as nontaxable retirement income.

**Facts**

Petitioner submits the following facts in connection with his Petition. Petitioner is a nonresident of New York. In January 2002, Washington Mutual Bank (“WMB”) acquired Dime Savings Bank of New York (“Dime”). Dime was a New York corporation headquartered in New York City. Petitioner was an executive vice president with Dime at the time of the acquisition and did not continue employment with WMB, and instead, accepted retirement. Petitioner was a participant in Dime’s SERP and its Deferred Compensation Plan. In March, 2002, Petitioner turned 55 and began receiving monthly payments under the SERP. In 2003, Petitioner began receiving quarterly payments under the Deferred Compensation Plan. The payments under the SERP were in a fixed amount for life and the quarterly payments under the Deferred Compensation Plan varied on the basis of the earnings from the assets in the account for a term of 12 years. Petitioner further asserts that both plans constituted “nonqualified deferred compensation plans” pursuant to IRC §3121(v)(2)(C).<sup>1</sup>

In 2008, WMB filed a voluntary petition in Bankruptcy Court in Delaware, was seized by the FDIC and its assets were sold to JPMorgan Chase. Pursuant to a Global Settlement Agreement, JPMorgan Chase undertook certain obligations with respect to the SERP and the Deferred Compensation Plan. The Global Settlement Agreement specified that JPMorgan Chase was not required to assume any “nonqualified deferred compensation plan” but was required to “satisfy the obligations to pay or provide any and all benefits with respect to the arrangements” in those plans. JPMorgan Chase was expressly authorized “to the extent of applicable laws, change the manner and form of those payments.”

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<sup>1</sup> Petitioner has submitted correspondence from the Trustee of both plans confirming that both plans constitute nonqualified deferred compensation plans.

In May, 2012, JPMorgan Chase disbursed to Petitioner a lump sum distribution that represented the present value of the SERP annuity, the balance in the Deferred Compensation Plan, and interest during the period of bankruptcy when payments were suspended. JPMorgan Chase withheld from the distribution an amount equal to New York State and local estimated income tax. Petitioner has resided in both New Jersey and Virginia and currently resides in Pennsylvania, but has never been a resident of New York.

## Analysis

Section 114(a) of Title 4 of the US Code, as added by Public Law 104-95, January 10, 1996, and applicable to amounts received after December 31, 1995, 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 (as determined under the laws of such State).” Section 114(b)(1) of Title 4 of the US Code defines the term “retirement income” as any income from, among other things: “(1) [a]ny plan, program or arrangement described in Internal Revenue Code section 3121(v)(2)(C), if such income (i) is part of a series of substantially equal periodic payments,<sup>2</sup> or (ii) is a payment received after termination of employment and under a plan, program or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations imposed by one or more sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of such Code or any other limitation on contributions or benefits in such Code on plans to which any of such sections apply.”

Pursuant to section 114 of Title 4 of the US Code, New York may not impose personal income tax on the retirement income of a nonresident or a nondomiciliary individual after December 31, 1995. “Retirement income” under 4 U.S.C. §114(b)(1)(I) means 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 expectancy of the recipient, or (ii) a period of not less than 10 years.<sup>3</sup> A “nonqualified deferred compensation plan” is defined in IRC §3121(v)(2)(C) as any plan or other arrangement for the deferral of compensation other than a plan described in IRC § 3121(a)(5) (generally, ERISA or “qualified” plans). Under the facts submitted by the Petitioner, both the SERP and the Deferred Compensation Plan were arrangements described in §3121(v)(2)(C) of the Code and payments made under those plans would have constituted nontaxable retirement income pursuant to 4 U.S.C. §114 had WMB not commenced bankruptcy proceedings.

The fact that the WMB bankruptcy proceeding caused Petitioner to accept a lump sum payment in settlement of payments that constituted retirement income under 4 U.S.C. §114 does not change the tax characterization of the payment. See *Hort v. Commissioner*, 313 U.S. 28

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<sup>2</sup> The slight variation of the SERP amounts do not cause that plan to fail the IRC retirement income test. “The fact that payments may be adjusted from time to time pursuant to such plan, program, or arrangement to limit total disbursements under a predetermined formula, or to provide cost of living or similar adjustments, will not cause the periodic payments provided under such plan, program, or arrangement to fail the ‘substantially equal periodic payments’ test.” (4 USC §114(b)(I)(ii)).

<sup>3</sup> Petitioner has confirmed that the term of the SERP was for life and the Deferred Compensation Plan was for a period of twelve years.

(1941), where the Supreme Court of the United States held that, in order to determine the nature and extent to which settlement amounts received by compromise or judgment are to be included in gross income, it is necessary to look to the nature of the item for which the settlement is a substitute. That is, the settlement amount received should be treated the same as the underlying item that was the basis for the settlement. The unforeseeable act of WMB filing for bankruptcy should not change the tax treatment of Petitioner's SERP or Deferred Compensation Plan. See *Hort, supra*; see also TSB-A-97(9)I.

Accordingly, we conclude that, for New York State and local personal income tax purposes, the lump sum payment received by the Petitioner in settlement of his SERP and Deferred Compensation Plan with WMB will be treated as nontaxable retirement income of a person who is not a resident or domiciliary under section 114(b)(1)(ii) of the US Code.

DATED: April 8, 2013

/S/  
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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.