New York State Department of Taxation and Finance
Office of Counsel

TSB-A-16(1)I
Income Tax
March 15, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I150204A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether a lump sum payment to be distributed to Petitioner in 2015 from his former employer's 401(k) Restoration Plan will be exempt from New York State and City personal income tax.

We conclude that the distribution will not be subject to New York State and City personal income tax.

Facts

In August 2014, Petitioner retired from a corporation ("the Corporation") where he had been employed since 1998. From the time he was first employed by the Corporation until December 31, 2014, Petitioner was a resident of New York State and City. On December 30, 2014, Petitioner turned in the keys to the New York City apartment that he had been renting and moved to another state, where he now resides. For purpose of this advice, we will assume that Petitioner will meet all the requirements to be considered a nonresident of New York State under Tax Law §605(b)(1)(A)(i) for the entirety of the 2015 tax year.

While he was employed at the Corporation, Petitioner deferred a portion of his income into the Corporation's 401(k) Plan (the "401(k) Plan"), a qualified retirement plan. In addition to the 401(k) Plan, Petitioner also contributed to the Corporation 401(k) Restoration Plan (the "Restoration Plan"), a nonqualified retirement plan designed to provide supplemental retirement benefits to highly compensated employees. Only employees whose annual base salary equaled or exceeded $200,000 (adjusted for the cost of living) were eligible to participate in the Restoration Plan. *See* Internal Revenue Code (IRC) § 401(a)(17). Only after he reached the maximum contribution limit for the 401(k) Plan would Petitioner be permitted to elect to defer portions of his salary and bonus compensation, and contribute those portions to the Restoration Plan. *See* §2.3(b) of the Restoration Plan.

The Restoration Plan is unfunded and intended to constitute an incentive and deferred compensation plan for a select group of officers and key management employees. The employee accounts established and maintained under the Restoration Plan are for accounting purposes only and shall not be deemed or construed to create a trust fund of any kind or to grant a property interest of any kind to any associate, beneficiary, or estate. Although each employee that participates in the plan designates the investment vehicle(s) in which his or her account shall be deemed to be invested, the Corporation is under no obligation to acquire or invest in any of the deemed investment vehicle(s), and any acquisition of or investment in a deemed investment vehicle(s) shall be made in the name of the Corporation and remain the sole property of the Corporation. Each employee's account is adjusted at regular intervals to reflect the amount the

employee would have earned or lost if the account had actually been invested in the investment vehicles selected. All contributions to the employees' accounts become fully vested on the date that they are made.

An employee may select the form of distributions (typically after retirement) applicable to each set of class year deferrals. Petitioner selected payment of a lump sum following termination of employment. As such, the distribution was payable as a lump sum within 90 days following the end of the Restoration Plan year in which his employment was terminated. During the period between termination and payment, an employee's account continued to fluctuate, based on the change in value of the deemed investments in the account as elected by the employee.

Analysis

Title 4 of the United States Code (USC) § 114(a) 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. The term "retirement income" means any income from qualified plans, including IRC § 401(k) plans. *See* 4 USC §114(b)(1)(A)-(H). It also means nonqualified deferred compensation plans described in IRC § 3121(v)(2)(C) or any plan, program, or arrangement that is in writing, that provides for retirement payments in recognition of prior service to be made to a retired partner, and that is in effect immediately before retirement begins, if such income 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 set forth in various sections of the IRC applicable to certain qualified plans, including §§ 401(a)(17) and 401(k). *See* 4 USC § 114(b)(1)(I)(ii). IRC § 3121(v)(2)(C) defines a "nonqualified deferred compensation plan" as any plan or other arrangement for deferral of compensation other than a plan described in IRC § 3121(a)(5) (generally ERISA or "qualified" plans).

The Restoration Plan is a nonqualified deferred compensation plan or arrangement described in IRC § 3121(v)(2)(C), and the lump sum distribution from the Restoration Plan meets the requirements of 4 USC § 114(b)(1)(I)(ii). The Restoration Plan is maintained solely for the purpose of providing supplemental retirement benefits after the termination of employment for the Corporation's employees earning in excess of compensation limitations under IRC § 401(a)(17), applicable to the Corporation's § 401(k) plan or other qualified plans. Assuming Petitioner is a nonresident of New York at the time he receives the lump sum payment from the Restoration Plan, 4 USC § 114 prevents New York from taxing the payment because the distribution qualifies as "retirement income" covered under the federal statute.

Under Tax Law § 639(a), individuals who change their status from New York resident to nonresident are put on the accrual method of accounting and are required to accrue to their resident period any items of income, gain, loss or deduction accruing to them prior to their change of residency. In determining when an item of income accrues for this purpose, the New York courts and the Department have generally relied on Federal law, specifically the "all events" test expressed in Treas. Reg. § 1.446-1(c)(ii)(A). As summarized by the Appellate Division, "[u]nder an accrual method, income is to be included for the taxable year when all the events have occurred that fix the right to receive the income and the amount of the income can

be determined with reasonable accuracy." *See Matter of Blanco v. Commissioner*, 282 A.D.2d 896 (3rd Dep't 2001), *lv. denied*, 96 N.Y.2d 719 (2001). The Department's Publication 88, addressing accruals, notes: "If you had a right to receive income without restrictions or contingencies at or before the date of the change in residence, this income would be accruable at the time you changed your residence, even if the income is actually received after you move out of New York State." *See* Department of Taxation and Finance Publication 88, General Information for New York State Nonresidents and Part Year Residents, page 15. The instructions to the Department's Form IT-225-I mirror Treas. Reg. § 1.446-1 and state that income accrues when the right to receive income is fixed and the amount becomes fixed and determinable. Form IT-225-I, Addition Modification A-115, page 5.

Until 2015, when Petitioner was no longer a resident of New York, he had no fixed right to receive any amount of income from his account in the Restoration Plan. Prior to 2015, Petitioner's account established and maintained under the Restoration Plan was unfunded and for accounting purposes only. The account was not deemed or construed to create a trust fund of any kind or to grant a property interest of any kind to Petitioner. Although Petitioner could designate the investment vehicle(s) in which his account was deemed to be invested, the Corporation was under no obligation to acquire or invest in any of the deemed investment vehicle(s). Any acquisition of or investment in a deemed investment vehicle(s) was made in the name of the Corporation, which remained the sole owner of the investment. Petitioner elected to take his distribution in a single lump sum payment following termination of his employment. The Restoration Plan provided that a lump sum payment following termination of employment must be paid in a single cash payment within 90 days following the end of the plan year in which the termination of employment occurred. Petitioner terminated his employment in August 2014. Thus, payment from Petitioner's account in the Restoration Plan was required to be distributed within 90 days following the end 2014, when Petitioner was no longer a resident of New York State.

Likewise, the amount of Petitioner's account could not be determined with reasonable accuracy prior to 2015. Participant's account was adjusted at regular intervals to reflect the amount he would have earned or lost if the account had actually been invested in the investment vehicles he selected, and Petitioner remained eligible to elect from among the available deemed investments through the last business day immediately preceding the payment date. Thus, although Petitioner's account in the Restoration Plan was fully vested, the amount of the account continued to change until the proceeds were distributed.

Because all the events that fixed Petitioner's right to receive the income from the Restoration Plan and the amount of Petitioner's income from the Plan could only be determined with reasonable accuracy after 2014, we conclude that Petitioner is not subject to New York State or City income tax on distributions from this account in 2015.

DATED: March 15, 2016

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

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.