

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(4)I
Income Tax
April 29, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO - I150120A

The Department of Taxation and Finance (“Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner, asks whether distributions under a nonqualified deferred compensation plan qualify as “retirement income” under 4 U.S.C.S. § 114(b)(1)(I) and, if so, whether the distributions are subject to New York State income tax withholding.

We conclude that the payments conform to the definition of “retirement income” under 4 U.S.C.S. § 114(b)(1)(I), and are not subject to New York State income tax withholding.

Facts

Petitioner participated in several nonqualified deferred compensation plans during his employment in New York. The plans provided retirement, disability and termination benefits for participating employees, and a death benefit payable prior to termination. During his employment, Petitioner was allowed to designate one of three forms of payment from each plan to be paid after separation from service. For some of the plans,¹ Petitioner elected to receive payments in quarterly installments over a 10-year period. Once a form of payment was chosen, Petitioner entered into a Participation Agreement with his employer that contractually locked in the choice. Under certain circumstances prior to retirement, Petitioner was allowed to change his payment form designation, but the election was irrevocable after retirement. Petitioner was domiciled and resided outside of New York during and after his employment. After retiring, Petitioner began receiving distributions from the nonqualified deferred compensation plans. Petitioner states these payments are reportable on Form W-2.

Analysis

Tax Law § 671(a) and New York tax regulation 20 NYCRR § 171.1 require that every employer maintaining an office or transacting business within New York State and making payment of any wages taxable under the personal income tax, must deduct and withhold from the employee’s wages an amount of tax substantially equivalent to the New York State personal income tax reasonably estimated to be due resulting from the inclusion in the employee’s New York adjusted gross income or New York source income of his or her wages received during the calendar year.

Section 114(a) of Title 4 of the U.S. Code 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. “Retirement income” under 4 U.S.C. § 114(b)(1)(I) means any plan, program, or arrangement

¹For plans where Petitioner received a lump sum distribution after retirement, Petitioner states that he filed a New York State Nonresident Income Tax Return and paid the tax due. He is not asking for an opinion on these lump sum distributions.

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 or life expectancy of the recipient or (ii) a period of not less than 10 years. 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).

It must be determined therefore, if the income from Petitioner’s Plan is part of a series of substantially equal periodic payments (not less frequently than annually) made for the life or life expectancy of the recipient or for a period of not less than 10 years. In this case, Petitioner elected in participation agreements with his employer to take annual distributions from the Plan as part of a series of quarterly installment payments over a 10-year period. Assuming Petitioner’s plan is a “nonqualified plan” as described in IRC § 3121(v)(2)(C), the payments would qualify as “retirement income” under 4 U.S.C. § 114(b)(1)(I) and, therefore, would not be subject to New York State income tax. Also, since the payments would not be subject to New York State income tax, such payments would not be subject to withholding tax under Tax Law § 671(a).

DATED: April 29, 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.