

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

TSB-A-83 (2) I  
Income Tax  
April 6, 1983

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I820311A

On March 11, 1982 a Petition for Advisory Opinion was received from International Business Machines Corporation, Armonk, New York 10504.

The issue raised is whether payments made under Petitioner's Total and Permanent Disability Income Plan are included within the category "pensions and annuities," within the meaning of section 612(c)(3-a) of the Tax law.

Section 612(c)(3-a) of the Tax Law provides, in pertinent part, for an exclusion from personal income taxation of a portion of "pensions and annuities received by an individual who has attained the age of fifty-nine and one-half . . . which are periodic payments attributable to personal services performed by . . . [the recipient] prior to his retirement from employment, which arise (i) from an employer-employee relationship . . . . "

Petitioner describes the plan in question as follows:

"IBM established the Disability Plan in August of 1947. IBM funds the Disability Plan by making contributions to a trust fund that has been determined by the Internal Revenue Service to be exempt from Federal income tax under Internal Revenue Code section 501(c)(9) as a voluntary employees' beneficiary association. The Disability Plan is applicable to all regular IBM employees who become totally and permanently disabled after having been employed by IBM for at least five years. [Reduced benefits are payable to employees with less than five years of service with IBM.] An employee may be considered to be totally and permanently disabled under the Disability Plan only if the employee is unable to perform any employment for pay or profit and has no reasonable expectation of becoming able to perform such employment.

"Benefits under the Disability Plan commence only after a totally and permanently disabled employee has received benefits for at least 52 weeks under the Sickness and Accident Plan. The benefits under the Disability Plan are as follows. For the first 18 months, the monthly benefit is 75 percent of the employee's regular compensation. Ordinarily, the 18-month period begins after the employee has received 52 weeks of benefits under the Sickness and Accident Plan. However, if the employee receives "individual consideration" benefits under the Sickness and Accident Plan, the period for which the "individual consideration" benefits are paid is applied against the 18-month period under the Disability Plan and reduces the length of that period. At the end of the 18-month (or shorter) period, the monthly benefit payable under the Disability Plan is equal to the greater of (a) 40 percent of the employee's regular monthly compensation when the employee became disabled or (b) the employee's accrued retirement income under the IBM Retirement Plan, based on actual service and earnings through the end of the regular (52-week) Sickness and Accident Plan benefit period. (If an employee became disabled prior to attaining age 55, the employee's service and

compensation under the Retirement Plan are projected from the expiration of regular benefits under the Sickness and Accident Plan to the employee's 55th birthday.) Disability benefits are subject to offset if the employee is entitled to receive Social Security or Workers' Compensation payments.

"Benefits under the Disability Plan cease when the employee attains age 65 or, if earlier, when the employee recovers from his or her disability. When a disabled employee attains age 65, the disability benefit ceases, and the employee becomes eligible to retire and receive a retirement income for life under the IBM Retirement Plan."

The term "pension" may be defined generally as "A stated allowance or stipend made by a government or business organization, in consideration of past services or of the surrender of rights or emoluments, to one retired from service " Webster's New International Dictionary, 2d ed., 1959. The application of such general definition to the term "pension" as used in the provision under consideration is limited, by the statutory language itself, as set forth above.

Further elucidation may be sought in the Federal treatment of the term "pension," pursuant to section 607 of the Tax Law, which provides that:

Any term used in this article [viz., Article 22, which imposes the Personal Income Tax] shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.

Pension plans are treated in section 401 of the Internal Revenue Code, and Regulations issued pursuant thereto provide the following:

A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees. The determination of the amount of retirement benefits and the contributions to provide such benefits are not dependent upon profits.

Benefits are not definitely determinable if funds arising from forfeitures on termination of service, or other reason, may be used to provide increased benefits for the remaining participants (see § 1.401-7, relating to the treatment of forfeitures under a qualified pension plan). A plan designed to provide benefits for employees or their beneficiaries to be paid upon retirement or over a period of years after retirement will, for the purposes of section 401(a), be considered a pension plan if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits, or, as in the case of money purchase pension plans, such contributions are fixed without being geared to profits. A pension plan may provide for the payment of a pension due to disability and may also provide for the

payment of incidental death benefits through insurance or otherwise. However, a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses (except medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14). (emphasis added) 26 C.F.R. § 1.401-1(b)(1)(i).

Accordingly, the payments here under discussion would constitute "pensions," within the meaning of section 612(c)(3-a) of the Tax Law, if paid from a plan constituting a qualified pension plan within the meaning of section 401 of the Internal Revenue Code. Inasmuch as the plan from which the subject payments are made does not qualify under such Federal provision, the payments are not excludable as "pensions." The next question to be addressed is whether the payments at issue constitute "annuities", for purposes of section 612(c)(3-a) of the Tax Law. Prior to an amendment made on March 16, 1983, the term "annuities" was defined, albeit in another context, in the Tax Commission's Personal Income Tax Regulations, as follows:

- (2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:
  - (i) It must be paid in money only, not in securities of the employer or other property.
  - (ii) It must be payable at regular intervals, at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy as of the date payments begin. An individual's life expectancy is the expected return multiple shown for the applicable age and sex in the table entitled "Table I. Ordinary Life Annuities-One Life-Expected Return Multiples", promulgated under section 1.72-9 of the Federal Income Tax Regulations.
  - (iii) It must be payable at a rate which remains uniform during such life or period or at a rate which varies only with (a) the fluctuation in the market value of the assets from which such benefits are payable, (b) the fluctuation in a specified and generally recognized cost-of-living index, or (c) the commencement of social security benefits.
  - (iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees.
  - (v) In the case of a pension or other similar benefit paid to a nonresident beneficiary of a deceased employee:

- (a) where the employee died after retirement, if the pension or other retirement benefit he was receiving constituted an annuity, payments to his beneficiary, even though they do not meet the requirements of subparagraphs (i), (ii) and (iii) of this paragraph, will constitute an annuity;
- (b) if the employee died before retirement, the pension or other benefit payable to his beneficiary need not be payable for the life of such beneficiary or for a period measured by his or her life expectancy, provided that it is payable pursuant to a plan established and maintained by the employer before the employee's death, under which a pension or benefit meeting the requirements set forth in subparagraphs (i) through (iv) of this paragraph would have been payable to the employee upon his retirement. For the purposes of this clause, the employee's life expectancy is determined as of the date of his death if he was then eligible for retirement under the terms of the plan; otherwise, his life expectancy is determined as of the earliest date when he would have become eligible for retirement under the plan. 20 NYCRR §131.4(d)(2).

Inasmuch as the payments at issue do not satisfy the requirement set forth at 20 NYCRR §131.4(d)(2)(iii), the same do not constitute "annuities," within the meaning of section 612(c)(3-a) of the Tax Law as construed by 20 NYCRR §131.4(d) prior to its amendment on March 16, 1983.

On March 16, 1983, Section 131.4(d)(2)(iii) was amended to read as follows:

(iii) It must be payable (a) at a rate which remains uniform during such life or period or (b) at a rate which varies only with (1) the fluctuation in the market value of the assets from which such benefits are payable, (2) the fluctuation in a specified and generally recognized cost-of-living index, or (3) the commencement of social security benefits or (c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term "annuity starting date" in the case of any contract or plan is the first day of the first period for which an amount is received as an annuity by the individual under the contract or plan.

Such amendment is applicable to taxable years ending on or after December 16, 1982. With respect to such periods, the payments in question will qualify as annuities, for purposes of section 612(c)(3-a) of the Tax Law. First, the payments are retirement benefits inasmuch as they are paid as part of a plan of payments made to individuals who are permanently disabled, and thus embarked upon a permanent cessation of active employment during which period they are to receive two series of payments, one from the Disability Plan followed by one from Petitioner's Retirement Plan. Thus, the requirement of the introductory clause of 20 NYCRR 131.4(d)(2), that the payments constitute a "retirement benefit," is satisfied. Subparagraph (i) is satisfied since the payments are made in money only. Subparagraph (ii) is satisfied as the payments are made at regular monthly intervals for life or at least half of the life expectancy of the individual, treating the "disability" and "retirement" arrangements as constituting together a cohesive scheme of retirement benefits.

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The third subparagraph is satisfied since the total of the amounts payable is determinable at the annuity starting date, inasmuch as the benefits payable under the Disability Plan are determined solely by reference to such objective factors as the employee's prior service and compensation, and any benefits to which he or she is entitled under the Social Security and Workers' Compensation laws.

Subparagraph (iv) provides that the individual's right to receive an annuity must be evidenced by a written instrument executed by his employer or by a plan established and maintained by his employer in the form of a definite written program communicated to its employees. The Disability Plan at issue is a "definite written program", and it has been communicated to all regular IBM employees. The Plan is included in full in a booklet entitled "About Your Company", which is distributed to all regular IBM employees. Thus, the Disability Plan satisfies the requirements of subparagraph (iv).

Accordingly, payments made under the subject disability plan during taxable years ending on or after December 16, 1982 constitute "annuities" subject to the exclusion provided for in section 612(c)(3-a) of the Tax Law.

DATED: April 5, 1983

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau