

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

TSB-A-86 (4) I  
Income Tax  
May 3, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I860228A

On February 2, 1986, a Petition for Advisory Opinion was received from Robert Vincent Smith, 451 Winter Street, Ext., Troy, New York 12180.

The issue raised is whether contributions to a New York State employee deferred compensation plan made by a New York State resident will be subject to the personal income tax imposed under Article 22 of the Tax Law when withdrawn from the plan if, at the time of withdrawal, the resident has changed his status and become a nonresident. Additionally, Petitioner asks whether income earned on such contributions will be taxable upon withdrawal.

Subsection (a) of section 457 of the Internal Revenue Code provides: "In the case of a participant in an eligible State deferred compensation plan, any amount of compensation deferred under the plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income is paid or otherwise made available to the participant or other beneficiary."

Chapter 306 of the Laws of 1985 amended the New York Tax Law to provide that amounts deferred under State deferred compensation plans will receive the same treatment for New York State personal income tax purposes as such amounts receive for federal income tax purposes under section 457 of the Internal Revenue Code. Technical Services Bureau Memorandum TSB-M-85-(16)-I.

Federal regulation 1.457-I(d)(3) provides: "Amounts deferred. "Amount(s) deferred" under an eligible plan means compensation deferred under the plan, plus income attributable to compensation so deferred. Income attributable to compensation deferred under an eligible plan includes gain from the disposition of property .... " 26 CFR 1.457-1.

Accordingly, for federal income tax purposes, and hence for New York State personal income tax purposes, income earned on compensation deferred under such a plan is treated the same as the compensation deferred. Thus, any reference in this advisory opinion to amounts deferred is intended to include deferred compensation and income earned thereon.

Section 632(a) of the Tax Law provides, in part, that the "New York adjusted gross income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income. . ., derived from or connected with New York sources . . . ." Section 632(b) of the Tax Law provides, in part, that "items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to: . . . a business, trade, profession or occupation carried on in this state..."

For Federal purposes, such amounts deferred under such a plan are characterized as wages. 26 CFR 35.3405.-1. Accordingly, such amounts deferred are characterized as wages for New York State personal income tax, purposes as well. Tax Law section 607. Inasmuch as amounts deferred are treated as wages, they are deemed, for purposes of section 632 of the Tax Law, to be derived from or connected with a New York source to the extent that Petitioner performed services in New York State.

Accordingly, if the entire amount deferred is attributable solely to services performed within New York State, then the entire amount deferred is subject to New York personal income tax. If the entire amount deferred is attributable solely to services performed outside of New York State, then none of the amount deferred is subject to tax. If the amount deferred is attributable, in part, to services performed within New York State and, in part, to services performed outside of New York State, then a portion of the amount deferred will be subject to tax. In such a case, the taxpayer must apportion the amount deferred in such a manner as to equitably reflect the amount of deferred compensation attributable to services performed within New York State. 20 NYCRR 131.23. In this regard, the method of allocation for pensions and other retirement benefits provided by regulation section 131.20 may be used by Petitioner to allocate the amount deferred.

It should also be noted that amounts deferred do not qualify for the pension and annuity exclusion under section 612(c)(3-a) of the Tax Law. Technical Services Bureau Memorandum TSB-M-85-(16)-I.

DATED: April 10, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.