

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

TSB-A-87 (9) I
Income Tax
December 8, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1870908A

On September 8, 1987, a Petition for Advisory Opinion was received from Leon Luxenberg, 14 W. Merrick Road, Valley Stream, New York 11580.

The issue raised is the taxability for purposes of the personal income tax imposed under Article 22 of the Tax Law of amounts withdrawn by a teacher from his tax deferred annuity. Petitioner specifies that the tax deferred annuity at issue is one established under the Tax Deferred Annuity Program of the New York City Teachers' Retirement System and that the teacher in question is not retired and is under 59½ years of age. Additionally, Petitioner asked whether the answer would be the same for taxable years 1986 and 1987.

To take advantage of the provisions of section 403(b) of the Internal Revenue Code providing for taxation of beneficiaries under annuities purchased by educational institutions, authorization is given under section 399-A of the Education Law for reduction of salaries of teachers in the City of New York in order to purchase tax deferred annuities. The Tax Deferred Annuity Program of the New York City Teachers' Retirement System, which implements this provision, is set out in section 13-582 of the Administrative Code of the City of New York.

Section 13-561 of the Administrative Code exempts from any state or municipal tax any return of contributions to a person under the provisions of Chapter 4 of Title 13 of the Administrative Code. Section 13-582(f) of the Administrative Code adopts the exemption provisions of section 13-561 by reference and provides that the exemption shall apply to the tax-deferred annuity net contributions and the benefits provided thereby except as otherwise specified in section 13-582. However, section 13-582(i)(4) of the Administrative Code provides the exemption provided by section 13-561 for return of contributions shall not apply to withdrawal of tax deferred annuity net contributions when a participant withdraws all or part of his accumulations in the annuity savings fund and variable annuity savings fund arising from tax deferred annuity net contributions.

Additionally, it is noted that the provisions of Tax Law section 612(c)(3-a), which provides an exemption from New York personal income tax for certain pensions and annuities, does not by its very terms apply to the situation described by Petitioner.

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Accordingly, it is determined that amounts withdrawn by a teacher who is not retired and who is under 59½ years of age from a tax deferred annuity established under the Tax Deferred Annuity Program of the New York City Teachers' Retirement System are subject to the personal income tax imposed under Article 22 of the Tax Law. This result is equally applicable to taxable years 1986 and 1987.

DATED: December 8, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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