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

TSB-A-98(5)I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I980120A

On January 20, 1998, a Petition for Advisory Opinion was received from Diane M. Fortune, 4006 New York Avenue, Seaford, New York 11783.

The issue raised by Petitioner, Diane M. Fortune, is whether payments made pursuant to Petitioner's employer's long term disability plan are an "annuity" within the meaning of section 612(c)(3-a) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was an employee of Willis Corroon Corporation until December 11, 1993, when she became eligible for her employer's long term disability plan. Petitioner's disability will prevent her from ever returning to work. Petitioner attained the age of 59 ½ on May 16, 1994. The long term disability plan is contracted with Unum Life Insurance Company of America by Petitioner's employer.

Under the long term disability plan, when Unum receives proof that an insured is disabled due to sickness or injury and requires the regular attendance of a physician, Unum will pay the insured a monthly benefit after the end of the elimination period of 180 days. The benefit will be paid for the period of disability if the insured gives Unum proof of continued disability and regular attendance of a physician. The maximum benefit period for an individual whose age at disability is less than 60 years, is to age 65, but not less than five years.

Under the contract with Unum, Petitioner is an eligible "Class 1" employee. A "Class 1" employee is one who earns over $40,000 per year. For a Class 1 employee, "disability" and "disabled" mean, in pertinent part, that because of injury or sickness the insured cannot perform each of the material duties of his regular occupation.

Petitioner is covered under "Option B" of the plan. Under "Option B", Petitioner is entitled to 70 percent of basic monthly earnings, including other disability income, not to exceed a maximum benefit of $15,000 per month. "Basic monthly earnings" means the employee's base salary plus production incentive compensation averaged over the most recent 12 months. The minimum monthly benefit is at least $100. Once the plan was determined it could not be affected by future increases in Social Security benefits. The entire cost of the plan is funded by Willis Corroon Corporation.

Petitioner has been certified disabled by Social Security. Petitioner has been receiving long-term disability payments since December 11, 1993. Petitioner will continue to receive these payments until attaining age 65, at which time she will convert to the Willis Corroon Pension Plan.

Section 612(a) of the Tax Law defines New York adjusted gross income of a resident individual as the individual's federal adjusted gross income with certain modifications. Section 612(c)(3-a) of the Tax Law contains a modification for pension and annuity income, other than pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the federal government.

Section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Personal Income Tax Regulations ("Regulations") provide that pension and annuity income not in excess of $20,000, received by an individual, may be subtracted in determining the individual's New York adjusted gross income providing the following conditions are met:

(a) the pension and annuity income must be included in federal adjusted gross income;

(b) the pension and annuity income must be received in periodic payments (except distributions from an individual retirement account [IRA] or self-employed retirement plan [Keogh]);

(c) the pension and annuity income must be attributable to personal services performed by such individual, prior to such individual's retirement from employment, which arises from either an employer-employee relationship or from contributions to a retirement plan which are tax deductible under the Internal Revenue Code ("IRC") (*e.g.*, IRA or Keogh); and

(d) such individual receiving the pension and annuity income must be 59 and ½ years of age or over.

The term "annuity" is not defined in section 112.3(c)(2)(i) of the Regulations, but is defined, for purposes of determining New York source income of a nonresident individual, in section 132.4(d) of the 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 of such individual's life expectancy as of the date payments begin.

(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 table 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.

(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.

In Richard J. Alexanderson, Adv Op of St Tax Commn, March 19, 1985, TSB-A-85-(2)I, it was held that the payments made to the petitioner from his employer's long term disability plan, constituted an "annuity", as defined in section 131.4(d)(2)(iii) of the Regulations as amended on March 16, 1983 and applicable to taxable years ending on or after December 16, 1982, and that the annuity payments were subject to the exclusion provided for in section 612(c)(3-a) of the Tax Law after the petitioner had attained the age of 59 ½ years of age. The employee fully retired due to a physical ailment and will never be able to return to any type of employment. All full time salaried employees under 64 ½ were eligible for membership in the long term disability plan and the entire cost of the plan was funded by the employer. If the employee was disabled longer than 6 months, monthly income from the plan would equal 60 percent of the employee's base salary including other disability income up to a maximum benefit of $3,000 per month. Once the plan was determined, it would not be affected by future increases in Social Security benefits. The plan provided a minimum benefit of at least $100 per month, regardless of whether the employee received other disability income. After the benefits started, they would continue up to age 65 or the date of retirement, if earlier. In the advisory opinion, it was determined that the long term disability payments were retirement benefits since they were paid as part of a plan of payments made to an individual who was permanently disabled, and thus embarked upon a permanent cessation of active employment during which period he was to receive two series of payments, one from the disability plan followed by one from the employee's retirement plan. The payments were made in money 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. The total of the amounts payable was determinable at the annuity starting date and the employee's right to receive the annuity was evidenced by a written plan. (Also, see International Business Machines Corporation, Adv OP St Tax Commn, April 5, 1983, TSB-A-83-(2)I.)

In this case, Petitioner was an employee of Willis Corroon Corporation until December 11, 1993, when she became eligible for her employer's long term disability plan. Petitioner's disability will prevent her from ever returning to work. The entire cost of the disability plan is funded by the employer and under the plan, Petitioner is entitled to 70 percent of basic monthly earnings, including other disability income, not to exceed a maximum benefit of $15,000 per month. Once the plan was determined it could not be affected by future increases in Social Security benefits. She will continue to receive these payments until attaining age 65, at which time she will convert to the Willis Corroon Pension Plan. Petitioner has been certified disabled by Social Security.

Like Alexanderson, supra, and IBM, supra, Petitioner's long term disability payments are received as a result of her permanent cessation of active employment due to permanent disability and are paid as part of a plan of two series of payments, one from the disability plan followed by one from the retirement plan and together these payments constitute retirement benefits. The payments are made in money at regular monthly intervals for life or at least half of the life expectancy of the individual. The total of the amounts payable is determinable at the annuity starting date and Petitioner's right to receive the annuity is evidenced by a written plan. Accordingly, the payments Petitioner receives from her employer's long term disability plan constitute annuities under section 132.4(d)(2) of the Regulations and as contemplated under section 612(c)(3-a) of the Tax Law. Therefore, assuming the payments are included in federal adjusted gross income, up to $20,000 of the payments Petitioner receives a year from the long term disability plan after May 16, 1994, will qualify for exclusion from federal adjusted gross income when computing New York adjusted gross income, pursuant to section 612(c)(3-a) of the Tax Law.

/s/
DATED: March 23, 1998 John W. Bartlett
Deputy Director
Technical Services Bureau

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