

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

TSB-A-99(2)I  
Income Tax  
June 25, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I990407A

On April 7, 1999, a Petition for Advisory Opinion was received from Paul R. Comeau and James R. Maloney, Hodgson, Russ, Andrews, Woods & Goodyear, LLP, 1800 One M&T Plaza, Buffalo, New York 14203-2391.

The issue raised by Petitioners, Paul R. Comeau and James R. Maloney, is whether a taxpayer is entitled to exclude from his New York adjusted gross income, under section 612(c)(12) of the Tax Law, all withdrawals from an IRA, received during each taxable year, until such time as the sum of such withdrawals exceeds the sum of all of the section 612(b)(7) of the Tax Law add-back modifications the taxpayer made with respect to the professional service corporation's contributions to the pension plan attributable to the taxpayer.

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

Taxpayer, Petitioners' client, was a shareholder and employee of a professional service corporation ("Corporation") organized under Article 15 of the Business Corporation Law of New York State. During his employment, Corporation maintained a pension plan for the benefit of its employees, including Taxpayer. Contributions were made to the pension plan on behalf of Taxpayer until March 31, 1986, at which time the proceeds of the plan were rolled over into an Individual Retirement Account ("IRA"). The IRA was not required to make annuity-like payments or to make payments in any other fixed or structured manner. Taxpayer had unrestricted access to the IRA, and could withdraw as much or as little as he saw fit at such times as he saw fit.

During the years Corporation made contributions to the pension plan on behalf of Taxpayer, Taxpayer was required by section 612(b)(7) of the Tax Law (for purposes of computing New York adjusted gross income under Article 22 of the Tax Law) to add back to his federal adjusted gross income a portion of Corporation's contributions to the pension plan attributable to Taxpayer. The portion Taxpayer was required to add back was the amount by which actual contributions exceeded a statutory maximum. Taxpayer made all such add-back modifications required by section 612(b)(7) of the Tax Law. At the time Taxpayer initiated withdrawals from the IRA, the funds in the IRA exceeded the total of the addback modifications which Taxpayer had been required to make under section 612(b)(7) of the Tax Law. Furthermore, all of the funds in the IRA at the time Taxpayer began his withdrawals were from the pension rollover (*i.e.* Taxpayer had not contributed any funds to the IRA in addition to the funds rolled over from the pension plan.).

## **Discussion**

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(b)(7) of the Tax Law requires an addition modification for a taxpayer who is a shareholder of a corporation organized under Article 15 or authorized to do business in New York State under Article 15-a of the Business Corporation Law, for the taxpayer's taxable years beginning before 1988, for the amount which is deductible by such corporation under section 404(a)(1), (2) or (3) of the Internal Revenue Code ("IRC") for its taxable year ending in or with such taxpayer's taxable year for contributions paid on behalf of such taxpayer minus the lesser of \$15,000 or 15 percent of the earned income derived by such taxpayer from such corporation during such taxpayer's taxable year.

Section 612(c)(12) of the Tax Law provides for a subtraction modification for the amount necessary to prevent the taxation of amounts properly included in New York adjusted gross income in prior taxable years in accordance with section 612(b)(7) of the Tax Law.

The computation of the subtraction modification under section 612(c)(12) of the Tax Law was addressed in the Department of Taxation and Finance Technical Services Bureau Memorandum, TSB-M-82(3)-I(Rev.), dated December 21, 1983 ("TSB-M-82(3)-I(Rev.)"). Such memorandum provides that when the shareholder of professional service corporation begins receiving retirement benefits, the subtraction modification is made in the following manner:

If the total aggregate amount of the addback modification under section 612(b)(7) can be recovered in 3 years, the payments received by the shareholder can be subtracted from federal adjusted gross income until the entire aggregate amount of addback previously taxed is recovered.

If the total aggregate amount of the addback modification under section 612(b)(7) cannot be recovered within 3 years, TSB-M-82(3)-I(Rev.) provides that a formula is applied to determine the amount of the subtraction modification.

Technical Services Memorandum TSB-M-89-(4)I, dated July 5, 1989, ("TSB-M-89-(4)I") explains the proper method of computing the pension and annuity exclusion under section 612(c)(3-a) of the Tax Law for a retired shareholder of a professional service corporation who is also eligible for the subtraction modification under section 612(c)(12) of the Tax Law. Such memorandum provides that a retired shareholder who receives a distribution from an IRA, Keogh or other qualified plan, the principal of which is fully or partially composed of moneys rolled over from a professional service corporation pension plan, remains eligible for the section 612(c)(12) subtraction modification. In this instance, the subtraction and, if the shareholder qualifies, the pension and annuity exclusion under section 612(c)(3-a), are computed as follows:

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1. Compute the amount of the qualified plan (or IRA) distribution attributable to the amount rolled over from the professional service corporation pension plan. The amount is determined using the rules for determining the previously taxed portion of distributions under section 72 of the IRC. This step is required only for the initial year of payment under the contract to determine whether the total amount previously taxed will be recovered in three years.

2. Then compute the section 612(c)(12) subtraction. Where the three-year rule applies, or where the payments constitute an annuity, the subtraction is to be computed using the guidelines in TSB-M-82-(3)I(Rev.).

3. The total distribution reported for federal purposes is then reduced by the section 612(c)(12) modification.

4. The portion of the distribution remaining, if any, up to a maximum of \$20,000, is to be subtracted as the pension and annuity exclusion under section 612(c)(3-a).

In this case, pursuant to section 612(b)(7) of the Tax Law, Taxpayer was required to add back to his federal adjusted gross income a portion of Corporation's contributions to the pension plan attributable to Taxpayer. On March 31, 1986, Taxpayer's proceeds of his pension plan were rolled over into an IRA. These proceeds were the only contribution Taxpayer made into the IRA. At the time that Taxpayer initiated withdrawals from the IRA, the funds in the IRA exceeded the total of the modifications Taxpayer made previously pursuant to section 612(b)(7) of the Tax Law.

Taxpayer's IRA does not require that annuity-like payments be made nor that payments must be made in any other fixed or structured manner. Once Taxpayer is eligible to make withdrawals from the IRA, Taxpayer can withdraw as much as Taxpayer wants whenever Taxpayer wants, with a mandatory commencement upon reaching age 70 ½. Accordingly, the total aggregate amount of the addback modification under section 612(b)(7) of the Tax Law could be recovered by Taxpayer in three years, if such amount were withdrawn within that three year period.

Therefore, pursuant to TSB-M-82(3)-I(Rev.), when Taxpayer begins receiving retirement benefits from the IRA, the amounts received by Taxpayer during each taxable year can be subtracted from federal adjusted gross income pursuant to section 612(c)(12) of the Tax Law, until the entire aggregate amount of addback previously taxed is recovered.

Further, pursuant to TSB-M-89-(4)I, after the entire aggregate amount of the addback modification under section 612(b)(7) of the Tax Law has been recovered, Taxpayer's withdrawals

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from the IRA may qualify, under section 612(c)(3-a) of the Tax Law, for the pension and annuity exclusion of up to \$20,000 a taxable year.

DATED: June 25, 1999

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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