

**New York State Department of Taxation and Finance  
Office of Tax Policy Analysis  
Taxpayer Guidance Division**

TSB-A-07(6)I  
Income Tax  
November 15, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I070813A

On August 13, 2007, a Petition for Advisory Opinion was received from Bryan Koshers, 1094 Merrick Avenue, Merrick, New York 11566.

The issue raised by Petitioner, Bryan Koshers, is whether a distribution received from a family tuition savings plan established under a qualified tuition program of a state other than New York and operated under section 529 of the Internal Revenue Code (529 plan) is subject to New York State personal income tax.

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

Petitioner is a resident of New York State. On January 1, 2005, Petitioner opened a 529 plan offered by a state other than New York and made a contribution to the 529 plan. The contribution was not subtracted from federal adjusted gross income for New York State personal income taxes.

In 2007, Petitioner received a distribution from the 529 plan representing a return of the contribution made to the 529 plan and deferred earnings from the 529 plan. The entire distribution is being used for college tuition expenses. The distribution is considered a qualified withdrawal for federal income tax purposes, and no amount will be subject to federal personal income tax.

**Applicable law**

Section 529(b) of the Internal Revenue Code (IRC) provides, in part:

Qualified tuition program. For purposes of this section –

(1) In general. The term “qualified tuition program” means a program established and maintained by a State or agency or instrumentality thereof or by 1 or more eligible educational institutions –

Section 529(c) of the IRC provides, in part:

Tax treatment of designated beneficiaries and contributors.—

(1) In general. Except as otherwise provided in this subsection, no amount shall be includible in gross income of –

(A) a designated beneficiary under a qualified tuition program, or

(B) a contributor to such program on behalf of a designated beneficiary, with respect to any distribution or earnings under such program.

\* \* \*

(3) Distributions. –

(A) In general. Any distribution under a qualified tuition program shall be includible in the gross income of the distributee in the manner as provided under section 72 to the extent not excluded from gross income under any other provision of this chapter.

(B) Distributions for qualified higher education expenses. For purposes of this paragraph –

(i) In-kind distributions. No amount shall be includible in gross income under subparagraph (A) by reason of a distribution which consists of providing a benefit to the distributee which, if paid for by the distributee, would constitute payment of a qualified higher education expense.

(ii) Cash distributions. In the case of distributions not described in clause (i), if –

(I) such distributions do not exceed the qualified higher education expenses (reduced by expenses described in clause (i)), no amount shall be includible in gross income, and

(II) in any other case, the amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.

Section 612 of the Tax Law provides, in part:

(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

(b) Modifications increasing federal adjusted gross income. There shall be added to federal adjusted gross income:

[None of the modifications required under section 612(b) of the Tax Law are applicable for a distribution from a family tuition savings plan established under a qualified tuition program of a state other than New York.]

(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

[None of the modifications required under section 612(c) of the Tax Law are applicable for a distribution from a family tuition savings plan established under a qualified tuition program of a state other than New York.]

## **Opinion**

Pursuant to the IRC, 529 plans may be established and maintained by a state, an agency or instrumentality of a state, or one or more eligible educational institutions of a state that offer a 529 plan. The earnings of a 529 plan are not subject to tax in the year earned and distributions from a 529 plan, including the earnings, are not included in federal gross income if used for qualified higher education expenses.

Pursuant to section 612(a) of the Tax Law, the starting point for determining New York adjusted gross income is federal adjusted gross income. The federal adjusted gross income is then subject to modifications pursuant to section 612 of the Tax Law. There is no modification required under section 612 of the Tax Law for a distribution from a family tuition savings plan established under a qualified tuition program of a state other than New York.

Petitioner states in the present case the entire distribution from the 529 plan is being used for college tuition expenses and that no amount of the distribution will be subject to federal income tax. Accordingly, since there is no modification required under section 612 of the Tax Law, Petitioner's 529 plan distribution, including the earnings, received from a qualified tuition savings plan established in a state other than New York is not included in New York adjusted gross income and is not subject to New York personal income tax.

DATED: November 15, 2007

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Taxpayer Guidance Division

**NOTE:** An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.