New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(2)I
Income Tax
February 18, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I101213B

On December 14, 2010 the Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner, who has not yet reached the age of 59½, asks whether a surviving spouse who elects to treat his deceased spouse's individual retirement account as his own qualifies as a beneficiary and can subtract up to the $20,000 limit from his New York taxable income as provided for under Tax Law §612(c)(3-a).

We conclude that, if Petitioner elects to treat his late wife's individual retirement account as his own he will no longer qualify as a beneficiary for purposes of the $20,000 income subtraction modification under Tax law §612(c)(3-a).

Facts

Petitioner is the sole beneficiary of his late wife's individual retirement account (IRA) and has not attained the age of 59½. If Petitioner's wife was still living and received distributions from her IRA, she would have qualified for the $20,000 income subtraction under Tax Law §612(c)(3-a). Petitioner, however, is considering electing to treat his late wife's IRA as his own in order to postpone the minimum distributions that would be necessary when his late wife would have reached the age of 70½ as required by Internal Revenue Code §408(a)(6). Petitioner from time to time may elect to receive distributions from this IRA before he attains the age of 59½.

Analysis

Tax Law §612(c)(3-a) provides a subtraction modification from federal adjusted gross income for "[p]ensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of [Tax Law § 612(c)], to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship . . .". Regulation 20 NYCRR §112.3(c)(2), which explains the employer-employee relationship under Tax Law §612(c)(3-a), states that "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 (*e.g.*, individual retirement account (IRA) or self-employed retirement (Keogh)". Additionally, Regulation 20 NYCRR §112.3(c)(2)(iv)(a) provides that "[w]here a beneficiary receives a payment which qualifies as a pension or annuity created by the decedent, such payment will come within the definition and meaning of 'pension and annuity' as defined in this paragraph. The beneficiary will be entitled to the same pension and annuity income modification that the decedent would have been entitled to, had such decedent continued to live, regardless of the age of the beneficiary".

While Petitioner has not attained the age of 59½ as required by Tax Law §612(c)(3-a) to qualify for the income subtraction modification of up to $20,000 of pension and annuity income received by an individual, Regulation 20 NYCRR §112.3(c)(2)(iv)(a) extends this subtraction modification to a beneficiary of a pension and annuity regardless of the beneficiary's age. Therefore, to currently qualify for the income subtraction modification, under Tax Law §612(c)(3-a), Petitioner must be a beneficiary of his wife's IRA. According to the facts submitted, Petitioner is the sole beneficiary of his wife's IRA and is considering making an election to become the owner of this IRA. In order to do this, Petitioner must elect to rollover his wife's IRA into an IRA owned by him as provided for under IRC §408(d). If Petitioner makes this election, however, he will no longer be a beneficiary.

Accordingly, if Petitioner becomes the IRA's owner, the extension of the $20,000 income subtraction modification to beneficiaries allowed under Regulation 20 NYCRR §112.3(c)(2)(iv)(a) will no longer apply to him and he must wait until he has attained the age of 59½ to qualify for the income subtraction modification under Tax law §612(c)(3-a).

DATED: February 18, 2011

/S/
DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.