

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

TSB-A-84 (2) I
Income Tax
October 8, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. 1820617A

On June 17, 1982 a Petition for Advisory Opinion was received from R. W. Kaszubinski, 404 No. Main Street, No. Syracuse, New York 13212.

The issue raised is the accrualability of payments received under a private annuity contract, for purposes of Article 22 of the Tax Law. Petitioner describes a taxpayer who in 1982 conveyed real property in New York in exchange for a private life annuity, and thereupon changed his residence from New York to Florida.

Section 654(c)(1) of the Tax Law provides that where an individual changes his status from resident to nonresident, such individual must, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status. The phrase "accruing prior to the change of status" refers to items "required to be included if a Federal income tax return were being filed for the same period on an accrual basis." 20 NYCRR 148.10(a). The applicable Federal regulation provides that "Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy." 26 C.F.R. 1.451-1.

Since in the present instance the amount to be received subsequent to the close of the taxable period in question is contingent upon the date of death of the annuitant, such amount can not in fact be determined with reasonable accuracy and is accordingly not accruable under the Federal rule. It is therefore not subject to the special accrual provision contained in Tax Law, §654(c)(1). Matter of John S. Litherland, State Tax Commission, August 22, 1972.

Payments from such a private annuity as is the subject of this Advisory Opinion are divided, for Federal purposes, into (1) excluded return of investment, (2) capital gain income, and (3) ordinary annuity income. Rev. Rul. 69-74. These items should be treated, on the taxpayer's non-resident return, as follows. The amount excluded as a return of investment is automatically excluded from New York adjusted gross income. The amount representing the capital gain is subject to tax as income from the sale of real property in New York. Tax Law, §632(b)(1)(A). The amount representing ordinary annuity income is excluded from tax under Tax Law, § 632(b)(2). Delmhorst v. State Tax Commission, 92 A.D. 2d 981, aff'd 60 N.Y. 2d 628; Epstein v. State Tax Commission, 89 AD 2d 256.

DATED: May 1, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau