

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

TSB-A-86 (11) I
Income Tax
August 29, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I860701B

On July 1, 1986, a Petition for Advisory Opinion was received from Nat Gilbert, 240 Hamlet Drive, Jericho, New York 11753.

The issues raised are: (1) whether payments made under an agreement signed by Petitioner qualify as "pensions and annuities," within the meaning of section 612(c)(3-a) of the Tax Law and (2) whether the filing of form W-2 by Petitioner's employer has any bearing on the determination of the nature of the payments made to Petitioner.

Petitioner was an active officer and director of Matsushita Electric Corporation of America (MECA) and Panafax Corporation (Panafax) until October 31, 1984 when he executed an agreement with MECA for what appears to be a paid leave of absence. Petitioner attained the age of fifty-nine and one half years in December of 1984. Petitioner submitted information describing the agreement in pertinent part as follows:

The agreement provides that Petitioner is to resign as an officer/director but is to continue as an employee of MECA on leave of absence. Petitioner's employment with MECA is to terminate on February 28, 1987. While Petitioner will not be required to render specific services during this time and is free to seek employment elsewhere, he will nonetheless be compensated \$17,000 per month with an additional lump sum payment of \$100,000 on March 1, 1987. Petitioner will also receive fringe benefits in the form of MECA life insurance, profit sharing, major medical and dental coverage, long term disability coverage and travel accident insurance for trips made on MECA business.

Petitioner also indicates that the payments are being made by his employer to avoid a possible age discrimination action.

ISSUE I

Section 612(c)(3-a) of the Tax Law provides, in pertinent part, for an exclusion from personal income taxation under Article 22 of the Tax Law of up to \$20,000 of:

...pensions and annuities received by an individual who has attained the age of fifty-nine and one half ... 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 or ((ii) from contributions to a retirement plan which are deductible for federal income tax purposes

This section requires both that the payments made be in the nature of a pension or annuity and that they be attributable to services performed prior to retirement.

Nothing contained in the agreement indicates that either Petitioner or his employer intended the payments in question to be pension or annuity payments. Instead, the agreement states that Petitioner is to remain an employee of MECA until February 28, 1987. The agreement treats the payments as if they are wages and not pensions or annuities. Petitioner's employer has treated the payments as wages by reporting them on a W-2 form rather than a W-2P form. If, as Petitioner has stated, the payments are being made in consideration of Petitioner's waiver of any claim for discrimination, then the nature of the payments is not that of a pension or annuity and such payments are not attributable to services performed before retirement.

Additionally, the payments made to Petitioner do not qualify as an annuity for purposes of Article 22 of the Tax Law. Section 131.4(d)(2) of the personal income tax regulations of the New York State Tax Commission which defines this term, although in another context, provides in pertinent part:

(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

(i) . . .

(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 his life expectancy as of the date payments begin

The payments in question do not fulfill requirement (ii) above. The Petitioner began his leave of absence on October 31, 1984 when he was 59 years old. The payments made to him will continue through February 28, 1987. An individual's life expectancy are to be calculated by use of the table provided in section 1.72-9 of the Federal Income Tax Regulations. According to this table, Petitioner can expect to live 18.9 years beyond his present 59 years. In order for payments made to the Petitioner to qualify as an annuity, they must be paid over a period not less than one half the receiver's life expectancy, which in this case is 9.45 years. Since the payments are made for a period less than one half petitioner's life expectancy - two years and 3 months or 2.25 years - they do not qualify as an annuity.

Accordingly, the payments made to Petitioner under the agreement between MECA and Petitioner during the period beginning October 31, 1984 and ending February 28, 1987 do not constitute pensions or annuities within the meaning of section 612(c)(3-a) of the Tax Law.

ISSUE II

The payments made to petitioner have been reported by MECA for income tax purposes on Form W-2. This is a wage and tax statement, while form W-2P is a statement for recipients of annuities, pensions or retired pay. Petitioner questions whether the nature of the payments made to him should be determined by the form used to report them.

While the employer's choice of reporting forms is not, by itself, controlling, it is an indication of the intention of the parties involved. The filing by MECA of form W-2 rather than W-2P appears to indicate the belief by MECA that the payments made to Petitioner were in the nature of wages, and were not pension or annuity payments.

DATED: August 29, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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