

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

TSB-A-99(1)I  
Income Tax  
June 25, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I990326A

On March 26, 1999, a Petition for Advisory Opinion was received from Samuel Boiko, 46 Harrison Place, Massapequa, New York 11758.

The issue raised by Petitioner, Samuel Boiko, is whether the payments received pursuant to his employer's deferred compensation plan, constitute an annuity within the meaning of section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Personal Income Tax Regulations ("Regulations").

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

Petitioner was an employee of Pinelawn Park for 27 years prior to his retirement at age 65 in December, 1995. Since retirement, Petitioner has received monthly retirement checks under the Pinelawn Memorial Park Deferred Compensation Plan, dated June 9, 1976 (the "Plan") maintained by his employer. The Plan is a non-qualified plan within the meaning of section 401 of the Internal Revenue Code.

The Plan provides that Pinelawn Cemetery ("Pinelawn"), has adopted a deferred compensation plan for its non-union employees, and in order to assist in making funds available in the future as may be needed, Pinelawn is purchasing life insurance contracts with annuity features covering those of its non-union employees who are physically qualified therefor and annuity plans for those who are not physically qualified for life insurance. The Plan provides for retirement annuity benefits as follows:

- (a) Annuity benefits are not payable if benefits are paid under the death benefits provision or the disability benefits provision of the Plan.
- (b) Annuity benefits are calculated by a percentage of final average compensation, where the percentage is determined by the number of full fiscal years of service. For 27 years of service, the Plan provides that the annuity benefit is 30 percent of the employee's final average compensation.
- (c) The Plan provides that the "final average compensation" for all non-union employees not on commission, is their last, full, calendar year's salary, and for all those non-union employees working on a commission basis, the final average compensation shall be determined as an average of the best, three, consecutive calendar years of the last, full, twelve calendar years of service.

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(d) Annuity benefits are payable monthly following the non-union employee's retirement on or after the normal retirement date – attainment of either age 65 or 10 fiscal years of full-time service, whichever comes second – the payments commencing on or about the 20<sup>th</sup> of the month following the month of retirement.

(e) Annuity benefits are to be paid for life or for 10 years certain, whichever comes second – in the event that following retirement and prior to completion of 120 monthly payments (10 years) the employee should die, then the remainder of the 120 payments are payable only to the beneficiary so named and filed in writing with Pinelawn.

Under the Plan, Petitioner will receive retirement annuity payments over his lifetime. If Petitioner dies prior to receiving 120 monthly payments, his beneficiary is entitled to any remaining payments necessary to guarantee payments for a minimum of 120 months, as provided under the Plan. Petitioner was not required to make contributions to the Plan during his period of employment. Petitioner receives no other retirement benefits from his former employer other than the benefits paid under the 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(c)(3-a) of the Tax Law contains a modification for pension and annuity income, other than pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the federal government.

Section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Regulations provide that pension and annuity income not in excess of \$20,000, received by an individual, may be subtracted in determining the individual's New York adjusted gross income providing the following conditions are met:

- (a) the pension and annuity income must be included in federal adjusted gross income;
- (b) the pension and annuity income must be received in periodic payments (except distributions from an individual retirement account [IRA] or self-employed retirement plan [Keogh]);
- (c) the 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.*, IRA or Keogh); and

(d) such individual receiving the pension and annuity income must be 59 ½ years of age or over.

The term "annuity" is not defined in section 112.3(c)(2)(i) of the Regulations, but is defined, for purposes of determining New York source income of a nonresident individual, in section 132.4(d) of the Regulations as follows:

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

(i) It must be paid in money only, not in securities of the employer or other property.

(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 of such individual's life expectancy as of the date payments begin.

(iii) It must be payable:

(a) at a rate which remains uniform during such life or period; or

(b) at a rate which varies only with:

(1) the fluctuation in the market value of the assets from which such benefits are payable;

(2) the fluctuation in a specified and generally recognized cost-of-living index; or

(3) the commencement of social security benefits; or

(c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term *annuity starting date* in the case of any contract or plan is the first day of the first

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period for which an amount is received as an annuity by the individual under the contract or plan.

(iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees.

In this case, pursuant to the written Plan of his employer, Petitioner is receiving monthly payments, equal to 30 percent of his final average compensation, for the rest of his life. This retirement benefit constitutes an annuity pursuant to section 132.4(d)(2) of the Regulations.

Assuming that this annuity income that Petitioner receives from the Plan is included in Petitioner's federal adjusted gross income, this annuity income meets the conditions set forth in section 612(c)(3-a) of the Tax Law and section 112.3(c)(2)(i) of the Regulations because Petitioner is more than 59 ½ years of age, and the annuity, received in monthly payments, is attributable to personal services performed by Petitioner prior to his retirement as a non-union employee of Pinelawn.

Accordingly, when computing New York adjusted gross income, Petitioner may, pursuant to section 612(c)(3-a) of the Tax Law, subtract from federal adjusted gross income up to \$20,000 of the payments Petitioner receives each year from the Plan.

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.