

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

TSB-H-80-(522)-I
Income Tax
February 2, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I800904A

On August 9, 1980 a Petition for Advisory Opinion was received from Marlene Anita Harding, 3 Stuyvesant Oval - 8B, New York City, New York 10009.

The issue raised is whether a taxpayer is entitled to retroactive modifications, under the Personal Income Tax imposed under Article 22 of the Tax Law, based on contributions made to a qualified higher education fund (a PASS fund) where such a fund was not in existence and no such contributions were actually made during the years in question. In addition, Petitioner also inquires as to the reduction in tax which would have inured to her benefit had she made modifications of \$750 with respect to each of the years in question.

Petitioner's income tax returns for 1978 and 1979, copies of which have been submitted with the Petition, were made out with no modification based on contributions to a qualified higher education fund. Petitioner did not establish nor make contributions to such a fund during 1978 or 1979.

Section 611(a) of the Tax Law provides that a taxpayer's New York adjusted gross income, the starting point in determining his New York taxable income, is equal to his Federal adjusted gross income as modified by certain specified additions and subtractions.

Section 612(c)(16) of the Tax Law provides for such a subtraction of amounts which during the taxable year are contributed by the taxpayer to a qualified higher education fund established by him, such amount limited to the product of seven hundred fifty dollars and the number of eligible beneficiaries of the fund. For the taxable year 1978 subtractions may be made of amounts contributed to a qualified education fund during the fifteen month period beginning January 1, 1978 and ending April 15, 1979. For the taxable year 1979 a taxpayer may subtract amounts contributed by him during the period January 1, 1979 to December 31, 1979.

In order for such a PASS modification to be made with respect to 1978 or 1979 contributions must have been made within the periods set forth in the previous paragraph. Contributions made to a fund established subsequent to 1979 may not be made the basis of modifications applicable to 1978 or 1979 taxable years.

Analysis of the returns submitted by Petitioner reveals that had modifications of \$750.00 been made for 1978 and 1979 the reduction in tax would have been \$119.35 and \$122.58, respectively.

Accordingly, since no qualified higher education fund had been established by Petitioner and no contributions to such a fund were made in 1978 or 1979, no modification may now be made with respect to such years.

DATED: December 2, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR