

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(4)I
Income Tax
June 13, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I051021A

On October 21, 2005, a Petition for Advisory Opinion was received from Patrick G. Calhoun, c/o Brian P. Goldstein, Esq., P.O. Box 12189, Albany, New York 12212-2189.

The issue raised by Petitioner, Patrick G. Calhoun, is whether the payment of a lump-sum distribution from the State Employees Federal Credit Union (SEFCU) Supplemental Retirement Plan (the Nonqualified Plan) to a nonresident of New York State constitutes New York source income for New York State personal income tax purposes.

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

SEFCU is a federal credit union exempt from federal income tax pursuant to section 501(c)(1) of the Internal Revenue Code (IRC). SEFCU employs Petitioner as its Chief Executive Officer. It is assumed that Petitioner will become a nonresident of New York prior to the receipt of the Nonqualified Plan benefits.

SEFCU maintains a profit-sharing plan (the PSP) that, according to Petitioner, qualifies for favorable tax treatment under section 401(a) of the IRC. As such, it is assumed for purposes of this Opinion that the PSP is subject to the limitations imposed under sections 401(a)(17) and 415 of the IRC and the nondiscrimination requirements under section 401(a)(4) that could limit the contributions and benefits Petitioner could receive under the PSP.

SEFCU also maintains the Nonqualified Plan for the benefit of Petitioner. For purposes of this Opinion, it is assumed that the Nonqualified Plan is a plan described in section 3121(v)(2)(C) of the IRC. Petitioner is the sole participant in the Plan.

Section 2.1 of the Nonqualified Plan provides that upon termination of employment on or after his retirement date for any reason other than death or disability, a lump-sum payment equal to \$3,400,000 less the amount of Petitioner's account balances under PSP will be payable to Petitioner as soon as administratively feasible. The benefits described in the preceding sentence are subject to reduction under certain circumstances described in the Nonqualified Plan agreement. In each instance where a reduction would apply, the amount of the reduced benefit is further reduced by the amount of Petitioner's account balances under PSP. Petitioner's benefits under the Nonqualified Plan are also subject to forfeiture under certain circumstances.

Section 4.1 of the Nonqualified Plan provides that the right of Petitioner or his designated beneficiary to receive a distribution from the plan shall be an unsecured claim against the general assets of SEFCU, and neither Petitioner nor his designated beneficiary shall have any rights in or against any specific assets of SEFCU.

Applicable law and regulations

Section 3121(v)(2)(C) of the IRC provides:

Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (a)(5).

Section 114 of Title 4 of the US Code provides, in part:

(a) No State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).

(b) For purposes of this section –

(1) The term “retirement income” means any income from –

* * *

(I) any plan, program, or arrangement described in section 3121(v)(2)(C) of such Code, if such income –

(i) is part of a series of substantially equal periodic payments (not less frequently than annually) made for –

(I) the life or life expectancy of the recipient (or the joint lives or joint life expectancies of the recipient and the designated beneficiary of the recipient), or

(II) a period of not less than 10 years, or

(ii) is a payment received after termination of employment and under a plan, program, or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations imposed by 1 or more of sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of such Code or any other limitation on contributions or benefits in such Code on plans to which any of such sections apply. . . .

Section 601(e) of the Tax Law imposes a personal income tax on nonresidents of New York State who have New York source income and provides, in part:

Nonresidents and part-year residents. (1) General. There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual . . . a tax which shall be equal to the tax base multiplied by the New York source fraction.

(2) Tax base. The tax base is the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b), (c), (d) and (m) of section six hundred six, as if such nonresident or part-year resident individual . . . were a resident subject to the provisions of part II of this article.

(3) New York source fraction. The New York source fraction is a fraction the numerator of which is such individual's . . . New York source income determined in accordance with part III of this article and the denominator of which is such individual's New York adjusted gross income determined in accordance with part II of this article. . . .

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . and

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources. . . .

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state;
or

(B) a business, trade, profession or occupation carried on in this state; . . .

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Section 601(e) of the Tax Law imposes a personal income tax on the taxable income derived from New York sources of a nonresident individual. The tax is equal to the tax computed as if the nonresident individual were a New York State resident for the entire year, reduced by certain credits, and then multiplied by the income percentage (i.e., New York source fraction). The numerator of the fraction used to compute the income percentage is the individual's New York source income; the denominator of the fraction is the nonresident individual's New York adjusted gross income from all sources for the entire year.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual is the sum of the items of income, gain, loss and deduction entering into federal adjusted gross income derived from or connected with New York sources and any New York addition and subtraction modifications under sections 612(b) and (c) of the Tax Law that relate to income derived from New York sources.

Section 114 of Title 4 of the US Code provides that only the state of which a person is a resident or domiciliary may tax the person on his or her retirement income. Section 114(b) provides that retirement income includes income received from any plan, program, or arrangement described in section 3121(v)(2)(C) of the IRC, if such income is a payment received after termination of employment and under a plan, program or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations imposed by one or more of sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of the IRC or any other limitation on contributions or benefits in such Code on plans to which any such sections apply.

The Nonqualified Plan provides that upon termination of employment on or after Petitioner's retirement date for any reason other than death or disability, a lump-sum payment equal to \$3,400,000 less the amount of Petitioner's account balances under PSP will be payable to Petitioner. The benefits are subject to reduction under certain circumstances described in the Nonqualified Plan agreement. However, in each instance where a reduction would apply, the amount of the reduced benefit is further reduced by the amount of Petitioner's account balances under PSP.

It appears that the Nonqualified Plan is maintained by SEFCU solely for the purpose of providing Petitioner a retirement benefit in excess of the limitations imposed on Petitioner's PSP under sections 401(a)(17) and 415 of the IRC. Accordingly, assuming that the Nonqualified Plan is a plan described in section 3121(v)(2)(C) of the IRC, the lump-sum distribution from the SEFCU Nonqualified Plan paid to Petitioner would be retirement income for purposes of section 114(b) of Title 4 of the US Code. Section 114 of Title 4 of the US Code provides that only the state of which an individual is a resident or domiciliary may tax the individual on his or her retirement income. Therefore, since Petitioner will be a nonresident of New York prior to the receipt of the Nonqualified Plan benefits, a payment made to Petitioner from the Nonqualified Plan is not New York source income for New York State personal income tax purposes. However, these conclusions are based on the assumption that the Nonqualified Plan is a plan described in section 312 (v)(2)(C) of the IRC. If this is not true, then the conclusions reached in this Opinion do not apply.

DATED: June 13, 2006

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