

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**ALFRED FLANTER** : DECISION  
DTA NO. 818698

for Redetermination of a Deficiency or for Refund of New :  
York State Personal Income Tax under Article 22 of the  
Tax Law for the Year 1996. :

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Petitioner Alfred Flanter, 20 Chapel Place, Great Neck, New York 11021, filed an exception to the determination of the Administrative Law Judge issued on August 22, 2002. Petitioner appeared by Martin M. Spencer, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether distributions received by petitioner from the New York State Deferred Compensation Plan in 1996 qualified for the \$20,000.00 pension and annuity exclusion provided for in Tax Law § 612(c)(3-a).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Before retiring, petitioner was employed by New York State as a professor at a State University.

During his employment with New York State, petitioner participated in the New York State Deferred Compensation Plan (the "Deferred Compensation Plan") opting to defer a portion of his salary pursuant to the provisions of IRC § 457 which governs deferred compensation plans for state and local governments.

Upon retirement, petitioner opted to receive distributions from the Deferred Compensation Plan in periodic payments, payable monthly.

The Deferred Compensation Plan issues a W-2 form to petitioner annually indicating the amount of the distribution received in one year.

In 1996, petitioner received a W-2 form from the Deferred Compensation Plan reporting wages of \$5,839.72.

Petitioner timely filed a Resident Income Tax Return for tax year 1996 reporting the amount he received from the Deferred Compensation Plan as wages on line "1" of the return.

On or about March 20, 2000, petitioner filed an Amended Resident Income Tax Return, form IT-201X, for 1996 claiming that the amount paid to him by the Deferred Compensation Plan qualified as an exclusion from income as pension income. He requested a refund in the amount of \$262.00.

On August 4, 2000, the Division issued a Notice of Disallowance to petitioner denying his claim for refund.

Following a proceeding conducted by mail by the Bureau of Conciliation and Mediation Services, petitioner was issued a Conciliation Order, dated August 3, 2001, denying petitioner's request for a refund and sustaining the Notice of Disallowance.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that petitioner's claim for a tax refund was premised on that portion of Tax Law § 612(c)(3-a) that dealt with periodic payments attributable to services performed prior to retirement. Petitioner claimed that the amounts paid to him by the Deferred Compensation Plan are pension payments paid on a periodic basis for services performed by him prior to his retirement. As such, petitioner argued, such payments are exempt from tax. The Division disagreed and argued that the payments to petitioner were correctly reported as wages on the W-2 form and on petitioner's personal income tax return for 1996.

The Administrative Law Judge pointed out that Tax Law § 612(c)(3-a) is expressly limited to "pensions and annuities" and, therefore, petitioner would only be entitled to the \$20,000.00 exclusion if the amounts received from the Deferred Compensation Plan were from a pension or annuity. The Administrative Law Judge noted that, in 1996, distributions from the Deferred Compensation Plan were wages and were not considered to be pension or annuity payments under Tax Law § 612(c)(3-a).

The Administrative Law Judge found that in 1996, the amounts petitioner received from the Deferred Compensation Plan were "wages" for federal income tax purposes and, therefore, were wages for New York State income tax purposes.

The Administrative Law Judge pointed out that under IRC former § 457, amounts paid from a state or local deferred compensation plan were treated as wages and not as pensions or annuities.<sup>1</sup>

The Administrative Law Judge found that income petitioner received from the Deferred Compensation Plan in 1996 was includable in gross income in the year received. Further, the Administrative Law Judge found that such amounts received as deferred compensation were considered to be wages subject to the general wage withholding rules of the Code and Regulations and not to the special rules applicable to pensions and annuities (*citing*, Treas Reg § 35.3405-1; A-23). The Administrative Law Judge concluded that the W-2 form received by petitioner for 1996 from the Deferred Compensation Plan correctly reported the amount paid from the plan as wages.

#### ***ARGUMENTS ON EXCEPTION***

Petitioner, on exception, has raised the same arguments as were presented below. Petitioner disagrees with the Administrative Law Judge's determination that his "periodic payments" from a Deferred Compensation Plan in 1996 do not constitute payments from a "pension" eligible for the pension exclusion authorized by Tax Law § 612(c)(3-a). To qualify for the (up to) \$20,000.00 pension exclusion it is enough, petitioner argues, that these periodic payments were attributable to his personal services performed prior to retirement.

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<sup>1</sup>The Federal Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), in part, amended section 457 (deferred compensation plans) to change the characterization of distributions from section 457 government plans. Along with other amendments, the end result was to allow state employees to roll over distributions from a state government deferred compensation plan to an eligible retirement plan which would allow a retired employee to treat distributions from the retirement plan as distributions from an independent retirement account (IRA). Such changes were not effective until January 1, 2002.

In opposition, the Division states that the evidence clearly supports the Administrative Law Judge's determination that the payment received by petitioner was not eligible for the \$20,000.00 pension exclusion.

***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons stated in her determination.

As noted by the Administrative Law Judge, the adjusted gross income of a New York resident individual is his federal adjusted gross income ("federal AGI") with certain modifications provided for in subsections (b) and (c) of Tax Law § 612. Subsection (c) provides for certain modifications which reduce federal AGI by allowing subtractions from that amount. Section 612(c)(3)(i) allows a taxpayer to subtract pensions paid to public officers and public employees of New York State.

Tax Law § 612(c)(3-a) provides for a separate modification. It provides, as relevant here, a subtraction from federal AGI for:

*Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includable in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, 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 (emphasis added).*

Petitioner claims that he is entitled to this pension and annuity exclusion, because he receives "periodic payments" from a deferred compensation plan attributable to his personal services performed prior to retirement. Petitioner's argument appears to be that all periodic payments should be given equal treatment. Petitioner is in error.

As the Administrative Law Judge correctly pointed out, the statute does not give this exclusion to all periodic payments, but only periodic payments that are from a pension or annuity (*see*, Tax Law § 612[c][3-a]). Pursuant to IRC former § 457, amounts paid from a state or local deferred compensation plan in 1996 were treated as wages and not as pensions or annuities. Inasmuch as the amount received by petitioner from the Deferred Compensation Plan was not considered to be a pension or annuity payment under IRC § 457, the Administrative Law Judge correctly concluded it was also not a pension or annuity payment under Tax Law § 612(c)(3-a). Accordingly, the 1996 payments to petitioner were not eligible for the \$20,000.00 pension exclusion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alfred Flanter is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Alfred Flanter is denied; and
4. The Notice of Disallowance, dated August 4, 2000, is sustained.

DATED: Troy, New York  
February 27, 2003

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/s/Donald C. DeWitt

Donald C. DeWitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner