STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALFRED FLANTER	:	DETERMINATION 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.	:	

Petitioner, Alfred Flanter, 20 Chapel Place, Great Neck, New York 11021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the Year 1996.

On December 10, 2001 and December 20, 2001, respectively, petitioner, by his representative, Martin M. Spencer, C.P.A., and the Division of Taxation, by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by May 10, 2002, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments presented, Jean Corigliano, Administrative Law Judge, renders the following determination.

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

1. The Division of Taxation (the "Division") and petitioner, Alfred Flanter, entered into a stipulation of facts which has been incorporated fully into this determination.

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

3. 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.

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

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

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

7. 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.

8. 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.

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

10. 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.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) provides that the adjusted gross income of a 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, and Tax Law § 612(c)(3)(ii) allows a taxpayer to subtract pensions paid to officers and employees of the United States and the District of Columbia.

Tax Law § 612(c)(3-a) provides for a separate modification. As pertinent, it provides a subtraction from federal AGI as follows:

> 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 includible 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. However, the term "pensions and annuities" shall also include distributions received by an individual who has attained the age of fifty-nine and one-half from an individual retirement account or an individual retirement annuity as defined in section four hundred eight of the internal revenue code, and distributions received by an individual who has attained the age of fifty-nine and one-half from self-employed individual and owner-employee retirement plans which qualify under section four hundred one of the internal revenue code, whether or not the payments are periodic in nature. (Emphasis added.)

B. Petitioner's claim for a tax refund is premised on that portion of Tax Law § 612(c)(3-a) emphasized above.[1] He argues 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. The Division takes the position that the payments made under the Deferred Compensation Plan are deferred wages and not pension payments. Thus, the Division argues, the payments were correctly reported as wages on the W-2 form and on petitioner's personal income tax return for 1996.

C. Tax Law § 612(c)(3-a) is expressly limited to "pensions and annuities"; therefore, petitioner is entitled to the $20,000.00 exclusion only if the amounts received from the Deferred Compensation Plan are from a pension or annuity. As the Division aptly explained in its brief, 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).

Tax Law § 607(a) states, in pertinent part, "[a]ny term used in [article 22] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." In 1996, the amounts petitioner received from the Deferred Compensation Plan were "wages" for federal income tax purposes; therefore, they were wages for New York State income tax purposes.

The legislative history of Tax Law § 612 establishes that amounts received under the Deferred Compensation Plan were intended to be treated the same for federal and state income tax purposes. Chapter 306 of the Laws of 1985 amended the Tax Law by repealing two provisions of the former law applicable to New York State deferred compensation plans. Tax

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[1] Petitioner does not claim that the payments made are either from an individual retirement account or annuity under section 408 of the Code or from a retirement plan under section 401 of the Code. Therefore, the provisions of section 612(c)(3-a) applicable to such payments are not considered here.

Law former § 612(b)(26) required participants to add to their federal AGI the amount deferred under the plan during the taxable year. Former section 612(c)(27) permitted participants who properly included a distribution from the plan in their federal AGI to subtract the part of the distribution that was previously included in total New York income under former section 612(b)(26). A participant in the plan, therefore, received a tax benefit only for federal income tax purposes. After repeal of these provisions, amounts deferred and received by plan participants were treated the same for New York State personal income tax and federal income tax purposes.

Under IRC former § 457, amounts paid from a state or local deferred compensation plan were treated as wages and not as pensions or annuities.[2] Former IRC § 457(a) provides that

> [i]n the case of a participant in an eligible deferred compensation plan, any amount of compensation deferred under the plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income is paid or otherwise made available to the participant or other beneficiary.

Pursuant to IRC § 457(a), income petitioner received from the Deferred Compensation Plan in 1996 was includible in gross income in the year received. Not only was the amount received includible in gross income, the amount received was 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 (***see***, Treas Reg § 35.3405-1; A-23). In 1996, petitioner

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[2] 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). The Division carefully outlined these changes but noted that they were not effective until January 1, 2002.

received a form W-2 from the Deferred Compensation Plan correctly reporting the amount paid from the plan as wages.

D. 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, it was not a pension or annuity payment under Tax Law § 612(c)(3-a). Accordingly, the 1996 payment was not eligible for the $20,000.00 pension exclusion.

E. Petitioner submitted a reply brief on June 6, 2002, almost a month after the brief was due. The Division objects to the late submission and asks that it be disregarded. Although the Division's objection is well taken, no harm is caused by accepting the late filing of the reply brief since it merely restates arguments already made in petitioner's initial brief. Both refer to an Advisory Opinion of the Commissioner of Taxation and Finance (TSB-A-01[2]) to support petitioner's argument. The issue addressed in that opinion is whether lump sum payments from a nonqualified compensation plan to New York nonresidents that have terminated employment are exempt from the state personal income tax. The opinion did not address plans governed by IRC § 457 and was not concerned with the provisions of Tax Law § 612(c)(3-a). Accordingly, it has no relevance to the issue raised by petitioner.

F. The petition of Alfred Flanter is denied in all respects, and the Notice of Disallowance, dated August 4, 2000, is sustained.

DATED: Troy, New York
August 22, 2002

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE