STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RICHARD T. AND CAROL J. BOURNS	:	DETERMINATION DTA NOS. 821366
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2001 and 2003.	:	AND 821404

Petitioners, Richard T. and Carol J. Bourns, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2001 and 2003.

On April 28, 2007 and May 2, 2007, respectively, petitioners appearing by Paul H. May, CPA, and the Division of Taxation appearing by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by August 22, 2007, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether payments received by petitioner Richard T. Bourns from the Kodak Unfunded Retirement Income Plan and the Kodak Excess Retirement Income Plan constituted pension or annuity payments such that petitioners were properly entitled to exclude from their New York adjusted gross income $20,000.00 of such payments per year pursuant to Tax Law § 612(c)(3-a).

FINDINGS OF FACT

1. Petitioner Richard T. Bourns reached the age of 65 on January 22, 1999 and, after some 40 years of employment as an executive with the Eastman Kodak Company (Kodak), retired on February 1, 1999. Mr. Bourns was a participant in the Kodak Unfunded Retirement Income Plan and the Kodak Excess Retirement Income Plan (the Kodak Plans) and, as a result, was entitled to receive payments thereunder upon his retirement. Mr. Bourns chose to receive an initial lump sum payment plus monthly payments thereafter.

2. By letter dated February 9, 1999, Kodak's Director of Pay and Benefit Services advised Mr. Bourns as follows:

> Subject: Unfunded Pension Plan Payments
>
> Acting on behalf of Eastman Kodak Company, I am pleased to inform you that your pension benefit payable from the Kodak Excess Retirement Income Plan and/or the Kodak Unfunded Retirement Income Plan will be paid to you in the following form based on your 02/01/1999 annuity start date.
>
> | Form of Payment | Payment Amount |
> |---|---|
> | Lump Sum | $2,341,504.00 |
> | and a Monthly Single Life Annuity | $5,529.37 |

3. By letter dated June 17, 2005, Kodak's Benefits Center advised Mr. Bourns as follows:

> Our records indicate that you are receiving a monthly payment of $5,324.41 from the Kodak Unfunded Retirement Income Plan and $204.96 from the Kodak Excess Retirement Income Plan. These are non-qualified pension plan payments and are not payments from a deferred compensation plan.

4. The Kodak Plans were administered in 1999 by Metropolitan Life Insurance Co. For the year 1999, Mr. Bourns received a Form 1099R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, Etc.). This Form 1099R reflects

a gross distribution and taxable distribution to Mr. Bourns, at boxes "1" and "2a" thereof, respectively, in the amount of $60,823.07 (i.e., the monthly single life annuity aggregate payment of $5,529.37 from the Kodak Plans times the 11 months of Mr. Bourns' retirement in 1999). The payer's name on this form is Metropolitan Life Insurance Co. Institutional Business Pensions.

5. By an August 2000 letter, Kodak advised Mr. Bourns that, effective September 2000, Mellon Trust had been appointed in replacement of Metropolitan Life Insurance Co. as the administrator of the Kodak Plans. This letter noted, among other things, that there would be no change in the amount or timing of the benefit payment, or the manner of its deposit (direct bank account deposit). An insert accompanying this letter provided, in relevant part, the following additional information:

> IMPORTANT INFORMATION REGARDING YOUR 2000 TAX STATEMENTS
>
> All recipients of Kodak Retirement Plan payments in 2000 from both Metlife and Mellon Bank, will receive two forms 1099R in January 2001.
>
> Both Metlife and Mellon Bank will issue forms for the portion of your payment issued by them. This does not affect the taxability of your payment or the amount of federal or state income tax due.
>
> Also, W-2's for retirees with taxable life insurance will come from Mellon Bank. (Emphasis as in original.)

6. For the year 2000, Mr. Bourns received a Form 1099R from Metropolitan Life Insurance Co. This Form 1099R reflects a gross distribution and taxable distribution to Mr. Bourns, at boxes "1" and "2a" thereof, respectively, in the amount of $44,234.96 (i.e., the monthly single life annuity aggregate payment of $5,529.37 times the eight months in 2000 during which Metlife was the administrator of the Kodak Plans). The payer's name on this form is Metropolitan Life Insurance Co. For the year 2000, Mr. Bourns also received a Form W-2

(Wage and Tax Statement) reflecting wages, tips, other compensation, at box "1" thereof, and nonqualified plans, at box "11" thereof, in the amount of $22,117.48 (i.e., the monthly single life annuity aggregate payment of $5,529.37 times the four months in 2000 during which Mellon Trust was the administrator of the Kodak Plans). The employer's name on this Form W-2 is Kodak Non Qualified Plan, Employer Identification Number 25-1864109.

7. Petitioners, Richard T. and Carol J. Bourns, timely filed a New York State Resident Income Tax Return (Form IT-201) for each of the years 2001 and 2003. Petitioners chose filing status "2" (Married filing joint return) on each of these returns, and two forms W-2 accompanied each return as follows:

a) Petitioners' return for 2001 was accompanied by:

1) a Form W-2 reflecting wages, tips, other compensation paid by Eastman Kodak Company as the employer (Employer Identification Number 16-0417150), in the amount of $636,083.72, upon which New York State income tax in the amount of $46,730.10 was withheld, and

2) a Form W-2 reflecting wages, tips, other compensation paid by Kodak Non Qualified Plan as the employer (Employer Identification Number 25-1864109), in the amount of $66,352.44 (i.e., $5,529.37 times 12 months), upon which no New York State income tax and no Federal Insurance Compensation Act (FICA) tax was withheld.

b) Petitioners' return for 2003 was accompanied by:

1) a Form W-2 reflecting wages, tips, other compensation paid by Eastman Kodak Company as the employer (Employer Identification Number 16-0417150), in the amount of $407,571.20, upon which New York State income tax in the amount of $28,935.30 was withheld, and

2) a Form W-2 reflecting wages, tips, other compensation paid by Kodak Non Qualified Plan as the employer (Employer Identification Number 25-1864109), in the amount of $66,352.44 (i.e., $5,529.37 times 12 months), upon which no New York State income tax and no FICA tax was withheld.

The $66,352.44 received by Mr. Bourns from the Kodak Plans in both 2001 and 2003 was reported on Form W-2 in box "1" as "wages, tips, other compensation" and in box "11" as "nonqualified plans."

8. Petitioners' return for 2001 reported wages, salaries, tips, etc. at line "1" thereof in the amount of $720,517.00, and claimed a New York subtraction modification in the amount of $20,000.00 at line "28" for the pension and annuity income exclusion. In the same manner, petitioners' return for 2003 reported wages, salaries, tips, etc. at line "1" thereof in the amount of $473,924.00, and claimed a New York subtraction modification in the amount of $20,000.00 at line "28". Petitioners made no entry on either return to report income at either line "9", "Taxable amount of IRA distributions," or Line "10", "Taxable amount of pensions and annuities." Rather, and consistent with the instructions for Form W-2, petitioners reported the total amounts shown on the foregoing forms W-2 issued to Richard Bourns at line "1" of their returns in each instance.[1]

9. On April 21, 2005, the Division of Taxation (Division) issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 2001 in the amount of $1,370.00 plus interest. On September 28, 2006, the Division issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 2003 in the amount of $2,486.00 plus interest. The calculation of the amount of additional tax asserted as due for each year is not in dispute and the sole issue presented is whether the Division improperly disallowed

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[1] For 2003, the amount on the forms W-2 ($407,571.20 plus $66,352.44) total together $473,923.64, the same amount as is reported at line "1" of petitioners' return for such year. For 2001, the amount on the forms W-2 ($636,083.72 plus $66,352.44) total together $702,436.16, which is some $18,080.84 less than the amount reported at line "1" of petitioners' return for such year. The evidence in the record does not disclose or explain the reason for this latter difference. However, for each year, the amount of New York State tax reported on the forms W-2 as having been withheld matches the amount reported as withheld on petitioners' returns at Line "64" thereof, with no excess or unaccounted for withholding claimed, and thus the difference in amount for the year 2001is irrelevant to the subtraction modification issue presented in this case..

petitioners' claimed exclusion of pension or annuity income in the amount of $20,000.00 for each of the years in question.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) provides that the adjusted gross income of a resident individual is his federal adjusted gross income with certain modifications provided for in subsections (b) and (c) of Tax Law § 612. Subsection (c) provides for modifications which reduce federal adjusted gross income by allowing subtractions therefrom. The specific subtraction modification at issue in this matter is set forth at Tax Law § 612(c)(3-a) which provides, as is relevant here, a subtraction modification from federal adjusted gross income 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 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 (emphasis added).

B. The foregoing statutory conditions pursuant to which an individual is entitled to the subtraction modification are also specified in the Commissioner's regulations at 20 NYCRR 112.3(c)(2)(i)(a-d) as follows:

> (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 where otherwise provided in this paragraph [i.e., 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 59½ years of age or over.

C. While the term "pension" is not further defined, the term "annuity" is specifically defined in the Commissioner's regulations at 20 NYCRR 132.4(d)(2) 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; or
>
> (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 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.

D. Distilled to its essence, Tax Law § 612(c)(3-a) sets forth five criteria which must be met in order for a pension or annuity payment to qualify for the subtraction modification. These five statutory criteria require that the payment must:

1. be received by an individual aged fifty-nine and one-half or older,

2. be includible in gross income for federal tax purposes,

3. be periodic,

4. be attributable to personal services performed by the individual prior to his retirement from employment, and

5. arise from an employer-employee relationship or from an employee's tax deductible contributions to a retirement plan.

Whether the pension or annuity payment is from a qualified or nonqualified plan is not among these specific criteria upon which entitlement to the subtraction modification is based, and the Division may not add additional criteria beyond those set forth in the statute for determining eligibility for the subtraction modification. In fact, the statute uses the general term "pensions and annuities received by an individual," without delineation between qualified and nonqualified plans, to describe all pension and annuity payments which, upon meeting the five statutory criteria, qualify for the subtraction modification. As petitioner points out, eligibility for the subtraction modification focuses on the character of the pension or annuity payment in the hands of the retiree and not upon the means by which the employer has chosen to finance the pension benefit, including life insurance or annuity contracts, qualified retirement trust, or an unfunded nonqualified pension plan, or upon the reason why a nonqualified plan may have been

set up by an employer, including for purposes of providing pension benefits in excess of those permitted to be paid via a plan qualified under Internal Revenue Code § 401(a).

E. Petitioner meets each of the criteria set forth in Tax Law § 612(c)(3-a). As set forth in the two letters from Kodak's Benefits Center, Mr. Bourns receives a monthly aggregate payment in the amount of $5,529.37. This payment is consistently and specifically termed a pension plan payment, a pension benefit, and a monthly single life annuity (***see*** Findings of Fact "2" and "3"). Kodak's letter of June 17, 2005 specifically states that the payment is not from a deferred compensation plan. This payment commenced on the February 1, 1999 "annuity start date," and has remained constant and unchanged since its inception upon Mr. Bourns's retirement from Kodak on such date. It is paid pursuant to the two Kodak Plans in which Mr. Bourns participated. Under the facts set forth above, this payment clearly meets the definition of a pension or annuity benefit payment set forth in Tax Law § 612(c)(3-a) and the Commissioner's regulations at 20 NYCRR 112.3(c)(2)(i)(a-d) and 20 NYCRR 134.4(d)(2), and thus qualifies for the subtraction modification. That is, the income is included in petitioners' gross income, and its recipient, Mr. Bourns, is more than 59½ years of age. The payment is made in money, is received monthly and is attributable to personal services performed by Mr. Bourns prior to his retirement as an executive employee of Kodak.

F. There is no apparent dispute between the parties that the payments in question are made in money, are periodic (here monthly) and ongoing for the balance of Mr. Bourns's life (i.e., a single life annuity), commenced upon Mr. Bourns's retirement from Kodak at which time he was over 59½ years old, are includible in federal gross income, and occur as the result of Mr.

Bourns's prior long-term employment with Kodak and pursuant to plans sponsored by Kodak.[2] It is also not disputed that the plans are "nonqualified" pension plans.[3] Nonetheless, the Division takes the position that the payments herein are "wages" and thus are not pension or annuity payments. Specifically, the Division argues that: (a) distributions from nonqualified pension plans are reported on Form W-2 as opposed to Form 1099R, are therefore characterized as wages, and thus are not distributions from a qualified pension (citing IRC § 3121[v]), and (b) distributions from nonqualified plans are subject to the general wage withholding rules of IRC § 3401 as opposed to the special withholding rules of IRC § 3405 applicable to distributions from qualified pension plans (citing Treas Reg § 35.3405-1:A-18). For the reasons that follow, the payments received by Mr. Bourns meet the definition of pension or annuity income and the Division's position denying petitioners' claimed Tax Law § 612(c)(3-a) subtraction modification is rejected.

G. It is true that Mr. Bourns's monthly single life annuity payment, originally reported on Form 1099R when Metropolitan Life Insurance Co. administered the Kodak Plans, is now reported on Form W-2 and has been so reported since Mellon Trust became the administrator of the Kodak Plans. In fact, it appears that such change of administrator for the Kodak Plans and the attendant change in the manner of reporting the payment is what gave rise to the matter at

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[2] To the extent relevant, 20 NYCRR 132.4(d), "Pensions or other retirement benefits constituting an annuity," provides that "where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services . . . . The term *compensation for personal services*, as used in the foregoing sentence includes, but is not limited to, amounts received in connection with the termination of employment, amounts received upon early retirement in consideration of past services rendered, amounts received upon retirement for consultation services, and amounts received upon retirement under a covenant not to compete." There is no claim or evidence that the payments in question here fall under any of these circumstances.

[3] A "qualified" pension plan is, in very general terms, an employer-sponsored plan that meets the requirements of IRC § 401, the preferential tax result of which is that none of the employer's contributions to the plan will be taxed to the employee until distributed to the employee (IRC § 402), while the employer will be allowed a deduction for such contributions in the year they are made (IRC § 404).

hand. In this regard, Mr. Bourns's receipt of a Form W-2 reflecting the subject payment correctly resulted in petitioners' inclusion of the amount of such payment on line "1" of their tax return. In turn, the Division's initial position of denying the subtraction modification upon audit review, premised on receiving a tax return reflecting a pension or annuity subtraction modification at line "28", with no corresponding pension or annuity income reported on line "9" or "10" of such return together with an attached Form W-2 showing wage income, was certainly justified. However, the manner in which a distribution or payment is reported for withholding purposes is not necessarily dispositive as to the correct characterization of that item, nor does it follow that a distribution or payment reported on a Form W-2 cannot be a payment made pursuant to a pension plan or an annuity. Under such reasoning, wages of a current employee reported on a Form 1099R would, though in error, be considered pension or annuity income. Ultimately, then, the nature of the payment itself, and not the manner in which the payor entity reports that payment for FICA or income tax withholding tax purposes, will determine the correct tax treatment thereof for purposes of Tax Law § 612(c)(3-a).

H. The Division relies for support on Tax Law § 607(a) which provides, in relevant part, as follows:

> (a) General. Any term used in this article [Tax Law 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 but such meaning shall be subject to the exceptions and modifications prescribed in this article or by statute.

As noted earlier, the Division reasons that because distributions from nonqualified plans are generally reported on Form W-2 as wages instead of on Form 1099R (which is generally used to report distributions from qualified retirement trusts), and are thus treated as wages pursuant to IRC § 3121(v), such distributions cannot simultaneously constitute pension or annuity income

eligible for the $20,000.00 subtraction modification. The Division also supports its conclusion by noting that nonqualified pension plan distributions so reported on Form W-2 are wages and not pension payments because they are subject to the general wage withholding rules of IRC § 3401, as opposed to the special withholding rules applicable to qualified pension plan distributions per IRC § 3405 and Treasury Regulation § 35.3405-1:A-18. This reliance on Tax Law § 607(a), and the ensuing conclusion that the manner in which the payments at issue are reported and treated for FICA and income tax withholding purposes means such payments do not constitute pension or annuity payments, is rejected.

I. The Division's argument appears to be most specifically premised on the position that periodic distributions from qualified retirement plans are excepted from the definition of the term "wages," per IRC §§ 3121(a)(5) and 3401(a)(12), and thus must be something other than wages, such as pensions or annuities, while periodic distributions from nonqualified plans are included within the term "wages," per IRC § 3121(v), and thus cannot be anything other than wages (i.e., cannot be pensions or annuities). As a starting point, and in addition to the foregoing pension and annuity criteria and definitions as found in the Tax Law and regulations thereunder (***see*** Conclusions of Law "A" through "C"), other sources defining the terms "pension," "pension plan," "annuity," "wages," and "retirement income" are instructive, as follows:

> Pension. Retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner. Deferred compensation for services rendered (Black's Law Dictionary 1021 [5th ed 1979]).
>
> Pension Plan. A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors

as years of service and compensation received by the employees (Treas Reg §401-1.[b][1].

Annuity. "Amounts received as an annuity" are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date (Treas Reg § 1.72-1[b]).

Wages. (a)(1) The term "wages" means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commission on sales or on insurance premiums, *pensions*, and *retired pay* are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(b)(1)(i) In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403 (Treas Reg § 31.3401.[a]-1[a][1],[2];[b][1][i]). (Emphasis added.)

Retirement Income. The term "retirement income" means any income from . . . any plan, program, or arrangement described in section 3121(v)(2)(c) of [the IRC][4] . . . 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

(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), 402(g), 403(b), 408(k), or 415 of [the IRC] or any other limitation

[4] IRC §3121(v)(2)(c) pertains to nonqualified deferred compensation plans.

> on contributions or benefits in [the IRC] on plans to which any of such sections apply. (4 USC § 114[b][1][I].)

This latter definition of "retirement income" explicitly includes periodic pension payments from nonqualified plans, including plans that are designed to be complementary to a qualified plan. In fact, all of the foregoing provisions are consistent with the terms of Tax Law § 612(c)(3-a) and provide no basis for concluding that periodic payments from nonqualified plans, such as the Kodak Plans, even though characterized as "wages" and reported as "wages subject to withholding," are not pensions or annuity payments falling within the eligibility criteria of Tax Law § 612(c)(3-a).[5]

J. As to the Division's reliance upon IRC § 3121(v), it is noted that IRC § 3121 pertains to FICA employment taxes under Subtitle C of the IRC, as opposed to income taxes under Subtitle A of the IRC. In this regard, IRC § 3121(a) commences with the introductory limiting language that the term "wages" is being defined "[f]or purposes of this chapter [i.e., Subtitle C - Employment Taxes Chapter 21 Federal Insurance Contributions Act]." Section 3121(a) then continues by broadly defining "wages" as "all remuneration for employment . . ., " but thereafter excludes from this broad definition of wages several specific types of remuneration including, generally, payments with regard to qualified pension plans (***see*** IRC § 3121[a][5]). From this, the Division apparently concludes that payments with regard to nonqualified plans, which are not so explicitly excluded from the definition of wages, are wages and therefore may not be considered pension payments for purposes of Tax Law § 612(c)(3-a). The distinctions in the

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[5] The Division also cites to ***Matter of Flanter*** (Tax Appeals Tribunal, February 27, 2003), noting that the pension income exclusion of Tax Law § 612(c)(3-a) did not apply therein to periodic distributions from a government deferred compensation plan reported to the plan participant on Form W-2 as wages. However, in this case Mr. Bourns' former employer, Kodak, specifically confirms that the monthly payments in question "are non-qualified pension plan payments and are not payments from a deferred compensation plan." (***See*** Finding of Fact "3".) Accordingly, ***Matter of Flanter,*** is distinguished on its facts and is thus not determinative in this matter.

treatment of payments by different types of pension plans (i.e., qualified versus nonqualified) involve primarily very specific inclusion/exclusion and timing rules for FICA tax purposes (***See, e.g.*** IRC § 3121[v][1],[2]), but have no bearing on whether or not such payments are pensions. Interestingly in this regard, although the amount of the $66,352.44 payment in question was reported as "wages" per Form W-2 for each year, the payor, Kodak Non Qualified Plan, did not deduct or withhold any amount therefrom for FICA purposes (***see*** Finding of Fact "7 a - b"). Simply put, because a payment may be reported as wages for FICA purposes does not preclude treating such payment as a pension or annuity payment for purposes of Tax Law § 612(c)(3-a).

K. Addressing specifically the Division's reliance on the general wage withholding rules of IRC § 3401, as applicable to distributions from nonqualified plans, versus the special withholding rules of IRC § 3405, as applicable to distributions from pensions, annuities and certain other deferred income, such alleged distinction does not support a conclusion that the former are not pension or annuity payments. IRC § 3401(a)(12) excepts distributions from qualified plans from the definition of wages subject to the general income tax withholding rules of IRC § 3402. In contrast, distributions from nonqualified plans are not so excepted and are subject to the general withholding rules of IRC § 3402 (subject to the withholding certificate exemption provision of IRC § 3402[n]). IRC § 3405, enacted in 1982 and applicable to distributions made after December 31, 1982 (Pub L 97-248, §334[a]), established withholding requirements for periodic distributions from qualified pension plans and other types of annuities and deferred income.[6] Prior to the enactment of IRC § 3405, withholding was not required on these types of periodic distributions from qualified plans whereas, after its passage, withholding

[6] One of the requirements to qualify for the subtraction modification of Tax Law § 612(c)(3-a) is that the payments must be "periodic."

was required in essentially the same manner as is the case with respect to periodic distributions from nonqualified plans (IRC § 3405[a][1]).[7] In simplest terms, income tax withholding was not required on distributions from qualified plans before 1982, at which point Congress determined that withholding should be required on such distributions. Eliminating the distinction between periodic distributions from nonqualified and qualified plans for withholding tax purposes, placed both on essentially equal footing for such purposes. This result effectively negates the Division's attempt to draw a distinction between distributions from qualified versus nonqualified pension plans on the basis of income tax withholding rules, and provides no support for a conclusion that periodic distributions from nonqualified pension plans such as those herein are not "pensions" for purposes of the subtraction modification for pension or annuity income under Tax Law § 612(c)(3-a).

L. The petition of Richard T. and Carol J. Bourns is hereby granted, and the notices of deficiency dated April 21, 2005 (pertaining to the year 2001) and September 28, 2006 (pertaining to the year 2003) are canceled.

DATED: Troy, New York
February 21, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[7] Withholding is generally required unless the payee files an "Election of No Withholding" per IRC § 3405(a)(2).