

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SYLVIA A. ROBERTS AND DELMONT C. ROBERTS, SR. (DECEASED)	:	DETERMINATION DTA NO. 824928
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioners, Sylvia A. Roberts and Delmont C. Roberts, Sr., (deceased), filed a petition for redetermination of deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2007.

On April 16, 2013 and May 2, 2013, respectively, petitioner Sylvia A. Roberts, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due by August 23, 2013, which date commenced the six-month period to issue a determination in this matter. Upon review of the entire record, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied the New York State pension exclusion as an allowable subtraction from federal adjusted gross income pursuant to Tax Law § 612(c)(3)(i) on petitioners' 2007 personal income tax return for pension benefits paid to Delmont Roberts by the United Sanitationmen's Association in the amount of \$24,250.00.

II. Whether Sylvia Roberts is entitled to innocent spouse relief under the Tax Law.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Statement of Proposed Audit Changes (Statement) to petitioners dated September 13, 2010, asserting additional tax due for tax year 2007 in the amount of \$2,511.00, plus interest. Upon review of petitioners' tax return for 2007, Form IT-201, the Division disallowed the pension and annuity income exclusion claimed on the return on the basis that the information in the Division's file indicated that the pension income received by Mr. Roberts was not from a New York State or local or U.S. government pension.

The Statement advised:

If you think the pension income is not subject to New York tax, please send information to support your claim. This information should show the source and amount of the pension income. An example of acceptable documentation is a copy of your 1099-R, Distributions From Pensions, Annuities, Retirement OR Profit Sharing Plans, IRAs, Insurance Contracts, etc.

2. The Division issued a Notice of Deficiency dated November 15, 2010, assessing additional personal income tax in the amount of \$2,511.00, plus interest.

3. The Division thereafter issued a Notice and Demand for Payment of Tax Due dated March 7, 2011, in the amount of \$2,511.00 plus interest in the amount of \$577.30, for a total of \$3,088.30.

4. A conciliation conference was held before the Bureau of Conciliation and Mediation Services (BCMS) on October 26, 2011, and a conciliation order dated December 30, 2011 was issued sustaining the statutory notice.

5. Sylvia Roberts filed a petition challenging the denial of relief by BCMS on March 26, 2012, on behalf of herself and her deceased husband, Delmont Roberts. Correspondence from Mrs. Roberts accompanied the petition, and provided the following information, in pertinent part:

I am writing this letter to request an appeal on the decision rendered by Mr. James Koval, Conciliation Referee, on December 30, 2011. I was denied relief from the 2007 Tax liability filed by my deceased husband and I. The document in question was *his taxable pension received early due, to his disability*.

Delmont C. Roberts, Sr. was diagnosed with liver disease and was ill for some time. The severity of his illness *qualified him for an early distribution of pension funds*. He was *employed with the NYC Sanitation Department for 21 years* and on April 22, 2010, my husband died due to complications undergoing a

liver transplant. Since his death, I do receive his pension which I get once a month. This is my only financial support and this liability would result in a severe hardship for me.

All documents required of me I submitted within the time constraints given, including his death certificate. The separation time between my husband and I since his death, would qualify me for this relief (emphasis supplied).

6. Attached to the petition was a copy of Form 1099 issued to Delmont C. Roberts at a Bronx, New York, address for tax year 2007 in the amount of \$24,250.00 from the Uniformed Sanitationmen's Assoc. Compensation Accrual Fund, bearing a New York, New York, address. On the Form 1099, federal income tax representing 20% of the gross distribution, i.e., \$4,850.00, was withheld. The distribution code in Box 7 of the Form 1099 was "2." The box for IRA/SEP/SIMPLE was not checked. There was no state information on the Form 1099, nor any New York state tax withheld.

7. Attached to the petition was Form IT-285, Request for Innocent Spouse Relief, filed by Sylvia Roberts. Based upon the Division's response in correspondence dated December 30, 2010, which it referred to as "Relief from Joint Liability Determination Letter," Mrs. Roberts filed form IT-285 sometime prior to that date, but the record does not reflect a specific date. The Division's determination letter stated, in pertinent part:

Our review of your request for Innocent Spouse Relief, Separation of Liability and/or Equitable Relief under section 654 of the Tax Law for the above tax year has been completed. We cannot grant your request for the reason(s) indicated below: [where two reasons, provided below, were checked off]

You did not show in the statement, and/or supporting documentation attached to your request for relief, that paying the liability in full would result in economic hardship. Examples of economic hardship include difficulty meeting household expenses, unanticipated medical expenses, child support arrears, or any similar financial distress.

You did not show in the statement, and/or supporting documentation attached to your request for relief, that you did not know, or have reason to know, at the time you signed the joint personal income tax return, of the items(s) giving rise to the deficiency or that the liability reported on the return would not be paid.

8. The death certificate of Delmont Roberts and a discharge summary from the Carolinas Healthcare System revealed that on April 21, 2010 he was admitted to the hospital with end-stage liver disease along with hepatitis C and hepatocellular carcinoma in order to have a liver

transplant. On April 22, 2010, due to a pulmonary embolism and clots within multiple chambers of his heart, Mr. Roberts went into cardiac arrest and died at the age of 60, during the liver transplant.

9. The executed contract between the New York City Department of Sanitation (City) and the Uniformed Sanitationmen's Association¹ (the Union) for the term March 2, 2007 to September 20, 2011 contained a section on health and welfare benefits, that referred to payments made on behalf of each employee by the City into the Uniformed Sanitationmen's Association Accrual Fund. The contract provision stated the following:

As additional compensation to each Employee, the City shall, during the term of this Agreement, pay into the Uniformed Sanitationmen's Association Compensation Accrual Fund (formerly or currently known as the Uniformed Sanitationmen's Association Annuity Fund) the following amounts per Employee for each working day for which such Employee is paid by the City, but not to exceed an aggregate of the per annum amount shown below [in a table] per Employee, for the purpose of furnishing certain additional benefits to each Employee.

10. The 2007 instructions for Forms 1099-R and 5498 published by the Internal Revenue Service (IRS)² provide a table that is entitled "guide to distribution codes," which is provided for payers of funds to properly identify the type of payment represented by the 1099-R. The 1099-R in this matter contained a code "2" in the box for distribution codes. The explanation for the use of code 2 was that it was for an early distribution, where an exception applies. The IRS instructions stated:

¹ The State Administrative Procedure Act § 306(4) permits the taking of official notice in administrative proceedings if judicial notice could be taken. A court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (*Matter of Crater Club v. Adirondack Park Agency*, 86 AD2d 714, 446 NYS2d 565 [1982], *affd* 57 NY2d 990, 457 NYS2d 244 [1982]). Courts today will often judicially notice matters of public record (Fisch on New York Evidence, § 1063 at 600 [2d ed]). As an executed contract, an accurate source of the contractual agreement between the City and the Union, and a matter of public record, this document is officially noticed. It is officially noticed merely to provide a reference to the Compensation Accrual Fund as compensation benefits accrued on behalf of certain New York City employees. The dollar amounts contributed per employee may have differed in a previous contract between the City and Union, since it is noted that this contract was not executed until May 20, 2009, though it covered the period during which Mr. Roberts was employed by the New York City Department of Sanitation.

² Pursuant to the State Administrative Procedure Act § 306(4) (*see* footnote 1) official notice of the IRS instructions for Forms 1099-R and 5498 for 2007 is taken since it is determinable from a source of indisputable accuracy and is a matter of public record.

Use Code 2 only if the employee/taxpayer has not reached age 59 ½ and the distribution was:

- A Roth IRA conversion (an IRA converted to a Roth IRA)
- A distribution made from a qualified retirement plan or IRA because of an IRS levy under section 6331.
- A section 457(b) plan distribution that is not subject to the additional 10% tax. But see Section 457(b) plan distributions on page R-10 for information on distributions that may be subject to the 10% additional tax.
- A distribution from a qualified retirement plan after separation from service where the taxpayer has reached age 55.
- A distribution from a governmental defined benefit plan to a public safety employee after separation from service where the taxpayer has reached age 50.
- A distribution that is part of a series of substantially equal periodic payments as described in section 72(q), (f), or (v).
- A distribution from a governmental plan for the payment of health or long-term care insurance premiums for a retired public safety officer under section 402(l).
- Any other distribution subject to an exception under section 72(q), (t), or (v) that is not required to be reported using Code 1, 3, or 4.

11. The online public record of New York City pensioners shows that October 2, 2007, was the retirement date of Delmont Roberts from the Department of Sanitation and that he was a member of the New York City Employees Retirement System.³

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner Sylvia Roberts asserts that the 2007 pension benefits that Delmont Roberts received from the Uniformed Sanitationmen's Association Compensation Accrual Fund upon his early retirement are exempt from taxation under Tax Law § 612(c)(3)(i) and therefore were improperly taxed by the Division.

Mrs. Roberts also maintains that she is entitled to innocent spouse relief.

13. The Division asserts that it properly determined that the pension benefits paid to petitioner by the Uniformed Sanitationmen's Association in 2007 could not be excluded from petitioners' New York State adjusted gross income pursuant to Tax Law § 612 (c)(3)(i). The basis for the Division's argument is that the income did not qualify for the exclusion because the

³ Pursuant to the State Administrative Procedure Act § 306(4) (*see* footnote 1) official notice of the online public record of New York City pensioners (*see* ThroughNY::Pensions-NYC EMP) is taken since it is a matter of public record.

source is a private entity, and the payments were not made from a New York State or New York City source, as required.

14. The Division also argues that petitioner Sylvia Roberts is not entitled to innocent spouse relief because she has not demonstrated that she did not know, or have reason to know, at the time she signed the return, of the item giving rise to the deficiency.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) defines New York adjusted gross income as federal adjusted gross income with modifications. This case involves whether petitioners' receipt of funds in 2007, evidenced by a Form 1099-R, qualifies for the modification specified in Tax Law § 612(c)(3)(i) for pensions paid to officers and employees of New York State, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes.

B. The regulations that provide additional guidance in the implementation of Tax Law § 612(c)(3) are found at 20 NYCRR 112.3, which states in pertinent part:

The following items are to be subtracted from Federal adjusted gross income in determining the New York adjusted gross income of a resident individual:

* * *

(c)(1) Pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the Federal government.

(i) Retirement benefits provided for in clauses (a) and (b) of this subparagraph which are included in Federal adjusted gross income, relate to services performed as public officers or public employees and all or a portion of which are actually contributed to (rather than merely being deemed contributed to) by New York State, its political subdivisions or agencies or the Federal government, shall be subtracted in computing New York adjusted gross income:

(a) pensions and other retirement benefits (*including, but not limited to, annuities, interest and lump sum payments*) paid to a public officer or public employee or the beneficiary of a deceased public officer or deceased public employee of New York State, its political subdivisions or agencies . . . (emphasis supplied).

C. The subtraction modification constitutes a statutory exemption from taxation and, therefore, must be strictly construed against the taxpayer (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027[1975]), but “the interpretation should not be so narrow and literal as to defeat its settled purpose [of the exemption]” (*Matter of Grace*, at 718 [1975]).

D. The Division maintains that the amount reported on the 1099-R did not qualify for the exclusion under Tax Law § 612(c)(3)(i) because the source was from a private entity and not from a New York State or New York City source. The Division’s reasoning is without merit and rejected, since the Tax Appeals Tribunal has previously held that a pension does not have to be paid from the state or municipal retirement system to qualify for the modification specified in Tax Law § 612(c)(3)(i) (*see Matter of Langlan*, Tax Appeals Tribunal, September 4, 1997; *Matter of Jackson*, Tax Appeals Tribunal, March 5, 1998). The only remaining issue for resolution is whether the payment was a retirement benefit in some form, payable to a retired employee of New York City.

E. Mrs. Roberts’s assertion that her husband was a 21-year veteran employee of the New York City Sanitation Department was not disputed by the Division. As an employee of the New York City Department of Sanitation, Mr. Roberts’s wages and benefits were likely governed by a collective bargaining agreement, similar to that described in Finding of Fact 9, between the City and the Union. Mr. Roberts was retired from the Department of Sanitation in 2007, as evidenced by Mrs. Roberts’s characterization of her deceased husband’s receipt of pension benefits that are the subject of this matter, and the online public record of New York City pensioners that shows the October 2, 2007 retirement date of Delmont Roberts from the New York City Department of Sanitation, and that he was a member of the New York City Employees Retirement System (*see*

ThroughNY::Pensions-NYC EMP). His receipt of \$24,250.00 in 2007 was reported as paid from the Uniformed Sanitationmen's Assoc. Compensation Accrual Fund (also known as the Uniformed Sanitationmen's Assoc. Compensation Annuity Fund) (Fund) on Form 1099-R as "Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc." The Fund was established to provide additional benefits to employees of the sanitation department, and in the case of Mr. Roberts, his employee benefits were paid out to him in the year of his retirement and reportable as federal taxable income.

The subject Form 1099-R also contained a distribution code "2" in a box that is used to describe the type of distribution that was being made. The Internal Revenue Service (IRS) Instructions for Form 1099-R for 2007 indicate that code "2" applies to a variety of circumstances where the recipient has not reached age 59 ½, there is an early distribution and some exception applies. Among the possible choices for the code "2" designation include a distribution from a qualified retirement plan after separation of service where the taxpayer has reached age 55, and a distribution subject to an exception to the 10 percent penalty for premature distributions from annuity contracts or retirement plans, where the distribution is attributable to the employee's being disabled. Both of these characterizations of the 1099-R distribution are consistent with other undisputed facts in this case.

Giving consideration to all of the facts, taken as whole, petitioner Sylvia Roberts has carried her burden of proof that the 2007 1099-R represents a retirement benefit paid to her husband, a former New York City sanitation employee, reportable as taxable federal income, and subject to the modification specified under Tax Law § 612(c)(3)(i). Accordingly, it is determined that the Division improperly denied the modification. Any other conclusion would likely defeat the settled purpose of the modification (*see Matter of Grace*).

F. Inasmuch as it has been determined that the modification under Tax Law § 612(c)(3)(i) should have been allowed, resulting in no deficiency to petitioners, it is unnecessary to determine whether Sylvia Roberts is entitled to innocent spouse relief under the Tax Law.

G. The petition of Sylvia A. and Delmont C. Roberts is granted and the Notice of Deficiency dated November 15, 2010 is hereby cancelled.

DATED: Albany, New York
February 13, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE