STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PETER AND MARGUERITE KANE	:	DECISION DTA NO. 824767
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 2007.[1]	:	

Petitioners, Peter and Marguerite Kane, filed an exception to the determination of the Administrative Law Judge issued on March 20, 2014. Petitioners appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis A. Warren, Esq. of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply that was received by this Tribunal on July 31, 2014, which date started the 6-month time period for the issuance of this decision, as oral argument was not requested.

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

ISSUE

Whether the distribution received by petitioners during 2007 from National Financial Services, LLC of Fidelity Investments constituted pension payments to an officer or employee of New York State such that petitioners properly excluded such payments from their New York

[1] Petitioners requested that all claims for state personal income tax due against them for the tax years 2007, 2008, 2009, 2010 and 2011 be consolidated and determined at one time. However, only tax year 2007 is challenged by this petition, and no other petitions for tax years 2008 through 2011 exist with the Division of Tax Appeals. Accordingly, only tax year 2007 will be addressed herein.

adjusted gross income pursuant to Tax Law § 612 (c) (3) (i).

FINDINGS OF FACT

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

1. Petitioners jointly filed their 2007 New York State Resident Income Tax Return, reporting, among other amounts, a pension and annuity income exclusion in the amount of $128,000.00. This amount represented a distribution from National Financial Services, LLC (NFS) of Fidelity Investments, made to Peter Kane in 2007, in relation to a New York State pension attributable to Mr. Kane.

2. Mr. Kane had attained the age of 59 ½ prior to the year 2007.

3. Upon review of petitioners' 2007 return and, in particular, the New York State pension exclusion, the Division of Taxation (Division) determined that $108,000.00 should not be excluded from taxable income as a New York State government pension, but otherwise allowed $20,000.00 of the distribution as a tax-free exclusion under Tax Law § 612 (c) (3-a).

4. Peter Kane was employed from 1965 to 1995 by the State University of New York (SUNY) where he participated in a pension plan managed by Teacher Insurance and Annuity Association - College Retirement Equities Fund, known as "TIAA/CREF" (SUNY pension).

5. In December 1995, Mr. Kane elected to take a distribution of $528,808.00 in complete liquidation of his SUNY pension and rolled it over to an individual retirement account (IRA) managed by NFS of Fidelity Investments.

6. The Division determined that by the end of the year 2006, Mr. Kane had received all the distributions that would qualify as the return of contributions to the pension of an employee

of SUNY that could be excluded from petitioners' adjusted gross income under Tax Law § 612 (c) (3) (i).

7. The Division issued correspondence to Mr. Kane, dated January 19, 2010, which cancelled assessment L-032579012-1 (not in issue in this matter), resulting in no tax due for tax year 2006. The explanation provided stated the following, in pertinent part:

> "Information provided shows that in 1995, $528,808 in TIAA/CREF contracts . . . was rolled into Fidelity (National Financial Serv). The TIAA/CREF contracts were 100% publicly funded (SUNY). Since only the rolled over amount retains its character as government pension, not any accumulated earnings, it appears that the 2006 distribution from National Financial Services is the final tax exempt pension amount to be disbursed from the Fidelity account."

8. The Division issued a statement of proposed audit changes, dated November 1, 2010, to petitioners with the following explanation, in pertinent part:

> "The $128,000 distribution you received from National Financial Services, LLC does not qualify for full exclusion as a New York State government pension.
>
> Information provided in protest to your assessments for previous years shows that in 1995, $528,808 in TIAA/CREF contracts RA A182364-8 and RA P102425-1 was rolled into Fidelity (National Financial Services). The TIAA/CREF contracts were 100% publicly funded (SUNY). Only the rolled over amount retains its character as government pension, not any accumulated earnings.
>
> Our records indicate that you have excluded the maximum $528,808 as New York State government pension in tax years prior to 2007. Therefore, the remainder of the distributions from National Financial Services cannot be considered distributions from New York State that qualify for full exclusion.
>
> Since you were a least 59 ½ during 2007 and received qualifying pension income, you have been allowed the appropriate pension and annuity income exclusion of up to $20,000 in our computation."

The statement computed tax due in the amount of $5,349.41 plus interest.

9. The Division issued a Notice of Deficiency, assessment L-034893475, to petitioners

dated January 18, 2011, asserting additional personal income tax due in the amount of $5,349.41, plus interest.

10. Petitioners requested a conciliation conference before the Bureau of Mediation and Conciliation Services, for a redetermination of the income tax deficiency, on or about February 1, 2011. Petitioners set forth the following explanation on the request:

> "The State constitution clearly states that New York State pensions are not subject to New York State income taxes. Nevertheless, the Department of Taxation has since 2001 sought to tax my New York State pension income even though they have received and acknowledged documentation proving the income source. Year after year the Department has finally admitted that their claim was illegitimate (most recently agreeing in a letter dated 1/25/10 that there was no tax owing for 2006). At this point it seem [sic] fair to describe this behavior as harassment that needs to end now."

11. A conciliation conference was held on September 20, 2011, and a conciliation order dated November 10, 2011 was issued to petitioners sustaining the notice of deficiency. A timely petition was thereafter filed in protest with the Division of Tax Appeals on December 8, 2011, and timely answered by the Division on February 8, 2012.

12. The parties stipulated to 15 findings of fact that have been incorporated above as either a statement of the issue or the findings of fact, with the exception of petitioners' address, which was excluded for privacy.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that the adjusted gross income of a resident individual is determined by starting with that individual's federal adjusted gross income and then applying certain New York State addition and subtraction modifications. As relevant to this matter, Tax Law § 612 (c) (3) (i) allows a reduction from income for pensions paid to state employees to the extent such income was included in federal adjusted gross income. The

Administrative Law Judge, citing 20 NYCRR 112.3 (c) (1), further explained that the Division's regulations interpret this reduction as only applicable to pensions and other retirement benefits that relate to services performed as a public employee and only where the benefit in question was contributed to by the state. The Administrative Law Judge, relying upon the statute, the regulations and persuaded by numerous advisory opinions issued by the Division, concluded that petitioners were not entitled to reduce their federal adjusted gross income by the distribution received in 2007 from NFS because the distribution represented accumulated earnings that were not attributable to Mr. Kane's retirement plan related to his state employment.

ARGUMENTS ON EXCEPTION

On exception, petitioners assert that the Division is discriminating against pension management firms other than TIAA/CREF and that the only reason provided for this different treatment is "just because we say so." Petitioners continue to maintain on exception that the rollover of Mr. Kane's SUNY pension from one asset management company to another does not in any manner change the nature of the pension and that therefore it should be treated the same as all other pensions related to services performed as a public employee.

The Division asserts that there are differences between TIAA/CREF and NFS, the most important being that TIAA/CREF was selected to manage the retirement plans of SUNY employees, not NFS. Other differences noted by the Division are that: (1) TIAA and CREF are New York corporations whereas NFS is not; (2) TIAA/CREF began providing retirement services to educators and now specializes in providing such services to those who work in the academic, research, medical and cultural fields, whereas Fidelity is the country's number one provider of IRAs; and (3) TIAA/CREF is not-for-profit whereas Fidelity is for-profit. The

Division further asserts that the Administrative Law Judge correctly noted that the Division's theory in this case is consistent with the series of advisory opinions on this issue and that she properly concluded that the distributions received by petitioners were no longer connected to Mr. Kane's public employment-related retirement.

OPINION

Article 16, Section 5 of the New York State Constitution provides that "[a]ll salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation." In accordance with this constitutional provision, and as relevant hereto, Tax Law § 612 (c) (3) (i) allows for the calculation of New York adjusted gross income by reducing federal adjusted gross income by the amount of pensions paid to employees of New York State to the extent that such income was included in federal adjusted gross income. This reduction is further defined by regulation as only applicable to pensions and other retirement benefits that relate to services performed as a public employee and only where the benefit in question was actually contributed to, at least in part, by the State (20 NYCRR 112.3 [c] [1]).

Optional retirement programs available for certain SUNY employees are defined contribution plans to which both SUNY and the employees contribute (***see*** Education Law Article 8-B; Opp. Atty. Gen. 2004 F-2). Mr. Kane participated in this program during his 30 years of employment with SUNY and, upon his retirement, opted to roll over the entire amount of his SUNY pension into an IRA managed by NFS.

Had Mr. Kane left his SUNY pension with TIAA/CREF, it appears that the total of the contributions made by SUNY, the contributions made by Mr. Kane and the earnings on those

amounts would have been excluded from petitioners' adjusted gross income pursuant to Tax Law § 612 (c) (3) (i). Indeed, the Division allowed the exclusion from petitioners' income in prior years up to the amount of the SUNY pension actually rolled over into the NFS IRA. Therefore, even though the payments came from NFS rather than TIAA/CREF, the Division considered the payments to be pension payments related to Mr. Kane's state employment and from a pension that was contributed to by SUNY. The question raised by petitioners is how did the rollover of Mr. Kane's SUNY pension into an IRA managed by NFS change the nature of that pension plan to the extent that the Division no longer considered it as related to his state employment. We find that the determination of the Administrative Law Judge does not adequately address that fundamental question, and, for that reason, remand this matter to the Administrative Law Judge.

The Administrative Law Judge discusses in the determination a series of advisory opinions issued by the Division. While the Administrative Law Judge acknowledges that advisory opinions have no precedential value, she finds the reasoning of such opinions persuasive, consistent with and supported by the statute and regulations, and similar to the analysis and reasoning set forth in the determination.

The initial advisory opinion on this issue, (TSB-H-80 [523] I, November 24, 1980), dealt with distributions from an IRA that was established by a tax-free roll over of amounts received as a pension from public employment in New York State. The advisory opinion consists of three paragraphs, the third setting forth the conclusion, as follows:

> "Article 16, §5 of the New York State Constitution provides that 'All salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation.' Thus, the receipt of a distribution from a qualified trust which constitutes such a pension is

> not subject to tax under the Personal Income Tax. The act of 'rolling over' the pension into an Individual Retirement Account is not itself a taxable event, and a *subsequent distribution from such an account would represent a nontaxable return of principal to the extent that the distribution represented a return of funds 'rolled over' into the account. To the extent that the distribution represented interest, or any other type of gain, earned in the account such portion would be subject to tax*." (Emphasis added).

This advisory opinion concludes that distributions from an IRA funded by a rollover from a pension plan of a state employee not subject to tax remain nontaxable to the extent of the rollover, while any interest or other gain earned in the IRA would be subject to tax. There is no reasoning or analysis set forth in support of this conclusion. Furthermore, while from a common sense point of view, one could assume that the amount of the rollover would have included employer and employee contributions together with earnings on those contributions, there are no facts set forth in the advisory opinion indicating what was included in the rollover. If the assumption was made that earnings on contributions were included in the rollover, there is no reasoning or analysis explaining why the amount of the rollover represents "nontaxable return of principal" not subject to tax while any interest or gain earned after the rollover is subject to tax. Additional advisory opinions following TSB-H-80 (523) I (specifically TSB-A-10 [6] I [July 13, 2010], TSB-A-03 [4] I [November 19, 2003], TSB-A-02 [5] I [July 24, 2002], and TSB-A-98 [4] I [March 24, 1998]), rely on the conclusions of the initial advisory opinion on this issue and provide no further reasoning or analysis. Therefore, any reliance on the reasoning and analysis of such opinions as persuasive is misplaced (***see Matter of Racal***, Tax Appeals Tribunal, May 13, 1993 [holding that decisions of the State Tax Commission, as a body of coordinate jurisdiction, were entitled to respectful consideration, but if no reason is given for the conclusions reached therein they are unpersuasive]; ***Matter of Vinter***, Tax Appeals Tribunal, September 27, 2001

[State Tax Commission decisions cited provide no assistance if they contain no explanations for the conclusions reached], ***dismissed on other grounds sub nom Matter of Vinter v Commissioner of Taxation & Fin.*** 305 AD2d 738 [2003]).

While the Administrative Law Judge allows that an advisory opinion has no precedential value, her stated reliance on the reasoning set forth therein leaves petitioners' argument that there is no explanation for the difference in treatment effectively unaddressed. We believe that "[t]o the extent that an Administrative Law Judge does not either address an issue explicitly raised by the parties in a proceeding or does not state a rationale for a conclusion that is reached," we are deprived of the research and analysis of both the Administrative Law Judge and the parties on exception (***Matter of United States Life Insurance Company***, Tax Appeals Tribunal, March 24, 1994). As we find that the determination does not adequately address petitioner's argument that the rollover of Mr. Kane's SUNY pension did not fundamentally change the nature of the pension to the extent that it could no longer be considered as related to his state employment, we remand this matter to the Administrative Law Judge for a supplemental determination.

The supplemental determination shall be rendered as expeditiously as possible and shall be based upon the factual record already made. However, we recognize that other than the advisory opinions previously discussed herein, little guidance was provided to the Administrative Law Judge by the parties on this legal issue. We therefore recommend that the Administrative Law Judge request supplemental briefs from the parties addressing the issue of the change in nature of the SUNY pension, before issuing her supplemental determination.

We will retain jurisdiction over this matter based on the exception timely filed by petitioners. After the Administrative Law Judge issues her supplemental determination,

petitioners will be allowed to add to their existing exception and briefs provided that they do so within 30 days of the issuance of the supplemental determination or request an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional submission by petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Albany, New York
January 29, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner