STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES AND DIANE PISCOPO	:	DETERMINATION DTA NO. 827433
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 2011.	:	

Petitioners, Charles and Diane Piscopo,[1] 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 2011.

On August 3, 2017 and August 16, 2017, respectively, petitioners, by their representative, Dean Nasca, CPA, and the Division of Taxation, by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by January 17, 2018, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that a lump sum distribution received by petitioner in 2011, from an Internal Revenue Code § 457 deferred compensation plan, does not qualify for the New York State pension and annuity exclusion provided for in Tax Law § 612 (c) (3) (i).

[1] Petitioner Diane Piscopo's name appears herein by virtue of the fact that she and petitioner Charles Piscopo filed a joint personal income tax return for the year 2011. References to "petitioner," in the singular tense, shall mean petitioner Charles Piscopo, unless otherwise specified or required by context, since the distribution in issue was attributed to Mr. Piscopo.

II. Whether petitioners are denied due process rights or unfairly prejudiced by the Division's reliance upon 20 NYCRR 112.3 (c) (1) as the legal basis for determining that the lump sum distribution is not excludable from New York taxable income for tax year 2011.

FINDINGS OF FACT

1. In 2011, petitioner received a lump-sum distribution of $133,349.00 from an Internal Revenue Code (IRC) § 457 deferred compensation plan (the 457 plan) administered by Fascore Institutional Services (Fascore) for petitioner's employer, the City of New York.

2. During his employment as a fireman with the City of New York from July 5, 1988, until he sustained a disability leading to his retirement on July 29, 2001, petitioner participated in the 457 plan that he established, 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.

3. Petitioner received a form 1099-R for the 2011 distribution and it was designated as a total distribution from the 457 plan. He was age 53 at the time of the distribution.

4. Petitioner reported the distribution as taxable pension on line 10 of his Form IT-201, New York State Resident Income Tax return, for 2011.

5. Petitioner claimed a New York subtraction on his 2011 return on line 26, for $133,349.00, as a pension of New York State and local government.

6. The Division selected petitioners' 2011 income tax return for review and issued a statement of proposed audit changes dated October 10, 2014, with the following explanation, in pertinent part:

> "We recomputed your New York taxable income.
>
> The pension and annuity income exclusion claimed on line 26 of your return has been adjusted or disallowed.

> Our records indicate that your pension and annuity income distribution from Fascore Institutional Services does not qualify as a state, local, or government pension and therefore cannot be fully excluded as a state, local or government.
>
> Distributions from Fascore Institutional Services qualify for an exclusion of up to $20,000.00 when you are age 59½ or older at the time the distribution is received.
>
> Your pension exclusion, for the tax year 2011, are [sic] summarized below:

Changed Item(s)	Shown on Return	Corrected exclusion	Net change
Public pensions exclusion on line 26	133,349.00	0.00	(133,349.00)"

The computational summary of tax due reflecting the corrected exclusion resulted in additional tax assessed of $9,541.03 plus interest.

7. In correspondence dated November 3, 2014, petitioners' representative responded to the statement of proposed audit changes by indicating that he disagreed with the Division's adjustment to the 2011 return, based upon his interpretation of the instructions for line 26 of the New York State income tax return, which read as follows, in part:

> "You may not subtract (1) pension payments or return of contributions that were attributable to your employment by an employer other than a New York public employer, such as a private university, and any portion attributable to contributions you make to a supplemental annuity plan which was funded through a salary reduction program, or (2) periodic distributions from government (IRC section 457) deferred compensation plans."

8. The Division responded the petitioner's inquiry in correspondence dated January 20, 2015, as follows, in part:

> "We have reviewed the information you sent in response to the assessment.
>
> A review of our records indicates that the above assessment(s) was correctly prepared and is, therefore, sustained.
>
> Distributions received from New York State/New York City Deferred Compensatio [sic] Plans (government section 457 plans) do not qualify as a New York State, loca [sic] governments, or federal government pension, and cannot be fully excluded on line 26 of your New York State tax return."

9. The Division issued a notice of deficiency to petitioner dated February 13, 2015, referencing the statement of proposed audit changes, assessing tax due of $9,541.03 plus interest of $2,253.49.

10. A conciliation conference was held on September 3, 2015, and the statutory notice was sustained by conciliation order CMS No. 266461, dated October 23, 2015.

11. A timely petition was filed with the Division of Tax Appeals on January 14, 2016, protesting the conciliation order.

12. The Division's submission documents in this matter included the affidavit of Debra Moseley, a Tax Technician 2 with the Division, whose responsibilities include reviewing and processing New York State personal income tax returns, conducting audits, resolving protests, and other such tasks, in connection with, among other programs, the pension exclusion audit program. She indicated that, after petitioner's return for 2011 was selected for review, the Division determined that:

> ". . . the [d]istribution did not qualify for the public pension exclusion because Fascore is not the State of New York, its political subdivision or agency or the Federal government, and no portion of the Distribution was actually contributed to (rather than merely being deemed contributed to) by the State of New York, its political subdivisions or agency or the Federal government, as required by 20 NYCRR 112.3(c)."

13. With the submission of its brief, the Division requested official notice[2] be take of three documents:

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[2] 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 [3d Dept 1982], ***affd*** 57 NY2d 990 [1982]). Courts today will often judicially notice matters of public record (Fisch on New York Evidence, § 1063 at 600 [2d ed]). As evidence of the type of contractual arrangement and an accurate source of the

a. The City of New York Deferred Compensation Plan/New York City Employees IRA Comprehensive Annual Financial Report for the fiscal years ended December 31, 2013 and 2014 (the annual report);

b. the New York City Deferred Compensation Plan, Summary Guide of 457 & 401(k) Plan Provisions (summary guide); and

c. Form IT-201-I, Instructions for Form IT-201, Full-Year Resident Income Tax Return, for tax year 2011 (instructions).[3]

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioners, relying on the 2011 Form IT-201 instructions for line 26, maintain that since the City of New York is unambiguously a New York public employer, and the petitioner did not take periodic distributions from the 457 plan, but instead opted for a lump sum, petitioner is entitled to a full exclusion of the distribution from his deferred compensation plan as a New York State pension.

Petitioners also argue that the portion of the Moseley affidavit that relates to the Division's claim under 20 NYCRR 112.3 (c) should be stricken, since the Division's assertion on this basis

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agreement between New York City and its employees, and a matter of public record, the annual report and summary guide are officially noticed. The annual report and summary guide are officially noticed merely to provide a reference to the general information of the deferred compensation plan and the timing of when the IRC § 401 (a) program was added to the deferred compensation plan for New York City employees. According to the annual report, the deferred compensation plan was an umbrella program for three defined contribution plans, including an Internal Revenue Code § 401 (a) qualified pension plan component that was referred to as a savings incentive program, to which employer contributions were made. However, this addition was not made to the plan until 2007, after petitioner retired. There is no evidence in the record that any employer contributions were made to petitioner's deferred compensation plan. It is noted that the annual report submitted into evidence covers fiscal years ended December 31, 2013 and 2014, and to the extent the 401 (a) component, funded with employer contributions, was not added to the plan available to petitioner prior to his retirement in 2001, the documents are relevant and noticed, even though the annual report and summary guide are not from 2011, the year of the distribution.

[3]Pursuant to the State Administrative Procedure Act § 306 (4) (***see*** footnote 2), official notice of the New York State instructions for Form IT-201 for 2011 is taken since it is determinable from a source of indisputable accuracy and is a matter of public record.

was not part of the original statement of proposed audit changes or the Division's answer, and to allow the Division to change its only theory of the case after three years from the issuance of the statement of proposed audit changes is unfairly prejudicial.

15. The Division asserts that the record is devoid of any evidence supporting a finding that the distribution received by petitioner was from a public pension plan. The Division further argues that there is no evidence that all or any portion of the distribution to petitioner was contributed to by the State of New York, or any public employer, as required by 20 NYCRR 112.3 (c) (1), and therefore, it does not qualify for the public employer pension exclusion. The Division maintains that it satisfied the requirements of due process by providing reasonable notice of the basis for the assessment and a meaningful opportunity for petitioners to respond. The Moseley affidavit merely further clarified the qualification of retirement benefits as a public pension.

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.[4] 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 petitioner's argument is premised on this modification.

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[4] Tax Law § 612 (c) (3-a) provides for a separate modification for a pension or annuity not in excess of $20,000.00, received by an individual who has attained the age of 59 ½ and is not otherwise excluded as a New York State or federal pension. This exclusion is not in issue, but is referenced in the Division's statement of proposed audit changes. Although the Division indicated that the distribution from petitioner's deferred compensation plan would otherwise qualify for this exclusion, petitioner had not yet attained age 59 ½ when he received it. Thus, it has no applicability to this matter.

B. The regulation that provides additional guidance for Tax Law § 612 (c) (3), i.e., 20 NYCRR 112.3, addresses modifications reducing federal AGI, in pertinent part, as follows:

> "The following items are to be subtracted from Federal adjusted gross income in determining the New York adjusted gross income of a resident individual:
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> * * *
>
> (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 (Tax Law §612 [c] [3]).
>
> (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; . . .
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> * * *
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> (iii) the provisions of this paragraph can be illustrated by the following examples:
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> * * *
>
> *Example* 2: A New York State employee leaves state service prior to vesting in the New York State Employee's Retirement System. Contributions made by or on behalf of such employee, as well as all investment earnings accumulated thereon, are to be subtracted in determining such employee's New York adjusted gross income.
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> * * *
>
> *Example* 5: A retired employee of a public benefit corporation receives a pension from a fund which was not contributed to by New York State, any of its political subdivisions or agencies or the Federal government and which is taxed under the Internal Revenue Code as annuity income. Since such pension income is not exempt from New York State personal income tax under New York State law because such pension was not actually contributed to by New York State, any of

> its political subdivisions or agencies or the Federal government, the amount included in Federal adjusted gross income on account of this pension is not subtracted in determining such employee's New York adjusted gross income and is therefore included in such employee's New York adjusted gross income."

C. Prior to 2002, distributions from 457 plans were considered deferred wages and not pension payments. The Federal Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), in part, amended section 457 to change the characterization of distributions from section 457 government plans to pension or annuity income, and these changes affected the New York tax treatment of such distributions (***see*** TSB-M-02[9]I). That said, there is a distinction between all pension or annuity income and retirement benefits that qualify as a public pension eligible for the full exclusion.

The Division maintains that the distribution did not qualify for a public pension because the pension subtraction requires that the funds be received from a public pension plan and Fascore is not a public pension plan. The Moseley affidavit reiterated the same reasoning and then expanded it to include the regulatory language associated with Tax Law § 612 (c) (3) (i), i.e., 20 NYCRR 112.3 (c) (1) (i), which essentially further defines the type of retirement benefits that qualify for the subtraction modification. The characteristics of the type of benefit that qualifies are that it must be paid to a public employee of New York State, included in federal adjusted gross income, relate to services performed as a public employee and all or a portion of the benefits must have been actually contributed to by New York State, its political subdivisions or agencies. Tax Law § 697 (a) gives the Division the power to administer and enforce the tax imposed by article 22, and authorizes it to make such rules and regulations as it may deem necessary to enforce the provisions of this article. The regulation that further defines the type of pension that qualifies as a public pension is clearly within the power of the Division to set forth

and enforce. Thus, reference to the regulation that is directly related to the governing statute is not prejudicial to petitioner given his opportunity to respond to its application.

The 457 plan, though used as a retirement vehicle, is not a pension plan in the traditional sense, and is, in fact, a state-sponsored voluntary retirement savings plan contributed solely by the employee. There are no contributions by New York State to a standard 457 plan, and none were shown to have been made to the plan in issue during the years that petitioner participated (***see*** footnote 2). The distribution to petitioner simply does not meet the statutory and regulatory criteria previously set forth for the application of the subtraction modification allowed to a New York State public pension.

D. As to the distribution and its taxability, information was not withheld from petitioners and the Division did not violate petitioners' due process. The Division did not change its legal theory or unfairly prejudice petitioners. Petitioners were on notice from the issuance of the statement of proposed audit changes that the Division had rejected the subtraction modification because the distribution was not from a public pension plan. The regulation cited by the Moseley affidavit merely clarified why the plan did not qualify. Petitioners had sufficient opportunity to respond to the more specific reasoning before and during the submission process. Accordingly, due process has been met and petitioners have not been prejudiced in any way.

E. As to petitioners' interpretation of the 2011 Form IT-201 instructions for line 26, they have misapplied the instructions. The distribution in this case does not qualify in the first instance as a New York State or local pension, thus any instruction relating to that line item is inapplicable in this matter. Likewise, petitioners have taken out of context and misapplied Example 2 of the regulation (20 NYCRR 112.3 [c] [1] [iii]), as it referenced contributions and investment earnings and their qualification for the subtraction modification. This example

presumes distributions from a New York State pension plan. The distribution in this matter was from a 457 plan, and not covered by Example 2. However, Example 5 (20 NYCRR 112.3 [c] [1] [iii]) , though not an exact factual depiction of this matter, is more on point. The retirement benefit in that example was not contributed to by New York State, and accordingly, did not qualify for the subtraction modification.

F. Petitioners made a mistake of law for which there is no relief. In ***Matter of Wallace*** (Tax Appeals Tribunal, October 11, 2001), the Tribunal has defined mistake of law, as follows:

> "A mistake of law. . . has been defined as acquaintance with the existence or nonexistence of facts, but ignorance of the legal consequences following from the facts (54 Am Jur 2d Mistake, Accident or Surprise § 8; ***see also, Wendel Foundation v. Moredall Realty Corp.***, 176 Misc 1006, 29 NYS2d 451)."

Petitioners mistakenly thought the lump sum distribution from the plan qualified as a public pension under the law. However, inasmuch as the 2011 distribution received by petitioner from the plan was not a public pension, it was not a pension or annuity payment eligible for the modification subtraction in its entirety under Tax Law § 612 (c) (3). Accordingly, the Division properly imposed tax on the income.

G. The petition of Charles and Diane Piscopo is denied, and the notice of deficiency dated February 13, 2015, is hereby sustained.

DATED: Albany, New York
June 21, 2018

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE