

## **Opinion No. 62-29**

February 5, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

**TO:** Mr. F. E. McCulloch, Director, Income Tax Division Bureau of Revenue, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

What types of retirement pensions or annuities are subject to State income tax?

#### CONCLUSION

See analysis.

### **OPINION**

#### ANALYSIS

Prior to 1961, Section 72-15-5 (4), N.M.S.A., 1953 Compilation exempt from State income tax all money received as employees' pensions, disability benefits or death benefits. This Section was repealed during the last legislative session by Chapter 149, Section 1, Laws 1961, compiled as Section 72-16-6, N.M.S.A., 1953 Compilation.

This recent enactment provided that:

"Base income' of a taxpayer means that part of the taxpayer's income generally defined as federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year."

Net income upon which State income tax is payable is base income with certain adjustments where applicable.

In view of the 1961 amendment of the State income tax law, the State tax is, in general effect, tied to the Federal income tax provisions. And since most annuities, pensions and other payments to retired employees where services have been rendered to the payor are taxable to recipients by the Federal government, the same rule applies in connection with State income tax, except in instances where there is a specific statutory exemption. Such a statutory exemption exists in the case of retirement benefits paid pursuant to both the Public Employees Retirement Act and the Educational Retirement Act. Section 5-5-21, and 73-12-89, N.M.S.A., 1953 Compilation.

The following items are the notable exceptions and modifications to the general rule making pensions and retirement benefits subject to Federal income tax:

1. Payments made under the Social Security Act to employees, their relatives, or their estates.
2. Benefits paid under the Railroad Retirement Acts.
3. Amounts paid by one for whom no services have been rendered. Such payments are considered gifts.
4. Most pensions of members of the armed services retired for reasons of disability and other benefits paid by the Veteran's Administration.
5. Voluntary pensions paid to retired ministers by their congregation. 20 T.C. 593.

Amounts received from employees' pension or profit - sharing plans or trusts or annuities are all subject to special provisions and may be said generally to be taxable. See I.R.C., Sections 402, 403, 72. Alexander, **Federal Tax Handbook**, Section 514 et seq., (1962).

We should point out that under the 1954 Federal Tax Code many taxpayers who receive pensions or other retirement benefits which are taxable may be entitled to a credit against their tax. I.R.C., Section 37; Reg. Section 1.37.

We have not attempted to discuss in detail the myriad types of annuities for such a comprehensive study would encompass at least a hundred-page treatise.

What the State income tax division must do is ascertain whether the particular annuity is taxable by the Federal government for income tax purposes. If so, it is also taxable by the State with the exception of retirement benefits paid pursuant to the Public Employees Retirement Act and the Educational Retirement Act.