

Opinion No. 67-132

November 6, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: E. P. Ripley General Counsel Department of Education Santa Fe, New Mexico

QUESTION

FACTS

Under Section 403(b) of the Internal Revenue Code of 1954, an income tax deferment is available to employees of state educational institutions of a portion of their compensation which is paid in the form of annuities purchased in their behalf by their employer. Under Section 403(b), supra, the employee pays no immediate income tax on the amount contributed by the employer toward purchase of the annuity. Instead, he pays on the annuity payments when received. The exclusions from current gross income applies only to amounts contributed by the employer for the purchase of the annuity contract or to amounts by which the employee's salary is reduced by the employer in exchange for the annuity contract. 3 CCH 1967 Fed. Tax Guide 32, 479-8.

QUESTION

Does the State Department of Education have the authority to enter into salary deduction agreements with employees for the purpose of purchasing annuity contracts on their behalf?

CONCLUSION

No.

OPINION

{*210} ANALYSIS

At the outset, it is important to note that this opinion does not consider or attempt to answer the question whether or not the purchase of annuity contracts by the Department of Education on behalf of its employees qualifies for treatment under Section 403(b) of the Internal Revenue Code of 1954. A ruling by this office on this question will not be binding on the Internal Revenue Service.

As a general rule, state departments have such powers as may have been delegated to them by express constitutional or statutory provisions or as may properly be implied from the nature of the particular duties imposed on them. They have no powers beyond those granted by express provision or necessary implication. **Golding v. Salter**, 107

So. 2d 348 (Miss. 1958); **State v. Mayberry**, 304 P.2d 663 (Wash. 1956); **Thomas v. Lauer**, 86 N.E. 2d 71 (Ind. 1949); 81 C.J.S. States Sec. 58 (1953); cf. **Martin v. Chandler**, 318 S.W. 2d 40 (Ky. 1958); **McDougall v. Board of Land Commissioners**, 49 P.2d 663 (Wyo. 1935); **Lingo-Laper Lumber Co., v. Carter**, 17 P.2d 365 (Okla. 1932).

Article XII, Section 6A of the New Mexico Constitution establishes the state department of public education but does not prescribe its powers and duties. Section 77-2-5(A), N.M.S.A., 1953 Compilation (1967 P.S.) provides that the State Board of Education may delegate administrative functions to the Department of Education. Section 77-2-6, N.M.S.A., 1953 Compilation (1967 P.S.) prescribes the duties of the department of education. None of these provisions specifically authorize the department of education to purchase annuity contracts for its employees nor must the authority to do so be necessarily implied from these provisions in order to enable the Department of Education to perform its duties.

Section 5-4-12, N.M.S.A., 1953 Compilation provides that:

{*211} All state departments and institutions and all political subdivisions of the state may cooperate in providing **group or other forms of insurance** for the benefit of eligible employees of the respective departments, institutions and subdivisions. The contributions of the state of New Mexico or any of its departments or institutions or the political subdivisions of the state except municipalities shall not exceed twenty per cent [20] of the cost of the insurance. The contributions of municipalities shall not exceed fifty per cent [50%] of the cost of the insurance. (Emphasis added)

Annuity contracts are not contracts of insurance. **Prudential Ins. Co., v. Howell**, 148 A.2d 145 (N.J. 1959); **Rosenbloom v. New York Life Ins. Co.**, 65 F. Supp. 692 (W. D. Mo. 1946); **In re Burtman's Estate**, 41 NYS 2d 778 (Sup. Ct. 1943); **Helvering v. Le Cierse**, 312 U.S. 531, 61 Sup. Ct. 646, 85 L. Ed. 996 (1941); **Daniel v. Life Ins. Co. of Virginia**, 102 S.W. 2d 256 (Tex. Civ. App. 1937); Opinion of the Attorney General No. 60-137, dated July 21, 1960.

In Appleman, **Insurance Law and Practice**, 83 (rev. ed. 1965) the difference between annuity contracts and insurance contracts is noted as follows:

Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different. One involves payments of stated amounts, known as premiums, by the insured over a period of years in return for which the insurer creates an immediate estate in a fixed amount in the event of his death which in good standing. These benefits are to be paid to some designated person other than the insured, although the policy may provide that after the expiration of a certain period of time, the insured may elect to receive certain of these amounts personally. There is an immediate hazard of loss thrown upon the insurer, with the required performance by the insured of certain obligations at designated intervals of time.

An annuity contract is almost diametrically opposed to this. The person designated as the recipient is the person paying the money. He pays in a fixed sum usually at one time, in return for which the company must then perform a series of obligations over a period of years, at designated times. The hazard of loss is no longer upon the company but upon the recipient who may die before any benefits are received. Instead of creating an immediate estate for the benefit of others, he has reduced his immediate estate in favor of future contingent income. The positions are almost exactly reversed. Annuity contracts must, therefore, be recognized as investments rather than as insurance.

It is our opinion that the Department of Education does not have the authority to purchase annuity contracts on behalf of its employees.

By: Edward R. Pearson

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