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RETIREMENT SYSTEMS:
TAXATION:

The State Income Tax Act, Act 281, P.A. 1967 does not modify or amend by implication Section 40 of the State Employees' Retirement Act, Act 240, as amended, which exempts pensions, annuities and benefits thereof from state taxation.

No. 4604 July 26, 1968.

Mr. Clarence W. Lock
Commissioner of Revenue
Treasury Building
Lansing, Michigan

You request an opinion of this office on the following questions:

1. Is the immunity from taxes granted in Section 40 of the State Employees' Retirement Act[1] so modified by the State Income Tax Act[2] as to require the payment of state income tax on pensions, annuities and retirement allowances of state employees of Michigan?

2. If the answer to the above question is in the affirmative, would such a modification violate Art. IX, § 24 of the 1963 Michigan Constitution prohibiting impairment of benefits from pension plans and retirement systems of the state or its political subdivisions?

Section 40 of the State Employees' Retirement Act, *supra,* provides:

"The right of a person to a pension, and annuity, or retirement allowance, any optional benefit, any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all moneys and investments and income thereof, are hereby exempt from any state, county, municipal, or other local tax, and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law whatsoever, and shall be unassignable except as in this act specifically provided."

The applicable provisions of the State Income Tax Act, *supra,* are Chapter 2, Sec. 51 (1) and (2); Chapter 1, Sec. 30 (a); and, Chapter 1, Sec. 2 (2) and (3) which state:

Chapter 2, Sec. 51:

"(1) For receiving, earning or otherwise acquiring income from any source whatsoever, there is levied and imposed a tax of 2.6% upon the taxable income of every person, other than a corporation.

"(2) For the purposes of this section, 'taxable income' means taxable income as defined in this act subject to the applicable source and attribution rules contained in this act."

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[1] Section 40 of Act No. 240, P.A. 1943, as amended; C.L. 1948 and C.L.S. § 38.40; M.S.A. 1961 Rev. Vol. § 3.981 (40).

[2] Act No. 281, P.A. 1967; C.L.S. § 206.1, et seq.; M.S.A. 1968 Cur. Mat. § 7.557 (101), et seq.

Chapter 1, Sec. 30 (a):

"Sec. 30. 'Taxable income' in the case of a person other than a corporation, financial institution, an estate or trust means:

"(a) Adjusted gross income as defined in the internal revene [sic] code subject to the following adjustments: . . ." [Then follow six adjustments.]

Chapter 1, Sec. 2. (2) and (3):

"(2) Any term used in this act shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required. Any reference in this act to the internal revenue code shall include other provisions of the laws of the United States relating to federal income taxes.

"(3) It is the intention of this act that the income subject to tax be the same as taxable income as defined and applicable to the subject taxpayer in the internal revenue code, except as otherwise provided in this act."

Since the State Income Tax Act, *supra,* requires that the same meaning of terms used therein shall be as "used in comparable context in the laws of the United States relating to federal income taxes." (Sec. 2 (2), *supra,*) in order to determine the meaning of "adjusted gross income" as defined in the internal revenue code, it is necessary to wade through a formidable mass of federal statutory, case and regulatory language. For example, the first confrontation is with Subchapter B, Part 1, Section 61 of the Internal Revenue Code of 1954, as amended, which defines the term "gross income." This section simply states that:

"§ 61(a). Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . ." [Then follow 15 specific items.]

But, that this apparent simplicity is deceptive is indicated by the annotations in the 1967 revised volume of West Publishing Company's United States Code Annotation which contains over 245 pages of references to court decisions and regulations interpreting this section; each page, it must be noted, refers to an average of 9-10 decisions so that there are over 2,000 references referring to the definition of the term "gross income."

But research does not terminate at this point. Having acquired a working knowledge of the phrase "gross income," it is next necessary to consider Section 62 of the Internal Revenue Code which states:

"For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions: . . ." [Then follow 8 specific items, the second of which is further subdivided into 4 parts.]

West's U.S.C.A., *supra,* contains digests of 38 decisions that refer to this section of the Internal Revenue Code of 1954, Title 28, U.S.C. §§ 72 and 403. But in addition, Sections 71-81 of the Internal Revenue Code of 1954, *supra,* deal with "Items Specifically Included in Gross Income" and Sections 101-122 thereof deal with "Items Specifically Excluded from Gross Income."

These references cover some 178 pages of West's U.S.C.A., *supra,* including brief digests of decisions interpreting these statutory provisions.

Thus, it is clear that when the legislature incorporated by reference the definition of "adjusted gross income" in Section 30 of the State Income Tax Act, *supra,* as that "defined in the internal revenue code," it grafted onto the state act a complex mass of legal data.

Section 40 of the State Employees' Retirement Act, *supra,* has not been expressly repealed by the State Income Tax Act, *supra,* nor by any other statute so that, if it is determined that the exemptions provided therein are to be abolished, such a determination must be derived by implication.

The basic rule of statutory construction, it must be remembered, is that of ascertaining and giving effect to the legislative intent. *Howard Pore v. State Commissioner of Revenue,* 322 Mich. 49, 58 (1948). Various subsidiary rules of construction have been formulated for the purpose of effectuating this basic guide, two of which are applicable; they are:

1. Repeals by implication are not favored;

and,

2. Where a general statute is in conflict with a specific statute, the specific controls over the general.

The first of these rules has been forcibly stated in 50 Am. Jur. "Statutes," § 543, p. 550-551, as follows:

> " . . . a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot by a fair and reasonable construction, be reconciled, made to stand together, and be given effect or enforced concurrently. . . ."

See also: 82 C.J.S. "Statutes," § 291b pp. 492-493. This rule has achieved the status of a maxim and was applied in the following decisions of the Michigan court: *Peoples Savings Bank v. Stoddard,* 359 Mich. 297 (1960); *Washtenaw County Rd. Com'rs v. Public Service Comm.,* 349 Mich. 663 (1957); and *State Highway Com'r v. Detroit City Controller,* 331 Mich. 337 (1951).

As to the second of the above rules of statutory construction, it is stated in 82 C.J.S. "Statutes," § 369 pp. 843-844:

> "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment. . . . where the general act is later, the special statute will be construed as remaining an exception to its terms, . . ."

Numerous Michigan cases have also applied this rule. *Bullinger v. Gremore,* 343 Mich. 516 (1955); *Reed v. Secretary of State,* 327 Mich. 108 (1950); *Board of Education v. Blondell,* 251 Mich. 528 (1930); and *Attorney General, ex rel Owen v. Joyce,* 233 Mich. 619 (1926).

One of these cases, in particular, bears resemblance to the case at hand. In *Board of Education v. Blondell, supra,* which dealt with 2 legislative acts that are no longer in effect, Section 8, Chapter 2, part 2 of Act 319, P.A. 1927 read as follows at page 530:

> " 'The property of all school districts shall be exempt from taxation for all purposes.' "

Act 118, P.A. 1927, which was the general tax law of the state, on the other hand, provided for exemption from taxation of:

> "Third, Lands owned by any county, township, city, village or school district and buildings thereon, used for school purposes; . . ."

The plaintiff school district, having obtained title to several dwelling units for anticipated needs, rented them to private individuals. Plaintiff then refused to pay the 1928 village tax and brought suit to restrain the defendants from reporting the tax as unpaid to the county treasurer. The Michigan court identified the problem on pages 531-532 in the following terms:

> "We are confronted with what obviously appears to be two inconsistent and repugnant provisions in two different acts passed at the same session of the legislature, although the general school code was approved later than the amendment to the general tax law. We are further met with the rule that repeals by implication are not favored. When there are two acts in conflict with one another, they cannot both be the law unless there is some way of giving effect to both of them.
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> "In the case of *Attorney General v. Joyce,* 233 Mich. 619, a somewhat similar situation presented itself. In that case, the special act relating to the election of commissioners provided that the board of supervisors might fill vacancies for that office for unexpired terms. A *later general act* passed in 1923 provided for the filling of vacancies and appointments of county officers by the probate judge, county clerk, and the prosecuting attorney. It contained no provision repealing the earlier statute. We held that *the later general act did not repeal the special act,* but that *the earlier act remained in full force and effect as a general exception to the later act.*" (Emphasis added)

The Court then concluded on page 532:

> ". . . that the provision in the school code exempting all property from taxation is an exception to the general tax law, and that all property of school districts is exempt. . . ."

Thus, while it is true that when two acts are so at variance that effect cannot be given to both, the later enactment is controlling, *Southward v. Wabash Railroad Company,* 331 Mich. 138 (1951), this precept is not applicable to the matter at hand because the two legislative pronouncements are not at variance with each other to the extent that they may not both be given effect. The term "adjusted gross income" as defined in the State Income Tax Act, supra, may be applied in accordance with legislative prescription subject, however, to the specific exclusion of state employees' pensions which, it must be presumed, the legislature did not intend to eliminate. In other words, the later act (State Income Tax Act, supra) cannot be said to repeal by implication the earlier act (State Employees'

Retirement Act, supra) because, in the words of the encyclopedic reference noted above, there is no such "clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy that the two acts cannot by a fair and reasonable construction, be reconciled, made to stand together, and be given effect or enforced concurrently." This rule of interpretation would appear to be particularly valid in the case at hand where the subsequent general statute has engrafted upon it a complex mass of law that has been incorporated by reference and in which is contained one item contradictory to the earlier specific statute.

It is therefore my conclusion that legislative adoption of the definition of "adjusted gross income" as defined by the United States Internal Revenue Code, did not have the effect of modifying or repealing the exemption from state taxation of the State Employees' Retirement Act, supra.

Your first question having been answered in the negative, it is unnecessary to give consideration to the second question.

FRANK J. KELLEY,
Attorney General.