

**RETIREMENT SYSTEMS:
TAXATION:**

Pensions and other benefits accruing from Chapter I of the state teachers retirement act are exempt from the state income tax and may be excluded in determining adjusted gross income. No such exemption is provided in Chapter II of the state teachers retirement act.

No. 4660

February 20, 1969.

Hon. Stanley M. Powell
Hon. William V. Weber
Hon. Thomas G. Ford, Sr.
State Representatives
House of Representatives
Lansing, Michigan

and

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

Referring to my recent Opinion No. 4604 of July 26, 1968 you have each, in separate communications, directed my attention to the provisions of the state teachers retirement act¹ and you have asked for my opinion as to whether the pensions, annuities, retirement allowances, optional benefits or any other benefits of the retirement act are exempt from the levy of the state income tax act of 1967.²

Opinion No. 4604, to which you refer, dealt with the tax-exempt provision of the state employees retirement act.³ I held therein that the state income tax act did not modify or repeal by implication the tax exemption of the retirement act because under applicable rules of statutory construction that serve as a guide to the legislative intent, repeals by implication are not favored⁴ and, where a general act (here, the state income tax act) standing alone can be harmoniously construed to include the special act (the exemption provision of the retirement act as an exception to or qualification of the general statute, effect must be given to both acts.

The teachers retirement act, supra, is divided into two separate and distinct parts which are conveniently designated as "chapters." Chapter I thereof deals solely with employees of school districts other than first class whereas Chapter II deals only with employees of school districts of

¹ Section 25 of Chapter I of Act 136, P.A. 1945, as amended; M.C.L.A. § 38.225; M.S.A. 1968 Rev. Vol. § 15.893(25).

² Act 281, P.A. 1967, as amended; M.C.L.A. 1967 Cum. Supp. § 206.1 et seq.; M.S.A. 1968 Cum. Supp. § 7.557(101) et seq.

³ Section 40 of Act 240, P.A. 1943; M.C.L.A. § 38.40; M.S.A. 1961 Rev. Vol. § 3.981(40).

⁴ *Peoples Savings Bank v. Stoddard* (1960), 359 Mich. 297.

the first class having a public school teachers retirement plan of their own. There is presently only one school district of the first class having a retirement plan of its own, the school district of the City of Detroit. Since the relevant provisions of each of these chapters are strikingly different, I will discuss them separately.

Chapter I

It is first necessary to compare the language of Section 40 of the state employees retirement act, *supra*, with that of Section 25 of Chapter I of the state teachers retirement act, *supra*, to determine whether there is sufficient substantive distinction to warrant a result contrary to that of Opinion No. 4604.

Section 40 of the state employees retirement act, *supra*, provides in pertinent part:

“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 Section 25 of Chapter I of the state teachers retirement act, *supra*, provides in pertinent part:

“A pension, an annuity, or retirement allowance, any optional benefit, or any other benefits accrued or accruing to any person under the provisions of this chapter, the various funds created by this chapter, and all moneys and investments and income thereof, are hereby exempt from any state, county, municipal, or other local tax, * * *.”

A comparison of these two statutory provisions reveals that, apart from editorial arrangement, the only difference between the two is that one (dealing with state employees) speaks of “the right of a person to” the benefits as being exempt, whereas the other (dealing with teachers) speaks of the benefits themselves as being exempt. I deem this to be a difference without distinction. Any benefit or proprietary interest is in effect a legally protected “right” to such benefits or interests so that the two concepts are synonymous and interchangeable. In a legal sense, a “right” exists when the law declares that a person may enforce a claim against another or resist the enforcement of a claim⁵ although commonly we speak of a proprietary interest when we really mean a right to it.

Thus, it is my opinion that, as in the case of pensions and other benefits of the state employees retirement act, *supra*, all sums received by any person by way of “[a] pension, an annuity, or retirement allowance, any optional benefit, or any other benefits accrued or accruing to” such person pursuant to Section 25 of Chapter I of the state teachers retirement act, *supra*, are exempt from state income taxes and persons receiving retirement benefits

⁵ *Mellinger v. City of Houston* (Tex., 1887), 3 S.W. 249, 253.

from the Michigan public school retirement system may exclude such sums in determining their adjusted gross income.

Chapter II

It must first be noted that Section 25 of Chapter I of Act 136, P.A. 1945, *supra*, provides:

"A pension, an annuity, or retirement allowance, any optional benefit, or any other benefits accrued or accruing to any person *under the provisions of this chapter*, the various funds created by this chapter, and all moneys and investments and income thereof, are hereby exempt from any state, county, municipal, or other local tax, * * *." (emphasis added)

Thus the legislature has clearly indicated its intent to limit the scope of the tax-exempt privilege to the benefits of the Chapter I retirement system and, as there is no comparable statutory language granting any tax exempt privileges to Chapter II system, beneficiaries thereof do not enjoy this privilege.

A question may be raised as to the fairness, equity or even constitutionality of legislative acts granting tax exemption to certain pension systems while denying it to others and I feel that it is necessary to address this issue.

In my opinion the fact that certain statutorily created pension plans provide for tax-exempt privileges, while others do not, does not represent such a degree of inequality of treatment as to constitute a denial of equal protection of the laws.

In *Detroit Edison Company v. East China Township School District No. 3*, 247 F. Supp. 296 (E. D. Mich. 1965); *affd.* 378 F. 2d 225 (6th Cir. 1967); *cert. den.* 389 U.S. 932 (1967), the court held that a state tax law will be held to conflict with the 14th Amendment only where it clearly results in such flagrant and palpable inequity between the burden imposed and the benefit received as to amount to an arbitrary taking of property without due process of law. And similarly in *Virgo Corporation v. Paiewonsky*, 384 F. 2d 569 (3rd Cir. 1967); *cert. den.* 390 U.S. 1041 (1968), on page 586, the Federal Court stated:

"We had occasion in *Port Construction Co. v. Government of Virgin Islands*, 1966, 359 F. 2d 663, 667-668, 5 V.I. 549, 558-559, to observe that the equal protection clause does not impose a rigid rule of equality of taxation. It does not prohibit those inequalities which may result from singling out one particular class for taxation or exemption therefrom. Only if it appears that there is no rational basis for the classification so that it is patently arbitrary may it be set aside as unconstitutionally discriminatory. Even singling out a group of taxpayers for special relief conditioned upon a showing of individual hardship is not necessarily invalid. *Jefferson Constr. Overseas, Inc. v. Government of V.I.*, 3 Cir. 1966, 359 F. 2d 668, 5 V.I. 543. * * *"

It must be recognized that each of the pension programs established by the state contains benefits and obligations in varying degrees.⁶ If the basic premise that exemption from taxes of one plan represents inequality of treatment, what is to be said of all of the other differences in these various plans? Need every provision in every pension plan be identical? To ask the question is to provide its answer. We must recognize there is legal recognition of tolerable inequities and that the legislature must be permitted to be the final arbiter in determining distribution of benefits and obligations.

In fact, in *Thoman v. City of Lansing* (1946), 315 Mich. 566, 580, the supreme court said:

“Courts cannot annul tax laws because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings.’ *Youngblood v. Sexton*, 32 Mich. 406, 414 (20 Am. Rep. 654).”

Thus, for tax purposes, it appears that inequality cannot be equated with illegality or unconstitutionality.

Recently in *City of Muskegon v. Slater* (1967), 379 Mich. 466, 471, Justice Adams had occasion to criticize the patchwork pattern of statutory allowance for attorney fees which he felt were unjust. On page 471 he pointed out:

“At the present time the allowance of costs, including attorney fees, is dealt with by a hodge-podge of statutory provisions that follow no pattern and that, when received as a whole, are completely unjust.”

He then noted on page 472:

“It may be further observed that the hopelessly inconsistent situation with regard to costs and attorney fees in eminent domain cases exists in virtually every other field of the law. * * *.”

⁶ The following retirement acts contain no provisions for tax exemption:

Firemen and Policemen Retirement Act—Act 345, P.A. 1937, as amended; M.C.L.A. § 38.551 et seq.; M.S.A. 1958 Rev. Vol. and 1968 Cum. Supp. § 5.3375(1) et seq.

Probate Judges’ Retirement Act—Act 165, P.A. 1954, as amended; M.C.L.A. § 38.901 et seq.; M.S.A. 1962 Rev. Vol. and 1968 Cum. Supp. § 27.3178(60.1) et seq.

State Police Pension Act—Act 251, P.A. 1935, as amended; M.C.L.A. § 28.101 et seq.; M.S.A. 1961 Rev. Vol. and 1968 Cum. Supp. § 3.331 et seq.

Municipal Employees’ Retirement Act—Act 135, P.A. 1945, as amended; M.C.L.A. § 38.601 et seq.; M.S.A. 1958 Rev. Vol. and 1968 Cum. Supp. § 5.4001 et seq.

Judges’ Retirement Act—Act 198, P.A. 1951, as amended; M.C.L.A. § 38.801 et seq.; M.S.A. 1962 Rev. Vol. and 1968 Cum. Supp. § 27.125(1) et seq.

On the other hand, the following retirement systems do contain a specific tax exemption provision:

State Employees’ Retirement Act—Section 40 of Act 240, P.A. 1943; M.C.L.A. § 38.40; M.S.A. 1961 Rev. Vol. § 3.981(40).

Legislators’ Retirement Act—Section 57 of Act 261, P.A. 1957, as amended; M.C.L.A. § 38.1057; M.S.A. 1968 Cum. Supp. § 2.169(57).

Public Library Employees’ Retirement System—Section 5 of Act 339, P.A. 1927; M.C.L.A. § 38.705; M.S.A. 1968 Rev. Vol. § 15.1775 (for reserve fund).

And he concluded (page 473 that:

"A complete revision and overhaul of the amount and power to assess costs and attorney fees in all Michigan courts is overdue. * * *."

In summary, it is my opinion that all sums received by any person by way of a pension, annuity, retirement allowance, optional benefit or any other benefits accruing to such person pursuant to Section 25, Chapter I of the state teachers retirement act, supra, are exempt from state income taxes and persons receiving retirement benefits from the Michigan public school retirement system may exclude such sums in determining their adjusted gross income. On the other hand, there is no exemption from the state income tax act of 1967, supra, for sums received by persons pursuant to provisions of Chapter II of the state teachers retirement act and, therefore, for persons receiving retirement benefits from the employees retirement system of the school district of the City of Detroit.

In closing, the following observations appear appropriate. The people have entrusted the power to make laws to the legislature. The attorney general is bound by his constitutional oath to interpret the law as enacted by the legislature. Only the legislature can remedy the apparent inequity in the matter of exemption of public employee retirement benefits from the provisions of the Michigan income tax law. The legislature should, at its earliest opportunity, study this matter and take such action as it considers equitable.

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Attorney General.

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SCHOOLS: Authority of boards of education to grant certain sick leave benefits.

Boards of education have statutory authority to allow individual public school employees to accumulate unused sick leave days from year to year to be used for periods of illness in subsequent years. Boards of education have statutory authority to pay a specified amount per unused sick leave day at retirement to their employees.

No. 4667

February 24, 1969.

Hon. Ray Smith
State Representative
The Capitol
Lansing, Michigan

You have requested my opinion on three questions, two of which are related. Only these two will be considered in this opinion. Since the other issue you have raised deals with a basically unrelated subject, it will be answered in a separate opinion.

The two related questions you have presented are:

"Does the Board of Education have the authority to pay an employee, at the time of termination of employment for retirement, a specific amount per unused sick leave days?"