

# The Commonwealth of Massachusetts



Department of Revenue

Leverett Saltonstall Building,

100 Cambridge Street, Boston 02204

L. JOYCE HAMPERS  
COMMISSIONER

June 19, 1980

You request a ruling concerning the Massachusetts income tax status of deferred compensation of employees participating in the Deferred Compensation Plan ("Plan") of the Town of

The Plan was organized in 1976 pursuant to Massachusetts General Laws, Chapter 44, Section 67. This section authorizes the treasurer of any Massachusetts city or town to contract with an employee to defer payment of a portion of the employee's income; the deferred portion may be invested in a life insurance or annuity contract, mutual fund or a bank investment trust.

Section 457 of the Internal Revenue Code now governs the taxation of compensation deferred under an eligible state deferred compensation plan. Under that Section, compensation deferred under an eligible state deferred compensation plan is includible in an employee's federal gross income only in the taxable year in which such compensation is paid to the employee. An eligible state deferred compensation plan may be established and maintained by a State, by any political subdivision of a State, or by their respective agencies.

In order for a compensation plan to be eligible under Section 457, the plan must: (1) restrict participation to those individuals who perform service for the employer; (2) provide that the maximum that may be deferred under the plan for the taxable year not exceed the lesser of \$7500 or 33 1/3% of the participant's includible compensation (except that higher ceilings may also be provided to employees within three years of normal retirement age); (3) provide that compensation may be deferred for any calendar month only if an agreement providing for deferral has been entered into before the beginning of that calendar month; (4) not provide that amounts payable under the plan will be available to participants or other beneficiaries earlier than when the participant is separated from service with the employer or is faced with an unforeseeable emergency; and (5) provide that all amounts of compensation deferred under the plan, all property and rights purchased with such amounts and all income attributable to such amounts, property or rights remain solely the property and rights of the employer until made available to the participant or other beneficiary.

Although the Plan is substantially in accordance with Section 457, it lacks a provision indicating the maximum amount of compensation which a participant may annually defer. The Internal Revenue Service allows a Plan until January 1, 1982 to satisfy the requirements of Section 457. However, beginning after taxable year 1978, no participant may defer more than the maximum permitted under the Code.

Massachusetts General Laws Chapter 62, Section 2(a) defines Massachusetts gross income as federal gross income with modifications not here relevant. Income is subject to Massachusetts income tax withholding if it is taxable under Massachusetts income tax law and if it constitutes wages for federal withholding purposes. (Massachusetts General Laws Chapter 62B, Section 1).

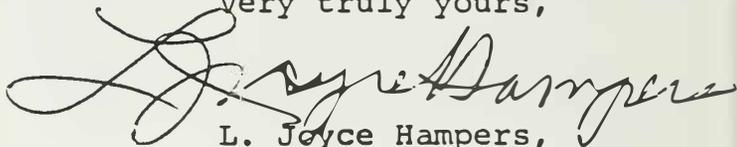
Based on the foregoing, it is ruled that:

1. Amounts deferred under the Town of                      Deferred Compensation Plan are not taxable under Massachusetts personal income tax laws in the year deferred to the extent that such amounts are not taxable for Federal income tax purposes.

2. Amounts deferred by participants in the Plan, so long as such amounts are considered deferred for Federal and Massachusetts income tax purposes, are not subject to withholding of Massachusetts income taxes at the time such amounts are deferred and are not included in the Form W-2 (Wages and Tax Statement) as wages or other compensation until the year in which the funds are made available to the employee.

3. Amounts paid out to participants in the Plan are includible in Massachusetts gross income and are subject to withholding of Massachusetts income taxes during the taxable year in which such amounts are paid or otherwise made available to such employees, their beneficiaries or estate through retirement, separation from service, death or unusual hardship.

Very truly yours,



L. Joyce Hampers,  
Commissioner of Revenue

LJH/RSF/jmcd

LR 80-38