



# COMMONWEALTH of VIRGINIA

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December 1, 2008

The Honorable Robert S. Wertz, Jr.  
Loudoun County Commissioner of the Revenue  
P.O. Box 8000  
Leesburg, Virginia 20177-9804

Dear Mr. Wertz:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a distribution from a retirement account that is deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, would be income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

## Response

It is my opinion that a distribution from a retirement account deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, is not income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

## Background

You seek guidance concerning the treatment of retirement account distributions, commonly referred to as rollovers, for purposes of determining eligibility for the exemption or deferral of taxes on property of certain elderly and handicapped persons under § 58.1-3211.

You advise that there are substantial differences of opinion regarding what distributions from retirement accounts, if any, should be excluded from total combined income for purposes of elderly or disabled persons qualifying for tax relief. You relate that elderly or disabled property owners occasionally transfer monies between retirement accounts or other investment accounts, often referred to as a "rollover" for federal income tax purposes. You also advise that some Virginia localities disregard a rollover when determining total combined income. The reasoning is that such rollovers generally are placed into another retirement account within sixty days, thus satisfying the Internal Revenue Service requirement and avoiding payment of penalties and taxes on the distribution.

Finally, you advise that you are aware of a 2006 opinion regarding income from IRAs, 401Ks, and similar retirement plans.<sup>1</sup> You observe that the opinion concludes that distributions from retirement plans, including lump sum and periodic distributions, should be considered income.<sup>2</sup> However, you note that the opinion does not mention distributions from one retirement plan deposited into another plan or monies distributed from a retirement fund into another form of account with the intent to use such account as a retirement fund.

### Applicable Law and Discussion

Section 58.1-3211(1)(a) requires that “the total combined income received from all sources during the preceding calendar year” be used to determine income. Further, § 58.1-3211(5) provides that “income shall mean total gross income from all sources, without regard to whether a tax return is actually filed. Income shall not include life insurance benefits or receipts from borrowing or other debt.”

A prior opinion of the Attorney General (the “1992 Opinion”) notes that “the exemption authorized by § 58.1-3210 is to provide relief to elderly or disabled individuals who bear a tax burden on their real estate that is extraordinary in relation to their income.”<sup>3</sup> The 1992 Opinion concludes that in deciding whether income is part of the “total combined income” contemplated by § 58.1-3211, “the focus of the inquiry is whether the income is available to meet expenses.”<sup>4</sup> Another opinion of the Attorney General notes that the term “income” generally has no accepted meaning in income tax law and concludes that the General Assembly did not intend to refer to income tax principles when using the term “income” in § 58.1-3211.<sup>5</sup> Income is “the amount of money received on a regular basis and thus available to meet expenses.”<sup>6</sup>

Generally, under the Internal Revenue Code, “any amount paid or distributed *out of* an individual retirement plan shall be included in gross income by the payee or distribute, as the case may be, in the manner provided under section 72.”<sup>7</sup> However, § 72 permits certain tax-free rollovers.<sup>8</sup> Any amount paid or distributed to an individual for whose benefit the account or annuity was established is not taxed if the entire amount received is paid into an individual retirement account or annuity, other than an endowment contract, not later than the sixtieth day after the day on which he receives the payment or distribution.<sup>9</sup>

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<sup>1</sup>2006 Op. Va. Att’y Gen. 199.

<sup>2</sup>*Id.*

<sup>3</sup>1992 Op. Va. Att’y Gen. 175, 176.

<sup>4</sup>*Id.* at 177. Prior Opinions of this Office interpreting § 58.1-3211 consistently have applied this rule. *See* Op. Va. Att’y Gen.: 1987-1988 at 527, 528; 1985-1986 at 304, 304; *see also* 1981-1982 at 354, 356; 1976-1977 at 294, 294-95; 1973-1974 at 401, 401 (interpreting § 58-760.1, predecessor to § 58.1-3211, and noting that income is compensation paid on regular basis and intended for daily expenses).

<sup>5</sup>1987-1988 Op. Va. Att’y Gen., *supra* note 4, at 528 (concluding that term “income” must be given its ordinary meaning in context of statute).

<sup>6</sup>1985-1986 Op. Va. Att’y Gen., *supra* note 4, at 304; *see also* 1976-1977 Op. Va. Att’y Gen., *supra* note 4, at 295 (defining “income” as “amount of money coming in on regular basis and thus available to meet expenses”).

<sup>7</sup>26 U.S.C.A. § 408(d)(1) (West Supp. 2008).

<sup>8</sup>*Id.* § 408(d)(3)(A) (West Supp. 2008).

<sup>9</sup>*Id.* § 408(d)(3)(A)(i) (West Supp. 2008).

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However, this rule does not apply to any amount received by an individual “if at any time during the [one] year period ending on the day of such receipt such individual received any other amount ... from an individual retirement account or an individual retirement annuity,” which was permitted to be received tax-free under such rule or any other rules permitting tax-free rollovers.<sup>10</sup>

Tax-free rollovers do not constitute income because such rollovers do not represent an amount of money received on a regular basis that is available to meet expenses. Therefore, distributions from one retirement account deposited into another retirement account or an investment account to be used as a retirement account, which are not readily available to meet expenses, cannot be counted as income for purposes of total income under § 58.1-3211.

### **Conclusion**

Accordingly, it is my opinion that a distribution from a retirement account deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, is not income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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<sup>10</sup>*Id.* § 408(d)(3)(B) (West Supp. 2008).