

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-09(12)I  
Income Tax  
September 23, 2009

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION    PETITION NO. I090518B

The petition asks whether [REDACTED], who is an S corporation shareholder and is unable to currently deduct the flow-through loss from her S corporation on her Federal income tax return, has any relief from New York Tax Law §612(b)(8), which requires her to add back to her Federal adjusted gross income the bonus depreciation allowed under Internal Revenue Code §168(k).

We conclude that, in determining Petitioner's New York taxable income, there is no relief under the Tax Law and she must add back the full amount of the bonus depreciation that was passed through to her from her S corporation pursuant to Tax Law §612(b)(8).

**Facts**

Petitioner is a New York City resident and is the 100% shareholder of a corporation that has made an S corporation election at both the Federal and New York State levels. For 2008 the S corporation is anticipating a Federal tax loss of approximately \$500,000. This loss is generated, in part, by \$1,200,000 of bonus depreciation allowed in accordance with IRC §168(k). Pursuant to IRC §1367, Petitioner is unable to claim the \$500,000 loss on her 2008 Federal income tax return because she has no stock or debt basis in the S corporation. Further, pursuant to Tax Law §612(b)(8), in calculating Petitioner's New York State adjusted gross income requirements, she must add back the IRC §168(k) bonus depreciation she claimed in computing her Federal adjusted gross income (FAGI). This requirement means that Petitioner must add back \$1,200,000 to FAGI when computing her New York taxable income.

**Analysis**

In determining Petitioner's New York taxable income, the starting point is her Federal adjusted gross income (FAGI), subject to the modifications set forth in § 612.<sup>1</sup> According to the facts provided, Petitioner's FAGI for tax year 2008 was \$0.00 as a result of a loss passed through from her S corporation. This loss was the result of \$1,200,000 of IRC §168(k) bonus depreciation passed through to Petitioner from the S corporation. This loss was reduced by IRC §1367, which limited Petitioner's loss to her adjusted basis in the S corporation. Thus, Petitioner was able to claim only \$700,000 of the bonus depreciation that the S corporation passed through to her. The remaining \$500,000 will be carried forward as a loss until such time as Petitioner has either sufficient income from the S corporation or an increase in her S corporation basis to offset the carry forward loss.

While Petitioner's FAGI is \$0.00, as stated above, in determining New York taxable income, FAGI is only the starting point. The addition modification under Tax Law §612(b)(8) requires her to add back the \$1,200,000 of bonus depreciation she claimed on her federal return. But Tax Law §612(c)(16) permits

---

<sup>1</sup> Tax Law § 612(a), General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

Petitioner to claim a deduction pursuant to Tax Law §612(k)<sup>2</sup>. Therefore, while Petitioner is required to add back the \$1,200,000 of bonus depreciation, she is allowed to subtract the depreciation deduction that was available under IRC §167 before IRC §168(k) was enacted.

Other than Tax Law §612(k), the Tax Law does not provide for any additional modifications or offsets to the add-back provisions of Tax Law §612(b)(8), even if Petitioner's FAGI is \$0.00. Therefore, while Petitioner's FAGI is \$0.00, she is required to add back the bonus depreciation, in determining her New York taxable income, less any depreciation deduction she can claim pursuant to Tax Law §612(k). The \$500,000 loss carried forward, that Petitioner was unable to claim on her 2008 federal return, can be claimed in determining her FAGI and New York taxable income at such time, and to the extent, that her basis in the S corporation has been increased and is available pursuant to IRC §1367.

DATED: September 23, 2009

/S/

---

Jonathan Pessen  
Director of Advisory Opinions  
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

---

<sup>2</sup> Tax Law §612(k), "... a taxpayer shall be allowed with respect to such property the depreciation deduction allowable under §167 of the Internal Revenue Code as such section would have applied to such property had it been acquired by the taxpayer on September tenth, two thousand one."