

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-82 (2) I  
Income Tax  
April 2, 1982

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. 1810901B

On September 1, 1981 a Petition for Advisory Opinion was received from Louis and Shirley Chauvin, c/o Edward Green, Ninth Floor, Lincoln Center, Syracuse; New York 13202.

Petitioners inquire as to the proper treatment of certain business income, and of a deduction for accelerated depreciation, within the context of the maximum tax rate on New York personal service income provided for under section 603-A of the Tax Law.

In their Personal Income Tax return for 1978, Petitioners claimed the application of the maximum tax rate on New York personal service income. Upon audit, it was proposed that 70% of an item of earned business income be deleted from Petitioners' New York personal service income. Section 603-A(b)(1) of the Tax Law, as it applied to calendar 1978, provided, in relevant part, that "For purposes of this section the term 'New York personal service income' means items of income includible as personal service income for purposes of section one thousand three hundred forty-eight of the internal revenue code, to the extent such items of income are includible in New York adjusted gross income .... " Regulations promulgated with respect to section 1348 of the Internal Revenue Code, applicable to calendar 1978, provide that: "If an individual is engaged in a trade or business (other than in corporate form) in which both personal services and capital are material income-producing factors, a reasonable allowance as compensation for the personal services actually rendered by the individual shall be considered earned income, but the total amount which shall be treated as the earned income of the individual from such a trade or business shall in no case exceed 30 percent of his share of the net profits of such trade or business .... " 26 C.F.R. 1.1348-3(a)(3)(i). In the present instance the item of income at issue was derived from a non-corporate trade or business in which both personal services and capital were material income-producing factors. Accordingly, Petitioners are entitled to include in their New York personal service income that portion of such earnings which represent "a reasonable allowance as compensation for the personal services actually rendered," but not in excess of 30% of Petitioners' share of the net profits of the business.

Petitioners next inquire as to the proper treatment of their New York item of tax preference for accelerated depreciation in computing New York personal service taxable income. The New York personal service taxable income of an individual is defined, in section 603-A(c) of the Tax Law, as:

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". . . the excess of

- (1) the amount which bears the same ratio (but not in excess of one hundred percent) to his New York taxable income as his New York personal service net income bears to his New York adjusted gross income, over
- (2) the sum of his items of tax preference, as defined in this article, for the taxable year."

Petitioner's deduction for accelerated depreciation constituted one of such items of tax preference, and is thus required to be subtracted, as provided in the above-quoted statutory provision, in arriving at the appropriate figure for New York personal service taxable income.

DATED: April 1, 1982

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau