

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

TSB-A-86 (17) I
Income Tax
December 4, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. 1860908A

On September 8, 1986, a Petition for Advisory Opinion was received from Alan Langer, c/o Richard A. Eisner & Company, 380 Madison Avenue, New York, New York 10017.

The issue raised is whether section 612(b)(3) of Article 22 of the Tax Law requires the New York City General Corporation Tax to be an addition to federal adjusted gross income in calculating the New York adjusted gross income of an individual shareholder of an S Corporation.

Section 617(a) of the Tax Law, relating to resident shareholders, and section 637(c) of the Tax Law, relating to non-resident shareholders, require that in determining New York adjusted gross income, shareholders of an electing New York S Corporation must make any of the modifications in section 612(b) of the Tax Law that relate to an S Corporation item of income, loss or deduction in accordance with their pro rata shares.

Section 612(b)(3) of the Tax Law provides that "[i]ncome taxes imposed by this state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted gross income and not credited against federal income tax" must be added to federal adjusted gross income in computing New York adjusted gross income.

Section 607(a) of the Tax Law provides that any term used in Article 22 of the Tax Law shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required. Section 164(a) of the Internal Revenue Code allows a deduction for: "State and local, and foreign, income ... taxes". In determining what constitutes an "income tax" under section 164(a)(3) of the Code, the federal courts agree that such a tax must be a net income tax"; that is, a direct tax on gain or profits, and that gain is a necessary ingredient of income. See Stratton's Independence, Ltd. v. Howbert, 231 US 399, 415; Eisner v. Macomer, 252 US 189, 207; and Bank of America National T. & S. Assoc. v. US, 459 F.2d 513, 517-8.

The New York City General Corporation Tax is not an income tax that is required to be added back to federal adjusted gross income, pursuant to section 612(b)(3) of the Tax Law, when computing New York adjusted gross income. AD Rutland Realty, Inc. Advisory Opinion of the State Tax Commission, November 13, 1986; See Matter of Bankers Trust New York Corporation v. Department of Finance, 120 AD2d 992, 502 N.Y.S. 2d 567.

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Accordingly, a shareholder of a New York S Corporation is not required to make the modification required by section 612(b)(3) of the Tax Law for the shareholder's distributive share of the New York City General Corporation Tax paid by the S Corporation.

DATED: December 4, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.