

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

TSB-A-88 (12) I
Income Tax
August 24, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I880601A

On June 1, 1988, a Petition for Advisory Opinion was received from Douglas Condon, Trager, Glass & Co., CPA's, P.C., 1790 Broadway, New York, N.Y. 10019.

The issue raised is the treatment for purposes of the personal income tax under Article 22 of the Tax Law of income or loss relating to the ownership by a resident individual of an interest in a corporation which is an S corporation for federal purposes but is not an S corporation for New York State purposes.

Petitioner has set forth a hypothetical situation wherein a taxpayer who is a New York State resident has a 100% ownership interest in a New Jersey corporation which has federal approval to be an S corporation. It is assumed for purposes of this Advisory Opinion that the federal S corporation does not do business in New York State and is not subject to tax under Article 9-A of the Tax Law.

Section 601 of the Tax Law imposes the personal income tax on the New York taxable income of resident individuals. Section 611 of the Tax Law provides that the New York taxable income of a resident individual is computed by subtracting from the individual's New York adjusted gross income, the individual's New York deduction and New York exemptions. The New York adjusted gross income of a resident individual is the individual's federal adjusted gross income with the modifications required by section 612 of the Tax Law. An individual's federal adjusted gross income includes a shareholder's pro rata share of a S corporation's income, loss, deduction and reduction for taxes, described in section 1366(f)(2) and (3) of the Internal Revenue Code.

Section 617(a) of the Tax Law provides that when computing New York adjusted gross income and New York taxable income of a resident shareholder of an S corporation not subject to tax under Article 9-A, any modification described in section 612(b), (c) or (d) or section 615 (c) or (d)(2) or (3) of the Tax Law which relates to an item of S corporation income, loss or deduction shall be made in accordance with the shareholder's pro rata share, for federal income tax purposes, of the item to which the modification relates. Section 617(b) of the Tax Law provides that each item of S corporation income, loss or deduction shall have the same character for a shareholder under Article 22 as for federal income tax purposes.

When a federal S corporation is not subject to tax under Article 9-A and does not do business in New York State, the election provided for in section 660 of the Tax Law, whereby all shareholders of a federal S corporation that is subject to tax under Article 9-A may elect to treat the corporation as a New York S corporation, does not apply and the modifications contained in section 612 of the Tax Law relating to such election do not apply.

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Accordingly, when a taxpayer is a New York State resident and is a shareholder of a federal S corporation that is not subject to tax under Article 9-A and that does not do business in New York State, the taxpayer's New York taxable income is computed pursuant to sections 611 and 612 of the Tax Law. However, the modifications contained in section 612(b)(18), (19), (20), (21) and section 612(c)(21) and (22) of the Tax Law do not apply. In addition, if such taxpayer computes the New York itemized deduction pursuant to section 615 of the Tax Law, the modification contained in section 615(c)(6) of the Tax Law does not apply.

It should be noted that for taxable years beginning after 1986 and before 1989, section 601(d)(1) of the Tax Law imposes a tax on certain unearned income of a resident individual who has New York adjusted gross income in excess of \$100,000. The tax is imposed on New York unearned income. Section 601(d)(4) of the Tax Law provides that "New York unearned income" means New York adjusted gross income with certain adjustments. The adjustments are contained in section 601(d)(5) and (6) of the Tax Law.

DATED: August 24, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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