

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

TSB-A-11(6)I
Income Tax
September 22, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1110623A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner is a nonresident of New York with investments in real estate through partnerships that had New York State source passive activity losses in 2010. As a result of the losses, Petitioner had zero federal adjusted gross income (FAGI). A federal bonus depreciation deduction tied to the losses was subject to an add back on her New York State return. Another New York State modification allowed her to subtract a depreciation deduction, based on those same losses but calculated under a federal law preceding adoption of the bonus depreciation deduction. As a result, Petitioner owed New York State income tax for 2010. Petitioner asks whether she may claim an additional passive activity loss equal to the New York adjustments in either the Federal or New York State column for tax year 2010. She further asks if she should be subject to New York income tax on a real estate activity conducted through a partnership which has a significant economic loss exceeding the New York adjustments.

We conclude that there is no provision under the Tax Law that would allow Petitioner to claim on the New York State income tax return an additional passive activity loss equal to the New York adjustments. The fact that Petitioner owed 2010 New York State income tax is not changed, even though the partnership in which she was a partner had significant economic losses exceeding her New York State adjustment.

Facts

Petitioner is a nonresident of New York State. Her New York source income for tax year 2010 was derived from an investment in real estate through partnerships that had significant economic losses. For federal income tax purposes, the losses, characterized as Internal Revenue Code (IRC) §168(k)(2) losses,¹ were treated as passive activity losses, limited for federal purposes to the amount of passive activity income. The partnership claimed a deduction for an accelerated method of bonus depreciation, which produced a federal adjusted gross income (FAGI) of zero. For New York State income tax purposes, the bonus depreciation deduction was subject to an addition modification and to a smaller subtraction modification. These modifications, in combination with the loss limitations at the federal level, resulted in Petitioner's owing New York State income tax, despite the zero FAGI.

Analysis

Petitioner first asks whether she may claim an additional passive activity loss equal to the New York adjustments in either the Federal column or the New York State column. The New York

¹ In a telephone conversation on July 25, 2011, Petitioner's representative confirmed that these losses were treated as IRC §168(k)(2) losses for federal income tax purposes.

source income of a nonresident individual means his FAGI derived from New York State sources, including his distributive share of a partnership income, gain, loss and deduction.² The income is then adjusted for the individual's New York State source portion of modifications described in Tax Law §612(b), (c), and (k).³

Under Tax Law §612(b)(8), the amount of the federal bonus depreciation deduction, allowed on IRC §168(k)(2) property and claimed on the federal return, must be added back on the New York State return.⁴ The Tax Law also provides for a subtraction modification for a depreciation deduction claimed on IRC §168(k)(2) property,⁵ but this deduction is not based on the bonus depreciation deduction schedule in IRC §168(k)(2). Instead, the subtraction modification is based on the depreciation allowance under IRC §167 as the section would have applied to the property had it been acquired by the taxpayer on September 10, 2001 - prior to adoption of the bonus depreciation deduction.⁶ There is no provision in the Tax Law under which Petitioner can claim an additional passive activity loss equal to the New York adjustments on the New York State income tax return. Thus, Petitioner may not claim an additional passive activity loss equal to the New York adjustments.

Lastly, Petitioner asked if she should be subject to New York income tax on a real estate activity conducted through a partnership which has a significant economic loss exceeding the New York adjustments. A partner in a partnership that has New York source income is subject to New York State income tax under the requirements of the Tax Law. Because Petitioner, after applying the modifications in the Tax Law to her FAGI, had New York source income, she is subject to New York State income tax.

DATED: September 22, 2011

/S/

DEBORAH R. LIEBMAN
Deputy 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.

² Tax Laws §631(a); §632.

³ Tax Law §631(a)(2).

⁴ Tax Law §612(b)(8).

⁵ Tax Law §612(c)(16) and §612(k).

⁶ Tax Law §612(k).