

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

TSB-A-91 (15) C  
Corporation Tax  
TSB-A-91 (7) I  
Income Tax  
July 5, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z910325B

On March 25, 1991, a Petition for Advisory Opinion was received from David Duchini, 2 Windsor Road, Scarsdale, New York 10583.

The issue raised by Petitioner, David Duchini, is whether S corporation distributions from the accumulated adjustments account that are treated as dividends for purposes of section 183 of Article 9 of the Tax Law, are allowed as a subtraction on the shareholder's personal income tax return.

Petitioner is the sole shareholder of Adolph's Trucking Co. Inc., a federal S corporation. For tax year ended December 31, 1989, Petitioner received a distribution from Adolph's Trucking Co. Inc.'s accumulated adjustments account. For New York State franchise tax purposes, Adolph's Trucking Co. Inc. is subject to tax under sections 183 and 184 of Article 9 of the Tax Law.

Section 183 of the Tax Law provides for a franchise tax on trucking companies based on the net value of issued capital stock employed in New York State. The franchise tax required to be paid under section 183 is the highest tax computed by the following three methods:

1. Allocated value of issued capital stock multiplied by the tax rate of 1.5 mills.
2. Allocated value of issued capital stock on which dividends are paid at a rate of 6% or more multiplied by the tax rate of .375 mills for each 1% of dividends paid. The rate of 1.5 mills is applied to capital stock on which dividends are not paid or are paid at a rate of less than 6%.
3. Minimum tax of \$75.

For purposes of computing the tax under section 183 of the Tax Law, distributions of an S corporation are treated as dividends paid on capital stock. La Flor De Mayo Express Inc., Dec St Tax Comm, July 3, 1975. See letter of Morton T. Valley, Deputy Tax Commissioner, to Commerce Clearing House, Inc., September 12, 1963.

Accordingly, the distribution that Adolph's Trucking made to Petitioner from the accumulated adjustments account is treated as a dividend for purposes of computing the franchise tax based on the net value of capital stock under section 183 of the Tax Law. However, since the tax under section 183 is based on the net value of capital stock, it is not a tax on dividends, and the distribution itself is not subject to tax under section 183.

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

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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.

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.

Section 660 of the Tax Law provides for an election 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. However, when a federal S corporation is not subject to tax under Article 9-A but is subject to tax under Article 9 of the Tax Law, such election does not apply and the modifications contained in section 612 of the Tax Law relating to such election do not apply.

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 but is subject to tax under Article 9 of the Tax Law, 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.

For federal income tax purposes, the undistributed income of an S corporation is taxed to the shareholders not the corporation. That is, the individual shareholder's federal adjusted gross income will reflect the individual's pro rata share of the S corporation's income, loss, deduction and reduction for taxes, described in section 1366(f) (2) and (3) of the Internal Revenue Code.

Section 1368 of the Internal Revenue Code provides the S corporation distribution rules including the use of an accumulated adjustments account to keep track of how much undistributed net income has been taxed to shareholders. Under section 1368(c) of the Internal Revenue Code, distributions from the accumulated adjustments account are non dividends. These distributions are tax-free to the shareholders to the extent of the shareholder's stock basis and then result in gain if such basis is exceeded.

For New York State personal income tax purposes, Petitioner's starting point for computing New York taxable income is federal adjusted gross income.

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There is no modification contained in Article 22 to make an adjustment for the distribution from the accumulated adjustments account. Accordingly, the distribution from the accumulated adjustments account is taxable to Petitioner for New York personal income tax purposes only to the extent such distribution is taxable to Petitioner for federal income tax purposes.

In conclusion, there is no provision in Article 22 for a deduction on Petitioner's personal income tax return for the distribution in 1989 from the accumulated adjustments account of Adolph's Trucking Co. Inc. that is treated as a dividend for purposes of computing the capital stock tax under section 183 of the Tax Law.

DATED: July 5, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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