

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(1)I
Income Tax
January 4, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I070517C

On May 17, 2007, a Petition for Advisory Opinion was received from Renaissance Technologies Corporation, 800 Third Avenue, New York, New York 10022.

The issue raised by Petitioner, Renaissance Technologies Corporation, is how to determine the amount of income derived from New York sources for nonresident shareholders of a New York S Corporation for purposes of Article 22 of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is an electing federal S corporation that is currently subject to tax under Article 9-A of the New York State Tax Law. Petitioner's shareholders have made a New York State election to be treated as a New York S Corporation. Its principal offices are located in the city of New York. Petitioner conducts business within and without New York State. Petitioner has shareholders who are New York State resident individuals and shareholders who are New York State nonresident individuals.

For federal income tax purposes, Petitioner has filed Form 1120S, *U.S. Income Tax Return for an S Corporation*, along with Schedule K-1, *Shareholder's Share of Income, Deductions, Credits, etc.*, for each shareholder. For New York State tax purposes, Petitioner has filed Form CT-3-S, *New York S Corporation Franchise Tax Return*. Petitioner also files Form CT-34SH, *New York S Corporation Shareholder's Information Schedule*, and Schedules A and B listing shareholders' New York State modifications and shareholders' identifying information.

Applicable law

Section 617(b) of the Tax Law provides, in part:

Character of items. Each item of partnership and S corporation income, gain, loss, or deduction shall have the same character for a partner or shareholder under this article as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner or shareholder as if realized directly from the source from which realized by the partnership or S corporation or incurred in the same manner as incurred by the partnership or S corporation.

Section 632(a)(2) of the Tax Law provides:

In determining New York source income of a nonresident shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty

of this article is in effect, there shall be included only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss and deduction entering into his federal adjusted gross income, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, as such portion shall be determined under regulations of the commissioner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter.

Section 632(c) of the Tax Law provides:

Partner's and shareholder's modifications. Any modification described in subsection (b) or (c) of section six hundred twelve, which relates to an item of partnership or S corporation income, gain, loss or deduction, shall be made in accordance with the partner's distributive share or the shareholder's pro rata share for federal income tax purposes of the item to which the modification relates, but limited to the portion of such item derived from or connected with New York sources.

Section 632(e)(2) provides, in part:

The character of . . . corporation items for a nonresident . . . S corporation shareholder shall be determined under subsection (b) of section six hundred seventeen.

New York Tax Treatment of S Corporations And Their Shareholders, Publication 35 (3/00), at 24-25, provides, in part:

The determination of the source of S corporation items is made at the corporation level, using the same allocation methods that apply to a corporation under Article 9-A or Article 32 of the Tax Law. For example, for an Article 9-A corporation, the corporation's business allocation percentage is applied to items of business income, and the corporation's investment allocation percentage is applied to items of investment income.

In addition, the shareholders must also include in the numerator any of the section 612 modifications that relate to the S corporation pass-through items. The New York source of a section 612 modification follows the source of the pass-through item to which it relates. For example, if 35% of the S corporation's business income is derived from New York sources, 35% of the section 612(b)(25) addition modification for federal ACRS depreciation would also be derived from New York sources.

Opinion

For New York State personal income tax purposes, nonresident shareholders include only the New York S corporation items of income, gain, loss, and deduction derived from New York sources as New York source income. Section 632(a)(2) of the Tax Law provides, in part, that in

determining New York source income of a nonresident shareholder of a New York S corporation, only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss, and deduction entering into his or her federal adjusted gross income is included. The determination of the source of S corporation items is made at the corporation level using the allocation methods that apply to the S corporation under Article 9-A or Article 32 of the Tax Law (e.g., the corporation's business allocation percentage is applied to items of business income and the corporation's investment allocation percentage is applied to items of investment income). See Publication 35, *supra*.

New York source income of a nonresident individual also includes any New York addition and subtraction modifications under section 612(b) and (c) of the Tax Law that relate to income derived from or connected with New York sources. See section 632(c) of the Tax Law. The New York source of a section 612 modification follows the source of the pass-through item to which it relates. For example, if 35% of the S corporation's business income is derived from New York sources, 35% of the section 612(b)(25) addition modification for federal ACRS depreciation would also be derived from New York sources.

Accordingly, as a New York S corporation subject to tax under Article 9-A of the Tax Law that conducts its business within and without New York State, Petitioner is required to compute its business allocation percentage and its investment allocation percentage using the method that applies to Petitioner under Article 9-A of the Tax Law. Petitioner must then report these percentages to its nonresident shareholders along with each shareholder's pro rata share of Petitioner's items of income, gain, loss, and deduction included in federal adjusted gross income as well as those items that relate to section 612(b) and (c) of the Tax Law.

DATED: January 4, 2008

/s/
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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.