

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

TSB-A-95 (8) I  
Income Tax  
November 14, 1995

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I950714A

On July 14, 1995, a Petition for Advisory Opinion was received from Jeffrey M. Palley, c/o Seymour Schneidman & Associates, 400 Park Avenue, New York, New York 10022.

The issue raised by Petitioner, Jeffrey M. Palley, is whether a New York resident estate may claim a resident tax credit, pursuant to section 620 of the Tax Law, for estate income taxes paid to another state.

Petitioner states that a New York resident estate owns 100 percent of a foreign State X S corporation. The foreign State X S corporation is a Federal S corporation that is treated as an S corporation in State X. The S corporation does not do business in New York State, is not subject to tax under Article 9-A of the Tax Law and has not made the New York S election. The corporation is selling all its assets (100 percent are located in State X) and the gains will be passed through to the estate. The estate will pay nonresident State X income tax on the gains.

Petitioner also states that the estate will increase its basis in the S corporation stock, pursuant to section 1367 of the Internal Revenue Code, following the sale of the assets. Subsequently, the corporation will be liquidated at a loss which will be deducted on the estate's Federal and New York Income Tax returns.

Since the loss is from the sale of an intangible asset which will not be sourced in State X, Petitioner states that the loss will not be available to offset the gain in State X. Therefore, the estate will have to pay income tax to State X on the gain flowing through the S corporation.

Petitioner further states that the estate will not have to pay tax on the capital gain to New York because the loss on liquidation will offset the gain.

Section 620 of the Tax Law provides as follows:

(a) **General.** A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States ... upon income both derived therefrom and subject to tax under this article. The term "income tax imposed" in the previous sentence shall not include the portion of such tax (determined in the manner provided for in section six hundred twenty-A) which is imposed upon the ordinary income portion (or part thereof) of a lump sum distribution which is subject to the separate tax imposed by section six hundred one-C.

(b) **Limitations.**

(1) The credit under this section shall not exceed the percentage of the tax otherwise due under this article determined by dividing the portion of the taxpayer's New York income subject to taxation by such other jurisdiction by the total amount of the taxpayer's New York income.

(2) The credit under this section shall not reduce the tax otherwise due under this article to an amount less than would have been due if the income subject to taxation by such other jurisdiction were excluded from the taxpayer's New York income.

. . .

(c) **Definition.** For purposes of this section New York income means:

. . .

(2) the amount of the income of an estate or trust, determined as if the estate or trust were an individual computing [the individual's] New York adjusted gross income under section six hundred twelve.

(d) **S corporation shareholders.** In the case of a shareholder of an S corporation, the term "income tax" in subsection (a) of this section shall not include any such tax imposed upon or payable by the corporation, but shall include any such tax with respect to the income of the corporation imposed upon or payable by the shareholder, without regard to whether an election independent of the federal S election was required to effect such imposition upon the shareholder.

Section 120.1(a) of the Personal Income Tax Regulations ("Income Tax Regulations") provides:

(1) Where a resident individual receives income derived from sources within another state of the United States . . . [the individual] is entitled to a credit against [the individual's] ordinary tax . . . for any income tax imposed on such income by the other jurisdiction.... A resident estate or trust is also entitled to a similar credit against ordinary tax, computed in the same way and subject to the same exception and limitations . . . as in the case of a resident individual....

(2) The credit against ordinary tax is allowable only for that portion of the income tax imposed by another state of the United States ... which is applicable to the income derived from sources within such other taxing jurisdiction ....

Section 120.4(c) of the Income Tax Regulations states that:

[t]he "income tax imposed by the other jurisdiction" means the total income tax payable thereto for the taxable year, exclusive of the portion of such tax ... which is imposed on the ordinary income portion (or part thereof) of a lump sum distribution, and any interest or penalties. No resident credit is allowable if no tax is actually due to the other jurisdiction ....

Section 120.4(d) of the Income Tax Regulations states that:  
"[i]ncome derived from sources within" another state ... is construed so as to accord with the definition of the term "derived from or connected with New York State sources", as set forth in [section 631 of the Tax Law] in relation to the [New York source income of a nonresident individual]. Thus, the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction. On the other hand, the resident credit is not allowed for tax imposed by another jurisdiction upon income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction. Thus, for example, no resident credit is allowable for an income tax of another jurisdiction on dividend income not derived from property employed in a business, trade or profession carried on in such jurisdiction.

Section 631(a) of the Tax Law provides that:

It]he New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into [the individual's] federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

(A) [the individual's] distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-two, and

(B) [the individual's] pro rata share of New York S corporation income, loss and deduction, increased by reductions for taxes described in [section 1366(f)(2) and (3) of the Internal Revenue Code], determined under section six hundred thirty-two, and

(C) [the individual's] share of estate or trust income, gain, loss and deduction, determined under section six hundred thirty-four, and

(2) the portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to [the individual] as a partner or shareholder of a New York S corporation).

Section 631(b) of the Tax Law provides that:

(1) [i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal

property in this state; or

(B) a business, trade, profession or occupation carried on in this state; or

(C) in the case of a shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty is in effect, the ownership of shares issued by such corporation, to the extent determined under section six hundred thirty-two.

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state ....

Section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means the individual's Federal adjusted gross income as defined in the Laws of the United States for the taxable year, with the modifications specified in section 612 of the Tax Law.

Herein, a New York resident estate owns 100 percent of a State X S corporation. When the S corporation sells all of its assets located in State X and realizes a gain, the New York resident estate will pay nonresident income tax to State X on such gain. When the S corporation is liquidated at a loss, such loss is not sourced in State X because the loss is from the sale of an intangible asset. Accordingly, such loss on the liquidation does not offset the gain realized for purposes of computing the nonresident income tax imposed by State X on the New York resident estate.

Pursuant to section 620(a) of the Tax Law and section 120.1(a)(1) of the Income Tax Regulations, a New York resident estate shall be allowed a credit against its ordinary tax for any income tax imposed by another state on the income of the New York resident estate that is income derived from sources within such other state, subject to the limitations contained in section 620 of the Tax Law and section 120.1 of the Income Tax Regulations. Section 620(d) of the Tax Law provides that the credit is allowable where the income tax of the other state is imposed on or payable by the New York resident estate as the shareholder of the S corporation.

For purposes of computing the credit, section 120.4(d) of the Income Tax Regulations provides that the "income derived from sources within" another state is determined the same as income "derived from or connected with New York State sources" as set forth in section 631 of the Tax Law for determining the New York source income of a nonresident individual.

When applying the limitations contained in section 620(b) of the Tax Law and section 120.2 of the Income Tax Regulations, the New York income of the New York resident estate is the amount of the income of the estate determined as if the estate were an individual computing the individual's New York adjusted gross income under section 612 of the Tax Law. A resident individual shareholder's gain on the sale of assets of an S corporation and a loss on the liquidation of such S corporation that is included in such individual's Federal adjusted gross income would be included in the computation of the individual's New York adjusted gross income.

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Accordingly, the New York resident estate described herein by Petitioner may be allowed to claim a resident tax credit pursuant to section 620 of the Tax Law and Part 120 of the Income Tax Regulations for the income tax imposed on the estate by State X on the income of the estate that is derived from sources within State X with respect to the State X S corporation. However, before such credit is allowable, all of the criteria and limitations set forth in section 620 of the Tax Law and Part 120 of the Income Tax Regulations must be met. However, it is not within the scope of this Advisory Opinion to make such determination. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.20; 20 NYCRR 2376.1(a).

DATED: November 14, 1995

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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