STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BIG V SUPERMARKETS, INC.	:	DECISION DTA No. 812066
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1987, 1988 and 1989.	:	

Petitioner Big V Supermarkets, Inc., 176 North Main Street, Florida, New York 10921, filed an exception to the determination of the Administrative Law Judge issued on March 16, 1995. Petitioner appeared by Deloitte & Touche LLP (Russell W. Banigan, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

Petitioner submitted a brief in support of its exception, the Division of Taxation submitted a brief in opposition and petitioner filed a reply brief. Oral argument was heard on February 8, 1996, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether "patronage dividends" as defined in section 1388 of the Internal Revenue Code are properly classified as investment income under Tax Law § 208(6).

II. Whether, if patronage dividends are properly classified as business income, petitioner's business allocation percentage should be calculated by including a share of the property, receipts and wages of the New Jersey cooperative that paid the patronage dividends.

III. Whether patronage dividends are eligible for the dividend exclusion provided in Tax Law § 208(9)(a)(2).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Big V Supermarkets, Inc. ("Big V"), and the Division of Taxation ("Division") entered into a stipulation which included stipulatedfacts, stipulations concerning the authenticity of certain documents, and stipulations of agreement to certain issues. The stipulated facts and other relevant stipulations have been incorporated into these Findings of Fact.

Big V is a New York corporation which owns and operates a chain of supermarkets under the "Shop Rite" trade name primarily in the Hudson Valley Region of New York.

The Division conducted a field audit of Big V which resulted in the issuance of six notices of deficiency, each dated September 13, 1991, asserting deficiencies of tax as follows:

Year	Tax	Amount
1987	9-A	$ 18,867.00
1987	MTA	2,524.00
1988	9-A	127,585.00
1988	MTA	15,233.00
1989	9-A	178,869.00
1989	MTA	24,340.00

The Division issued a Conciliation Order, dated April 9, 1993, sustaining the notices of deficiency.

Big V is the largest member of the Wakefern Food Corporation ("Wakefern"), a New Jersey corporation operating on a cooperative basis for the benefit of its stockholder customers. Wakefern calculates its Federal taxable income as a cooperative corporation under sections 1381-1388 of the Internal Revenue Code.

Big V is allowed to use the Shop Rite name by permission of Wakefern as required by Article X and Article XII of Wakefern's By-Laws (the "By-Laws"). Big V does not operate supermarkets under any trade name other than "Shop Rite".

By the terms of Wakefern's By-Laws, each cooperative member is required to make an investment in the common stock of Wakefern. The amount of the investment which is required from each member is based on the number of supermarkets owned and the volume of each store's purchases from Wakefern. Regarding the investment requirements of stockholders, Article XI of the By-Laws provide as follows:

> "The Board of Directors . . . shall have the power from time to time to determine, on a uniform basis as to all Wakefern stockholders, the ratio between the required minimum investment of each stockholder per store and each stockholder's weekly purchases per store from Wakefern and shall also have the power to determine the method of arriving at such average weekly purchases and to set minimum and maximum amounts of required investments."

During the audit years, Big V owned approximately 17% of the outstanding shares of Wakefern. The amount of its investments during each of the audit years was as follows:

1987	$24,000,000.00
1988	22,745,225.00
1989	22,745,198.00

During the audit years, the total value of Big V's assets was as follows:

1987	$211,058,628.00
1988	175,379,298.00
1989	167,810,342.00

During the audit years, Big V's net worth was as follows:

1987	$22,400,060.00
1988	12,655,408.00
1989	11,223,371.00

Under the terms of a Warehouse Agreement, expiring September 1, 2000, Big V is obligated to purchase at least 85% of its merchandise requirements from Wakefern and did so in 1987, 1988 and 1989.

Under Article XIX of the By-Laws, all Wakefern stockholders are "patrons" as that term is defined by the Treasury Regulations of the Internal Revenue Code. The difference between prices charged to stockholder members on their inventory orders and the discounted prices paid by Wakefern on volume purchases creates the earnings of Wakefern. At the end of its fiscal

year, Wakefern distributes to its members the net earnings of each product department of Wakefern. Article XIX provides, as pertinent here:

> "[T]he Board of Directors shall distribute as a 'patronage dividend' to each stockholder a share of the net earnings of each product department of Wakefern during each fiscal year, in proportion to the value (i.e., dollar volume) of business done by the stockholder with each product department of Wakefern during that fiscal year, so that all of said net earnings of Wakefern resulting from business done with its patrons during each fiscal year (otherwise termed 'patronage') are distributed; provided, however, that if there is a net loss in one (1) or more of the product departments of Wakefern, each patron will be charged with a portion of that loss, in proportion to the value of business done by said patron with the appropriate product department, or as the Board of Directors shall otherwise determine." (Emphasis in original.)

As stated in Article XIX of the By-Laws, net losses suffered by Wakefern can be assessed against Wakefern's patrons. As an illustration, in 1993 Big V was assessed $405,000.00 by Wakefern as its share of costs suffered by Wakefern during labor strikes against various Wakefern patrons.

During the audit years, Big V received patronage dividends from Wakefern as follows:

Year	Amount
1987	$ 877,406.00
1988	2,961,591.00
1989	3,076,882.00

For Federal income tax purposes, Big V reported the patronage dividends it received from Wakefern on Schedule C, Form 1120 as "other dividends", not eligible for Federal dividend exclusions. This treatment is consistent with the rules for tax treatment of patronage dividends found in IRC §§ 1381-1388.

Big V filed New York State corporation franchise tax reports for the audit years, classifying all or part of the patronage dividends as investment income, as follows:

YEAR	PATRONAGE DIVIDEND REPORTED AS INVESTMENT INCOME	PERCENT OF TOTAL PATRONAGE DIVIDEND
1987	$ 877,406.00	100%
1988	1,480,795.00	50%
1989	2,461,220.00	80%

No dividend exclusion was claimed on Big V's New York corporation franchise tax reports for any of the patronage dividends received.

Big V accrues an estimate of its expected patronage dividend for book income. By the time the tax return for a given year is prepared, Big V has learned the correct patronage dividend for that year and reports that amount on its Federal and State tax returns.

In the years preceding the audit years, Big V classified none of the patronage dividends it received as investment income.

On audit, the Division determined that the patronage dividends were a form of rebate which should have been classified as a reduction of the cost of goods sold, similar to a purchase discount or allowance. The Division eliminated the amount of the patronage dividends from Big V's investment income and recomputed its investment allocation percentage accordingly. For the years 1987, 1988 and 1989, the Division calculated investment allocation percentages of .1828%, .0020% and .1338%, respectively.

The Division reclassified as business income that portion of the patronage dividends reported by Big V as investment income. The Division recomputed Big V's business allocation percentages, arriving at percentages of 95.6954%, 95.1678% and 94.2541% for the years 1987, 1988 and 1989, respectively. The amount of the patronage dividends was not included in the calculation of the business allocation percentages.

The Division made several other adjustments to Big V's corporation franchise tax reports. Big V's investment tax credit was decreased, it was allowed to file on a combined basis with its sole subsidiary, Big V Properties, Inc., and its employment incentive credit was recomputed. The only audit adjustment in dispute in this proceeding is the reclassification of the patronage dividends as business income.

In an affidavit, Florence Engel, a supervising corporation tax auditor, stated that the Division conducted an audit of Wakefern for the fiscal years ended October 1, 1988, September

30, 1989 and September 29, 1990. According to Ms. Engel, the audit revealed that Wakefern deducted from its gross income the amount of the patronage dividends paid to its shareholders.[1]

The parties to the dispute agree that the entire amount of the patronage dividends reported by Big V on its Federal income tax returns for the subject years should be treated as either business or investment income as determined by the Division of Tax Appeals.

The Division has never promulgated any regulations, advisory opinions, or other documents regarding the treatment of patronage dividends.

The New York State Department of Taxation and Finance has never promulgated any regulations, advisory opinions or other documents defining the term "dividend".

During the course of the audit, Big V requested, as an alternative to treating patronage dividends as investment income, a modification of Big V's business allocation percentage "to reflect its prorata portion of Wakefern's property, payroll and receipts" (Letter from Anthony J. Melfi, May 16, 1991).[2] The Division did not recompute Big V's business allocation percentage as requested.

Absent Big V's relationship with Wakefern, Big V would be required to replace the inventory purchasing function which it now relies on Wakefern to perform. For example, it would be necessary for Big V to establish facilities (warehouses, personnel, purchasing networks, etc.) to perform the purchasing function or to join another cooperative organization that purchases inventory for its members. The preferred alternative would enable Big V to

---

[1]Petitioner initially objected to having this affidavit admitted into evidence but later withdrew its objection.

[2]Paragraph 22 of the Stipulation states that "Big V requested the auditors from the [Division] exercise their discretion . . . to modify Big V's property and payroll ratios of the business allocation percentage to include Big V's prorata share of Wakefern's property and payroll." However, in three letters submitted to the Division on March 7, 1991, May 16, 1991 and November 11, 1992 (Stipulation, ¶ 23), Big V included Wakefern's business receipts as one of three factors to be used in modifying its own business allocation percentage. In its brief, petitioner's representative requested that Wakefern's business receipts be included in the allocation formula. The Division noted the discrepancy between the stipulation and the brief and stated: "Petitioner apparently seeks to abandon its agreement in Stip par. 22 and resurrect the receipts request contained in the letters attached to its petition." Unfortunately, the stipulation does not reflect an agreement by petitioner to abandon its original request. Paragraph 22 merely states that petitioner asked the auditors to modify the property and payroll ratios. If the deletion of any reference to business receipts was intended by the parties to reflect an agreement, that agreement should have been made explicit.

realize the same economic benefits (i.e., economies of scale) or detriments which it receives from Wakefern.

"If Big V is permitted to include in its property and payroll ratios its prorata share (based on percentage [of] ownership) of Wakefern's property and payroll, the 1987, 1988 and 1989 franchise tax assessments could be reduced. Although both parties anticipate a reduction would result, no calculation has been performed at the time of this stipulation agreement. Such calculation will be performed on remand of this matter to the Division of Taxation (if so ordered by the Division of Tax Appeals)." (Stipulation, ¶ 21.)

Wakefern's issuer allocation percentages are:

Year	Percentage
1987	19.99%
1988	19.08%
1989	18.27%

OPINION

In the determination below, the Administrative Law Judge held that "a patronage dividend is an amount paid to the patron as a result of business transacted between the cooperative and the patron" and "is properly treated as business income" (Determination, conclusion of law "A"). The Administrative Law Judge analyzed the definition of patronage dividend in section 1388 of the Internal Revenue Code ("IRC") and held that such dividends received by petitioner were based on its business transacted with Wakefern and not its investment in Wakefern.

Next, the Administrative Law Judge held that petitioner's failure to timely seek permission to vary the statutory business allocation percentage formula will not bar it from obtaining such relief when permission is requested during the course of an audit. The Administrative Law Judge also held that petitioner's failure to provide the information necessary to make such a recalculation would not bar petitioner from obtaining such relief because both parties stipulated that such a calculation would be performed if this matter were remanded to the Division. However, the Administrative Law Judge rejected petitioner's

argument that categorizing patronage dividends as business income unfairly severs that income from the assets that produced it. She held that the dividends were not a product of petitioner's investment in Wakefern, but resulted from the volume of purchases made by petitioner.

Finally, the Administrative Law Judge refused to allow petitioner the fifty percent dividend exclusion provided in Tax Law § 208(9)(a)(2) with respect to the patronage dividends, holding that patronage dividends are not paid to shareholders in their capacity as shareholders.

On exception, petitioner asserts that the Administrative Law Judge erred in classifying patronage dividends as mere rebates. Petitioner contends that amounts received from Wakefern were income distributions. Petitioner then alleges that this income is properly classified as investment income because (1) the Wakefern common stock is investment capital as defined in Tax Law § 208(5), and (2) the patronage dividends are income from investment capital as defined in Tax Law § 208(6).

Next, petitioner argues that if the patronage dividends are determined to be business income rather than investment income, then petitioner's business allocation percentage should be varied to include a proportionate share of Wakefern's property, receipts and wages. Petitioner alleges that the Division's denial of this request will separate the income from the assets that generated such income.

Finally, petitioner argues that patronage dividends should be eligible for the fifty percent dividend exclusion pursuant to Tax Law § 208(9)(a)(2). Petitioner asserts that the Administrative Law Judge erred in holding that patronage dividends must meet the IRC § 316 definition of "dividend" in order to come within the ambit of Tax Law § 208(9)(a)(2).

In response, the Division argues that patronage dividends from a cooperative functioning as a cooperative are not investment income to the recipient. In support of its arguments, the Division alleges that these distributions are not in the nature of investment income from investment capital, but rather the distributions are merely rebates on purchases made by the patron shareholder.

While the Division argues that petitioner's request to vary the business allocation percentage is untimely because petitioner did not seek prior permission to do so, the Administrative Law Judge found against the Division on this issue and it did not take exception to this finding. Therefore, we will not consider this issue herein.

The Division also argues that it is not appropriate to allocate a proportionate share of Wakefern's property, receipts and wages to its patrons.

Finally, the Division asserts that patronage dividends are not eligible for the fifty percent dividend exclusion under Tax Law § 208(9)(a)(2) because patronage dividends are not true dividends, but, as previously argued, rebates of amounts previously paid.

We affirm the determination of the Administrative Law Judge.

Subchapter T of the Internal Revenue Code (IRC §§ 1381-1388) provides special rules for taxation of corporations acting on a cooperative basis and their patrons. Pursuant to IRC § 1382(b), patronage dividends are allowed as a deduction from the gross income of a cooperative. Patronage dividends are required to be included in the patron's gross income (IRC § 1385[a]), unless such amounts are taken into account as an adjustment to basis of property (IRC § 1385[b]). Section 1388 of the Internal Revenue Code defines patronage dividends as amounts paid by a cooperative organization to its patrons:

> "(1) on the basis of quantity or value of business done with or for such patron,
>
> "(2) under an obligation of such organization to pay such amount, which obligation existed before the organization received the amount so paid, and
>
> "(3) which is determined by reference to the net earnings of the organization from business done with or for its patrons" (IRC § 1388[a]).

In her determination, the Administrative Law Judge essentially adopted the analysis of the Eighth Circuit Court of Appeals in Farm Service Coop. v. Commissioner (619 F2d 718, 80-1 USTC ¶ 9352) in rejecting petitioner's argument that patronage dividends are earnings from investment capital and instead held that they are more akin to rebates. In so holding, the Administrative Law Judge quoted the following passage:

"[b]y virtue of consistent administrative practice, all cooperatives have been permitted to treat patronage payments as a deduction from gross income (under specified conditions) since 1914. T.D. 1996, 16 Treas. Dec. Int. Rev. 100 (1914); Logan, Federal Income Taxation of Farmers' and Other Cooperatives, 44 Tex. L. Rev. 250, 285-86 (1965). The theory underlying this tax treatment is clear, although stated in various ways: the cooperative is merely an agent for the patron; a patronage dividend constitutes a rebate or price adjustment for the patron; or the money returned in fact always belonged to the patron. See Des Moines County Farm Service Co. v. United States [71-1 USTC ¶ 9200], 324 FSupp 1216, 1219 (S.D. Ia.), aff'd per curiam [71-2 USTC ¶ 9665], 448 F2d 776 (8th Cir. 1971).

"The deductibility of patronage dividends first received explicit legislative recognition and approval in the Revenue Act of 1951, ch. 521, § 314(a)(2), 65 Stat. 492 (repealed 1962). See Des Moines County Farm Service Co. v. United States, supra, 324 FSupp at 1219. It was generally thought at that time that the earnings of cooperatives would be currently taxable either to the cooperative or to its patrons. Subsequent court decisions, however, held that noncash allocations of patronage dividends, though deductible by the cooperative, were not taxable to the patron.

"The enactment of subchapter T, section 17(a) of the Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960, was intended to overturn these decisions. S. Rep. No. 1881, 87th Cong., 2d Sess., reprinted in [1962] U.S. Code Cong. & Ad. News 3304, 3414. Subchapter T, I.R.C. §§ 1381-88 permits cooperatives to deduct amounts allocated in cash or scrip as patronage dividends, and it makes patrons currently taxable on these patronage dividends to the extent that they arise out of patrons' business transactions with the cooperative. 'Exempt' cooperatives, those satisfying the criteria of I.R.C. § 521(b) may allocate to their patrons and deduct not only earnings derived from patronage activities, but also dividends on capital stock and earnings derived from such business done for the United States or from nonpatronage sources. I.R.C. § 1382(c). See generally Land O'Lakes, Inc. v. United States [75-1 USTC ¶ 9431], 514 F2d 134 (8th Cir.), cert. denied, 423 U.S. 926 (1975); Logan, Federal Income Taxation of Farmers' and Other Cooperatives, 44 Tex. L. Rev. 250 (1965). Nonexempt cooperatives may allocate and deduct only income arising from business with patrons, and then only under additional conditions specified in I.R.C. § 1388(a) [footnote omitted]. I.R.C. § 1382(b).

"Because of this restriction on the scope of allowable deductions, nonexempt cooperatives must separate patronage- from nonpatronage-sourced income. A nonexempt cooperative is a hybrid business organization, taxed like an ordinary corporation with respect to nonpatronage-sourced income (see subchapter C, I.R.C § 301 et seq.), but like a partnership with respect to patronage-sourced income. See Conway County Farmers Ass'n v. United States [78-2 USTC ¶ 9840], 588 F2d 592, 596 (8th Cir. 1978). That is to say, nonpatronage-sourced income is fully taxable to the cooperative and, if paid out in dividends to the patron, to him as well. Patronage-sourced income is taxed only once, usually to the patron" (Farm Service Coop. v. Commissioner, supra, 80-1 USTC ¶ 9352, at 83,902-83,903).

Petitioner argues that the Administrative Law Judge erred in relying on Farm Service Coop. v. Commissioner (supra). Relying on Coastal Chemical Corp. v. United States (546 F2d 110, 77-1 USTC ¶ 9167), petitioner states that "[w]hile the Farm Service analysis demonstrates the conduit nature of a cooperative's patronage operations . . . it does not address the characterization of patronage dividends when geographic sourcing is the issue" (Petitioner's brief in support, p. 9).

We disagree that geographic sourcing is the issue here. In Coastal Chemical, a foreign patron not doing business in the United States was required to pay tax on patronage dividends it received from a domestic cooperative. There is no dispute that such amounts must be included in the receiving patron's gross income by virtue of IRC § 1385(a). The issue here is not whether such amounts must be included in the patron's gross income, but how such amounts are to be classified for New York franchise tax purposes -- either as investment income or business income. Geographic sourcing only comes into play after determining whether such amounts are investment income and apportioned to New York using the investment allocation percentage or properly classified as business income and apportioned to New York using the business allocation percentage.

Tax Law former § 208(5) defined investment capital as "investments in stocks, bonds and other securities . . . not held for sale to customers in the regular course of business . . . ." Investment income was defined as income from investment capital (Tax Law former § 208[6]).[3]

Petitioner contends that patronage dividends are investment income based on a strict reading of the statute and regulations. Petitioner contends that neither the Tax Law nor the regulations preclude patronage dividends from being investment income. We reject such a strict interpretation. "[T]he determination of whether income is investment income to a specific taxpayer must depend upon that taxpayer's particular relationship to the asset and is not resolved

[3]The definition of "investment income" was amended in 1989 by L 1989, ch 61, § 351. However, such amendment has no bearing on the issues in this matter.

. . . by ascribing an absolute, unchanging character to an asset and claiming that income in any way derived from this asset must be investment income" (Matter of Custom Shop Fifth Ave. Corp., Tax Appeals Tribunal, August 1, 1991, affd Matter of Custom Shop Fifth Ave. Corp. v. Tax Appeals Tribunal, 195 AD2d 702, 600 NYS2d 295). Accordingly, we agree with the Administrative Law Judge that patronage dividends are properly classified as business income under Article 9-A of the Tax Law because they are amounts paid as a result of business transacted with the cooperative and not based on the amount of stock held in the cooperative.

Next, we address whether petitioner's business allocation percentage should be modified to reflect its prorata portion of Wakefern's property, receipts and payroll.

Every corporation subject to Article 9-A franchise tax must allocate its business income within and without New York using a three-factor formula taking into account its property, receipts and payroll (Tax Law § 210[3]; 20 NYCRR 4-2.2). Tax Law § 210(8) grants the Commissioner of Taxation the discretion to vary the statutory formula if it does not properly reflect the activity, business, income or capital of the taxpayer in New York. Citing People ex rel. Alpha Portland Cement Co. v. Knapp (230 NY 48) and Matter of British Land (Maryland) v. Tax Appeals Tribunal (85 NY2d 139, 623 NYS2d 772), petitioner asserts that including its patronage dividends in entire net income without varying the business allocation percentage to reflect a portion of Wakefern's property, receipts and payroll unfairly severs the income from the assets that produced such income. We disagree.

Amounts received as patronage dividends and included in petitioner's gross income were generated by petitioner's purchases from Wakefern and not Wakefern's own assets. Wakefern, in its capacity as a cooperative, was merely acting as an agent on behalf of petitioner and the other patrons in making volume purchases and passing the resulting savings on to them (Farm Service Coop. v. Commissioner, supra, 80-1 USTC ¶ 9352, at 83,902). Petitioner's strenuous objection to the Administrative Law Judge's characterization of patronage dividends as a rebate or price adjustment is rejected. The Eighth Circuit's characterization of patronage dividends as a rebate or price adjustment, upon which the Administrative Law Judge relied, is consistent

with IRC § 1385(b) which provides that amounts received as patronage dividends are not included in the patron's gross income if taken into account as an adjustment to basis of property.

Lastly, we address whether patronage dividends are eligible for the fifty percent exclusion from entire net income in Tax Law § 208(9)(a)(2) for dividends received.

In the determination below, the Administrative Law Judge stated:

> "[t]he term 'dividend' is not defined by the Tax Law or regulations promulgated under the authority of the Tax Law. New York's courts have established a general rule that whenever practicable and reasonable the Federal construction of similar tax provisions should be adopted in construing State tax provisions (see Matter of Marx v. Bragalini, 6 NY2d 322, 323, 189 NYS2d 846, 854). Accordingly, the relevant Federal law and regulations regarding the definition of a dividend will be applied here. The term 'dividend' is defined in section 316(a) of the Internal Revenue Code as 'any distribution of property made by a corporation to its shareholders' out of accumulated or current earnings and profits. To be considered a dividend, a distribution of earnings must be made by a corporation to its shareholders in their capacity as shareholders (Treas Reg § 1.301-1[c]). A patronage dividend is understood by the Federal courts to be 'a rebate or price adjustment' (Farm Service Cooperative v. Commr., supra). Moreover, to qualify as a patronage dividend a payment must 'arise out of the patrons' business transactions with the cooperative' (id). Therefore, a patronage dividend is not paid to shareholders in their capacity as shareholders. Petitioner concedes in the Stipulation (¶ 5) that patronage dividends do not qualify for the Federal dividend exclusion (IRC § 243). It has offered no persuasive reason why New York State should follow a different practice. Since patronage dividends are not deemed dividends under Federal law, they cannot be 'deemed' dividends under Tax Law § 208(9)(a)(2)" (Determination, conclusion of law "C").

On exception, petitioner contends that the Administrative Law Judge's conclusion "ignores how the Division of Taxation has applied Tax Law section 208(9)(a)(2) to income other than that described in IRC section 316" (Petitioner's brief in support, p. 26). Specifically, petitioner asserts that Subpart F income is not within the IRC § 316 definition of dividend, yet the Division allows such income to qualify for the dividend exclusion in Tax Law § 208(9)(a)(2). We disagree with petitioner's contention.

While it is true that the Division treats Subpart F income as eligible for the dividend exclusion in Tax Law § 208(9)(a)(2), the Division's rationale for such is entirely consistent with the Administrative Law Judge's analysis with respect to patronage dividends:

> "[t]he Subpart F provisions of the Code describe a dividend which is deemed to have been distributed in the taxable year. Indeed, Subpart F income is included in gross income only because it is treated as a dividend. This is made plain by the text of Code § 951 . . . . Subpart F income is the amount 'which would have been distributed with respect to the stock,' and so forth . . . . In the legislative history, Subpart F income is described as a dividend to the United States shareholders, and it is on this basis that it is included in gross income. Other provisions of the Code conform in this understanding. Under § 952(c), Subpart F income may not exceed 'the earnings and profits' of the foreign corporation in that taxable year. The amount of Subpart F income must, under § 951(a)(2)(B), be reduced by actual dividend distributions received by any person, other than the taxpayer, who had owned the taxpayer's stock during some part of the taxable year" (TSB-A-87[23]C, quoting Dow Chemical Co. v. Commissioner of Revenue, 378 Mass 254, 267-272).

Based on the above-quoted passage, it is readily apparent that Subpart F income does come within the definition of dividend in section 316(a) of the Internal Revenue Code. Thus, we conclude that the Administrative Law Judge completely and correctly analyzed this issue and affirm for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Big V Supermarkets, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Big V Supermarkets, Inc. is denied; and
4. The notices of deficiency dated September 13, 1991 are sustained.

DATED: Troy, New York
August 1, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner