STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GAEL DE BROUSSE	:	DETERMINATION DTA NO. 816052
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1995.	:	

Petitioner, Gael De Brousse, c/o Schiller & Schiller, 102-50 62nd Road, Forest Hills, New York 11375, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1995.

On December 2, 1997 and December 15, 1997, respectively, petitioner by his representative, Schiller & Schiller (David Schiller, CPA) and the Division of Taxation by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by April 10, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether, in order to calculate New York City resident tax, petitioner is entitled to reduce New York State taxable income by petitioner's share of income from a Subchapter S corporation.

FINDINGS OF FACT

1. Petitioner, Gael De Brousse, filed a Resident Income Tax Return for the year 1995. On this return, petitioner reported income of $6,666.68 from "[r]ental real estate, royalties, partnerships, S corporations, trusts, etc." Petitioner also reported City of New York resident tax due in the amount of $805.00.

2. Petitioner filed a Claim for Credit or Refund of Personal Income Tax seeking a refund of City of New York resident tax in the amount of $292.00. The claim was based on petitioner's position that the income received from a Subchapter S corporation was not subject to City of New York resident tax. Petitioner's representative asserted that an error was caused by the failure of the Form IT-201 to provide for a deduction of S corporation income from New York State taxable income. In the claim, petitioner's representative recalculated the amount of tax due as follows:

New York State Taxable Income		$ 22,566.86
Deduct Subchapter S income from New York taxable income		6,666.68
New York City taxable income		$ 15,900.00
Tax Paid	$ 805.00	
Tax due	513.00	
Amount overpaid	$ 292.00	

3. In a letter dated May 22, 1997, the Division of Taxation ("Division") advised petitioner that the claim for a refund was disallowed. The letter stated that income from a Subchapter S corporation was includable in taxable income for purposes of New York State and New York City taxable income on Form IT-201. The letter further explained that the Division and the New York City Department of Finance were separate taxing authorities and that petitioner would have to contact the New York City Finance Department about a Subchapter S modification.

4. In a letter dated June 2, 1997, petitioner responded to the previous letter from the Division by stating, among other things, that line 11 of the Resident Income Tax Return demands that Subchapter S income be included for purposes of calculating taxable income. According to the letter, line 59 of the return erroneously directs that the City of New York resident tax is computed on this amount. It is submitted by petitioner that this is improper because there are no distributions of income for New York City resident tax purposes.

5. The Division issued a Notice of Disallowance, dated July 3, 1997, which stated, among other things that: Tax Law § 612 does not have a modification for Subchapter S corporations; New York State administers only New York City resident and nonresident earnings tax; and Form NYC-45 and instructions were issued by the New York City Department of Finance.

6. Petitioner filed a petition with the Division of Tax Appeals which stated, in part: that income from a Subchapter S corporation is subject to New York City tax on Form IT-201; that there is no distribution of taxable income to stockholders for purposes of corporation tax; that New York City does not recognize Subchapter S corporations; and that the profits are taxable at corporate tax rates.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner submitted a series of letters wherein an objection was raised that the Division did not allow a deduction on the personal income tax return for the income of the Subchapter S corporation that was taxed by the City of New York. Petitioner characterized this practice as "double taxation." Petitioner also stated that the deduction of the Subchapter S income from New York taxable income was proper because "there is no distributable income" and because "corporations must pay taxes at corporate rates without deductions for distributions to electing shareholders." (Petitioner's representative's letter of February 12, 1998.) Relying upon Tax Law

§ 689(e) and (f) and Internal Revenue Code § 6201(d), petitioner also maintains that the burden of proof is on the Division to prove that additional income was received.[1]

8. It is the Division's position that petitioner bears the burden of proof. The Division also maintains that under the Administrative Code of the City of New York, the same income may be subject to the general corporation tax and the New York City personal income tax.[2]

CONCLUSIONS OF LAW

A. Generally, subchapter 2 of chapter 6 of Title 11 of the Administrative Code of the City of New York ("Administrative Code") imposes a general corporation tax upon every domestic or foreign corporation "[f]or the privilege of doing business, or of employing capital, or of owning or leasing property in the city in a corporate or organized capacity, or of maintaining an office in the city, for all or any part of each of its fiscal or calendar years. . . ." (Administrative Code § 11-603[1].) In general, during the year in issue, the general corporation tax was calculated as the highest of: (1) 8.85% of a taxpayer's allocated entire net income, (2) 1.5 mills of a taxpayer's total business and investment capital allocated within the City, (3) 8.85% of an amount determined by taking 30 percent of (a) the taxpayer's entire net income plus (b) salaries and compensation paid to officers and to stockholders owning more than 5 percent of the taxpayer's issued capital stock minus (c) $15,000.00, or (4) $300.00; plus 3/4 of a mill per dollar of subsidiary capital allocated within the City. (Administrative Code § 11-604[1][E].)

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[1] In one letter, petitioner made reference to an overpayment of income taxes in 1985. Since the petition refers to the year 1995, it is assumed that the reference to the year 1985 was a typographical error.

[2] At one juncture, an issue had been raised regarding the use of the term "Atty" by petitioner's representative. It now appears that this difficulty has been resolved and therefore it will not be given further attention.

Administrative Code § 11-602(8) defines the term "entire net income," in pertinent part, as follows:

> 'Entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income).
>
> (i) which the taxpayer is required to report to the United States treasury department, or
>
> (ii) which the taxpayer would have been required to report to the United States treasury department if it had not made an election under subchapter s of chapter one of the internal revenue code . . . .

B. The foregoing sections require a corporation, that is subject to the New York City general corporation tax and which has made an election under Subchapter S of chapter one of the Internal Revenue Code, to calculate its entire net income in the same manner as it would have done if it had not made such an election. Moreover, as noted by the Division in its letter brief, this method of taxation of corporations that have made a Subchapter S election is required by the Administrative Code of the City of New York regardless of the way by which corporate distributions to individuals from Subchapter S corporations are treated for Federal, New York State and New York City personal income tax purposes.

C. Chapters 17 and 19 of Title 11 of the Administrative Code of the City of New York, which impose the City of New York personal income tax on residents and nonresidents, respectively, do not provide for the exclusion or deduction of distributions of income from Subchapter S corporations which are also subject to the New York City general corporation tax. Thus, the same income may be subject to both the general corporation tax at the corporate level and the New York City personal income tax on an individual level.

Here, petitioner reported the receipt of income from a Subchapter S corporation in the amount of $6,666.68. Since the Administrative Code does not provide for the exclusion or

deduction of this income, the Division properly denied petitioner's claim for a refund of the New York City personal income tax paid on this amount.[3]

D. In this case, petitioner filed a petition challenging the denial of a claim for refund. Section 11-1789(e) of the Administrative Code of the City of New York places the burden of proof upon the petitioner in any case except for the following issues:

> (1) whether the petitioner has been guilty of fraud with intent to evade tax;
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> (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax;
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> (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction required to be reported under section 11-1759, and of which change or correction the tax commission had no notice at the time it mailed the notice of deficiency; and
>
> (4) whether any person is liable for a penalty under subdivision (q) or (r) of section 11-1785.

Since the issue raised by petitioner does not fall within any of the foregoing categories, petitioner bears the burden of proof of showing that the Division's denial of the refund was erroneous (***see, Matter of Tavolacci v. State Tax Commn.,*** 77 AD2d 759, 431 NYS2d 174; 20 NYCRR 3000.15[d][5]). In this instance, petitioner has not presented any evidence which would satisfy this burden.

E. The authorities relied upon by petitioner are inapposite. Petitioner's reliance upon Tax Law § 689(f) is misplaced because an issue has not been raised regarding the admissibility of a Federal determination. Similarly, I.R.C. § 6201(d) has no bearing on this matter since an issue

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[3] At least one commentator has noted that, even in the absence of a corporate distribution, the same income is taxed at both the corporate and individual level **(*see*,** Inside New York Taxes**,** February 1989).

has not been presented regarding a dispute with respect to an item of income reported on an information return.

F. The petition of Gael De Brousse is denied.

DATED: Troy, New York
August 6, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE