STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GAEL DE BROUSSE	:	DECISION 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 an exception to the determination of the Administrative Law Judge issued on August 6, 1998. Petitioner appeared by Schiller & Schiller (David Schiller, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of his exception and a reply brief in response to the Division of Taxation's brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

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

II. Whether Tax Law § 689(f) or Internal Revenue Code § 6201(d) imposes the burden of proof upon the Division of Taxation with regard to the issues presented here.

FINDINGS OF FACT

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

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.

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		$22,566.68
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	

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.

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.

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.

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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that a corporation subject to the City's general corporation tax which has made an election under subchapter S of chapter one of the Internal Revenue Code, is required to calculate its entire net income in the same manner as it would have

done if it had not made such an election (***see***, Administrative Code of the City of New York § 11-604[1][E]; § 11-602[8]). Further, the Administrative Law Judge noted, this method of taxation by corporations that have made a subchapter S election is required by the New York City Administrative Code (hereinafter "Administrative Code") regardless of the way in which corporate distributions to individuals from subchapter S corporations are treated for Federal, New York State and New York City personal income tax purposes.

The Administrative Law Judge next concluded that chapters 17 and 19 of Title 11 of the Administrative Code, 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. As a result, 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.

In this case, petitioner reported 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 Administrative Law Judge concluded that the Division properly denied petitioner's claim for a refund of the New York City personal income tax paid on this amount.

The Administrative Law Judge next addressed the question of the burden of proof. In this case, petitioner filed a petition challenging the denial of a claim for refund. The Administrative Law Judge concluded that since the issue raised by petitioner does not fall within any of the categories set forth in section 11-1789(e) of the Administrative Code, petitioner bore 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]).

The Administrative Law Judge concluded that petitioner failed to meet this burden of proof and, accordingly, he sustained the Division's denial of petitioner's refund.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the Division did not allow a deduction on his personal income tax return for the income of the subchapter S corporation that was taxed by the City of New York. Petitioner argues that this constitutes double taxation. Petitioner also states 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" (Attachment to exception, p. 2).

Petitioner also asserts that the Administrative Law Judge erred in not giving sufficient credence to the argument that Tax Law § 689(f) and Internal Revenue Code § 6201(d) impose the burden of proof on the Division to prove that additional income was received.

The Division argues that petitioner bears the burden of proof. The Division also maintains that under the Administrative Code the same income may be subject to the general corporation tax and the New York City personal income tax.

OPINION

The Administrative Law Judge completely and correctly addressed all of the issues raised by the parties. After reviewing the entire record and the arguments presented therein, there is no basis proffered on this exception that would persuade us to modify the Administrative Law Judge's determination in any respect and, thus, the determination is affirmed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gael De Brousse is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Gael De Brousse is denied; and

4. The Notice of Disallowance dated July 3, 1997 is sustained.

DATED: Troy, New York
March 11, 1999

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

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner