

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

TSB-A-85 (20) C
Corporation Tax
October 10, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C841023A

On October 23, 1984, a Petition for Advisory Opinion was received from Charrette Corporation, 31 Olympia Avenue, Wolburn, Massachusetts 01888.

Petitioner requests an Advisory Opinion to the effect that the net operating loss of a subsidiary corporation which was merged into Petitioner be allowed as a net operating loss deduction carry-forward on the New York State Corporation Franchise Tax Return of the Petitioner under Article 9-A of the Tax Law.

On August 1, 1984, Charrette Drafting Supplies Corporation (a New York Corporation) merged into its parent Charrette Corporation (a Massachusetts corporation). Charrette Corporation will file its New York State corporation franchise tax return for the period 8/1/84 - 7/31/85. After the merger, Charrette Corporation will continue the same business activity in New York State as those of Charrette Drafting Supplies Corporation. Prior to the merger Charrette Drafting Supplies Corporation sustained a net operating loss on its New York State corporation franchise tax return.

Tax Law section 208, subdivision 9, paragraph (f) permits a corporation subject to Tax under Article 9-A a net operating loss deduction "which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty-four,... except that... such deduction shall not include any operating loss sustained... during any taxable year in which the taxpayer was not subject to tax imposed by this article...".

In the Matter of American Can Company v. State Tax Commission (37 A.D. 2d 649; 323 N.Y.S. 2d6), the court concluded that, "there was no intent to allow taxpayers to acquire net operating losses by way of merger with a subsidiary where the subsidiary was not conducting business in New York prior to merger." Furthermore, "if the deduction is not available to a corporation during a taxable year in which it is not subject to tax, logic would indicate that it should not be available as a deduction to the successor of that corporation." In the matter of American Can Company, Decision of the State Tax Commission, March 9, 1970 and Berkey Photo, Inc., Decision of the State Tax Commission, May 2, 1984 (TSB-H-84(24)C), the State Tax Commission allowed a successor corporation the net operating loss of its merged subsidiary for those periods that the subsidiary was taxable in New York State prior to the merger.

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Accordingly, Petitioner's New York State corporation franchise tax return for the period 8/1/84 - 7/31/85 can include the net operating loss of Charrette Drafting Supplies Corporation that would be allowed under section 172 of the I.R.C., or the New York State net operating loss of Charrette Drafting Supplies Corporation, if less than the Federal net operating loss.

DATED: October 10, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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