

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

TSB-A-90(15)C  
Corporation Tax  
August 14, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C900419D

On April 19, 1990, a Petition for Advisory Opinion was received from Arista Records, Inc., 6 West 57th Street, New York, New York 10019.

The issue raised by Petitioner, Arista Records, Inc., is whether section 3-8.5 of the Business Corporation Franchise Tax Regulations, relating to aggregating net operating losses, may be used in computing a New York State aggregate when the New York loss in a particular tax year has already been applied, but for Federal income tax purposes there is a loss still available for carryforward, and such tax year is included in the Federal aggregate.

Petitioner's net operating gains and losses for the period from September 29, 1979 through June 30, 1988 were as follows:

	<u>Federal</u>	<u>New York State</u>
9/29/79 - 3/31/80 net loss	\$ (1,336,021)	\$ (1,206,923)
4/1/80 - 6/30/80 net loss	(5,213,940)	(1,943,545)
7/1/80 - 6/30/81 net loss	(13,617,505)	(5,913,743)
7/1/81 - 6/30/82 net loss	(23,101,387)	(16,083,602)
7/1/82 - 5/31/83 net loss	(20,048,655)	(16,858,455)
6/1/83 - 6/30/83 net loss	(1,746,184)	(1,387,636)
7/1/83 - 12/31/83 net loss	(4,147,559)	(4,082,597)
1/1/84 - 12/31/84 net loss	(4,623,480)	(4,554,046)
1/1/85 - 12/31/85 net loss	(2,187,255)	(2,031,156)
1/1/86 - 12/31/86 net income	10,639,062	10,721,344
1/1/87 - 12/31/87 net income	14,792,065	14,843,255
1/1/88 - 6/30/88 net loss	(2,186,657)	(1,292,428)

The total of the Federal net operating losses (hereinafter "NOLs") for the periods ended 3/31/80 through 12/31/85 amount to \$76,021,986 while the total of the New York State losses for the same periods amount to \$54,061,703. For the taxable year ended 12/31/86, the application of the aggregate NOL rule permitted Petitioner to utilize a NOL of \$9,064,211 arising from the carryforward of Federal and New York State losses from the taxable periods ended 3/30/80, 6/30/80 and 6/30/81. As a result of the application of the aggregate NOL rule, Petitioner's New York State NOL for the taxable period ending 6/30/81 was reduced to zero. Petitioner's return for the taxable year ending 12/31/87 shows total unutilized NOLs of \$65,382,924 for Federal purposes and \$44,997,492 for New York State purposes. None of the Federal NOL for the taxable period ending 6/30/88 was utilized as a Federal NOL carryback on the return for the taxable year ending 12/31/87.

Section 208.9(f) of the Tax Law provides, in pertinent part, that:

A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code., except that

\* \* \*

(3) such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code  
....

Section 3-8.5 of the Business Corporation Franchise Tax Regulations provides:

When the net operating losses of two or more years, or the portions of net operating losses of two or more years, are carried back or carried forward to be deducted from the income of one particular taxable year, the Tax Commission requires that an aggregate method of deducting the losses be used. The taxpayer must compute the aggregate of the Federal net operating losses to be carried to the particular taxable year, and, also, compute the aggregate of the net operating losses under article 9-A for such year.

After computing the two aggregate figures, whichever of the two (Federal or State) is smaller is the aggregate net operating loss which is allowable as a carry back or carry forward to the particular taxable year. The limitations described in subdivisions (b), (c) and (d) of section 3-8.2 of this Subpart apply in deducting the aggregate of losses.

Section 3-8.2 of the Business Corporation Franchise Tax Regulations, the case law and an administrative decision establish that the amount of the NOL deduction for New York State purposes cannot exceed the amount deducted on the Federal tax return for the corresponding year. Telmar Communications Corp. v. Procaccino, 48 AD2d 189; Matter of Lehigh Valley Industries, Inc., Tax Appeals Tribunal, May 5, 1988.) Further, the source year of the NOL deducted on the New York State return must be the same as the NOL deducted on the Federal return (Matter of Lehigh Valley Industries, Inc., *supra*.)

However the aggregate absorption method set forth in Section 3-8.6 of the Business Corporation Franchise Tax Regulations is used when the losses in two or more years are carried back or carried forward against the income in one year. For any particular year to be included in an aggregate, there must be a loss in that year for both Federal and New York purposes. In addition, in each year that a NOL deduction is allowed, the New York NOL deduction is limited to the Federal NOL deduction in that year.

Herein, the entire available New York NOL for the taxable period ending 6/30/81 was applied in the 3/31/80, 6/30/80 and 6/30/81 aggregate that was carried forward to the taxable year ended 12/31/86. Since the loss for the taxable period ending 6/31/81 has been reduced to zero,

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Petitioner does not have a New York aggregate loss situation for the taxable periods ending 6/30/81 and 6/30/82, even though there is an aggregate for such years for Federal purposes. The amount of New York NOL for the taxable period ending 6/30/82 that may be carried forward to the taxable year ending 12/31/87 is limited to \$5,263,661, the amount of Federal NOL for the taxable period ending 6/30/82 that is carried forward to the taxable year ending 12/31/87. The balance of the New York NOL for the taxable period ending 6/30/82 available for future carryforward is \$10,819,941.

DATED: August 14, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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