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

TSB-A-90(1)C
Corporation Tax
January 11, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION   PETITION NO. C890920B

On September 20, 1989, a Petition for Advisory Opinion was received from Corsearch, Inc., 19 West 21st Street, New York, New York 10010.

The issue raised by Petitioner, Corsearch, Inc., is what is the proper method of computing the net operating loss carryforward available for New York State franchise tax purposes, under Article 9-A of the Tax Law, where the federal Subchapter S election was in effect for the loss years, but the S election was not in effect for New York State franchise tax purposes for such years.

Petitioner, was incorporated and began business in New York State on July 12, 1983 as Pro Data Searches, Inc. and elected on July 18, 1983 to be taxed for federal income tax purposes as an S corporation. No such election was made for New York State franchise tax purposes. In June, 1984, Pro Data Searches, Inc., a New York corporation was reincorporated in Delaware and began business in New York State. This was accomplished by organizing Corsearch, Inc., a Delaware corporation, and merging Pro Data Searches, Inc. into Corsearch, Inc. pursuant to section 368(a)(1)(F) of the Internal Revenue Code. Effective January 1, 1986, Corsearch, Inc. revoked its S election for federal income tax purposes, and has continued to operate in New York State as a regular "C" corporation for federal and New York State tax purposes.

The history of the corporations profits and losses are as follows:

Company Name	Year	Federal Tax Status	Federal	New York State
Pro Data Searches, Inc.	1983	S Corp	(244,636)	(241 046)
Pro Data Searches, Inc.	1/1-6/27/84	S Corp	(244,727)	(257 261)
Corsearch, Inc.	6/28-12/31/84	S Corp	(206,746)	(205 391)
Corsearch, Inc.	1985	S Corp	(267,458)	(256 143)
Corsearch, Inc.	1986	C Corp	(170,858)	(166 542)
Corsearch, Inc.	1987	C Corp	(25,984)	(25 692)
Corsearch, Inc.	1988	C Corp	166,614	166 818

The federal losses in the years the corporation was an S corporation were computed as if the corporation had not made the election under Subchapter S of the Internal Revenue Code.

Petitioner states that, for New York franchise tax purposes, its net operating loss generated in a year in which a federal S election was in effect, is being used in a year in which the federal S election is not in effect. In 1989, the actual available federal net operating loss deduction for Corsearch, Inc. will be $30,228, the amount of the net operating loss carryforward generated

in the years the corporation was not an S corporation. The available federal net operating loss deduction, calculated as if the corporation had never been an S corporation, would be $993,795. Assuming the corporation has enough profits in 1989 to use the entire amount of net operating losses available for carryforward, it is implied but unclear, in section 208.9(f)(3), that the full $993,795 would be the limitation for the New York State net .operating ..... loss deduction. If the limitation is 993,795, the actual New York State net operating loss carryforward of $985,257 would be allowed in full.

Petitioner contends that section 208.9(f) of the Tax Law is unclear as to whether such section is referring to years in which a federal S election is still in effect or years in which a federal S election was in effect for a prior year.

Petitioner further contends that the intent of the statute is to treat a taxpayer, who has not elected S corporation status for New York State but has made the election for federal income tax purposes, the same as a taxpayer who has not made the federal election. The New York State net operating loss limitation for a taxpayer who had never made an S election would be $993,795, the federal net operating loss allowable for carryforward. Therefore, Petitioner contends that it should be allowed its full New York State net operating loss carryforward of $985,257.

Section 208.9(f) of the Tax Law states:

> [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, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that in every instance where such deduction is allowed under this article:
>
> (1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by paragraphs (a), (b) and (g) hereof,
>
> (2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article,
>
> (2-a) such deduction, for a taxable year in which the taxpayer was a target corporation in a subdivision seventeen corporate acquisition or any subsequent taxable year, shall not include any net operating loss sustained by the target corporation in its taxable year during which such acquisition occurred or in any prior taxable year.
>
> (2-b) such deduction, for a taxable year in which the

taxpayer was a surviving corporation in a subdivision eighteen corporate merger or any subsequent taxable year, shall not include any net operating loss sustained by any target corporation in its taxable year during which such merger occurred or in any prior taxable year. Where the target corporation is merged into another corporation, its "taxable year during which such merger occurred" means its taxable year ending immediately prior to such merger.

(2-c) such deduction, for a taxable year in which the taxpayer was a consolidated corporation in a subdivision eighteen corporate consolidation or any subsequent taxable year, shall not include any net operating loss sustained by any target corporation in its taxable year ending immediately prior to such consolidation or in any prior taxable year.

(3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code, or the deduction for the taxable year which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code,

(4) where the shareholders of the taxpayer have made the election provided for in subsection (a) of section six hundred sixty of this chapter, such deduction shall not include any net operating loss sustained during any taxable year for which such election was in effect, and

(5) the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code shall for purposes of this paragraph be determined as if the taxpayer had elected under such section to relinquish the entire carryback period with respect to net operating losses, except with respect to the first ten thousand dollars of each of such losses, sustained during taxable years ending after June thirtieth, nineteen hundred eighty-nine.

For New York State franchise tax purposes, Pro Data Searches, Inc. and Corsearch, Inc., computes its New York State net operating loss for each year in which it is taxable under Article 9-A. For taxable years 1983 and short taxable period ended 6/27/84, Pro Data Searches, Inc. computes a federal net operating loss as if it had not made the election to be treated as a federal S corporation. For short taxable period ended 12/31/84 and taxable year 1985, Corsearch, Inc. computes a federal net operating loss as if it had not made the election to be treated as a federal S corporation. For taxable years 1986 and 1987, Corsearch, Inc. is a "C" Corporation for federal income tax purposes and computes its federal net operating loss accordingly.

Section 208.9(f) of the Tax Law provides that when Corsearch, Inc. computes its New York State net operating loss deduction for taxable year 1988, such deduction is limited to the net operating loss deduction that would have been allowed under section 172 of the Internal

Revenue Code for taxable year 1988, as if Corsearch, Inc. and Pro Data Searches, Inc. had not made a federal S election for the loss years 1983 through 1985. Based on Petitioner's figures, for purposes of section 208.9(f)(3), the 1988 net operating loss deduction is limited to $166,614. Therefore, the aggregate New York State net operating loss available for carryforward to 1989 and subsequent years would be $985,461. Assuming Petitioner has enough profits in 1989 to use the entire amount of New York State net operating loss carryforward, such carryforward is limited, by section 208.9(f)(3), to the net operating loss deduction that would have been allowed under section 172 of the Internal Revenue Code for 1989, as if Corsearch, Inc. and Pro Data Searches, Inc. had not made the federal S election for the loss years. Accordingly, pursuant to section 208.9(f)(3), the net operating loss deduction limitation is $993,795 and the amount of the New York State net operating loss deduction for 1989 would be $985,461.

It should be noted that it is not within the scope of this advisory opinion to verify the accuracy of Petitioner's dollar amounts.

DATED: January 11, 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.