

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

TSB-A-99(15)C
Corporation Tax
March 1, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C981123A

On November 23, 1998, a Petition for Advisory Opinion was received from Walton Milk Hauling Inc., 3846 Dry Bridge Road, Alexander, New York 14005.

The issue raised by Petitioner, Walton Milk Hauling Inc., is whether it may claim a net operating loss deduction under Article 9-A of the Tax Law for a net operating loss carryforward from taxable years it was subject to tax under Article 9 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a trucking corporation that was subject to New York State franchise tax under sections 183 and 184 of Article 9 of the Tax Law until December 31, 1997. Effective January 1, 1998, Petitioner is now subject to Article 9-A of the Tax Law.

Petitioner has a net operating loss carryforward at December 31, 1997 for federal income tax purposes. Petitioner would also have a net operating loss carryforward for New York State franchise tax purposes if it had been taxable under Article 9-A of the Tax Law prior to January 1, 1998.

Discussion

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. Section 209.4 of the Tax Law, provides that a corporation liable for tax under sections 183 and 184 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Section 208.9 of the Tax law defines entire net income as "total net income from all sources ... which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department ... except as hereinafter provided...." Therefore, the taxable income reported for federal income tax purposes is the starting point for computing entire net income. After determining federal taxable income, it must be adjusted as required by section 208.9 of the Tax Law.

Section 208.9(f) of the Tax Law permits a net operating loss deduction when computing entire net income as follows:

[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 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 in which the taxpayer was not subject to the tax imposed by this article....

Section 3-8.2 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides, in part, as follows:

(a) The net operating loss deduction allowed under article 9-A is presumably the same as that which is allowed for Federal income tax purposes, subject to the three limitations explained in subdivisions (b), (c) and (d) of this section.

(b) The first limitation on the net operating loss deduction for purposes of article 9-A is that no deduction is allowed for a loss ... sustained during any year in which the corporation sustaining the loss was not subject to tax under article 9-A....

In this case, the net operating loss or losses giving rise to the loss carryforward was sustained in years during which Petitioner was subject to tax under sections 183 and 184 of Article 9 of the Tax Law rather than under Article 9-A of the Tax Law. Section 208.9(f)(2) of the Tax Law and section 3-8.2(b) of the Article 9-A Regulations, precludes Petitioner, an Article 9-A taxpayer effective January 1, 1998, from utilizing losses sustained during earlier years when it was not subject to tax under Article 9-A. (See, Brookhaven Servicing Corp., Dec St Tax Commn, July 26, 1984, TSB-H-84(37)C.

Accordingly, when computing entire net income pursuant to section 208.9 of Article 9-A of the Tax Law, Petitioner may not take a deduction for a net operating loss carryforward where the

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loss or losses were sustained in taxable years during which Petitioner was subject to tax under sections 183 and 184 of Article 9 of the Tax Law.

DATED: March 1, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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