

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

TSB-A-82-(6)-I
Income Tax
September 24, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I820322A

On March 22, 1982, a Petition for Advisory Opinion was received from Manuel S. Martinez, 210 West Rocks Road, Norwalk, Connecticut 06851.

The central issue presented herein is the proper treatment of a nonresident's operating loss where such loss constitutes his only item of income, gain, loss or deduction connected with New York sources, but where he did not have a Federal net operating loss with respect to the year of such New York related loss.

Petitioner was a resident of New York from 1974 until July, 1979, during which period he annually filed resident personal income tax returns. In December, 1978 Petitioner purchased an apartment house in Westchester County. In 1980, during which year Petitioner was a nonresident of New York, he incurred an operating loss with respect to such building. During 1980 Petitioner's sole item of income, gain, loss or deduction derived from or connected with New York sources was the operating loss arising from Petitioner's ownership of the apartment building. This loss was made the basis for a deduction taken on Petitioner's 1980 Federal income tax return, but did not result in a Federal net operating loss carryback or carryover. It is clear, based on the facts as here presented, that Petitioner is entitled to a net operating loss deduction, pursuant to Matter of Graham v. Tax Commission, 48 AD 2d 444, aff'd 40 NY2d 889. In that case the court held invalid a "regulation of the Tax Commission denying a nonresident taxpayer a net operating loss deduction by way of carryback or carryover, which deduction is based solely on income, gain, loss or deduction derived from or connected with New York sources." *Id.*, at 445. See *Matter of the Petition of David Van Alstyne, Jr. and Janet G. Van Alstyne*, State Tax Commission, May 1, 1981, TSB-H-82-(156)-I.

Petitioner seeks to utilize his net operating loss deduction as a carryback to his 1977, resident New York personal income tax return. This he may not do. In 1977 Petitioner was a resident taxpayer and filed his return accordingly. Section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual, the starting point in determining his New York taxable income, means "his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section." Since Petitioner did not have a Federal net operating loss carryback to 1977, he can obtain no such benefit on his New York return by virtue of his 1980 New York loss. As expressed by the Court in Shiels v Tax Comm, 95 Misc. 2d 605, rev'd 72 AD 2d 896, rev'd 52 NY 954:

There is no specific statutory provision whereby a New York State resident is allowed a deduction for net operating loss or whereby such a resident is allowed to carry back or carry forward a net operating loss

to tax years other than the tax year in which the loss was sustained. The New York State resident has the advantages of deducting a net operating loss and carrying back or carrying forward the unused portion of that deduction only insofar as such items are, for Federal income tax purposes, deducted from the gross income of that taxpayer. Id., at 606-7.

Thus, the court went on to say, "Section 612, as written, does not evidence a legislative intent to permit a resident taxpayer a net operating loss deduction in excess of the deduction claimed on his Federal return." Id., at 608.

It is accordingly necessary, in the present instance, to harmonize the Shiels and Graham decisions. The desired harmony may be achieved by application of the following. A nonresident's net operating loss in excess of his Federal net operating loss, if any, may be carried back and carried forward, but only to years with respect to which he was or is a nonresident. In addition, a taxpayer may elect to carry the net operating loss forward only, foregoing his right to carry it back to past years. Thus, in the present instance, Petitioner's 1980 net operating loss may be carried back to his short taxable year consisting of July through December of 1979, with respect to which period he was a nonresident, and any unused portion of the loss may then be carried forward to those of the fifteen years next succeeding 1980 with respect to which he is a nonresident. Alternatively, Petitioner may elect to restrict himself to carrying his net operating loss forward to such fifteen years. The figures three and fifteen represent the years to which a Federal net operating loss occurring in 1980 could be carried back and forward for Federal income tax purposes. This use of Federal rules is in accordance with the mandate contained in section 632(b)(3) of the Tax Law, which provides, in pertinent part, that deductions with respect to net operating losses, except insofar as they are based solely on New York items of income, gain, loss and deduction, "shall be determined in the same manner as the corresponding Federal deductions."

Petitioner also inquires as to whether he is required to file personal income tax returns for 1981, based on the receipt of income from the apartment building in question, and for 1982, based on a gain derived from the sale of such building. Section 651(a)(3) of the Tax Law requires the filing of a return by a nonresident individual whose New York adjusted gross income exceeds certain specified amounts. Section 632(a)(1) of the Tax Law provides that the New York adjusted gross income of a nonresident individual includes, inter alia, the "net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources ..." Income from the apartment building, and any gain from its disposition, would constitute items of income and gain

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includible in Petitioner's New York adjusted gross income. Assuming these items to be Petitioner's only such items derived from or connected with New York sources, Petitioner would be required to file nonresident returns where the magnitude of such items of income and gain exceed the amounts specified in section 651(a)(3) of the Tax Law.

DATED: September 22, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau