

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

TSB-A-96 (3) I
Income Tax
May 20, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I960122B

On January 22, 1996, a Petition for Advisory Opinion was received from Mr. Rocco B. Commisso, 212 Old Mountain Road, RD1, Box 212, Otisville, New York 10963.

The issue raised by Petitioner, Mr. Rocco B. Commisso, is whether a federal net operating loss which is generated during a New York State nonresident taxable year may be carried back to a New York State resident taxable year to reduce a prior period tax liability under Article 22 of the Tax Law.

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

Petitioner was a resident of New York State during taxable years 1993 through 1995. Petitioner was subject to a federal and New York State tax liability for each of these years. Petitioner intends to change his residence during 1996 at which time he will be considered a nonresident of New York State.

During 1996, Petitioner intends to acquire a partnership interest and will be actively participating in the management and daily operations of the partnership. It is anticipated that this partnership will generate a federal net operating loss for taxable years 1996 and 1997. It is also expected that the partnership will be operating exclusively outside of New York State. As a result, the losses generated will not be connected with New York State sources.

There is no specific statutory provision which allows a New York resident to deduct a net operating loss or to carry-back a net operating loss. Rather, the right of a New York resident to deduct a net operating loss from the individual's New York taxable income or to carry-back the unused portion of a net operating loss derives from section 612 of the Tax Law. Section 612 provides that the starting point for determining New York taxable income of a New York resident is the individual's federal adjusted gross income. See, Matter of Berg v Tully, 92 AD2d 436; Matter of Sheils v St Tax Comm, 95 Misc 2d 605, rev'd, 72 AD2d 896, rev'd, 52 NY2d 954.

A New York resident may not claim a net operating loss deduction on the individual's New York income tax return in excess of the amount of net operating loss deduction claimed on the individual's federal income tax return. See, Sheils, supra; Matter of Gurney v Tully, 51 NY2d 818, revg for reasons stated in dissenting opinion below, 67 AD2d 303, 305-307.

Section 154.8(c) of the Personal Income Tax Regulations ("Regulations") provides that a net operating loss, sustained in the year a change of resident status occurs, may be carried back to another taxable year under certain conditions. Section 154.8(c)(1) provides as follows:

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[i]f the taxable year to which the carry-back ... is to be applied is a taxable year in which an individual ... is a resident, such carry-back ... may be applied on the New York State resident income tax return to the extent such carry-back ... is includible as a carry-back in the computation of Federal adjusted gross income of an individual ... for such taxable year, and only if the taxable year for which the carry-back ... is to be applied is a taxable year under article 22 of the Tax Law.

Accordingly, pursuant to section 612 of the Tax Law, section 154.8(c) of the Regulations and Sheils, supra, where a federal net operating loss is carried back to a taxable year that an individual was a resident of New York State, the recomputation of federal adjusted gross income for the carry-back year will result in a recomputation of New York adjusted gross income for the carry-back year. A net operating loss carry-back may be allowed for New York personal income tax purposes to the extent that the carry-back is includible in the individual's federal adjusted gross income for the carry-back year.

In this case, Petitioner anticipates that in 1996 he will become a nonresident of New York State, and that the partnership will generate a federal net operating loss for taxable years 1996 and 1997. If Petitioner sustains a federal net operating loss in taxable year 1996 or 1997 that is carried back to another taxable year, Petitioner's federal adjusted gross income will be recomputed for the carry-back year. When the taxable year to which the net operating loss carry-back is to be applied is a taxable year Petitioner was a resident of New York, the net operating loss carry-back may be applied on his resident income tax return to the extent that the net operating loss carry-back is includible as a carry-back in his recomputed federal adjusted gross income for the carry-back year. Petitioner's recomputation of his New York adjusted gross income for the net operating loss carry-back year, to reflect the recomputed federal adjusted gross income for the carry-back year, may result in a reduced New York taxable income and a reduction in Petitioner's New York income tax liability for the carry-back year.

DATED: May 20, 1996

s/Doris S. Bauman
Director
Technical Services Bureau

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