

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ALVIN GOTTESMAN	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1978 and 1979.	:	
_____	:	DECISION
	:	DTA NOS. 801368/801611
In the Matter of the Petition	:	:
	:	
of	:	
	:	
GOTTE'S LUNCHEONETTE, INC.	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1978	:	
and 1979.	:	
_____	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 14, 1988 with respect to a petition by Gotte's Luncheonette, Inc., c/o Alvin Gottesman, 10828 Lake Palm Lane, Boynton Beach, Florida 33437. The petition was filed for redetermination of a deficiency or for refund of corporate franchise tax under Article 9-A of the Tax Law for the years 1978 and 1979 (File No. 801368).

Petitioner, Alvin Gottesman, 10828 Lake Palm Lane, Boynton Beach, Florida 33437, filed an exception to the determination of the Administrative Law Judge issued on January 14, 1988 with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File No. 801611).

The petitioners appeared by Pollan, Milowsky & Company (Jerome M. Pollan, CPA). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Neither of the parties requested oral argument on these exceptions and neither of the parties filed a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether for purposes of calculating its corporation franchise tax Gotte's Luncheonette, Inc. is allowed to carry back net operating losses from the years 1981 and 1982 to the years 1978 and 1979 to offset taxable income that resulted from the audit.

II. Whether the cash availability audit performed to determine Alvin Gottesman's income should be adjusted to treat certain withdrawals from a checking account as payments for personal living expenses and certain deposits into bank accounts as the deposit of loan proceeds.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

Petitioner, Alvin Gottesman timely filed New York State income tax resident returns for the years 1978 and 1979. On both of said returns, Mr. Gottesman reported, inter alia, wage income of \$14,300 from Gotte's Luncheonette, Inc.

Mr. Gottesman executed a series of three consents, dated February 25, 1982, December 16, 1982 and November 20, 1983, wherein he agreed to extend the period of limitation for assessment of personal income tax for the years 1978 and 1979 to any time on or before April 15, 1985.

On July 16, 1984, the Division of Taxation issued a Notice of Deficiency to Alvin Gottesman for the years 1978 and 1979 asserting additional New York State personal income tax of \$7,295.00, plus a five percent negligence penalty of \$365.00 and interest of \$3,978.25, for a total allegedly due of \$11,638.25.

The aforementioned Notice of Deficiency was based on an explanation contained in the Statement of Personal Income Tax Audit Changes dated May 29, 1984, wherein Mr. Gottesman's

reported taxable income was increased by \$32,726.00 for 1978 and \$21,893.00 for 1979. The proposed increases to Mr. Gottesman's taxable income were the result of the Division of Taxation's reconstruction of his income through use of cash availability analyses.

Petitioner Gotte's Luncheonette, Inc. (hereinafter "Gotte's") timely filed corporation franchise tax reports for the calendar years 1978 and 1979. On said reports, Gotte's computed negative taxable income of \$13,791.00 and \$1,899.00 for 1978 and 1979, respectively.

Gotte's also executed three consents extending the period of limitation for assessment of corporation franchise tax for the calendar years 1978 and 1979 to any time on or before April 15, 1985.

On July 3, 1984, the Division of Taxation issued two notices of deficiency to Gotte's asserting that additional corporation franchise tax was due. One notice was for the calendar year 1978 and asserted additional tax due of \$480.00, plus a five percent negligence penalty of \$24.00 and interest of \$329.00, for a total allegedly due of \$833.00. The other notice was for the 1979 calendar year and asserted a tax due of \$1,749.00, plus a five percent negligence penalty of \$87.00 and interest of \$1,033.00, for a total allegedly due of \$2,869.00

The corporation tax deficiencies resulted from using the additional income discovered pursuant to the income tax audit of Alvin Gottesman. The theory was that all of Alvin Gottesman's reported income was derived from Gotte's and therefore the additional funds in question could only have come from said corporation. The Division of Taxation allowed net operating losses from 1976 and 1977 to be carried forward to the 1978 tax year.

Petitioner Alvin Gottesman and his spouse, Paula Gottesman, maintained two personal checking accounts during the years 1978 and 1979. One of the checking accounts was maintained at Long Island National Bank, while the other checking account was with the Bank of Commerce. Mr. Gottesman was able to provide for examination the cancelled checks from the Long Island National Bank checking account; however, all cancelled checks from the Bank of Commerce checking account had been destroyed and were therefore unavailable for examination.

In order to determine Mr. Gottesman's personal living expenses, the auditor assigned to this case reviewed all cancelled checks from the Long Island National Bank checking account. Based on his review of the aforementioned cancelled checks, his audit experience and his determination that Mr. Gottesman's lifestyle was that of an average individual, the auditor estimated personal living expenses of \$25,000.00 for 1978 and \$20,000 for 1979. These estimated amounts were in addition to personal living expenses of \$4,935.84 for 1978 and \$3,575.53 for 1979 which were paid by check through the Long Island National Bank checking account. Since the auditor was unable to review the cancelled checks from the Bank of Commerce checking account, he determined that no personal living expenses were paid by check through said account. Withdrawals from the Bank of Commerce checking account totalled \$17,768.26 in 1978 and \$20,761.36 in 1979.

Subsequent to the personal income tax and corporation franchise tax audits involved in this proceeding, the Division of Taxation initiated an examination of Gotte's New York State sales and use tax liability for the period March 1, 1979 through December 28, 1981. Said examination concluded that Gotte's had not underreported its gross sales for said period. A sales tax liability was assessed based solely on the disallowance of claimed nontaxable sales.

OPINION

In the case at bar each of the parties have taken exception to the Administrative Law Judge's determination. First, the Division of Taxation's exception challenges the Administrative Law Judge's determination allowing net operating losses from 1981 and 1982 to be carried back to the years 1978 and 1979 to offset the additional corporation franchise tax determined by the audit. The Division argues that such deductions are not allowed because there is no indication that the carrybacks were allowed for Federal purposes.

Section 208 of the Tax Law provides the authority which allows an Article 9-A taxpayer to take a net operating loss deduction. This section 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" (Tax Law §208.9[f].)

The regulations and case law establish that the amount of the net operating loss deduction for State purposes cannot exceed the amount deducted on the Federal tax return for the corresponding year. (20 NYCRR 3-8.2[d]; Matter of 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 net operating loss deducted on the State return must be the same as that of the net operating loss deducted on the Federal return (Matter of Lehigh Valley Industries, Inc., *supra*). Petitioner, Gotte's Luncheonette, Inc., did not prove the amount of the net operating loss deduction claimed by it for Federal tax purposes for the years 1978 and 1979, nor the source years of such deduction. Therefore, we reverse the Administrative Law Judge's determination permitting the petitioner, Gotte's Luncheonette, Inc., to carry back the net operating losses of 1981 and 1982 to 1978 and 1979.

In his exception, the petitioner, Alvin Gottesman, challenges the income tax cash availability audit by asserting that the checks he wrote on the Bank of Commerce checking account were drawn to pay for his personal living expenses and that the living expenses determined on the audit should be reduced to reflect this. In order to substantiate his claim, the petitioner submitted copies of the bank statements pertaining to this checking account to the Administrative Law Judge, but he did not submit cancelled checks or copies of cancelled checks. Petitioner did not prove that the Bank of Commerce checks were written for his personal expenses and therefore the Administrative Law Judge did not err in finding against the petitioner on this issue.

The petitioner, Alvin Gottesman, also asserts that the Administrative Law Judge should have accepted his explanation that deposits in the amounts of \$2,349.81 and \$2,581.21 represent loan proceeds made to him by the Manufacturers Hanover Trust Co. However, he failed to submit proof to substantiate this claim. Therefore, we sustain the Administrative Law Judge's determination on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted and conclusion of law "E" and so much of conclusion of law "F" of the Administrative Law Judge's determination that granted the petition of Gotte's Luncheonette, Inc. are reversed;
2. The exception of petitioner Alvin Gottesman is denied;
3. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above but, except as so modified, is in all other respects affirmed; and
4. The petition of Alvin Gottesman is granted to the extent indicated in conclusions of law "A", "B" and "F" of such determination; that the Division of Taxation is directed to recompute the Notice of Deficiency issued to Alvin Gottesman on July 16, 1984 accordingly; that the Division is further directed to recompute the Notice of Deficiency issued on July 3, 1984 to Gotte's Luncheonette, Inc. to reflect the recomputation of such Notice of Deficiency issued to Alvin Gottesman; and that, except as so granted, the petitions of Gotte's Luncheonette, Inc. and Alvin Gottesman are in all other respects denied.

Dated: Albany, New York
August 25, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner