

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

DAVIES LAKE HOTEL, INC. :

for Redetermination of a Deficiency or for Refund :

of Corporation Franchise Tax under Article 9-A :

of the Tax Law for the Years 1972 and 1975 :

through 1981.

In the Matter of the Petition :

of :

ESTATE OF ADOLPH MILICH :

DECISION

for Redetermination of a Deficiency or for Refund :

of Personal Income Tax under Article 22 of the

Tax Law for the Years 1972 through 1975.

In the Matter of the Petition :

of :

ADOLPH MILICH, JR. :

for Redetermination of a Deficiency or for Refund :

of Personal Income Tax under Article 22 of the Tax

Law for the Years 1978 through 1981.

In the Matter of the Petition :

of :

ROBERT AND BARBARA MILICH :

for Redetermination of a Deficiency or for Refund :

of Personal Income Tax and Unincorporated

Business Tax under Articles 22 and 23 of the Tax

Law for the Years 1978 through 1981.

Petitioner Davies Lake Hotel, Inc. , 25 New Valley Road, New City, New York 10956, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1988 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1972 and 1975 through 1981 (File No. 802595).

Petitioner Estate of Adolph Milich, c/o Robert Milich, 11 Milich Lane, New City, New York 10956, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1988 with respect to its petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 through 1975 (File No. 802598).

Petitioner Adolph Milich, Jr., 29 New Valley Road, New City, New York 10956, filed an exception to the determination of the Administrative Law Judge issued on June 9, 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 through 1981 (File No. 802597).

Petitioners Robert and Barbara Milich, 11 Milich Lane, New City, New York 10956, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1988 with respect to their petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1978 through 1981 (File No. 802599).

Petitioners appeared by Paul F. Onderdonk, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was scheduled at petitioners' request and subsequently canceled at their request.

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

ISSUE

Whether petitioner Davies Lake Hotel, Inc. is entitled to net operating loss deductions offsetting income adjustments determined upon audit.

FINDINGS OF FACT

We find the factor as stated in the Administrative Law Judge's determination. Such facts are incorporated herein by this reference and are summarized as follows.

The deficiencies at Issue arise from an audit of the corporate petitioner, Davies Lake Hotel, Inc. ("the corporation"). A sales tax audit of corporation resulted in a determination of additional sales and use taxes (The sales and use taxes due are not at issue and appear to have been paid.) The matter was then referred for corporation tax and personal income tax audit action.

Davies Lake Hotel, Inc.

On June 21, 1985 the Division of Taxation issued a Statement of Franchise Tax Audit Changes against the corporation for the years 1972, and 1975 through 1981 stating tax due for each of such years in the following respective amounts.

<u>Year</u>	<u>Amount</u>
1972	\$5,068.08
1975	8,404.47
1976	4,655.80
1977	250.00
1978	2,422.50

1979	6,292.00
1980	4,329.50
1981	1,621.50

On August 2, 1985, the Division of Taxation issued notices of deficiency to the corporation for the same amounts plus penalties under Tax Law section 1085(a)(1); (a)(2); (b).

Estate of Adolph Milich, Deceased

A portion of the additional income of the corporation was attributed to the Estate of Adolph Milich as a constructive dividend. A Statement of Audit Changes issued to said petitioner on June 21, 1985 for tax due stated, in part, as follows:

<u>Year</u>	<u>Amount</u>
1972	\$996.40
1973	805.73
1974	957.00
1975	\$2,646.24

On August 8, 1985, a Notice of Deficiency was issued to the Estate of Adolph Milich, deceased, for 1972, 1973, 1974 and 1975 for \$5,405.37 in tax, \$2,837.82 in penalty (Tax Law § 685[a][1]; [a][2]; [b]) and \$7,189.50 in interest, for a total of \$15,432.69.

Adolph Milich, Jr.

A portion of the additional income of the corporation was attributed to Adolph Milich, Jr., as a constructive dividend. On June 21, 1985, a Statement of Audit Changes was issued to said petitioner stating, in part, as follows:

<u>Year</u>	<u>Amount</u>
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1978	\$1,104.78
1979	3,872.68
1980	2,657.42
1981	772.16

The following consents extending the period of limitation upon assessment of personal income and unincorporated business taxes were executed by Adolph Milich, Jr. and Marsha Milich: ¹

(a) Consent dated December 13, 1982 extending the period of limitation for the year 1979 to April 15, 1984.

(b) Consent dated January 17, 1984 extending the period of limitation for the years 1979 and 1980 to April 15, 1985. (c) Consent dated January 15, 1985 extending the period of limitation for the years 1979, 1980 and 1981 to April 15, 1986.

On August 8, 1985, the Division issued a Notice of Deficiency to petitioner Adolph Milich, Jr., for the years 1978, 1979, 1980 and 1981 in the amount of \$8,407.04 in tax, \$420.35 in penalty (Tax Law § 685[b]) and \$5,160.56 in interest, for a total of \$13,987.95.

Robert and Barbara Milich

A portion of the additional income of the corporation was attributed to Robert Milich as a constructive dividend. On June 21, 1985, a Statement of Audit Changes was issued to Robert and Barbara Milich stating, in part, as follows:

<u>Year</u>	<u>Amount</u>
1978	\$ 905.87

¹It is noted that there is no consent for 1978 in the record.

1979	3,828.62
1980	3,582.79
1981	738.97

The following consents extending the period of limitation upon assessment of personal income and unincorporated business taxes were executed by Robert and Barbara Milich:²

(a) Consent dated January 8, 1982 extending the period of limitation for 1979 to April 15, 1984.

(b) Consent dated January 14, 1984 extending the period of limitation for 1979 and 1980 to April 15, 1985.

(c) Consent dated January 29, 1985 extending the period of limitation for 1979, 1980 and 1981 to April 15, 1986.

On August 8, 1985, the Division issued a Notice of Deficiency to Robert and Barbara Milich for the years 1978, 1979, 1980 and 1981 in the amount of \$9,056.25 in tax, \$452.81 in penalty (Tax Law § 685[b]) and \$5,479.01 in interest, for a total due of \$14,988.07.

Robert Milich (Unincorporated Business Tax)

On June 21, 1985, the Division issued a Statement of Unincorporated Business Tax Audit Changes to Robert Milich for the year 1980 explaining that \$5,812.00 in additional unincorporated business income had been determined based on unreported Federal audit changes, resulting in \$232.67 in additional tax due. On August 8, 1985, the Division issued a Notice of Deficiency for unincorporated business tax for 1980 to Robert Milich for \$232.67 in tax and \$128.67 in interest, for a total of \$361.34. At the hearing, petitioners' representative conceded that this deficiency was correct and it is not at issue herein.

²As was the case with Adolph Milich, Jr. and Marsha Milich (footnote 1), there is no consent for 1978 in the record.

Business Operations of the Corporation

The corporation was formed in 1959. The 1971 New York State corporation franchise tax report indicated that its principal business activity was "Bar -- Hotel". The 1973 report indicated "Food Bevg. Rec.". The 1974 report indicated "Lake -- Recreation".

Between 1971 and 1975, the corporation was controlled by Adolph Milich, who owned 68 percent of the stock and served as treasurer of the corporation. Adolph Milich died in 1975 at approximately 83 years of age.

The corporation's accountant prepared Federal income tax returns and State corporation franchise tax reports for the corporation for the years 1971 through 1976. The State, however, received only the reports for 1971, 1973 and 1974 and petitioners conceded that the reports prepared for 1972, 1975 and 1976 were, for some reason, not filed. The accountant was apparently not retained to prepare reports for years subsequent to 1976 and no reports were filed for those years.

Net Operating Loss Deductions

A copy of the corporation's 1971 Federal income tax return showed an operating loss for said year of \$32,050.00. The balance sheet on the return showed negative retained earnings at the beginning of 1971 of \$78,626.00 and penalties of \$713.00, for negative retained earnings (including the 1971 loss) of \$111,389.00. The New York corporation franchise tax report showed a Federal operating loss of \$32,050.00 and a New York loss of \$31,950.00. Petitioners' representative claimed at the hearing that the 1971 New York report contained "a net operating loss carry-forward deduction of \$76,869.00 and it's our position that operating loss deduction

should be included in the calculation of the deficiency for 1972, and to the extent that it is available, for the years 1975 and thereafter."

A copy of the corporation's 1973 Federal return shows a loss from operations of \$4,613.00, with negative retained earnings at the beginning of 1973 of \$139,176.00 and negative retained earnings at the end of 1973 of \$143,789.00. A copy of the New York report for 1973 shows a Federal loss of \$4,613.00 with a New York loss of \$4,488.00.

A copy of the corporation's 1974 Federal return shows a loss from operations of \$14,199.00 with a balance of negative retained earnings at the beginning of 1974 of \$143,789.00. The total at the end of 1974 was \$157,988.00. A copy of the New York report shows the \$14,199.00 Federal loss and a \$14,050.00 New York loss.

The Tax Appeals Bureau Conference

Pursuant to a Tax Appeals Bureau conference, petitioners provided additional substantiation of business expenses which resulted in the following modifications of the aforementioned deficiencies: ³

(a) Davies Lake Hotel, Inc.

<u>Year</u>	<u>Amount</u>
1972	\$2,939.68
1975	3,972.70
1976	4,036.90
1977	-0-
1978	1,182.20
1979	4,558.50
1980	2,150.80
1981	635.00

³Modification of deficiencies in tax resulted in modification of penalties. The revised penalties are not shown herein.

(b) Estate of Adolph Milich, Deceased

<u>Year</u>	<u>Amount</u>
1972	\$ 397.46
1973	805.73
1974	957.00
1975	531.54

(c) Adolph Milich, Jr.

<u>Year</u>	<u>Amount</u>
1978	\$ 563.62
1979	2,834.16
1980	1,307.26
1981	382.00

(d) Robert and Barbara Milich

<u>Year</u>	<u>Amount</u>
1978	\$425.96
1979	2,790.10
1980	2,232.70
1981	360.26

OPINION

Petitioners assert on exception that the net operating losses for 1971, 1973 and 1974 should be carried forward to 1972 and 1975 through 1981. In addition, petitioner Adolph Milich, Jr. and petitioners Robert and Barbara Milich assert that the assessment for 1978 is barred by the statute of limitations because the Division did not obtain a proper consent.

Finally, petitioners assert that the statute of limitations bars the Division from authority to examine the net operating losses claimed on the 1971, 1973 and 1974 franchise tax returns.

The Division asserts that the Division is authorized to examine the net operating losses for 1971, 1973 and 1974 in connection with the assessment of the tax liability for the years in question, 1972 and 1975 through 1981.

The Administrative Law Judge sustained the Division's position and denied the carry-forward of the net operating loss deduction to the years in question. The Administrative Law Judge also determined that the 1978 assessments for petitioners Adolph Milich, Jr. and Robert and Barbara Milich were proper because the petitioners did not assert the statute of limitations at hearing.

We deal first with the authority for the Division to consider the 1971, 1973 and 1974 franchise tax returns and the net operating losses.

Tax Law sections 1089(g) and 689(g) each provide as follows:

"Jurisdiction over other years. -- The tax commission shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid."⁴

Sections 1089(g) and 689(g) are similar to section 6214(b) of the Internal Revenue Code. Accordingly, we may look to federal case law for guidance. "It is well settled that [pursuant to sec. 6214(b)] we may determine the correct amount of taxable income or net operating loss for a year not in issue (whether or not the assessment of a deficiency for that year is barred) as a preliminary step in determining the correct amount of a net operating loss carryover to a taxable

⁴Internal Revenue Code section 6214(b) authorizes the Tax Court of the United States to examine the validity of deductions resulting from losses in years for which the statute of limitations has expired, when redetermining income for other tax years under its consideration.

year in issue . . . (Cites omitted.)" Lone Manor Farms, Inc. v. Commr. [Dec. 32,403], 61 TC 436, 440 (1974), affd, without published opinion 510 F2d 970 (3d Cir 1975).

The Division is not barred from disallowing the purported net operating losses arising from the years 1971, 1973 and 1974 despite the expiration of the statute of limitations on assessment for said years. The Division is entitled to recompute petitioners' income for the closed years in determining the deficiencies for the years at issue (Johnson v. Commr., 41 TCM 71).

We next address whether petitioners have met their burden of proof to establish the net operating loss.

Petitioners have the burden of proof under Tax Law sections 1089(e) and 689(e) to establish the net operating loss deductions. The only evidence introduced by petitioners at the hearing pertained to the preparation of the corporation franchise tax reports and Federal income tax returns for 1971, 1973 and 1974, which indicate that losses were incurred in said years. No other documentation or testimony was offered. Petitioners appear to be relying on the fact said reports were accepted by the Division and the statutory periods of limitation have expired. Mere acceptance of the returns by the Division cannot be construed as an expression by the Division as to the propriety of the reports (see, Niles Bement Pond Co. v. United States, 281 US 357; Mount Vernon Trust Co. v. Commr. of Internal Revenue, 75 F2d 938).

We find petitioners have not sustained their burden of proof. They failed to produce sufficient evidence, documents, business records or testimony to substantiate their claimed net operating losses for 1971, 1973 and 1974 (Gregory Wood, 57-2 US Tax Cas ¶ 10,006 [D Ariz 1957]; Moss Industries, Inc., 12 TCM 317) .

We deal finally with assessments for 1978 for petitioners Robert and Barbara Milich and Adolph Milich, Jr. Assertion of the statute of limitations as a bar to the 1978 assessment must be asserted by the petitioners. At the hearing, petitioners conceded that the only issue remaining to be resolved was whether the corporation was entitled to the aforementioned net operating loss deductions. Accordingly, the Administrative Law Judge did not have the issue before him.

Petitioners now assert the statute of limitations as a bar to the assessments for those years on exception. The Division does not refute the assertion. Since it is clear from the record that no consent for 1978 was signed, we conclude that the 1978 income tax assessments against Robert and Barbara Milich and Adolph Milich, Jr. are time barred.

Accordingly, it is ORDERED. ADJUDGED and DECREED that:

1. The exceptions of the petitioners, Davies Lake Hotel, Inc., Estate of Adolph Milich, Adolph Milich, Jr. and Robert and Barbara Milich, are granted to the extent that the income tax assessments issued to Adolph Milich, Jr. and Robert and Barbara Milich for 1978 are cancelled, but except as so granted the exceptions of the petitioners are denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but except as so modified the determination is affirmed; and

3. The petitions of Davies Lake Hotel, Inc., Estate of Adolph Milich, Adolph Milich, Jr. and Robert and Barbara Milich are granted to the extent indicated in paragraph "1" above and conclusion of law "G" of the Administrative Law Judge's determination and the notices of deficiency are to be modified accordingly, but except as so granted are in all other respects denied and the notices of deficiency are sustained.

Dated: Albany, New York
JAN 20 1989

John P. Dugan
President

Francis R. Koenig
Commissioner