STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions

of

THE AETNA CASUALTY AND SURETY COMPANY

for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1986 and 1987.

In the Matter of the Petition

of

AETNA LIFE INSURANCE AND ANNUITY COMPANY

for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Year 1986.

In the Matter of the Petition

of

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Year 1986.

DECISION
DTA NOS. 809867, 809868, 809869 AND 810589

Petitioner The Aetna Casualty and Surety Company, 151 Farmingdale Avenue, Hartford, Connecticut 06156, petitioner Aetna Life Insurance and Annuity Company, One City Place, Tax Department YF7F, Hartford, Connecticut 06156 and petitioner The Automobile Insurance Company of Hartford, Connecticut, One City Place, Tax Department YF7F, Hartford, Connecticut 06156, each filed an exception to the determination of the Administrative Law

Judge issued on May 6, 1993. Petitioners appeared by Seth L. Rosen, Esq. and Barry S. Schuman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief on exception, the Division of Taxation filed a letter in response and petitioners replied to the letter. Oral argument was heard on January 5, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether under Tax Law § 1503(b)(4) a New York net operating loss deduction carried forward or back from a given year must arise from the same loss year as the net operating loss deducted on the insurance corporation's Federal income tax return for the corresponding year.

II. Whether under the aggregation rule of 20 NYCRR 3-8.5 petitioners were entitled to aggregate New York net operating losses of two or more years.

III. Whether the interpretation of Tax Law § 1503(b)(4) set forth by the Division of Taxation offends the equal protection clauses of the United States and New York State constitutions.

IV. Whether, under the theory of equitable recoupment, Aetna Casualty and Surety Company is entitled to a refund otherwise barred by the statute of limitations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners and the Division of Taxation ("Division") executed four stipulations of fact, one for each petition. The stipulated facts are adopted and incorporated into the following Findings of Fact.

Petitioners, The Aetna Casualty and Surety Company ("Casualty"), Aetna Life Insurance and Annuity Company ("Life") and The Automobile Insurance Company of Hartford, Connecticut ("Auto"), are all Connecticut corporations licensed to do business in New York and subject to the franchise tax on insurance corporations, article 33 of the Tax Law.

Petitioners were members of a consolidated group of corporations of which The Aetna Life and Casualty Company was the common parent and, for Federal income tax purposes, they joined in the consolidated return of that group. Each petitioner timely filed New York State franchise tax returns for the years in issue, on a separate basis.

Each petitioner properly computed its net operating losses and net operating loss deductions for the subject years as if it were filing on a separate basis for Federal income tax purposes.

CASUALTY

The following chart represents Casualty's Federal and New York State net income or loss as reported on its State corporation franchise tax returns for the years 1977 through 1987, without regard to any loss carryovers or carrybacks from other years:[1]

Casualty's Separate Federal and New York Net Income
(Loss) as Reported on Casualty's New York Returns

	Federal	New York
1977	$171,888,149	$281,877,420
1978	121,611,251	281,089,931
1979	42,563,698	226,903,957
1980	(154,290,719)	73,517,470
1981	(366,253,401)	(69,563,062)
1982	(373,752,364)	(97,630,538)
1983	(240,013,658)	(28,289,380)
1984	(328,477,566)	(144,013,517)
1985	(229,689,325)	(98,693,037)
1986	160,326,363	306,978,127
1987	218,760,815	288,786,198

A mathematical error was made in calculating Casualty's net New York loss for 1981 on the return as filed. In calculating net income on Casualty's 1981 franchise tax return, total deductions were added to total income rather than subtracted. Casualty's net loss before

[1]Federal income is calculated as if Casualty had filed a Federal return on a separate basis and New York State income or loss as shown is before application of the New York allocation factor. These same statements apply to all future references to Federal or State income or loss for Casualty, Life and Auto for all years in issue, as well as references to Federal and State net operating loss deductions for all petitioners.

deductions was ($88,469,646.00) and the total deductions were $18,906,584.00, resulting in a correct net operating loss of $107,376,230.00 for 1981.

Casualty's 1986 New York net income as reported on its New York return, without regard to any deduction attributable to net operating loss carrybacks or carryforwards ("NOL deduction"), was accepted upon audit by the Division.

Casualty claimed a New York NOL deduction of $306,978,127.00 on its 1986 New York State corporation franchise tax return. Casualty's 1986 Federal NOL deduction was $160,326,363.00.

Casualty had a New York State net operating loss in 1981 of $69,563,062.00 and income of $281,089,931.00 in 1978. Casualty never carried back its 1981 net operating loss to 1978.

Upon audit of Casualty's 1986 return, the Division determined that Casualty was required to carry back its 1981 net operating loss to reduce its 1978 New York income. The effect of this required carryback was to use up the entire amount of the 1981 New York State loss.

Casualty had a Federal net operating loss of $366,253,401.00 in 1981 and Federal income of $121,611,251.00 in 1978, $42,563,698.00 in 1979, and $160,326,363.00 in 1986. On audit, the Division carried back or forward the 1981 Federal net operating loss to reduce Casualty's 1978, 1979 and 1986 Federal income to zero. This left a balance to carry forward of $41,752,089.00.

The Division disallowed Casualty's entire 1986 New York State NOL deduction on the ground that the State and Federal NOL deduction must flow from the same source year, in this case 1981. The Federal 1981 net operating loss was used to reduce Casualty's 1986 Federal income to zero; however, Casualty was required to carry forward its State net operating loss from 1981 to reduce its 1986 State income. Since its 1981 net operating loss was used up by carrying it back to 1978, there was no remaining loss to carry forward.

The Division issued to Casualty two notices of deficiency for 1986, dated August 25, 1989, asserting a deficiency of corporation franchise tax in the amount of $4,440,733.00, plus interest and additional charges, and a deficiency of the metropolitan transportation business tax surcharge in the amount of $440,434.84, plus interest and additional charges.

A Statement of Audit Adjustment issued at the same time as the notices of deficiency contained the following explanation:

> "[Casualty's] 1981 New York loss was used up in 1978. Since no other loss was applied to 1986 for federal purposes, no other loss can be applied to 1986 for New York purposes either."

The statute of limitations for filing a refund claim that would have permitted Casualty to carry back its 1981 New York State net operating loss to offset its 1978 taxable income expired on September 15, 1985, without Casualty filing a refund claim for such carryback.

Had Casualty timely carried back its 1981 net operating loss to offset its 1978 taxable income, Casualty would have received a refund. As Casualty did not carry back its 1981 net operating loss to 1978, Casualty did not receive a refund for such loss.

Casualty paid $4,481,323.00 in tax plus interest of $1,987,652.00 on January 23, 1991 in full payment, as recomputed by the Division, of the asserted tax deficiency and applicable interest.

Casualty timely filed a Claim for Refund of Corporation Tax Paid on Form CT-8 with respect to the assessed deficiency for tax of $4,468,870.00 and interest of $1,982,127.00 on July 17, 1991.

By letter dated July 23, 1991, the Division denied Casualty's refund request.

Casualty's 1987 New York net income as adjusted upon field audit by the Division, without regard to any NOL deduction, was $249,473,977.00.

Casualty claimed a New York NOL deduction on its 1987 New York State corporate franchise tax return, in the amount of $131,211,407.00.

Casualty's 1987 Federal NOL deduction, as calculated on a separate return basis for New York purposes, was $218,760,815.00.

Upon a field audit of Casualty's 1987 return, the Division asserted that Casualty's 1987 NOL deduction should have been comprised only of losses from 1981 and 1982

($97,630,538.00) and not from the years 1984 and 1985 as claimed on Casualty's 1987 New York corporation franchise tax return.

The Division asserted an additional tax of $502,946.00 (plus any Metropolitan Transit District Tax and applicable interest related to this issue) as a result of such disallowance.

Casualty paid $502,946.00 of tax (plus any Metropolitan Transit District Tax and applicable interest) on December 10, 1991 as an offset against refunds due to Casualty as a result of the field audit, in full payment of the asserted tax deficiency and applicable Metropolitan Transit District Tax and interest.

Casualty timely filed a Claim for Refund of Corporation Tax Paid on Form CT-8 with respect to the amount at issue on December 10, 1991.

By letter dated December 24, 1991, the Division denied Casualty's refund request.

From 1978 through 1986, Casualty reported interest income on State and municipal debt obligations which was includible in net income for New York purposes and exempt from Federal tax in the following amounts:

	Casualty's Interest Income from State and Municipal Bonds
1978	$148,034,019
1979	171,543,263
1980	199,482,729
1981	208,037,826
1982	207,915,511
1983	178,247,573
1984	159,673,038
1985	113,857,331
1986	110,078,200
1987	147,690,095

LIFE

The following chart presents Life's Federal and New York State net income or loss as reported by Life on its New York State corporate franchise tax returns, without regard to any net operating loss carryover or carryback from other years, for the years 1978 through 1986:

Life's Separate Federal and New York Net Income (Loss) as Reported on Life's New York Returns

	Federal	New York
1978[2]	($ 4,393,052)	($ 2,338,612)
1979	14,569,419	16,800,312
1980	27,453,841	29,395,044
1981	(105,994,205)	(103,215,996)
1982	(182,359,051)	(179,765,807)
1983	(168,585,947)	(167,369,091)
1984	(35,231,343)	(28,936,259)
1985	(18,353,921)	(12,571,210)
1986	55,612,270	61,654,495

Life's 1986 New York net income as adjusted upon audit by the Division, without regard to any deduction attributable to net operating loss carryovers or carrybacks was $62,015,472.00. The adjustment was due to a decrease upon audit of the 50% dividends received deduction reported on line 36 of the return from $6,136,599.00 to $5,775,622.00.

Life claimed an NOL deduction of $61,654,495.00 on its 1986 New York State corporate franchise tax return, reducing its New York State 1986 income to zero.

Life's 1986 Federal NOL deduction, as calculated by Life on a separate return basis for New York purposes, was $55,612,275.00.

Upon audit of Life's 1986 return, the Division disallowed Life's 1986 New York State NOL deduction to the extent of $7,774,882.00 ($61,654,495.00 - $53,879,613.00). In statements of audit adjustment dated August 4, 1989, the Division asserted a tax deficiency of $40,853.00, plus applicable interest, as a result of the NOL deduction disallowance.

The Division's adjustment to Life's 1986 NOL deduction was calculated as follows. The Division reduced Life's New York State NOL deduction to the Federal amount available to carry forward from 1981 to 1986. For Federal purposes, Life had a net operating loss balance of

2 For tax years 1978 through 1983, Life's separate Federal income is calculated by adding line 27 or line 28 (as appropriate) to line 23 or 24 (as appropriate) of the return to conform to the method for computing Federal income as reported on line 23 of the return for all other taxable years.

$1,732,662.00 from the years 1975 through 1978 available to carry forward to 1986.[3] This amount was carried forward to reduce Life's 1986 Federal net income to $53,879,613.00. The Division then carried forward from Life's 1981 Federal net losses ($105,994,205.00) the amount necessary to reduce Life's 1986 Federal net income to zero ($53,879,613.00). Life's New York State NOL deduction was then reduced to the Federal amount carried forward from 1981 or $53,879,613.00.

The Statement of Audit Adjustment states:

> "The entire New York loss is used. After deducting $1,732,662 of 1978 loss, the balance of income $53,879,613 is used up by the 1981 loss; therefore for New York State purposes, [Life's] deduction is limited to $53,879,613 too."

Life paid $40,969.00 in tax, plus interest of $18,171.00, on January 23, 1991 in full payment, as recomputed by the Division, of the asserted tax deficiency and applicable interest.

Life timely filed a Claim for Refund of Corporation Tax Paid on Form CT-8 with respect to the asserted deficiency for tax of $40,916.00 and interest of $18,147.00 on July 17, 1991. By letter dated July 23, 1991, the Division denied Life's refund request.

From 1978 through 1986, Life reported interest income on State and municipal debt obligations which was includible in income for New York State purposes and exempt from Federal tax in the following amounts:

Life's Interest Income from
State and Municipal Bonds

1978	-0-
1979	-0-
1980	-0-
1981	$ 9,254.00
1982	60,878.00
1983	85,009.00
1984	6,794.00
1985	3,276.00
1986	111,485.00

3 Life had no New York State net operating losses available to carry forward from years prior to 1981.

AUTO

The following chart presents Auto's Federal and New York State net income or loss as reported on its New York State corporate franchise tax returns, without regard to any net operating loss carryover or carryback from other years, for the years 1982 through 1986:

Auto's Separate Federal and New York Net Income
(Loss) as Reported on Auto's New York Returns

	Federal	New York
1982	($1,148,942)	$3,143,125
1983	(524,260)	3,098,322
1984	(2,376,371)	1,142,340
1985	(9,280,712)	(6,879,101)
1986	3,528,158	6,533,442

Auto's 1986 New York net income as reported on Auto's New York return, without regard to any deduction attributable to net operating loss carrybacks or carryforwards was accepted upon audit by the Division.

Auto claimed an NOL deduction of $6,533,442.00 on its 1986 New York State corporate franchise tax return.

Auto's 1986 Federal NOL deduction, as calculated on a separate return basis for New York purposes, was $3,528,158.00.

Upon audit of Auto's 1986 return, the Division disallowed Auto's entire 1986 New York State NOL deduction. In statements of audit adjustment dated December 15, 1989, the Division asserted a tax deficiency of $582,525.00, plus applicable interest, as a result of such disallowance.

One Statement of Audit Adjustment asserts that Auto's "1986 federal income is used up by [its] 1982, 1983 and 1984 losses. None of [its] 1985 loss is carried to 1986. Since none of [its] 1985 federal loss is carried to 1986, none of [its] New York loss can be carried to 1986 either. Federal taxable income can only be reduced to zero."

The Division issued to Auto two notices of deficiency dated February 2, 1990, asserting a deficiency of corporation franchise tax in the amount of $527,273.00 and a deficiency of metropolitan transportation tax surcharge in the amount of $55,252.00.

On May 10, 1991, a Conciliation Order was issued by the Bureau of Conciliation and Mediation Services with respect to this matter which recomputed the statutory notices received by Life to assert a deficiency of $153,818.00, plus interest computed at the applicable rate.

Life paid $153,818.00 in tax, plus interest of $73,867.00, on April 16, 1991 in full payment of the asserted tax deficiency and interest computed at the applicable rate and now seeks a refund of the amount paid.

From 1982 through 1986 Auto reported interest income on State and municipal debt obligations which was includible in income for New York purposes and exempt from Federal tax in the following amounts:

Auto's Interest Income from State and Municipal Bonds	
1982	$3,373,871
1983	2,850,539
1984	2,729,310
1985	1,515,816
1986	1,258,293

OPINION

Section 1503(b) of the Tax Law sets forth modifications to be made to a life insurance company's Federal taxable income to determine the company's entire net income for New York purposes. Among the required modifications are the adjustments to net operating losses required by section 1503(b)(4), which provides, in part, that:

> "[a]ny 'net operating loss deduction' or 'operations loss deduction' allowable under sections one hundred seventy-two or eight hundred ten of the internal revenue code, respectively, which is allowable to the taxpayer for federal income tax purposes:
>
> (A) shall be adjusted to reflect the modifications required by the other paragraphs of this subdivision;
>
> (B) shall not, however, exceed any such deduction allowable to the taxpayer for the taxable year for federal income tax purposes; and
>
> (C) shall not include any such loss incurred in a taxable year beginning prior to January first, nineteen hundred seventy-four or during any taxable year in which the taxpayer was not subject to the tax imposed under section fifteen hundred one."

The Administrative Law Judge stated that Matter of Royal Indemnity Co. v. Tax Appeals Tribunal (75 NY2d 75, 550 NYS2d 610) had established that the State net operating loss deduction under section 1503(b)(4) could not exceed the amount of the Federal net operating loss deduction for the same year. The Administrative Law Judge also stated that we had already upheld, in Matter of Lehigh Valley Indus. (Tax Appeals Tribunal, May 5, 1988), the Division's interpretation of section 1503(b)(4) requiring that the Federal and State net operating loss deduction arise from the same source year. Although Lehigh Valley arose under Article 9-A of the Tax Law and involved section 208(9)(f) of the Tax Law, the Administrative Law Judge concluded that, under Matter of Royal Indemnity Co. v. Tax Appeals Tribunal (supra), the regulations and case law under section 208.9(f) are equally applicable to section 1503(b)(4). The Administrative Law Judge noted that petitioners conceded that Lehigh Valley was direct precedent, but argued that Lehigh Valley was incorrectly decided. The Administrative Law Judge did not address petitioners' arguments as to the correctness of the Lehigh Valley decision because she concluded that the decision was binding precedent.

On exception, petitioners ask us to reconsider our decision in Lehigh Valley. First, petitioners assert that our decision is not supported by the statute. Petitioners contend that our decision "ultimately stands or falls on the proper interpretation of the word 'allowable' in section 1503(b)(4)(B)" and that it cannot be said that the word "allowable" means "same source year."

We do not agree that our decision stands or falls on the meaning of the term "allowable." Instead, our decision is based on the calculation that is being performed under section 1503(b)(4) and the fact that this calculation begins with the allowable Federal deduction. We conclude that by referring to the Federal deduction as the starting point for the calculation, the Legislature meant to refer to both the amount and the source of that number. We reason that the legislative intention "to conform operating loss carryback and carryover practices with Federal law" (Matter of Telmar Communications Corp. v. Procaccino, 48 AD2d 189, 369 NYS2d 208) is achieved only if conformity is based on both the source and amount of the Federal deduction. As we stated in Lehigh Valley:

> "[p]etitioner's argument would reduce conformity to a mere numerical exercise with no regard to the other aspects of the computation of the net operating loss deduction. In short, the result would be a superficial conformity between numbers only, with no obvious, nor necessary correlation between the computation of the numbers" (Matter of Lehigh Valley Indus., supra).

Petitioners also argue that we have incorrectly relied on the decision in Matter of Eveready Ins. Co. v. New York State Tax Commn. (129 AD2d 958, 515 NYS2d 339, lv denied 70 NY2d 604, 519 NYS2d 1027) to support our conclusion in Lehigh Valley. In Eveready, the Court held that a taxpayer that had net operating losses in 1974 and 1975 was not entitled to a net operating loss deduction on its 1977 State return because the Federal net operating loss deduction for 1977 was based on a 1973 net operating loss which was not deductible for State purposes. Petitioners attempt to limit the meaning of Eveready by arguing that the case simply applied the Federal ordering rules for applying net operating losses. We think this characterization is too superficial. Eveready did apply the Federal ordering rules but these rules were applied first at the Federal level and then this result, i.e., the loss years comprising the Federal deduction, was held to control the calculation of the State deduction. As a result, the Court concluded that the taxpayer would not be entitled to deduct its 1974 and 1975 net operating loss carryovers "until the 1973 loss is exhausted as a deduction for Federal tax purposes" (Matter of Eveready Ins. Co. v. New York State Tax Commn., supra, 515 NYS2d 339, 341). This same rule was followed in Matter of American Employers' Ins. Co. v. State Tax Commn. (114 AD2d 736, 494 NYS2d 513).[4] These cases did not follow the approach of Matter

[4]Petitioners contend that American Employers was based on amount conformity and has no bearing on source year conformity (Petitioners' brief on exception, p. 19, fn. 7). We disagree. The taxpayer in American Employers' sought to deduct net operating losses from 1974 and 1975 on its 1976 State tax return. For Federal purposes, the taxpayer had carried back these losses and fully applied them to years preceding 1974 and as a result had no net operating loss to apply to 1976. If this case dealt only with amount conformity, the Court would have held simply that the taxpayer was not entitled to a net operating loss deduction on its 1976 State return because it had no such deduction on its Federal return. Instead, the Court went further and closed with the observation that the taxpayer would never be able to "claim the unused portion of the net operating loss deduction which appeared on its 1976 New York franchise tax return" (Matter of American Employers' Ins. Co. v. State Tax Commn., supra, 494 NYS2d 513, 514). The rationale for this statement seems to be that the taxpayer had already utilized the 1974 and 1975 net operating losses at the Federal level and suggests to us a source year conformity rule.

of Avien, Inc. (532 F2d 273)[5] and simply apply the Federal ordering rules to the available State net operating losses. In our view, Eveready and American Employers' both support the conclusion that the New York deduction has to arise from the same source year as the Federal deduction and sustain the methodology employed by the Division in this case.

Next, petitioners argue that "Casualty and Life had NOL carryforwards to 1986 that arose from multiple source years for both state and federal purposes and are entitled to rely on 20 NYCRR section 3-8.5" (Petitioners' brief on exception, p. 27). Petitioners claim that the application of this aggregation rule to Casualty would permit it to claim an NOL deduction of $160,326,363.00 in 1986 and of $131,211,407.00 in 1987 and would permit Life a net operating loss deduction of $55,612,270.00 in 1986. Petitioners made this same argument in their brief to the Administrative Law Judge (see, Petitioners' hearing brief, pp. 33-35). In response, the Administrative Law Judge went through a detailed analysis explaining that the rules of 20 NYCRR 3-8.1 and the ordering rules set forth at 20 NYCRR 3-8.1 were followed by the Division. This explanation was as follows:

> "Basically, section 3-8.1(c) requires that a taxpayer use a net operating loss carryover in a sequential manner. In the case of Casualty, it was required to carry back its 1981 net operating loss to the earliest of the three taxable years preceding, or in this case, 1978.[6] The effect of this carryback was to exhaust the 1981 State operating loss. After carryback of the 1981 Federal loss to offset Federal income for 1978 and 1979, Casualty had an unused Federal 1981 net loss of $202,078,452.00 which was larger than the amount required to reduce its 1986 Federal income to zero. Consequently, Casualty was not required to aggregate Federal loss years to offset its 1986 Federal income. As the Division notes in its brief, petitioners' attempt to apply the aggregation rule of section 3-8.5 under these circumstances is simply a method of circumventing the source year conformity rule.
>
> "For tax year 1987, Casualty was required to aggregate the unused portion of its Federal 1981 net operating loss and its Federal 1982 net operating loss. This yields an aggregate Federal net operating

[5]We see no basis for petitioners' continuing reliance on the decision in Avien given the Court of Appeals' specific declination in Royal Indemnity to follow the reasoning of Avien.

[6] 20 NYCRR 3-8.1(d) permits a taxpayer "to waive the entire carryback period with respect to a net operating loss for any taxable year ending after December 31, 1975," provided that the election be made in writing by the due date for filing a report for the taxable year of the net operating loss. Since Casualty filed no such election, it was required to make the carryback to 1978.

> loss of $575,830,816.00. Casualty's 1981 State loss was used up entirely (by carryback to 1978), thus aggregation of the 1981 and 1982 State losses yields an amount equal to the 1982 loss. Since the New York aggregate loss for 1981 and 1982 ($97,630,538.00) is less than the Federal aggregate loss, the maximum allowable net operating loss deduction is $97,630,538.00, as calculated by the Division.
>
> "The same analysis applies to the calculation of Life's 1986 net operating loss deduction. The unused amount of Life's Federal net operating losses for the years 1975 through 1978 were carried forward to reduce its Federal 1986 income from $55,612,275.00 to $53,879,613.00. This amount was then carried forward
>
> from 1981 to reduce Life's 1986 Federal net income to zero. For State purposes, the aggregate of net operating losses for the years 1975 through 1978 and 1981 was $103,215,996.00 (the loss available for the year 1978 and prior years was zero). Consequently, the maximum net operating loss available for 1986 is $53,879,613.00, the lesser of the Federal and State amounts" (Determination, conclusion of law "C").

Petitioners have not demonstrated to us that this explanation is incorrect. Instead, petitioners seek an application of the 3-8.5 aggregation rules without the limitation of source year conformity, i.e., they seek to aggregate net operating losses at the State level without regard to whether net operating losses from the same source years were included in calculating the aggregate Federal net operating loss. We see nothing in 3-8.5 that supports petitioners' interpretation that the aggregation rules apply without regard to the same source year rules. To the contrary, the examples in 3-8.5 only portray facts where the net operating losses aggregated at the State level arise from the same source year as the net operating losses aggregated at the Federal level. Thus, we agree with the Administrative Law Judge that the regulation was correctly applied to petitioners Casualty and Life.

Next, petitioners argue that the source year conformity and amount conformity rules violate both the Federal and State Equal Protection Clauses because these rules subject similarly situated taxpayers to different effective tax rates depending upon whether the taxpayer's New York income is also subject to tax by the Federal government. Petitioners argue that:

> "[t]axpayers, such as Petitioners, who earn income which is includible in New York taxable income but excludible from federal gross income, (footnote omitted) such as interest on New York State and City municipal bonds, have a reduced opportunity to utilize NOL carryovers

> and are therefore subject to a higher effective rate of tax than taxpayers who earn the same amount of New York taxable income from sources that the federal government chooses to tax, such as interest on corporate obligations" (Petitioners' brief on exception, pp. 32-33).

The Administrative Law Judge rejected petitioners' argument, stating:

> "I cannot see that the disparity perceived by petitioners results from anything other than the Legislature's decision to tax municipal bond income. The requirement of State and Federal amount and source year conformity does no more than further the policy choice of the Legislature. The addback generally causes New York net income to be greater than Federal taxable income in any year resulting in a net gain. In a loss year, it causes the New York net operating loss to be less than the Federal net operating loss. This is a perfectly consistent result. Petitioners' equal protection argument is premised on a comparison of investors holding two different kinds of investments, i.e., municipal bond holders like petitioners and other bond holders. These investors are differently situated as a result of legislative choices. There is no remedy in the equal protection clause for the inequity petitioners perceive (see, Matter of Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915)" (Determination, conclusion of law "D").

On exception, petitioners have not shown us that the Administrative Law Judge's analysis was incorrect; therefore, we affirm the Administrative Law Judge on this issue for the reasons stated in the determination.

Next, petitioners argue that Casualty is entitled to offset a portion of the 1986 deficiency with the refund it would have received if it had filed a timely refund claim carrying back the 1981 net operating loss to 1978. Petitioners' claim for this offset rests on the theory of equitable recoupment as articulated in National Cash Register Co. v. Joseph (299 NY 200).

The Administrative Law Judge held that National Cash Register allowed equitable recoupment only for taxes paid during the same period as that covered by the asserted deficiency. As a result, the Administrative Law Judge concluded that Casualty was not entitled to an offset of the 1978 refund because 1978 was not within the period of the asserted deficiency.

We agree with the Administrative Law Judge that if National Cash Register, a sales tax case, controlled the application of equitable recoupment under Article 33, Casualty would not be entitled to an offset because the tax at issue, for 1978, was not paid during the period of the asserted deficiency. However, we base our denial of the offset on section 1089(g) of the Tax Law which provides:

> "Jurisdiction over other years.--The [tax commissioner] 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."[7]

We conclude that section 1089 precludes us from considering whether Casualty made an overpayment for 1978 (see, Matter of Chamberlin, Tax Appeals Tribunal, January 30, 1992 and Matter of Hemmers, Tax Appeals Tribunal, March 1, 1990 [where we applied the similar provision of section 689(g) of the Tax Law]; see also, Crawford v. Commissioner, T.C. Memo 1969-182, 28 TCM 909 and Grayson v. Commissioner, T.C. Memo 1955-092, 14 TCM 318 [where the Tax Court held that it lacked jurisdiction, under the comparable Internal Revenue Code provisions, to grant a refund based on a net operating loss carryback to a year that was not the subject of a deficiency notice]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of The Aetna Casualty and Surety Company, Aetna Life Insurance and Annuity Company and The Automobile Insurance Company of Hartford, Connecticut are denied;

2. The determination of the Administrative Law Judge is affirmed; and

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[7] Section 1089(g) is applied to Article 33 by section 1519 of the Tax Law.

3. The petitions of The Aetna Casualty and Surety Company, Aetna Life Insurance and Annuity Company and The Automobile Insurance Company of Hartford, Connecticut are denied.

DATED: Troy, New York
June 23, 1994

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

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