STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
REFCO PROPERTIES, INC.	:	DETERMINATION DTA NO. 812292
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended January 31, 1985 and January 31, 1986.	:	

Petitioner, Refco Properties, Inc., 200 West Madison Street, Chicago, Illinois 60606, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended January 31, 1985 and January 31, 1986.

On April 25, 1994 and August 24, 1994, respectively, petitioner by its duly authorized representative, Fred O. Marcus, Esq., and the Division of Taxation by William F. Collins, Esq. (Robert Tompkins, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by January 21, 1995. The Division of Taxation submitted its documentary evidence on October 3, 1994. Petitioner, in turn, submitted a brief on November 16, 1994. The Division of Taxation submitted its brief on December 23, 1994. Petitioner submitted its reply brief on January 27, 1995, which began the six-month period for issuance of this determination. After review of the evidence and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner may claim a New York net operating loss deduction which exceeds its Federal net operating loss deduction.

FINDINGS OF FACT

Stipulated Facts

Petitioner, Refco Properties, Inc. ("Refco"), is a Delaware corporation with its principal

offices located at 200 West Madison Street, Chicago, Illinois.

The periods in issue in this matter are the tax years ending January 31, 1985 and January 31, 1986 (hereinafter "years in issue").

Refco timely filed Form 1120, U.S. Corporation Income Tax Return, for the years in issue.

Refco timely filed New York Form CT-3, New York Corporation Franchise Tax Report ("report"), for the years in issue.

For Federal income tax purposes, the following amounts were available to Refco as net operating loss ("NOL") carryforwards under section 172 of the Internal Revenue Code ("Code") in each of the years in issue:

Year Ended	Amount Available as NOL Carryforward Deduction
1/31/85	$18,219,247.00
1/31/86	18,115,862.00

A schedule showing the amount of NOL carryforward deduction ("NOLD") available to Refco during the years in issue is as follows:

Federal NOL Deduction Analysis	Year Ended 1/31/85	Year Ended 1/31/86
FTI (Federal Taxable Income) before NOLD	$ 103,385.00	$ 677,092.00
NOLD:		
Carryforward from 1/31/78	(34,483.00)	
Carryforward from 1/31/79	(68,902.00)	
Carryforward from 1/31/79		(677,902.00)
	-0-	-0-

New York NOL Deduction Analysis	Year Ended 1/31/85	Year Ended 1/31/86
ENI (entire net income) per prior audit before NOL deduction	$1,147,539.00	$2,015,672.00
NOLD:		
Carryforward from 1/31/78	(34,483.00)	
Carryforward from 1/31/79	(68,902.00)	
Carryforward from 1/31/79		(677,092.00)
Entire Net Income per Audit	$1,044,154.00	$1,338,580.00

On its U.S. corporation income tax returns for each of the years in issue, Refco claimed NOL carryforward deductions under section 172 of the Code in the following amounts:

Carryforward Utilization	Year Ended 1/31/85	Year Ended 1/31/86
From 1/78 to 1/85	$34,483.00	
From 1/79 to 1/85	68,902.00	
From 1/79 to 1/86		$677,092.00

The amounts utilized by Refco as NOL carryforward deductions on its U.S. corporation income tax returns for each of the years in issue were less than the amounts actually available under section 172 of the Code as set forth in paragraph 5 of the stipulation of facts.

On its report for the taxable year ending January 31, 1985, Refco claimed a NOL carryforward deduction in the amount of $4,309,738.00.

The amount claimed by Refco as a NOL carryforward deduction on its report for the year ending January 31, 1985 exceeded the amount utilized by Refco as a NOL carryforward deduction on its Federal return for that year.

On its report for the taxable year ending January 31, 1986, Refco claimed a NOL carryforward deduction in the amount of $677,092.00.

The amount claimed by Refco as a NOL carryforward deduction on its report for the year ending January 31, 1986 was equal to the amount utilized by Refco on its Federal return for that same year.

Refco's New York taxable income before apportionment and before any NOL deduction during the years in issue exceeded its Federal taxable income before NOL deductions during this same period due to various additions to New York taxable income, including depreciation

adjustments, required by Tax Law § 208(9). Refco's respective State and Federal taxable incomes before NOL deductions during the years in issue were:

Year Ended	Federal Taxable Income Before NOL	New York Taxable Income Before Apportionment and Before NOL
1/31/85	$103,385.00	$1,147,539.00
1/31/86	677,092.00	2,015,672.00

Upon audit, the Division of Taxation ("Division") reduced Refco's New York NOL carryforward deduction for the taxable year ending January 31, 1985 to the amount utilized by Refco on its Federal return for that same year and determined that additional tax and interest were due from Refco.

Refco subsequently made payment to the Division in satisfaction of the determination of additional tax and interest due.

Refco subsequently filed claims for refund of New York franchise tax paid for each of the years in issue.

On its claims for refund, Refco recomputed its New York corporation franchise tax liability for the years in issue by claiming NOL carryforward deductions in the following amounts:

NOL Deduction	Year Ended 1/31/85	Year Ended 1/31/86
From 1/78 to 1/85	$ 34,483.00	
From 1/79 to 1/85	990,804.00	
From 1/80 to 1/85	122,252.00	
From 1/80 to 1/86		$ 295,834.00
From 1/81 to 1/86		1,719,838.00

The amounts claimed as NOL carryforward deductions on Refco's claims for refund exceeded the Federal NOL carryforward deductions utilized by Refco on its Federal returns for the years in issue.

Refco's claims for refund were denied by the Division by letter dated July 23, 1993.

In denying Refco's claims for refund, the Division stated that a NOL deduction for New York purposes may not exceed the deduction allowed for that year for Federal income tax purposes under section 172 of the Code.

Refco timely protested and took exception to the Division's denial of the claims for refund by filing a petition, dated September 17, 1993, with the Division of Tax Appeals.

On April 25, 1994, Refco executed a Consent to Submission Without Hearing in this matter.

CONCLUSIONS OF LAW

A. Tax Law § 208(9)(f) provides:

> "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 . . . .
>
> * * *
>
> "(3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code . . . ."

Section 172(a) of the Code provides:

> "There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term 'net operating loss deduction' means the deduction allowed by this subsection."

B. Under Tax Law § 208(9), a New York taxpayer is entitled to claim a NOL deduction on its New York return, limited only by the amount allowed under section 172 of the Code. Petitioner argues that the deduction allowed under section 172 of the Code is not the deduction which a taxpayer claims or "utilizes" on its Federal return for any given years, but rather is the sum of all NOL carrybacks and carryforwards "available" for that year. Petitioner contends that "allowed", in the context of Tax Law § 208(9), does not mean "utilized" but instead must be interpreted to mean the same as "allowed" under section 172 of the Code. In effect, petitioner makes a contention similar to that made in Royal Indemnity Company v. Tax Appeals Tribunal (75 NY2d 75, 550 NYS2d 610), where the taxpayer argued that the New York NOL deduction for any taxable year is determined by applying Federal computational principles to the amounts of income or loss determined under New York law and is not limited to or dependent on the amount of the Federal NOL deduction allowed to the taxpayer for that same year. In Royal Indemnity, the court ruled, however, that the New York NOL deduction cannot exceed the

amount deducted on the Federal return for the corresponding year. The Division has taken a similar position in this matter, maintaining that the New York State NOL deduction in a particular tax year is limited by Tax Law § 208(9)(f)(3) to the Federal NOL deduction allowed in that year, which may not exceed Federal taxable income under section 172 of the Code.

C. Petitioner points out that Royal Indemnity is distinguishable from the present matter in that the taxpayer in that case was subject to tax under Article 33 of the Tax Law (insurance companies) rather than Article 9-A. In Royal Indemnity, the court stated that Tax Law § 1503(b)(4) provides that any NOL "allowable under section one hundred seventy-two . . . of the internal revenue code [26 USC § 172] which is allowable to the taxpayer for federal income tax purposes" may be used for State tax purposes. Under Tax Law § 1503(b)(4)(B), any such deduction "shall not, however, exceed any such deduction allowable to the taxpayer for the taxable year for federal income tax purposes . . . ." The court further recognized the similarities between the statutory language of Tax Law § 1503, as it refers to section 172 of the Code, and that of Tax Law § 208(9)(f), when it stated that:

> "Respondent's interpretation of Tax Law § 1503 is supported by the legislative history. The legislative history suggests that the deduction provisions contained in Article 33 of the Tax Law were intended to be substantially similar to those required under article 9-A (see, State Dept of Taxation and Fin., Mem. in support, Bill Jacket, L 1974, ch 649, at 3; State Ins. Dept, Mem. in support, id., at 7; Senate Budget Report on Bills in support, id., at 11, 12). The Legislature provided that the provisions in article 33 should be regarded as being in pari materia and construed in a like manner as substantially identical provisions contained in article 9-A (L 1974, ch 649, § 12). At the time of the enactment of article 33, the analogous article 9-A loss deduction provision (see, Tax Law § 208[9][f]) had been consistently interpreted as limiting the State loss deduction for the tax year to the amount of the Federal deduction (see, Matter of Abraham & Strauss v. Tully, 47 NY2d 207, 214)."

The court concluded that the New York NOL deduction cannot exceed the amount deducted on the Federal return for the corresponding year (Royal Indemnity Company v. Tax Appeals Tribunal, supra, citing Matter of American Employers' Insurance Co. v. State Tax Commn., 114 AD2d 736, 494 NYS2d 513; Matter of Eveready Insurance Co. v. New York State Tax Commn., 129 AD2d 958, 515 NYS2d 339, lv denied 70 NY2d 604, 519 NYS2d 1027).

D. Under Article 9-A of the Tax Law, the NOL deduction from entire net income is

permitted by Tax Law § 208(9)(f). This section's description of the deduction begins with the statement that the deduction "[s]hall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code . . . " (Tax Law § 208[9][f]; emphasis added). The starting point is clearly the Federal deduction. It is completely consistent with the normal use of the term "deduction" to find that it means the amount of the Federal number (Matter of Lehigh Valley Industries, Tax Appeals Tribunal, May 5, 1988).

The limitation to the amount of the Federal NOL deduction is premised on the understanding that section 208(9)(f) was "[p]lainly intended to conform operating loss carryback and carryover practices with Federal law in order to assist new businesses and those with fluctuating incomes" (Telmar Communications Corp. v. Procaccino, 48 AD2d 189, 369 NYS2d 208). That the amount of the State loss cannot exceed the amount of the Federal loss is essential to this principle of Federal conformity. Thus, it has been well settled that the Article 9-A NOL deduction is limited to the amount of the Federal NOL deduction for the corresponding year (Telmar Communications Corp. v. Procaccino, supra; Matter of Lehigh Valley Industries, supra).

E. The ordering rule in section 172(b)(2) of the Code limits the Federal NOL deduction when it provides that Federal taxable income must not be considered to be less than zero. Thus, the deduction allowed in a particular year will not be more than Federal taxable income in that year. The excess portion of a potential Federal NOL deduction that is more than Federal taxable income cannot be used for that year because there is no Federal taxable income against which to apply the excess portion of the NOL carrybacks and carryforwards. Ssection 172 of the Code specifically says that Federal taxable income cannot be taken below zero.

F. Based on the above, it is determined that petitioner may not claim a New York NOL deduction which exceeded its Federal NOL deduction for the corresponding year.

G. The petition of Refco Properties, Inc. is denied and the Division's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
July 20, 1995

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE