

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HAUTH INTERNATIONAL, INC.

DECISION

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 June 30, 1976 and June 30, 1977.

Petitioner, Hauth International, Inc., Box 711, Tenafly, New Jersey 07670, 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 June 30, 1976 and June 30, 1977 (File No. 45654).

Petitioner, by letter dated September 2, 1986, waived a hearing and submitted its case for decision by the State Tax Commission based upon the record as it exists. After due consideration of the record, the Commission renders the following decision.

ISSUES

I. Whether petitioner was entitled to claim consolidated Federal losses on its individual New York returns.

II. Whether claims for refund of corporation franchise tax, predicated on the assertion of a right to retroactively file combined franchise tax reports for prior years, were properly denied.

FINDINGS OF FACT

1. Petitioner, Hauth International, Inc. ("Hauth"), filed its New York State corporation franchise tax reports for the fiscal years ended June 30, 1976 and June 30, 1977 on an individual basis using consolidated figures reflecting the business operations of Hauth International, Inc. and a company

which is denominated "Marita" in the consolidated balance sheets. United States corporation income tax returns, Form 1120, were attached to both franchise tax returns but only the return for the period ended June 30, 1976 indicates that the Form 1120 was being filed on a consolidated basis.

2. For both fiscal years in issue, petitioner claimed a New York net operating **loss** deduction. For the year ended June 30, 1976, petitioner claimed said deduction in the amount of \$143,044.00 and for the period ended June 30, 1977 petitioner claimed said deduction in the sum of \$25,433.00. Both of these net operating **loss** deductions were derived from losses incurred in the period ended June 30, 1974 by Hauth, Marita Leather Export and Marita Leather Corp. For the period ended June 30, 1974, Marita Leather Export showed a loss on the consolidated balance sheet of \$6,392.40, Marita Leather Corp. showed a **loss** of \$116,140.18 and Hauth showed a loss of \$27,150.57.

3. On March 21, 1983, petitioner filed claims for refund of corporation franchise tax for the fiscal years ended June 30, 1976 and June 30, 1977, based upon **loss** carrybacks from the years ended June 30, 1978, June 30, 1979 and June 30, 1980. Said losses were stated as follows:

<u>Period of Loss</u>	<u>Amount of Federal Loss</u>	<u>Amount of New York State Loss</u>
June 30, 1978	\$42,150.00	\$42,025.00
June 30, 1979	3,668.00	3,367.00
June 30, 1980	21,886.00	21,636.00

Petitioner provided the following explanation on each of its claims:

"This form **is** filed in case that carryforeward [sic] losses are insufficient for period 6/30/76 and 6/30/77."

4. Petitioner also filed amended New York State corporation franchise tax reports for the periods ended June 30, 1974, June 30, 1975, June 30, 1976 and

June 30, 1977, all of which incorporated the net operating **loss** carryforwards from the fiscal year ended June 30, 1974.

5. Prior to petitioner's filing of said refund claims, the Audit Division issued statements of audit adjustment for the periods ending June 30, 1976 and June 30, 1977. The statement for the period ended June 30, 1976 stated a tax deficiency of \$7,893.09 and interest of \$1,922.75, for a total amount due of \$9,815.84. From this figure, the Audit Division credited \$313.17 from the period ended June 30, 1972, leaving a balance due of \$9,502.67. The Statement of Audit Adjustment for the period ended June 30, 1977 indicated a tax deficiency of \$2,309.80 and interest of \$366.33, for a total due of \$2,676.13. The explanation on both statements of audit adjustment stated, in pertinent part, as follows:

"Under New York State Corporation Tax Law, a corporation who reports on a consolidated basis with the federal government must report on an individual basis with the State of New York.

The adjustment shown above reflects a substitution of individual amounts for Hauth International, Inc. with the consolidated figures that were originally reported. The disallowance of the net operating **loss** deduction **shown** on the original return, is a result of the substitution for individual amounts."

6. On September 10, 1979, the Audit Division issued two notices of deficiency to Hauth International, Inc. The first was for the period ended June 30, 1976 and stated a tax deficiency in the sum of \$7,579.92 with interest of \$2,019.83, for a total amount due of \$9,599.75. The second was for the period ended June 30, 1977 and stated a tax deficiency of \$2,309.80 with interest of \$395.91, for a total amount due of \$2,705.71. By letter dated October 3, 1984, the Audit Division denied petitioner's claims for refund for the fiscal year ended June 1978 and the fiscal year ended June 1979 because said claims were filed beyond three years from the due date

of the **loss** year return. The claim for the June 1980 loss was deemed timely filed and petitioner was instructed to provide further documentation in connection with its claim for refund.

7. By letter dated November 6, 1979, petitioner protested both notices of deficiency issued to it on September 10, 1979. On March 29, 1985, the petitioner filed a perfected petition, protesting both the disallowance of the **loss** carryforwards and the denials of refund claims. By letter dated September 2, 1986, the petitioner, by its president, Peter Hauth, waived a hearing in this matter and submitted the case for decision by the State Tax Commission based upon the record as it exists.

8. Hauth International, Inc. was incorporated under the laws of the State of New York in April of 1964 and began business in the same year. It **is** engaged in the business of importing hides, skins and leather.

9. Marita Leather Corp., a corporation incorporated under the laws of the State of New York, was acquired by stock purchase by Hauth International, Inc. on May 4, 1973. For the period ended June 30, 1974, Marita Leather Corp. showed a net operating **loss** of \$116,140.18. This figure was reflected on the consolidated balance sheet attached to the New York State Corporation Franchise Tax Report of Hauth International, Inc. for the same period.

10. The consolidated balance sheet attached to the 1974 New York State Corporation Franchise Tax Report also indicated that another company, Marita Leather Export, was included in the consolidated figures. **Also** attached to the return **is** a sheet of paper stating, "This report covers the following companies: Marita Leather Export Corporation, Marita Leather Corporation and Hauth International, Inc." Other than this notation,

Hauth International, Inc. never requested permission to file its corporation franchise tax reports on a combined basis with any other company.

11. Upon audit, the **loss** claimed on the franchise tax report for the period ended June 30, 1974 was found to be a consolidated loss and was reduced to an individual **loss** of Hauth International, Inc. in the sum of \$20,866.00 for State purposes. This loss was set up **as** if incurred on an individual basis ("as if" basis) and then applied to the periods ended June 30, 1971, June 30, 1972 and June 30, 1973. Since there was **no** profit against which to apply a **loss** for the period ended June 30, 1971, calculated on an "as if" basis, the claim for refund for that period was denied. The entire state **loss** of \$20,866.00 was allowed for the period ended June 30, 1972 and a refund was issued for that period. For the period ended June 30, 1973, no loss carryforward remained to offset profit and therefore the claim for refund was denied. For the period ended June 30, 1975, the Audit Division did find that tax was due but did not issue an assessment because the date was beyond the three year statute **of** limitations. For the periods ended June 30, 1976 and June 30, 1977, statements of audit adjustment and notices of deficiency were issued as stated above.

12. The petitioner contends that the **loss** reported in 1974 should be carried forward and applied to the years in issue and that the Audit Division's modification was arbitrary. Petitioner also argues, in the alternative, that if the Audit Division denies the **loss** carryforward then the losses suffered by Hauth in the fiscal years ended June 30, 1978, June 30, 1979 and June 30, 1980 should be carried back and, ~~viz.~~, applied to the years in issue, fiscal years ended June 30, 1976 and June 30, 1977.

CONCLUSIONS OF LAW

A. That, for the years in issue, 1976 and 1977, Tax Law § 211.4 states, in pertinent part, as follows:

"In the discretion of the tax commission, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations or by interests which own or control either directly or indirectly substantially all the capital stock of one or more other corporations, may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the tax commission may require...."

B. That former 20 NYCRR 5.28 states, in pertinent part, as follows:

"Combined Reports; When Required or Permitted (Law Section 211.4).

a. Combined reports may be required or permitted in the following cases:

1. Where any taxpayer owns or controls, either directly or indirectly, substantially all the capital stock of one or more other corporations.
2. Where substantially all the capital stock of any taxpayer is owned or controlled, either directly or indirectly, by one or more other corporations.
3. Where substantially all the capital stock of the taxpayer and substantially all the capital stock of one or more other corporations are owned or controlled, either directly or indirectly, by the same interests.

b. In any case where the test of stock ownership or control set forth above is met, a combined report may be permitted or required by the State Tax Commission, in its discretion. In determining whether, in a case where the test of stock ownership or control is met, the tax will be computed on the basis of a combined report, the State Tax Commission will consider various factors, including the following: (1) whether the corporations are engaged in the same or related lines of business; (2) whether any of the corporations are in substance merely departments of a unitary business conducted by the entire group; (3) whether the products of any of the corporations are sold to or used by any of the other corporations; (4) whether any of the corporations perform services for, or lend money to, or otherwise finance or assist in the operations of, any of the other corporations; (5) whether there are other substantial intercompany transactions among the constituent corporations."

C. That former 20 NYCRR 5.11 states as follows:

"Form of Reports on Combined Basis. In all cases where a combined report is required or permitted to be filed (see section 5.28), such report must be filed on form CT-3A, setting forth the information requested. In addition, a separate report on Forms CT-3 and CT-3A-1 are required to be filed for each corporation included in the combined report, but such separate reports need not repeat any information which is contained in the combined report."

D. That from the returns filed by petitioner it **is** apparent that it filed as a separate and individual entity using consolidated figures which represented not only its **own** operations but the operations of at least one wholly-owned subsidiary, Marita Leather Corp. The Tax Commission has never been apprised of the status of Marita Leather Export. Although the taxpayer filed on a consolidated basis for Federal purposes, it never requested permission to file on a combined basis for State purposes, nor did it ever file proper returns prescribed by the former regulation at 20 NYCRR 5.11 for combined reports. Further, the existence and relationship of subsidiaries to the parent corporation were never disclosed and therefore the Commission could not have applied the criteria in Tax Law § 211.4 or former 20 NYCRR 5.28(b) and determined if a combined report was proper.

E. That 20 NYCRR 6-2.4(a), adopted during 1976, provides in pertinent part:

"A taxpayer must make a written request for permission to file a combined report... The request must be received by the Tax Commission not later than **30** days after the close of its taxable year."

This regulation applies to all taxable years beginning on or after January 1, 1976, including the second year in issue, ~~i.e.~~, fiscal year ended June 30, 1977. Petitioner failed to comply with this regulation and therefore was not entitled to file on a combined basis for tax year ended June **30**, 1977.

F. That, since petitioner did not file **on** a combined basis for the years in issue but **on** a separate basis for New York State purposes, it should have computed its net operating **loss** deduction as if it were filing **on** a separate basis for Federal income tax purposes. (20 NYCRR § 3-8.1(a); Ruling of the State Tax Commission, July 21, 1965.)

G. That petitioner's reliance upon Matter of Glick Construction Corp. v. New York State Tax Commission, (95 AD2d 129) for the principle that prior approval to file **on** a combined basis was not required for the years **in** issue was misplaced. Glick Construction Corp. had filed **on** a combined basis for five years prior to the years in issue and said returns had been accepted as such by the Audit Division. **In** the instant case, however, Hauth International, Inc. filed **on** an individual basis both prior and subsequent to the years in issue, never **on** a combined basis. Therefore, the issue of whether or not prior approval to file **on** a combined basis was required is moot.

H. That Tax Law § 1087(d) states, in pertinent and applicable part, as follows:

"Overpayment attributable to net operating **loss** carryback.---A claim for credit or refund of **so** much of an overpayment under article nine-a as is attributable to the application to the taxpayer of a net operating **loss** carryback shall be filed within three years from the time the return was due for the taxable year of the **loss**....

The claims for refund filed by Hauth International, Inc. **on** March 1, 1983 seeking to apply net operating loss deductions for the fiscal years ended June **30**, 1978, June **30**, 1979 and June 30, 1980 **in** the **sum** of \$67,028.00 were not timely with regard to the first two periods. (20 NYCRR 8-2.4[a][1].) The third claim was timely filed but **no** substantiating documentation was


submitted to the Audit Division, as requested, sufficient to justify said carryback loss.

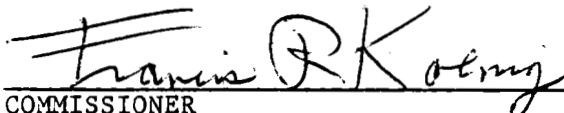
I. That the petition of Hauth International, Inc. is denied and the notices of deficiency dated September 10, 1979 are sustained, together with penalty and such additional interest as may be lawfully owing.

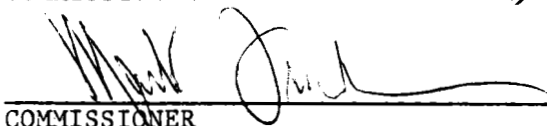
DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER