

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH F. McCRINDLE	:	DECISION
for Redetermination of a Deficiency or for		
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1980.	.	

Petitioner, Joseph F. McCrindle, c/o Rose, Feldman, Radin, Pavone & Skehan, 805 Third Avenue, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 46892).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1985 at 2:45 P.M., with additional information to be submitted by August 19, 1985. Petitioner appeared by Rose, Feldman, Radin, Pavone & Skehan (Elliott Glass, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a net operating loss carryover from previous years to the year in issue where all returns, including the return for the year in issue, were filed subsequent to the commencement of the audit.

FINDINGS OF FACT

1. Petitioner, Joseph F. McCrindle, a resident of New Jersey, owned various residential properties within New York State from 1971 through 1980. He operated these properties at considerable losses. Such losses totalled

were sold at a loss in 1975, 1976 and 1977. Petitioner also received \$250,000.00 from a New York resident trust during this period; thus, his net losses were \$880,000.00. In 1979 and 1980, petitioner sold some of his New York properties at a profit.

2. On June 7, 1982, the Audit Division sent a letter to petitioner informing him that information received by the Division indicated that in 1980 he derived income from the sale of property located in New York, but that no New York income tax return had been filed under his name. Petitioner replied that since he had New York net losses for the years 1971 through 1979, he filed no New York nonresident returns for those years. He also replied that had such returns been filed, there would have been a New York State net operating loss carryover available to petitioner which would have exceeded his 1980 New York income resulting in no New York tax. Petitioner reported his New York losses on his Federal returns from 1971 through 1979; however, his income from outside New York was substantial and he had no net operating loss for Federal income tax purposes.

3. On February 24, 1983, petitioner filed New York State income tax nonresident returns for each of the taxable years 1971 through 1980. On each of the returns for the years 1971 through 1978, petitioner reported New York net operating losses as follows:

1971	\$ 3,736.00
1972	55,157.00
1973	82,120.00
1974	59,766.00
1975	99,008.00
1976	169,767.00
1977	257,251.00
1978	145,783.00

For 1979, petitioner had New York adjusted gross income of \$36,819.00. He

\$671,809.00 to offset his income resulting in a net operating loss available for carryover of \$634,990.00. In 1980, petitioner reported New York adjusted gross income of \$87,165.00 against which he applied his available net operating loss resulting in zero New York tax and a net operating loss available for carryover of \$547,825.00.

4. On September 1, 1983, the Audit Division issued a Notice of Deficiency against petitioner asserting personal income taxes due of \$8,317.66, plus penalty of \$3,035.94 and interest of \$2,360.55, for a total due of \$13,714.15 for the year 1980. A Statement of Personal Income Tax Audit Changes issued May 13, 1983 explained that petitioner's New York taxable income was recomputed to be \$41,819.00 and that the net operating loss carryover was disallowed because "the losses were not claimed in the loss years." Petitioner does not object to the recomputation of taxable income, but maintains that he has a sufficient net operating loss carryover to reduce his New York income for 1980 to zero.

CONCLUSIONS OF LAW

A. That, during the year in issue, a net operating loss could be carried back three years. Any amount not used to offset income in the three years could be carried over to as many as seven years following the loss year (five years for net operating losses incurred in tax years ended before 1976).

I.R.C. §§172(a) and 172(b).

B. That section 632(b)(3) of the Tax Law provides that, with respect to nonresident individuals, "[d]eductions with respect to capital losses, net long-term capital gains and net operating losses shall be based solely on income, gain, loss and deduction derived from or connected with New York sources, under regulations of the tax commission."

determined in the same manner as the corresponding federal deductions." A nonresident may claim a New York net operating **loss** deduction carryback or carryover even if his Federal income tax return does not reflect an actual net operating **loss**. Graham v. State Tax Commission, 48 A.D.2d 444.

C. That section 687(d) of the Tax Law imposes a limitation on the period during which a claim for refund may be filed for an overpayment attributable to a net operating **loss** carryback. The Audit Division's reliance on this section is misplaced in that neither a claim for refund nor a carryback is involved in the instant case. There is no period of limitations for filing returns. The limitation applies only to claiming a refund. The only time limitation applicable to claiming a net operating **loss** carryover occurs where the taxpayer elects to forego the three year carryback in which case the loss may be carried forward only. Such election must be made by the return due date, including extensions, for the tax year of the net operating **loss** for which the election is to be in effect. I.R.C. §172(b)(3)(C); 20 NYCRR 131.7(c)(2)(ii) effective November 19, 1984. Petitioner was not subject to the latter limitation because he had net operating losses for the three year carryback periods for the years 1975 through 1978 thus enabling him to carry over the losses for 1975 through 1978 to 1979 and 1980. The fact that the returns for 1971 through 1980 were not timely filed is immaterial since petitioner was not claiming a refund of an overpayment attributable to a net operating **loss** carryback. Therefore, petitioner is allowed a net operating loss carryover for taxable year 1980.

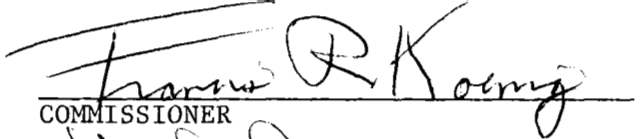
D. That the petition of Joseph F. McCrindle is granted and the Notice of Deficiency issued September 1, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1984

PRESIDENT


COMMISSIONER


COMMISSIONER