

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

IDS LIFE INSURANCE COMPANY OF NEW YORK

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Articles 27 and 33 of the Tax Law for the
Year 1980.

Petitioner, IDS Life Insurance Company of New York, 14 Computer Drive
West, Albany, New York 12205, filed a petition for redetermination of a deficiency
or for refund of corporation franchise tax under Articles 27 and 33 of the Tax
Law for the year 1980 (File No. 54150).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of
the State Tax Commission, W. Averell Harriman State Office Campus, Albany, New
York, on January 28, 1986 with all briefs to be submitted by February 25, 1986.
Petitioner appeared by Michael B. Carlin, Esq. The Audit Division appeared by
John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether the failure of the Audit Division to serve an answer within
the period prescribed by 20 NYCRR 601.6 warrants finding the Audit Division in
default.

II. Whether petitioner was entitled to claim net operating loss carry-
forwards to a particular year for New York State purposes which in their
aggregate amounts equaled the net operating losses claimed on the Federal
return for the same carryforward year, but which were comprised, in part, of
different loss years for New York State and Federal purposes.

FINDINGS OF FACT

1. Petitioner, IDS Life Insurance Company **of** New York, was incorporated in 1972 in the State of New York. Its principal business activity consists of the sale of life insurance.

2. During the years 1972 through 1978, petitioner incurred net operating losses. It had a net profit during the years 1979 and 1980.

3. Petitioner filed a State of New York Franchise Tax Return for Insurance Corporations for the year 1980. On this return, petitioner claimed net operating **loss** carryforwards from the years 1973 through 1978. However, on its Federal return for the same period petitioner claimed net operating loss carryforwards from the year 1973. The aggregate amount of the claimed net operating losses were the same for both New York State and Federal purposes.

4. On July 17, 1984 the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax in the amount **of** \$15,881.00 plus interest in the amount of \$7,534.81 for a total amount due of \$23,415.81. To the extent at issue herein, the Notice of Deficiency was premised upon the Audit Division's position that petitioner was not entitled to a net operating **loss** carryforward to the year 1980 from the years 1973 through 1978.

5. On or about April 26, 1985, petitioner was advised that its petition was accepted as a perfected petition. The answer **of** the Audit Division was served on petitioner on or about August 15, 1985.

CONCLUSIONS OF LAW

A. That 20 NYCRR 601.6(a)(1) requires the Law Bureau to serve an answer within sixty days of the acknowledgement of the receipt of an acceptable perfected petition. It is clear that the answer was served on petitioner within the sixty day period.

prescribed by 20 NYCRR 60.6(a)(1). However, where there has been no showing of prejudice to petitioner from the failure to serve an answer within the time required, petitioner's argument that the failure to serve the answer in a timely manner warrants granting relief in its favor must be rejected (see Matter of Bower v. New York State Tax Comm., 86 A.D.2d 932).

B. That for taxable years commencing before January 1, 1974, insurance corporations such as petitioner were subject to the tax imposed by section 187 of Article 9 of the Tax Law. The tax was measured by the insurance corporation's premiums written on risks located or resident in this state.

C. That for taxable years commencing on or after January 1, 1974, insurance corporations are subject to franchise taxes imposed by Article 33 of the Tax Law.

D. That section 1503 of the Tax Law sets forth the rules by which entire net income is calculated. A net operating **loss** deduction is permitted by paragraph (4) of subdivision (b) as follows:

"Any 'net operating loss deduction' ...allowable under section...one hundred seventy-two...of the internal revenue code...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."

E. That, in view of section 1503(b)(4)(C) of the Tax Law, the Audit Division properly concluded that petitioner may not claim a net operating **loss** carryforward from the year 1973.

F. That section 1503(b)(4) of Article 33 of the Tax Law and section 208.9(f) of Article 9-A of the Tax Law, which allow corporate taxpayers subject to taxation under the respective articles net operating loss deductions, are substantially similar and are to be construed in a like manner (L. 1974, Ch. 649, section 12).

G. That in Matter of The Employers' Fire Insurance Company, State Tax Commission, April 3, 1981, determination confirmed, Matter of The Employers' Fire Insurance Company v. State Tax Comm., Cal. No. 3 (Sup. Ct., Albany Co., November 12, 1981), the Commission noted, with regard to Tax Law sections 1503(b)(4) and 208.9(f):

"That the allowance, by the aforementioned statutes, of net operating loss carryback and carryforward is intended to conform New York practices with Federal practices, and to assist new businesses and those with fluctuating incomes. See Telmar Communications Corp. v. Procaccino, 48 A.D.2d 189 (3d Dept. 1975); American Can Co. v. State Tax Commission, 37 A.D.2d 649 (3rd Dept. 1971); Governor's Memorandum, N.Y.S. Legislative Annual 1961, 461; Dept. of Taxation and Finance Memorandum to the Governor, S. Int. No. 2842, Pr. No. 4441, April 6, 1961 (L. 1961, Ch. 713 Bill Jacket)."

H. That in view of the foregoing policy, it is clear that "[t]here can be no carryforward of a net operating loss to years in which there was no Federal net operating **loss** carryforward stemming from the same **loss**." (Matter of The Employers' Fire Insurance Company, supra at State Tax Commission, April 3, 1981; see also Matter of American Employers' Insurance Company v. State Tax Comm.,

114 A.D.2d 736). Accordingly, the Audit Division properly disallowed the net operating loss carryforward from the years 1974 through 1978 since there was no corresponding Federal net operating loss carryforward from 1974 to 1978.

I. That the petition of IDS Life Insurance Company of New York is denied and the Notice of Deficiency dated July 17, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986

Robert W. Allen
PRESIDENT

• *Francis R. Koenig*
COMMISSIONER

Mark J. Judd
COMMISSIONER