

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
American Employers' Insurance Co. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article 33 of the Tax Law for the Year 1976. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon American Employers' Insurance Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

American Employers' Insurance Co.
One Beacon St.
Boston, MA 02108

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
20th day of December, 1983.

David Parchuck

James A. Haglund
pursuant to Tax Law section 174

Authorized to administer oaths

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Authorized to administer oaths

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 20, 1983

American Employers' Insurance Co.
One Beacon St.
Boston, MA 02108

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 & 1519 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
John S. Breckenridge
Everett, Johnson & Breckenridge
20 Exchange Place
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
AMERICAN EMPLOYERS' INSURANCE 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 1976.

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DECISION

Petitioner, American Employers' Insurance Company, One Beacon Street, Boston, Massachusetts 02108, filed a petition for redetermination of a deficiency or for refund of franchise tax on insurance corporations under Article 33 of the Tax Law for the year 1976 (File No. 31520).

On March 25, 1983, petitioner, by its representative, Everett, Johnson & Breckinridge, Esqs. (John S. Breckinridge, Esq., of counsel), waived a formal hearing and consented to submission of this matter to the Tax Commission on the basis of the contents of the file, with all briefs to be submitted by August 8, 1983.

ISSUE

Whether petitioner is entitled to a 1976 New York net operating loss deduction based upon its 1974 and 1975 New York net operating losses, notwithstanding that it claimed no federal net operating loss deduction in 1976.

FINDINGS OF FACT

1. On September 12, 1980, the Audit Division issued to petitioner, American Employers' Insurance Company ("American"), a Notice of Deficiency asserting additional franchise tax due under Article 33 of the Tax Law for the

year 1976 in the amount of \$16,185.00, plus interest thereon. The explanatory Statement of Audit Adjustment, issued under the same date, stated:

"A New York net operating loss deduction is allowed in the same manner allowed under section 172 of the Internal Revenue Code, carried back three years, and then ahead five. Since the losses incurred in 1974 and 1975 would have been carried back on an 'as if' basis, they must be treated in that way for New York State tax purposes."

2. American is an insurance corporation organized under the laws of the Commonwealth of Massachusetts and licensed to do an insurance business in the State of New York as a property and casualty insurer.

3. American timely filed New York franchise tax reports under section 187 of Article 9 of the Tax Law for the years prior to 1974, and under Article 33 for the taxable years 1974 through 1976.

4. American is a member of an affiliated group whose parent is Commercial Union Corporation, and its income and deductions are included in the consolidated federal income tax return filed by Commercial Union Corporation. For purposes of Article 33, American's income and deductions were computed as if it were filing on a separate basis for federal income tax purposes, and all references herein to American's federal income and net operating losses are amounts computed as if it were filing on a separate basis for federal income tax purposes.

5. American incurred net operating losses in the taxable years 1974 and 1975 for federal and New York tax purposes.

6. American's New York net operating loss for the taxable years 1974 and 1975 amounted to \$401,839 and \$6,229,480, respectively.

7. American's 1974 and 1975 federal net operating losses, \$829,224 and \$3,794,576, respectively, were carried back for federal income tax purposes to

years prior to 1974 and were utilized in full as federal net operating loss deductions in such years.

8. American's 1976 federal income tax return reflected income of \$4,168,268. No net operating loss deduction was claimed.

9. In its 1976 New York franchise tax report, American claimed a net operating loss deduction of \$4,623,800.

10. American takes the position that it is entitled to a 1976 net operating loss deduction based upon its 1974 and 1975 net operating losses and the amount of that deduction equals \$6,631,319, the sum of its 1974 and 1975 net operating losses, \$401,839 and \$6,229,480, respectively.

CONCLUSIONS OF LAW

A. 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.

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

Section 1501 imposes a franchise tax similar to that which is imposed on business corporations by Article 9-A. Pursuant to section 1502, this tax is calculated on one of four alternative bases, the first being the taxpayer's entire net income or the portion thereof allocated to New York.

In addition, section 1510 imposes a tax, similar to that imposed by former section 187, measured by the taxpayer's premiums.

C. That section 1503 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."

The above-quoted paragraph is substantially similar to section 208.9(f), which allows the corporate taxpayer subject to taxation under Article 9-A a net operating loss deduction. These two provisions, section 1503(b)(4) and 208.9(f), are in pari materia and must be construed in a like manner. L. 1974, Ch. 649, section 12.

D. That this Commission previously decided, on similar facts, that an insurance corporation subject to taxation under Article 33 was not entitled to carry over a net operating loss to a taxable year in which it claimed no federal carry over arising from the same loss. Matter of The Employers' Fire Insurance Company, State Tax Comm., April 3, 1981, determination confirmed, Matter of The Employers' Fire Insurance Co. v. State Tax Comm., Index No. 7354-81 (Sup. Ct. Albany Co. Nov. 12, 1981). In reaching this conclusion, the Commission considered arguments similar to those advanced by petitioner in the within proceeding, and relied upon the plain language of section 1503, as well as regulations promulgated under and decisions interpretative of section 208.9(f). 20 NYCRR 3-8.2(d); section 3.12(d), Ruling of State Tax Comm.,

March 14, 1962; Matter of Telmar Communications Corp. v. Procaccino, 48 A.D.2d 189 (3d Dept.); Matter of Savin Business Machines Corp., State Tax Comm., March 24, 1970; Matter of Hi-Lo Food Centers, Inc., State Tax Comm., March 9, 1970; Matter of Spedcor Electronics, Inc., State Tax Comm., March 9, 1970; Matter of Vision Associates, Inc., State Tax Comm., March 9, 1970.

Further, the limitation of a taxpayer's New York net operating loss deduction to that amount reflected on the federal return for the same taxable year is buttressed by the recent court holdings in Matter of Sheils v. State Tax Comm. (52 N.Y.2d 954), Matter of Gurney v. Tully (51 N.Y.2d 818) and Matter of Berg v. Tully (461 N.Y.S.2d 562 [3d Dept.]). In Gurney, individual taxpayers were denied net capital loss carryovers on their New York returns for the years in dispute because no capital loss carryovers were used in arriving at the federal adjusted gross income on their federal returns for the same period. The three cited cases concerned Tax Law section 612 which, notably, does not contain the express limitation found in section 1503(b)(4)(B).

E. That petitioner is not entitled to a 1976 net operating loss deduction based upon losses incurred in 1974 and 1975, which losses were carried back to and exhausted in years prior to 1974 for federal purposes.

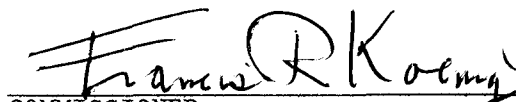
F. That the petition of American Employers' Insurance Company is hereby denied, and the Notice of Deficiency issued on September 12, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER