

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Turnpike Tobacco Stores, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 6/30/79. :

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Turnpike Tobacco Stores, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Turnpike Tobacco Stores, Inc.
171 E. Industry Court, P.O. Box 291
Deer Park, NY 11729

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
9th day of November, 1984.

David Parchuck

[Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Turnpike Tobacco Stores, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 6/30/79. :

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Charles J. Rappaport, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles J. Rappaport
Gandin, Schotsky & Rappaport
425 Broad Hollow Rd.
Melville, NY 11747

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
9th day of November, 1984.

David Parchuck

Quinn R. Hupel
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Turnpike Tobacco Stores, Inc.
171 E. Industry Court, P.O. Box 291
Deer Park, NY 11729

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 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
Charles J. Rappaport
Gandin, Schotsky & Rappaport
425 Broad Hollow Rd.
Melville, NY 11747
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| TURNPIKE TOBACCO STORES, INC. | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Franchise Tax on Business Corporations | : | |
| under Article 9-A of the Tax Law for the Fiscal | : | |
| Year Ended June 30, 1979. | : | |

Petitioner, Turnpike Tobacco Stores, Inc., 171 East Industry Court, P.O. Box 291, Deer Park, New York 11729, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal year ended June 30, 1979 (File No. 34899).

On July 6, 1983, petitioner, by its representative, Gandin, Schotsky & Rappaport, P.C., waived a formal hearing before the State Tax Commission and requested the Commission to render its decision based on the Department of Taxation and Finance file, the stipulation of facts executed by Gandin, Schotsky & Rappaport, P.C. (Charles J. Rappaport, Esq., of counsel) on behalf of petitioner and by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel) on behalf of the Audit Division, and memoranda of law to be submitted by January 31, 1984.

ISSUE

Whether petitioner is entitled to a New York net operating loss deduction, which is premised on a deduction for wages and salaries attributable to the federal new jobs tax credit, but which exceeds its federal net operating loss deduction for the same taxable year.

FINDINGS OF FACT

1. Petitioner, Turnpike Tobacco Stores, Inc., showed a net operating loss of \$76,884.00 on its federal corporation income tax return for the fiscal year ended June 30, 1977, its first year of business. This net operating loss was carried forward for federal income tax purposes to fiscal year 1978 in the amount of \$31,242.00 and to fiscal year 1979 in the amount of \$45,642.00.

2. For the fiscal year ended June 30, 1978, petitioner's federal return showed taxable income of \$31,242.00, and \$93,310.00 available for the new jobs tax credit.

3. On its New York franchise tax report for the fiscal year ended June 30, 1978, petitioner claimed a deduction in the amount of \$93,310.00 for that portion of wages and salaries not deductible for federal purposes under Internal Revenue Code section 280C, relying on Tax Law section 208.9(a)(7). Petitioner's report thus showed "adjusted negative entire net income" of \$62,068.00 (federal taxable income of \$31,242.00 less the deduction of \$93,310.00, but before any New York net operating loss deduction).

4. Commencing with the fiscal year ended June 30, 1979, petitioner requested and received permission to file New York franchise tax reports on a combined basis with S & L Wholesalers, Inc. and 218 Broad Hollow Corp.

5. For the fiscal year ended June 30, 1979, petitioner's New York combined entire net income, before any net operating loss deduction, was \$157,584.00. Petitioner claimed a net operating loss deduction of \$138,952.00 comprised of two carryovers: a net operating loss in the amount of \$76,884.00 carried forward from fiscal year 1977, and a net operating loss in the amount of \$62,068.00 carried forward from fiscal year 1978 (see Finding of Fact "3").

6. On August 26, 1981, the Audit Division issued to petitioner a Notice of Deficiency, asserting additional franchise tax under Article 9-A of the Tax Law for the fiscal year ended June 30, 1979 in the amount of \$7,993.00, plus interest. This asserted deficiency was based on the Audit Division's restriction of the net operating loss deduction to the amount of \$45,642.00, the amount of petitioner's net operating loss deduction for federal purposes.

7. Petitioner seeks redetermination of the deficiency pursuant to Tax Law section 208.9(a)(7), which expressly permits the corporate taxpayer to deduct wages and salaries otherwise disallowed under the federal jobs tax credit.

CONCLUSIONS OF LAW

A. That, in general, for purposes of the franchise tax on business corporations, entire net income is defined as "total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department...". Tax Law section 208.9. At issue in this proceeding are two modifications to the base of federal taxable income: the deduction for wages and salaries attributable to the federal jobs tax credit (section 208.9[a][7], applicable to taxable years beginning on or after January 1, 1977), and the net operating loss deduction (section 208.9[f]).

B. That Internal Revenue Code section 44B authorizes a tax credit for the employment of certain new employees, the amount of the credit to be determined under Code sections 51, 52 and 53. For fiscal year 1978, the year in which petitioner claimed the jobs credit on its federal return, the amount of the allowable credit was equal to 50 percent of the excess of the aggregate unemployment insurance wages paid during 1977 over 102 percent of the aggregate unemployment insurance wages paid during 1976. Code section 51(a)(1). Correlatively, no

deduction is permitted "for that portion of the wages or salaries paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under section 44B...determined without regard to the provisions of section 53...". Code section 280C(b). The employer's deduction for wages or salaries paid or incurred must be reduced by the amount of the allowable jobs credit.

The starting point for calculating entire net income is, as aforesaid, federal taxable income. When the federal jobs credit was enacted, federal taxable income and thus New York entire net income was increased, by reason of the disallowance of the previously available deduction for wages and salaries (Code section 380C[b]). This situation was remedied for corporations subject to Article 9-A taxation by the passage of Tax Law section 208.9(a)(7) (Laws of 1978, Chapter 33), which provides that entire net income does not include "that portion of wages and salaries paid or incurred for the taxable year for which a deduction is not allowed pursuant to the provisions of section two hundred eighty-C of the internal revenue code." The purpose underlying said provision was explained in a memorandum of Senator Roy M. Goodman, one of the sponsors:

"The purpose of this bill is to restore tax deductions for wage and salary payments which would otherwise be lost because of amendments in the federal tax law...The Federal Tax Law was amended in 1977 to provide an incentive in the form of a tax credit to employers who hire additional employees...This bill will enable businesses which elect the federal tax credit to take a deduction on their New York State tax returns equal to the amount which was disallowed on their federal returns because they elected the tax credit." N.Y. Legis. Ann., 1978, p. 83.

Petitioner claimed the deduction granted by section 208.9(a)(7) on its franchise tax report for the fiscal year ended June 30, 1978 (Finding of Fact "3").

C. That Tax Law section 208.9(f) allows the corporation subject to Article 9-A taxation a net operating loss deduction, as follows:

"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 of nineteen hundred fifty-four,... except that...such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code..."

The Audit Division limited petitioner's net operating loss deduction for the fiscal year ended June 30, 1979 to \$45,642.00 (the amount of the net operating loss deduction petitioner claimed for federal purposes), effectively disallowing a portion of petitioner's deduction for wages and salaries attributable to the federal jobs credit. Petitioner maintains that section 208.9(a)(7) must be given its full effect and must be read as an exception to section 208.9(f), to permit a net operating loss deduction in the amount of \$138,952.00.

We decline to so construe paragraph (a), subparagraph (7) and paragraph (f) of section 208.9. The language "such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code" operates to limit all deductible expenses which comprise the net operating loss and in turn, the net operating loss deduction. To read various exceptions into paragraph (f) which do not clearly appear therein would render the limitation meaningless.

It has been our long-standing policy to confine the amount of the New York net operating loss deduction to that amount claimed for federal purposes in the taxable year in question (or where appropriate, to the amount which would reduce federal taxable income to zero). E.g., Matter of The Employers' Fire Insurance Company, State Tax Comm., Apr. 3, 1981, determination confirmed, Matter of The Employers' Fire Insurance Company v. State Tax Comm., Index No.

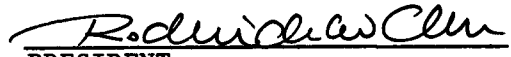
7354-81 (Sup. Ct. Albany Co. Nov. 12, 1981); 20 NYCRR 3-8.2(d); section 3.12(d), Ruling of State Tax Comm., Mar. 14, 1962. See also Matter of Sheils v. State Tax Comm. (52 N.Y.2d 954), Matter of Gurney v. Tully (51 N.Y.2d 818), Matter of Berg v. Tully (92 A.D.2d 436, mot. for lv. to app. den. 60 N.Y.2d 552); these cases concerned Tax Law section 612 which, notably, does not contain the express limitation found in section 208.9(f).

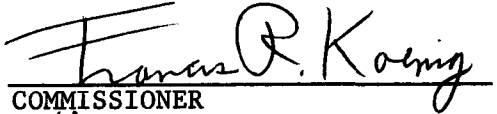
D. That the petition of Turnpike Tobacco Stores, Inc. is denied, and the Notice of Deficiency issued on August 26, 1981 is sustained.

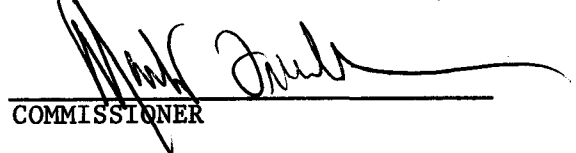
DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER