

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

David Berg :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the year 1971. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of April, 1981, he served the within notice of Decision by certified mail upon David Berg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Berg
245 E. 63rd St.
New York, NY 10021

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
17th day of April, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

David Berg

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the year 1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of April, 1981, he served the within notice of Decision by certified mail upon Barry J. London the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Barry J. London
Cohen & Uretz
1775 K St. N.W.
Washington, DC 20006

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
17th day of April, 1981.

Conce A. Hagelund

J. Vredenburg

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

April 17, 1981

David Berg
245 E. 63rd St.
New York, NY 10021

Dear Mr. Berg:

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) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Barry J. London
Cohen & Uretz
1775 K St. N.W.
Washington, DC 20006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DAVID BERG : DECISION
for Redetermination of a Partial Disallowance :
of Claim for Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Year :
1971.

Petitioner, David Berg, residing at 245 East 63rd Street, New York, New York 10021, filed a petition for redetermination of a partial disallowance of a claim for refund of personal income tax under Article 22 of the Tax Law for the year 1971 (File No. 17290).

Petitioner has requested in writing that the Tax Commission decide this matter without the necessity for a formal hearing based upon the record including an affidavit submitted by him, sworn to August 16, 1979.

The Tax Commission hereby makes the following decision.

ISSUE

Whether the amount of a net operating loss deduction in a carryback year is limited to positive Federal taxable income computed before application of the net operating loss provisions or Federal modified taxable income computed pursuant to section 172(b) (2) of the Internal Revenue Code.

FINDINGS OF FACT

1. Petitioner, David Berg, filed resident New York State income tax returns for the years 1970 through 1974. For 1971, petitioner paid personal income tax in the amount of \$43,827.54.

2. In 1975, petitioner filed a claim for refund of New York State personal income tax for the year 1971 in the amount of \$39,763.00 based on a carryback to 1971 of net operating losses for the years 1973 and 1974.

3. The petitioner computed his claim for refund as follows:

Carryback of 1974 operating loss to 1971

Total New York income per return				\$326,590.00
Addback: 1971 Capital Gain				200,679.00
				<u>\$527,269.00</u>
Deduct:				
1973 net operating loss deduction				\$318,024.00
Adjusted Gross Income				<u>\$209,245.00</u>
Deduct 1974 net operating loss deduction				154,747.00
				<u>\$ 54,498.00</u>
Deduct Federal Itemized Deductions		\$158,393.00		
Life Insurance		100.00		
		<u>\$158,493.00</u>		
Less: New York State Taxes	\$71,265.00			
Modification	<u>32,730.00</u>			
		<u>103,995.00</u>		
Balance				54,498.00
Taxable Income				<u>-0-</u>
Tax per Rate Schedule				-0-
Minimum Tax				\$ 4,065.00
Total Tax Due				<u>\$ 4,065.00</u>
Total Tax Paid				43,828.00
Refund				<u>\$39,763.00</u>

4. On December 30, 1975, the Income Tax Bureau issued to petitioner a Voucher for Income Tax Refund (Form IT-111) for 1971 in the amount of \$27,051.54, with interest of \$2,223.18, for a total of \$29,274.72.

5. On December 30, 1975, the Income Tax Bureau issued to petitioner a Notice of Partial Disallowance (Form IT-51) of the claim for refund for 1971. The claim was disallowed in the amount of \$12,711.46.

6. The voucher for refund (Form IT-111) stated, in part, that:

"The amount of 1974 loss to be carried to 1971 would be limited to the balance of Federal taxable income, after first applying the 1970 carryover. Therefore, the maximum amount of the 1974 loss applicable to 1971 would be (\$85,259.43).

Further, the limitation on items of tax preference was computed incorrectly, as exemptions must be considered when determining the net operating loss deduction. Also, the modification for allocable expenses must be recomputed."

7. The Income Tax Bureau recomputed the petitioner's claim for refund as follows:

1971 - Total New York income	\$326,590.15
1970 - Carryover	(80,913.07)
1974 - Maximum deduction	(85,259.43)
1971 - New York income after deduction	\$160,417.65
Federal itemized deductions	\$158,393.13
Plus: Life insurance premiums	100.00
Less: State and local income taxes	71,266.00
Less: Modification-Section 615(c) (4)	32,388.00
New York Itemized deductions	54,839.00
Balance	\$105,578.65
Exemptions	1,950.00
New York Taxable Income	\$103,628.65
Tax per tax rate schedule	\$ 13,068.00
Statutory credit	25.00
New York tax	\$ 13,043.00
Minimum income tax	3,733.00
Total tax due	\$ 16,776.00
New York tax previously adjusted	43,827.54
Refund of Personal Income Tax	27,051.54
Interest	2,223.18
Total Refund	\$ 29,274.72

8. Petitioner's Federal income tax return for 1971 was audited by the Internal Revenue Service. As a result, his Federal adjusted gross income was increased by \$8,353.86, from \$318,236.29 to \$326,590.15.

9. Federal net operating losses of \$110,533.00 and \$235,236.00 were claimed for the years 1973 and 1974, respectively. Petitioner argued that \$80,913.07 of the 1973 loss may be carried to the year 1971 and that the entire 1974 loss of \$235,236.00 may also be carried to the year 1971, making a total net operating loss deduction for 1971 of \$316,149.07. Petitioner cites the decisions reached by this Commission on October 3, 1977 in the Matter of the Petitions of William & Elizabeth Gregory, George & Mary Gregory and James and Margaret Sheils and argues that these decisions limit the New York net operating

loss deduction to the lesser of the sum of the carryback and carryovers or modified taxable income computed under section 172(b)(2) of the Internal Revenue Code. Since petitioner's modified taxable income computed under section 172(b)(2) of the code is \$368,875.86, it is contended that in accordance with the above cited decisions the New York net operating loss deduction would be \$316,149.07, the total of carrybacks and carryovers, as said amount is less than modified taxable income. The Income Tax Bureau limited the net operating loss deduction to \$166,172.50, audited positive Federal taxable income before consideration of the net operating loss provisions.

CONCLUSIONS OF LAW

A. That although the language used in the decisions in the Matter of the Petitions of William & Elizabeth Gregory, George & Mary Gregory and James & Margaret Sheils refers to modified taxable income, the final result of said decisions was to limit the New York net operating loss deduction to positive Federal taxable income.

B. That section 172 of the Internal Revenue Code provides that the net operating loss is a deduction from gross income to arrive at adjusted gross income. However, for the purpose of determining carrybacks and carryovers the code requires that the deduction shall not be used to reduce taxable income for the deduction year to an amount less than zero. As the result of the interaction of these two principles, it is apparent that the true economic benefit generated by the net operating loss deduction is a partial or total reduction of Federal taxable income. (See Matter of James H. Sheils, et al., v. State Tax Commission, __ N.Y.2d __ [February, 1981], rev'g 72 A.D.2d 896.)

C. That petitioner's New York net operating loss deduction has been properly limited to positive Federal taxable income; and therefore the petition and claim for refund are denied and the Notice of Partial Disallowance issued December 30, 1975 is sustained.

DATED: Albany, New York

APR 17 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER