

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Newburger, Loeb & Co.	:	
(Now N. S. Holdings)	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1967 & 1968.	:	

State of New York
County of Albany

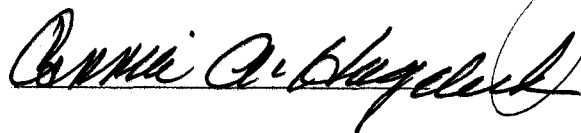
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Newburger, Loeb & Co., (Now N. S. Holdings) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

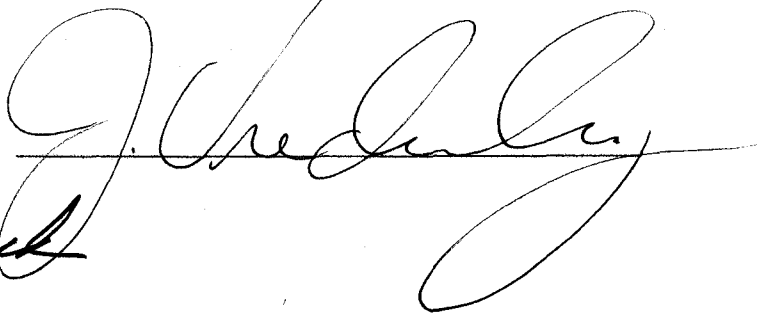
Newburger, Loeb & Co.
(Now N. S. Holdings)
c/o Osmond Fraenkel
120 Broadway
New York, NY 10005

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
4th day of June, 1982.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Newburger, Loeb & Co.
(Now N. S. Holdings)

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Unincorporated
Business Tax under Article 23 of the Tax Law for
the Years 1967 & 1968

State of New York
County of Albany

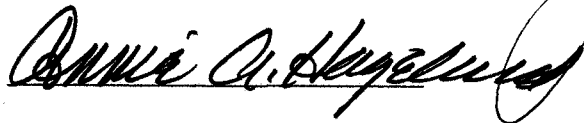
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Albert R. Dworkin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

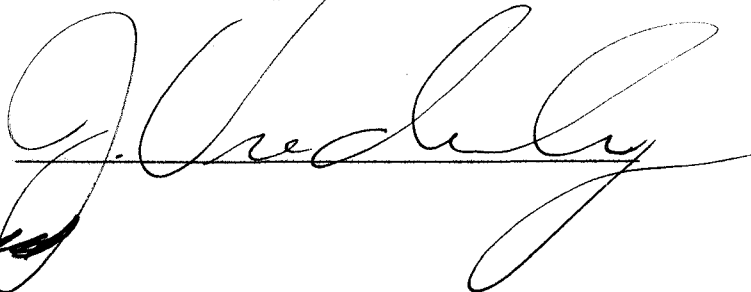
Albert R. Dworkin
7 The Pines
Old Westbury, NY 11568

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
4th day of June, 1982.





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

June 4, 1982

Newburger, Loeb & Co.
(Now N. S. Holdings)
c/o Osmond Fraenkel
120 Broadway
New York, NY 10005

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) 722 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Albert R. Dworkin
7 The Pines
Old Westbury, NY 11568
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NEWBURGER, LOEB & CO.	:	DECISION
(Now N. S. HOLDINGS)	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967	:	
and 1968.	:	

Petitioner, Newburger, Loeb & Co., now N. S. Holdings, c/o Osmond Fraenkel, Esq., 120 Broadway, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967 and 1968. (File No. 22815.)

Petitioner waived a formal hearing and requested the State Tax Commission to issue a decision based upon a stipulation entered into between counsel for the petitioner and counsel for the Audit Division, executed on or about March 16, 1981.

The State Tax Commission renders the following decision.

ISSUES

I. Whether the claims for refund based on a net operating loss carryback were properly disallowed on the ground that the member partners in the carryback years did not have at least an 80 percent interest in the loss year.

II. Whether in computing the partners' proportionate interest in the partnership, all items of income and deduction are to be taken into consideration except the allowance for taxpayer services and the unincorporated business exemption.

III. Whether the change in ownership of the partnership interest from Morris Newburger, a general partner, to the Estate of Morris Newburger, constitutes a material change in ownership.

FINDINGS OF FACT

The representatives for the petitioner and the Audit Division entered into a Stipulation on or about March 16, 1981, which stipulated and agreed to the following facts:

1.a. Petitioner paid New York State Unincorporated Business Tax (hereinafter UBT) in the amount of \$104,169.29 for the year 1967.

b. A timely claim for refund of the 1967 UBT was filed, on or about November 3, 1971.

2.a. Petitioner paid UBT in the amount of \$157,089.06 for the year 1968.

b. A timely claim for refund of \$70,066.00 (plus any additional amounts computed to be due) was filed, on or about November 3, 1971.

3.a. By notice dated April 12, 1976, the Department of Taxation and Finance gave notice of disallowance of the claim for the years 1967 and 1968. The notice dated April 12, 1976 (exhibit 6) was based on a determination by the Income Tax Bureau that in order to qualify for net operating loss carryback, the percentage required under Tax Law Section 706(b) ¹ is the arithmetical percentage of individual partners' interests in the total unincorporated business taxable ² income reported at Line 14, Page 4, Form IT-204, having an interest in the partnership which sustained the loss in the carryback year, and when there are both positive and negative distributions during the loss year, their nature is disregarded and all positive and negative distributions are added together in determining the Section 706(b) ³ percentage. The computations setting forth

the percentages which the Income Tax Bureau asserts to be correct are contained in the file and are as follows:

<u>1970 Partners</u>	<u>1970 Distribution</u>		<u>Percentage of Interest Partners Common to 1970</u>	
	<u>With Federal Adjustment</u>	<u>Percentage of Interest</u>	<u>Partners 1967</u>	<u>Partners 1968</u>
Leo Stern	\$(411,056.50)	9.0446	9.0446	9.0446
Robert L. Stern	(885,570.55)	19.4855	19.4855	19.4855
Andrew M. Newburger	(663,532.04)	14.5999	14.5999	14.5999
Robert L. Newburger	(884,295.55)	19.4574	19.4574	19.4574
Charles H. Gross	(564,992.95)	12.4317		
George F. Conniff	(23,796.78)	.5236	.5236	.5236
Edward R. Holt	(100,014.95)	2.2007	2.2007	2.2007
Harold J. Richards	(170,814.01)	3.7585	3.7585	3.7585
Adolphus Roggenburg	(13,288.48)	.2924	.2924	.2924
Julius S. Schnall	(40,217.02)	.8849	.8849	.8849
John F. Thistleton	4,627.10	.1018	.1018	.1018
William A. McGovern	3,693.76	.0813	.0813	.0813
Ned D. Frank	(63,408.30)	1.3952		
Sanford Roggenburg	3,319.85	.0730		
John F. Settel	(138,656.83)	3.0509		
Richard D. Stern	(88,956.50)	1.9573		
Lewis A. Bracker	(8,528.73)	.1877		
Fred Kayne	30,134.02	.6630		
Edmund M. Rubin	(10,906.15)	.2400		
Jacob Schoefer	16,754.43	.3687		
Charles S. Sloane	12,548.02	.2761		
Joseph L. Searles III	9,923.04	.2183		
Robert Therese	(28,233.67)	.6212		
Benjamin Peyser	(55,476.59)	1.2207	1.2207	1.2207
Trust u/w Lester M. Newburger	25,138.00	.5531		
Estate of Morris Newburger	(152,569.00)	3.3570		3.3570
Gerald N. Frank	10,687.00	.2351		.2351
William S. Irle	51,370.00	1.1303		1.1303
Jeanne A. Donoghue	7,542.00	.1659		
Mabel Bleich	7,542.00	.1659		
Jacob Wachs	8,994.00	.1979		
Saul A. Brown	8,994.00	.1979		
Philip Shulman	24,627.00	.5419		
Robert Sidel	4,256.00	.0936		
Joseph W. Quarte	10,306.00	.2268		
Total Distribution	\$(4,063,858.38)			
Total for percentage computation	\$ 4,544,770.82	99.9998%	71.6513%	76.3737%

b. Petitioner filed a petition with the Tax Appeals Bureau on April 10, 1978.

c. The petition was perfected by letter dated August 22, 1978, and answered by letter of the Department of Taxation and Finance on October 25, 1978.

4. Petitioner is the successor to Newburger, Loeb & Co. Newburger, Loeb & Co. (hereinafter sometimes referred to as Partnership) throughout the calendar years 1967, 1968 and 1970 was a partnership which engaged in the stock brokerage business and related activities.

5. For the years 1967, 1968 and 1970, partners participated in the division of partnership income by way of (a) salaries to some of the partners, (b) interest paid partners on their capital accounts, (c) shares allocated to some of the partners in the profits of segments of the overall activities, (d) bonuses paid to some of the partners, with each of the foregoing items (a), (b), (c) and (d) being deducted (as among the partners) as an expense of the business. Any remaining net profits of a given year (if the balance after those special allocations was a profit) or the resulting loss (if the balance after those special allocations was a loss) was then apportioned among the partners in various fractional shares.

6.a. Petitioner filed a UBT return for the year 1967 reflecting a taxable profit of \$2,604,232.26. ⁴

b. A schedule computed from the books and records of the partnership showing the components of each partner's final net share in the partnership profit ⁵ for 1967 is attached to the stipulation as Exhibit 9. The UBT allowance for partner's services and UBT exemption was apportioned among the partners in accordance with each partner's share in profits under the terms of the partnership agreement.

c. The apportionment among the partners of the 1967 income ⁶ was as follows:

(i) To partners in 1967 who were also partners in 1970 and who sustained losses in 1970:

George F. Conniff	\$	43,289.07	
Edward R. Holt		93,743.90	
Andrew M. Newburger		407,862.76	
Morris Newburger*		420,813.51	
Robert L. Newburger		419,992.71	
Benjamin F. Peyser		87,670.78	
Harold J. Richards		181,667.93	
Adolphus Roggenburg		112,591.97	
Julius S. Schnall		49,488.81	
Leo Stern		264,343.15	
Robert L. Stern		416,825.07	
		<u>\$2,498,289.66</u>	95.94%

* Morris Newburger died September 12, 1968. The Estate continued to be a partner.

(ii) To partners in 1967 who were also partners in 1970 but did not sustain losses in 1970:

John F. Thistleton	\$	20,000.00	
William A. McGovern		28,000.00	
Aggregate	\$	<u>48,000.00</u>	1.84%

(iii) To partners in 1967 who were not also partners in 1970:

Estate of Lester Newburger	\$	35,855.10	
S.N. Golde		22,087.50	
Aggregate	\$	<u>57,942.60</u>	2.22%

(iv) Exhibit 9 reflects the computations yielding these figures. \$2,604,232.26 100.00%

7.a. Petitioner filed a UBT return for the year 1968 reflecting a taxable profit of \$2,856,166.67 (sic). ⁷

b. A schedule computed from the books and records of the partnership showing the components of each partner's final net share in the partnership profit ⁸ for 1968 is attached to the stipulation as Exhibit 10. The UBT allowance for partner's services and UBT exemption was apportioned among the partners in

accordance with each partner's share in profits under the terms of the partnership agreement.

c. The apportionment among the partners of the 1968 income ⁹ was as follows:

- (i) To partners in 1968 who were also partners in 1970 and who sustained losses in 1970:

George F. Conniff	\$	43,946.15	
Edward R. Holt		93,772.22	
Andrew M. Newburger		469,863.66	
Estate of Morris Newburger		324,854.18	
Robert L. Newburger		486,579.64	
Benjamin F. Peyser		153,941.98	
Harold J. Richards		179,435.11	
Adolphus Roggenburg		112,737.56	
Julius S. Schnall		47,095.17	
Leo Stern		316,059.40	
Robert L. Stern		472,762.51	
Aggregate		<u>\$2,701,047.58*</u>	94.56%

*The aggregate figure of \$2,701,047.58 is correct and should be allocated as above rather than in the amounts set forth on page 2 of the Claim for Refund and in par. M of the Petition.

- (ii) To partners in 1968 who were also partners in 1970 but did not sustain losses in 1970:

John F. Thistleton	\$	20,004.33	
William A. McGovern		30,000.00	
Willard S. Irle		31,287.91	
Gerald N. Frank		20,500.57	
Aggregate		<u>\$ 101,792.81</u>	3.57%

- (iii) To partners in 1968 who were not also partners in 1970:

Estate of Lester Newburger	\$	33,605.40	
Estate of S. R. Golde		19,718.88	
Aggregate		<u>\$ 53,324.28</u>	1.87%

- (iv) Exhibit 10 reflects the computations yielding these figures \$2,856,164.67 100.00%

8.a. Petitioner filed a UBT return for the calendar year 1970 reflecting a Partnership net loss of \$4,191,625.00. ¹⁰

b. A schedule computed from the books and records of the partnership showing the components of each partner's final net share in the partnership loss for 1970 is attached to the stipulation as Exhibit 12. ¹¹

c. The apportionment among the partners of the 1970 net loss of \$4,191,625.00 was as follows:

- (i) Partners in 1970 who sustained losses and who were also partners in 1967 and 1968:

George F. Conniff	\$ 24,745.00	
Edward R. Holt	104,045.00	
Andrew M. Newburger	677,210.00	
Estate of Morris Newburger*	152,569.00	
Robert L. Newburger	907,182.00	
Benjamin F. Peyser	56,512.00	
Harold J. Richards	176,801.00	
Adolphus Roggenburg	14,640.00	
Julius S. Schnall	41,900.00	
Leo Stern	422,809.00	
Robert L. Stern	908,457.00	
Aggregate Net Losses	(\$3,486,870.00)	83.19%

*Morris Newburger died September 12, 1968.
The Estate continued to be a partner.

- (ii) Partners in 1970 who sustained losses who were not partners in 1967 or 1968:

Richard Stern	\$ 92,814.00	
Charles H. Gross	583,114.00	
Ned D. Frank	67,121.00	
John F. Settel	144,568.00	
Lewis A. Bracker	9,139.00	
Edmund M. Rubin	12,029.00	
Robert Therese	30,421.00	
Aggregate Net Losses	(\$ 939,206.00)	<u>22.40%</u>

- (iii) Aggregate of losses of all loss partners for the year and percent thereof to the partnership net loss of \$4,191,625.00
- | | | |
|--|------------------|----------------|
| | (\$4,426,076.00) | <u>105.59%</u> |
|--|------------------|----------------|

- (iv) Partners in 1970, who were also partners in 1967 and 1968 who had net income from the partnership in 1970, despite the burden of the

1970 loss, because credits for compensation and/or interest on capital exceeded the burden of their loss (under the partnership agreement).

John F. Thistleton	\$	4,548.00	
William A. McGovern		3,084.00	
Aggregate	\$	<u>7,632.00</u>	.18%

- (v) Partners in 1970 who were also partners in 1968 who had net income from the partnership in 1970, etc. as in (iv).

Gerald N. Frank	\$	10,687.00	
Willard S. Irle		51,370.00	
Aggregate	\$	<u>62,057.00</u>	1.48%

- (vi) Partners in 1970 who were not partners in 1967 or 1968 who had net income from the partnership in 1970, etc. as in (iv).

Trust u/w Lester M. Newburger	\$	25,138.00	
Jacob Wachs		8,994.00	
Saul A. Brown		8,994.00	
Robert Sidel		4,256.00	
Joseph W. Quarte		10,306.00	
Sanford Roggenburg		2,631.00	
Fred Kayne		28,166.00	
Jacob Schaefer		16,195.00	
Charles S. Sloane		10,580.00	
Joseph L. Searles III		9,791.00	
Jeanne G. Donoghue		7,542.00	
Mable (sic) Bleich		7,542.00	
Philip Shulman		24,627.00	
Aggregate	\$	<u>164,762.00</u>	3.93%

- (vii) Aggregate of net income of all profitable partners for the year and percent thereof to the partnership net loss of \$4,191,625.00
- | | | | |
|--|----|-------------------|--------------|
| | \$ | <u>234,451.00</u> | <u>5.59%</u> |
|--|----|-------------------|--------------|

- (viii) Exhibit 12 reflects the computation yielding these figures. \$4,191,625.00 100.00%

9. The Federal Partnership Income Tax Return for the year 1970 was examined by the Internal Revenue Service, which reduced the net loss as reported in that return for the year 1970 by \$127,766.62, and redetermined the loss to

be \$4,069,276.38 for Federal Income Tax purposes, consisting of two ordinary ¹² losses in the amount of \$3,927,842.38 and capital loss in the sum of \$141,434.00.

10. As a result of the Federal Adjustment, a net loss of \$4,063,858.38 was sustained by the Petitioner for the year 1970, as computed in accordance with the Unincorporated Business Tax provisions of the Tax Law. These computations are attached to the stipulation as Exhibit 14.

11. (a) Morris Newburger was a partner throughout 1967 and until his death on September 12, 1968.

(b) In accordance with the Partnership Agreement effective January 1, 1967 through December 31, 1968, the Estate of Morris Newburger remained a partner after the death of Morris Newburger.

(c) In 1969 and 1970, the Estate of Morris Newburger remained a limited partner in partnership in accordance with partnership agreements executed by the Estate's Executors.

12. The Department of Taxation and Finance contends that when computing the partner's proportionate interest in a partnership, all items of the income and deduction are taken into consideration, not including the allowance for taxpayer services or the exemption; that these two items are merely to reduce business income to a taxable balance; and that it is the individual percentage to line 18 ¹³ page 4 of the partnership return which determine the 80% provision.

13. The Department further contends that the change in ownership of the partnership interest from Morris Newburger, a general partner, to the Estate of Morris Newburger, (a limited partner) constitutes a material change in ownership.

CONCLUSIONS OF LAW

A. That section 706(2)(a) of the Tax Law states in part that:

"A deduction shall be allowed for net operating losses incurred by the unincorporated business, except as otherwise provided by subparagraph (b) of this paragraph, in an amount computed in the same manner as the net operating loss deduction which would be allowable for the taxable year for federal income tax purposes if the unincorporated business were an individual taxpayer (but determined solely by reference to the unincorporated business gross income and unincorporated business deductions, allocated to New York, of the unincorporated business)..."

B. That section 706(2)(b) of the Tax Law provides, in part, that in the case of a partnership, no net operating loss carryback or carryover to any taxable year shall be allowed unless one or more of the partners during such taxable year were persons having a proportionate interest amounting to at least 80 percent of all such interests, in the unincorporated business gross income and unincorporated business deductions of the partnership which sustained the loss for which a carryback or carryover is claimed. The section further provides a method for limiting the amount of carryback and carryover allowable on account of such loss.

C. That in computing the partners' proportionate interest in a partnership, all items of income, gain, loss and deductions allocated to New York are taken into consideration within the meaning and intent of sections 706(2)(a) and (b) of the Tax Law. This computation does not include the partners' allowance for services or the statutory exemption as these two items are not subject to allocation but are merely used to reduce the excess of unincorporated business gross income over unincorporated business deductions to a taxable balance. These two items also are not taken into account in determining the interest of a partner for the purpose of the 80 percent requirement.

D. That section 706(2)(b) of the Tax Law provides only for the percentage interest needed for a partnership to be allowed to carryback or carryover a net operating loss and a limitation on the amount of the loss which would be allowed to be carried back or carried over. The section is not to be read independently but in conjunction with section 706(2)(a) of the Tax Law.

E. That the interpretation of the State Tax Commission with respect to sections 706(2)(a) and (2)(b) of the Tax Law is evidenced by the subsequent codification in Regulations 20 NYCRR 206.3(b) and (c) respectively which became effective February 1, 1974.

F. That the Estate of Morris Newburger, a limited partner, is an entity and different from Morris Newburger, an individual, who was an active general partner. Therefore, the aforementioned are not common partners in determining the 80 percent interest.

G. That the percentage of each partner's interest in the partnership is computed regardless of whether one partner had a share of loss while another had a share of income in either the loss year or the carryback or carryover year. In this respect, the percentage would not exceed 100 percent as shown in Finding of Fact #3.a. supra, since both income and loss distributions are considered positive amounts in determining both the numerator and denominator.

H. That for the years 1967 and 1968 the percentage of interest by partners who had an interest both in those years and the loss year does not constitute at least 80 percent of all interests in the unincorporated business gross income and unincorporated business deductions of the partnership within the intent and meaning of section 706(2)(b) of the Tax Law. The computations (without the allowance for partner service and exemption) shown in Findings of Fact #6.c.(i) and 7.c.(i) would be used to determine the limitation of the net

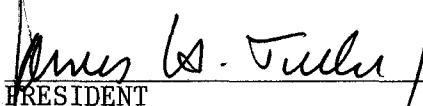
operating loss carryback allowable, if petitioners had met the 80 percent provisions of section 706(2)(b).


I. That the denial of petitioner's claims for refund for the years 1967 and 1968 was correct. Petitioner's petition for a redetermination thereof is hereby denied.

DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

FOOTNOTES

- 1 Correct section of the Tax Law is 706(2)(b).
- 2 The correct designation of Line 14, Page 4, Form IT-204 is Total of lines 12 and 13. It must be assumed that the stipulation is referring to Line 18, Page 4, Form IT-204 which is total income from business (after New York modifications and less a deduction for contributions). There is no designation on the form for total unincorporated business taxable income; only taxable business income (Page 1, line 30).
- 3 See footnote 1.
- 4 Correct designation of said amount is taxable business income determined as follows: \$2,674,232.26 (total income from business) less \$65,000.00 (allowance for partners' services) less \$5,000.00 (exemption) equals \$2,604,232.26 (taxable business income).
- 5 See footnote 4.
- 6 See footnote 4.
- 7 Correct designation of said amount is taxable business income determined as follows: \$2,926,164.67 (total income from business) less \$65,000.00 (allowance of partners' services) less \$5,000.00 (exemption) equals \$2,856,164.67 (taxable business income).
- 8 See footnote 7.
- 9 See footnote 7.
- 10 This amount does not include any deductions for allowance for partners' services or an exemption. Since no taxable income would be computed in a loss year, no deduction for allowance for partners' services or for exemption would be allowed.
- 11 See footnote 10.
- 12 For unincorporated business tax purposes, capital losses are treated as ordinary losses and allowed in full.
- 13 See footnote 2.