

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YIZHAQ IVGI	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2007 through 2010.	:	DTA NO. 829875

Petitioner, Yizhaq Ivgi, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the years 2007 through 2010.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on November 8, 2021 at 10:30 a.m., with the final brief to be submitted by March 7, 2022, which date commenced the six-month period for issuance of this determination. Neither party filed a brief in this matter. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed a claim for a carryback of a 2010 net operating loss as reported on petitioner's amended resident income tax return for 2007.

FINDINGS OF FACT

1. Petitioner, Yizhaq Ivgi, filed a New York resident income tax return for 2007, dated March 10, 2010, reporting tax due in the amount of \$19,414.00 (2007 return). Petitioner's 2007 return did not claim a net operating loss.

2. Petitioner filed a New York resident income tax return for 2010, reporting a net

operating loss of \$529,516.00 (2010 return).¹

3. Petitioner filed a 2010 federal income tax return, form 1040, reporting a net operating loss of \$529,516.00. On his 2010 federal income tax return, petitioner elected to waive the net operating loss carryback pursuant to Internal Revenue Code (IRC) (26 USC) § 172 (B) (3) and relinquished the entire carryback period with respect to the net operating loss incurred for the tax year ended December 31, 2010.

4. Petitioner carried forward the 2010 net operating loss to tax year 2011. Petitioner filed a New York resident income tax return for 2011, signed September 4, 2013, reporting the 2010 net operating loss deduction of \$529,516.00 (2011 return).

5. On August 10, 2018, petitioner filed an amended resident income tax return, form IT-201-X, for tax year 2007 (amended 2007 return). Petitioner's amended 2007 return claimed a net operating loss deduction of \$531,548.00, including a carryback of the 2010 net operating loss of \$529,516.00.² Petitioner requested a refund of \$19,414.00 on the amended 2007 return.

6. The Division of Taxation (Division) issued a notice of disallowance, dated December 26, 2018, for tax year 2007, stating in part:

“The 2007 Amended Resident Income Tax return filed for the period ending 12/31/2007 has been selected for review.

The 2007 amended return filed to report the carryback of the 2010 net operating loss has been disallowed based on the following:

¹ The 2010 return is undated and there is no information in the record as to when it was filed.

² The difference between the net operating loss reported on the 2010 return of \$529,516.00 and the amount claimed as a carryback from 2010 of \$531,548.00 is not explained in the record. Petitioner introduced into the record a portion of an unsigned amended federal income tax return for 2007 containing an explanation of changes stating that “Form 1040 for year ended December 31 2010 reflected a net operating loss of \$531,548 which is carried back to earliest year of 2007.” Petitioner presented no evidence that the 2007 amended federal return was filed or accepted by the Internal Revenue Service.

1 – The amended return was filed out of statute. The timeframe to file an amended return based on a net operating loss carryback is three years from the due date, or extended due date, of the loss year return. Therefore, an amended return based on a 2010 net operating loss should have been filed by 04/18/2014 or 10/17/2014. The 2007 amended return was filed on 08/10/2018.

2 – The 2010 net operating loss was carried forward. Once you choose to waive the carryback period, it is irrevocable.

3 – Generally, if you have a NOL for a tax year ending in 2010, you must carry back the entire amount of the NOL to the 2 tax years before the NOL period. That means for a 2010 NOL you must carry the loss back to the 2008 tax period and not 2007 as requested.

Based on the above, we have disallowed the 2007 amended return filed. Your refund request in the amount of \$19,414.00 has been denied.”

CONCLUSIONS OF LAW

A. The New York adjusted gross income of a resident individual means his federal adjusted gross income, with certain modifications (Tax Law § 612 [a]). Federal adjusted gross income is, therefore, the starting point in calculating New York adjusted gross income and is defined in the IRC generally as gross income less certain deductions (26 USC § 62 [a]). Among the deductions subtracted from gross income to arrive at federal adjusted gross income is the net operating loss deduction (*see* 26 USC § 172). The net operating loss deduction is therefore accounted for in the calculation of federal adjusted gross income. New York taxpayers are permitted to carry back or carry forward net operating losses only insofar as such items are, for federal income tax purposes, deducted from gross income to arrive at adjusted gross income (*see Matter of Berg v Tully*, 92 AD2d 436 [3d Dept 1983]; *Matter of Sheils v State Tax Commn.*, 95 Misc 2d 605 [Sup Ct, Alb Co 1978], *revd* 72 AD2d 896 [3d Dept 1979], *revd* 52 NY2d 954 [1981]). Therefore, taxpayers cannot determine a net operating loss or claim a deduction for such loss in a manner different from that provided in IRC (26 USC) § 172 (*see id.*).

B. IRC (26 USC) § 172 (b), as in effect for the years at issue, required that a net operating loss first be carried back to each of the two previous years and, if unabsorbed by those years, that the remaining portion be carried forward to each of the 20 years following the loss year (IRC [26 USC] former § 172 [b] [1], [2]). IRC (26 USC) § 172 (b) (3), as in effect for the years at issue, provides that a taxpayer may elect to relinquish the entire carryback period and carry forward the loss to the taxable years following the loss year. That section further provides that:

“Such election shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extensions of time) for filing the taxpayer’s return for the taxable year of the net operating loss for which the election is to be in effect. *Such election, once made for any taxable year, shall be irrevocable for such taxable year*” (26 USC § 172 [b] [3], emphasis added).

In *Young v Commissioner* (83 TC 831, *affd* 783 F2d 1201 [5th Cir 1986]), the Fifth Circuit analyzed the election to forego the carryback of a net operating loss under 26 USC § 172 (b) (3) and concluded that the essence of section 172 (b) (3) is that a taxpayer unequivocally communicates his election and binds himself to his decision concerning the best use of his net operating loss. In reaching its conclusion, the Fifth Circuit reviewed the legislative history of the statute and found that Congress made the election to relinquish the entire carryback period irrevocable and required that the election be made within the time allowed for filing the return in the year of loss.

C. Here, petitioner unequivocally elected to waive the net operating loss carryback and relinquished the entire carryback period with respect to the net operating loss incurred for the tax year ended December 31, 2010 (*see* finding of fact 3). As such, the Division properly disallowed the refund claimed in petitioner’s amended 2007 return. Additionally, even if

petitioner had not waived the net operating loss carryback, pursuant to IRC (26 USC) former § 172 (b), a net operating loss carried back is limited to each of the two previous years (i.e. 2008 and 2009) and, if unabsorbed by those years, the remaining portion would be carried forward to each of the 20 years following the loss year. As such, the loss could not be carried back to 2007.

D. The petition of Yizhaq Ivgi is denied and the notice of disallowance dated December 26, 2018 is sustained.

DATED: Albany, New York
September 1, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE