

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (1) C
Corporation Tax
January 19, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C930921A

On September 21, 1993, a Petition for Advisory Opinion was received from Jusco (U.S.A.), Inc., 175 Beal Street, Hingham, Massachusetts 02043.

The issues raised by Petitioner, Jusco (U.S.A.), Inc., are (1) whether the New York net operating loss is limited to the amount of the Federal net operating loss deduction pursuant to section 208.9(f) of the Tax Law and section 3-8.2 of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations"), (2) whether there is an inconsistency between section 208.9(f)(1) of the Tax Law and section 208.9(f)(3) of the Tax Law and (3) whether there is an undue burden placed on a taxpayer by the section 208.9(f)(3) of the Tax Law net operating loss limitation when computing the adjustment to taxable gain or loss under section 208.9(a)(12) or (b)(11) of the Tax Law upon subsequent disposal of assets.

Petitioner was the subject of an audit for the periods ended 1/28/89 and 10/28/89. The audit resulted in a \$593,332 reduction in the net operating loss carryforward from the period ended 1/28/89, utilized in the period ended 10/28/89. This adjustment, which resulted in additional franchise tax and MCTD tax of \$7309, was made pursuant to the limitation imposed by section 208.9(f)(3) of the Tax Law as follows:

Year ended 1/28/89

Federal taxable income before NOL	\$ (355,998)
Additions:	
(a) State and local taxes	4,900
(b) Federal ACRS deduction	612,569
Subtractions:	
(c) NY depreciation	(1,210,801)
NY loss reported for period ended 1/28/89 and carried to period ended 10/28/89	<hr/> \$ (949,330) -----

The disallowance of the statutory additions and subtractions (a), (b) and (c) resulted in the net adjustment of \$593,332.

The laws of New York State are presumed to be constitutional by the Commissioner of Taxation and Finance. There is no jurisdiction at the administrative level to declare such laws unconstitutional; therefore, it must be presumed that the relevant sections

of the law are constitutional to the extent that they relate to the imposition of the tax liability on Petitioner.

Section 208.9(f) of the Tax Law states, in pertinent part, that:

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, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that in every instance where such deduction is allowed under this article:

(1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by paragraphs (a), (b) and (g) hereof,

(2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article,

...

(3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code, or the deduction for the taxable year which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code,

...

(5) the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code shall for purposes of this paragraph be determined as if the taxpayer had elected under such section to relinquish the entire carryback period with respect to net operating losses, except with respect to the first ten thousand dollars of each of such losses, sustained during taxable years ending after June thirtieth, nineteen hundred eighty-nine.

Section 3-8.2 of the Regulations states:

(a) The net operating loss deduction allowed under article 9-A is presumably the same as that which is allowed for Federal income tax purposes, subject to the three limitations explained in subdivisions (b), (c) and (d) of this section.

(b) The first limitation of the net operating loss deduction for purposes of article 9-A is that no deduction is allowed for a loss sustained during any taxable year beginning prior to January 1, 1961, or sustained during any year in which the corporation sustaining the loss was not subject to tax under article 9-A.

...

(c) The second limitation on the net operating loss deduction for purposes of article 9-A is that any net operating loss which is carried back or forward for Federal tax purposes must be adjusted to reflect the additions and subtractions required by sections 3-2.3 and 3-2.4 of this Part.

...

(d) The third limitation on the net operating loss deduction for purposes of article 9-A is that in any year, it may not exceed the deduction allowable for that year for Federal income tax purposes under section 172 of the Internal Revenue Code, or the deduction which would have been allowable if the taxpayer had not made an election under subchapter S, adjusted to exclude any loss or portion thereof arising from any taxable year in which the corporation sustaining the loss was not subject to tax under article 9-A (see subdivision (b) of this section and section 3-8.1(b) of this Subpart)

In Matter of Royal Indem. Co. v Tax Appeals Tribunal, (1989, 3d Dept) 148 AD2d 845, aff'd 75 NY2d 75, the court held that in the calculation of a franchise tax assessment, New York State net operating loss deductions are limited to those amounts that are Federally allowable, that is, allowed to be taken on the Federal tax return for the corresponding year; thus, the Tax Appeals Tribunal properly sustained the administrative determination that the insurance company could not carry forward its 1974 and 1975 net operating losses as deductions on its 1976 and 1977 and New York State franchise tax returns in amounts which exceeded those it had deducted on its Federal tax returns. See also, Matter of American Employers' Ins. Co. v State Tax Commn., 114 AD2d 736; Matter of Eveready Ins. Co. v New York State Tax Commn., 129 AD2d 958, iv denied 70 NY2d 604; Telmar Communications Corp. v Procaccino, 48 AD2d 189; Matter of Lehigh Valley Industries, Inc., Tax Appeals Tribunal, May 5, 1988.

Further, the source year of the net operating loss deducted on the New York State return must be the same as the net operating loss deducted on the Federal return (Matter of Lehigh Valley Industries, Inc., *supra.*). See also, Arista Records, Inc., Adv Op Comm T & F, August 14, 1990, TSB-A-90(15)C.

Section 3-8.5 of the Regulations provides:

When the net operating losses of two or more years, or the portions of net operating losses of two or more years, are carried back or carried forward to be deducted from the income of one particular taxable year, the [Commissioner of Taxation and Finance] requires that an aggregate method of deducting the losses be used. The taxpayer must compute the aggregate of the Federal net operating losses to be carried to the particular taxable year, and, also, compute the aggregate of the net operating losses under article 9-A for such year.

After computing the two aggregate figures, whichever of the two (Federal or State) is smaller is the aggregate net operating loss which is allowable as a carry back or carry forward to the particular taxable year. The limitations described in subdivisions (bi), (c) and (d) of section 3-8.2 of this Subpart apply in deducting the aggregate of losses.

Accordingly, with respect to Issue "1", when Petitioner determines the amount of the net operating loss deduction allowable for a taxable year under section 208.9(f) of the Tax Law, the three limitations must be applied. First, any net operating loss which is carried back or forward for Federal tax purposes must be adjusted reflect the additions and subtractions required by section 208.9 of the Tax Law. Second, the loss must be sustained during a year that the corporation sustaining the loss was subject to tax under Article 9-A of the Tax Law. Third the net operating loss deduction allowable under section 208.9 of the Tax Law for any year, may not exceed the deduction allowable for that year for Federal income tax purposes under section 172 of the IRC.

With respect to Issue "2", there is no inconsistency between sections 208.9(f)(1) and 208.9(f)(3) of the Tax Law. A net operating loss deduction is the amount of net operating loss or losses from one or more years that are carried back or carried forward to a particular income year. A net operating loss is the loss sustained in a particular taxable year due to a taxpayer's deductions exceeding its receipts. Before a taxpayer can determine the amount of a net operating loss deduction, the taxpayer must first compute the amount of the New York State net operating loss for a particular taxable year. The New York State net operating loss for a particular taxable year is computed by adjusting the net operating loss for such taxable year which is carried back or forward for Federal income tax purposes by the additions and subtractions contained in section 208.9(a), (bi) and (gl) of the Tax Law.

To determine the amount of the New York State net operating loss deduction, the taxpayer may only include a New York State net operating loss (as determined above) from a taxable year the taxpayer was subject to tax under article 9-A of the Tax Law. In addition, the amount of the net operating loss deduction may not exceed the amount of the deduction for the taxable year allowed under section 172 of the IRC, or the deduction for the taxable year which would have been allowed if the taxpayer had not made an election under Subchapter S of Chapter one of the IRC. Where the New York State net operating loss for a particular taxable year exceeds the amount of such loss that is allowed to be carried back or forward in the net operating loss deduction, the excess may be included in the net operating loss deduction for another taxable year if there is, also, an excess amount of loss for Federal income tax purposes for such loss year and such excess is included in the net operating loss deduction for such other taxable year for Federal income tax purposes and the limitations described in section 208.9(f)(1), (2) and (3) of the Tax Law and section 3-8.2(a), (b), (c) and (d) of the Regulations are met.

Accordingly, for purposes of computing the net operating loss deduction pursuant to section 208.9(f) of the Tax Law, section 208.9(f)(1) explains how to compute the amount of New York State net operating loss for the loss year, and section 208.9(f)(3) explains that the amount that can be

carried back or carried forward as the New York State net operating loss deduction in an income year is limited to the amount of net operating loss deduction allowed for Federal income purposes under section 172 of the IRC for that income year.

With respect to Issue "3", where a taxpayer's net operating loss deduction for a taxable year is limited by section 208.9(f)(3) of the Tax Law, no adjustment to taxable gain or loss under section 208.9(a)(12) or (b)(II) of the Tax Law is required upon subsequent disposal of assets. The adjustments required to be made pursuant to section 208.9(a), (b) and (g) of the Tax Law are not affected by a net operating loss deduction allowed pursuant to section 208.9(f) of the Tax Law. Accordingly, there is no undue burden placed on the taxpayer by the limitation contained in section 208.9(f)(3) of the Tax Law.

DATED: January 19, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.