

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-10(10)I  
Income Tax  
October 28, 2010

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I100608A

On June 8, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], on behalf of [REDACTED]. Petitioners ask: If a refund of personal income tax caused by a net operating loss is not given by the State within forty-five days of the claim for refund, should interest on such overpayment be allowed from the due date of the loss year return (April 15<sup>th</sup>) without regard to extensions of time to file?

We conclude that interest on a personal income tax refund caused by a net operating loss carryback that is not refunded to a taxpayer within forty-five days of a claim for refund should be allowed from the due date of the loss year return without regard to extensions of time to file.

**Facts**

Petitioners filed an extension request for the filing of their 2008 New York State personal income tax return prior to the April 15, 2009 due date. They filed their 2008 personal income tax return prior to the October 15, 2009 extended due date. In November of 2009, the taxpayers filed Form IT-113-X to carry back their 2008 loss to the 2004 tax year. In March of 2010, the taxpayers received a refund for the full amount requested and interest from the extended October 2009 actual filing date of the 2008 return, rather than from April 15, 2009, the due date of the return for the loss year without extensions.

**Analysis**

Tax Law §688(a) provides in part:

§ 688. Interest on overpayment.--(a) General.--Notwithstanding the provisions of section sixteen of the state finance law, interest shall be allowed and paid as follows at the overpayment rate set by the commissioner pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum upon any overpayment in respect of the tax imposed by this article:

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(2) from the date of the overpayment to a date (to be determined by the commissioner) preceding the date of a refund check by not more than thirty days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(3) Late returns. Notwithstanding the provisions of paragraph one or two of this subsection, in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

Tax Law §688(c) provides in part: “(c) *Income tax refund within forty-five days of claim for overpayment.* If any overpayment of tax imposed by this article is credited or refunded within forty-five days after the last date prescribed (or permitted by extension of time) for filing the return of such tax on which such overpayment was claimed or within forty-five days after such return was filed, whichever is later, . . . no interest shall be allowed under this section on any such overpayment. In regard to an amended return claiming such overpayment or a claim for credit or refund on which such overpayment was claimed, if such overpayment is refunded within forty-five days of filing such return or such claim, no interest shall be allowed from the date such return or such claim is filed until the day the refund is made. . . .”

Tax Law §688(d) provides: “(d) *Refund of income tax caused by carryback.* For purposes of this section, if any overpayment of tax imposed by this article results from a carryback of a net operating loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss arises. Such filing date shall be determined without regard to extensions of time to file. For purposes of subsection (c) of this section any overpayment described herein shall be treated as an overpayment for the loss year and such subsection shall be applied with respect to the overpayment by treating the return for the loss year as not filed before claim for such overpayment is filed. The term “loss year” means the taxable year in which such loss arises.”

Section 688 does not address interest on refunds arising from net operating loss carrybacks not paid within 45 days of a claim for refund when the return for the loss year was filed on or before its extended due date. However, the provisions of section 688 of the Tax Law are modeled on section 6611 of the Internal Revenue Code. The New York Court of Appeals has said, “It has long been the policy of our courts to adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions.” (Marx v. Bragalini, 6 N.Y.2d 322 [1959].) When state statutes are modeled on federal statutes, it is accepted that federal cases may be used for guidance in interpreting those statutes. (Matter of Ilter Sener, Tax Appeals Tribunal, May 5, 1988, citing Matter of Levin v. Gallman, 42 NY2d 32). It is noted that the New York Tax Appeals Tribunal also previously found a federal revenue ruling helpful in interpreting New York interest provisions. (Matter of Unicorn American Corporation, Tax Appeals Tribunal, December 28, 1995.) Federal interpretive material has been found consisting of legislative history and Internal Revenue Manual sections with respect to section 6611 of the Internal Revenue Code. The federal Joint Committee on Taxation, in explaining amendments to section 6611 made by the Tax Equity and Fiscal Responsibility Act of 1982, said:

If, however, the claim for refund (including an application for tentative carryback or refund adjustment) based on the carryback of the loss or credit from the loss year is filed after the due date of the return for the loss year (determined without regard to extensions), the Act provides that interest on the refund is payable only if the refund is not made within 45 days of the claim. If the 45-day period expires, interest runs from the due date of the return for the loss year. [Staff of the Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982 (H.R. 4961, 97<sup>th</sup> Congress; Public Law 97-248) at page 259.]

At least one Internal Revenue Manual section gives an example of the loss year return filed after the due date of the loss year return, but before the extended due date. The refund claim was not paid within 45 days of the refund claim, and interest was paid beginning on the loss year return due date because the loss year return was timely filed on extension. (IRM 21.5.9.5.40 [05-17-2010], Carryback Forms 1040X, 1120X, 1041, 1120-C and 990-T Interest Computation Dates.) This example in the Internal Revenue Manual is consistent with the conclusion in an IRS Private Letter Ruling that addresses this issue (PLR 8350109, 9/15/83).

Petitioners filed their claim for refund due to a net operating loss carryback in November of 2009. In March of 2010, they received their refund and interest from the date the original return for the loss year was filed during the extension period (in October of 2009). Tax Law §688(d) provides that an overpayment caused by a carryback is not deemed to have been made prior to the filing date for the taxable year in which the net operating loss arose (here April 15, 2009), determined without regard to extensions of time to file. With respect to the 45-day interest rule in Tax Law §688(c), Tax Law §688(d) provides that the carryback overpayment will be treated as an overpayment for the loss year and the return for the loss year is to be treated as not being filed before the claim for the overpayment is filed. The claim for the overpayment was filed in November of 2009, and the overpayment, paid in March of 2010, was not paid within 45 days of the claim for overpayment so as to be paid without interest being owed on the refund. The original return for the loss year was timely filed within the extension period so that interest would not begin from the filing date of a late return. Interest is therefore owed the taxpayers from the date of overpayment to a date preceding the refund check by not more than thirty days. Pursuant to Tax Law §688(d), the date of overpayment is deemed to be the filing date of the return for the loss year, determined without regard to extensions, i.e., April 15, 2009.

DATED: October 28, 2010

/S/  
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DANIEL SMIRLOCK  
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.