

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

TSB-A-92 (5) C
Corporation Tax
February 27, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C911016C

On October 16, 1991, a Petition for Advisory Opinion was received from FSB-Properties, 144-51 Northern Boulevard, Flushing, New York 11354.

The issue raised by Petitioner, FSB-Properties, is whether, after revoking its election to be taxed under Article 9-A of the Tax Law (thereby subjecting itself to tax under Article 32 of the Tax Law), it would be able to carryback a capital loss sustained in the first year it was subject to tax under Article 32 to a previous tax year when it was subject to tax under Article 9-A.

Petitioner, a wholly-owned subsidiary of Flushing Savings Bank, is doing business in New York and is currently subject to tax under Article 9-A of the Tax Law. Flushing Saving Bank is a banking corporation doing business in New York State and is subject to franchise tax under Article 32 of the Tax Law.

Petitioner is a corporation that would qualify as a banking corporation under section 16-2.5 of the Franchise Tax on Banking Corporations Regulations (hereinafter "Article 32 Regulations") and could be subject to tax under Article 32 of the Tax Law. However, pursuant to section 16-2.5(j)(3) of the Article 32 Regulations, Petitioner had made an election to be taxed under Article 9-A of the Tax Law. Such section 16-2.5(j)(3) provides that "[t]he election is made by the filing of a tax return pursuant to article 9-A of the Tax Law and revocation is made by the filing of a tax return pursuant to article 32 of the Tax Law." For taxable year 1990, Petitioner is considering the revocation of its election to be taxed as an Article 9-A corporation, thereby subjecting itself to tax under Article 32 of the Tax Law. For taxable year 1990, Petitioner has incurred a substantial capital loss.

Section 18-2.5(b) of the Article 32 Regulations provides that:

A taxpayer sustaining a net capital loss for Federal income tax purposes is permitted to carry back or carry forward such loss to the same extent and to the same years as is allowed under section 1212 of the Internal Revenue Code. A corporation which files as part of a consolidated group for Federal income tax purposes, but files on a separate basis for purposes of article 32 of the Tax Law, must compute its net capital loss as if it were filing on a separate basis for Federal income tax purposes.

Section 3-7.1 of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provides that:

(a) Except as provided in section 3-7.4 of this Subpart, a taxpayer sustaining a net capital loss is permitted to carry back or carry forward such loss to the same extent and the same years as is allowed under section 1212 of the Internal Revenue Code. . .in computing entire net income for purposes of article

9-A. A corporation which reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A must compute its net capital loss and the amount of such capital loss which is allowed as if it were filing on a separate basis for Federal income tax purposes.

(b) . . . The amount that a taxpayer may carry back or carry forward to any taxable year may not exceed the amount of loss which may be allowed pursuant to the Internal Revenue Code.

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If, for taxable year 1990, the revocation of the section 16-2.5(j)(3) election is not made, Petitioner will continue to be subject to tax under Article 9-A of the Tax Law and its 1990 net capital loss would be available for carry back to previous tax years when Petitioner was also subject to tax under Article 9-A of the Tax Law.

If Petitioner is an Article 32 taxpayer for taxable year 1990 and it has a net capital loss pursuant to section 18-2.5(b) of the Article 32 Regulations, Petitioner may carry back such net capital loss to taxable years it was subject to tax under Article 9-A of the Tax Law if Petitioner meets all of the requirements of Subpart 3-7 of the Article 9-A Regulations regarding a net capital loss carry back. For such carry back purposes, the net capital loss must be computed as if Petitioner had been subject to Article 9-A of the Tax Law instead of Article 32 of the Tax Law. That is, Petitioner must determine whether the net capital loss is derived from subsidiary capital and/or investment capital and/or business capital, respectively, so that the carry back can be applied to subsidiary and/or investment and/or business incomes, respectively.

DATED: February 27, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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