

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-18(2)I
Income Tax
July 11, 2018

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1180606A

The Department of Taxation and Finance (the Department) received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks about the legal basis for Condition 5G on NYS Form DTF-4.1 (Offer in Compromise for fixed and final liabilities), which requires the taxpayer to agree to forfeit any current capital loss or net operating loss credits taken on any future New York State tax return as a condition of acceptance of the taxpayer's Offer in Compromise (hereinafter OIC). Petitioner also asks for a definition of "any current capital loss," "net operating loss" and "any future New York State Return" and whether a forfeiture of a loss includes only capital losses/net operating losses from the tax period sought to be compromised or whether it also includes capital losses/net operating losses accrued after the tax periods for which the compromise is being sought, but before the date the compromise is accepted. Further, he asks whether the forfeiture applies to losses based on future tax returns and whether the forfeiture provision bars the taxpayer from ever taking any losses at any time in the future.

We conclude that the condition requiring the taxpayer to agree to forfeit any current capital loss or net operation loss credits (i.e., carryforward amounts), as set forth in Condition 5G on NYS Form DTF-4.1, is a valid exercise of the Commissioner's discretion, pursuant to Tax Law § 171(15), that furthers the statutory mandate to reject any offer in compromise that "would undermine [tax] compliance" or "would be adverse to the best interest of the state." *Id.*; *see also* 20 NYCRR 5005.1(b)(5), (c)(3).

Under New York State personal income tax, the terms "capital loss" and "net operating loss" have the same meanings as under the Internal Revenue Code. *See* Tax Law, § 607(a). Current capital loss or net operating loss carryforward amounts that must be forfeited are all such carryforwards that accrued before the OIC is accepted, regardless of whether the losses accrued during the tax period being compromised or during another period; such loss carryforward amounts cannot be applied toward any future year. In the context of Condition 5G of NYS Form DTF-4.1, the definition of "any future return" is based on the ordinary meaning of those words and, as such, refers to any New York tax return that is amended or filed after the date the OIC is accepted. The forfeiture does not apply to losses that accrue in tax years after the OIC is accepted.

Facts

Petitioner and his wife submitted an Offer in Compromise seeking to reduce their tax liability for tax years 2005 and 2008 and some taxes from a defunct LLC from 2000. Petitioner stated that he accrued certain losses from his activities as a day trader in 2009 and 2010 that

could be carried forward to future years. However, under Condition 5G, those loss carry forward amounts would have to be forfeited.

Analysis

Issue (1): The legal basis for Condition 5G of Form DTF-4.1

Tax Law § 171(15) authorizes the Commissioner of Taxation and Finance (hereinafter “the Commissioner”) to compromise any taxes or other impositions or any warrant or judgment for taxes or other impositions administered by the Commissioner, and the penalties and interest in connection therewith, under circumstances set forth in the statute. The law specifically directs the Commissioner to not accept offers in compromise that would undermine tax compliance or that would be adverse to the best interests of the State.

The Commissioner has promulgated regulations implementing Tax Law § 171(15), including a number of conditions enumerated in 20 NYCRR 5005.1(c) that must be met for a taxpayer to qualify to have his or her tax debt compromised pursuant to the acceptance of an OIC. In addition, 20 NYCRR 5005.1(c)(3) unambiguously states that “the department may require the taxpayer to agree to any other conditions which may be necessary to effectuate a just offer in compromise.” Moreover, 20 NYCRR 5005.1(b)(5) provides that an OIC “will not be accepted **for any reason** where acceptance of such an offer would undermine voluntary compliance with the taxes... administered by the commissioner or would not be in the best interests of the State.” (Emphasis added.) Accordingly, “[s]uch an offer... is strictly within the discretion of the Commissioner of Taxation and Finance to accept or reject.” *In the Matter of the Petition of Filemon G. and Nora M. Basa*, 1996 WL 599581, at 3, (referring to the OIC Program pursuant to Tax Law § 171[15]). In *Jacobi v Tax Appeals Trib.*, 156 AD3d 1154, 1158 (3d Dept 2017), *lv to appeal denied sub nom. Jacobi v Tax Appeals Trib. of State of New York*, 2018-231, 2018 WL 2069330 (Ct App May 3, 2018), the Court, citing 20 NYCRR 5005.1(d); (e)(2), (3), found that “the Commissioner has broad discretion in deciding whether to accept an offer in compromise.”

In the Commissioner’s broad discretion to require conditions designed to effectuate a just OIC, the Commissioner has specified eight conditions that must be satisfied for an offer in compromise to be accepted. These conditions are set forth in Form DTF-4.1 section 5. Condition 5G requires taxpayers to “also agree to forfeit any current capital loss or net operating loss credits taken on any future New York State return.” Form DTF-4.1 is the standard agreement that all taxpayers seeking an OIC must use and all taxpayers must agree to the conditions in section 5 in order to have their offers accepted by the Commissioner.

As set forth above, there is clear and unambiguous statutory and regulatory authority for the Commissioner, in his or her discretion, to require the forfeiture of any current capital loss or net operating loss credits or carryforward amounts taken on any future New York State return as a condition for acceptance of an OIC.

Issue (2): Definition of terms contained in Form DTF-4.1:

Petitioner asks about the meaning of “any current capital loss”, “net operating loss” and “any future New York State Return”. The meaning of the terms used on Form DTF-4.1 are not ambiguous. The form specifies that only the “current” losses cannot be carried forward; therefore, the date the OIC is accepted determines what is current. Loss carry forward amounts available to the taxpayer as of the date the OIC is accepted are the “current” loss credits that are referenced. Thus, any capital or net operating losses or loss carryforward amounts accrued after the acceptance date of the OIC would not be impacted by the agreement. The terms “capital loss” and “net operating loss” have the same meaning under the New York State income tax law as under the Internal Revenue Code. *See* Tax Law § 607; IRC §§ 172 (net operating loss); 165(f) (capital losses). The term “any future New York State Return” is any New York State tax return that is filed or amended after the OIC is accepted.

Conclusion

The Commissioner has broad discretion to determine what conditions should be included in an OIC, including the authority to require that current capital and net operating loss carryforwards or credits be forfeited. The OIC program is designed to allow qualifying, financially distressed taxpayers the opportunity to put overwhelming tax liabilities behind them (20 NYCRR 5005.1[e][3]). There is no guarantee that an applicant’s offer will be accepted and the Commissioner may reject an offer for public policy considerations (20 NYCRR 5005.1[e][2][i][f]). The program is voluntary; therefore, if the applicant believes the conditions set by the Commissioner are not in his or her best interest, he or she is not compelled to enter into the agreement.

DATED: July 11, 2018

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.