

Opinion No. 66-139

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BY: OPINION OF BOSTON E. WITT, Attorney General Edward R. Pearson, Assistant Attorney General

TO: Howard T. Downing, Director, Income Tax Division, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

FACTS

A foreign corporation transacts business both within and without New Mexico. Separate accounting records are kept for the corporation's New Mexico activities. Its New Mexico activities have resulted in a net operating loss. The corporation, however, has reported a net income from all activities on its federal corporate income tax return.

QUESTIONS

1. Can the corporation, apportioning income by means of separate accounting, carry the net operating loss either back or forward in the computation of New Mexico taxable income for other years?
2. Is the result the same if the corporation elects to apportion its income under the Uniform Division of Income for Tax Purposes Act?

CONCLUSIONS

1. No.
2. Yes.

OPINION

{*182} ANALYSIS

The New Mexico Income Tax Act, Sections 72-15A-1 through 72-15A-15, N.M.S.A., 1953 Compilation (1965 P.S.), neither specifically allows nor disallows carry-back or carry-for-ward net operating loss deductions. It is a fundamental principal that a deduction cannot be taken unless there is specific statutory authority for taking the deduction.

Section 72-15A-3, N.M.S.A., 1953 Compilation (1965 P.S.) levies an income tax on the net income of every foreign corporation engaged in the transaction of business in, into

or from this state, or deriving any income from any property within New Mexico. Net income is defined generally as federal taxable income upon which the federal income tax is calculated with certain adjustments. Section 72-15A-2, N.M.S.A., 1953 Compilation (1965 P.S.). Because net income is defined by reference to federal taxable income, a net operating loss is to be accorded the same treatment under the New Mexico Income Tax Act as it is by the Internal Revenue Code. Opinion of the Attorney General No. 65-206, dated October 18, 1965. In Opinion No. 65-206, we said:

It is therefore our opinion that New Mexico is bound by any credits, deductions or exemptions that a taxpayer is allowed **on his federal return in the computation of federal taxable income.** (Emphasis added.)

Net operating losses are to be accorded the same treatment under the New Mexico Income Tax Act as they are by the Internal Revenue Code only because "base income", as defined in Section 72-15A-2(O), supra, is the result of the computation of federal taxable income. Therefore, if under the Internal Revenue Code, a net operating loss carry-back or carry-forward deduction is allowed in the computation of federal taxable income for a particular year following 1961, it is also allowed as a deduction in the computation of New Mexico taxable income for the same year following 1961.

In answer to the first question, the corporation cannot carry back or {^{*}183} carry forward the net operating loss attributable to New Mexico activities in the computation of New Mexico taxable income for other years because the corporation has no net operating loss which it can carry back or carry forward in the computation of federal taxable income for those other years.

Section 72-15A-9, N.M.S.A., 1953 Compilation (1965 P.S.) provides in part that:

At the election of any taxpayer, net income may be prior to the application of the tax rates provided in sections 5 and 6 (72-15A-5 and 72-15A-6), apportioned and allocated as follows:

* * *

F. Other deductions and exemptions **allowable in computing federal taxable income** and not specifically allocated in the Uniform Division of Income for Tax Purposes Act shall be equitably apportioned in accordance with regulation of the commissioner. (Emphasis added.)

If, under the Internal Revenue Code, a corporation, which allocates income as provided in the Uniform Division of Income for Tax Purposes Act can carry back or carry forward a net operating loss in the computation of federal taxable income for a particular year following 1961, it then can carry back or carry forward the loss in the computation of New Mexico taxable income for the same year following 1961.

In answer to the second question, the corporation cannot carry back or carry forward the net operating loss directly attributable to its New Mexico activities in the computation of New Mexico taxable income for other years because it cannot carry back or carry forward the loss in the computation of federal taxable income for the same year.