

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ABEX CORPORATION</b>	:	DECISION
	:	DTA No. 807575
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1977	:	
through 1985	:	

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Petitioner Abex Corporation, c/o Paul D. Caccamo, Assistant Treasurer, Liberty Lane, Hampton, New Hampshire 03842 filed an exception to the determination of the Administrative Law Judge issued on December 27, 1991 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1977 through 1985. Petitioner appeared pro se by Paul D. Caccamo. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner attached a brief to its exception. The Division of Taxation filed a letter brief in response. Neither party requested oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether petitioner is entitled to carry forward a net operating loss arising from the year 1982 to the years 1983, 1984 and/or 1985.

II. Whether petitioner may, at this stage in the proceedings, introduce new evidence before the Tax Appeals Tribunal to support its claims regarding the carryforward issue.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Abex Corporation ("Abex"), is a diversified manufacturer which operates on a divisional basis. Its corporate headquarters moved from New York City to Stamford, Connecticut in 1984 and then to Boston, Massachusetts in 1986. Petitioner is a wholly-owned subsidiary of IC Products Company ("Products") which in turn is a wholly-owned subsidiary of IC Industries, Inc. ("Company"). The Company's name was changed to the Whitman Corporation on December 1, 1988.

During the tax years involved, Abex deducted on its New York franchise tax reports interest expense on loans provided by IC Commercial Paper, Inc. ("Commercial Paper") as follows:

<u>Year</u>	<u>Amount</u>
1983	\$5,242,180.00
1984	5,830,556.00
1985	4,817,030.00

Commercial Paper is a subsidiary of the investment banking firm, Merrill Lynch Capital Markets, Inc., and is unrelated to petitioner, the Company or Products.

The financial arrangement which was the basis of these payments was entered into on March 15, 1983, and is entitled " Designated Subsidiary Loan Agreement." The parties to the agreement were Commercial Paper, the Company and Abex. The purpose of the arrangement was to permit the operating subsidiaries of the Company (which, in addition to Abex, included Midas International Corporation, an automobile exhaust system franchisor headquartered in Chicago, Illinois; Pepsi-Cola Bottlers, Inc., a soft drink bottler also headquartered in Chicago; and Pet Incorporated, a specialty foods company headquartered in St. Louis, Missouri) to obtain current financing for their operations from the commercial paper market. The Company, being a holding company, had no operations and therefore no need for such financing.

Neither the Company nor the individual operating subsidiaries possessed a sufficient credit rating to directly access the commercial paper market. A rating of "A-1" or "A-2" from Standard and Poor's Corporation would normally be required to access such market. However, with the assistance of Merrill Lynch, various commercial banks and the combined assets of Products, Commercial Paper was established and provided with a stand-by letter of credit which enabled it to obtain an "A-1" credit rating.

Pursuant to the Designated Subsidiary Loan Agreement, Commercial Paper would sell its short-term notes in the commercial paper market and loan the proceeds to the operating subsidiaries (including Abex) to enable them to purchase the merchandise necessary to carry on their businesses. To more efficiently handle the loan repayments, the Company assumed the obligations of the operating subsidiaries to Commercial Paper, collected principal and interest payments from each operating subsidiary and used them to pay Commercial Paper. As a result of the Company assuming the obligations of Abex with respect to the loan from Commercial Paper, Abex was released from all liability to Commercial Paper with respect to such loan.

The Company did not directly own the stock of the operating subsidiaries, all of which was owned by Products. Products was a holding company formed to sell long-term debt. According to the loan agreement, the operating subsidiaries made their payments to Products, which in turn made payment to the Company. The loan agreement further provided that Abex agreed to be indebted to Products in an amount equal to all loans made by Commercial Paper to Abex and assumed by the Company. Under the agreement, Products was obligated to forward the payments from Abex to the Company, which was obligated to use the payments from Products to pay Commercial Paper the Company's obligations in respect of the loans made to Abex and assumed by the Company.

The Division of Taxation (hereinafter the "Division"), during an audit of Abex, added back to petitioner's entire net income 90% of the interest paid to Products that was related to the Commercial Paper loans. In addition, the Division discovered on audit that Abex had unreported Federal audit adjustments for 1977, 1978 and 1979. The auditor increased Abex's

entire net income for these years by the amount of the Federal audit adjustments, resulting in additional tax due for each of the three years.

During the course of the audit, Abex filed claims for credit or refund of corporation tax paid, form CT-8, for the years 1979, 1980 and 1981. The refund claims were filed on December 24, 1987. The refunds were based upon net operating loss carrybacks from the years 1982, 1983 and 1984. On audit, the Division disallowed the 1982 loss carryback on the basis that the statute of limitations for filing such claim had expired. The auditor carried back the 1983 loss to 1980. As a result of various audit adjustments not at issue in this matter, the loss for 1984 was changed to income, resulting in no carryback for this year.

As a result of the audit, the Division determined the following amounts of additional tax, penalty and interest (computed to September 14, 1989) due:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>
12/31/77	\$ 420.00	\$ 817.00	\$ 263.00
12/31/78	618.00	1,106.00	387.00
12/31/79	14,974.00	24,481.00	7,832.00
12/31/80	(47,622.00)	(70,470.00)	0.00
12/31/81	0.00	0.00	0.00
12/31/82	0.00	0.00	0.00
12/31/83	0.00	0.00	0.00
12/31/84	1,215.00	648.00	0.00
12/31/84	33,644.00	17,942.00	0.00
12/31/85	2,596.00	945.00	0.00
12/31/85	72,650.00	26,441.00	0.00

Penalties were asserted for the years 1977, 1978 and 1979 based on Tax Law § 1085(a)(1), (2) and (k), for petitioner's failure to file a return, failure to pay tax shown on a return and for petitioner's substantial understatement of tax liability.

On September 14, 1989, the Division issued seven notices of deficiency under Article 9-A to Abex for the years 1977, 1978, 1979, 1984 (2) and 1985 (2), asserting total tax due of \$78,495.00, plus penalty and interest.

The Company and its affiliated corporations, including Abex, filed a consolidated Federal income tax return for the year 1982. The Company and its affiliated corporations elected to relinquish the entire carryback period with respect to its net operating loss for the taxable year

ended December 31, 1982, pursuant to Internal Revenue Code § 172(b)(3). Abex did not introduce any evidence into the record of this matter as to the amount of the losses that were claimed to have been carried forward from 1982 to 1983, 1984 or 1985 for Federal tax purposes.

### ***OPINION***

The Administrative Law Judge determined that while petitioner's payments of interest on indebtedness to its parent, IC Products Company ("Products"), fall within the scope of the addback requirement of Tax Law § 208.9(b)(5), petitioner qualifies for the conduit exception to the addback provisions for the audit period prior to April 1, 1984.<sup>1</sup> Therefore, the Administrative Law Judge concluded that prior to April 1, 1984, and contrary to the Division's position, petitioner was not required, for State franchise tax purposes, to add back to its entire net income 90% of the interest paid by Abex to Products.

The Administrative Law Judge also determined that since petitioner elected, pursuant to Internal Revenue Code § 172(b)(3), to relinquish the entire carryback period with respect to its net operating loss for the taxable year ended December 31, 1982 for Federal tax purposes, petitioner is not entitled to carry back the 1982 loss for New York State tax purposes.

Moreover, the Administrative Law Judge determined that since petitioner did not prove either the source year of the loss or the amount of the net operating loss deduction claimed by it for Federal tax purposes for 1983, 1984, or 1985, petitioner is not entitled to carry forward the 1982 loss for New York State tax purposes (citing, Matter of Fazal Ahmad, P.C., Tax Appeals Tribunal, August 8, 1991; Matter of Gottesman, Tax Appeals Tribunal, August 25, 1988).

On exception, petitioner argues that it should be permitted to carry forward the net operating loss deduction for 1982 to 1983 through 1985. In response to the Administrative Law Judge's

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As noted in the Administrative Law Judge's determination, the Tax Appeals Tribunal held that the effective date of the Division's removal of the conduit principle as an exception to the interest addback requirement of Tax Law § 208.9(b)(5) was April 1, 1984 (see, Matter of Friesch-Groningsche Hypotheek Bank Realty Credit Corp., Tax Appeals Tribunal, December 28, 1990, affd 585 NYS2d 867).

statement that Abex had "not introduce[d] any evidence into the record . . . as to the amount of the losses that were claimed to have been carried forward from 1982 to 1983, 1984 or 1985 for Federal tax purposes" (Determination, p. 5), petitioner has attached a number of exhibits to its exception in support of its position. Petitioner explains that it is submitting the additional evidence because "[w]hile such evidence was available to the auditors during their examination, it was inadvertently excluded from the petition filed" (Petitioner's notice of exception, attached rider, p. 1).

In response, the Division asks that the Administrative Law Judge's determination be sustained in full. The Division objects to petitioner's offering of new evidence at this stage in the proceedings, claiming that: petitioner has had ample opportunity to attempt to prove its case; despite these opportunities, petitioner has failed to offer any proof on the "key points" of the amount and source year of the net operating loss deduction claimed for Federal (and, therefore, for State) tax purposes; petitioner's claim that the new proof was available to the auditor is contradicted by the record which reveals that the auditor was unaware of the section 172(b)(3) election; and the Division, after having relied on the record, would be prejudiced by having the new evidence introduced (Division's letter brief in response, pp. 2-3).

In the alternative, the Division argues that even if the new evidence is considered, no net operating loss carryforward is available to petitioner for 1984 as a matter of law. The Division claims that since a Federal net operating loss already exists for 1984, the 1982 net operating loss cannot be carried forward to 1984 for Federal tax purposes. If there is no Federal net operating loss carryforward to 1984, there can be no carryforward for New York franchise tax purposes either (citing, Matter of Lehigh Valley Indus., Tax Appeals Tribunal, May 5, 1988).

We affirm the Administrative Law Judge's determination. Further, because the substantive issues raised on appeal are the same as those raised before the Administrative Law Judge, and because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we deem it unnecessary to analyze these issues any further. Therefore, we affirm the Administrative Law Judge for the reasons stated in his determination.

In rendering this decision, we did not take into account the new evidence petitioner submitted on exception. As the Division correctly points out, we have a strict policy of barring the submission of evidence after the hearing is closed. This policy is based on a sound principle:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Abex Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Abex Corporation is granted to the extent indicated in conclusion of law "C" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The notices of deficiency issued on September 14, 1989, as modified in accordance with paragraph "3" above, are sustained.

DATED: Troy, New York  
October 8, 1992

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner