

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
ANDREW S. BURG;
PROTEST TO DENIAL OF CLAIMS FOR
REFUND OF PERSONAL INCOME TAX
FOR TAX YEARS 1998 & 1999**

No. 03-13

DECISION AND ORDER

A formal hearing on the above-referenced protest was held July 2, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. Andrew S. Burg ("Taxpayer") represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer filed New Mexico personal income tax returns for calendar years 1998 and 1999 reporting tax due to the state.
2. The Taxpayer was unable to pay these liabilities in full and entered into an installment agreement with the Department.
3. As a result of an IRS examination of the Taxpayer's 2000 federal income tax return, the IRS agreed to recognize the Taxpayer as a professional stock trader and allowed him to claim a significant net operating loss (NOL) arising out of the losses he suffered in the stock market.
4. Pursuant to federal law, the Taxpayer was able to carry the NOL back against his 1998 and 1999 federal income tax liabilities.
5. The IRS employee with whom the Taxpayer worked told the Taxpayer that he could also apply the NOL against his 1998 and 1999 state tax liabilities.

6. Relying on the advice received from the IRS employee, the Taxpayer filed amended 1998 and 1999 New Mexico income tax returns seeking to carry the NOL back against his state income tax liabilities for those years and claim a refund of the tax previously paid.

7. On March 5, 2003, the Department denied the Taxpayer's refund claims.

8. On March 11, 2003, the Taxpayer filed a written protest to the Department's denial of his refund claims.

DISCUSSION

The issue presented is whether New Mexico law allows the Taxpayer to claim a refund of 1998 and 1999 New Mexico personal income taxes based on the carry back of NOLs established in his 2000 income tax return.

The Department maintains that the Taxpayer is not entitled to the refund because New Mexico law does not allow NOLs to be carried back to prior years. The calculation of New Mexico state income taxes begins with a determination of "base income", which is defined in NMSA 1978, § 7-2-2(B) as the taxpayer's federal adjusted gross income, plus the amount of the net operating loss deduction allowed by § 172(a) of the Internal Revenue Code and taken by the taxpayer for that year. New Mexico then allows certain exclusions to arrive at the "net income" upon which income tax is imposed. NMSA 1978, § 7-2-2(N)(7) allows the following exclusion for NOLs:

(7) for taxable years beginning on or after January 1, 1991, an amount equal to the sum of any net operating loss carryover deductions to that year claimed and allowed, provided that the amount of any net operating loss carryover from a taxable year beginning on or after January 1, 1991 may be excluded only as follows:

(a) in the case of a timely filed return, in the taxable year immediately following the taxable year for which the return is filed; or

(b) in the case of amended returns or original returns not timely filed, in the first taxable year beginning after the date on which the return or amended return establishing the net operating loss is filed; and

(c) in either case, if the net operating loss carryover exceeds the amount of net income exclusive of the net operating loss carryover for the taxable year to which the exclusion first applies, in the next four succeeding taxable years in turn until the net operating loss carryover is exhausted; in no event shall a net operating loss carryover be excluded in any taxable year after the fourth taxable year beginning after the taxable year to which the exclusion first applies.

These carryover provisions are further amplified in Department Regulation 3.3.1.13 NMAC. The example in subsection D(b)(2) of the regulation is directly on point:

Example: B reports for income tax purposes on a calendar year basis. The 1991 original return included a net operating profit from a partnership in which B is a partner. Subsequently, the partnership reports revised information to B, showing a net operating loss instead of the original net operating profit. Consequently, in June, 1993, B files an amendment to B's timely filed 1991 original New Mexico individual income tax return. B may first apply the 1991 net operating loss reported on the 1993 amended return to B's New Mexico individual income tax return for 1994. B may not apply this net operating loss to 1992 or 1993.

The statutes and regulations clearly establish that the Taxpayer in this case is not entitled to use the NOLs established in his 2000 income tax return to eliminate his state tax liabilities for the 1998 and 1999 tax years.

In support of his protest, the Taxpayer testified that he was given erroneous advice concerning his state taxes by the IRS. He also stated his belief that the capital gains reported on his 1998 and 1999 returns were fabrications resulting from the failure of the federal Securities and Exchange Commission to properly carry out its oversight responsibilities. The issues the Taxpayer raises are not issues that the Department or its hearing officer have jurisdiction to consider. The Taxpayer must address his concerns on what he sees as the incompetence or malfeasance of the federal government to the appropriate federal agencies or to his congressional representatives. The only matter at issue in this administrative protest is whether the Department's denial of the Taxpayer's refund claims is supported by New Mexico law. Based on the statutes and regulations cited above, the Department's denial was correct.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of his claims for refund of 1998 and 1999 personal income taxes, and jurisdiction lies over the parties and the subject matter of this protest.

2. New Mexico law does not allow the Taxpayer to claim a refund of 1998 and 1999 New Mexico personal income taxes based on the carry back of NOLs established in his 2000 income tax return.

For the foregoing reasons, the Taxpayer's protest IS DENIED.