

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

HI-LINE TRUCKING, INC.,)	
)	DOCKET NO: CT-1998-4
Appellant,)	
)	
-vs-)	
)	FINDINGS OF FACT,
THE DEPARTMENT OF REVENUE)	CONCLUSIONS OF LAW,
OF THE STATE OF MONTANA,)	ORDER AND OPPORTUNITY
)	<u>FOR JUDICIAL REVIEW</u>
Respondent.)	

The above-entitled appeal was heard on July 14, 1999 in Sidney, Montana. The taxpayer was represented by Rocky Torgerson and Tara Hill, certified public accountants. The Department of Revenue was represented by Brendan Beatty, tax counsel, and Brian Staley, revenue agent for the Corporation License Tax Bureau. The notice of the hearing was duly given as required by law. The Board, being well and fully informed in the premises, finds and concludes as follows:

STATEMENT OF THE ISSUE

The taxpayer contends that the issue is one of fairness. For tax year 1993 (year ended August 31, 1994), Hi-Line Trucking, Inc. (Hi-Line) sustained a net operating loss. On the 1993 tax return, question number five, (check here - yes or no - if you wish to forego the net operating loss carryback provision) was inadvertently left unanswered. Hi-Line treated

the net operating loss as a carryforward on its 1994 and 1995 returns. The Department of Revenue (DOR) denied the carryforward of the 1993 net operating loss and notified Hi-Line that the 1993 net operating loss must be carried back three years. When the loss was carried back to tax year 1990, a denial of a refund request in the amount of approximately \$5,700 resulted due to the fact that the statute of limitations had run for that year.

FINDINGS OF FACT

1. The taxpayer is subject to the Montana corporation license tax pursuant to Section 15-31-101, MCA.
2. The State Tax Appeal Board has jurisdiction in this matter pursuant to Section 15-2-302, MCA.

TAXPAYER'S CONTENTIONS

Hi-Line agreed that it did not make an election to carry forward the net operating loss on the 1993 return by marking "yes" in the box for the election to forego the carry back of the net operating loss and provided a copy of the 1993 corporate license tax return showing that it did not make an election regarding the carry back of the net operating loss (question 5, page 3 of the 1993 return). Hi-Line acknowledged that it should have done so.

Section 15-31-119, (11), MCA, provides:

A taxpayer entitled to a carryback period for a net operating loss may elect to forego the entire carryback period. If the election is made, the loss may be carried forward only.

The election must be made on or before the date on which the return is due, including any extension of the due date, for the tax year of the net operating loss for which the election is to be in effect. The election is irrevocable for the year made.

Hi-Line pointed out that this code section does not specify the manner in which the election must be made. Hi-Line consistently treated the 1993 net operating loss as a carryforward on both the 1994 and the 1995 income tax returns.

Page 5 of Taxpayer's Exhibit 1, the 1994 corporate license tax return, details the net operating loss carryforward on Schedule C. Line 7 of Schedule C indicates a 1993 net operating loss of \$242,882. Hi-Line argued that the DOR clearly was aware of the carryforward of the 1993 net operating loss through the taxpayer's action on the 1994 return.

On the 1995 tax return, which is included on page seven of Taxpayer's Exhibit 1, line 8 indicates a net operating loss carryover of \$541,653. That amount includes the \$242,882 carried forward from 1993. Hi-Line consistently treated the 1993 net operating loss as a carryforward on these returns.

The taxpayer argued that, in the interest of fairness, the DOR should have provided both notice of the election to forego the carryback of the 1993 net operating loss and the opportunity to object to that election. Hi-Line provided the DOR with both notice and opportunity to object. Notice of the election to forego the carryback of the 1993 net operating loss

was affirmatively demonstrated through the taxpayer's actions on the 1994 and the 1995 returns. As indicated on the exhibit, the tax returns clearly show the treatment of the 1993 net operating loss as a carryforward. The DOR had the opportunity to object to this election on both the 1994 and 1995 income tax returns. In fact, the DOR did object to the use of the carryforward on the 1995 income tax return, but not on the 1994 tax return.

The objection to this election came in a letter dated October 6, 1997, well after the statute of limitations had run on the carryback to the 1990 income tax return. If the DOR had objected to the election when it had received the 1994 tax return, Hi-Line would not have been barred from using the net operating loss carryback on the 1990 income tax return. The DOR, by not objecting to the election on a timely basis, has cost Hi-Line money.

Also in the interest of fairness, net operating losses may be treated differently for federal and state income tax purposes. The DOR has indicated that, if the election to forego the net operating loss carryback had been made on the federal return, it would have accepted that election on the state return. Hi-Line is not bound to make the same choice regarding the treatment of the federal and state net operating losses and, in fact, chose to treat these losses differently: treating the 1993 net operating loss as a carryback for federal purposes does not

prevent that operating loss as a carryforward for state purposes.

During this appeal process, Hi-Line has timely complied with each deadline for submission of additional information or appeal. However, Hi-Line contended the same cannot be said for the DOR. First, the DOR did not object to the election in a timely fashion. Second, Hi-Line timely appealed the decision of the division administrator in a letter dated March 19, 1998. This appeal was required to be made within a 30 day time period. Hi-Line complied with that deadline. A letter dated March 25, 1998 from Mary Bryson, director of the DOR, (Taxpayer's Exhibit 2) indicated that she would review the case and issue a decision within 60 days as dictated by Section 15-1-211 (c), MCA. No letter was received from the director requesting additional time to consider the case. In fact, there was no further correspondence from the director until Mr. Torgerson contacted the DOR on behalf of Hi-Line in August of 1998. The final agency decision of the DOR was issued on August 20, 1998. If Hi-Line had failed to respond within a prescribed time frame, the right to appeal within the DOR would have been forfeited. Hi-Line argued that consequences should also ensue when the DOR fails to meet a deadline.

DEPARTMENT OF REVENUE CONTENTIONS

Mr. Beatty stated the issue relates to the effect of what can happen when a line on a tax return is left incomplete.

The issue is not one of fairness but one of how to correctly complete a tax return and whether or not the DOR should be able to rely upon what is supplied by a taxpayer on a tax return. Mistakes are made by taxpayers and sometimes those mistakes cost taxpayers money, which is what happened in the present case.

The taxpayer filed a return that was incorrect. The mistake didn't have an effect until there was actual taxable income.

DOR Exhibit A is a copy of a November 12, 1997 letter from Mr. Torgerson to Melissa Kopp, an auditor with the DOR's corporation license tax division. This letter references the matter under contention in this appeal and contains an acknowledgement by Mr. Torgerson that ". . . to properly elect to forgo (sic) the NOL carryback, the yes box of question 5 on page 3 of the 1993 form CLT-4 should have been checked. It was an oversight on our part that this box was not checked. I would like to point out, however, that the no box was not checked either." In response to questioning by Mr. Beatty as to whether or not the proper way to complete the subject tax form was to fill out the yes or no box, Mr. Torgerson replied, "Yes, you should check one or the other and that question was completely missed." (Rocky Torgerson testimony, State Tax Appeal Board hearing, July 14, 1999).

DOR Exhibit B is a copy of the taxpayer's 1992

corporation license tax return. This document contains a question to be answered by the taxpayer - Question 8, page 4: "Check here if you wish to forego the net operating loss carryback provision." The taxpayer left the box unchecked.

DOR Exhibit C is a copy of an amended corporation license tax year return for tax year 1990. This document shows that the 1992 net operating loss was carried back to tax year 1990. The taxpayer also attempted to carry that net operating loss forward to tax year 1994.

Section 15-31-119, (11), MCA, provides:

A taxpayer entitled to a carryback period for a net operating loss may elect to forego the entire carryback period. If the election is made, the loss may be carried forward only. The election must be made on or before the date on which the return is due, including any extension of the due date, for the tax year of the net operating loss for which the election is to be in effect. The election is irrevocable for the year made.

Mr. Beatty argued that this section requires an affirmative act to elect to forego the carryback provision. This affirmative act must be made on or before the date on which the return is due.

The statute does not require that the DOR attempt to "second guess" a taxpayer if the return is not properly completed. The statute does not permit the DOR to "cut somebody a break" in the unfortunate circumstance of a mistake made that ends up costing the taxpayer money. The statute does not allow

a taxpayer or the DOR to "step outside the code" due to an accident.

Mr. Staley testified that, unless there is a statement made by the taxpayer on the return to forego the carryback, the DOR would only be guessing as to the taxpayer's intent. Unless the taxpayer affirmatively states its intention to forego the carryback, the net operating loss is carried back for three years due to statutory requirements. (Section 15-31-119 (3), MCA).

Mr. Staley gave a chronology of the events transpiring in this matter. Mr. Staley testified that the 1992 return was filed showing a net operating loss of \$6,115 and there was no election made to forego the net operating loss carryback on that return. Subsequently, the taxpayer did file an amended return to carry that loss back and did receive a refund.

The 1993 return showed a large net operating loss. The election to forego the net operating loss carryback was not made.

The 1994 return also showed a large net operating loss and the taxpayer did make the election to forego the net operating loss carryback and, thus, to carry the loss forward.

The 1992, 1993 and 1994 returns were audited by an auditor with the DOR's corporation license tax division. These returns would have been checked only for the current year net operating loss and to see if the \$50 minimum tax was paid. There would be no reason to check the net operating loss carryover

because there is no tax effect in the current year if a loss is incurred. In that event, a \$50 minimum tax is due.

When the 1995 return was received, there was taxable income of \$54,548. There was a net operating loss carryforward claimed to offset that income. A DOR auditor determined that an election was not made to forego the carryback of the 1993. That loss was properly carried back to the years 1990 and 1991, resulting in refunds to the taxpayer. The 1990 refund was beyond the statute of limitations and, therefore, could not be issued. The 1991 refund was issued explaining that proper treatment of the 1993 net operating loss was to carry it back three years.

Mr. Staley stated the net operating loss carryover would not be checked by an auditor until there was actually income to be offset. He testified that each return is audited upon receipt. Any current year net operating loss is checked for accuracy, but if a net operating loss carryover is reported in addition to the current year loss, the DOR does not verify the accuracy of that carryover at that point because it's not offsetting any income. The DOR would not have checked on the oversight made by the taxpayer (failure to elect to forego the carryback of net operating loss) until there was income to be offset.

Mr. Staley testified that the corporation license tax return has been modified many times during his eight year tenure

with the DOR. Specific to this appeal, the portion of the return where the taxpayer expresses preference for treatment of net operating losses has been modified several times in recent years: the 1993 return contained a box to check yes or no; the 1994 return simply required a check mark to choose to forego carryback; the 1995 return, as well as subsequent returns to present, contained a box to check yes or no. All of these variations always required an affirmative act on the part of the taxpayer, however.

DOR Exhibit D is a copy of the decision rendered by Judge John Warner of the Montana Twelfth Judicial District in Hill County in the matter of Xeno, Inc., v. Department of Revenue, DV-89-140, on May 3, 1990. This case was similar to the present appeal in that a mistake was made by the taxpayer in completing a tax return. The mistake made resulted in dollar consequences to the taxpayer. Judge Warner concluded in Xeno, :

"It is tempting to find a reason to grant Xeno relief in this single case. An equity minded judge would like to find a way to relieve Xeno from the results of its mistake. However, to do so would be to look for an excuse based on sympathy. There is no statutory way to correct the mistake, and there is no precedent allowing the doctrine of recoupment to be stretched so far."

On the issue of the tardiness of the DOR director's decision, Mr. Beatty offered sincere apologies. He also noted

that Section 15-1-211 (c), MCA, unfortunately, does not carry repercussions for failure to comply with the prescribed time frame.

DISCUSSION

Mr. Torgerson stated that the taxpayer's intention was to carry the 1993 net operating loss of \$242,882 forward to offset taxable income in the future. Unfortunately, the election to carry that net operating loss forward was inadvertently not made in the manner prescribed on the return, i.e., choosing "yes" in response to the question "do you wish to forego the net operating loss carryback provision." Hi-Line argued that its intentions to carry that loss forward to future tax years were evidenced by the actions taken on the 1994 and 1995 income tax return.

Mr. Torgerson acknowledged the proper procedure to follow in completing the tax return in his November 12, 1997 letter to the Melissa Kopp of the DOR's Corporation License Division, "I understand that to properly elect to forego (sic) the NOL carryback, the yes box of question 5 on page 3 of the 1993 form CLT-4 should have been checked. It was an oversight on our part that this box was not checked. . ." (DOR Exhibit A).

Section 15-31-119 (11), MCA, requires that an election must be made to forego net operating loss carryback and that such election must be made on or before the date on which the return

is due. That election required the taxpayer to check the box marked "yes" (question 5, page 3 of the 1993 corporation license tax return). That election was not made by Hi-Line.

Section 15-31-119 (4), MCA, prescribes that, in the event an election is not made to forego the carryback, "a net operating loss for any taxable period ending after December 31, 1975, in addition to being a net operating loss carryback to each of the three preceding taxable periods, must be a net operating loss carryover to each of the seven taxable period following the taxable period of the loss." The DOR acted properly and in accordance with statute.

The Board realizes that this failure was a sad mistake that resulted in the loss of an approximate \$5,700 refund. The Board agrees with Judge Warner's sentiments and sympathies in Xeno. It is tempting to try and find a way to relieve Hi-Line of the unfortunate consequences of its mistake. However, just as in Xeno, the statutory requirements are clear. The taxpayer failed to meet those requirements (checking the box which would have made its intentions clear, i.e., to forego the carryback of the 1993 net operating loss it sustained).

The Board finds that the DOR acted properly and in accordance with statute when it denied Hi-Line's attempt to carry forward the 1993 net operating loss and finds the DOR's explanation to be satisfactory regarding the issue of why the DOR

failed to notify the taxpayer that it had not checked yes or no in question 5, page 3 of the 1993 corporation license tax return.

However, the Board notes that question five, page three of the 1994 corporate license tax return is confusing. The previous four questions clearly required a yes or a no response. Question five asks you to "check here if you wish to forego the net operating loss carryback provision." The two response choices are yes or no. We realize that there are space constraints on a tax return form. However, perhaps a more clear wording of the question might have been "check yes if you wish to forego the net operating loss carryback provision." It is easy to see how a taxpayer might have been confused by the wording on the form.

CONCLUSIONS OF LAW

1. The DOR properly followed the dictates of Section 15-31-119 (4) and 15-31-119 (11), MCA, in this matter.

2. The appeal of the taxpayer is hereby denied and the decision of the Montana Department of Revenue is hereby affirmed.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that Hi-Line's request to reinstate the August 31, 1994 net operating loss carryforward is denied.

DATED this ____ day of July, 1999.

BY ORDER OF THE
STATE TAX APPEAL BOARD

GREGORY A. THORNQUIST, Chairman

(S E A L)

JAN BROWN, Member

JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of July, 1999, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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