NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	DETERMINATION
Of	:	TAT(H) 12-17(GC)
PLASMANET, INC.	:	

Gallancy-Wininger, A.L.J.:

Petitioner, Plasmanet, Inc., 420 Lexington Avenue, New York, New York 10170, filed a Petition for Hearing (Petition) with the New York City (City) Tax Appeals Tribunal (Tribunal) seeking a redetermination of a deficiency of General Corporation Tax (GCT), pursuant to Chapter 6, Subchapter 2 of Title 11 of the City Administrative Code (Administrative Code). The deficiency was asserted by the City Department of Finance (Respondent) in a Notice of Determination dated August 18, 2011 (Original NOD) for the periods January 1, 2008 to December 31, 2008 and January 1, 2009 to December 31, 2009 (Tax Year or Tax Years), in the amount of $52,872.54 consisting of GCT due of $43,772.90, interest of $4,722.35 calculated to September 16, 2011, and penalties pursuant to Administrative Code § 11-676 [11], in the amount of $4,377.29.

Petitioner requested a Conciliation Conference before Respondent's Conciliation Bureau. A Conciliation Decision upholding the Original NOD and terminating the Conciliation Proceeding was issued on February 17, 2012 (Conciliation Decision). Petitioner protests the Conciliation Decision, by the Petition filed on May 16, 2012.

Petitioner appeared by Steven R. Schaeffer, CPA, of Cohen & Schaeffer, P.C., Certified Public Accountants. Respondent was initially represented by Joshua M. Wolf, Assistant Corporation Counsel and later by Frances J. Henn, Esq. Senior Counsel, City Law Department.

Petitioner filed a Motion for Summary Judgment on March 5, 2013.[1] During the course of a pre-hearing conference, the parties agreed, with the consent of the undersigned, to have the controversy determined on submission without the need for appearance at a hearing pursuant to § 1-09 (f) of the Rules of Practice and Procedure of the Tribunal (Tribunal Rules). The parties executed a Stipulation dated November 4, 2013, consenting to such agreement (November 4th Stipulation). Pursuant to ¶ 1-09 (f) (2) of the Tribunal Rules, the November 4th Stipulation was accompanied by a stipulation (Stipulation of Facts) including a list of attached Exhibits (Stipulation Exhibits). Petitioner submitted a brief on November 12, 2013 and Respondent submitted a brief on December 10, 2013.

Subsequently, representatives for Petitioner and Respondent agreed that the matter should not be determined pursuant to § 1-09 (f) of the Tribunal Rules, and requested a formal hearing. The Hearing commenced on February 4, 2014. At that time, Petitioner withdrew its motion for summary determination on the record (tr at 4). The Stipulation of Facts and the Stipulation Exhibits were admitted into evidence (Tribunal's Exhibit 1). Included with the Stipulation Exhibits is a copy of a worksheet prepared by Respondent reflecting an adjustment to the principal amount of the

[1]The Motion for Summary Judgment consisted solely of a document denominated as a "Motion For Summary Judgment" signed by Petitioner's representative, and was not supported by an affidavit, a copy of the pleadings or other proof. (*See*, § 1-05 (d) of the Tribunal Rules.)

deficiency asserted in the Original NOD from $43,772.90 to $43,716.79 (Tribunal's exhibit 1, tab K). Additional Exhibits were also admitted into evidence at Hearing.

At Hearing, Respondent's representative initially stated that there were further changes to the NOD and possible changes to other documents, that neither Petitioner's representative nor Respondent's representative would have had a chance to review. For that reason, the Hearing was adjourned.

At Hearing, Respondent provided a Computation of Tax which asserts a deficiency for Tax Year 2008, in the principal amount of $614.34, with interest calculated to July 16, 2014 in the amount of $278.84, for a total of $892.18. The Computation also asserts a deficiency for the 2009 Tax Year in the principal amount of $55,424.51, plus interest in the amount of $19,372.29 calculated to July 16, 2014, plus penalties for substantial understatement of liability, in the amount of $5,481.02, for a total of $79,384.64. The total deficiency for both Tax Years is $80,277.82 (Respondent's Exhibit E). This schedule differs from the Computation of Federal/NYC Net Operating Loss Deduction (B-12) submitted with the Stipulation Exhibits, as it removes references to Petitioner's charitable contributions for 2006, 2007, 2008 and 2009 and makes a $9,521 adjustment to income for 2008 to reflect a Federal Revenue Agent's Report (RAR) which was made following audit.

Following the Hearing, Respondent submitted a further revised NOD (Final NOD) asserting a deficiency for both tax years in the aggregate amount of $80,263.20[2], consisting, for the 2008 Tax Year, of principal in the amount of $583.39, and interest calculated to

[2]The Final NOD reflects the allowance of a previously disallowed deduction in the amount of $525. (Tr at 15.)

July 16, 2014 in the amount of $264.79, and for the 2009 Tax Year, of principal in the amount of $54,810.17, interest calculated to July 16, 2014 in the amount of $19,123.83, and penalties for the substantial understatement of liability in the amount of $5,481.02.

Petitioner submitted a brief on September 24, 2014. Respondent submitted a brief on December 8, 2014. Petitioner submitted a further brief on January 21, 2015, Respondent submitted a Reply Brief on February 11, 2015 and Petitioner submitted a Reply To Respondent's Brief on March 13, 2015. By letter dated March 16, 2015, the parties were advised that the record in this matter would be closed on April 1, 2015. The record was closed on April 1, 2015.

ISSUES

The primary issue in this matter is whether Administrative Code § 11-602 [8] [f] limits the deduction of net operating losses (NOLs) in any tax year, to those NOLs that have the same source year as the NOLs deducted by the taxpayer on its U.S. Corporation Income Tax Return (IRS Form 1120 or Federal Return) for the same tax year (Same Source Year Rule). Further, there are three issues related to the Same Source Year Rule: (1) Whether the $10,000 carryback limitation contained in Administrative Code § 11-602 [8] [f] [5] precludes the application of the Same Source Year Rule. (2) Whether the Same Source Year Rule is applicable where the aggregate method of deducting NOLs is used. (3) Whether Respondent is precluded from applying the Same Source Year Rule where differences between Federal and City taxable income occur because of different Federal and City statutory provisions regarding depreciation.

A further issue is whether Administrative Code § 11-602 precludes a charitable deduction unless such a deduction was taken on Petitioner's Federal Return for the same Tax Year.

And finally, the issue of whether Respondent properly imposed penalties for substantial understatement of liability in this matter, is presented.

FINDINGS OF FACT

Petitioner is a Delaware corporation that conducts business in the City. Petitioner owns two subsidiaries, Jumpstart Media, Inc. and Freelotto Phone Company, Inc. Petitioner operates "freelotto.com" and "plasmanet.com" and serves as an Internet-based sweepstakes provider. In addition, Petitioner offers clinical trial recruitment, advertisement and marketing services.

Petitioner timely filed its 2008 City General Corporation Tax Return (GCT Return) on September 2, 2009 and its 2009 GCT Return on August 10, 2010.[3] Petitioner reported on a calendar year basis on both its Federal Returns and its GCT Returns for Tax Years 2008 and 2009.[4]

Petitioner's 2009 GCT Return included a New York City Carryover Schedule that identified the amounts of NOLs, the years in which the NOLs were generated, and the amounts carried over to Tax Year 2009.

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[3]Petitioner filed these returns pursuant to an Application for Automatic 6-Month Extension Of Time To File Business Income Tax Return for both 2008 and 2009.

[4]The Exhibits submitted to the Tribunal included only portions of Petitioner's IRS Form 1120 for the years 1999, 2001, 2003 - 2007. No portion of Petitioner's IRS Form 1120 was submitted for 2000 or 2002. No copies of Petitioner's GCT returns for 2005 or 2005 were submitted to the Tribunal.

The Internal Revenue Service conducted an audit of Petitioner's Federal corporate tax return for the 2008 Tax Year. The Federal audit resulted in an increase in the amount of $9,521 to Petitioner's reported 2008 Federal taxable income.

The Department performed a field audit of Petitioner's GCT tax returns filed for the 2008 and 2009 Tax Years. Upon the conclusion of the audit, Respondent issued the Original NOD.[5]

There is no dispute regarding the amount of Petitioner's federal NOLs for Tax Years 1999 through 2005, which are as follows:

Tax Year	Federal NOL
1999	($4,471,409)
2000	($7,619,131)
2001	($3,937,788)
2002	($3,099,832)
2003	($3,447,231)
2004	($ 763,862)
2005	($ 549,394)

For tax years 2006, 2007, 2008 and 2009, Petitioner did not incur a net operating losses, but rather, reported taxable income on its Federal Returns.

Petitioner used a portion of its available NOLs to fully offset both its Federal taxable income and its City taxable income in tax years 2006 and 2007. Petitioner also used its available NOLs to

[5] Petitioner and Respondent stipulated that as a result of a computational error resulting from an adjustment made to Petitioner's 2008 Federal Return, the principal amount of tax reflected on the Original NOD should have been $43,716.79 rather than the Original NOD amount of $43,772.90. (Stipulation at ¶ 9).

wholly offset its Federal taxable income for Tax Years 2008 and 2009.

Respondent introduced an exhibit at Hearing that explains its application of Petitioner's NOL deductions for Tax Years 1999 through 2009.[6]

In calculating Petitioner's NOL carryovers, Respondent applied the Same Source Year Rule. Although for Federal purposes, for Tax Year 2008, Petitioner applied NOL carryovers of $10,851,773 sourced from Tax Years 2000 to 2003, to fully offset its Federal taxable income, for GCT purposes, because Respondent applied the Same Source Year Rule, Respondent determined that Petitioner had NOLs of only $10,818,066[7] available to offset its Entire Net Income (ENI) of $11,219,771.

For Federal purposes, for Tax Year 2009, Petitioner applied NOL deductions (NOLDs) of $2,635,093 sourced from Tax Years 2003, 2004 and 2005 to fully offset Petitioner's Federal taxable income. Upon Respondent's application of the Same Source Year Rule, Respondent determined that only $1,311,711 was available to offset Petitioner's ENI of $2,720,466.

Petitioner's 2009 GCT Return as filed included a New York City Carryover Schedule (Statement 3) that identified the amounts of net operating loss carryovers generated in 2003, 2004 and 2005 that were carried forward to Tax Year 2009.

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[6]See Exhibit E (at 4), (Computation of Federal/NYC Net Operating Loss Deduction (B-12)).

[7]This amount reflects the RAR Adjustment of $9,521.

Petitioner made the following charitable contributions:

Tax Year	Amount
2001	$ 43,603
2002	0
2003	71
2004	6,000
2005	4,500
2006	25,500
2007	236,000
2008	279,237
2009	105,857

Petitioner did not deduct charitable contributions on its Federal Returns in either Tax Year 2008 or Tax Year 2009.[8]

Estella Dong, Respondent's auditor, testified that in computing the original deficiency, she considered deductions for charitable contributions. However, Ms. Dong testified that because Petitioner did not deduct charitable contributions on its Federal returns for Tax Years 2008 and 2009, and because she was advised that Petitioner could no longer deduct its charitable contributions on its Federal returns due to the expiration of the statute of limitations (Limitations Period), she revised her work papers and revised the

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[8]A schedule forming part of Petitioner's 2009 Federal return, headed Line 19 Contributions Deduction contains the following calculation:

1. TAXABLE INCOME (EXCLUDING CONTRIBUTIONS AND DOMESTIC PRODUCTION ACTIVITIES DEDUCTION) 2,635,093.
2. LESS: NOL CARRYOVER 3,294,042.
3. PLUS: CAPITAL LOSS CARRYBACK
4. TAXABLE INCOME WITHOUT REGARD TO CONTRIBUTIONS, SPECIAL DEDUCTIONS, DOMESTIC PRODUCTION ACTIVITIES DEDUCTION, NOL CARRYBACKS, AND CAPITAL LOSS CARRYBACKS $-658,949.
5. CONTRIBUTION DEDUCTION LIMITATION is (TAXABLE INCOME X 10%) NONE
6. AMOUNT OF DEDUCTIBLE CONTRIBUTIONS $341,857.
7. CONTRIBUTION DEDUCTION (LESSER OF LINE 5 OR LINE 6) NONE

Notice of Determination to eliminate the adjustment to the Federal NOL deductions by these amounts for 2008 and 2009. (Tr at 28-29.)[9]

STATEMENT OF POSITIONS

Petitioner challenges the application of the Same Source Year Rule to its NOLDs and charitable contributions.

Petitioner asserts that the $10,000 limitation on net loss carrybacks found in Administrative Code § 11-602 [8] [f] [5] is evidence that the source year conformity is not required.

Petitioner asserts that the aggregate dollar amount of available NOLDs should offset taxable income.

Petitioner asserts that the application of the Same Source Year Rule would serve to disallow its depreciation expense twice, once because Federal law permits the use of accelerated depreciation while City law does not and, a second time when depreciation forms a part of an NOL that is not allowable for City purposes because the NOL deduction is not from the same source year as the deduction taken on the Federal return.

In addition, Petitioner challenges Respondent's initial inclusion in and subsequent removal from the auditor's workpapers, of charitable contributions of $145,479 for Tax Year 2008 and $105,857 for Tax Year 2009. Petitioner further asserts that it should not be required to amend its Federal Returns to deduct its charitable contributions for on its GCT returns.

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[9]Schedule B-12 appearing as part of Tribunal Exhibit 1, tab C accounts for Petitioner's charitable contributions. Respondent's Exhibit E, does not reflect Petitioner's charitable contributions.

Respondent asserts that its application of the Same Source Year Rule to Petitioner's NOLDs is supported by applicable law. It further asserts that the $10,000 limitation on net loss carrybacks does not affect the applicability of the Same Source Year Rule.

Respondent asserts that because Petitioner did not utilize its charitable deductions on its 2008 and 2009 Federal Returns, it is precluded from using those deductions for City purposes. Respondent further asserts that since the Limitations Period has expired,[10] Petitioner cannot now amend its Federal Returns for tax years 2008 and 2008 to use charitable deductions in lieu of NOLDs.

Respondent asserts that the Same Source Year Rule is applicable even though Respondent's treatment of depreciation differs from the federal treatment of depreciation.

Further, Respondent asserts that its imposition of penalties for substantial understatement of tax liability was warranted.

CONCLUSIONS OF LAW

Administrative Code § 11-603 [1] states:

> For the privilege of doing business, or of employing capital, or of owning or leasing property in the city in a corporate or

[10] *See*, Administrative Code § 11-678 [1], which provides that: [c]laim for a credit or refund of an overpayment of tax under [subchapters 2, 3 and 4 of Chapter 6 of the City Administrative Code] shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . . See, also, 26 USC § 6511 [a] for a similar Federal income tax provision.

> organized capacity, or of maintaining an office in the city, for all or any part of its fiscal or calendar years, every domestic corporation . . . shall annually pay a tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided. . . .[11]

Administrative Code § 11-602 [8] provides:

> The term "entire net income" means the total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income),
>
> (i) which the taxpayer is required to report to the United States treasury department. . .

The starting point for the calculation of City GCT is a taxpayer's Federal taxable income, as set forth on line 28 of the taxpayer's IRS form 1120. (Tr at 25.) Administrative Code § 11- 602 requires various adjustments to the taxpayer's Federal taxable income.

The fundamental issue in this matter is whether source year conformity with Petitioner's reported Federal taxable income is required when applying NOLs to compute City ENI, and further, whether Petitioner was required to have deducted its charitable contributions on its Federal Returns in order to deduct them for GCT purposes.

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[11] *See*, Administrative Code § 604 (1) [E], which establishes a formula that requires taxpayers to compute GCT on the greatest of (i) ENI (or the portion of ENI allocated within the City); (ii) total business and investment capital (or the portion thereof allocated within the City); (iii) ENI plus salaries and other compensation paid to certain officers and stockholders, less $15,000 and net losses for the reporting year (or the portion thereof allocated to the City); and (iv) City receipts.

Subject to the limitations set forth in City Administrative Code § 11-602 [8][f], taxpayers are permitted to deduct net operating losses. Administrative Code § 11-602 [8][f] states:

> A net operating loss deduction shall be allowed which shall be the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code . . . except that in every instance where such deduction is allowed under this subchapter:
>
> * * *
>
> (3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code . . . (Emphasis supplied.)
>
> * * *

and further,

> (5) the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code shall for the purposes of this paragraph be determined as if the taxpayer had elected under such section to relinquish the entire carryback period with respect to net operating losses, except with respect to the first ten thousand dollars of each of such losses sustained during taxable years ending after June thirtieth, nineteen hundred eighty nine[.]

In *Matter of Andal Corporation (Formerly National Kinney Corporation)*, City Tax Appeals Tribunal TAT (E) 93-179 (GC) [City Tax Appeals Tribunal, June 30, 1995], the City Tax Appeals Tribunal expressly stated:

> The GCT statute bases a taxpayer's New York City NOL on the Federal NOL, allowing an NOL deduction that is limited (in relevant part) to the amount of the Federal NOL deduction and subject to the requirement that the New York City NOL must have arisen in the same taxable year as the NOL that was carried over and used for Federal purposes.

(*Andal*, at 14)

The application of the Same Source Year Requirement and same amount conformity for purposes of computing NOLs under the New York State (State) corporate franchise tax is supported by State statute and case law. (See State Tax Law § 208 [9] [f] [3] (concerning the definition of "entire net income" for State corporation franchise tax purposes); *Matter of Lehigh Valley Industries, Inc.* NYS Tax Appeals Tribunal Decision, [NY St Div of Tax Appeals TSB-D-88(2)C, May 5, 1988]; *Matter of American Employers' Insurance Company v State Tax Commission*, 114 AD2d 736 [3rd Dept 1985] (requiring Federal tax conformity for NOLDs in connection with franchise tax under Article 33 of the State Tax Law); *Royal Indemnity Company v Tax Appeals Tribunal*, 75 NY2d 75 [1989](upholding amount conformity for NOLDs in connection with franchise tax under State Tax Law Article 33)). For the 2008 and 2009 Tax Years, State Tax Law § 208 [9] [f] [3] contained provisions identical to those of Administrative Code § 11-602 [8][f][iii].

The State Tax Appeals Tribunal recently upheld the Same Source Year limitations in a matter involving federal/state decoupling resulting from differing provisions regarding depreciation. (*Matter of Five Star Equipment, Inc.*, NYS Tax Appeals Tribunal Decision, [NY St Div of Tax Appeals DTA Nos. 824861 and 8245006, April 15, 2015].) In *Five Star Equipment*, the State Tribunal relied on *Matter of Refco*

Properties, Inc., (NYS Tax Appeals Tribunal Decision [NY St Div of Tax Appeals DTA No. 812292, July 11, 1996]), *Matter of Royal Indemnity Company* and *Lehigh Valley*. The Tribunal noted that "This situation does not differ from others where deductions are available at the federal level but not at the state level." (*Five Star Equipment* citing *Karlsberg v Tax Appeals Tribunal*, 85 AD3d 1347 [3rd Dept 2011], lv dismissed, 17 NY3d 900 [2011].) Thus, despite differing treatment of depreciation between Federal and State purposes, the Same Source Year Rule applies to computation of a taxpayer's City NOLDs.

The Appellate Division, Third Department addressed the issue of federal/state conformity in *Karlsberg*, stating that:

> Pursuant to the doctrine of federal conformity, courts should adopt, whenever reasonable and practical, the [f]ederal construction of substantially similar tax provisions, particularly where the state statute is modeled on [the] federal law [internal citations omitted]. . . .

(*Karlsberg* at 1348.) Where there is a specific statutory exception, the principle of conformity does not apply. (*Karlsberg* at 1348.)

The State Code of Rules and Regulations (20 NYCRR § 3-8.5) establishes a method for aggregating net operating losses (Aggregation Requirement), requiring a taxpayer to:

> compute the aggregate of the Federal net operating losses to be carried to [a] particular taxable year, and also, compute the aggregate of the net operating losses under article 9-A [of the State Tax Law].
>
> After computing the two aggregate figures, whichever of the two (Federal or State) is

> smaller is the aggregate net operating loss which is allowable as a carry back or carry forward to the particular taxable year.

The Aggregation Requirement is nevertheless subject to the limitation contained in subdivision (d) of 20 NYCRR 3-8.2, which expressly restricts net operating loss deductions to an amount not in excess of "the deduction allowable for that year for Federal income tax purposes under section 172 of the Internal Revenue Code. . . ." (20 NYCRR 3-8.5; 20 NYCRR 3-8.2 [d]). The State Tribunal specifically held in *Lehigh Valley* that the Same Source Rule applies notwithstanding the Aggregation Requirement. The Tribunal stated:

> It is well settled, . . . that the Article 9-A net operating loss deduction is limited to the amount of the Federal net operating loss deduction for the corresponding year (see, *Telmar Communications Corp v. Procaccino*, 48 AD 2d 189; 20 NYCRR 3-8.2[d]). The limitation to the amount of the Federal net operating loss deduction is premised on the understanding that section 208.9(f) was '[p]lainly intended to conform operating loss carryback and carryover practices to Federal law in order to assist new businesses and those with fluctuating incomes. . . . <u>The rule that the net operating loss deduction must arise from the same loss year would appear to be as essential to this principal of Federal conformity as the rule that the amount of the State deduction cannot exceed the Federal.</u> (Emphasis added.)

(See also, *Aetna Casualty and Surety Company v Tax Appeals Tribunal*, 214 AD2d 238 [3rd Department, 1995] lv den 87 NY2d 811 [1996]). The Appellate Division, Third Department expressly stated:

> Petitioner's attempt to rely on the regulation governing aggregation of losses from multiple years (*see*, 20 NYCRR 3-8.5) to circumvent the

source year conformity rule is also unavailing
. . . .

(*Aetna* at 242.)

Petitioner's assertion that the Aggregation Requirement eliminates the need for compliance with the Same Source Year Rule is rejected.

Administrative Code § 11-602 (8) [f] [5] imposes an explicit $10,000 limitation on carrybacks. This limitation does not render the Same Source Year Rule inapplicable. (*See e.g. Karlsberg,* which upheld the application of State Tax Law § 615 (f), providing for the reduction of the amount of itemized deductions based on the adjusted gross income of the taxpayer; *Eveready Insurance Company v New York State Tax Commission* (129 AD2d 958 [3rd Dept 1987]) which upheld a provision of State Tax Law § 1503 [b] [4] [C] that caused the taxpayer to lose a NOLD arising prior to 1974).

Matter of Brooke-Bond Group (U.S.), Inc. NYS Tax Appeals Tribunal Decision, [NY St Div of Tax Appeals DTA No. 810951, December 28, 1995], on which Petitioner relies, may be distinguished from the facts herein. *Brooke-Bond* involved a situation in which the taxpayer's New York entire net income was less than its federal NOL deduction. The State Tax Appeals Tribunal found that in such case, the taxpayer may take a smaller NOL deduction for State purposes than it took for federal purposes and was not required to forgo the ability to carry forward or backward a portion of its State NOL.

Internal Revenue Code (26 USC) § 170 [a] allows a tax deduction for charitable contributions made within a taxable year. For corporations, the amount of the deduction is generally limited to

ten percent (10%) of the taxpayer's taxable income. (26 USC § 170 [c].) A contribution made by a corporation that exceeds the amount deductible for such year may be deducted for each of the succeeding 5 taxable years in the order of time, subject to certain limitations (26 USC § 170 [d] [2] [A]). Further, 26 USC § 170 [d] [2] [B] establishes the following special rule for net operating loss carryovers:

> For the purpose of subparagraph (A), the excess of -
>
> (i) the contributions made by a corporation in a taxable year to which this section applies, over
>
> (ii) the amount deductible in such year under the limitation in subsection (b)(2)(A), shall be reduced to the extent that such excess reduces taxable income (as computed for the purposes of the second sentence of section 172(b)(2)) and increases a net operating loss carryover under section 172 to a succeeding taxable year.

The Code of Federal Regulations provides:

> A corporation having a net operating loss carryover from any taxable year must apply the special rule of [Internal Revenue Code] section 170 (d)(2)(B) and the provisions of [26 CFR § 170A-11(c)(2)] before computing. . . the excess charitable contributions carryover from any taxable year. (Emphasis supplied.)

(26 CFR § 170A-11[c][2].) Thus, 26 USC § 170 [d] [2] [B] establishes an interrelationship for federal purposes, of net operating loss carryovers and carryovers of excess charitable contributions.

Administrative Code § 11-602 [8] does not expressly address the treatment of a taxpayer's charitable deductions for GCT purposes, as GCT is based upon the taxpayer's Federal ENI with certain adjustments. (Administrative Code § 11-603 [1].)

Only the Tax Years set forth in the Final NOD are the subject of this proceeding. It is not relevant for this proceeding whether NOL deductions or charitable deductions for other tax years are available, as posited by the auditor's work papers.

Were charitable deductions available to Petitioner for 2008 and 2009, and had Petitioner deducted charitable contributions on its Federal Returns for such Tax Years, charitable deductions would have been reflected in Petitioner's Federal taxable income from which Petitioner's GCT is calculated. (*See* IRS Form 1120 for 2008 and for 2009, lines 19, 28 and 28; City Administrative Code § 11-602 [8][f]). Because GCT is calculated from its Federal taxable income, charitable deductions must be taken on the Federal Return for a particular tax year in order for the charitable deductions to be available for GCT purposes for that tax year. Petitioner asserts that it did not deduct its charitable contributions on its Federal tax returns for either 2008 or 2009, because such deductions were not available. (*See* n 8, infra.) Petitioner's further assertion that it would not have been necessary to amend its Federal Return for 2008 or 2009 in order to take a charitable deduction is without merit.

City Administrative Code § 11-676 imposes a penalty for a substantial understatement of GCT for a taxable year. Such section provides that there is a substantial understatement of tax for any taxable year:

> [I]f the amount of the understatement for the taxable year exceeds the greater of ten percent of the tax required to be shown on the return for the taxable year or five thousand dollars. . . . The amount of such understatement will be reduced by that portion of the understatement which is attributable to the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. The commissioner of finance may waive all or any part of the addition to tax provided by this subdivision on a showing by the taxpayer that there was reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith. (Emphasis added.)

Petitioner's 2009 GCT return asserts that the net tax is $19,995. The NOD asserts a deficiency for principal in the amount of $54,810.17, which amount exceeds ten percent of the tax required to be shown on Petitioner's 2009 GCT return.

Petitioner attached to its 2009 GCT Return, a schedule captioned NET OPERATING LOSS (NON SRLY) that it offered to explain the NOL amounts which Petitioner carried over to the 2009 tax year. Since the schedule was attached to the return, Petitioner's tax treatment of NOLS was adequately disclosed and the substantial understatement penalty should not have been imposed.

Petitioner's other arguments have been considered and are unavailing.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is liable for the GCT asserted in the Final Notice of Determination, as its NOL deductions were required to have the same source year as its Federal NOL deductions. However, Respondent is not entitled to the substantial understatement penalty under City Administrative Code § 11-676.

The Petition of Plasmanet Inc. is denied and the Notice of Determination is sustained except to the extent of the substantial understatement penalty. Respondent's claimed substantial understatement penalty is denied.

DATED: September 29, 2015
New York, New York

Jean Gallancy-Wininger
Administrative Law Judge