



STATE OF DELAWARE
DEPARTMENT OF FINANCE
DIVISION OF REVENUE
CARVEL STATE BUILDING
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WILMINGTON, DELAWARE 19801

DIVISION OF REVENUE
TAX RULING 88-2

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NET OPERATING LOSS CARRYFORWARDS - NON-RESIDENTS

The question has been raised as to the proper treatment of net operating loss carryforwards by nonresidents owning rental property in Delaware.

Assume a nonresident owns rental property in Delaware but has no other Delaware source income. Because of operating expenses and depreciation the nonresident has net operating losses in Delaware each year despite the rental income. On the sale of the real property gain is recognized either through depreciation recapture or capital gain on the difference between the amount realized and the adjusted basis. Pursuant to 30 Del. C. §1121 *et seq.* this gain is taxable in Delaware. The issue then becomes whether the accumulated net operating losses from prior years may be carried forward to offset the gain in the year of sale.

Nonresidents are subject to 30 Del. C. §1122 (d) which permits operating losses to be deducted in the year incurred but this section has no provision for either carryback or carryforward. Without any such express provision the cumulative net operating losses from prior years may not be carried forward to offset the gain in the year of sale.

Tax Newsgram 72-42 has been raised by nonresidents as authority for permitting net operating losses to be carried forward. That Newsgram applied to part-year residents who incurred capital losses in Delaware in excess of the annual deductible amount under federal rules after realizing offsetting capital gains for federal tax purposes while a resident of another state. The carryforward is permitted for the resident pursuant to the Newsgram since otherwise the resident would not have the opportunity to ever deduct this loss in any state if Delaware did not permit the carryforward. On the other hand nonresidents with operating losses in Delaware have the opportunity to deduct those losses each year on their resident returns in the year incurred. Accordingly, to the extent Tax Newsgram 72-42 suggests similar treatment for nonresidents with net operating loss carryforwards as for part-year residents with capital loss carryforwards, Tax Newsgram 72-42 is clarified to apply only to part-year residents with capital loss carryforwards as described therein.

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