
IRS Issues Guidance on Extended Net Operating Loss Carryback Period

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On November 6, 2009, President Obama signed into law the Worker, Homeownership, and Business Assistance Act of 2009 (the “Act,” P.L. 111-92) which provides, among other things, that a taxpayer with net operating losses (“NOLs”) for 2008 or 2009 may elect to carry the NOL from one of those years back to the third, fourth or fifth preceding taxable year instead of the second preceding taxable year. On November 20, 2009, the Internal Revenue Service issued Revenue Procedure 2009-52 providing guidance on the new provision and setting forth the procedures for making the election.

Prior Relief

The Act expands upon relief originally contained in the American Recovery and Reinvestment Tax Act of 2009 (the “Recovery Act,” Division B of P.L. 111-5). The Recovery Act contained a similar election to carry an NOL back to a third, fourth or fifth preceding taxable year but only for “eligible small businesses” and only for NOLs arising in taxable years ending in 2008 (or, at the election of the taxpayer, in taxable years beginning in 2008). The IRS provided guidance on the Recovery Act provision and its elections in Revenue Procedures 2009-19 and 2009-26. Under the Recovery Act, an “eligible small business” is defined by cross-reference to Internal Revenue Code section 448(c), dealing with limitations on use of the cash method of accounting, but by substituting “\$15 million” for “\$5 million.” Accordingly, “eligible small businesses” are generally corporations, partnerships and sole proprietorships having average annual gross receipts no greater than \$15 million.

The Act

General

Under Internal Revenue Code section 172(b)(1)(H), as amended by the Act, a taxpayer may elect to carry an NOL for one of its taxable years ending after December 31, 2007 and beginning before January 1, 2010

back to the third, fourth or fifth preceding taxable year (as selected by the taxpayer in its election). For calendar-year taxpayers the eligible loss years are 2008 and 2009, but fiscal-year taxpayers have three taxable years from which to choose (the taxable year ending in 2008, the taxable year beginning in 2008 and ending in 2009 and the taxable year beginning in 2009). Unlike the Recovery Act, the Act provides that if the five-year carryback period is selected, the NOL that can be carried back to the fifth preceding taxable year is limited to 50 percent of the taxable income for that preceding taxable year (determined prior to application of the NOL for the loss year or any subsequent taxable year). Any NOL carryback from the loss year remaining after application of the 50 percent of taxable income limitation in the fifth preceding taxable year is available in the succeeding preceding taxable years, subject to the normal ordering rules but without application of the 50 percent of taxable income limitation.

Also unlike the Recovery Act, the Act provides that for alternative minimum tax purposes, the 90 percent of alternative minimum taxable income limitation applicable to the deduction of alternative minimum tax NOLs does not apply to the amount of an alternative minimum tax NOL that is attributable to an NOL for which the taxpayer has elected the extended carryback period provided by the Act. However, Revenue Procedure 2009-52 states that any carryback of an alternative minimum tax NOL to a fifth preceding taxable year is limited to 50 percent of alternative minimum taxable income for the carryback year.

Eligible Small Businesses

The Act retains the Recovery Act's \$15 million gross receipts definition of an "eligible small business," again by cross-reference to Internal Revenue Code section 448(c) with "\$15 million" substituted for "\$5 million," and contains two special rules. First, the 50 percent of taxable income limitation for an NOL carryback to a fifth preceding taxable year does not apply to an election made prior to the Act's date of enactment (November 6, 2009) by an "eligible small business" under the Recovery Act provision. Second, an "eligible small business" that made or makes an election under the Recovery Act provision is allowed to elect the extended carryback period provided by the Act for an additional, second taxable year.

Life Insurance Companies

The Act contains a comparable extended carryback election for losses from operations of life insurance companies for taxable years ending after December 31, 2007 and beginning before January 1, 2010. Under amended Internal Revenue Code section 810(b), a life insurance taxpayer can elect to carry these losses from one eligible taxable year back to the fourth or fifth preceding taxable year, instead of the third preceding taxable year. The 50 percent of taxable income limitation applies to losses from operations carried back to a fifth preceding taxable year as do the provisions regarding the alternative minimum tax.

Excluded Taxpayers

Unlike the relief under the Recovery Act, the Act's extended carryback election is not available to recipients of certain benefits (even if repaid) under the Troubled Asset Relief Program ("TARP"), to the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, or to any member during 2008 or 2009 of the same affiliated group (without regard to the exclusions of Internal Revenue Code section 1504(b)) as any of the foregoing.

Revenue Procedure 2009-52

Revenue Procedure 2009-52 provides that an eligible taxpayer must make the election by the due date, including extensions, for filing the taxpayer's federal income tax return for the last taxable year beginning in 2009. Once the election is made it is irrevocable. The common parent of an affiliated group filing a consoli-

dated federal income tax return makes the election for a consolidated net operating loss of the group, but the IRS has explicitly reserved on the issue of whether a consolidated return group can make or revoke a carryback waiver election for the portion of a consolidated net operating loss attributable to a member acquired from another group.

Loss Year Return

A taxpayer makes the election by attaching a statement to the federal income tax return (or amended return) for the taxable year in which the NOL arose. Note that the due date of the election will in most cases be much earlier than expiration of the statute of limitations for the loss year. The attachment must state that the taxpayer is electing to apply Internal Revenue Code section 172(b)(1)(H) (section 810(b)(4) if a life insurance company) under Revenue Procedure 2009-52, that the taxpayer is neither a TARP recipient nor an affiliate of a TARP recipient in either 2008 or 2009, and to which of the third, fourth or fifth (fourth or fifth if a life insurance company) preceding taxable years the NOL (loss from operations if a life insurance company) is to be first carried back. A taxpayer making the election must also attach a copy of the election statement to the taxpayer's claim for tentative carryback adjustment under Internal Revenue Code section 6411; the due date for making that claim (normally 12 months following the end of the loss year) will be changed to the due date, including extensions, for filing the taxpayer's federal income tax return for the last taxable year beginning in 2009. In some cases, this changed due date will be earlier than the normal due date under Internal Revenue Code section 6411.

Carryback Year Application or Claim

Alternatively, a taxpayer choosing to make the election under the Act may do so by attaching a statement to the appropriate form for applying the NOL carryback (e.g., IRS Forms 1139 or 1120X for a corporation). This attachment must state that the taxpayer is electing to apply Internal Revenue Code section 172(b)(1)(H) (section 810(b)(4) if a life insurance company) under Revenue Procedure 2009-52, that the taxpayer is neither a TARP recipient nor an affiliate of a TARP recipient in either 2008 or 2009, and to which of the third, fourth or fifth (fourth or fifth if a life insurance company) preceding taxable years the NOL (loss from operations if a life insurance company) is to be first carried back. The time for claiming a tentative carryback adjustment on the appropriate form will also be changed to the due date, including extensions, for filing the taxpayer's federal income tax return for the last taxable year beginning in 2009. In some cases, this changed due date will be earlier than the normal due date under Internal Revenue Code section 6411.

Previously Filed Application or Claim

A taxpayer may elect the Act's extended carryback period for an eligible NOL even if the taxpayer has already filed an application for a tentative carryback adjustment or an amended return (other than an amended return with respect to an election under the Recovery Act by an eligible small business) for the taxable year to which the NOL will be carried back by virtue of the election. But in those circumstances, the election must also state that election amends a previous carryback application or claim.

Prior Carryback Waiver

An otherwise eligible taxpayer that previously elected under Internal Revenue Code section 172(b)(3) (section 810(b)(3) if a life insurance company) to waive the carryback period for an eligible NOL (loss from operations if a life insurance company) for a taxable year ending before November 6, 2009, may revoke that waiver and elect the extended carryback period under the Act in the manner described under "Loss Year Return" or "Carryback Year Application or Claim," above. The election must state that the taxpayer is revoking an earlier NOL (loss from operations if a life insurance company) carryback waiver, and must

also state that the taxpayer is electing to apply Internal Revenue Code section 172(b)(1)(H) (section 810(b)(4) if a life insurance company) under Revenue Procedure 2009-52, that the taxpayer is neither a TARP recipient nor an affiliate of a TARP recipient in either 2008 or 2009, and to which of the third, fourth or fifth (fourth or fifth if a life insurance company) preceding taxable years the NOL (loss from operations if a life insurance company) is to be first carried back. The revocation must also be filed before the due date, including extensions, for filing the taxpayer's federal income tax return for the last taxable year beginning in 2009. Any election to revoke a prior waiver also applies for purposes of the alternative minimum tax.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the attorneys below.

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