

NOL CARRYBACKS UNDER THE CARES ACT AND OTHER FEDERAL TAX CASH-GENERATING OPPORTUNITIES



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Today's Agenda

- ▶ Summary of the carryback provisions in the CARES Act
- ▶ Carryback filing procedures
- ▶ Additional carryback issues and questions requiring further guidance
- ▶ Other federal tax cash-generating and cash-saving procedural options that may be due as soon as April 15, 2020

Summary of CARES Act Carryback Provisions

Net Operating Losses - Pre/Post-TCJA, CARES

YEAR NOL GENERATED	CARRYBACK PERIOD	CARRYFORWARD PERIOD	TAXABLE INCOME LIMITATION
Beginning before January 1, 2018	2 taxable years	20 taxable years	No limitation
Beginning after December 31, 2017, and before January 1, 2021	5 taxable years	Indefinitely	No limitation prior to taxable years beginning in 2021, 80% of taxable income after
Beginning after December 31, 2020	No carryback	Indefinitely	80% of taxable income

NOL Carryovers/Carrybacks

NOLs generated in taxable years beginning after December 31, 2017, and before January 1, 2021, may now be carried back 5 taxable years

- ▶ Technical correction to the TCJA - indefinite carryover and prohibited carryback (other than for special 5-year carrybacks) effective for taxable years *beginning* after December 31, 2017
- ▶ Special carryback does not apply to NOLs generated by REITs
- ▶ Life insurance company carrybacks to years beginning before January 1, 2018, treated as § 810 operations loss carryback
- ▶ CERT rules eliminated by the TCJA not revived in CARES Act
- ▶ Short periods from M&A activity are treated as a full carryback year - carryback may not span 5 calendar years
- ▶ Carryback cannot offset § 965 income; Carryback to taxable year with § 965 income results in deemed § 965(n) election

Section 461(l) - Limitation on Business Losses

Prior Law

- ▶ Limits annual deduction for net business losses of non-corporate taxpayers to a specified maximum amount
- ▶ Annual maximum for 2018, indexed annually for inflation, is \$500,000 for married filing jointly and \$250,000 for all other taxpayers
- ▶ Amounts in excess of annual limitation are carried forward as a net operating loss
- ▶ Limitation applies for calendar years 2018 through 2025, consistent with most other individual income tax provisions

CARES Act Provisions

- ▶ Defers the application of section 461(l) limitations until calendar year 2021
- ▶ Removes separate application of section 461(j) limitation on farm losses until 2026
- ▶ Clarifies application of post-2020 limitation in the case of wages from employment, capital gains and losses from sale of business assets, net operating loss deductions under section 172, and section 199A deductions for qualified business income

Alternative Minimum Tax (AMT) Credit

- ▶ Under TCJA, corporate AMT credits were refundable over a four-year period from tax years beginning in 2018 through 2021
- ▶ Under the CARES Act, any remaining corporate AMT credit is fully refundable for the tax year beginning in 2019
- ▶ *Alternatively, a taxpayer may elect to make the credit fully refundable for the tax year beginning in 2018*
- ▶ Treasury is directed to provide procedures where a taxpayer electing to make the credit refundable for 2018 can file for a tentative refund of the additional credit amount, and such refund should be granted within 90 days
- ▶ Given uncertainty surrounding application of Section 383 rules to AMT credits post TCJA, strong consideration should be given to make the election for 2018



Carryback Filing Procedures



Impact of Carryback on Carryforwards

If the carryback of an NOL modifies a credit carryforward from the carryback year, what is the appropriate method of amending affected returns that follow? Can the taxpayer simply adjust the carryforward schedules and not amend?

The ability to adjust the carryforward will depend on how much of the NOL is used for the carryback. The carryback may be fully utilized in the carryback. Therefore, it would be necessary to amend each of the returns that follow to account for the carryforward adjustment.

Statute of Limitations

Does it matter that a taxpayer may want to carry back an NOL to a closed year?

- ▶ The relevant statute of limitations period for purposes of an NOL carryback generally is the *loss year*, i.e., as long as the loss year is open (such as 2018, 2019, 2020), the loss may be carried back - even to an otherwise closed year
- ▶ The SOL is extended to any time before the expiration of the assessment period for the taxable year in which the NOL arose, which is generally three years from the extended due date of the return.
- ▶ Taxpayers generally are not exposed to liability for unrelated issues in the carryback year beyond the risk that the refund claimed on a Forms 1120X or 1040X will be offset by such issues, or the refund obtained after filing Forms 1139 or 1045 will be returned.

Options for Obtaining a Refund - 2019 Returns

- ▶ Original return yet to be filed: For 2019 tax returns which are still within the extended due date period, file the return as planned unless decision is to forgo the carryback period, in which case:
 - Stand-alone C corporation check box 11, Schedule K of Form 1120;
 - Consolidated C corporations make the election at the parent-level by checking the box and attaching a statement; and
 - Non-corporate taxpayers make election by filing a statement with the return.

Both Checkpoint and BNA contain sample statements in Microsoft Word format

- ▶ Original return already filed: For 2019 tax returns which have been filed but are still within the extended due date period, file a superseding return with election to forgo. If desire is to carry back and no original statement and/or election with filing, do nothing.



Obtaining a Refund

Forms 1139 and 1045 - “Quick” Refund

- ▶ Generally the faster option for obtaining a refund.
- ▶ Form must be filed within 12 months of the last day of the taxable year in which the NOL arises.
- ▶ Service must review request and issue tentative refund within 90 days - expectation is it may take longer due to COVID-19 crisis impact on IRS Service Centers.
- ▶ Not a final action of the Service - claims can still be audited, and claims in excess of \$5 million subject to Joint Committee review.
- ▶ Must be paper filed.



Obtaining a Refund

Forms 1139 and 1045 - “Quick” Refund (cont’d)

- ▶ Fiscal filers - CARES Act has extended the date for filing a timely request for the first taxable year beginning before January 1, 2018 and ending after December 31, 2017. Without further guidance it has not made the same extension for calendar 2018 and later filings. *More on this to follow.*
- ▶ Cannot use this option to carry back a credit or offset § 965 income - see form instructions.




Forms 1120X, 1040X, Amended 1041

- ▶ Alternative where quick refund is unavailable.
- ▶ Takes longer to process but considered a final action by the Service.
- ▶ Must be filed by the later of three years of the due date for the year in which the NOL arose or the date the return for that year was filed.

Options for Obtaining a Refund - 2018

- ▶ Fiscal returns beginning before but ending on or after January 1, 2018: The CARES Act extended the time period for using the Forms 1139 / 1045 to 120 days following the enactment of the Act (July 25, 2020).
- ▶ Calendar 2018 returns and later: Same extension does not yet apply to calendar year 2018 returns and later. Meaning, the 1120X is the only option until further guidance is provided. May be likely - financial crisis extensions were carried out through additional guidance.



Carryback Issues and Questions Requiring Further Guidance



ATNOL Computations

How does the ATNOL work now that the TCJA has repealed the corporate AMT?

- ▶ Although corporate AMT applies, the statutory framework for determining the ATNOL is still in place.
- ▶ Until further guidance is provided, appears reasonable to determine the ATNOL amount by adjusting the current year net operating loss by the AMT adjustments and limiting to 90% deduction in the carryback year.



AMT Credit Refund

Can or should taxpayers use Form 1139 for the CARES Act provision that allows a 100-percent refund of the AMT credit in 2018?

- ▶ There is currently no guidance that this is the appropriate method to amend for an AMT credit refund.
- ▶ Although § 6411 provides Treasury the authority to adopt the same review process as the Form 1139, it is not clear that the Form 1139 will be used or modified for this purpose.
- ▶ Suggestion is to wait for further guidance before amending to refund remaining AMT credit in 2018, or use the Form 1120X route if time is not of the essence.

Past Elections to Forgo the Carryback

What happens if the taxpayer has previously elected (for example, by checking box 11, Schedule K on Form 1120) to forgo the carryback period on a return that had no carryback provision prior to the CARES Act?

- ▶ The election to forgo a carryback is irrevocable.
- ▶ A special rule was adopted to enable a revocation of this election for certain tax years ending before January 1, 2010, during the financial crisis - see Rev. Proc. 2009-52, 2009-2 CB 744. See also Priv. Ltr. Rul. 201140007, explaining this revenue procedure in the context of a request of an extension of time to make the election.
- ▶ Situation seems rare as no need to elect out for taxable years with no carryback. Still, some taxpayers may have unknowingly checked the box.



Other federal tax cash-generating and cash-saving procedural options that may be due as soon as April 15, 2020


Two key federal tax procedural options to generate cash or save cash - both due April 15, 2020

Form 4466, Corporation Application for Quick Refund of Overpayment of Estimated Tax (keep in mind ID theft considerations can delay a refund)

- ▶ Corporations that overpaid its estimated tax for the prior tax year (e.g., calendar year 2019) may apply for a quick refund of the overpaid taxes by filing Form 4466 before due date excluding extensions, which would be April 15, 2020
 - A quick refund is available if the overpayment is at least 10 percent of the expected tax liability and at least \$500. If, however, a taxpayer's 2019 return is ready to be filed, return should be filed without filing Form 4466.

Form 1138, Extension of Time for Payment of Taxes by a Corporation Expecting a Net Operating Loss Carryback

- ▶ Corporations that expect a loss in the current tax year (e.g., calendar year 2020), may file Form 1138 by the date the prior year tax is required to be paid (e.g., April 15, 2020), i.e., due date excluding extensions. This will relieve taxpayer of need to make a payment with its 2019 return when a loss is expected in 2020 and will be carried back to 2019. Interest still applies.



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