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Client Advisory

IRS Issues Guidance on New NOL Carryback Provisions

The Worker, Homeownership, and Business Assistance Act of 2009 was signed into law on November 6, 2009.

It's a very important piece of legislation as it increases the number of years to which net operating losses ("NOLs") may be carried back, thereby affording many loss-sustaining taxpayers the opportunity to convert their losses into tax refunds and obtain much-needed cash in relatively short order.

On November 20, the IRS issued Revenue Procedure 2009-52, which explains the filing process that must be followed in order to make the necessary election and obtain those refunds.

Background. Prior to 2009, NOLs could generally be carried back two years and forward twenty years.

Earlier this year, prior to the Act being adopted, the law was changed to allow eligible small businesses ("ESBs") to elect to carry back "applicable 2008 losses" for up to five years. That allowed eligible taxpayers to receive the tax-refund benefit from their losses much more quickly, as suddenly there were more years to which their losses could immediately be carried. Generally speaking, ESBs are taxpayers with three-year-average gross receipts of \$15,000,000 or less. Applicable 2008 losses are NOLs sustained in a tax year ending in 2008 or, at the taxpayer's election, a tax year beginning in 2008.

The New Legislation. Under the new Act, all taxpayers (other than those who have received TARP benefits) may elect to increase the carryback period for an "applicable NOL" from two years to three, four or five years. The extended carryback period, therefore, is no longer limited to ESBs.

An applicable NOL is an NOL sustained in any tax year ending after December 31, 2007 and beginning before January 1, 2010. Thus, for calendar year taxpayers, an applicable NOL is one sustained during 2008 or 2009, and for fiscal year taxpayers, it's an NOL sustained in years beginning in 2007, 2008 or 2009.

Generally, this election may be made for only one tax year. ESBs, however, are allowed to make the election for two tax years. Once made, the election is irrevocable.

A special limit is applied for losses carried into the fifth preceding year: the amount of the NOL which can be carried back into the fifth year may not be more than 50% of the taxpayer's taxable income

for that fifth year. ESBs, however, are not subject to this limitation. There is no limit on the amount of income which may be offset in the third and fourth preceding years. One of the goals of practitioners, therefore, will be to determine into which years the loss should be carried in order to maximize the client's tax benefit.

If a taxpayer has previously waived its carryback rights with respect to an applicable NOL, the new rules permit a revocation of that election (so that the loss may now be carried back), provided that the revocation is filed by the due date of the taxpayer's last tax year beginning in 2009.

Rev. Proc. 2009-52. The procedures and timing requirements for making the elections are set forth in the revenue procedure. To view the full procedure document, visit <http://www.irs.gov/pub/irs-drop/rp-09-52.pdf>.

If you have questions, please contact Gordon F. Moore, Chair of Archer & Greiner's Tax Group, at (856) 354-3087 or gmoore@archerlaw.com.

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