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Internal Revenue Service Addresses Questions Related to NOL Carryback Provisions

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In recently released Notice 2010-58, the Internal Revenue Service provides guidance in the form of questions and answers addressing specific issues related to two net operating loss ("NOL") provisions enacted in 2009.

The first provision, aimed at small businesses, was enacted as part of the American Recovery and Reinvestment Tax Act of 2009, and amended Code Section 172(b)(1)(H) to allow an eligible small business (i.e., those with gross receipts of no more than \$15 million) to elect to carry back an NOL arising in 2008 for a period of 3, 4 or 5 years ("ARRA election"). The ARRA election is irrevocable and may be made for only one taxable year.

The second provision, which is not limited to small businesses, was enacted under the Worker, Homeownership, and Business Assistance Act of 2009, and amended Code Section 172(b)(1)(H) to allow taxpayers to elect to carry back a NOL arising in 2008 or 2009 for a period of 3, 4 or 5 years (the "WHBAA election"). Like the ARRA election, the WHBAA election is irrevocable and may be made for only one taxable year. However, a taxpayer that made or makes an ARRA election may also make a WHBAA election.

If a WHBAA election is made to carry back an NOL for the full five-year period, the offset amount for the fifth year is limited to 50 percent of taxable income in such year. The amount of the NOL otherwise carried to tax years after such fifth preceding year is adjusted to take this limitation into account. Further, for purposes of computing the alternative minimum tax ("AMT"), the general rule that a taxpayer's NOL deduction cannot reduce its alternative minimum taxable income ("AMTI") by more than 90 percent is disregarded for NOLs for which a WHBAA election is made. For NOLs carried back to the 5th preceding taxable year, the 50 percent limitation is applied separately based on the AMTI.

Our prior client alerts detailing the form of and timing requirements for the WHBAA election can be found at:

http://www.paulhastings.com/assets/publications/1444.pdf?wt.mc_ID=1444.pdf and

http://www.paulhastings.com/assets/publications/1457.pdf?wt.mc_ID=1457.pdf.

Q&A Highlights

ARRA and WHBAA Elections

- A taxpayer cannot revoke an ARRA election to make a WHBAA election.
- A taxpayer may only make one ARRA election (if eligible) and one WHBAA election. Such elections can be in the same taxable year if the taxpayer has an NOL that is partly attributable to an eligible small business and partly attributable to a business that is not an eligible small business.
- A taxpayer must qualify as an eligible small business only for the taxable year of the ARRA election. That is, where a taxpayer has previously made an ARRA election, the taxpayer need not continue to qualify as an eligible small business in order to make a WHBAA election.

AMT NOL Deductions

- The 90 percent AMTI limitation does not apply to NOLs for which either an ARRA election or a WHBAA election is made.
- A taxpayer that incorporates in 2006 and adopts a calendar taxable year may not make a WHBAA election and elect to carry back its 2008 NOL to the 3rd preceding taxable year for the purpose of not being subject to the 90 percent AMTI limitation because it does not have a 3rd, 4th, or 5th preceding taxable year to which an NOL may be carried back. However, the same taxpayer would be able to make such an election for a 2009 NOL.

Other Issues

- Whether a taxpayer makes a WHBAA election on an original or amended return or on a Form 1045 or 1139, the taxpayer has until 6 months from the unextended due date for filing its federal income tax return for the last taxable year beginning in 2009 to make the election.
- Where a taxpayer has an NOL in 2008 and elects to waive the carryback period under Code Section 172(b)(3), the taxpayer may revoke its Code Section 172(b)(3) election for 2008 only if the taxpayer is making a WHBAA election for its 2008 NOL.
- If, prior to the enactment of the WHBAA, a taxpayer made an election under Code Section 168(k)(4) to accelerate the AMT and research credits in lieu of bonus depreciation, the taxpayer may revoke such election if the Service authorizes the revocation in a private letter ruling. However, the Service generally will not issue a private letter ruling allowing the taxpayer to revoke such an election if the taxpayer is using hindsight to create or increase an NOL in that taxable year that is more beneficial to the taxpayer.
- Where a calendar year taxpayer has an NOL in 2008, and after December 31, 2009, but before the due date of the taxpayer's 2009 return, files a Form 1045 to carry back its 2008 NOL to 2006, the taxpayer's Form 1045 is not timely because the taxpayer's Form 1045 does not constitute a WHBAA election because it is not an election to carry back the 2008 NOL for a period of 3, 4, or 5 years. If the taxpayer does not make a WHBAA election for the 2008 NOL, the Form 1045 must be filed within 12 months following the end of the loss year.

- Where a corporate taxpayer makes the WHBAA election and merges into another corporation in a later taxable year, the acquiring corporation is still eligible to make a WHBAA election, provided it has not previously done so.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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