

New Tax Legislation Allows Individuals and Businesses to Elect Extended Carryback Period for 2008 and 2009 NOLs

11/16/09

Individuals and businesses filing U.S. income tax returns should take note of the Worker, Homeownership and Business Assistance Act of 2009 (the "Act"), signed into law on November 6, 2009. Under the Act, most taxpayers may elect to carry back net operating losses ("NOLs") from taxable years beginning or ending in 2008 or 2009 for up to five years. Prior to the Act, the NOL carryback period was limited to two years, with an optional five-year carryback period for 2008 losses of certain small businesses. The 20-year carryforward period remains unchanged.

In general, an extended carryback period may be elected for only one loss year (*i.e.*, 2008 or 2009, but not both). A corporation or partnership with average gross receipts of \$15 million or less, however, may elect an extended carryback period for two different loss years. For any taxpayer, an election to use an extended carryback period cannot be revoked once it is made.

Under the Act, the amount of any NOL that is carried back to the fifth prior taxable year may not exceed 50 percent of taxable income in that year. For example, assume "X Co." has a NOL of \$5 million for 2009. In 2004, X Co. had taxable income of \$6 million. If X Co. elects to carry its NOL back to its 2004 tax year, it will be able to use only \$3 million of the NOL in 2004. There is no limitation on the amount of NOL carrybacks that can be used in later taxable years.

The Act also suspends the 90-percent limitation on the alternative minimum tax ("AMT") deduction of NOL carrybacks for NOLs carried back under an extended carryback election.

Taxpayers that can benefit from an extended NOL carryback period may consider 2009 transactions that cause them to recognize losses that have already accrued economically. Taxpayers considering such transactions should be aware that the Act expressly authorizes the Internal Revenue Service to "prescribe such rules as are necessary to prevent the abuse of the purposes of the [Act] . . . including anti-stuffing rules, anti-churning rules (including rules relating to sale-leaseback transactions) and rules . . . relating to losses from wash sales."

In view of the irrevocability of an extended carryback election and the lack of current IRS guidance concerning anti-abuse rules under the Act, taxpayers should consult their tax advisors before making an election or planning transactions intended to trigger 2009 losses.

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