

Tax Tip



June 1, 2010

NOL Carryback New Guidance

The IRS has explained how businesses can elect the new optional longer NOL carryback provisions provided for in the Worker, Homeownership, and Business Assistance Act (WHBAA) of 2009.

Under WHBAA, all taxpayers (except for TARP recipients) may elect to increase the carryback period for an applicable NOL to 3, 4, or 5 years from 2 years. An applicable NOL means the taxpayer's NOL for any tax year ending after December 31, 2007, and beginning before January 1, 2010. Generally, an election may be made for only one tax year. But "eligible small businesses" (ESBs, see below) that made or makes an election under the Code, as in effect before Nov. 6, 2009 (WHBAA's enactment date), may make an election for two tax years instead of just one.

The WHBAA election is an expansion of the increased carryback period election provided by the American Recovery and Reinvestment Act of 2009, which was available only to ESBs, and only for 2008 NOLs. An ESB is a corporation or partnership that meets the gross receipts test of Code Section 448(c) (applied by substituting \$15 million for \$5 million) for the tax year in which the loss arose, or a sole proprietorship that would meet that test if the proprietorship were a corporation.

Some highlights of the Q&A include:

- A taxpayer can make the WHBAA election using one of two methods: 1) attach an election statement to the federal tax return or amended return for the loss year; or 2) attach an election statement to the carryback form itself (Form 1045/1139/1040X/1120X).
- Even if a taxpayer attaches the election to the federal tax return for the loss year, a taxpayer must still include a copy of an election statement with the carryback form.
- The statement must indicate:
 - ◊ That you are electing to apply Section 172(b)(1)(H) under Rev. Proc. 2009-52.
 - ◊ That you are not a TARP recipient.
 - ◊ The length of the elected carryback period.
- The IRS will not process a carryback that does not include the election statement.
- The WHBAA election must be made by the due date (including extensions) for filing the tax return for the last taxable year beginning in 2009, for either 2008 or 2009 losses.
- A taxpayer that previously filed a 2-year carryback for losses incurred in 2008 and that has already received refunds for those years, but wishes to amend the carryback to a 3, 4, or 5 year carryback, should simply file an amended carryback form (including the election) and prepare the form as if it were the first form filed. The IRS will make the necessary adjustments by offsetting overpayments from the earlier years against the previously issued refunds before refunding any remaining overpayments.

If you have any questions please contact our Tax Services Group:

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