

US: Consolidated return considerations of NOL carrybacks under CARES Act

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Recently issued Internal Revenue Service (IRS) guidance on procedures for claiming relief under the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* answers many questions on applying of NOL carryback elections to United States (US) federal consolidated groups. Some uncertainty remains, however, particularly in the area of split-waivers.

This Alert addresses election and refund claim procedures for US federal consolidated groups under the NOL-related provisions of the CARES Act. For further detail regarding the various corporate tax provisions of the CARES Act, see EY Global Tax Alert, [US CARES Act has corporate implications, including NOL deductions, Section 163\(j\) interest expense limitation and AMT acceleration](#), dated 1 April 2020.

Background

New Internal Revenue Code¹ Section 172(b)(1)(D), enacted by the CARES Act, allows NOLs arising in tax years beginning after 31 December 2017, and before 1 January 2021 (e.g., NOLs incurred in 2018, 2019, or 2020 by a calendar-year taxpayer) to be carried back to each of the five tax years preceding the NOL's tax year. In doing so, it temporarily overrides the repeal by the *Tax Cuts and Jobs Act of 2017* (TCJA) of the ability of most taxpayers to carry back NOLs. As part of the new ability to carry back NOLs, taxpayers may elect to skip any tax years during the carryback period in which they had a Section 965

inclusion. The CARES Act also temporarily removes the TCJA-enacted 80% limitation on the absorption of NOLs until tax years beginning after 2020.

In addition, the CARES Act modifies the TCJA's alternative minimum tax (AMT) provisions. The TCJA repealed the corporate AMT and allowed corporations to fully offset regular tax liability with remaining AMT credits. Any remaining AMT credits not absorbed became refundable incrementally from 2018 through 2021. The CARES Act accelerates the refund schedule, permitting corporate taxpayers to claim the refund in full in either 2018 or 2019.

The CARES Act also generally modifies the adjusted taxable income (ATI) limitation under Section 163(j) for deducting interest expense, increasing the limit from 30% to 50% of ATI, for tax years that begin in 2019 or 2020, and allows taxpayers to elect to use in 2020 their ATI from 2019 rather than their actual ATI in 2020.

Revenue Procedure 2020-24 and Notice 2020-26

In [Revenue Procedure 2020-24](#), the IRS describes the timing and methods for taxpayers to (1) elect to waive the carryback period for an NOL arising in a tax year beginning in 2018 or 2019; (2) elect to exclude all Section 965 years from the carryback period for an NOL arising in a tax year that begins in 2018, 2019 or 2020; or (3) make an application under Section 6411(a) for an NOL arising in a tax year that began before 1 January 2018 and ended after 31 December 2017 (a straddle year).

[Notice 2020-26](#) grants a six-month extension to file a "quick" tentative refund claim Form 1045 or Form 1139, for taxpayers that have an NOL arising in a tax year that began during calendar year 2018 and ended on or before 30 June 2019. The six-month extension only applies to requests for a tentative refund based on an NOL carryback.

For further detail on the procedures described in Revenue Procedure 2020-24 and Notice 2020-26, see EY Global Tax Alert, [US: Taxpayers need to consider international tax implications of making certain net operating loss elections under Revenue Procedure 2020-24](#), dated 13 April 2020.

Revenue Procedure 2020-24 specifically addresses the treatment of consolidated groups in three ways:

- ▶ "Taxpayer" is defined to include a consolidated group.
- ▶ "NOL" is defined to include a consolidated net operating loss (CNOL) as determined under Treas. Reg. Section 1.1502-11(a).

- ▶ The agent for the consolidated group, as determined under Treas. Reg. Section 1.1502-77 (typically the group's common parent), must make the Section 172(b)(3) waiver or the Section 172(b)(1)(D)(v)(I) election to exclude all Section 965 years from the carryback period.

Revenue Procedure 2020-24 also informs taxpayers (including consolidated groups) that they "may consult" Notice 2020-26 for procedures to file a Form 1139 for tax years beginning after 31 December 2017. Notice 2020-26 does not, however, specifically reference consolidated groups. While Notice 2020-26 is presumably intended to apply to consolidated groups, a lack of clarity remains on this issue.

NOL waiver provisions for consolidated groups

Under Treas. Reg. Section 1.1502-21(b)(3)(i), a consolidated group may make an irrevocable election under Section 172(b)(3) to relinquish the entire carryback period for a CNOL for any consolidated return year (a general waiver election). A general waiver election must be made for the consolidated return year in which the CNOL arises.

Separately, a partial or "split waiver" election may be made under Treas. Reg. Section 1.1502-21(b)(3)(ii)(B) when a corporation that had been a member of a prior consolidated group becomes a member of another consolidated group. If a split-waiver election is made, the acquiring consolidated group irrevocably relinquishes, for all CNOLs attributable to the new member, the portion of the carryback period for which the new member was a member of a prior consolidated group. A split-waiver election must be made in the year in which the new member becomes a member of the consolidated group.

In response to the 2008-2009 financial crisis, Congress amended Section 172 in November 2009, generally permitting taxpayers to elect to extend the then-applicable two-year NOL carryback period by up to three additional years for NOLs arising in 2008 or 2009. Through Temp. Reg. Section 1.1502-21T(b)(3)(ii)(C), Treasury extended the due date for consolidated groups filing the election, thereby allowing those groups to make a split-waiver election that might have been otherwise time-barred. The now-expired temporary regulations allowed a consolidated group, solely for its CNOL subject to the extended carryback period, to make a split-waiver election either for the entire pre-acquisition carryback period or only for the extended carryback period.

More recently, following the TCJA's repeal of the ability to carry back NOLs, consolidated groups would not have had reason to make a general waiver election or a split-waiver election because no NOL carryback was otherwise possible. In addition, the original deadline for making a general waiver election for a CNOL arising in 2018, or making a split-waiver election with respect to a member that joined a consolidated group in 2018, has passed (with extensions, the return for a calendar-year group would have been due by 15 October 2019). Thus, absent specific guidance, the current ability to make an election for such CNOLs is time-barred, a result that is seemingly at odds with the legislative intent behind the CARES Act.

Revenue Procedure 2020-24, through its references to consolidated groups and CNOLs, establishes an extended deadline for consolidated groups to make an otherwise untimely general waiver election. Neither Revenue Procedure 2020-24 nor Notice 2020-26, however, appears to provide US federal consolidated groups the general ability to make an untimely split-waiver election.

Implications

Those US federal consolidated groups wishing to apply for a "quick" tentative refund from an NOL carryback within the extended six-month period allowed under Notice 2020-26 should proceed with caution and consult appropriate professionals, given some degree of uncertainty regarding the applicability of such relief to consolidated groups.

Even more uncertainty exists over the ability to make an otherwise untimely split-waiver election based simply upon Revenue Procedure 2020-24's extension of time to make a general waiver election. Thus, consolidated groups desiring to make an otherwise untimely split-waiver election may find it more prudent to wait for additional IRS guidance. Based on the rapidity with which the IRS issued guidance on similar procedural matters following the 2009 changes to NOL carryback periods, guidance could be forthcoming in near term. Those consolidated groups that simply seek to affect a general waiver election, however, should follow the process outlined in Revenue Procedure 2020-24.

In the meantime, US federal consolidated groups should review their relevant transaction agreements if they were involved in an acquisition, disposition, spin-off, or similar type transaction changing the status of any member during any of the carryback years under the CARES Act or a year in which a CNOL was generated. This review is important to assess whether any contractual obligations (or rights) affect the group's ability to utilize any portion of their CNOLs attributable to an acquired or departing member and determine which party is entitled to the proceeds of a refund absent a waiver election.

Endnotes

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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