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Wayne R. Strasbaugh (strasbaugh@ballardspahr.com) is a Partner with the Philadelphia office of Ballard Spahr LLP. Mr. Strasbaugh is a tax specialist whose practice is concentrated in tax issues related to domestic mergers and acquisitions of corporations, cross-border corporate acquisitions employing disregarded entities and hybrid entities, and spin-off transactions.

IRS Provides Section 9100 Relief for Late-Filed NOL Election

By Wayne R. Strasbaugh (Ballard Spahr LLP)

A recently released private letter ruling has interest for any individual and corporate taxpayers who reported net operating losses (NOL) in 2008 or 2009. The ruling, LTR 201125014 (Mar. 22, 2011), grants a taxpayer an extension to elect to carry back NOLs for up to five years under a temporary provision enacted by the Worker, Homeownership, and Business Assistance Act of 2009.

The provision, Section 172(b)(1)(H) of the Internal Revenue Code (IRC), applies to taxpayers with NOLs arising in taxable years ending after 2007 and beginning before 2010 (that is, the 2008 and 2009 years of a calendar-year taxpayer).¹ The taxpayer who applied for the private letter ruling missed the normal deadline to elect to carry back NOLs.

Reasons for Extended Carryback Election

Why would a taxpayer make the extended carryback election? The obvious reason would be to offset taxable income recognized in the carryback years and thereby obtain a refund of previously paid tax. If the taxpayer operated at a loss in each of the carryback years, it would seem that no tax refund or other benefit could be obtained by making the election. However, a parallel alternative minimum tax (AMT) provision (IRC Section 56(d)(1)(A)(ii)) provides that taxpayers making the extended carryback election will be able to offset 100 percent of any NOL subject to the election against the alternative minimum taxable income of the year to which it is carried.² Under the normal AMT carryback and carryover rules, only 90 percent of the NOL would be available for offset.

The statutory language does not limit the “full offset” of the NOL to AMT carryback years and, by implication, permits the “full offset” in carryover years. The IRS has confirmed this interpretation in Notice 2010-58, 2010-37 I.R.B. 326 (Aug. 20, 2010), Q&A-11.

Thus, the benefits of the extended carryback election continue for AMT purposes for all carryover years—up to 20 taxable years following the year in which the NOL arose (that is, conceivably, as far into the future as 2029). Even if a taxpayer is not currently subject to AMT, there is a good chance that it could fall under that regime during at least one year of the carryover period. For this reason, taxpayers unaware of the benefits of the election may wish to follow the lead of the taxpayer in LTR 201125014 and file a request to the IRS for Section 9100 relief in order to make a late filing of the extended carryback election.

¹Enacted earlier the same year, the American Recovery and Reinvestment Act (ARRA, commonly referred to as the Stimulus Act) had provided a similar election under IRC Section 172(b)(1)(H) for an “eligible small business.” The IRS private letter ruling may also be relevant to some taxpayers who missed the deadline for making the ARRA election.

²The fifth carryback year is subject to a 50 percent-of-taxable-income ceiling, however, for both regular and AMT tax purposes.

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