

Federal Tax Weekly

Issue Number 12

www.CCHGroup.com

March 19, 2009

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IRS Issues Guidance On Extended NOL Carryback For Small Businesses Under 2009 Recovery Act; Promises Accelerated Refunds

◆ *IR-2009-26, Rev. Proc. 2009-19, Q&As for NOL Carryback Election*

The IRS has unveiled eagerly-awaited guidance for small businesses that want to elect to carry back 2008 net operating losses (NOLs) as much as five years. The package of guidance, including a revenue procedure and Q&As on the IRS web site, implements a new benefit enacted in the *American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)*. The agency also addressed “testing years” and explained how to take advantage of the NOL relief.

■ **CCH Take Away.** “The new net operating loss provisions could throw a lifeline to struggling businesses, providing them with a quick infusion of cash,” IRS Commissioner Douglas Shulman said in a statement. “We want to make it as easy as possible for small businesses to take advantage of these key tax benefits.” The IRS guidance was released as part of a comprehensive effort by the Obama Administration to provide an infusion of cash to small businesses. The campaign, called “Unlocking Credit for Small Businesses,” includes creating a secondary market for Small Business Administration (SBA) loans, raising SBA loan guarantees to 90 percent, eliminating SBA loan fees, and encouraging banks to make small business loans.

■ **Planning Note.** The guidance was urgently needed since some elections must be made by April 17, 2009. Other taxpayers with a longer election deadline may still be eager to make the election quickly to obtain an immediate refund against profits earned in the last three to five years. The IRS also updated the instructions to Form 1045, Application for Tentative Refund and Form 1139, Corporate Application for Tentative Refund, to facilitate use of the special carryback provision on an expedited basis.

■ **Comment.** David Culp, senior manager in the Washington National Tax Practice of KPMG LLP, told CCH, “it was nice that the election procedures fit into the existing procedures and rules. It doesn’t take a lot to claim an NOL.”

■ **Reminder.** Congress limited NOL relief to small businesses. To qualify for the new five-year carryback provision, an eligible small business (ESB) must have no greater than an average of \$15 million in gross receipts over a three-year period ending with the tax year of the NOL.

2009 Recovery Act

Under prior law, taxpayers could carry back NOLs to the two previous years and carry

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Route to: _____

Corporate Tax Rate Reduction Possible; Taxing Employer-Provided Health Care Also In Play

Despite the Administration's crowded first-year agenda, President Obama has again expressed interest in lowering the corporate income tax rate. During a March 12 Business Roundtable gathering of CEOs in Washington, D.C., Obama expressed openness to lowering the corporate tax rate if the reduction is paid for by eliminating yet-defined corporate loophole closers. In a significant shift, Administration officials also signaled to lawmakers on Capitol Hill tentative support for taxing employer-provided health care benefits to pay for health care reform.

Corporate tax rate

Many industrialized countries have lowered their corporate tax rates in recent years. Corporate leaders are urging the Obama Administration to do likewise or jeopardize the success of worldwide U.S. business opportunities.

■ **Comment.** "It will be interesting to see whether the Obama Administration pursues reducing the corporate income tax rate in the short-term

and, if so, how the Administration would fund a reduction. The budget blueprint, recently released by the Administration, includes a number of revenue raising proposals that could be used for such a reduction," Marc Gerson, partner, Miller & Chevalier, LLP, Washington, D.C., told CCH.

Efforts to lower the corporate tax rate may be resisted by small businesses, such as S corps, partnerships, and limited liability companies (LLCs), which pay federal income taxes at individual income tax rates. The imbalance between corporate and individual business rates likely will become even more pronounced if the old 36 and 39.6 percent marginal income tax rates return in 2011.

■ **CCH Take Away.** Michael Schlesinger, partner, Schlesinger & Sussman, New York, and author of *Practical Guide to S Corporations (4th edition)*, told CCH that "An S corp is a unique statutory animal and, regardless of changes to income tax brackets, offers the shareholder-

employee benefits not available with any other business entity." Some of the benefits, Schlesinger noted, include the creation of capital gains for shareholders; special treatment for charitable contributions; the imposition of self-employment tax only on those distributions that are reasonable salary; the purchase of a personal residence from an S shareholder for Code Sec. 121 purposes. Also, under some state and local laws, it is more beneficial to be an S corp than an LLC.

Health care

Perhaps even more controversial than lowering the corporate tax rate is a proposal floated by some White House officials during the past week to tax employer-provided health benefits. This position represents a fundamental shift from what Obama said during the presidential campaign. White House budget director Peter Orzag indicated that taxing employer benefits is among many ideas that are "on the table."

Practitioners' Corner

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Individual Income:

Individual Income Tax Returns, total	1.0%
Individuals with Taxable Positive Income (TPI) under \$200,000, without earned income tax credit (non-business)	0.4%

Business returns (Nonfarm) by size of Total Gross Receipts (TGR):

Under \$25,000	1.2%
\$25,000 - \$100,000	1.9%
\$100,000 - \$200,000	3.8%
\$200,000 and above	3.1%

Farm Returns

Farm Returns:	0.6%
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Business and Non-business returns with earned income tax credit by size of TGR:

Under \$25,000	2.0%
\$25,000 and above	3.5%

Estate and trust income:

Estate and trust income:	0.1%
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Corporations:

Small Corporations	1.0%
Large Corporations	15.3%

S Corporations:

S Corporations:	0.4%
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Partnerships:

Partnerships:	0.4%
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Gift tax:

Gift tax:	0.4%
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Civil penalties. In FY 2008, the IRS assessed 30.2 million civil penalties against non-compliant individual income taxpayers for a total amount of \$13.3 billion. Of all penalties assessed by the IRS, individual income taxpayers continued to account for the majority at roughly 75-percent. Assessed employment tax-related penalties followed at approximately 21-percent. Corporate income tax penalties were 1.94-percent of the total.

Criminal investigations. During 2008, the IRS initiated investigations for 1,531 legal source crimes (approximately 40-percent of all tax-related criminal investigations), 1,441 illegal source financial crimes, and 777 narcotics-related financial crimes. Of those investigations, 2,785 illegal source financial crimes (73.57-percent) were referred for prosecution, of which 2,144 resulted in conviction. Nearly 900 legal source tax crimes were referred for prosecution and 666 (74.58-percent) resulted in conviction.

Offers-in-compromise. In FY 2008, the IRS only received 44,000 offers-in-compromise (OICs), reflecting a continuing drop from the 106,000 the agency received in FY 2004. The agency only accepted 11,000 OICs, a 25-percent acceptance rate. The number of OICs received and accepted in FY 2008 was approximately the same as in FY 2007. The acceptance rate was nearly identical: 46,000 submitted, and 12,000, or 26.084-percent, accepted in 2007.