

The NOL Carryback Rules Under the CARES Act

TAX SECTION



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On March 27, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act introduced a number of new provisions to assist businesses and individuals during the COVID-19 pandemic. One such provision adjusts the rules of net operating loss (“NOL”) carrybacks.

Before 2018, NOLs of a business or individual could be carried back two years and carried forward twenty years. When carried forward, NOLs at that time were allowed to offset 100% of taxable income. The Tax Cuts and Jobs Act of 2017, however, disallowed NOL carrybacks for all post-2017 losses, extended the twenty-year carryforward to an unlimited carryforward, but limited the NOL offset to 80% of taxable income.

Now that COVID-19 is disrupting business profits, Congress decided to temporarily reverse these rules to allow NOL carrybacks again via the CARES Act. NOLs from 2018, 2019, and 2020 can now be carried back up to five years. Such losses may offset 100% of taxable income rather than 80%. This is an opportunity for taxpayers who had a large profit in 2019 and a large loss in 2020 to carry back the NOL and receive a refund of the previously paid tax for 2019.

The IRS issued Revenue Procedure 2020-24 and Notice 2020-26 to provide guidance as to the new NOL rules. Taxpayers are allowed to waive the carryback of an NOL arising in a particular year. Revenue Procedure 2020-24 provides guidance about that election. Taxpayers who wish to waive the carryback for an NOL arising in 2018 or 2019 must make the election by attaching to the Federal income tax return filed for the first taxable year ending after March 27, 2020, a separate statement for each year for which the taxpayer wishes to make the election. The statement must indicate the taxpayer is electing to apply Section 172(b)(3) under Rev. Proc. 2020-24 and the taxable year for which the statement applies.

Additionally, Section 6411(a) permits an application for tentative carryback adjustment by filing Form 1139. The application generally must be filed no later than twelve months after the end of the year in which the NOL carryback arises. Notice 2020-26 extends this twelve-month deadline for tax year

2018 by six months. Thus, NOLs arising in 2018 may be carried back by Form 1139 if filed by June 30, 2020.

These NOL carryback rules may provide an avenue for a much-needed injection of cash to struggling businesses.

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