

Part III - Administrative, Procedural, and Miscellaneous

Expanded Carryback of Net Operating Losses and Losses from Operations

Notice 2010-58

This notice provides guidance related to § 13 of the Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2984 (November 6, 2009) (the WHBAA). Section 13 of the WHBAA amends §§ 172(b)(1)(H) and 810(b) of the Internal Revenue Code to allow taxpayers to elect to carry back an applicable net operating loss (NOL) for a period of 3, 4, or 5 years, or a loss from operations for 4 or 5 years, to offset taxable income in those preceding taxable years. This notice addresses certain issues that have arisen under § 172(b)(1)(H), as amended by the WHBAA. This notice applies to losses from operations of a life insurance company under § 810 in the same manner as to NOLs under § 172.

BACKGROUND

In general

Section 172(a) allows a deduction equal to the aggregate of the NOL carryovers and carrybacks to the taxable year. Section 172(b)(1)(A)(i) provides that an NOL for any taxable year generally must be carried back to each of the 2 years preceding the taxable year of the NOL. Section 172(b)(3) provides that any taxpayer entitled to a carryback period under § 172(b)(1) may make an irrevocable election to relinquish the carryback period for an NOL for any taxable year.

Section 56(a) provides certain adjustments that apply in computing alternative minimum taxable income (AMTI), in lieu of the treatment applicable in computing the regular tax. Section 56(a)(4) provides that the alternative tax net operating loss (ATNOL) deduction shall apply in lieu of the NOL deduction allowed under § 172 in determining the amount of alternative minimum taxable income. Section 56(d)(1) provides certain adjustments and limitations used in determining the ATNOL deduction for the taxable year. Under § 56(d)(1)(A)(i), the ATNOL deduction generally cannot exceed 90 percent of AMTI, determined without regard to the ATNOL deduction and the deduction under § 199 (the 90 percent limitation).

Section 810(b)(1)(A) provides that life insurance companies may carry back a loss from operations for any taxable year to each of the 3 years preceding the taxable year of the loss. Section 810(b)(3) provides that any taxpayer entitled to a carryback period under § 810(b)(1) may make an irrevocable election to relinquish the carryback period for a loss from operations for any taxable year.

American Recovery and Reinvestment Act of 2009

Section 1211 of the American Recovery and Reinvestment Tax Act of 2009, Div. B of Pub. L. No. 111-5, 123 Stat. 115 (February 17, 2009) (ARRA), amended § 172(b)(1)(H) to allow an eligible small business (ESB) to elect to carry back a 2008 applicable NOL for a period of 3, 4, or 5 years (ARRA election). Unlike the § 172(b)(1)(H) election under the WHBAA (WHBAA election), the ARRA election is applicable only to an NOL attributable to an ESB. The ARRA election is irrevocable and may be made for only one taxable year. Rev. Proc. 2009-26, 2009-19 I.R.B. 935 (April 25, 2009), modifying and superseding Rev. Proc. 2009-19, 2009-14 I.R.B. 747 (March

16, 2009), advises taxpayers how to make the ARRA election.

Worker, Homeowner, and Business Assistance Act of 2009

Section 172(b)(1)(H)(i), as amended by the WHBAA, permits a taxpayer to elect to carry back its applicable NOL to 3, 4, or 5 years preceding the taxable year of the applicable NOL. This election is not limited to an ESB. Section 172(b)(1)(H)(ii) provides that the term “applicable net operating loss” means the taxpayer’s NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010. Section 172(b)(1)(H)(iii) provides that the election under § 172(b)(1)(H) is required to be made in a manner prescribed by the Secretary, and must be made by the due date (including extensions) for filing the return for the taxpayer’s last taxable year beginning in 2009. The election is irrevocable and, in general, may be made for only one taxable year. However, § 172(b)(1)(H)(v) allows a taxpayer that made or makes an ARRA election also to make a WHBAA election.

Section 172(b)(1)(H)(iv) limits the amount of an applicable NOL that a taxpayer elects under § 172(b)(1)(H)(i) to carry back to the 5th taxable year preceding the taxable year of the loss (5th preceding taxable year) to 50 percent of the taxpayer’s taxable income for the 5th preceding taxable year. The taxable income for the 5th preceding taxable year is computed without regard to the NOL for the loss year or any taxable year thereafter. The excess of the amount of the loss over 50 percent of the taxable income, as determined under § 172(b)(2), for the 5th preceding taxable year is carried to later taxable years. For the carryback of an ATNOL to the 5th preceding taxable year, the 50 percent limitation is applied separately based on the AMTI. The limitation on the

amount of an applicable NOL that may be carried back to the 5th preceding taxable year does not apply to an NOL carryback under the ARRA election.

Section 13(b) of the WHBAA amends § 56(d)(1)(A)(ii) to provide that the 90 percent limitation does not apply to an ATNOL deduction attributable to an applicable NOL for which a taxpayer made an election under § 172(b)(1)(H).

Section 13(e)(4) of the WHBAA provides that a taxpayer that has elected under §§ 172(b)(3) or 810(b)(3) to forgo a carryback for a loss for a taxable year ending before the date of enactment of the WHBAA (November 6, 2009) may revoke that election before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009. An application under § 6411(a) for the applicable NOL is treated as timely if filed before that due date.

Section 13(f) of the WHBAA provides that the election under § 172(b)(1)(H) is not available to certain taxpayers that receive benefits under the Emergency Economic Stabilization Act of 2008, Title I of Div. A of Pub. L. No. 110-343, 122 Stat. 3765, and certain affiliates of these taxpayers.

QUESTIONS AND ANSWERS

ARRA and WHBAA Elections

Q-1. A taxpayer makes a valid ARRA election for an NOL for 2008. May the taxpayer revoke the ARRA election to make a WHBAA election for the 2008 NOL?

A-1. No. The ARRA election is irrevocable and a taxpayer may not change or revoke the ARRA election made for 2008.

Q-2. A fiscal-year taxpayer has NOLs for its taxable years beginning in 2007, 2008, and 2009. The taxpayer makes a valid ARRA election for its taxable year beginning in 2007.

May the taxpayer make a WHBAA election for its taxable year beginning in 2008 and another WHBAA election for its taxable year beginning in 2009?

A-2. No. Section 172(b)(1)(H)(v)(I) provides that, in the case of an ESB that made or makes an ARRA election, a § 172(b)(1)(H) election may be made for 2 taxable years.

The ARRA election and the WHBAA election are both § 172(b)(1)(H) elections.

Accordingly, the taxpayer may only make one ARRA election and one WHBAA election.

If the taxpayer makes an ARRA election for its taxable year beginning in 2007, the taxpayer may make a WHBAA election for either the taxable year beginning in 2008 or the taxable year beginning in 2009, but not both.

Q-3. In the taxable year ending in 2008, a taxpayer has an NOL that is partly attributable to a business that is an ESB and partly attributable to a business that is not an ESB (a non-ESB). The taxpayer makes a valid ARRA election for the portion of the NOL attributable to the ESB. May the taxpayer make a WHBAA election for the portion of the NOL that is attributable to the non-ESB?

A-3. Yes. The ARRA election is applicable only to the portion of the NOL that is attributable to an ESB. The taxpayer may make a WHBAA election for the portion of the 2008 NOL that is attributable to the non-ESB.

Q-4. Assume the same facts as in Q-3 and that the taxpayer makes a valid WHBAA election for the portion of the NOL attributable to the non-ESB for the taxable year ending in 2008. May the taxpayer make a second WHBAA election for another taxable year?

A-4. No. The taxpayer may not make a second WHBAA election because the taxpayer may make only one election under the ARRA and one election under the WHBAA.

Q-5. In the taxable year ending in 2008, a taxpayer has an NOL that is partly attributable to an ESB and partly attributable to a non-ESB. For this taxable year the taxpayer makes a valid ARRA election for the portion of the NOL attributable to the ESB and elects a 5-year carryback for this NOL. The taxpayer carries back the portion of the NOL attributable to the non-ESB 2 years. After the enactment of the WHBAA, the taxpayer makes a valid WHBAA election for the portion of the NOL attributable to the non-ESB and elects a 5-year carryback for this NOL. In determining the NOL deduction for the 5th preceding taxable year, how does the 50 percent of taxable income limitation apply?

A-5. The taxpayer computes taxable income for the 5th preceding taxable year without deducting the portion of the 2008 NOL for which the taxpayer previously made the ARRA election and without deducting the portion of the 2008 NOL for which the taxpayer is making an election under the WHBAA.

Q-6. If a taxpayer previously made an ARRA election, must the taxpayer continue to qualify as an ESB in the year of the WHBAA NOL in order to make a WHBAA election?

A-6. No. A taxpayer must qualify as an ESB only for the taxable year of the ARRA election.

Q-7. A taxpayer makes an ARRA election for an NOL for 2008. However, the Internal Revenue Service rejects the election because the NOL is attributable to a non-ESB.

May the taxpayer make a WHBAA election for the 2008 NOL?

A-7. Yes. Because a non-ESB may make a WHBAA election, the taxpayer may make a WHBAA election for the 2008 NOL, provided it is timely filed.

Alternative Tax Net Operating Loss Deduction

Q-8. A calendar-year taxpayer makes an ARRA election for the taxpayer's NOL in 2008 and a WHBAA election for the taxpayer's NOL in 2009. Does the 90 percent limitation on the use of the ATNOL deduction apply for either the 2008 NOL or the 2009 NOL?

A-8. No. Under § 56(d)(1)(A)(ii)(I), the 90 percent limitation does not apply to the 2008 ATNOL for which the taxpayer makes an ARRA election or to the 2009 ATNOL for which the taxpayer makes a WHBAA election. The 90 percent limitation does not apply to any extended carryback election under § 172(b)(1)(H). Therefore, even if the taxpayer makes only the ARRA election for 2008, the 90 percent limitation does not apply.

Q-9. A taxpayer has an applicable NOL resulting from losses in certain investment arrangements that took the form of "Ponzi" schemes and qualify as theft losses. Section 172(b)(1)(F)(ii)(I) provides a 3-year carryback period for NOLs resulting from theft losses. May the taxpayer make the WHBAA election to carry back its applicable NOL to the 3rd preceding taxable year for the purpose of not being subject to the 90 percent limitation on deducting the ATNOL from the year of the theft loss?

A-9. Yes.

Q-10. A taxpayer incorporates in 2006 and adopts a calendar taxable year. The taxpayer has an NOL in 2008. May the taxpayer make the WHBAA election and elect to carry back its 2008 NOL to the 3rd preceding taxable year for the purpose of not being subject to the 90 percent limitation on deducting the ATNOL from 2008?

A-10. No. The taxpayer cannot make a WHBAA election because it does not have a 3rd, 4th, or 5th preceding taxable year to which to carry back its NOL.

Q-11. A taxpayer incorporates in 2006 and adopts a calendar taxable year. The taxpayer has NOLs in 2006, 2007, 2008, and 2009. May the taxpayer make the WHBAA election to carry back its 2009 NOL to the 3rd preceding taxable year for the purpose of not being subject to the 90 percent limitation on deducting the ATNOL from 2009?

A-11. Yes. The taxpayer has a 3rd preceding taxable year to which to carry back its 2009 NOL, even though each of the taxable years preceding 2009 has a loss and none of the NOL is used in those years. Any 2009 NOL that is unused in the taxable years preceding 2009 also is not subject to the 90% limitation when applied to taxable years after 2009.

50 Percent Limitation

Q-12. In 2002, a taxpayer has an NOL of \$100,000 that it carries over to 2003. The taxpayer has an NOL of \$200,000 in 2005 that it carries back to 2003. In 2008, the taxpayer has an NOL of \$500,000 and makes a WHBAA election to carry back its NOL 5 years to 2003. In 2003, the taxpayer has \$400,000 taxable income before any NOL carryback or carryover. How much of the 2008 NOL may the taxpayer deduct in 2003?

A-12. The taxpayer's 2003 taxable income in the amount of \$400,000 is first reduced by the \$100,000 NOL carryover from 2002, and also reduced by the \$200,000 NOL carryback from 2005. Accordingly, the 50 percent limitation is applied to the remaining \$100,000 of taxable income. The taxpayer may deduct \$50,000 of its 2008 NOL in 2003. The taxpayer's taxable income for 2003, after deducting the 2008 NOL, is \$50,000.

Q-13. A taxpayer has an NOL in 2009 of \$100,000 and makes a WHBAA election to carry it back 5 years to 2004. In 2004, the taxpayer has taxable income of \$50,000 before the NOL carryback. The taxpayer has no NOLs from taxable years before 2009 that it may carry to 2004. Because the taxpayer is electing to carry back its NOL to the 5th preceding taxable year, the taxpayer may deduct only \$25,000 (50 percent of \$50,000) of the 2009 NOL in 2004. The portion of the taxpayer's 2009 NOL that may be carried to 2005 and thereafter must be determined in accordance with § 172(b)(2).

Section 172(b)(2) provides that the portion of an NOL carried to a taxable year is the excess of the NOL (if any) over the sum of the taxable income for prior taxable years to which the NOL may be carried. For this purpose, taxable income for prior taxable years is computed with certain modifications. If the taxpayer's taxable income for 2004, as determined with the modifications required under § 172(b)(2) (modified taxable income), is \$60,000, how much of the taxpayer's 2009 NOL may be carried to 2005?

A-13. Taxpayer's 2009 NOL is absorbed by 50 percent of the taxpayer's modified taxable income for 2004, that is, \$30,000 (50 percent of \$ 60,000). The taxpayer carries the unabsorbed portion of the 2009 NOL, \$70,000, to 2005.

Other Issues

Q-14. Under § 301.9100-2(b) of the Procedure and Administration Regulations, a taxpayer that files a timely return has 6 months from the unextended due date for filing its federal income tax return for the last taxable year beginning in 2009 to make a WHBAA election on an amended return. Does a taxpayer that files a timely return similarly have 6 months from the unextended due date for filing its federal income tax

return for the last taxable year beginning in 2009 to file a Form 1045 or 1139 to carry back an applicable NOL for which a taxpayer makes a WHBAA election?

A-14. Yes, whether a taxpayer makes a WHBAA election on an original or amended return or on a Form 1045 or 1139, the taxpayer has until 6 months from the unextended due date for filing its federal income tax return for the last taxable year beginning in 2009 to make the election.

Q-15. A calendar year C corporation is dissolved in June 2008. The taxpayer files the final tax return for the short taxable year by the due date, September 15, 2008, without an extension. The corporation files a Form 1139 in March 2009 to carry back its 2008 NOL to 2006. May the corporation file an amended Form 1139 to make a WHBAA election for the 2008 NOL, and if so, by when?

A-15. The corporation may amend its Form 1139 to make a WHBAA election for the 2008 NOL. The due date to make a WHBAA election and file an application for tentative refund is determined as if the corporation remained in existence and on a calendar taxable year for all of 2008 and 2009. Accordingly, the due date for the corporation to make a WHBAA election by filing an amended Form 1139 is September 15, 2010. The same due date applies if the corporation dissolves in 2009 instead of 2008.

Q-16. A taxpayer has an NOL in 2008 and elects to waive the carryback period under § 172(b)(3). May the taxpayer revoke its § 172(b)(3) election under § 13(e)(4)(A) of the WHBAA without making a WHBAA election for the 2008 NOL?

A-16. No. The taxpayer may revoke its § 172(b)(3) election for 2008 only if the taxpayer is making a WHBAA election for its 2008 NOL.

Q-17. If, before the enactment of the WHBAA, a taxpayer makes an election under § 168(k)(4) not to claim the additional first year depreciation for a taxable year ending after 2007 and beginning before 2010, may the taxpayer revoke this election to make a WHBAA election for an NOL in that taxable year?

A-17. A taxpayer may revoke the election not to claim the additional first year depreciation if the Service authorizes the revocation in a private letter ruling. See §1.168(k)-1(e)(7)(i). However, the Service generally will not issue a private letter ruling allowing the taxpayer to revoke an election not to claim the additional first year depreciation if the taxpayer is using hindsight to create or increase an NOL in that taxable year that is more beneficial to the taxpayer.

Q-18. A calendar year taxpayer has an NOL in 2008. After December 31, 2009, but before the due date of the taxpayer's 2009 return, the taxpayer files a Form 1045 to carry back its 2008 NOL to 2006. Is the taxpayer's Form 1045 timely?

A-18. No. The taxpayer's Form 1045 does not constitute a WHBAA election for the 2008 NOL because it is not an election to carry back the 2008 NOL for a period of 3, 4, or 5 years. If the taxpayer does not make a WHBAA election for the 2008 NOL, the Form 1045 must be filed within 12 months following the end of the loss year.

Q-19. A farming loss generally is carried back to each of the 5 taxable years preceding the taxable year of the loss under § 172(b)(1)(G). May a taxpayer make the WHBAA election for an applicable NOL attributable to the farming loss and carry back the NOL for a period of 3, 4, or 5 years?

A-19. Yes. However, the taxpayer must timely waive its 5-year carryback period for the NOL under § 172(i)(3) in order to make a WHBAA election to carry back the NOL for a

period of 3 or 4 years. The taxpayer does not need to waive the 5-year carryback period under § 172(b)(1)(G) to elect a 5-year carryback period under the WHBAA.

Q-20. If a corporate taxpayer makes the WHBAA election and merges into another corporation in a later taxable year, is the acquiring corporation that has not previously made a WHBAA election allowed to make the WHBAA election for a taxable year of the acquiring corporation ending after December 31, 2007, and beginning before January 1, 2010?

A-20. Yes.

DRAFTING INFORMATION

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