

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part I, § 172.)

Rev. Proc. 2002-40

SECTION 1. PURPOSE

.01 The Job Creation and Worker Assistance Act of 2002 (the Act) added § 172(b)(1)(H) to the Internal Revenue Code to provide a 5-year carryback period for net operating losses (NOLs) for any taxable year ending during 2001 and 2002. Pub. L. No. 107-147, § 102(a), 116 Stat. 21 (March 9, 2002). Consistent with the intent of Congress as reflected in correspondence to the Treasury Department subsequent to the Act's enactment, this revenue procedure provides qualifying taxpayers who filed returns for a taxable year ending during 2001 and 2002 without taking advantage of the new 5-year carryback with a limited opportunity to do so and to apply for a tentative carryback adjustment if they act on or before October 31, 2002.

.02 Specifically, this revenue procedure allows taxpayers that incurred an NOL in a taxable year ending during 2001 or 2002 and elected under § 172(b)(3) to forgo the NOL carryback period to revoke their elections in order to apply the 5-year carryback period. This revenue procedure also allows such taxpayers, as well as taxpayers who used a 2-year carryback period for an NOL in a taxable year ending during 2001 or 2002, to file an application for a tentative carryback adjustment under § 6411(a) based on a 5-year NOL carryback period even if the 12-month period for filing such an application has expired. A revocation and/or application for tentative carryback adjustment under this revenue procedure must be made on or before October 31, 2002. Finally, this revenue procedure allows taxpayers that filed returns for a taxable year ending in 2001 or 2002, and who neither elected to forgo the carryback period, nor used the 2-year carryback period, to elect to relinquish the 5-year carryback period (and thereby retain the ability to use the 2-year carryback period) if they act on or before October 31, 2002.

.03 In connection with these rules allowing taxpayers to reevaluate options regarding the carryback period, the Internal Revenue Service and Treasury Department intend to provide relief for consolidated groups that failed to waive the portion of the carryback period for consolidated net operating losses attributable to certain acquired members for which such members were members of another group. The scope of such relief will be announced shortly in separate guidance.

SECTION 2. BACKGROUND

.01 Section 172(b)(1)(A)(i) generally provides that an NOL for any taxable year must be carried back to each of the 2 years preceding the taxable year of such NOL. Section 172(b)(3) provides that any taxpayer entitled to a carryback period under § 172(b)(1) may elect to relinquish the carryback period with respect to an NOL for any taxable year.

.02 Section § 102 of the Act amended § 172 of the Code in two respects. First, § 172(b)(1)(H) was added to allow a 5-year carryback period for NOLs for any taxable year ending during 2001 and 2002. Second, § 172(j) was added to allow any taxpayer entitled to the 5-year carryback under § 172(b)(1)(H) from any loss year to elect to relinquish that carryback period with respect to an NOL for any taxable year. A taxpayer making this election generally must apply the 2-year carryback period set forth in § 172(b)(1)(A)(i).

.03 An election to relinquish either the NOL carryback period in general under § 172(b)(3), or just the 5-year carryback period under § 172(j), must be made by the due date (including extensions) for filing the taxpayer's return for the taxable year of the NOL and in the manner prescribed by the Secretary.

.04 Section 6411(a) provides that a taxpayer may file an application for a tentative carryback adjustment of the tax for the prior taxable year affected by an NOL carryback from any taxable year. Section 6411(a) also provides that the application must be filed on or after the date of filing for the return for the taxable year of the NOL from which the carryback results and within a period of 12 months after such taxable year or, with respect to any portion of a business credit carryback attributable to an NOL from a subsequent taxable year, within a period of 12 months from the end of such subsequent taxable year. Section 6411(b) provides a 90-day period during which the Service will make a limited examination of the application to discover omissions and errors of computation and determine the amount of the decrease in tax attributable to the carryback. The Service may disallow, without further action, any application that contains errors of computation that cannot be corrected within the 90-day period or that contains material omissions. The decrease in tax attributable to the carryback will be applied against unpaid amounts of tax. Any remainder of the decrease will, within the 90-day period, be credited or refunded.

.05 It has been brought to the attention of the Service and Treasury Department that some taxpayers that incurred an NOL in a taxable year ending during 2001 filed returns before the Act became law and either elected under § 172(b)(3) to relinquish the NOL carryback period in general or applied the 2-year carryback period. In some cases, these taxpayers might have wished to take advantage of the 5-year carryback period, had they been aware of its availability, and apply for a tentative carryback adjustment. The Chairmen and Ranking Members of both the House Ways and Means Committee and the Senate Finance Committee have advised the Treasury Department

of their intent that qualifying taxpayers be allowed to take advantage of the 5-year NOL carryback period to the maximum extent possible, and that they intend to pursue technical corrections legislation that will clarify this intent. Specifically, the technical corrections legislation will allow the Service to issue guidance to allow taxpayers to reconsider a previous election under § 172(b)(3) to relinquish the NOL carryback period in general, and to file an application for a tentative carryback adjustment under § 6411(a), to take advantage of the 5-year carryback period, on or before October 31, 2002. When enacted, this legislation will be effective as if originally included in the Act. This revenue procedure describes how the Service is taking into account Congressional intent in administering the provision.

SECTION 3. SCOPE

This revenue procedure applies to taxpayers that incurred an NOL for any taxable year ending in 2001 or 2002.

SECTION 4. TAXPAYERS THAT ELECTED TO FORGO THE CARRYBACK PERIOD

.01 In order to give effect to the intent of Congress to allow taxpayers a 5-year NOL carryback period, any taxpayer that previously elected under § 172(b)(3) to forgo the carryback period for an NOL for any taxable year ending in 2001 or 2002 may revoke such election in order to apply the 5-year carryback period by following the procedures of section 7 of this revenue procedure on or before October 31, 2002. Any revocation of the election to forgo the NOL carryback period will also apply to a carryback of any alternative tax NOL for the same taxable year.

.02 If a taxpayer that previously elected under § 172(b)(3) to forgo the carryback period for an NOL incurred in a taxable year ending in 2001 or 2002 does not want to revoke that election in order to use the 5-year carryback period provided by § 172(b)(1)(H), the taxpayer need not file any additional form or statement. Unless the taxpayer follows the procedures set forth in section 7 of this revenue procedure, the taxpayer's previous election applies as well to forgo the 5-year carryback period.

SECTION 5. TAXPAYERS THAT APPLIED THE 2-YEAR CARRYBACK PERIOD

.01 If a taxpayer that previously filed an application for a tentative carryback adjustment (whether or not the Service has acted upon such application) or an amended return using a 2-year carryback period for an NOL incurred in a taxable year ending in 2001 or 2002, and that did not elect to forgo the 5-year carryback period under § 172(j), wants to use the 5-year carryback provided under § 172(b)(1)(H), the taxpayer may do so by following the procedures of section 7 of this revenue procedure on or before October 31, 2002. Any amendment of a prior refund claim will also apply to a carryback of any alternative tax NOL for the same taxable year. In the case of an amended application for a tentative carryback adjustment, the 90-day period described in § 6411(b) will begin on the date the amended declaration is filed.

.02 If a taxpayer that previously filed an application for a tentative carryback adjustment or an amended return using a 2-year carryback period for an NOL incurred in a taxable year ending in 2001 or 2002 prefers to apply the 2-year carryback period, rather than the 5-year carryback period provided under § 172(b)(1)(H), the taxpayer need not file any form or statement in order to satisfy the requirements for an election under § 172(j) to forgo the 5-year carryback period. Unless the taxpayer follows the procedures of section 7 of this revenue procedure, the taxpayer will be considered to have made an election under § 172(j) to forgo the 5-year carryback period in favor of the 2-year carryback period.

SECTION 6. TAXPAYERS THAT NEITHER ELECTED TO FORGO THE CARRYBACK PERIOD NOR APPLIED THE 2-YEAR CARRYBACK PERIOD

.01 Any taxpayer that:

- (1) filed a federal income tax return for a taxable year ending in 2001 or 2002;
- (2) did not elect under § 172(b)(3) to forgo the carryback period in general for an NOL incurred in such taxable year; and
- (3) did not previously file an application for a tentative carryback adjustment or an amended return using a 2-year carryback period for such NOL, may apply the 2-year carryback period, in lieu of the 5-year carryback period, by following the procedures of section 7 of this revenue procedure on or before October 31, 2002.

.02 For any taxpayer described in section 6.01 of this revenue procedure that does not follow the procedures of section 7 of this revenue procedure to apply the 2-year carryback period, the 5-year carryback period will apply by operation of law. In that event, the period of limitations provided in § 6511 will apply in the case of any claim for refund on an amended return, and the period provided in § 6411(a) will apply in the case of any tentative carryback adjustment, that is based on the 5-year carryback period.

SECTION 7. PROCEDURES

.01 *What to File.* A taxpayer described in section 4 or 5 of this revenue procedure that wants to use the 5-year carryback period must file the appropriate form(s) using a 5-year carryback period. A taxpayer described in section 6 of this revenue procedure that wants to relinquish the 5-year carryback period (and thus retain its ability to use the 2-year carryback period) must file the appropriate form(s) using a 2-year carryback period, even if no refund or change in tax liability is shown on the form(s). The appropriate form(s) are:

- (1) for corporations, a Form 1139, Corporation Application for Tentative Refund, or Form 1120X, Amended U.S. Corporation Income Tax Return;
- (2) for individuals, a Form 1045, Application for Tentative Refund, or Form 1040X, Amended U.S. Individual Income Tax Return; and

(3) for estates or trusts, a Form 1045, or amended Form 1041, U.S. Income Tax Return for Estates and Trusts.

.02 *Labels.* Taxpayers described in section 4.01 of this revenue procedure should type or print across the top of the appropriate form “Revocation of NOL carryback waiver pursuant to Rev. Proc. 2002-40.” Taxpayers described in section 5.01 of this revenue procedure should type or print across the top of the appropriate form “Amended refund claim pursuant to Rev. Proc. 2002-40.”

.03 *When to File.* Any form filed pursuant to this revenue procedure must be filed on or before October 31, 2002.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective for NOLs arising in taxable years ending after December 31, 2000.

DRAFTING INFORMATION

The principal author of this revenue procedure is Martin Scully, Jr. of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Scully at (202) 622-4960 (not a toll-free call).