



CARES Act Massively Expands NOL Availability, Removes TCJA Limits, and Brings Back and Even Extends Carrybacks

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In the late hours of March 25, 2020, the United States Senate met to vote on a third “Coronavirus” bill to provide relief to the American people. The Senate ultimately passed H.R. 748—the Coronavirus Aid, Relief, and Economic Security Act or “CARES Act.” Two days later, the House followed suit and sent the bill the President for his approval. The Act contains many stimulus provisions, even some that affect recently-amended Internal Revenue Code (“Code”) sections. This post covers an important amendment to Section 172, which governs the use of “net operating losses” or “NOLs.”

The NOL provisions were last amended by the Tax Cuts and Jobs Act (“TCJA”) in December 2017. Before the TCJA, taxpayers could “carryback” an NOL that arose in the current year to the 2 prior tax years, or “carryforward” that NOL for 20 years. The TCJA, however, did away with carrybacks altogether, and while it allowed indefinite carryforwards, those were limited to 80% of taxable income.

The CARES Act reverses many of the TCJA’s changes to Section 172 while also expanding NOL availability for taxable years 2018, 2019, and 2020. As a result, taxpayers may see increased NOLs, and refunds, for those years, which now include not only carryovers (no longer subject to the 80% limitation) from prior years, but also carrybacks from later years.

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The return of carrybacks is significant. Perhaps even more significant: the CARES Act extends the carryback timeline to 5 years for losses occurring in 2018, 2019, and 2020. This extended carryback timeline therefore allows potential refunds of taxes paid for 2013, 2014, 2015, 2016, and 2017. The most likely effect: 2020's virus lockdown-related losses will create refunds as far back as 2015.

The refund statute of limitations would normally prove problematic for refunds that old. But we expect the IRS to create mechanisms to overcome these time bars, perhaps by using refund mechanisms similar to those found in Section 1341 of the Code and the so-called "claim of right" doctrine.

Perhaps revealing that the government views the Coronavirus crisis as temporary, for 2021 and beyond the CARES Act re-implements the TCJA's 80% taxable income limitation, along with potential additional limitations. Thus, from 2021 onward, a taxpayer's total NOLs will, in most cases, be limited to 80% of taxable income. Some taxpayers may find those NOLs limited even further if their 2021 (or thereafter) carryforwards are from pre-2018 tax years.