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INSIGHT: Who CARES for Taxpayer Cash Flow? The IRS and Its Quick Refund Fix



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As part of the effort to help businesses weather the Covid-19 storm, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) made significant changes to broaden the use of net operating loss (NOL) carrybacks and carryforwards. But in its haste to act, Congress failed to make a statutory change needed to put cash from those NOLs in taxpayers' hands as soon as possible. Specifically, Congress did not change the statutory period for seeking quick refunds of tax under Section 6411—which are processed and paid no later than 90 days after filing—based upon tentative carry-back adjustments. That oversight threatened the speedy refund of vitally needed cash.

The IRS recently stepped into the breach to come to taxpayers' aid. Relying on its statutory power under [Section 6081](#) to grant reasonable extensions of time for required filings, the IRS, on April 9, 2020, issued [Notice 2020-26](#). This Notice grants a six-month extension of time to file a quick refund application with respect to the carryback of NOLs that arose in any taxable year that began during calendar year 2018 and that ended on or before June 30, 2019. Next, on April 13, 2020, the IRS announced that starting on April 17, 2020, and until further notice, corporate taxpayers may submit tentative quick refund applications via fax to 844-249-6236. See [Temporary procedures to fax certain Forms 1139 and 1045 due to Covid-19](#), IRS (Apr. 13, 2017). Previously, a quick refund application could be filed only via hard copy delivered through the USPS or by a private delivery service.

Although the IRS is introducing the six-month filing extension and the temporary tax acceptance with respect to quick refund claims, the procedures to process

tentative refund claims remain the same. Therefore, a taxpayer's quick refund application will still be subject to a limited examination by the IRS, with review by the Joint Committee on Taxation (JCT) deferred until well after the taxpayer has gotten its tentative refund.

This article provides an overview of the recent NOL provisions in the CARES Act. It then explains the IRS's and JCT's processes as they relate to quick refund claims. Even in ordinary times, the great advantage of the quick refund procedure is that the IRS pays first and asks questions later, with no prior JCT review before the tentative refund is made. See [Columbia Gas System, Inc. v. United States](#) (“The presumption of § 6411 is in favor of prompt refunds for taxpayers pinched by NOL’s”). This procedure is even more valuable in the current Covid-19 environment, where cash is king. Due to the economic downturn, the Commissioner of the IRS Large Business and International Division (LBI), Doug O'Donnell, recently said the IRS is preparing for a flood of large refund claims that must be reviewed by the JCT pursuant to [Section 6405\(b\)](#) before they can be issued. Therefore, taxpayers with carry-back claims well founded on the merits would be well advised to take advantage of the quick refund process and avoid the refund queue if at all possible.

Overview of NOL Legislation

The CARES Act provides tax relief to both corporate and noncorporate taxpayers by instituting a five-year carryback period and temporarily repealing the 80% limitation for NOLs arising in 2018, 2019, and 2020. Prior to the Tax Cuts and Jobs Act (TCJA), an NOL could be carried back two years and carried forward 20 years to offset taxable income on a dollar-for-dollar ba-

sis in those years. For NOLs arising in taxable years beginning after Dec. 31, 2017, the TCJA repealed the two-year carryback and limited the NOL deduction in any post-TCJA year to 80% of taxable income, but permitted an indefinite carryforward period by repealing the 20-year carryforward limitation. Tax code [Sections 172\(a\)\(2\), 172\(b\)\(1\)\(A\)](#).

The CARES Act repeals the 80% taxable income limitation for NOL carryovers that can be deducted in tax years beginning before Jan. 1, 2021. CARES Act Section 2303(a) (amending Section 172(a)). It also clarifies an interpretive issue that had arisen under the TCJA text. Specifically, the CARES Act provides that for any taxable year beginning after Dec. 31, 2020, the 80% limitation on taxable income equals 80% of the excess of taxable income over the amount of *pre-TCJA* NOLs carried to such year, making clear that the 80% limitation does not apply to NOLs arising before the changes made by the TCJA. Taxable income, in turn, is calculated without regard to the NOL deduction under Section 172, the deduction for qualified business income under [Section 199A](#), and the deduction for foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI) under [Section 250](#).

The CARES Act also provides that NOLs arising in a taxable year beginning after, Dec. 31, 2017, and before Jan. 1, 2021, shall be treated as a carryback to each of the five preceding taxable years unless the taxpayer elects to forego the carryback. CARES Act Section 2303(b) (adding Section 172(b)(1)(D)). The NOL carryback provision generally operates on a “all or nothing” basis, that is, taxpayers may not choose to carry back NOLs to only particular years within the five-year carryback period. However, if one or more years in the carryback period reflects [Section 965](#) income (each, a “Section 965 year”), the taxpayer may elect to exclude all Section 965 years from the carryback period.

The IRS recently provided guidance on when and how to file the following elections relating to NOL carrybacks: (1) the election to waive the NOL carryback period; (2) the election to exclude from the carryback period any Section 965 year; and (3) the election under a CARES Act technical correction provision that permits the use of the pre-TCJA two-year carryback rule for a taxable year beginning before Jan. 1, 2018, and ending after Dec. 31, 2017, often called a “straddle year” (the “technical correction”). See [Revenue Procedure 2020-24](#). The technical correction provides that for a period of 120 days from March 27, 2020 (i.e., until July 27, 2020), these fiscal year taxpayers may apply for a tentative quick refund claim under [Section 6411](#) for an NOL carryback from a straddle year to a prior year under the former two-year carryback rule, even though the normal deadline for making that request would have been during 2019. See CARES Act Section 2303(d)(4), which resolved a sticky interpretive issue under the TCJA in favor of taxpayers. And the more recent guidance in Notice 2020-26, as discussed further below, has addressed the ability of taxpayers to file quick refund claims with respect to NOLs arising in a taxable year beginning on or after Jan. 1, 2018, and ending before March 27, 2019, even though the one-year period for filing applications for those years had expired as of the date of enactment.

Tentative Quick Refund Overview

The IRS often takes significant time to process refund claims, because the agency is expected to audit returns of all years for which a refund is claimed.

However, because taxpayers may have sudden liquidity concerns (such as the current Covid-19 environment), Congress provided for tentative carryback adjustments in Section 6411. See [Pesch v. Commissioner](#) (explaining how the quick refund procedure was established in waning days of World War II to facilitate conversion to peacetime production). Under Section 6411, a taxpayer may apply for a tentative quick refund based on a tentative carryback adjustment of the tax liability for a prior taxable year that is affected by an NOL carryback provided in Section 172(b), as well as business credit carrybacks provided in [Section 39](#) and capital loss carrybacks provided in [Section 1212](#). (Note that, while not addressed by this article, corporate taxpayers may have another option to obtain a quick refund by filing Form 4466, *Corporation Application for Quick Refund of Overpayment of Estimated Tax*).

While the amounts paid are colloquially called quick refunds or quickie refunds, Section 6411(a) specifies that a taxpayer’s application for a tentative quick refund does not constitute a claim for credit or refund (save for a very limited exception related to interest owed on refunds not made within 45 days).

Filing a Tentative Quick Refund Application

Corporations can apply for a tentative quick refund using Form 1139, *Corporation Application for Tentative Refund*, and the Code and regulations require that taxpayers must apply within 12 months of the close of the year in which the carryback arises. Tax code Section 6411(a); Treasury Regulations 1.6411-1(b)(1), 1.6411-1(c). While the CARES Act provided much-needed relief in the form of NOL carrybacks, it did not provide additional time to file quick refund claims with respect to NOLs arising in a taxable year beginning on or after Jan. 1, 2018, and ending before March 27, 2019. For example, in the case of an NOL that arose in a taxable year ending on Dec. 31, 2018, a corporate taxpayer would have had until Dec. 31, 2019, to file Form 1139—well before the Coronavirus crisis engulfed the U.S. and the CARES Act permitted NOL carrybacks. While the CARES Act would allow the taxpayer to seek a refund for that year, the speedy access to cash offered by Section 6411 would not be available.

Fortunately, in Notice 2020-26, the IRS granted a six-month extension of time to file Form 1139 with respect to the carryback of an NOL that arose in any taxable year that began during calendar year 2018 and ended on or before June 30, 2019. Again, using the example of a corporate taxpayer with an NOL arising in a taxable year ending Dec. 31, 2018, such a taxpayer will now have until June 30, 2020, to file Form 1139. (Notice 2020-26 also addresses what should happen if a taxpayer wants to file a single tentative refund request for both an NOL carryback and an AMT credit under CARES Act changes to [Section 53](#).)

To take advantage of the extension of time for requesting a tentative refund based on an NOL carryback, the taxpayer must perform the following actions: (a) file

the applicable form no later than 18 months after the close of the taxable year in which the NOL arose (e.g., no later than June 30, 2020, for a taxable year ending Dec. 31, 2018) and (b) include on the top of the applicable form “Notice 2020-26, Extension of Time to File Application for Tentative Carryback Adjustment.” See Notice 2020-26. (Notice 2020-26 did *not* extend the deadline for filing tentative refunds based on an NOL carryback for taxable years ending Dec. 31, 2019, and Dec. 31, 2020. Therefore, taxpayers must apply for a tentative refund by Dec. 31, 2020, and Dec. 31, 2021, respectively, for those years.)

The taxpayer’s application also must include the following information:

1. The amount of the NOL;
2. The amount of the tax previously determined for the prior taxable year affected by the NOL (ascertained in accordance with the method prescribed in [Section 1314\(a\)](#));
3. The amount of decrease in tax attributable to the NOL;
4. The unpaid amount of tax for the prior taxable year affected by the NOL (not including any amount required to be shown under the following number (5));
5. The amount of tax in the year with respect to which an extension of time for payment under [Section 6164](#) is in effect; and
6. Such other information as may be required by the regulations. Tax code Section 6411(a).

Form 1139 and Section 965

The instructions for Form 1139 and the IRS Internal Revenue Manual (IRM) state that taxpayers which carry back to Section 965 years are not permitted to file a Form 1139 but instead are required to file an amended return for the affected carryback tax years. See Instructions for Form 1139 (Corporation carrying back to years that have a Section 965 year “may not use this form. An amended return must be used to carry back to such years.”); IRM 21.5.9.5.51, Carryback Applications and Claims with Section 965 Involvement (June 17, 2019). That prohibition had very limited application prior to the CARES Act, since after the TCJA, only select taxpayers (e.g., property and casualty insurance companies) were still able to use the former two-year carryback rule and so could have carried back an NOL to a Section 965 year.

The CARES Act now raises the possibility for NOL carrybacks to Section 965 years by any taxpayer having an NOL arising in 2018, 2019, or 2020. The CARES Act treats any taxpayer carrying back an NOL to a Section 965 year as having made the Section 965(n) election, such that the NOL will not be applied to reduce taxable income in the Section 965 year that is attributable to the mandatory repatriation income inclusion (as grossed up for deemed paid foreign taxes). Generally, this provision is good news for taxpayers because Section 965 income was taxed at favorable rates, thus preserving the ability to use the NOL carryback against highly taxed income.

The CARES Act also permits taxpayers to elect to exclude a Section 965 year from the five-year carryback. Carrying back an NOL to a Section 965 year will likely trigger the IRS’s administrative position that overpayments of tax, whether they arise from excess payments of estimated tax or an NOL carryback, must be applied

to pay down future installments of Section 965 transition tax liability. See FAQ4 in [Frequently asked questions about carrybacks of NOLs for taxpayers who have had Section 965 inclusions](#), IRS (Apr. 23, 2020). While we believe the IRS position is flawed, taxpayers unwilling to challenge that position might need to model whether and the extent to which foregoing the carryback reduces its value due to tax rate changes.

Nevertheless, for those taxpayers considering an NOL carryback to a Section 965 year, the IRS has reversed its prior position prohibiting use of Form 1139. In recent guidance the IRS announced that taxpayers are free to “disregard the portion of instructions for Form 1139 . . . that prohibit taxpayers from using these forms to apply for refunds for Section 965 years.” See FAQ3 in [Frequently asked questions about carrybacks of NOLs for taxpayers who have had Section 965 inclusions](#), IRS (Apr. 23, 2020).

IRS Limited Examination and Taxpayer Options if Application Disallowed

Under Section 6411(b), the IRS conducts a limited examination of the application and makes the resulting credit or refund within 90 days of the filing of the application—and employees are advised to issue tentative refunds within 45 days, if at all possible, to avoid owing interest on any eventual tentative refund. IRM 21.5.9.3.2, Status of a Carryback Application/Claim (Jan.16, 2018); IRM 21.5.9.5.11, Carryback Interest (Oct. 1, 2019).

A limited examination of the application generally consists of looking for omissions and errors of computation, rather than any review of the merits of the tax attributes giving rise to the application. Thus, as specified in Treas. Reg. 1.6411-3(b), the IRS may correct any mathematical error appearing on the application and incorrect computations of NOLs. However, the IRS cannot correct the amount claimed on the return giving rise to the NOL, e.g., a depreciation deduction, even if the IRS believes that the taxpayer has claimed an excessive amount. Similarly, the IRS cannot include an item of gross income not included by the taxpayer, even though the IRS believes that the taxpayer should have done so.

If a defect in a taxpayer’s application can be cured within the 90-day period, Treas. Reg. 1.6411-3(c) and the IRM instruct the IRS to attempt to obtain the necessary missing information. IRM 21.5.9.4.3, Rejecting Unprocessable Carryback Applications/Claims (Oct. 1, 2019). Nevertheless, the IRS may still deny an application in whole or in part if the IRS believes that the application contains material omissions or errors of computation that cannot be corrected within the 90-day period.

The IRS’s determination that quick-refund applications should be disallowed in whole or in part cannot be challenged in any proceeding. Treas. Reg. 1.6411-3(c). The taxpayer’s only option at that point is to file a refund claim under [Section 6402](#) and pursue that claim under normal refund claim procedures, which may eventually require litigation. However, if the taxpayer’s claim is ultimately found meritorious, the IRS will end up owing interest from the date of the tentative refund application. See tax code [Section 6611\(f\)\(4\)](#).

Impact of an Ongoing Exam or Litigation on Tentative Quick Refund Processing

Corporations may apply for a tentative quick refund using Form 1139, even when the year to which the NOL is carried is currently under IRS audit. The IRS must still follow its normal procedures for responding to these applications. An open examination generates a freeze code, but it does not prevent processing a Form 1139 claim. IRM 21.5.9.5.33, Carryback Form 1045 and Form 1139 with Examination Criteria (Oct. 1, 2019). However, in cases where the DOJ is litigating a case for the IRS or has secured a judgment, the IRM instructs the IRS to contact the DOJ for the DOJ's approval before processing a claim. On the other hand, if a taxpayer has filed a Tax Court petition for the year of a carryback, the IRS simply processes the claim and then notifies IRS Appeals (Appeals). Thus, the right of taxpayers to quickly receive tentative refunds is powerful—so powerful that taxpayers can even receive them for years in litigation. See *Nestlé Holdings v. Commissioner*; see also *Columbia Gas System*, *supra*.

Application of Decrease in Tax and Potential Quick Refund

After conducting this limited examination, the IRS determines the amount of decrease in tax attributable to the NOL. Pursuant to Section 6411(b) and Treas. Reg. 1.6411-3(d), the decrease in tax attributable to the carryback is applied in the following order: (1) against any unpaid amount of the tax with respect to which such decrease was determined (i.e., unpaid tax for the carryback year); (2) against any unsatisfied amount of any tax for the taxable year immediately preceding the taxable year of the NOL carryback, business credit carryback, or capital loss carryback, the time for payment of which was extended under Section 6164; and (3) against any tax or installment thereof “then due” from the taxpayer, and, if not so credited, it can then be refunded to the taxpayer.

In [Revenue Ruling 2007-51](#), the IRS determined that the phrase “then due” in Section 6411(b) includes an unassessed internal revenue tax liability determined in a notice of deficiency. Therefore, if within the 90-day period for processing the quick refund application, the IRS determines an amount of tax liability in a notice of deficiency and sends this notice to the taxpayer pursuant to [Section 6212](#), the IRS may credit a decrease in tax resulting from a tentative carryback adjustment against unassessed internal revenue tax liabilities determined in the notice of deficiency for a different tax year sent to the taxpayer.

For example, assume that on May 15, 2020, a corporate taxpayer files a Form 1139 carrying back an NOL from tax year 2019 to tax year 2018. The carryback generates a \$250,000 decrease in tax for tax year 2018. On June 15, 2020, the IRS sends a notice of deficiency to the taxpayer for tax year 2017 in the amount of \$1 million. As of June 15, 2020, the IRS had not assessed the \$1 million deficiency for tax year 2017 or tentatively refunded the \$250,000 decrease in tax for tax year 2018. The \$1 million tax liability determined in the notice of deficiency is an amount “then due” for purposes of Section 6411(b).

IRS Full Examination

After a tentative quick refund, the IRS will examine the return under its regular audit procedures. If the IRS then determines that the tentative quick refund or credit amount was greater than the correct amount, the IRS has three non-exclusive options:

- Send a notice of deficiency within the three-year period during which a deficiency may be assessed for the taxable year of the NOL resulting in the carryback (Tax code [Section 6501\(h\)](#));
- Assess the amount of the excessive refund or credit as though it were a mathematical error (which would then allow the taxpayer to file a refund claim) (Tax code [Section 6213\(b\)\(2\)](#)); or
- Commence an action for erroneous refund within the two-year period of Section 6501 (Tax code [Section 7405](#)).

JCT Review

Unlike an actual refund claim over \$2 million (\$5 million in the case of a C corporation) subject to JCT review under [Section 6405\(a\)](#), the IRS will make the tentative quick refund before JCT review. Tax code Section 6405; IRM 4.36.2.2.2, Tentative Refunds IRC 6405(b) (Sept. 22, 2015).

Nevertheless, after the IRS conducts its full examination, the JCT will have the opportunity to review the carryback and potentially raise adjustments or offsets to it. Tax code Section 6405(b). A carryback is subject to JCT review if the taxpayer is entitled to a refund over the \$2 million or \$5 million threshold amount. If the IRS determines that the taxpayer's carryback adjustment exceeds the threshold amount, the IRS Joint Committee Review Team (IRS Review Team) will review the carryback adjustment and prepare a report for the JCT. See IRM 4.36.2.4., Determining Joint Committee Jurisdictional Amount (Sept. 22, 2015); IRM 4.36.1.4, Overview of the Joint Committee Review (JCR) Process (Sept. 21, 2015).

The IRS Review Team is a specialized IRS team within LBI that oversees the preparation of Joint Committee reports for all agreed, partially agreed, and no-change cases and surveyed cases, regardless of the business operating division. A Joint Committee Specialist within the IRS Review Team reviews the case files for procedural, computational and technical accuracy and prepares the report that is submitted to the JCT refund staff for review.

For unagreed cases, no report is required at the time the case is closed to Appeals. IRM 4.36.3.2, Examination Procedures (Sept. 22, 2015). However, once an agreement has been reached and the case still meets JCT criteria, Appeals will be responsible for preparing and submitting a report to the JCT.

Partially agreed cases will require reporting to the JCT if the taxpayer is entitled to a refund in excess of the statutorily prescribed amounts, regardless of the resolution of the unagreed, issues. This situation is known as a minimum refund. If the taxpayer signs Form 870, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*, requesting the refund, the examiner will follow the Joint Committee procedures, and the IRS Review Team will prepare and submit a report to the

JCT on the minimum refund. The Appeals Officer will submit a supplemental report to the JCT when the unagreed issues are finally resolved, even if the resolution of such issues does not cause an additional refund or credit.

If the IRS Review Team cannot complete its review due to technical, computational, or procedural errors, the IRS Review Team will send a Notice of Suspended Referral (NSR) form or a Case Return Transmittal (CRT) form to the examiner and team manager to outline errors for correction so the review of the case can be completed and processed. (IRM 4.36.4.2, Notice of Suspended Referrals (NSR) and Case Return Transmittals (CRT) (Sept. 23, 2015).) The IRS Review Team may return the case to the examination team in the following type of situations: (1) substantial error; (2) fraud or malfeasance; (3) serious administrative omission; (4) unprocessable cases; and (5) corrections favorable to the taxpayer. Cases returned to the examination team by the IRS Review Team under these criteria must involve a clear and substantial error or an unexamined large, unusual, or questionable item. If the issues identified in the CRT or NSR are not resolved, the examination team must provide a status report every 30 days to the IRS Review Team until resolution. Upon resolution, the examination team must provide a written response to the issues and concerns noted by the IRS Review Team when the case was returned to the examination team.

After the Joint Committee Specialist's review, the Joint Committee Specialist will: (1) prepare the Joint Committee report to the JCT in the final form; (2) complete and attach Form 4081, *Transmittal Memorandum-Joint Committee Case*; (3) submit the Joint Committee report to the authorized IRS Review Team official for approval; and (4) promptly forward the Joint Committee report, by express mail, to the JCT's Refund Counsel in Washington, DC. (IRM 4.36.4.3, Processing of Joint Committee Report (Sept. 23, 2015).)

Although there are different types of reports (i.e., regular, expedite refund, minimum refund, modified expedite, supplemental, and foreign sales), the most common report is a regular report. (IRM 4.36.5.1, Introduction—Types of Reports (Sept. 23, 2015).) All reports generally include information such as taxpayer information including history and related parties, proposed refunds and deficiencies, reason for the refund, and calculation spreadsheets.

The JCT is particularly concerned with cases where taxpayers claim benefits that do not appear to have been intended by the relevant statute. *See Tax Refund Claims—An Overview of the Joint Committee on Taxation's Review Process*, Staff of the Joint Committee on Taxation (Jan. 2019), available at <https://www.jct.gov/publications.html?func=startdown&id=5156>. In such a case, the JCT may recommend a statutory amendment or ask the IRS to either issue guidance or clarify prior published guidance. The JCT may also identify issues that were not handled correctly by either the examination team or, if applicable, Appeals.

Upon completion, the JCT will issue either a clearance letter, which indicates that the JCT does not disagree with the IRS, or a staff review memorandum (SRM), which outlines areas where the JCT disagrees with the IRS's position and recommends a different result. Although the JCT may recommend adjustments to the amount of the refund, neither the IRS nor the DOJ is bound to accept it. (IRM 4.36.4.5, Disclosure of Correspondence with the Joint Committee on Taxation (Sept. 23, 2015).) Therefore, when the JCT raises an issue on a case, the IRS has two options: (1) agree to adopt that position and present it to the taxpayer as the position of the IRS, or (2) reply to the JCT with the reasons for disagreement. (IRM 4.36.3.10, Disclosure of Correspondence with Joint Committee on Taxation (May 4, 2010).) This applies to both the examination team and Appeals. (IRM 8.7.9.10.2.1, SRM Procedures and Tracking—Response Required (Dec. 27, 2017); *see also Tax Refund Claims—An Overview of the Joint Committee on Taxation's Review Process*.)

Conclusion

The quick refund procedure offers extraordinary benefits to taxpayers. First, the presumption of Section 6411 is in favor of prompt refunds generated by carrybacks. Second, the IRS not only is required to issue a tentative refund or credit to qualifying taxpayers within 90 days, but also must pay interest to the taxpayer if the tentative refund or credit is not issued within 45 days. Third, unlike regular refund claims issued pursuant to Section 6402, the IRS issues tentative refunds before the JCT's review, which could be especially invaluable as the Covid-19 pandemic leads to a flood of refund claims for the IRS to process. Fourth, taxpayers can receive tentative quick refunds for years under audit or in litigation. Fifth, the IRS has offered additional relief to cash-stricken taxpayers with respect to tentative refund claims by extending the deadline to file and by offering the option to send Form 1139 by fax.

The IRS thoughtfully used its administrative discretion to help achieve the goal Congress sought to achieve. Taxpayers in need of cash should consider taking advantage of these quick refund procedures.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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