

December 3, 2009 | Posted By

Newly Enacted 5-Year NOL Carryback Election To Provide Significant Tax Savings

On November 6, 2009, the "Worker, Homeownership, and Business Assistance Act of 2009" (the "Act") was signed into law. While primarily directed at extending unemployment compensation benefits, the Act provides a significant opportunity for taxpayers that have net operating losses in 2008 and 2009 to trigger tax refunds by carrying those losses up to five years back, rather than the two years generally provided under existing law. It is estimated that this extended carryback period could generate up to \$33 billion in additional tax refunds for affected taxpayers.

In general, most business taxpayers can carry NOL deductions back two years or forward 20 years. The Act now generally enables business taxpayers - with the noticeable exception of those that received TARP funds - to elect to extend the carryback period from the normal two years to either three, four or five years (although the amount of the NOL that can be carried back to the fifth tax year preceding the loss year is limited to 50% of the taxpayer's taxable income for that year). This election only applies, however, to an NOL incurred in any single taxable year beginning or ending in either 2008 or 2009.

As an example, assume that XYZ, Inc. had net income of \$10 million in each of 2003, 2004 and 2005 on which it paid \$3.5 million in federal tax in each year. XYZ broke even in 2006 and 2007, but recognized net losses of \$20 million in 2008 and \$10 million in 2009. Under the Act, XYZ could elect to extend the normal carryback period for either its 2008 or 2009 loss to up to five years. Under this scenario, XYZ would probably elect to carry its \$20 million 2008 loss back four years, with the result that it would offset its entire net taxable income in 2004 and 2005, thereby triggering \$7 million in federal tax refunds that it would not have been able to access absent the election provided by the Act.

It should be noted that the American Recovery and Reinvestment Act of 2009 ("ARRA"), enacted earlier this year, provided certain "eligible small business" taxpayers (generally defined as businesses with average annual gross receipts of \$15 million or less) with the opportunity to extend the NOL carryback period to up to 5 years for losses incurred in 2008. Small businesses that previously made an election under ARRA may make the election under the Act to extend the carryback period for any 2009 losses. In addition, electing eligible small business taxpayers will not be subject to the 50% of taxable income limitation for NOL carrybacks to the fifth year preceding the loss year that would otherwise apply.

The Act provides significant opportunities for business that paid federal income taxes within the 3- to 5-year extended carryback period to recover some or all of those tax payments by carrying back 2008 or 2009 losses.

For further information, please contact [Keith Gercken](#) at (415) 774-3207 or [Dawn Mayer](#) at (213) 617-2998.