

# IRS Issues Guidance on Key Business Tax Provisions of CARES Act

## Coronavirus Legal Advisory

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As expected, the Internal Revenue Service ("IRS") has begun to address some of the details left open by the business tax provisions of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). This Alert summarizes several pieces of important guidance issued by the IRS during the first two weeks of April relating to (i) the utilization of net operating losses ("NOLs"), (ii) the ability of partnerships to take advantage of certain CARES Act relief provisions by amending tax returns for prior years and (iii) the limitations on deductions for business interest expense. Please visit our [Coronavirus Resource Center](#) for additional Alerts concerning the CARES Act, including provisions relating to individuals and employee benefits.

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## Guidance Relating to NOLs

### Background

- The CARES Act relaxed the restrictions on NOL carrybacks and carryforwards enacted by the Tax Cuts and Jobs Act of 2017 ("TCJA") by (i) permitting NOLs generated in 2018, 2019 and 2020 to be carried back 5 years preceding the loss year (instead of only being eligible for carryforward as provided by the TCJA) and (ii) allowing these NOL carrybacks to offset 100% of taxable income in the carryback years, without regard to the 80% limitation enacted by the TCJA.
- The newly-available 5-year carryback provision could enable C corporations to offset NOLs against taxable income otherwise taxable at the 35% highest marginal rate for pre-2018 taxable years (instead of the 21% flat rate enacted by the TCJA for post-2017 taxable years).

### Notice 2020-26: Extension of Time to File Quick Refund Claim for NOL Carryback from 2018

- Under Section 6411(a) of the Internal Revenue Code of 1986, as amended (the "Code"), a taxpayer is entitled to file an application for a "tentative" carryback adjustment for the taxable years affected by an NOL carryback (generally made on Form 1139 for corporations and Form 1045 for taxpayers other than corporations). Such an application – commonly referred to as a "quick" refund claim because it enables the taxpayer to receive a refund more quickly than by filing an amended return for the carryback year – generally must be filed within 12 months of the close of the taxable year in which the NOL arose. However, at the time the CARES Act was enacted on March 27, 2020, the 12-month period for filing a

quick refund claim had already expired for calendar year 2018 and fiscal years beginning after January 1, 2018 and ending before March 27, 2019.

- Under **Notice 2020-26**, the IRS has granted a six-month extension of time to file a quick refund claim attributable to an NOL arising in a taxable year beginning during calendar year 2018 and ending on or before June 30, 2019.
- No extension has been granted for NOLs arising in 2019 or 2020 taxable years, as the regular 12-month deadline for filing a quick refund claim has not yet expired for those years.
- **Notice 2020-26** also contains special procedures for filing quick refund claims for taxable years beginning in 2018 where a corporation desires to recover 100% of its remaining minimum tax credits for such year (under a separate relief provision of the CARES Act) as part of a single adjustment with an NOL carryback to such year. These rules are further amplified by FAQs on the IRS website.

**Rev. Proc. 2020-24: Election to Relinquish 5-Year Carryback of NOLs Arising in 2018, 2019 and 2020**

- Under Section 172(b)(3) of the Code, a taxpayer may elect to relinquish the new 5-year carryback period for NOLs and instead carry the NOL forward to future taxable years. This election ordinarily must be made by the due date (including extensions) for filing the taxpayer's return for the taxable year of the NOL. At the time the CARES Act was enacted, this deadline had already expired for many taxable years beginning in 2018 and 2019.
- To give taxpayers more time to make a decision with respect to whether to relinquish the new 5-year carryback for any taxable year beginning in 2018 or 2019, **Rev. Proc. 2020-24** allows a taxpayer to make a relinquishment election no later than the due date, including extensions, for filing the taxpayer's return for the first taxable year ending after March 27, 2020. For example, a calendar year corporation would now be permitted to make the relinquishment election for 2018 or 2019 on its timely filed return for 2020 (due in 2021).

**Rev. Proc. 2020-24: Special Rule for NOL in Fiscal Year Straddling 2017-2018**

- As originally enacted, the TCJA's repeal of NOL carrybacks applied to taxable years **ending** after December 31, 2017, even though the legislative history indicated an intent for the repeal to kick in for taxable years **beginning** after December 31, 2017. The CARES Act has resolved this inconsistency by conforming the TCJA's effective date provision to the intent expressed in the legislative history.
- From a practical standpoint, this means that NOLs arising in fiscal years beginning before January 1, 2018 and ending **after** December 31, 2017 (a "2017-2018 Straddle Period") are now eligible for the 2-year carryback available under pre-TCJA law.
- In recognition of the fact that taxpayers with NOLs for 2017-2018 Straddle Periods were obviously not aware of the now-clarified 2-year carryback option at the time they originally filed their returns, the CARES Act (i) extends the deadline for filing a "quick" refund claim attributable to a 2-year carryback of such NOL until July 27, 2020, and (ii) allows affected taxpayers to waive the 2-year carryback period, to reduce the carryback period, or to revoke any prior election to waive the carryback period. The procedures for implementing these relief provisions are more fully set forth in **Rev. Proc. 2020-24**.

**Quick Refund Claims by Fax**

- As indicated above, there are various circumstances in which it may be beneficial for taxpayers to obtain the benefit of an NOL carryback by filing an application for a tentative carryback adjustment under Section 6411(a) of the Code for the carryback year(s). Such "quick" refund claims also may be made to enable C corporations to recover unused minimum tax credits in accordance with the CARES Act. Normally, quick refund claims

can be filed only by hard copy delivered through the U.S. postal service or by certain private delivery services.

- In recognition of the logistical problems caused by the coronavirus lockdown and to expedite the ability of taxpayers to receive the applicable refunds, the IRS has posted FAQs on its website announcing a temporary procedure by which quick refund claims may be submitted by fax beginning on April 17<sup>th</sup>. The new temporary rules specifically allow a previously-mailed hard copy to be supplemented by fax.

### **Guidance Relating to Partnership Amended Returns**

- Under **Rev. Proc. 2020-23**, partnerships otherwise subject to the centralized audit rules enacted by the Bipartisan Budget Act of 2015 (“BBA”) are allowed to file amended returns for taxable years beginning in 2018 and 2019.
- The significance of this guidance in the context of the CARES Act requires some background: Under the BBA rules, partnerships (including LLCs classified as partnerships) are subject to a complex centralized audit regime under which federal taxes arising from an IRS examination are generally determined, assessed and collected at the partnership level. These procedures apply to all partnerships, unless the partnership makes a valid election for those procedures not to apply (and many partnership are not eligible to make such an election). Partnerships subject to the BBA rules (“BBA Partnerships”) are generally prohibited from filing amended returns; instead, they are required to file an “Administrative Adjustment Request” (“AAR”) under Section 6227 of the Code. Unlike the filing of a conventional amended return showing a reduction in taxable income (under which the ultimate taxpayer ordinarily would be entitled to a refund), filing an AAR for a BBA Partnership enables a partner to receive any tax benefits only on the partner’s tax return for the year in which the AAR is filed. As a result, without the option to file an amended return as granted by **Rev. Proc. 2020-23**, BBA Partnerships that have already filed their Forms 1065 for taxable years potentially impacted by the CARES Act would be unable to take advantage of the CARES Act tax relief on a retroactive basis except by filing an AAR, which, as indicated above, would delay receipt of any resulting tax benefits.
- Under **Rev. Proc. 2020-23**, a BBA Partnership that has filed a Form 1065 and furnished all required K-1 schedules for taxable years beginning in 2018 or 2019 prior to the issuance of the revenue procedure (April 8, 2020) is permitted to file an amended return (and avoid the requirement to file an AAR under the BBA rules), but only if such amended return is filed before September 30, 2020. Interestingly, the amended returns may take into account tax attributes unrelated to the CARES Act as well as any tax changes triggered by the CARES Act (and there is no indication that any CARES Act-related changes must be reflected). Specific procedures are set forth regarding the form and substance of such amended returns (including special rules applicable to a BBA Partnership currently under examination by the IRS).

### **Guidance Relating to Business Interest Expense**

- **Rev. Proc. 2020-22** addresses various elections relating to the limitations on business interest deductions set forth in Section 163(j) of the Code to take into account changes made by the CARES Act.
- To put this revenue procedure in a broader context, the CARES Act has increased the limitation on the deduction of business interest expense from 30% to 50% of adjusted taxable income (“ATI”) for tax years beginning in 2019 and 2020 (with more complex rules applying to partnerships and their partners). In addition, taxpayers can elect for 2020 to use their 2019 ATI as the base for determining their interest expense limitation.
- Certain real estate businesses (referred to in the Code as an “electing real property trade or business”) are permitted to elect out of the Section 163(j) limitations, although a condition to the election out is a stretched-out period of depreciation for the business’s real property and the inability to elect bonus depreciation for certain real property

improvements. In recognition of the fact that the CARES Act has now made “qualified improvement property” eligible for bonus depreciation retroactively to the original effective date of the TCJA, **Rev. Proc. 2020-22** allows taxpayers to make a late election (or to withdraw a previously-made election) to be an electing real property trade or business for purposes of the Section 163(j) limitations. Generally, the election (or withdrawal of a prior election) is made by filing an amended return or AAR by October 15, 2021 (or September 30, 2020 in the case of a BBA Partnership that chooses to file an amended return in accordance with **Rev. Proc. 2020-23**, as describe above), although the deadline could be earlier based on the applicable statute of limitations considerations.

- The CARES Act amendments to Section 163(j) allow a taxpayer to elect not to use the new 50% of ATI rule for 2019 or 2020. **Rev. Proc. 2020-23** spells out the procedures by which this election is implemented. Basically, the election is made simply by using the pre-CARES Act 30% limitation on a timely filed return, an amended return, or an AAR, as applicable, without the need for a formal statement.
- As noted above, the CARES Act amendments to Section 163(j) allow a taxpayer to use 2019 ATI (instead of 2020 ATI) to calculate the taxpayer’s percentage of ATI limitation for 2020, which will be helpful for those taxpayers that have suffered financial reversals in 2020. **Rev. Proc. 2020-23** spells out the procedures by which the taxpayer would elect to use 2019 ATI, essentially providing that the election is made by using 2019 ATI on a timely filed return, an amended return, or an AAR, as applicable, without the need for a formal statement.
- **Rev. Proc. 2020-23** also includes special rules for applying the CARES Act’s Section 163(j) amendments to partnerships and their partners.