Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:04:KBConnelly
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to: Mary Jephson
Tax Analyst
SE:S:E:EP:SI

from: Senior Technician Reviewer
(Procedure & Administration)
CC:PA:Br4

subject: Section 6501(h) and (k): Assessment Expiration Date

This responds to your request for advice concerning the effect of IRC §§ 6501(h) and (k) on the assessment statute expiration date ("ASED") for the gain year (the year to which the loss is carried back) in cases involving Net Operating Loss ("NOL") carrybacks.

Section 6501(a) of the Internal Revenue Code ("Code") provides that a tax deficiency generally must be assessed within three years after the filing of the return. Sections 6501(h) and (k) provide exceptions to this general rule with respect to NOL carrybacks.

Under section 6501(h), a deficiency in the gain year resulting from an NOL carryback may be assessed at any time before the ASED of the loss year. In effect, the ASED for assessing the deficiency in the gain year caused by the carryback is extended to include the ASED for the loss year. Thus, the NOL carryback from the loss year reopens the assessment period of the gain year. However, section 6501(h) only extends the ASED for deficiencies attributable to the NOL carryback deduction. Consider the following example modeled from Treas. Reg. § 301.6501(m)-1(a)(2):

> M Corporation claims a NOL of $50,000 for tax year 2008 and files a Form 1120X to carry back the loss to its 2005 tax year. In 2009, M receives a refund of $50,000 for 2005 due to the carryback. In 2011, it is determined that the amount of the NOL for 2008 is $30,000 rather than $50,000. Assuming that M filed its 2008 return timely, the Service has until March 15, 2012 to assess the excessive amount refunded, *i.e.*, $20,000 ($50,000, the original amount refunded due to the NOL, minus $30,000, the correct amount of the NOL).

Section 6501(k)(formerly section 6501(m)) also extends the ASED of the gain year in cases involving tentative carrybacks under section 6411, but it is broader than 6501(h). Section 6501(k) opens the door for the assessment of a deficiency relating to any item on the taxpayer's return; it is not limited solely to one relating to the NOL carryback. . Under 6501(k), if a NOL carryback results in a tentative carryback allowance under section 6411, the ASED for assessing the deficiency in the gain year is extended to include the applicable period in (h). The amount that may be assessed, however, is limited to the carryback amount tentatively allowed less any amount already assessed under section 6501(h). Thus, if the ASED under section 6501(h) is still open to assess deficiencies in the gain year attributable to the carryback, the assessment period also is still open to assess a deficiency in the gain year that is unrelated to the carryback, except that the assessable amount may not exceed the amount of the carryback minus any amount already assessed under section 6501(h). Consider the following example modeled from Treas. Reg. 301.6501(m)-1(a)(2):

> M Corporation claims a NOL of $50,000 for tax year 2008 and files an application under section 6411 of the Code for a carryback adjustment of its tax for 2005. In 2009, M receives a refund of $50,000 due to the carryback. In 2011, the Service determines that the correct amount of the NOL for 2008 is $30,000 rather than $50,000. In addition, the Service determines that M had an additional deficiency of $40,000 for 2005 due to its failure to report certain income on its 2005 return.
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> - Assuming that M filed its 2008 return timely, under section 6501(h) the Service has until March 15, 2012 to assess the excessive carryback amount refunded, *i.e.*, $20,000 ($50,000, the original amount refunded, minus $30,000, the correct amount of the NOL).
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> - Under section 6501(k), the Service may also assess on or before March 15, 2012 $30,000 of the $40,000 deficiency due to M's failure to include certain income on its 2005 return ($50,000, the amount refunded under section 6411, minus $20,000, the amount that may be assessed under section 6501(h) solely by reason of the excess carryback).

You also asked us to review and comment on three IRM provisions. IRM 21.5.9.5.10, Multiple Adjustments, sets forth instructions concerning cases involving multiple adjustments in a carryback situation. The scenario you wish us to consider is the last example in IRM 21.5.9.5.10(2), which involves both a carryback and a tax increase for the gain year. The example assumes that the "Statute is NOT open on the Gain Year." The example is as follows:

> On April 20, 2009, taxpayer files an amended return that includes a general tax increase of $1,000 for 200512. The ASED expired for 200512 in 200903. The taxpayer also files an amended return to claim a NOL carryback from 200712 to 200512 for $2,000. Input TC 299 for $2,000. Send $1,000 to Excess

Collections. Issue manual refund for $1,000.

This example is correct. Although the ASED expired for 200512, the Service may set off the $1,000 general tax increase against the $2000 NOL carryback due from 200712.[1]

The second IRM provision that you wish us to examine, IRM 8.17.6.4.1(2), Restricted Interest on Cases with No Deficiencies, which also deals specifically with carryback situations, provides as follows:

> Normally, restricted interest is assessed on potential deficiencies (before allowance of carrybacks) within the period of limitations applicable to the tax even though the deficiency in tax is eliminated by a carryback. However, when an unassessed deficiency that is barred by the statute of limitations is offset by a carryback, the interest on that deficiency will not be assessed, but will be computed and will offset a refund due to the taxpayer.

This provision is correct with one caveat. If a NOL has been carried back, the assessment period of the gain year does not expire until the ASED of the loss carryback year. Therefore, the deficiency and interest thereon may be assessed until the ASED of the loss carryback year.

The final IRM provision that we reviewed is IRM 20.2.9.7.2., Interest on Barred Assessments, which does not deal specifically with carryback situations. This provision provides as follows:

> A deficiency. . . is sometimes barred by statute from assessment because the period for assessment has expired, even though. . . [there is] an overassessment which is not barred from allowance. Compute interest on the deficiency; do not assess the interest. On the allowance document, show the amount of interest as a deduction from the overassessment and provide a suitable explanation for the taxpayer.

This is similar to 8.17.6.4.1(2) except that it does not deal with carryback situations. This provision is correct.

If you have any questions, please call Branch 4, 202-622-3630

[1] If the carryback was a tentative carryback allowed under section 6411, section 6501(k) would kick in and the ASED of the gain year, 200903, would be extended to include the ASED of the loss year, 201103. Therefore, instead of setting off the general tax increase and sending $1,000 to Excess Collections, the Service would assess the tax increase and apply the $1,000 to the deficiency.