



ABA Subchapter S News



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■ IRS Issues Guidance on Extended NOL Carryback Provision

The IRS has issued guidance on the extended (up to five years) carryback provision that was included in the American Recovery and Reinvestment Act (the “stimulus bill”) that was signed by the President last month. This provision would allow any taxpayer that is an “eligible small business” (ESB) to elect a 3, 4, or 5-year net operating loss (NOL) carryback for a taxable year ending after 2007. The guidance includes a Rev. Proc. and a Q&A document that provides answers to some of the questions the IRS has received on the topic.

The guidance clarifies that the extended carryback is available for C corporations, S corporation shareholders, partners in partnerships [including LLCs], and sole proprietors. Furthermore, the \$15 million gross receipts test is determined at the entity level, and the NOL to be carried back flows through to the partners or shareholders of the entity.

The guidance also clarifies that there is no \$15 million limitation on the gross receipts of the owner in pass through entities. Thus, for an S corporation, there is the possibility that a shareholder can carryback more than 15 million in losses if the shareholder is also a shareholder (or partner) in another unrelated entity that is an ESB. Also, because the limitation is determined at the entity level, rather than owner level, an individual that is an owner in three pass through entities may still qualify for the extended carryback even if the combined gross receipts of the three entities exceed 15 million. For instance, in the Rev. Proc., the IRS provides an example in which an individual is an owner in three pass-through entities. Two of the entities are related, and their combined gross receipts are over \$15 million. The third entity is unrelated to the other two has gross receipts of under \$15 million. The individual cannot carryback his/share of the NOL of the two related entities under the extended carryback provision, but will be allowed to carry his/her share of the NOL of the third entity for up to five years.

It is important to note that, for an S corporation shareholder to be able to use the extended carryback provision, the loss must be otherwise allowable to the shareholder in the year allocated to him/her. For instance, a passive shareholder that has no other passive income will likely not be able to elect to use the extended carryback provision because, without passive income, the NOL is not allowable in determining the passive shareholder's taxable income. On the other hand, an active shareholder will be able to use the extended carryback provision.

The guidance further points out the difference between the three year “average gross receipts” test that is used in the extended carryback provision and the Section 448(c) test. Section 448(c) refers to **the three years prior to the current year**, whereas the provision uses the **loss year and the two prior years**. It is essential to note that under the aggregation rule, related entities, including C corporations, S corporations, partnerships, LLCs, and proprietorships would be aggregated to determine whether the

gross receipts test is met. In addition, attribution rule applies to determine ownership in an entity and the common ownership rule is 50%. Thus, the aggregation rule would operate to disqualify many taxpayers that would have met the \$15 million gross receipts without the aggregation. View the [Rev. Proc.](#) and the [Q&A](#).

■ **ABA Telephone Briefing on Community Bank Tax Issues**

The ABA will host a telephone briefing on tax issues for community banks in April. This live, two-hour telephone briefing will provide you with an update on some important tax issues specifically for community banks. Please visit <http://www.aba.com/teleweb/tb040709.htm> for more information on the program, and http://online.krm.com/iebms/reg/reg_p1_form.aspx?oc=10&ct=0018458&eventid=15357 to register online.



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