INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

February 22, 2021

Third Party Communication: None
Date of Communication: Not Applicable

Number: **202120015**
Release Date: 5/21/2021

Index (UIL) No.: 172.00-00
CASE-MIS No.: TAM-120328-20

Ashley Targac
Associate Area Counsel (Houston)
(Large Business & International)

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No.:
Year(s) Involved:
Date of Conference:

LEGEND:

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Date 1 =

$A=

$B =

$C =

ISSUE:

May a taxpayer who has elected to waive its right to carryback the entire net operating loss under section 172(b)(3) of the Internal Revenue Code and section 1.1502-21(b)(3)(i) of the Income Tax Regulations still carryback specified liability losses not composed of product liability losses 10 years under section 172(b)(1)(C) in light of section 1.172-13, which permits a taxpayer to carryback product liability losses, a component of SLLs, despite having elected to waive its right to carryback such losses?[1]

CONCLUSION:

A taxpayer who has elected to waive its right to carryback the entire net operating loss under section 172(b)(3) and section 1.1502-21(b)(3)(i) may not make a separate election to carryback specified liability losses not composed of product liability losses 10 years under section 172(b)(1)(C).

FACTS:

Taxpayer is the parent of an affiliated group that files a consolidated federal income tax return. In both Year 3 and Year 4, Taxpayer incurred consolidated net operating losses ("CNOLs") of approximately $A each year. Taxpayer made valid section 172(b)(3) elections pursuant to section 1.1502-21(b)(3)(i) of the Income Tax Regulations to waive its CNOL carrybacks for Year 3 and Year 4 on its federal income tax returns for those tax years.

Taxpayer subsequently discovered that it had specified liability losses (SLLs), including deferred statutory losses (defined below), for Year 3 and Year 4 in the approximate amounts of $B and $C, respectively. On Date 1, Taxpayer timely filed a Form 1120-X for Year 1 and Year 2 to carryback its SLLs back 10 years to Year 1 and Year 2, resulting in refund claims for those years. In the explanation of the claim, Taxpayer stated that it intended only to waive the general two-year carryback for NOLs provided by section 172(b)(1)(A), but not the 10-year carryback period for SLLs provided by section 172(b)(1)(C).

LAW:

Section 172(a) of the Internal Revenue Code (Code) provides that a deduction shall be allowed for the taxable year in an amount equal to the aggregate of the net operating loss carryovers to such year, plus the net operating loss carrybacks to such year.

[1] All references to the Internal Revenue Code are to the Internal Revenue Code as in effect for the tax years at issue, , and all references to the Regulations are to the Treasury Regulations as in effect for the same years.

Section 172(b)(1)(A) of the Code provides that a net operating loss shall be carried back to each of the 2 taxable years preceding the taxable year of such loss, and shall be carried forward to each of the 20 taxable years following the taxable year of the loss.

Section 172(b)(1)(C) of the Code provides that in the case of a taxpayer with a specified liability loss, the specified liability loss shall be a net operating loss carryback to each of the 10 taxable years preceding the taxable year of such loss.

Section 172(b)(3) of the Code provides that a taxpayer entitled to a carryback period under section 172(b)(1) may elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year in a manner provided by the Secretary by the due date of the return (including extensions), and that once made, shall be irrevocable for that year.

Section 172(c) of the Code provides that the term “net operating loss” means the excess of the deductions allowed by this chapter over the gross income, computed with the modifications specified in section 172(d).

Section 172(f)(1) of the Code provides that a specified liability loss generally means the sum of the following amounts to the extent taken into account in computing the NOL for the taxable year: (a) any amount allowable as a deduction under section 162 or section 165 which is attributable to product liability or expenses incurred in the investigation of or settlement of, or opposition to, claims against the taxpayer on account of product liability (also the definition of a product liability loss) and (b) any amount allowable as a deduction which is in satisfaction of five specified liabilities imposed under a Federal or State law (deferred statutory loss) if the act (or failure to act) giving rise to such liability occurs at least 3 years before the beginning of the taxable year.

Section 172(f)(6) of the Code provides that any taxpayer entitled to a 10-year carryback under subsection (b)(1)(C) for SLLs from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(C). The election shall be made in a manner provided by the Secretary by the due date of the return (including extensions), and that once made, shall be irrevocable for that year.

The special carryback rule for product liability losses (PLLs) was added to the Code by the Revenue Act of 1978, Pub. L. No. 95-600, and was effective for tax years beginning after September 30, 1979. The special carryback rule for deferred statutory or tort liability losses was added to the Code by the Tax Reform Act of 1984, Pub. L. No. 98-369, and was effective for taxable years beginning after 1983.

Section 11811(b) of the Revenue Reconciliation Act of 1990 (1990 RRA), Pub. L. No. 101-508, combined pre-1990 RRA section 172(j) (relating to product liability losses) with pre-1990 RRA section 172(k) (relating to deferred statutory or tort liability losses) into current section 172(f), which provides rules relating to specified liability losses. Tort

liability losses were removed from section 172(f) of the Code in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277 and was effective for taxable years ending after October 12, 1998.

Section 1.172-13 of the Income Tax Regulations (Regulations), which was proposed on March 25, 1983, provides guidance with respect to the carryback of product liability losses. Section 1.172-13 was finalized on August 26, 1986, prior to the time that the 1990 RRA adopted the term "specified liability losses" for both product liability losses and deferred statutory or tort liability losses.

Section 1.172-13(c)(4) of the Regulations provides that if a taxpayer sustains during the taxable year both a net operating loss not attributable to product liability and a product liability loss, an election pursuant to section 172(b)(3)(C) (relating to election to relinquish the entire carryback period) does not preclude the product liability loss from being carried back 10 years under section 172(b)(1)(l) and paragraph (a)(1) of this section.

Section 1.1502-21(b)(3)(i) of the Regulations provides that a consolidated group may make an irrevocable election under section 172(b)(3) to relinquish the entire carryback period with respect to a CNOL for any consolidated return year. Except as otherwise provided, the election may not be made separately for any member, and must be made in a separate statement entitled "This is an election under section 1.1502–21(b)(3)(i) to waive the entire carryback period pursuant to section 172(b)(3) for the [insert consolidated return year] CNOLs of the consolidated group of which [insert name and employer identification number of common parent] is the common parent."

ANALYSIS:

Taxpayer makes several arguments in support of allowing Taxpayer to carryback its deferred statutory losses despite the otherwise effective election it made. First, Taxpayer argues that the IRS cannot administer section 172's carryback waiver provision inconsistently by allowing a carryback of PLLs, a component of SLLs, under section 1.172-13(c)(4) of the Regulations despite the waiver but not allowing a carryback of other components of SLLs because of the waiver. According to Taxpayer, section 1.172-13(c)(4) remains an authoritative regulatory interpretation of the relevant statutory language that should be applied to all NOL categories. However, section 1.172-13 by its terms only applies to PLLs, not SLLs. No statutory or other binding authority exists to expansively apply the regulatory exception to carryback periods for loss types not mentioned in the regulation such as the 10-year carryback period provided by section 172(b)(1)(C) for specified liability losses which include the deferred statutory losses at issue.

Second, in its initial TAM request, Taxpayer argued that the legislative reenactment doctrine applies to allow it to carryback its SLLs despite its filed waiver. At Taxpayer's

conference of right, the taxpayer withdrew its argument that the legislative reenactment doctrine applies to this case.

Third, Taxpayer argues that the Code also contains provisions that support an interpretation under which each carryback period described in section 172 may be waived independently under section 172(b)(3). Taxpayer cites section 172(f)(6), which permits a taxpayer to elect to waive the 10-year carryback period for SLLs in favor of the applicable two-year general carryback period of section 172(b)(1)(A)(i). Taxpayer argues that because the Code provides for a separate waiver of the 10-year carryback period in section 172(f)(6) that Congress intended separate waivers for each carryback period under section 172(b)(3) as well. However, while Congress did provide for a separate waiver to subsume the 10-year carryback period for SLLs into the general 2-year carryback period in section 172(f)(6), it did not provide taxpayers with the right to waive each individual carryback period separately and completely in section 172(b)(3). Congress could have so provided but did not do so. Each Code provision must be interpreted by its terms.

Finally, Taxpayer argues that the Supreme Court has ruled the agencies cannot inconsistently apply interpretations to different or new categories governed by a specific law, and thus must apply the regulation exception in section 1.172-13(c)(4) of the Regulations not only to PLLs but also to deferred statutory losses. In Clark v. Martinez, 543 U.S. 371 (2005), the Court considered the government's authority to detain aliens pending deportation. In general, such authority was limited to a period of 90 days, but the statute provided for discretionary extension of the detention period beyond 90 days. The statutory text that granted this discretion applied, without express differentiation, to three separate statutory categories of aliens. The Supreme Court had previously interpreted this text to limit the government's discretion to detain an alien who fell within one of the three enumerated categories. Based on plausible policy considerations, the government argued that the previously established limitation should not apply to the other categories of aliens to which the same authorizing text applied. The Court disagreed, stating that the operative language of the relevant section, "'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject" and that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." Id. at 378. Taxpayer argues that when the same text applies without differentiation to several enumerated statutory categories, the same interpretation of the text must apply to all such categories. In other words, since section 1.172-13(c)(4) applies to PLLs, a subcategory of SLLs, Clark requires that the regulation also apply to the other enumerated SLL categories, including the deferred statutory losses at issue in this case. However, the discretionary authority in Clark existed in the statute itself. Section 172(b)(3) contains no such discretionary authority. The holding in Clark does not apply to a regulatory exception.

Taxpayer also argues that the same conclusion can be drawn from the Supreme Court's ruling in United Dominion Industries v. United States, 532 U.S. 822 (2001). In United

Dominion, the issue was whether a single entity or separate member approach was the proper method of calculating consolidated PLLs, and thus whether consolidated PLLs could be carried back to include the product liability expenses of even those group members having positive separate taxable income. The regulation that enumerated the items computed on a consolidated single member basis, section 1.1502-12, included net operating losses, but the regulation was adopted before the Code was amended to provide a 10-year carryback for PLLs and thus excluded product liability expenses in the list of enumerated items. The Court of Appeals found significance in the omission of product liability expenses from the relevant regulation. The Supreme Court disagreed, concluding that the omission had no significance and occurred simply because the regulation was promulgated before PLLs were added as a component category of NOLs.

Taxpayer argued that United Dominion requires the interpretative logic of an existing regulation to apply to relevant categories added to the Code after the regulation's issuance. Taxpayer implies that even though the IRS failed to update section 1.172-13 of the Regulations to cover SLLs, not just PLLs, the failure was probably due to inattentiveness, and thus the logic of the regulation must apply to the subsequently added SLL category of deferred statutory losses. This argument seems to be in support of Taxpayer's original argument that the legislative reenactment doctrine applies to allow it to carryback its SLLs despite its filed waiver. Under the doctrine of legislative reenactment, administrative pronouncements are deemed to receive congressional approval whenever Congress reenacts an interpreted statute without substantial change. Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978); Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110 (1939). After the promulgation of section 1.172-13(c)(4) in 1986, Congress made many changes to the statute in 1990, including the creation of the SLL category at issue in this case. The doctrine does not apply when such substantial, relevant changes are made to the interpreted statute. The legislative reenactment doctrine does not entail expansive reinterpretations or additions to the text of regulations, such as expanding the regulatory exception under section 1.172-13(c)(4) from PLLs to SLLs. The doctrine is inapplicable to this case.

The field argues, and this office agrees, that a taxpayer which makes an election under section 172(b)(3) to waive the entire carryback period for a taxable year may not carry back any portion of the taxpayer's NOL not attributable to PLLs, including any portion of the NOL that is attributable to a SLL not composed of PLLs. Section 172(c) defines a NOL as encompassing all allowable deductions for the taxable year, including deductions that generate SLLs, and thus only one NOL exists in any given taxable year. When a taxpayer elects to relinquish the entire carryback period with respect to an NOL pursuant to section 172(b)(3), the election by its terms applies to the entire NOL for the taxable year and includes all carryback periods (except the 10 year carryback period for PLLs pursuant to section 1.172-13(c)(4) of the Regulations). Section 1.1502-21(b)(3)(i), which prescribes the mechanism for filing a waiver, does not require the taxpayer to specify which carryback period it is waiving because the language of section 172(b)(3) states that it is waiving the entire carryback period. Section 172(b)(3) thus does not

allow a taxpayer to make the election for a portion of the NOL applicable to a specific carryback period for a taxable year. In addition, no provision in the Code or the Regulations suggests that there can be multiple NOLs in a taxable year for purposes of the election under section 172(b)(3). Consequently, a taxpayer making an election under section 172(b)(3) is prohibited from carrying back any portion of the NOL not attributable to PLLs, including any portion of the NOL attributable to a SLL not composed of PLLs.

CONCLUSION:

A taxpayer who has elected to waive its right to carryback the entire net operating loss under section 172(b)(3) and section 1.1502-21(b)(3)(i) may not make a separate election to carryback specified liability losses not composed of product liability losses 10 years under section 172(b)(1)(C).

CAVEAT(S):

A copy of this technical advice memorandum is to be given to Taxpayer. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.