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EARLELAW NEWSLETTER

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New Law Extends Net Operating Loss Carryback for Small Businesses

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The Internal Revenue Service has announced that small businesses with deductions exceeding their income in 2008 can use a new net operating loss tax provision to get a refund of taxes paid in prior years.

The new provision, enacted as part of the American Recovery and Reinvestment Act of 2009, enables small businesses with a net operating loss (NOL) in 2008 to elect to offset this loss against income earned in up to five prior years. Typically, an NOL can be carried back for only two years. Some taxpayers must make an election to use this special carryback by April 17, 2009.

“The new net operating loss provisions could throw a lifeline to struggling businesses, providing them with a quick infusion of cash,” said IRS Commissioner Doug Shulman. “We want to make it as easy as possible for small businesses to take advantage of these key tax benefits.”

With the economic downturn and the new law, the IRS expects record numbers of small businesses to be eligible for the refunds. The IRS said it is putting in special steps to ensure timely processing of these refunds to help small businesses during this difficult period.

Small businesses with large losses in 2008 may be able to benefit fully from those losses now, rather than waiting until claiming them on future tax returns.

The normal two-year carryback remains available if the small business does not elect the special carryback provision. If the loss exceeds the

income for the carryback period, the taxpayer can continue to carry forward the remaining balance of the NOL for up to 20 years.

For small businesses that use a fiscal year, this special carryback may be used for an NOL in either a tax year that ends in 2008 or a tax year that begins in 2008. Once a taxpayer makes this election, it may not be changed.

To qualify for the new five-year carryback provision, a small business must have no greater than an average of \$15 million in gross receipts over a three-year period ending with the tax year of the NOL. Businesses with more than \$15 million in gross receipts still qualify to carry back their 2008 NOL for two years.

There are several methods that a small business uses to elect the new provision as detailed in the Revenue Procedure.

If a small business previously elected to waive the carryback of 2008 NOL but now wants to elect this special carryback, the small business may revoke its previous election to waive the carryback. The election revocation must be made on or before April 17, 2009.

Generally small businesses that are not corporations (including sole proprietorships filing schedule C with their Form 1040) may accelerate a refund by using Form 1045, Application for Tentative Refund.

Corporations with NOLs may also accelerate a refund by using Form 1139, Corporation

Application for Tentative Refund.

The IRS will be closely monitoring these filings and will provide additional staff as needed to process these forms. The IRS said it will work to issue refunds within 45 days.

Form 1045 or Form 1139, whichever the taxpayer uses, generally must be filed within one year after the end of the tax year of the NOL. In addition, the current year's tax return must be filed by the date the Form 1045 or Form 1139 is filed.

Accelerated refunds paid via Form 1045 or Form 1139 is described as "tentative" because the applications for refunds are potentially subject to review at a later date.

Earle Law Offices provides trial and appellate litigation, as well as non-litigation, legal services in the areas of business law, family law, real estate law, tax law, and trusts and estates.

* Mr. Earle is licensed to practice law in all California state trial and appellate courts, the United States Supreme Court, the United States Court of Appeals for the Fourth and Ninth Circuits, federal trial courts in the Northern District of California, and the United States Tax Court. He has also served as a Judge Pro Tempore for the Santa Clara Superior Court. In addition to practicing law, Mr. Earle is also a licensed Real Estate Broker.

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