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From:

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To:

Cc:

Subject: Advice on the Form 1139 case

Thanks for your patience. I have now extensively discussed this case with all the subject matter experts in Counsel and here are the key points.

1) The taxpayer's election under section 172(b)(1)(H) to elect a 5-year NOL carryback back in lieu of the normal 2-year period was not timely; it was required to have been made by the due date of the tax return, including extension (i.e.,). See IRC § 172(b)(1)(H)(iii)(II). The election could be made on a Form 1120, a Form 1120, or a Form 1139. See Rev. Proc. 2009-52. In this case, the taxpayer attached the election to the Form 1139 filed in (and also the one received by the IRS in). Thus, the taxpayer does not have a valid election that would serve as the basis for carrying back the NOL to the tax year. Consequently, the taxpayer is not entitled to the refund it already received for the tax year.

2) Up until now, we have been trying to convince the IRS that the Form 1139 filed in contained a mathematical error that the IRS could (and should) have corrected within the meaning of Treas. Reg. § 1.6411-3 and therefore the Form 1139 was a timely, valid tentative refund application. The lack of a valid election to carryback the NOL more than the normal 2-year period is not a mathematical error that the IRS could have corrected. Therefore, there is no legal basis for advocating to the IRS that the taxpayer is entitled to the refund that it received, or the refund that it has not yet received. The tax year is under audit and the correct amount of the NOL will be determined during the audit, and the taxpayer can file a Form 1120X for the tax year to claim the correct amount of refund.

4) Lastly, as I had previously mentioned, it *may be possible* for the taxpayer to obtain Treas. Reg. § 1.9100 relief for the late IRC § 172(b)(1)(H) election, but that would

require the taxpayer to submit a private letter ruling request. I say "may be possible" because it is not clear at this time whether the taxpayer is eligible, given that the timeliness of the election is statutory, and Treas. Reg. § 1.9100 relief is typically reserved for elections with a due date set by regulation. That is something for the taxpayer's representative to explore and decide whether to submit a private letter ruling request.

Unless you have further questions, I will be closing my file on this case.

Thanks.