

THE U.S. SHOWS IT CARES BY ENACTING TAXPAYER-FRIENDLY MODIFICATIONS TO RULES FOR DEDUCTING NOLS

Apr 08, 2020

Section 2303 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted on March 27, 2020, includes taxpayer-friendly modifications to the restrictions placed on the deductibility of net operating losses ("NOLs") pursuant to the Tax Cuts and Jobs Act of 2017 (the "2017 Tax Act").

One of the most significant changes was to reverse provisions of the 2017 Tax Act to allow taxpayers to carry back NOLs arising in 2018, 2019, and 2020 up to 5 years (including to years when the corporate tax rate was as high as 35% (i.e., prior to 2018)). For parties that have engaged in M&A transactions during these years, the changes may provide opportunities to realize value from carrying back NOLs from past acquisition targets, depending on factors such as the acquisition agreement terms, the tax position of the target at and prior to the acquisition, and the extent of transaction tax deductions associated with the acquisition.

Here are a few fact patterns that may be applicable depending on the taxpayer's particular situation and acquisition history:

- With respect to buyers of a corporation in 2018 or later, consideration should be given to carrying back the corporation's NOLs to obtain a refund of taxes paid, particularly if:
 1. the corporation was paying federal income taxes in the years preceding the acquisition,
 2. the corporation incurred significant transaction tax deductions that gave rise to NOLs, and
 3. the acquisition agreement does not require refunds of taxes attributable to pre-closing periods to be paid over to the sellers.

The benefit here is two-fold because (a) the use of NOLs in post-closing years is likely subject to limitations, and (b) the corporate tax rate in years prior to 2018 was higher, making deductions more valuable in years prior to 2018. (We note that, in our experience, a "no seller recourse" or "walk-away" deal structure is more likely to provide for the buyer to keep tax refunds.)

- Likewise, sellers of a corporation in 2018 or later should consider whether the acquisition agreement entitles sellers to obtain a refund with respect to the carry back of NOLs from tax years beginning in 2018, 2019, or 2020 to a pre-closing period.
- Finally, buyers of a corporation in 2018 or later should consider whether the acquisition agreement entitles the sellers to obtain a refund with respect to the carryback of NOLs, in which case the sellers may request the buyer to amend the corporation's income tax returns to claim NOL carry backs to the extent available.

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MEET THE TEAM



Cathryn R. Benedict

St. Louis

cathryn.benedict@bclplaw.com

[+1 314 259 2146](tel:+13142592146)



Philip B. Wright

St. Louis / New York

philip.wright@bclplaw.com

[+1 314 259 2499](tel:+13142592499)



Frank A. Crisafi

Atlanta

frank.crisafi@bclplaw.com

[+1 404 572 6840](tel:+14045726840)

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