



June 22, 2020

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. William M. Paul
Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Request for Additional Guidance and Relief Regarding Section 461(l) – Limitations on Excess Business Losses of Noncorporate Taxpayers

Dear Messrs. Kautter, Rettig, and Paul:

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS or “Service”) to address the need for guidance and relief related to Internal Revenue Code (IRC or “Code”) section 461(l),¹ as enacted under Pub. L. No. 116-136, commonly referred to as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or “the Act”). Section 461(l)² imposes on each applicable taxpayer a limitation on the deductible loss related to a trade or business in the taxable year in which the loss is incurred (the “excess business loss” or “EBL”).

On March 27, 2020, the CARES Act was enacted and retroactively amended legislation related to section 461(l), as enacted in the Tax Cuts and Jobs Act (“TCJA”). The IRS has since issued Rev. Proc. 2020-24 and Notice 2020-26 providing additional guidance with respect to net operating losses (“NOLs”) and the related tax filings. This letter is in response to the amended code section, the revenue procedure, and the notice.

¹ Unless otherwise indicated, references to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), and references to a “Treas. Reg. §” are to the Treasury regulations promulgated under the Code.

² See AICPA comment letter, [“Request for Guidance Related to Section 461\(l\) – Limitations on Excess Business Losses of Noncorporate Taxpayers,”](#) submitted February 28, 2019.

The Honorable David J. Kautter
The Honorable Charles P. Rettig
Mr. William M. Paul
June 22, 2020
Page 2 of 4

Specifically, the AICPA submits recommendations to address the following areas:

- I. Treatment of Previously Reported Excess Business Losses
- II. Relief for Underpayment of Estimated Taxes

BACKGROUND

The CARES Act amended section 461(l), which imposed a limitation on the deductible loss related to a trade or business in the taxable year in which the loss is incurred. The limitation creates an excess business loss, which is defined as the aggregate deductions for the taxable year attributable to trades or businesses of such taxpayer, over the aggregate gross income or gain for the taxable year attributable to such trades or businesses of such taxpayer, plus \$250,000 (\$500,000 for a married filing joint return). Any disallowed loss becomes an NOL carryover to the next subsequent year.

Under the TCJA, section 461(l)(1)(A) was enacted and made the limitation applicable for any taxable year beginning after December 31, 2017 and before January 1, 2026. The CARES Act amended section 461(l)(1)(B), making the limitation applicable for any taxable year beginning after December 31, 2020 and before January 1, 2026.

The CARES Act may negatively affect taxpayers who previously reported an excess business loss limitation on their tax return for the 2018 tax year. Those taxpayers may need to amend their 2018 returns, incurring unnecessary costs of tax preparation. The refunds related to the amended return may not release until after additional IRS review, which may take many months. As a result of the retroactive change in section 461(l), taxpayers may have underpaid their estimated tax payments for the 2019 tax year as they can no longer claim the NOL anticipated for 2019.

RECOMMENDATIONS

I. Treatment of Previously Reported Excess Business Losses

The AICPA recommends that Treasury and the IRS provide taxpayers, who reported excess business losses for the 2018 tax year, with the opportunity to adjust their section 461(l) loss without amending their return. As noted, amending the return will incur costs and a potentially lengthy review process for taxpayers who were following the law as it existed when their returns were filed. We recommend that Treasury and the IRS allow affected taxpayers to file Form 1045, *Application for Tentative Refund*, to request a refund related to the allowance of the excess business loss that was limited on their 2018 tax return. Having a simplified option, without filing an amendment, to make the adjustment and allowing for a quicker refund would satisfy the goal of providing cash from tax refunds to taxpayers who may need the liquidity for their businesses. For taxpayers who will have a 2018 NOL as a result of this adjustment, the deadline to file Form 1045 related to a 2018 NOL is June 30, 2020. Recently released FAQs noted that if Form 1045 is filed before June 30, 2020, the taxpayer is deemed to meet the deadline even if the form is not processed

The Honorable David J. Kautter
The Honorable Charles P. Rettig
Mr. William M. Paul
June 22, 2020
Page 3 of 4

before the amended return is processed. However, if the requirement is that the return needs to be amended and processed before Form 1045 is processed, there are concerns that these taxpayers may not receive the refund related to the carryback in a timely manner.

An alternative recommendation is for Treasury and the IRS to grant an automatic approval of a taxpayer's Form 1040-X, *Amended U.S. Individual Income Tax Return*, for the 2018 tax year, if the only change to the originally filed return is the removal of the excess business loss limitation. The applicable pages of the Form 1040-X, along with the originally filed return, could then be attached to the faxed Form 1045 to assist in the processing and approval of the application.

Please provide guidance confirming that taxpayers need not amend the 2018 income tax return if they have an NOL from their 2018 return (unrelated to the section 461(l) disallowed loss). Taxpayers electing under section 172(b)(3) to waive the NOL carryback period (per Rev. Proc. 2020-24) merely adjust the NOL carryforward to reflect the additional business loss due to the removal of the section 461(l) disallowed loss. We also recommend this process for taxpayers carrying the NOL back five years (*i.e.*, the taxpayer need not first amend the 2018 income tax return to restore the previously disallowed section 461(l) loss). We recommend allowing taxpayers to attach a statement to Form 1045 reflecting the additional NOL due to the removal of the business loss limitation.

II. Relief for Underpayment of Estimated Taxes

The AICPA recommends that Treasury and the IRS exercise their authority under section 6654(e)(3)(A) to grant relief to taxpayers for estimated tax underpayment penalties and interest charges, to the extent that they are related to the changes in the excess business loss limitation statute. We also recommend that Treasury and the IRS provide relief for taxpayers who would like to apply any refund from their amended 2018 return to their 2019 tax payments.

Prior to the CARES Act, taxpayers who reported excess business loss limitations on their 2018 tax returns were anticipating an NOL in the amount of the limitation (up to 80% of such taxpayer's taxable income under section 172(a)(2)(B)(ii)) on their 2019 tax returns. Those taxpayers calculated and paid their estimated tax payments under traditional methods for the 2019 tax year based on their estimated tax liability with the benefit of the section 461(l) NOL carryover. The CARES Act was enacted on March 27, 2020, after the statutory due date of the taxpayer's fourth quarter estimated tax payment for the 2019 tax year, which was due by January 15, 2020. Therefore, taxpayers did not have the opportunity to adjust their 2019 estimated tax payments accordingly and need relief from any underpayment of estimated tax penalties and interest charges that are a result of a disallowed section 461(l) NOL. We request this relief regardless of whether taxpayers are provided with an option to avoid filing an amended return.

The Honorable David J. Kautter
The Honorable Charles P. Rettig
Mr. William M. Paul
June 22, 2020
Page 4 of 4

* * * * *

The AICPA is the world's largest member association representing the CPA profession, with more than 431,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact David Baldwin, Chair, AICPA Individual & Self-Employed Tax Technical Resource Panel, at (480) 758-5617 or Dave@baldwintax.com; Amy Wang, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9264 or Amy.Wang@aicpa-cima.com; or me at (612) 397-3071 or Chris.Hesse@CLAconnect.com.

Sincerely,

A handwritten signature in blue ink that reads "Christopher W. Hesse". The signature is fluid and cursive, with a prominent flourish at the end.

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation
Mr. John P. Moriarty, Associate Chief Counsel, Income Tax and Accounting, IRS