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KPMG report: Initial impressions of Rev. Rul. 2020-8 and 10-year limitations period, foreign tax credit and NOL carrybacks (COVID-19)

The IRS on Friday afternoon, April 17, 2020, released an advance version of a new revenue ruling (Rev. Rul. 2020-08) addressing the appropriate period for refund claims resulting from a foreign tax credit (FTC) carryback that was “released” by reason of a net operating loss (NOL) carryback from a subsequent year.

Read [Rev. Rul. 2020-8](#) [PDF 18 KB]

KPMG observation

The topic of the revenue ruling is of keen current interest for many taxpayers given the recent changes to the NOL carryback rules enacted in the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act). While the reasons for the new ruling are murky, for the time being there is no change in practice or result for, e.g., carrybacks of 2018 and 2019 NOLs that have been or will be filed in the near term.

Background

Section 6511(d)(3)(A) provides an extended 10-year limitation period (in lieu of the general three-year limitation period provided in section 6511(a)) for a claim for credit or refund “[i]f the claim for credit or refund relates to an overpayment attributable to [foreign tax credits]. . . .” The special 10-year limitation period starts on “the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued” (with no mention of extensions). Ordinarily, section 6511(d)(3)(A) allows taxpayers an extended period to claim refunds for FTCs attributable to, e.g., additional payments of foreign taxes and for switching from deducting to crediting foreign tax expense.

In Rev. Rul. 71-533, the IRS ruled that a claim for refund or credit of an overpayment resulting from an FTC carryback that arose as the result of an NOL carryback from a subsequent year was subject to the special 10-year limitation period provided by section 6511(d)(3)(A). The ruling hypothesized a taxpayer that generated an NOL for its 1969 tax year and carried the loss back to its 1966 tax year, resulting in

no taxable income for that year. However, since the taxpayer had claimed FTCs to offset its U.S. federal income tax liability for its 1966 tax year, the NOL carryback created excess FTCs for that year that the taxpayer carried back to its 1964 tax year, resulting in an overpayment for the 1964 tax year. The taxpayer filed a claim for refund of the overpayment for its 1964 tax year, and the IRS ruled that the taxpayer's claim was subject to the 10-year limitation period under section 6511(d)(3)(A).

The IRS decision in Rev. Rul. 71-533 was based in part on its previous holding in Rev. Rul. 68-150. That earlier revenue ruling provides, in relevant part, that section 6511(d)(3)(A) applied to "claims for credit or refund based on the correction of mathematical errors in the computation of taxes subject to the provisions of that section... or any other adjustments to the size of the foreign tax credit, including those due to the payment of additional foreign taxes."

Rev. Rul. 2020-08

Rev. Rul. 2020-8 announces that Rev. Rul. 71-533 and the above-quoted portion of Rev. Rul. 68-150 are being reconsidered and are suspended while the Treasury and the IRS reconsider the issues. In particular, the IRS is considering whether the special limitation period for claims for credit or refund that relate to overpayments attributable to NOL carrybacks provided by section 6511(d)(2)(A) should have been applied to the facts of Rev. Rul. 71-533, rather than section 6511(d)(3)(A)'s 10-year period. Section 6511(d)(2)(A) provides a separate special time window for refund claims attributable to carrybacks of NOLs and net capital loss carrybacks, which is three years after the return due date (including extensions) for the tax year in which the NOL or net capital loss arose.

Under the facts of Rev. Rul. 71-533, the taxpayer would have had until 1974 to timely file a claim for credit or refund applying the section 6511(d)(3)(A) limitation period. However, had the IRS applied section 6511(d)(2)(A), the limitation period would have ended in 1972 (i.e., three years after the year in which the taxpayer generated the NOL). Rev. Rul. 71-533 does not specifically state when the refund claim for the 1964 tax year was filed, but it seems reasonable to infer that it occurred in a reasonable time after the taxpayer filed the 1969 tax return in 1970 to establish the 1969 NOL that was eligible to be carried back to 1966. Thus, one may assume that the claim would have been timely whether the IRS had applied section 6511(d)(2)(A) or section 6511(d)(3)(A).

Current implications

The CARES Act (Pub. L. No. 116-136) amended section 172(b)(1) to provide for a carryback of any NOL arising in a tax year beginning after December 31, 2017, and before January 1, 2021, to each of the five tax years preceding the tax year in which the loss arises. Taxpayers that carry back NOLs under the amended NOL carryback provision and, as a result, generate excess FTCs that may be carried back to a previous tax year may be affected by the potential application of the section 6511(d)(2)(A) limitation period rather than the section 6511(d)(3)(A) limitation period. Consider the following example.

Example

US Co, a calendar year taxpayer, generates a \$100 NOL for the 2019 tax year. Under the amended carryback rules, US Co carries the 2019 NOL back to its 2014 tax year. The 2019 NOL reduces US Co's 2014 taxable income to zero. However, US Co claimed \$50 of FTCs for the 2014 tax year, which results in excess FTCs that US Co carries back to its 2013 tax year. The FTC carryback results in a \$25 overpayment for the 2013 tax year. Under section 6511(d)(3)(A), US Co would have until 10 years from the un-extended due date of its 2013 tax return to file a claim for refund with respect to the 2013 overpayment (i.e., March 15, 2024). By comparison, under section 6511(d)(2)(A), US Co must file its claim for refund within three years of the due date (including extensions) of its 2019 tax return (i.e., October 15, 2023, assuming an extension was filed).

Rev. Rul. 2020-08 is silent as to **why** Treasury and the IRS are reconsidering the prior rulings, although the quoted portion of Rev. Rul. 68-150 suggests that the IRS may be reconsidering whether a

carryback of “released” FTCs occurring because of an NOL carryback should be treated differently from a change to the foreign taxes paid or accrued in the “source” year (e.g., through computational edits or additional payments). It may also be that the 2018 decision in *Trusted Media Brands, Inc. v. United States*, 899 F.3d 175 (2d Cir. 2018) influenced this decision, and specifically that case’s analysis of what refund claims are properly “attributable to” FTCs.

In *Trusted Media Brands*, the taxpayer originally claimed a credit for foreign taxes paid but, on an amended tax return for the 2002 tax year filed in 2011, instead elected to claim deductions. This change caused a cascading series of adjustments that eventually resulted in the taxpayer’s claim for refund of an overpayment of tax from the 1995 tax year. The taxpayer claimed that the special 10-year statute of limitations of section 6511(d)(3)(A) applied in this situation to allow the refund (that is, that the special 10-year period started to run from its 2002 tax return). The IRS denied this refund claim as untimely, and asserted that the standard three-year statute of limitations applied. The taxpayer eventually filed a refund action in federal district court. The federal district court denied the taxpayer’s claim as untimely concluding that: (1) the special 10-year statute of limitations for refund claims for foreign taxes applies only to credits and not deductions; and (2) the taxpayer’s overpayment claim for its 1995 tax year was not properly “attributable to” its 2002 tax year, and therefore, even if the claim for the 10-year limitation period applied, the claim (filed in December 2011) was untimely.

The Second Circuit affirmed, holding that the special 10-year statute of limitations for refund claims for foreign taxes applies only to credits, and not deductions. Thus, the Second Circuit agreed with the lower court that the taxpayer’s refund claim was time-barred.

Notwithstanding the discussion in *Trusted Media Brands*, in the example above, it appears that the taxpayer would have several years after the end of the 2019 tax year to file a claim for refund with respect to the overpayment resulting from the FTC carryback to the 2013 tax year under either section 6511(d)(2)(A) or section 6511(d)(3)(A).

Prospective application only

Rev. Rul. 2020-8 states that while the Treasury Department and IRS are reconsidering whether section 6511(d)(3)(A) applies to claims for refund or credit of an overpayment resulting from an FTC carryback arising as a result of an NOL carryback from a subsequent year, the suspension of Rev. Rul. 71-533 and the partial suspension of Rev. Rul. 68-150 will not be applied adversely to a taxpayer that filed or files a claim for credit or refund within the limitations period of section 6511(d)(3) in accordance with Rev. Rul. 71-533 and Rev. Rul. 68-150. As a result, taxpayers for now may still rely on the earlier rulings while the IRS reconsiders these matters.

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