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KPMG report: Insurance-related measures in consolidated NOL regulations

Temporary regulations (T.D. 9900) and proposed regulations (REG-125716-18) released for publication in the Federal Register by the U.S. Treasury Department and IRS provide guidance under sections 1502 and 172 regarding consolidated net operating losses (NOLs).

The proposed regulations specifically update the regulations applicable to consolidated groups that include both life insurance companies and other companies to reflect the statutory changes.

The following discussion focuses on the implications of the proposed regulations regarding the treatment of consolidated NOLs of life insurance companies.

Regulations

The two packages of regulations were released on July 3, 2020, and will appear in the Federal Register on July 8, 2020.

The [temporary regulations](#) [PDF 220 KB] (28 pages) promulgated under section 1502 permit consolidated groups that acquire new members that were members of another consolidated group to elect in a year subsequent to the year of acquisition to waive all or part of the pre-acquisition portion of an extended carryback period under section 172 for certain losses attributable to the acquired members when there is a retroactive statutory extension of the NOL carryback period under section 172. These temporary regulations reflect provisions enacted as part of the "Coronavirus Aid, Relief, and Economic Security Act" (Pub. L. No. 116-136) (CARES Act) that retroactively extend the carryback period under section 172 for tax years beginning after 2017 and before 2021.

The [proposed regulations](#) [PDF 380 KB] (96 pages) include proposed amendments to the consolidated return regulations under section 1502, and provide guidance implementing recent statutory amendments to section 172 as made by the 2017 tax law (Pub. L. No. 115-97, which is the law that is often referred to as the "Tax Cuts and Jobs Act" (TCJA)) and the CARES Act.

These proposed regulations respond to and address the issues surrounding absorption of consolidated NOL carryovers and carrybacks, which arise as a result of the TCJA and CARES Act.

Implications for insurance companies

The TCJA, enacted in December 2017, generally disallowed the potential to carry back any life insurance company ordinary losses of life insurance companies and non-insurance companies. The TCJA allowed for an unlimited carryforward period for the NOLs of these companies subject to an 80% limitation of the taxpayer's taxable income.

In contrast, nonlife insurance companies continued to be eligible to carry back NOLs for two years and to carry forward NOLs for 20 years. NOL carryforwards for nonlife insurance companies are not subject to the 80% limitation that applies to life insurance companies and non-insurance companies.

The CARES Act, enacted in March 2020, introduced the ability for life and nonlife insurance companies to carry back NOLs five years for certain tax years. Losses in years beginning after December 31, 2017, and before January 1, 2021, may be carried back five years. Additionally, the CARES Act removed the 80% limitation when utilizing the expanded carryback and carryforward rules for NOLs.

The recently released proposed regulations (REG-125716-18) clarify the application of the ability of nonlife insurance companies to carry back losses within a consolidated group that includes non-insurance companies that are generally not eligible to carry back ordinary losses. The proposed regulations formalize a two-factor approach if a consolidated group is comprised of both nonlife insurance companies and other members in a consolidated return year beginning after December 31, 2020. In general, the post-2017 consolidated net operating loss deduction limit for the group would equal the sum of two parts.

- The first part relates to the income of the non-insurance companies. In general, the loss carryback is limited to an amount no greater than 80% of the group's consolidated taxable income (determined without regard to the income or losses attributable to nonlife insurance companies).
- The second part relates to the income of nonlife insurance companies. This part generally equals 100% of the consolidated net income attributable to the nonlife insurance companies.

These parts are adjusted for any deductions under sections 172, 199A, and 250.

Reg. section 1.1502-47 was initially promulgated in 1983. At that time, life insurance companies were subject to the three phase system of taxation under the "Life Insurance Company Income Tax Act of 1959" (Pub. L. No. 86-69, June 25, 1959).

Since 1982, the tax regime for life and nonlife insurance companies has substantially changed. Although, Reg. section 1.1502-47 has been modified since 1982, various provisions in Reg. section 1.1502-47 are outdated. The proposed regulations update Reg. section 1.1502-47 by: (1) removing paragraphs implementing statutory provisions that have been repealed; (2) revising paragraphs implementing statutory provisions that have been substantially revised; (3) updating terminology and statutory references to account for other statutory changes; and (4) removing paragraphs that contain obsolete transition rules or that are no longer applicable because the effective date in the current life-nonlife regulations have passed.

KPMG observation

The temporary regulations (T.D. 9900) and proposed regulations (REG-125716-18) provide further guidance on the utilization of NOLs by life insurance companies as well as life-nonlife consolidated groups as related to the TCJA and CARES Act provisions. The proposed regulations simplify the consolidation of life and nonlife insurance companies by limiting the subgroups to these two categories.

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