

Office of Chief Counsel
Internal Revenue Service
Memorandum

Release Number: 20184201F
Release Date: 10/19/2018

CC:LB:2:NEW:2:CConnell
POSTU-103028-17

UILC: 1311.00-00, 1311.02-00, 1311.01-00

date: August 06, 2018

to: Thomas M. Rooney
Revenue Agent

from: Craig Connell
General Attorney
(Large Business & International)

subject:

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether the mitigation provisions of I.R.C. § 1311, et seq. apply to permit the assessment of approximately \$ against for the taxable year.

CONCLUSIONS

Mitigation does apply once the parties enter into a closing agreement agreeing that a portion of the NOL deduction claimed in should be allowed in

FACTS



LAW AND ANALYSIS

You wish to apply the mitigation rules of I.R.C. § 1311, et seq. to assess approximately [redacted] against [redacted] for the tax year [redacted], which was never assessed. This amount relates to the [redacted] NOL that the Service originally allowed as a carryback to [redacted]. [redacted] now claims that this amount should be carried back to the tax years [redacted]. The statute of limitations for [redacted] is now expired.

In order for mitigation to apply to [redacted] tax year [redacted], the following requirements must be met: (1) there must have been a "determination" as defined in section 1313(a); (2) that determination caused one of the errors described in section 1312; and (3) on the date of that determination, any adjustment to correct the error is barred by operation of law (other than a section 7122 compromise or these mitigation provisions). See Costello v. Commissioner, T.C. Memo. 2016-33. Additionally, with respect to the circumstance of adjustment under section 1312(2) ("double allowance of a deduction or credit"), an adjustment under the mitigation provisions shall be made only if there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made, and the position maintained by the taxpayer is inconsistent with the erroneous allowance of a deduction or credit. I.R.C. § 1311(b)(1).

Here, there has not yet been a determination with respect to [redacted] claims for the taxable years [redacted]. However, a determination for mitigation purposes will have been made under I.R.C. § 1313(a) when the parties enter into a closing agreement concerning these claims or there is a final disposition of the claims. We understand that you intend to allow the claims in full and will enter into a closing agreement to that effect. Upon execution of the closing agreement by all parties, the closing agreement will be a determination within the meaning of I.R.C. § 1313(a)(2).

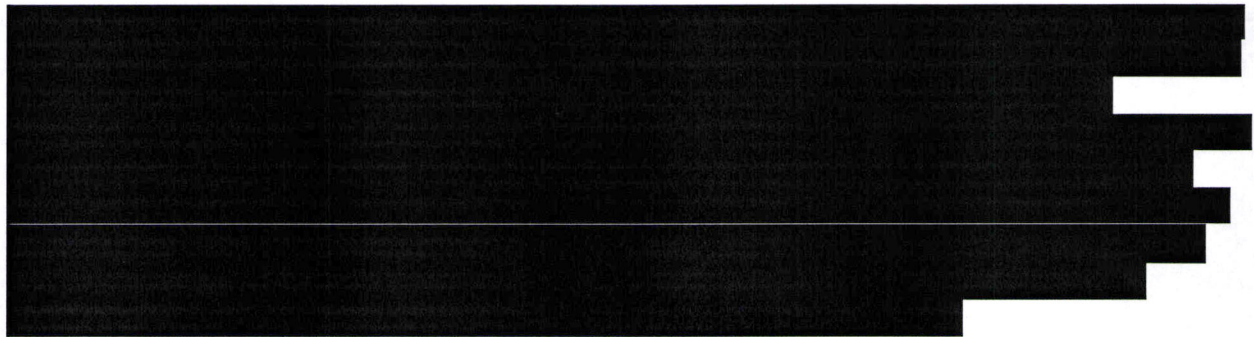
The execution of the closing agreement will result in an error described in I.R.C. § 1312(2). [redacted] was originally allowed a deduction in [redacted] for the [redacted] NOL. As a result of

allowing claims for , the portion of the NOL related to will be allowed in and again in

Correction of this error is prohibited by law because the statute of limitations on assessing tax year expired on . We note that the statute of limitations for was open on the date filed the amended return, the amended return, and the amended return. However, under I.R.C. § 1311(a), the operative date to determine if correction of the error is prevented is the date of determination (in this case the date the closing agreement is executed), not the date the claims were filed.

The execution of the closing agreement will also result in the adoption of a position maintained by that is inconsistent with the erroneous allowance of a NOL deduction in year affirmatively maintained its position by filing refund claims for the portion of NOL carryback related to in the tax years , and 's position with respect to tax years is inconsistent with the erroneous allowance of these same costs in . We note that did not claim the NOL on its tax return or otherwise maintain that these costs were allowed in .³ However, I.R.C. § 1311(b)(1) only requires to have maintained a position that the costs are allowable in , and that this position be inconsistent with the erroneous allowance of the costs in . I.R.C. § 1311(b)(1) does not also require to have originally maintained that the costs were allowable in .

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

³ The service determined that the NOL was allowable in . did sign a Form 870, agreeing with the Service's determination that the NOL was deductible in the tax year .

Please call (973) 681-6615 if you have any further questions.

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By: _____
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