

ID: CCA_2010110913411363

Number: **201050031**

Release Date: 12/17/2010

Office:

UILC: 172.00-00

From:

Sent: Tuesday, November 09, 2010 1:41:14 PM

To:

Cc:

Subject: The WHBAA and the revocation of a section 172(b)(3) election.

As you have requested, we are sending you this email to explain our reasoning as to why the taxpayer in your case cannot revoke its election under section 172(b)(3) for the tax year.

As and I discussed with you during our phone call of November 3, Q&A 16 of Notice 2010-58 illustrates the Service's published position regarding the application of sections 172(b)(1)(H) (i.e. WHBAA election) and 172(b)(3). Q&A 16 illustrates a situation where a taxpayer has previously made an election under section 172(b)(3) to waive the carryback period for an NOL arising in 2008. The taxpayer now wants to revoke that election but the taxpayer is not also making a WHBAA election for 2008. The answer provided by the Q&A is that the taxpayer may revoke the section 172(b)(3) election only if he is making a WHBAA election for 2008.

This Q&A 16 in Notice 2010-58 clearly illustrates the Service's position that an irrevocable election to waive a carryback period under section 172(b)(3) may be revoked only if a taxpayer makes a WHBAA election for the same taxable year that the section 172(b)(3) election applies. For example, if a taxpayer makes a WHBAA election for its 2009 NOL, the taxpayer may not revoke its section 172(b)(3) election for any taxable years other than 2009. This position, as part of Notice 2010-58, was approved by the Chief Counsel, Commissioner's office and Treasury. Accordingly, based on the facts that you provided, the taxpayer is not allowed to revoke its section 172(b)(3) election for .

This position is consistent with the intent of Congress as reflected in the structure of the section 13 of the Worker, Homeownership, and Business Assistance Act of 2009 ("WHBAA") and the technical explanation of the WHBAA written by the staff of the Joint Committee on Taxation at the time the WHBAA was enacted. Section 13(e)(4) of the WHBAA provides transitional rules meant to allow taxpayers to take advantage of the WHBAA election for a taxable year ending before the enactment of the WHBAA (which was Nov 6, 2009). Under one of these transitional rules, taxpayers may revoke an earlier section 172(b)(3) election. This particular transitional rule is necessary because the section 172(b)(3) election is normally irrevocable. Without this transitional rule, a taxpayer who made the section 172(b)(3) election for a taxable year ending before the enactment of the WHBAA would not be able to make a newly enacted WHBAA election for that taxable year.

In addition, the technical explanation of certain revenue provisions of the WHBAA, written by the staff of the Joint Committee on Taxation, explains this transition rule. This explanation provides that a taxpayer may revoke its section 172(b)(3) election with respect to an applicable NOL for a taxable year ending before the date of enactment. An applicable NOL is defined as the taxpayer's NOL for a taxable year beginning or ending in either 2008 or 2009. Section 172(b)(1)(H)(ii) provides the same definition for the applicable NOL.

Under the facts you provided, the NOL for which the taxpayer made a section 172(b)(3) election arose in the taxable year. Consequently, the NOL in this case is not an applicable NOL and, based on the Joint Committee technical explanation, the relief provided by the transition rule would not apply to allow the revocation of the section 172(b)(3) election.

I hope this information is helpful.