

ID: CCA\_2009081310470241

Number: **200940022**

Release Date: 10/2/2009

Office:

UILC: 6662.00-00

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**From:**

**Sent:** Thursday, August 13, 2009 10:47:04 AM

**To:**

**Cc:**

**Subject:** RE: Stat notice and carryback

Hi

The application of an accuracy related penalty depends upon the existence of an underpayment (as defined in section 6664), not a deficiency. The penalty would apply to any portion of an underpayment for a year to which the loss is carried that is attributable to a valuation misstatement for the year in which the carryback/over of the loss arises. See 1.6662-5(c)(1). This means that the penalty could apply to any or all of the years the loss is carried to (look at each year separately), so long as there is an underpayment in those years. See the explanation in FSA 2001 WL 4999971, discussing the court's holding in *Pesch v. CIR*, 78 TC 100, where a tentative carryback adjustment resulted in a refund, and the TC held that the refund was a "rebate." (The FSA makes a connection between "rebate" defined for purposes of deficiency and underpayment).

Let me know if you want to discuss.