



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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The Honorable Dan Benishek
Member, United States House of Representatives
810 South Otsego Avenue, Suite 105
Gaylord, MI 49735

Attention:

Dear Congressman Benishek:

I am responding to your inquiry, dated February 10, 2011, on behalf of your constituent, . The IRS denied application for tax refund based on a carry back of net operating losses (NOLs). This letter explains why the IRS denied his application.

files his income tax returns on a calendar year basis. On or after November 17, 2010, he filed IRS Form 1045, Application for Tentative Refund, to elect to carry back losses incurred during 2009 to the taxable year ending December 31, 2006. Congress authorized this election in section 172(b)(1)(H) of the Internal Revenue Code (Code), as provided in section 13(a) of the Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2992.

Taxpayers who make this election may carry back an applicable NOL (an NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010) to 3, 4, or 5 years preceding the taxable year of the applicable NOL (section 172(b)(1)(H)(i) and (ii) of the Code).

Congress also limited the time in which taxpayers could make this election. Specifically, Congress provided that taxpayers had to make this election "by the due date (including extension of time) for filing the return for the taxpayer's last taxable year beginning in 2009" (section 172(b)(1)(H)(iii) of the Code). Thus, a taxpayer who files a return on a calendar year basis had to make the election (for example, by filing Form 1045) no later than October 15, 2010.

The IRS denied 's application for a tentative refund because he missed the October 15, 2010, deadline that Congress imposed for making the election to carry back

his NOLs to 2006. To extend the deadline as requested would require legislative action by Congress. The IRS lacks the authority to make this change.

If you have any questions, please contact me or at

Sincerely,

Michael J. Montemurro
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)