

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

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to:  
Associate Area Counsel ( , Group 2)  
(Large Business & International)

from:  
Senior Counsel, Branch 1  
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subject: Corporation Disaster Casualty Loss Deduction

This Chief Counsel Advice responds to your request for assistance. For purposes of our discussion, we have changed the order in which the issues are presented. This advice may not be used or cited as precedent.

**LEGEND**

Taxpayer	=
Year 1	=
Year 2	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Hurricane 1	=
Hurricane 2	=

Tax Return =  
TPA X =

## ISSUES

1. May a taxpayer make the election to deduct a disaster casualty loss in the preceding tax year, under § 165(i) of the Internal Revenue Code and § 1.165-11(e) of the Income Tax Regulations, on an informal claim for refund?
2. If a taxpayer is allowed to make the § 165(i) election on an informal claim for refund, did the taxpayer in this case timely file an informal claim for refund for Year 1?
3. Under § 1.165-11(e), must the § 165(i) election be made on a return, amended return, or claim for refund for the year preceding the disaster, or may the taxpayer make the election by submitting a statement with the tax return for the year of the disaster?

## CONCLUSIONS

1. Under § 1.165-11(e), the § 165(i) election must be made on a return, amended return, or claim for refund. We interpret the last option as requiring a formal refund claim. In appropriate circumstances, however, we believe that a § 165(i) election that is made on a document meeting the requirements of an informal claim for refund, for purposes of § 6402 and § 6511, may be effective to meet the deadline in § 1.165-11(e) for making the § 165(i) election. However, such a filing should be perfected by subsequently filing a formal refund claim.
2. The taxpayer did not make the § 165(i) election on a document qualifying as an informal claim for refund within the period for making the election set out in § 1.165-11(e), which expired on Date 5.
3. Section 1.165-11(e) requires a taxpayer to make the § 165(i) election on a return, amended return, or claim for refund for the year preceding the disaster. Accordingly, the statement filed with the taxpayer's Year 2 return was not effective as a § 165(i) election. It was also filed after the period for making the election under § 1.165-11(e) had expired.

## FACTS

The taxpayer is a corporation that uses the calendar year as its tax year.

The examination of the taxpayer's tax return for Year 1 commenced on Date 1. On Date 3, the taxpayer received an Examination plan (the Plan) for the examination of the

tax return for Year 1. According to the Plan, all taxpayer proposed adjustments (TPAs) submitted by the taxpayer had to be individually numbered and formatted in a specified manner.

During Year 2 the taxpayer sustained losses from Hurricanes 1 and 2. We assume for purposes of this discussion that these were disaster losses eligible for the § 165(i) election. The taxpayer did not elect to claim the disaster losses as a deduction on its tax return for Year 1, which, according to the Internal Revenue Service's records, was filed on Date 2.<sup>1</sup>

On Date 4, the taxpayer submitted a two-page document (the Date 4 document) advising Examination that the taxpayer was proposing an adjustment to the taxpayer's tax return for Year 1. The document indicated that the proposed adjustment was an election pursuant to §§ 165(i) and 1.165-11 to take into account in Year 1 disaster losses sustained by the taxpayer in Year 2. Although the first page of the Date 4 document stated that the enclosure (the second page of the document) was a taxpayer proposed adjustment, the second page did not have a designated TPA number and was not presented in the format specified by the Plan. The document stated that disaster losses were suffered at various taxpayer facilities in various states as a result of both Hurricanes. The document did not propose an adjustment, but stated that the final amount of casualty losses subject to the deduction would be provided in a "final Taxpayer Proposed Adjustment" at a later date. The taxpayer did not specify which losses were the subject of the election, which facilities were affected, which state the losses occurred in, which hurricane caused the losses, the nature of the damage, or the amount of the losses.

On Date 5, the original due date for the Year 2 tax return, the period for making the § 165(i) election for the Year 2 losses expired.

During monthly meetings following Date 4, the taxpayer informed Examination that it intended to file a claim with respect to the disaster losses.

On Date 6, the taxpayer filed its tax return for Year 2. A copy of the Date 4 document was attached to the Year 2 return.

On Date 7, the taxpayer submitted TPA X. The TPA was numbered and in the format required by the Plan. The TPA stated that the taxpayer was making the § 165(i) election for one particular loss at one particular location in a particular state, as a result of one of the hurricanes (Hurricane 2). The TPA claimed a specific amount as a negative adjustment to taxable income. It stated that it was not a revision of a previous TPA.

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<sup>1</sup> The taxpayer asserts that the Year 1 return was filed on a different date. This would not affect the current analysis.

On Date 8, Examination sent taxpayer an e-mail informing the taxpayer that the Service could not accept TPA X because the regulations require the taxpayer to file a formal claim for refund to make the § 165(i) election.

In response, the taxpayer filed a protest on Date 9 and a supplemental protest on Date 10.

## LAW AND ANALYSIS

Section 165(i) of the Internal Revenue Code provides that any loss attributable to a disaster occurring in an area subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Disaster Relief and Emergency Assistance Act may, at the election of the taxpayer, be taken into account for the taxable year immediately preceding the taxable year in which the disaster occurred.

Section 1.165-11(e) of the Income Tax Regulations provides that a § 165(i) disaster loss must be made by filing a return, an amended return, or a claim for refund clearly showing that the election has been made. In general, the return or claim should specify the date or dates of the disaster which gave rise to the loss, and the city, town, county, and State in which the property which was damaged or destroyed was located at the time of the disaster.

Under § 1.165-11(e), the § 165(i) election must be made on or before the later of (1) the due date (without regard to extensions) for filing the income tax return for the taxable year in which the disaster actually occurred, or (2) the due date (with extensions) for filing the income tax return for the taxable year immediately preceding the taxable year in which the disaster actually occurred.

Section 301.6402-2(b)(1) of the Regulations on Procedure and Administration provides that the claim for refund must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. In addition, the statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

Section 301.6402-3(a)(3) of the Income Tax Regulations, provides that in the case of an overpayment of income taxes for a taxable year of a corporation for which a Form 1120 has been filed, a claim for refund shall be made on Form 1120X ("Amended U.S. Corporation Income Tax Return").

### Issue 1: Section 165(i) Election on Informal Refund Claim

The regulations in § 1.165-11(e) prescribe the proper time and manner for making a § 165(i) election. To be effective, an election must be made on a qualifying document. An election that is not made on a return, or an amended return (presumably a non-refund amended return), must be made on a “claim for refund.” We interpret that reference as incorporating the requirements for an effective refund claim under § 6402 and the corresponding regulations and case law. Thus, a § 1.165-11(e) election that is made on a claim for refund must meet the requirements under both § 1.165-11(e) and § 6402.<sup>2</sup>

According to the § 6402 regulations, a claim for refund by a corporate taxpayer should be made on Form 1120X. The regulations further provide that the statement of the grounds and facts in support of the refund claim must be verified by a written declaration that it is made under the penalties of perjury. See §§ 301.6402-2(b)(1) and 301.6402-3(a)(3). Nevertheless, the courts have recognized the informal claim concept for all taxpayers, including corporate income taxpayers who, under the regulations, otherwise should have filed a timely claim on Form 1120X. See, e.g., New England Elec. Sys. v. United States, 32 Fed. Cl. 636 (1995) (although formal claim on Form 1120X was untimely in part, written submissions to IRS other than the Form 1120X -- when combined with background knowledge of IRS auditors -- found to be valid informal claim); Arch Engineering Co. v. United States, 783 F.2d 190, 192 (Fed. Cir. 1986). A number of courts have held that various documents, other than returns, may qualify as informal claims for refund. However, such informal claims must have a “written” component and must meet certain specificity criteria such as a clear request for a refund, sufficient details, and the grounds for the refund. Id. at 192 (there are no rigid guidelines for informal claims, except that such a claim must have a written component and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years.)

The § 6402 regulations require taxpayers to seek income tax refunds via tax returns or amended tax returns. The § 1.165-11(e) regulations contain broader language than the § 6402 regulations, requiring that taxpayers make the disaster loss election by filing a return, an amended return, or a claim for refund. Because the courts do not view the more specific language of section 6402 as a bar to informal claims for refund, we conclude that the language used in § 1.165-11(e) would not bar the use of informal claims for refund, providing that all of the elements of the informal claim doctrine are satisfied, as well as the requirements of § 1.165-11(e).

In appropriate circumstances, therefore, we believe that a § 165(i) election that is made on a document meeting the requirements of an informal claim for refund, for purposes of § 6402 and § 6511, may be effective to meet the deadline in § 1.165-11(e) for making

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<sup>2</sup> The taxpayer suggests that because § 1.165-11(e) refers to an “amended return” separately from a “claim for refund,” the latter phrase must refer to some document other than an amended return. We interpret the regulation as intended to cover, for example, a situation in which an amended return reduces the amount to be paid and is not itself a refund claim, not as raising the negative implication the taxpayer suggests. See note 3 below.

the § 165(i) election. However, such a filing should be perfected by subsequently filing a formal refund claim.

Issue 2: Whether the taxpayer filed a qualifying informal claim.

It is unclear whether the taxpayer claims that the two-page document submitted to the IRS on Date 4 amounted to an informal claim making the § 165(i) election. In any case, we conclude that the document did not satisfy the requirements of either § 6402 or § 1.165-11(e).

The Date 4 document lacked the necessary elements of an informal claim for refund under § 6402. Although the first page of the document stated that the enclosure (the second page of the document) was a taxpayer proposed adjustment, the second page did not have a designated TPA number and was not presented in the format specified by the Plan. The document stated that disaster losses were suffered at various taxpayer facilities in various states as a result of both Hurricanes. The document did not specify which losses were the subject of the election, which facilities were affected, which state the losses occurred in, which hurricane caused the losses, the nature of the damage, or the amount of the losses. Moreover, the document did not propose an adjustment, but stated that the final amount of casualty losses subject to the deduction would be provided in a “final Taxpayer Proposed Adjustment” at a later date. At most, it averred that the taxpayer would submit a refund claim in the future. The courts have generally found such “claim to be filed later” notifications to fail as informal claims. See, e.g., D’Amelio v. United States, 679 F.2d 313, 315 (3d Cir. 1982).

For the same reasons, the Date 4 document is deficient as an election under § 1.165-11(e). For example, a § 1.165-11(e) election is generally made on a disaster-by-disaster basis, see § 1.165-11(d), but the Date 4 document, which was almost completely open-ended with respect to the location and nature of the damage, did not provide a basis for determining whether a purported election was being made with respect to Hurricane 1, Hurricane 2, or both. Each Hurricane was a separate declared disaster. If under the taxpayer analysis, the Date 4 document was an election for both, then it would be unclear whether the document filed by the taxpayer on Date 7, TPA X, which only purported to make the § 165(i) election with respect to Hurricane 2, was an implicit revocation of the Hurricane 1 election. Under the taxpayer’s analysis, its Date 4 election with respect to Hurricane 1 might arguably still be in effect, “dormant” but capable of perfection indefinitely – clearly an absurd result. We recognize that a filing may be effective as a § 165(i) election even if certain details must be furnished later. However, we do not believe that a vague “placeholder” document such as the Date 4 document – indefinite as to the nature, scope, and location of the claimed losses, which state they occurred in, which disaster they resulted from, or even whether an election or elections were being made – is the type of document contemplated in the § 165(i) regulations.

Alternatively, the taxpayer contends that the more specific documents submitted to the IRS on Dates 7 and 9 (TPA X and the initial protest) represented an informal claim for a refund. Whether these documents met the requirements of § 6402 is irrelevant in this situation because under the provisions of § 1.165-11(e) the taxpayer was required to make a disaster loss election by Date 5. In addition, neither TPA X nor the protest can be viewed as “perfecting” a timely informal claim, since neither document was filed on the form prescribed in § 1.165-11(e) and, as discussed above, the Date 4 document did not constitute an informal claim for refund.

### Issue 3: Election on disaster-year return.

Finally, the taxpayer asserts that a § 165(i) election was made by attaching a copy of the Date 4 document to the tax return for Year 2. This contention is incorrect for several reasons.

First, as discussed in the last section, the Year 2 return was filed on Date 6, which was after the period for making the § 165(i) election had expired, on Date 5, and no timely informal claim had been filed that the Year 2 return could be viewed as perfecting. In addition, the copy of the Date 4 document attached to the Year 2 return suffered from the same vagueness as the original Date 4 document, as discussed above.

More broadly, however, it is clear that the “return” referred to in the § 1.165-11(e) regulations is the return (or amended return, or claim for refund) for the year preceding the year of the disaster, not the year of the disaster. The first sentence of § 1.165-11(e) specifies that an election to claim a deduction with respect to a disaster loss “for” the taxable year immediately preceding the taxable year in which the disaster actually occurred must be made “by filing a return, an amended return, or a claim for refund” showing the election. The reasonable reading of that sentence is that the “return” referred to is the return of the year “for” which the election is being made. This is logical, because by definition the preceding-year return is the return affected by the casualty loss deduction that is being carried back; similarly, any refund will be computed by redetermining the tax liability for the preceding year, not the disaster year.<sup>3</sup>

Any possible ambiguity is cleared up by the fact that this interpretation is consistent with the long-standing administrative interpretation of the requirement. For many years, the Service published an annual list of declared disasters as to which the § 165(i) election could be made. The first such publication, issued prior to the § 1.165-11(e) regulations, provided:

A taxpayer who qualifies may take the deduction for the loss in the preceding year’s return by electing to do so. *The election is made by filing the original or an*

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<sup>3</sup> Under the third sentence of § 1.165-11(e), the election must be made by the later of (1) the unextended due date of the disaster-year return, or (2) the extended due date of the preceding-year return. The fact that both returns are referenced in computing this time period does not mean that the election may be made on either return.

*amended income tax return for the taxable year preceding the year in which the disaster occurred* and taking the deduction for the loss in that return. Or, he may file a claim for refund on Form 843 and supply the necessary facts and computation to support his claim.

Rev. Rul. 63-21, 1963-1 C.B. 37 (emphasis added).<sup>4</sup> Substantially identical language was contained in the lists published each year, before and after the regulations were promulgated, until the annual list was discontinued (when the Service determined that taxpayers could find the information online). See, e.g., Rev. Rul. 2003-29, 2003-1 C.B. 587 ("the taxpayer may elect to claim a deduction for that loss *on the taxpayer's federal income tax return for the taxable year immediately preceding the taxable year in which the disaster occurred*"). See also Pub. 547, *Casualties, Disasters, and Thefts* (2011), p. 13 ("How to deduct your loss in the previous year."). The taxpayer's contention is without merit.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call \_\_\_\_\_ if you have any further questions.

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<sup>4</sup> Note that this language sheds light on why the § 1.165-11(e) regulations refer to both an "amended return" and a "claim for refund." See note 2 above. An income tax refund claim was not always made on an amended return, and an amended return is not always a refund claim.