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**From:** [REDACTED]

**Sent:** Thursday, January 12, 2017 3:30:02 PM

**To:** [REDACTED]

**Cc:** [REDACTED]

**Bcc:**

**Subject:** RE: Request for Assistance on NOL issue, [REDACTED]

[REDACTED] Congress delineated the specific requirements in sections 1311-1314 to ensure that relief would be afforded only in limited circumstances. Because the Service would be the party attempting to invoke the mitigation provisions, it would bear the burden to prove that the following specific requirements have been met:

1. An error must have occurred in a taxable year which cannot otherwise be corrected by operation of law;
2. There was a determination for another year with respect to the item giving rise to the error;
3. The determination was within one of the categories enumerated in section 1312 as a circumstance of adjustment; and
4. The party who prevailed in the determination maintained a position that was adopted there and that was inconsistent with the erroneous treatment.

See *Fruit of the Loom, Inc. v. Commissioner*, 72 F.3d 1338, 1341-42 (7th Cir. 1996).

The Service is clearly able to meet its burden in proving the first three elements: (1) petitioner was allowed to carryback the entire NOL in even though a portion of that NOL had been carried over to the , and the statutory period is closed; (2) the court's decision allowing carryback of the NOL to is a determination under section 1313(a)(1); and (3) double allowance of a deduction is a circumstance of adjustment under section 1312(2).

It is not clear that the Service could meet its burden in proving the fourth element. See IRC § 1311(b)(1). By carrying over a portion of the NOL to ,

. It would seem equitable for this to constitute the maintenance of an inconsistent position by taxpayer because otherwise the Service is disadvantaged in making adjustments to the earlier year if the error cannot be corrected in the later year.

. Nonetheless, the mitigation provisions were not drafted to be a general equitable remedy. The specific elements must be met and [REDACTED].

[REDACTED]

[REDACTED]

If the Service does pursue mitigation as a basis for moving forward with an examination of the [REDACTED], we note that the Service has one year from the date of the determination ( [REDACTED] ) to make an assessment.

Please let us know if you have any questions.

Thanks,