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From: [REDACTED]
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To: [REDACTED]
Cc: [REDACTED]
Bcc:
Subject: RE: Mitigation Issue

You asked whether the mitigation applies to allow taxpayers to claim refunds by carrying back certain NOLs to closed years () and () when examination of an open year () leads to the disallowance of a carryforward of a different NOL and revealed the taxpayers' errors in carrying forward the NOLs without making the election to waive the carryback period. The facts, as we understand them, are as follows.

had NOLs in taxable years , and . It failed to make an election to forego the carryback period and instead carried the and NOLs to and then carried the NOL to . In examining the tax year, the revenue agent discovered that the NOL should have been carried back first to , and then any excess carried forward to . To determine the correct amount, however, the revenue agent had to correct the NOL deduction taken in , which should have been carried back to and . The result is that, if all the errors were corrected, the taxpayer would have an overpayment in , , and , and a deficiency in .

had NOLs in taxable years and . It failed to make an election to forego the carryback period and instead carried the NOL to and and then carried the NOL to . In examining the tax year, the revenue agent discovered that the NOL should have been carried back to . In order to determine the correct calculations, the revenue agent corrected the NOL from , that should have been carried back to and , with the remainder carrying forward to . The result for is that, if all the errors were to be corrected, there is an overpayment in and and deficiencies in , , and .

In order for mitigation to apply, (1) correction in the error year is barred by a law or rule of law, (2) there is a determination as defined under section 1313(a), (3) there is a circumstance of adjustment as defined under section 1312, and (4) there is a condition necessary for adjustment as defined under section 1311(b). The "error" referred to is

the failure to carry back the taxpayers' NOL losses and the failure to file an election to forego the carryback period.

Here, the first requirement, a correction in the error year is barred by a law or rule of law, is met. For both taxpayers, tax years _____ and earlier are closed, and those are the years in which the error would need to be corrected.

The second requirement is not currently met, however, the parties can satisfy this requirement if the parties execute a closing agreement or other agreement meeting the requirements of section 1313(a). Alternatively, this requirement would be met if the taxpayers filed a refund claim, and it was denied, for the _____ tax year based on the _____ NOL carryback. The statute of limitations regarding the carryback of NOLs is governed by 6511(d)(2), which states that in lieu of the normal 3 year period of limitation, when the claim for credit or refund relates to an NOL carryback, the period shall be three years from the time prescribed for filing the return for the taxable year of the NOL. In short, the relevant statutes are the years in which the NOLs occurred, rather than the years for which the carryback results in a refund.

This situation meets the circumstance of adjustment as described in section 1312(4), a double disallowance of a deduction under section 1312(4). Exam proposes to disallow the carryforward of the _____ NOLs to _____ and although the carryback of the NOLs is allowed, a refund for _____ would not be allowed because the NOL from _____ for _____ and the NOLs from _____ and _____ for _____ were also improperly carried forward without waiving the carryback period. When those NOLs are disallowed in the refund claim for the _____ tax year, it would result in a double disallowance because the _____ and _____ years are closed for both _____ and _____.

In order for mitigation to apply for circumstances described in section 1312(4), the resulting refund must not have been barred by any law or rule of law at the time the taxpayer first maintained that it was entitled to such deduction for the taxable year to which the determination relates. I.R.C. § 1311(b)(2)(B).

_____ filed its _____ income tax return, carrying forward the _____ NOL, on _____. The statute of limitation to file a refund for _____ income tax year expired on _____. Thus, the _____ tax year was open when _____ first maintained it was entitled to the _____ NOL deduction, and mitigation could apply to allow _____ to carryback its _____ NOL to _____. The amount subject to recovery using mitigation is limited to the amount of the double disallowance, in this case _____, the amount of the _____ NOL.

_____ filed its _____ income tax return, carrying forward the _____ and _____ NOLs on _____. The statute of limitations to file a refund for _____ and _____ income tax years expired on _____ and _____, respectively, so both years were open when _____ first maintained it was entitled to the _____ and _____ NOL deductions. Thus, mitigation could apply to allow _____ to carryback its

NOL to and its NOL to , if a determination were to exist with respect to
income tax year.

Please feel free to contact me if you have any questions. Thank you.