

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

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date: May 24, 2010

to: Susan C. Joseph
Chief, Specialty Accounts
Process & Program Management

from: Charles B. Christopher
Chief, Branch 7
Procedure and Administration

subject: Katrina Loss Statute of Limitations

This memorandum responds to your request for advice. This advice was coordinated with Branch 1 of Procedure & Administration.

ISSUES

1. Whether, for disasters declared prior to January 15, 2009, and in accordance with IRS-issued guidance, the applicable period in which to file a claim for credit or refund with respect to net operating loss or capital loss carrybacks pursuant to I.R.C. § 6511(d)(2) includes the period of any postponement of time under section 7508A for filing the original return claiming the loss even if the taxpayer did not utilize the postponement of time.
2. Whether, for disasters declared after January 15, 2009, and in accordance with IRS-issued guidance, the applicable period in which to file a claim for credit or refund with respect to net operating loss or capital loss carrybacks pursuant to I.R.C. § 6511(d)(2) includes the period of any postponement of time under section 7508A for filing the original return claiming the loss even if the taxpayer did not utilize the postponement of time.

CONCLUSIONS

1. Guidance issued by the IRS in response to Hurricane Katrina treated postponement periods as extensions in order to provide maximum relief for taxpayers affected by the unprecedented devastation. Because the special

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limitation period for filing a claim for credit or refund that relates to an overpayment attributable to a net operating loss carryback or capital loss carryback found in I.R.C. § 6511(d)(2)(A) provides that the limitation period ends 3 years after the time prescribed by law for filing the return, including any extensions, it is appropriate that the postponement period provided in response to Hurricane Katrina (and other federally declared disasters declared between January 1, 1999, and January 15, 2009, where similar guidance was issued) be treated in the same manner as an extension for purposes of I.R.C. § 6511(d)(2)(A).

2. Treas. Reg. § 301.7508A-1(b), effective for disasters declared after January 15, 2009, explicitly states that “[t]he postponement of the deadline of a tax-related act does not extend the due date for the act, but merely allows the IRS to disregard a time period of up to one year for the performance of the act.” The regulations further provide that the postponement period under I.R.C. § 7508A runs concurrently with extensions of time to file and pay, if any. Therefore, with respect to federally declared disasters declared after January 15, 2009, the postponement period does not serve as an extension for purposes of I.R.C. § 6511(d)(2)(A).

Background

In October, the office of Special Counsel to the National Taxpayer Advocate (NTA) asked the assistance of Procedure & Administration (P&A) to resolve an issue relating to Hurricane Katrina losses and I.R.C. § 6511(d)(2). The questions centered on whether a claim to carry back net operating losses (NOLs) is timely where the 2005 return claiming the disaster-related casualty loss was filed April 15, 2006, prior to the end of postponement period (October 16, 2006 or April 15, 2007, where extension filed). Procedure & Administration responded that if the taxpayer timely filed a 2005 return and claimed the casualty loss, the sole issue is when must the taxpayer file amended returns for the 2002, 2003, 2004 tax years to claim refunds to carry back NOLs. We concluded that the taxpayer’s refund claim was timely because it was filed on a date before three years after the extended due date. In other words, the taxpayer had until October 16, 2009, to file an amended return claiming the NOL and seeking a refund. Because the taxpayer filed the claim on October 14, 2009, the claim was timely.

In January 2010, P&A learned from the office of Special Counsel to the NTA that Accounts Management in Austin disallowed the taxpayer’s claims for [REDACTED] NOL carrybacks. Accounts Management concluded that, because the taxpayer was granted an extension per Katrina disaster but did not avail himself of the extension, the statute started to run on April 15, 2006, the date that the taxpayer filed the return, making the RSED April 15, 2009. They did not believe the taxpayer’s failure to take advantage of the longer period of time to file his [REDACTED] return is relevant to the I.R.C. § 6511(d)(2) analysis. The taxpayer timely claimed the loss on his [REDACTED] return.

In response to the above, P&A reiterated its earlier advice that the claim for NOL carrybacks was timely if made by October 16, 2009. We then advised that, under the terms of the I.R.C. § 7508A regulations effective for disasters that occurred during the period January 1, 1999 – January 15, 2009, while the postponement period does not change the time prescribed by law for filing the return, the postponement period is treated in the same manner as an extension for purposes of section 6511(d)(2).

Thereafter, Accounts Management had additional questions whether, under the terms of the I.R.C. § 7508A regulations effective for disasters declared after January 1, 1999, and before January 15, 2009, returns claiming NOL carrybacks were timely filed where the claims were filed more than three years after the original return claiming the loss was filed.

Analysis

Section 6511(d)(2) provides for a special period of limitation with respect to net operating loss or capital loss carrybacks. Section 6511(d)(2)(A) states in relevant part:

If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) [which provides special rules in case of extension of time by agreement] in respect of such taxable year, whichever expires later.

I.R.C. § 6511(d)(2)(A).

Application of I.R.C. § 6511(d)(2) per guidance issued pursuant to I.R.C. § 7508A, effective for disasters declared between January 1, 1999, and January 15, 2009

The regulations issued pursuant to I.R.C. § 7508A (Treas. Reg. § 301.7508A-1), effective for disasters declared between January 1, 1999, and January 15, 2009 (including Hurricane Katrina) state in paragraph (b)(1) that the IRS may “disregard a period of up to 90 days in determining, under the internal revenue laws ... whether any or all of the acts described in (c) were performed within the time prescribed.” These regulations were substantially amended by the Victims of Terrorism Tax Relief Act of 2002, which extended the time period during which the Secretary may postpone certain tax-related acts to a period of up to one year. The regulations do not address whether a postponement period is intended to serve as an extension for purposes of other statutes. Therefore, we must look to other IRS-issued guidance to make that determination.

Guidance issued by the IRS in response to Hurricane Katrina, News Releases and Notice 2005-73 evidence that, at that time, the IRS interpreted a postponement period in the same manner as an extension of the statutory due date under the terms of the regulations issued pursuant to I.R.C. § 7508A.

See, News Release IR-2005-84, August 30, 2005 (“[t]he **Extension Period** for returns and other tax payments is Aug. 29 – Oct. 31, 2005) (emphasis added); News Release IR-2005-109, September 21, 2005 (“tax relief will be automatic, and taxpayers won’t need to do anything to get the **extensions** and other relief available) (emphasis added); News Release, IR-2005-112, September 28, 2005 (**Deadlines** for Taxpayers Affected by Hurricane Katrina **Extended** Until Feb. 28”) (emphasis added); and, Notice 2005-73, October 17, 2005, (“**relief is granted under sections 6081, 6161, 6656, and 7508A** of the Internal Revenue Code”) (emphasis added). Section 6081 provides for an extension of time to file.

Lack of clarity as to the effect of the postponement period in the regulations issued pursuant to I.R.C. § 7508A effective for disasters declared between January 1, 1999, and January 15, 2009, and statements made in published guidance issued by the IRS in response to Hurricane Katrina that deadlines were “extended,” may have allowed affected taxpayers to conclude that the postponement period served as an extension for purposes of I.R.C. § 6511(d)(2)(A). Accordingly, where an affected taxpayer filed his 2005 return claiming a disaster-related casualty loss prior to the end of the postponement period (October 16, 2006, or April 15, 2007, if extension filed), a claim for credit or refund that relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback made pursuant to I.R.C. § 6511(d)(2)(B) is timely, if filed by October 16, 2009 (or April 15, 2010, if extension filed). In other words, the taxpayer is deemed to have filed on the last day of the period, October 16, 2006, even if the taxpayer filed earlier. If the taxpayer filed the claim for refund prior to October 16, 2009, that claim is timely.

Application of I.R.C. § 6511(d)(2) under regulations issued pursuant to I.R.C. § 7508A, effective for disasters declared after January 15, 2009

Revised Treas. Reg. § 301.7508A-1, effective for disasters declared after January 15, 2009, states in paragraph (b)(3) that the postponement period under section 7508A runs concurrently with extensions of time to file and pay, if any, under other sections of the Internal Revenue Code. The revised regulations further state in paragraph (b)(4) that, “[t]o the extent that other statutes may rely on the date a return is due to be filed, the postponement period will not change the due date of the return.” As such, under the terms of revised Treas. Reg. § 301.7508A-1, effective for disasters declared after January 15, 2009, the postponement period provided in response to a federally declared disaster cannot serve as an extension for purposes of the special limitation period provided in I.R.C. § 6511(d)(2)(B).