Net Operating Loss Carrybacks Are Not Tax Subsidies

To the Editor:

Your June 15 issue contains a news story by Alexis Gravely, "More Than 200 Groups Want NOL Carryback Change Reversed" that refers to a letter, with 233 signatory organizations, dated June 10, 2020, addressed to all members of Congress, urging the repeal of the provision in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) that permits the carryback of net operating losses incurred in 2018, 2019, and 2020 to the preceding five tax years because the provision allows "wealthy business owners and corporations to use losses in certain years to avoid paying taxes in other years." The letter alleges the provision is an "unwarranted tax break" that in the context of an "unprecedented national emergency" is "particularly outrageous."

That is quite an accusation . . . especially because it has absolutely no validity as a matter of sound tax or economic policy! To put the matter in context, the function of NOL carrybacks and carryforwards is to allow a business to pay tax on the income it has earned over its existence without regard to the artificial (but necessary) imposition of an annual reporting period. For example, assume Company A is in business for two years. In year 1 it has income of 100, in year 2 it has a loss of 100 and goes out of business. Measured over its life cycle, the business has had no income. In the absence of a loss carryback provision (or its equivalent) this entity has overpaid its tax.

The Joint Committee on Taxation does not list NOL carrybacks and carryforwards as "tax expenditures." Rather, it has stated:

> The Joint Committee staff assumes that normal income tax law would provide for the carryback and carryforward of net operating losses. The staff also assumes that the general limits on the number of years that such losses may be carried back or forward were chosen for reasons of administrative convenience and compliance concerns, and may be assumed to represent normal income tax law (Joint Committee on Taxation, "Estimates of Federal Tax Expenditures for Fiscal Years 2019-2013," JCX-55-19, at 8 (Dec. 18, 2019)).

There are provisions of the CARES Act, and indeed the Internal Revenue Code in general, that do constitute tax subsidies. Those provisions are reported annually in the JCT document cited above and should be subject to a rigorous policy analysis. The NOL carryback provision is not one of them. Indeed the temporary provision should be made permanent to ameliorate the tax planning games that will be played to accelerate losses into 2020.

Sincerely,

Harry L. Gutman
Former chief of staff of the Joint Committee on Taxation
June 15, 2020 ■