



This Week in State Tax (TWIST)

January 23, 2023



to listen to the
podcast please
[click here.](#)

Virginia: Taxpayer Failed to Properly Elect to Forgo NOL Carryback

The Virginia Tax Commissioner recently responded to a protest regarding the election required to waive a net operating loss carryback. The taxpayer filed a consolidated federal income tax return and a separate Virginia corporate income tax return for the disputed tax years. On its 2015 Virginia return, the taxpayer claimed a net operating loss deduction against its 2015 federal taxable income based on a loss incurred in 2014. The Department of Taxation determined that in 2014 the taxpayer failed to elect to waive the two-year carryback that was allowed for the tax years at issue. After the Department carried back the loss, an assessment was issued for the 2015 tax year because the net operating loss deduction was fully utilized in 2013.

Under a Virginia regulation, taxpayers that do not want to carry back an NOL are required to file a statement so indicating with the original Virginia return for the tax year in which the NOL was incurred. The taxpayer argued that the election required to waive the two-year carryback of net operating losses did not apply to corporations filing separate returns in Virginia because the regulation was located in the administrative code under a section with the heading "Consolidated and Combined; Carryovers." The taxpayer also appeared to assert that because the Department's tax return instructions did not address the election, it was not required. The Commissioner disagreed with both arguments. The regulation, although under a heading referencing consolidated and combined returns, specifically stated that the election statement must be filed by a "corporation or an affiliated group of corporations." In addition, in the Commissioner's view, tax return instructions are not intended to be a comprehensive explanation covering all nuances of the tax code, but rather a source of helpful guidance for taxpayers.

The Commissioner also highlighted that Treasury likewise required a similar election statement to waive a federal net operating loss carryback. A corporation that files separately for federal purposes does not need to include the election statement with its return, but instead may check the box on Schedule K to waive the loss carryback for federal tax purposes. Virginia has routinely allowed corporations that checked the box on Schedule K to waive the state's net operating loss carryback. The taxpayer, however, did not check this box on Schedule K included with the separate federal pro forma return filed for the 2014 tax year. Accordingly, the Department's position was upheld. Please contact [Diana Smith](#) with questions on PD 22-149.



For more news and insights on tax developments, follow KPMG's U.S. Tax practice on Twitter – [@KPMGUS_Tax](#).

kpmg.com/socialmedia



The following information is not intended to be "written advice concerning one or more federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.