INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
July 15, 1999

Number: **199944004**
Release Date: 11/5/1999
Index (UIL) No.: 172.07-00 CC:DOM:IT&A:B6
CASE MIS No.: TAM-105852-99

District Director

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND: Taxpayer =

State A =

State A Code =

ISSUES: May deductions for state taxes, interest thereon, or interest on federal taxes generate a specified liability loss within the meaning of § 172(f)(1)(B)[1]?

CONCLUSION: Deductions for state taxes, interest thereon, or interest on federal taxes cannot generate a specified liability loss within the meaning of § 172(f)(1)(B).

FACTS: Taxpayer incurred a net operating loss (NOL) for each of its 1992, 1993, and 1995 taxable years. The NOL for each year was attributable in substantial part to deductions (deductions at issue) for asserted state income tax liabilities in excess of that reported by Taxpayer (additional state tax liabilities), interest thereon, and/or federal income tax deficiency interest . The additional state and/or federal taxes were attributable to Taxpayer's taxable years 1983, 1984, 1985, 1986, 1987, 1988, and 1990. Taxpayer treated the portion of each of its 1992, 1993, and 1995 NOLs generated by the deductions at issue as specified liability losses within the meaning of § 172(f)(1)(B). Because specified liability losses qualify for a 10-year carryback period under § 172(b)(1)(C), Taxpayer filed refund claims for its 1984 through 1986 taxable years.

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[1] Unless specifically provided otherwise, citations to sections which omit the title of the United States Code refer to sections of the Internal Revenue Code of 1986 as applicable to the taxable years at issue. Likewise, citations to the Code refer to the Internal Revenue Code of 1986.

LAW AND ANALYSIS:

The Statute

Prior to its amendment in § 3004(a) of the Tax and Trade Relief Extension Act of 1998, § 172(f)(1)(B) treated as a specified liability loss the portion of a NOL generated by:

> (B) any amount [other than product liability expenses and certain expenses related thereto] allowable as a deduction under [chapter 1 of the Internal Revenue Code] with respect to a liability which arises under a [f]ederal or [s]tate law or out of any tort of the taxpayer if-
>
> (i) in the case of a liability arising out of a [f]ederal or [s]tate law, the act (or failure to act) giving rise to such liability occurs at least 3 years before the beginning of the taxable year, or
>
> (ii) in the case of a liability arising out of a tort, such liability arises out of a series of actions (or failures to act) over an extended period of time a substantial portion of which occurs at least 3 years before the beginning of the taxable year.

For this purpose a liability is not taken into account unless the taxpayer used an accrual accounting method throughout the period or periods during which the acts or failures to act giving rise to the liability occurred.

The Legislative History

Congress first enacted the statutory language pertinent to this case in the Tax Reform Act of 1984 (1984 Act) when it enacted § 172(k) of the Internal Revenue Code of 1954. The amounts described in § 172(f)(1)(B) as specified liability losses were originally described in § 172(k) as deferred statutory or tort liability losses.

Prior to the enactment of the economic performance requirement in § 461(h), §1.461-1(a)(2) of the Income Tax Regulations generally treated an accrual method taxpayer as incurring a liability for federal income tax purposes when the following two-pronged (the all-events test) test was satisfied:

> (1) all the events occurred that established the fact of the liability, and
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> (2) the amount of the liability could be determined with reasonable accuracy.

The Treasury Department became concerned when courts began interpreting the two-pronged all-events test in a manner that allowed accrual method taxpayers to deduct liabilities far in advance of when the liabilities had to be satisfied by payment or other performance. Because of the time value of money, the benefit to taxpayers from such accruals could be substantial.[2] The Treasury Department's concern became particularly acute in the early 1980s with the advent of historically high United States interest rates.

For example, state and/or federal laws generally require miners to restore the surface of land which they strip mine to a condition comparable to its pre-mined state. A miner's legal obligation to restore arises when the miner disturbs the land, although actual restoration may not occur until some time thereafter.

If strip miners failed to reasonably estimate future costs to restore the land, the Service succeeded in preventing them from deducting estimated restoration costs for taxable years when the land was disturbed. Patsch v. Commissioner, 208 F.2d 532, 534-535 (3d Cir. 1953); Commissioner v. Gregory Run Coal Co., 212 F.2d 52, 57-58 (4th Cir.), cert. denied, 348 U.S. 828 (1954). On the other hand, if the deductions claimed were based on reasonably accurate estimates of future costs to restore, the courts generally allowed the strip miners to deduct the estimated costs for the taxable years when the land was disturbed. Harrold v. Commissioner, 192 F.2d 1002, 1006 (4th Cir. 1951); Denise Coal Co. v. Commissioner, 271 F.2d 930, 936 (3d Cir. 1959); Ohio River Collieries Co. v. Commissioner, 77 T.C. 1369, 1377 (1981).

Likewise, Treasury became concerned when courts concluded that the occurrence of a work-related injury satisfied the first prong of the all-events test in the case of uncontested self-insured workmen's compensation liabilities, thereby allowing taxpayers that could reasonably estimate liabilities to be paid well in the future, such as workmen's compensation disability or survivor annuities, to deduct such amounts currently rather than when actually paid. Crescent Wharf & Warehouse Co. v. Commissioner, 518 F.2d 772 (9th Cir. 1975); Wien Consolidated Airlines, Inc. v. Commissioner, 60 T.C. 13 (1973), aff'd, 528 F.2d 735 (9th Cir. 1976).

Another situation that concerned Treasury and involved a much greater potential for a taxpayer to deduct an amount far in excess of the present value of the legal obligation giving rise to that deduction involved the obligation to decommission a nuclear power plant. In the case of a nuclear power plant the legal obligation to decommission could arise well in advance of the time when the decommissioning was

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[2] For example, in an extreme case the present value of the tax savings attributable to an accrued liability could exceed the present value of the liability, transforming the creation of a liability into a profitable event for the taxpayer.

completed.[3]

The Administration decided to seek a legislative solution to the problem caused by cases such as Ohio River Collieries. Specifically, the Administration proposed the addition of an "economic performance" requirement to the all-events test. See Staff of the Joint Committee on Taxation, Summary of Administration's Revenue Proposals in the Fiscal Year 1985 Budget Proposal 31 (Comm. Print 1984). Under the proposed change, the all-events test would be "clarified" so that with certain exceptions, deductions would not be permitted until services were performed, the use of property actually occurred, or in the case of workmen's compensation or similar liabilities, the liability was actually satisfied. Id. "Under the proposal, the net operating loss carryback rules would be amended to allow losses to be carried back to the year in which the obligation generating the loss arose." Id.

In February 1984, the Subcommittee on Oversight of the House Ways and Means Committee held a hearing on the Administration's proposal to deal with "premature accruals" by the addition of a new economic performance requirement. See Timing and Measurement of Taxpayer Deductions for Obligations to be Paid in the Future, Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives, 98th Cong., 2d Sess. (February 24, 1984). Many of the taxpayers and tax practitioners who testified at the hearing objected to the Administration's proposal because in their view it would result in a mismatching of revenue and expenses.

For example, in the case of mining reclamation if reclamation costs can only be deducted in the taxable year when the work is actually done, such deductions will not be matched with the earlier gross income they helped to generate. On the other hand, as Treasury officials pointed out, because of the time value of money immediately deducting the total estimated cost of restoring the land overstates the true economic cost to the taxpayer.

To eliminate the distortions caused by the time value of money, Treasury officials advocated deferring deductions through the addition of an economic performance requirement. The potential mismatching resulting from imposing an economic performance requirement, however, could result in overtaxing taxpayers in certain

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[3] Decommissioning a nuclear power plant requires reducing the level of radioactivity in the plant to a level considered safe for unrestricted use. Some methods of decommissioning may take over 100 years to complete. Timing and Measurement of Taxpayer Deductions for Obligations to be Paid in the Future: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives, 98th Cong., 2d Sess. 112 (February 24, 1984) (statement of Donald W. Kiefer, Congressional Research Service, Library of Congress).

situations[4]. To remedy this potentially unfavorable result, Treasury officials proposed liberalizing the NOL carryback provisions for deductions deferred because of economic performance:

> We recognize that requiring deductions for future expenses to be taken in the year of economic performance also requires that the net operating carryback rules be amended to insure that taxpayers are not overtaxed. Our proposals provide for extension of the carryback period in appropriate circumstances to insure that the deferred expenses will be able to be fully utilized.
>
> Generally expenses attributable to liabilities arising more than 3 years prior to economic performance will be permitted to be carried back for a period not to exceed 10 years, subject to certain transition rules. Special carryback rules might be appropriate for certain expenses to be paid in the future such as the nuclear powerplant decommissioning costs.

Id. at 7 (statement of Ronald A. Pearlman, Deputy Assistant Secretary for Tax Policy, U.S. Treasury).

Congress adopted the Administration's proposed economic performance requirement by enacting § 461(h) of the Internal Revenue Code of 1954 in § 91(a) of the 1984 Act, and in § 91(d) of that act Congress simultaneously enacted the provision allowing the 10-year carryback for deferred statutory or tort liability losses. Furthermore, the discussion of the new 10-year carryback provision appears in the same section of the committee reports where § 461(h) is discussed.

Although the House and Senate Reports to the 1984 Act describe the operation of the proposed new 10-year NOL carryback provision, neither of these reports discuss the reason for its enactment. The Conference Report, however, provides:

> The House bill provides a 10-year carryback for net operating losses attributable to certain liabilities deferred under these provisions. ...
>
> The provisions of the bill apply generally to expenses incurred (without regard to the economic performance requirement) after the date of enactment. ...
>
> Conference agreement

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[4] For example, suppose that when an expense satisfies the economic performance requirement, and thus is allowed as a deduction, there is no gross income for it to offset for the taxable year allowable nor for any of the taxable years to which the deduction might be carried for the normal NOL carryback period.

The conference agreement generally follows the House bill, ...

H.R. (Conf.) Rep. No. 861, 98th Cong., 2d Sess. 872-73 (1984). Examination of the quoted language's context makes clear that the reference to provisions deferring liabilities refers to the economic performance requirement.

Sealy

In Sealy Corp. v. Commissioner, 107 T. C. 177 (1996), aff'd, 171 F.3d 655 (9th Cir. 1999)[5] the petitioners asserted that the portion of NOLs generated by deductions for the following items constituted specified liability losses within the meaning of § 172(f)(1)(B): (1) professional fees incurred to comply with reporting, filing, and disclosure requirements imposed by the Securities and Exchange Act of 1934, (2) professional fees incurred to comply with ERISA reporting requirements, and (3) professional fees incurred in connection with an IRS income tax audit.

The Tax Court held that deduction of the above expenses did not result in specified liability losses because the liabilities for the expenses did not arise under a federal or state law within the meaning of § 172(f)(1)(B). The Tax Court gave three reasons for its conclusion.

First, the court noted that the federal law cited by the petitioners did not establish the petitioners' liability to pay the amounts at issue. The petitioners' liability did not arise until the services were contracted for and received and the petitioners' choice of the means of compliance, rather than the cited regulatory provisions, determined the nature and amount of their costs. If the petitioners had failed to comply with the auditing and reporting requirements or had not obtained the particular services at issue, their liability would not have been measured by the value of the services they actually contracted for and received. 107 T.C. at 184.

Second, the court read the legislative history of § 172(f)(1)(B) to suggest that Congress intended the provision to apply only to liabilities the deduction of which the economic performance requirement caused to be deferred. Because the economic performance requirement did not delay petitioners' accrual of the deductions at issue, the court concluded that Congress did not intend for NOLs generated by those deductions to qualify as specified liability losses. Id. at 185-86.

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[5] On appeal the Ninth Circuit focused on the fact that the acts giving rise to the liabilities at issue in Sealy did not occur at least 3 years before the beginning of the taxable year of the related deductions as required by § 172(f)(1)(B)(i). The Ninth Circuit did not expressly address the Tax Court's conclusion that the liabilities at issue did not arise under federal or state law within the meaning of § 172(f)(1)(B).

Finally, in determining the scope of liabilities arising under either federal or state law within the meaning of § 172(f)(1)(B), the court considered the specific types of liabilities referred to in §172(f): product liability, nuclear decommissioning liabilities, and torts. Invoking the statutory construction rule of ejusdem generis, the court concluded that Congress intended the 10-year carryback to apply to a relatively narrow class of liabilities similar to those identified in the statute. The court thought the costs at issue in Sealy were routine costs not like those identified in the statute. Id. at 186.

Taxpayer Position

State A statutes impose the additional state tax liabilities and interest thereon at issue here. Likewise, federal statutes impose federal income tax deficiency interest. Therefore, Taxpayer asserts that the liabilities at issue arose under state or federal law within the meaning of § 172(f)(1)(B).

For each of the additional state tax liabilities and interest thereon, or liabilities for federal tax deficiency interest, Taxpayer contends that its filing of a state or federal income tax return, as applicable, not showing the correct amount of tax due for a taxable year constituted “the act” within the meaning of § 172(f)(1)(B)(i) giving rise to each of the liabilities at issue. Alternatively, Taxpayer contends that its failure to file a state or federal income tax return, as applicable, showing the correct amount of tax due for a taxable year constituted “the failure to act” within the meaning of § 172(f)(1)(B)(i) giving rise to each of the liabilities at issue. Because Taxpayer filed the applicable tax return for each of the tax liabilities at issue at least 3 years before the beginning of the taxable year for which Taxpayer deducted the applicable additional state tax liability or any interest thereon, or any applicable federal tax deficiency interest, Taxpayer contends the deductions at issue satisfy the 3-year test of § 172(f)(1)(B)(i). Therefore, Taxpayer asserts that the portion of any NOL generated by the deductions at issue constitutes a specified liability loss within the meaning of § 172(f)(1)(B).

Response

1. Liability Arising Under Federal or State Law

A. Narrow Class

Taxpayer implicitly argues that any liability literally imposed by federal or state law constitutes a liability arising under either federal or state law within the meaning of § 172(f)(1)(B). In contrast to the fact pattern in Sealy, state or federal statutes directly impose the liabilities at issue in this case. However, we agree with the Tax Court that Congress intended § 172(f)(1)(B) to apply to deductions allowable with respect to a relatively narrow class of liabilities rather than to deductions allowable with respect to any liability literally imposed under federal or state law.

The Tax Court's opinion is supported by the statutory construction rule of ejusdem generis and the legislative history to the 1984 Act. The Conference Report states that a 10-year carryback is provided for "net operating losses attributable to certain liabilities deferred under these provisions" H.R. (Conf.) Rep. No. 861, 98th Cong., 2d Sess. 872 (1984) (emphasis added), and the report's context makes clear that the provisions referred to encompass the economic performance requirement. Also see H.R. Rep. No. 432 (Part 2), 98th Cong., 2d Sess. 1256 (1984) (the 10-year carryback provision is for "certain deferred liability losses"). Based on the foregoing, it is clear that Congress intended to enact a limited exception to the normal 3-year carryback rule for a narrow class of liabilities when it enacted the statutory language pertinent to this case.

Moreover, when we examine the legislative history to the 1984 Act as well as the characteristics of the specifically enumerated liabilities in § 172(f) to determine the characteristics of the liabilities for which Congress intended § 172(f)(1)(B) to apply, we conclude that Congress did not intend state taxes, interest thereon, or interest on federal tax liabilities to be included within that class.

B. Characteristics of the Class

Application of the rule of ejusdem generis requires a determination of the characteristics of the class suggested by the enumerated items. The specific liabilities arising under federal or state law, identified in the statute and discussed in the legislative history to the 1984 Act, share a distinguishing characteristic. Inherent in the nature of each type of identified liability is an element of substantial delay between the the act or failure to act giving rise to the liability and the time a deduction may be claimed for the liability because of the economic performance requirement. For example, because of the economic performance requirement, a taxpayer's deduction for nuclear decommissioning costs is inherently delayed by the substantial number of years that expire between the time the decommissioning liability is created and the actual decommissioning of the plant.[6]

In contrast to the types of liabilities arising under federal or state law identified in the statute and the legislative history to the 1984 Act, a state tax liability constitutes a routine cost that does not involve an inherent substantial delay between the time the events giving rise to the liability occur and when the deduction for such liability becomes allowable. There may be substantial delays between the events giving rise to a state tax liability and the time when such liability becomes an allowable deduction. For example, an accrual method taxpayer may report too little state tax liability on its tax

[6] However, under § 468A an electing taxpayer may get deductions for certain amounts paid into a nuclear decommissioning reserve fund before beginning the decommissioning process.

return and then may unsuccessfully contest the assertion of a greater tax liability. In this case, assuming that the taxpayer does not pay the tax liability pending resolution of the contest, the tax deduction will be delayed until resolution of the contest and payment of the liability. Such a delay, however, is not part of the inherent nature of the liability. A taxpayer need not report and pay less than the proper amount of its state tax liability. Thus, a state tax liability does not have the inherent delay feature required to qualify for the narrow class of liabilities that arise under federal or state law within the meaning of § 172(f)(1)(B).

Likewise, it follows that an interest liability[7] on a due but unpaid state or federal tax liability does not possess the inherent delay characteristics necessary to qualify as arising under federal or state law within the meaning of § 172(f)(1)(B). Consequently, the deductions at issue cannot generate a specified liability loss within the meaning of § 172(f)(1)(B).

2. Act or Failure to Act

We have concluded that the additional state tax liabilities, interest thereon, and federal tax deficiency interest, do not constitute liabilities arising under federal or state law within the meaning of § 172(f)(1)(B). In addition, we disagree with Taxpayer's assertion that the "act or failure to act" giving rise to all of the interest liabilities at issue satisfies the 3-year test of § 172(f)(1)(B)(i). Therefore, even if the liabilities at issue did arise under federal or state law within the meaning of § 172(f)(1)(B), some of the interest deductions still would not generate a specified liability loss.

By using the phrase "the act or failure to act"[8] rather than say "an act or failure to act" § 172(f)(1)(B)(i) requires identifying a particular act or failure to act giving rise to the

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[7] Moreover, in the case of interest economic performance occurs as the interest economically accrues. § 1.461-4(e). Thus, the economic performance rules cannot cause a delay between the events giving rise to an interest liability and the time such interest becomes an allowable deduction for federal income tax purposes.

[8] Section 1 of title 1 of the United States Code provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise words importing the singular include and apply to several persons, parties, or things; ..." In this case the legislative history to § 172(f)(1)(B) indicates that the term "act or failure to act" as used in that section should not be construed to include any number of acts or failures to act. See First National Bank v. Missouri, 263 U.S. 640 (1924) (rule providing that words importing the singular number may extend and be applied to several persons or things is not one to be applied except where it is necessary to carry out the evident intent of the statute).

liability. However, the occurrence of a given event, such as the creation of a liability, generally results from an infinite series of necessary preceding causes. Because a number of acts or failures to act may satisfy a “but for” test with regard to causation of a given liability, the phrase “act or failure to act” cannot be said to be free from ambiguity. Therefore, one must examine the legislative history of § 172(f)(1)(B) to determine which act or failure to act in the chain of causation leading to the creation of a given liability to treat as “the” act or failure to act for purposes of § 172(f)(1)(B)(i).

As noted above, the legislative history indicates that Congress’ primary concern when it enacted the § 172(f)(1)(B) language pertinent to this case was to ensure that taxpayers, whose deduction of certain liabilities was deferred because of the economic performance requirement, be able to use those deductions when finally allowable to reduce taxable income, either in the taxable year allowable or in prior taxable years through the vehicle of the new 10-year NOL carryback. Thus, Congress only meant to provide relief for existing liabilities the deduction of which is deferred for a prescribed period.

To effectuate this intent, we believe the final act or failure to act[9] in the chain of causation leading to the creation of a given liability from which it can be determined that the taxpayer has a legal obligation qualifies as “the act or failure to act” within the meaning of § 172(f)(1)(B)(i). Treating an act or failure to act occurring any earlier than this as the relevant act or failure to act for § 172(f)(1)(B)(i) purposes could frustrate the intent of Congress by allowing an extended carryback period for deductions for liabilities involving little or no deferral between the actual creation of the liability and the allowance of the deduction therefore.

With regard to interest on federal tax liabilities § 6601(a) provides:

> If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before

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[9] Under this view if a taxpayer contests a liability, resolution of the contest against the taxpayer does not constitute the final act or failure to act giving rise to the taxpayer’s liability. "The principal function of a judgment is to adjudicate the existence or nonexistence of the right or liability in question." 46 Am. Jur. 2d Judgments § 8 (1969). "A judgment or decree duly entered, establishes in the most authentic form, that which had theretofore been in dispute, or unsettled or uncertain." Adams v. Davis, 156 P.2d 207, 209 (Sup. Ct. Utah 1945). A judgment for monetary damages for past acts does not create any liability that did not already exist, however, it merely confirms its existence. Thus, entry of a judgment should not be considered the act or failure to act which gives rise to a liability for purposes of § 172(f)(1)(B). This view is also consistent with the meaning of the phrase “act or failure to act” as used in § 6501(l)(1).

> the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

Section 6622(a) provides that such interest shall be compounded daily.[10]

Under this statutory scheme a taxpayer incurs no obligation to pay interest on federal taxes until immediately after the taxpayer fails to pay the tax by the due date. At that time the taxpayer becomes liable for a single day's interest on the unpaid tax. For each additional day any portion of the tax or accumulated interest thereon remains unpaid, the taxpayer becomes liable for an additional day of interest on the unpaid tax and interest. Consequently, interest on unpaid federal taxes and interest thereon economically accrues, that is, the taxpayer becomes liable for such interest, on a daily basis even though the interest may not accrue for deduction purposes until some later time, for example, because the asserted tax and interest liability is contested.

The final failure to act within the meaning of § 172(f)(1)(B)(i) giving rise to an interest liability on federal taxes and unpaid interest thereon for a particular day is the failure to pay the balance, outstanding as of the close of the prior day, on which such liability economically accrues. Therefore, compound interest that economically accrues for the taxable year such interest becomes deductible or for the 3 taxable years preceding such taxable year does not satisfy the 3-year test of § 172(f)(1)(B)(i).

3. With Respect To

We do not find it necessary to express an opinion regarding exactly which "act or failure to act" within the meaning of § 172(f)(1)(B)(i) gave rise to the pertinent state or federal tax liabilities in this case. We agree with Taxpayer, however, that the "act or failure to act" within the meaning of § 172(f)(1)(B)(i) that gave rise to the tax liabilities upon which the interest deductions at issue in this case accrued satisfied the 3-year test of § 172(f)(1)(B)(i). Therefore, if it were to be determined, contrary to our primary conclusion in this memorandum, that such tax liabilities did arise under federal or state law within the meaning of § 172(f)(1)(B), it would be necessary to interpret the meaning of the phrase "with respect to" as used in § 172(f)(1)(B).

As used in § 172(f)(1)(B) the meaning of the compound preposition "with respect to" is ambiguous. One might interpret it as meaning "related to in some manner". Under this broad interpretation, in addition to deductions for the liability itself, other related deductions having some connection with the liability would qualify as deductions

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[10] With regard to the timing of the imposition of compound interest liability on unpaid State A income taxes, the State A statutes operate in the same manner as the cited federal statutes.

allowable “with respect to” the liability. Under this interpretation, deductions for liabilities not themselves satisfying the 3-year test of § 172(f)(1)(B)(i), but bearing a close relationship to a liability satisfying that test and arising under federal or state law within the meaning of § 172(f)(1)(B), could generate a specified liability loss. On the other hand, one might interpret “with respect to” narrowly, as equivalent to the simple preposition “for”. Resolution of this ambiguity requires examining the legislative history of § 172(f)(1)(B).

As noted above, the legislative history indicates that Congress' primary concern when it enacted the § 172(f)(1)(B) language pertinent to this case was to ensure that taxpayers, whose deduction of certain liabilities was deferred because of the economic performance requirement, be able to use those deductions when finally allowable to reduce taxable income, either in the taxable year allowable or in prior taxable years through the vehicle of the new 10-year NOL carryback. Thus, Congress only meant to provide relief for existing liabilities the deduction of which is deferred for a prescribed period.

To effectuate this intent, the phrase “with respect to” as used in § 172(f)(1)(B) must be interpreted as equivalent to the simple preposition “for”. Otherwise, congressional intent could be frustrated through the allowance of an extended carryback period for deductions for liabilities involving little or no deferral between the actual creation of the liability and the allowance of the deduction therefore. Therefore, even if it were determined that the tax and interest liabilities at issue in this case arose under federal or state law within the meaning of § 172(f)(1)(B), only the interest economically accruing at least 3 years before the beginning of the taxable year of deduction could generate a specified liability loss.

CAVEAT

A copy of this technical advice memorandum is to be given to Taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.