



TaxNewsFlash

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U.S. Tax Court: Taxpayer's elections under section 172(b)(3) did not relinquish carryback of specified liability loss

The U.S. Tax Court on November 13, 2025, in a reviewed decision, held that the taxpayer's elections under section 172(b)(3) relinquished the carryback of only that portion of its net operating loss (NOL) that exceeded its reported "specified liability loss," within the meaning of section 172(f)(1) (prior to amendment by Public Law 115-97¹), and not the carryback of its entire NOL.

The majority opinion of the court was joined by 17 judges, with one judge, who wrote a separate concurring opinion, concurring only in part. A senior judge wrote an opinion concurring in part and dissenting in part, in which another judge joined.

The case is: *Apache Corporation and Subsidiaries v. Commissioner*, 165 T.C. No. 11 (November 13, 2025). Read the Tax Court's [opinion](#)

Summary

For each of 2016 and 2017, the taxpayer, a U.S. oil and gas exploration and production company, reported a consolidated NOL (CNOL) that consisted in part of a specified liability loss (SLL) as defined under section 172(f)(1), as in effect for the years at issue. The taxpayer's return for each year included an election under Treas. Reg. § 1.1502-21(b)(3)(i) to waive the entire carryback period pursuant to section 172(b)(3) for the CNOL. However, the taxpayer expressly stated that it did not elect under section 172(f)(6), as in effect for the years at issue, to relinquish the carryback period with respect to the specified liability loss incurred in each year.

¹ An NOL arising in a tax year beginning before 2018 is generally carried back two years or forward 20 years. Specified liability losses arising in tax years beginning before 2018 were eligible for a 10-year carryback. Public Law 115-97 repealed the special carryback provisions for specified liability losses for tax years beginning after 2017, along with other changes made to section 172.

The taxpayer subsequently received a tentative refund for each of 2006 and 2007 from the carryback of the SLLs it reported for 2016 and 2017, respectively. However, the IRS then determined deficiencies for 2006 and 2007 based on the disallowance of the carrybacks.

The taxpayer timely petitioned the Tax Court for redetermination of its deficiencies, and both the taxpayer and the IRS filed cross-motions for partial summary judgment on the issue of whether the taxpayer's elections under section 172(b)(3) relinquished the carryback period for its claimed SLLs as well as the remainder of its CNOL, and thus that the taxpayer could not separately carry its claimed SLLs to 2006 and 2007.

After considering the statutory text of section 172, its structure and legislative history, judicial precedent interpreting it, as well as the IRS's past interpretation of the statute as expressed in regulations (in particular, Treas. Reg. § 1.172-13(c)(4)), the Tax Court concluded that the taxpayer's waiver did not prevent it from claiming a 10-year carryback of its SLLs.

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