MEMORANDUM

To: Frank Breslin, Revenue Commissioner

CC: Rebecca LopezKriss, Deputy Revenue Commissioner
Laurice I. Smith, Director of Policy
Jonathan A. Liss, Senior Revenue Policy Analyst

From: Frances Ruml Beckley, Chief Revenue Counsel

Date: October 19, 2023

Re: ***Amendment to Business Income and Receipts Tax Regulations– Section 411 – Treatment of Net Operating Losses.***

I have reviewed the attached amendment to Section 411 of the Business Income and Receipts Tax Regulations which (i) changes the carry forward period to twenty years, consistent with recent state law authorization and clarifies the Department's position with respect to loss carry forwards after changes in ownership. I find the amendment to be legal and in proper form. In accordance with Section 8-407(a) of The Philadelphia Home Rule Charter, you may now forward the amendment to the Department of Records where it will be made available for public inspection.

Frances Ruml Beckley

City of Philadelphia – Department of Revenue

AMENDMENTS TO SECTION 411 OF THE CITY OF PHILADELPHIA'S BUSINESS INCOME AND RECEIPTS TAX REGULATIONS

Section 411 of the City of Philadelphia's Business Income and Receipts Tax Regulations is amended to the following:

Section 411. Net Operating Losses

(A) Definition

1) For Taxpayers who have elected to report net income under Method I, a net operating loss means a net loss as computed under Section 403.

2) For Taxpayers who have elected to report net income under Method II, a net operating loss means any net loss incurred from the operation of a business, as properly returned to and ascertained by the Federal Government prior to giving effect to the exclusion for dividends received and net operating losses from other tax periods, subject to the same adjustments made applicable to net income, and as allocated and apportioned in accordance with the provisions of Sections 406, 407, 408, 409 and 410. The net operating loss must be apportioned by use of the apportionment factors applicable to the period in which the net operating loss was incurred.

(B) Deduction of Net Operating Losses

Apportioned net operating losses may be deducted from apportioned net income in the tax year to which the apportioned net operating loss is carried forward.

(C) Carry Forward Period

For net operating losses incurred in a tax year reported on Business Income and Receipts Tax Returns for years prior to 2022, the amount of any ~~An~~ apportioned net operating loss may be carried forward ~~for three tax years following the tax year for which it was first reported. The earliest apportioned net operating loss must be carried over to the earliest taxable year in which the taxpayer reports taxable apportioned net income before deducting an apportioned net operating loss carried forward.~~***to subsequent tax years but may not be carried forward past the third tax year following the tax year for which it was first reported. For net operating losses incurred in a tax year reported on Business Income and Receipts Tax Returns for years 2022 and thereafter, t***~~T~~he amount of any apportioned net operating loss ~~in excess of the apportioned net income for any tax year to which it is carried forward~~ may be carried forward to subsequent tax years but may not be carried forward past the ~~third~~ **twentieth** tax year following the tax year

for which it was first reported. ***The earliest net operating loss shall be carried forward to the earliest taxable year to which it may be carried.***

(D) ~~Effective Dates for Net Operating Loss Carryforwards.~~

~~1) The 1986 tax year shall be the first tax year to which a net operating loss reported for a prior tax year may be carried forward and deducted from net income.~~

~~2) The first net operating loss which may be carried forward to a succeeding tax year shall be a net operating loss reported on the 1985 Business Income and Receipts Tax Return. No net operating losses for periods prior to the tax period used as the measure of net income or loss for the 1995 Business Income and Receipts Tax Return may be carried forward and deducted from net income on any Business Income and Receipts Tax Returns.~~ ***Net Operating Loss Carryforwards of Taxpayers to Which Internal Revenue Code Sections 381 and 382 Apply***

In the case of a change in ownership as described in section 381 or 382 of the Internal Revenue Code of 1986, as amended, the carryforward and limitations provided in the Internal Revenue Code with respect to net operating losses shall apply for the purposes of computing the portion of a net operating loss carryforward recognized under subsection (B) of this section. When any acquiring corporation or transferor corporation participated in the filing of consolidated returns to the Federal Government, the entitlement of the acquiring corporation to the City of Philadelphia net operating loss carryforward of the acquiring corporation or the transferor corporation will be determined as if separate returns had been filed with the Federal Government prior to the change in ownership.

For its application to the Philadelphia net operating loss deduction, the net operating loss limitation prescribed by section 382 of the Internal Revenue Code shall be apportioned to Philadelphia using an average of the transferor corporation's Philadelphia apportionment factors for the prior three (3) years, unless special circumstances would make that distortive.

This section applies to both Method I and Method II Taxpayers [who have elected to report net income under Method I and to those who have elected to report net income under Method II].

(E) Documentation to be Provided With a Business Income and Receipts Return Substantiating the Succession of Net Operating Loss Carryforwards to Which Internal Revenue Code Section 381 Applies

To substantiate the succession of Net Operating Loss Carryforwards under Internal Revenue Code section 381, Taxpayers must provide documentation as requested by the Department of Revenue.

(F) Documentation to be Provided With a Business Income and Receipts Return Substantiating Limitations and Adjustments for Taxpayers to Which Internal Revenue Code Section 382 Applies

Taxpayers having net operating loss (NOL) limitations under IRC section 382 must provide substantiating documentation as requested by the Department of Revenue.

(G) Corrections to Net Operating Loss Carryforwards

In the case of incorrectly determined Net Operating Loss Carryforwards from prior years, Taxpayers must file amended tax returns to correct NOLs for prior tax years (both open and closed years).

Bold italics denotes new matter

~~Strikethroughs denotes deletions~~

Date: October 19, 2023

Frank Breslin
Revenue Commissioner