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December 16, 2021

VIA EMAIL

Josh Pens, Director of Tax Policy
Colorado Department of Revenue
Taxation Division
1881 Pierce St.
Lakewood, CO 80214

Re: Comments on Proposed Rule 39-22-504(2): Colorado NOLs for C Corporations

Dear Mr. Pens:

Thank you for the opportunity to provide comments on proposed Rule 39-22-504(2) (Proposed Rule), which proposes changes to current Rule 39-22-504(2) by adding provisions that would disallow Colorado state modifications that reduce a taxpayer's apportionable income below zero, thereby removing taxpayers' ability to generate a Net Operating Loss (NOL). On behalf of the Council On State Taxation (COST), I urge you to reject this rule change because it exceeds the language and intent of the underlying State statute, and is inconsistent with the plain language of the existing regulation and the Department of Revenue's longstanding interpretation thereof. In addition, the proposed change circumvents the legislative process that created the statutory State modifications that would be disallowed because of the change. Further, by increasing taxes on certain taxpayers without voter approval, the proposed change violates the Colorado Taxpayer's Bill of Rights (TABOR).

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in Colorado that would be impacted by the Proposed Rule.

The Proposed Rule Exceeds the Governing Statute

The Proposed Rule changes the way NOLs are generated in the State by limiting Colorado NOLs to the Federal NOL for a combined group and would only permit Colorado State modifications to reduce a taxpayer's apportionable income to zero. This

change completely reverses the existing rule, which provides, “*The Colorado net operating loss of a C corporation is computed the same as a federal net operating loss except that the Colorado loss is computed using the modified federal income allocated and apportioned to Colorado*”.¹ Further, the Proposed Rule exceeds Colorado Rev. Stat. Sec. 39-22-504, which provides that “*A net operating loss deduction shall be allowed in the same manner that it is allowed under the internal revenue code except as otherwise provided in this section. The amount of the net operating loss that may be carried forward and carried back for Colorado income tax purposes shall be that portion of the federal net operating loss allocated to Colorado under this article 22 in the taxable year that the net operating loss is sustained*”.² Importantly, the statute refers to no such limitation as the Department proposes in the Draft Rule. In our view, limiting the NOL in the proposed manner would require a change to the governing statute.

If the Department of Revenue were to adopt this limitation, it would circumvent legislative intent in determining a taxpayer’s taxable income by subjecting to tax income that the legislature has determined should not be subject to tax in Colorado. In doing so, the Proposed Rule also violates TABOR, which requires voter approval for tax increases.

Conclusion

For all these reasons, we encourage the Department to reject this proposed regulation change and ensure that any changes to the Proposed Rule are consistent with Colorado statutes. Thank you for your time and consideration, and, if you have any questions or if you would like to discuss these comments further, please do not hesitate to contact me.

Respectfully,



Erica S. Kenney

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

¹ Colo. Code Regs. 39-22-504(2)(1).

² Colo. Rev. Stat. Sec. 39-22-504(1)(a).