STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

June 21st, 2024

Rob Demeter
Director General
Tax Legislation Division
Tax Policy Branch
Department of Finance
90 Elgin Street
K1A 0G5

Via email: rob.demeter@fin.gc.ca

Dear Mr. Demeter:

Subject: Requesting a Technical Amendment to ITA Subsection 164 (6)

The Society for Trust and Estate Practitioners (Canada) (STEP) appreciates this opportunity to provide our submission to request a technical amendment to ITA subsection 164 (6).

STEP's membership represents a broad cross-section of professional advisors operating in the estate planning and business succession planning fields, and we believe that our comments may be of assistance as you contemplate the submission.

We would be pleased to discuss our submission with you at your convenience.

Kindly direct any enquires to Michael Dodick, Chief Operating Officer at mdodick@step.ca.

Yours truly,

Ian Lebane, LLB, LLM, TEP
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Kenneth Keung, CPA, CA, CPA (CO,USA), CFP, MTAX, LLB, TEP
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Subsection 164(6), Misaligned Timing, and the Avoidance of Double Taxation

This submission discusses the mechanics, history, and purpose of subsection 164(6) of the *Income Tax Act* ("the Act") and suggests changes to improve the administration of the Act. The general scheme of the Act is to levy tax on income and capital gains and to avoid taxing the same income and gains twice. However, the requirement under subsection 164(6) that a loss arising from a disposition must occur within the first taxation year of the estate may give rise to double taxation. The limited time frame mandated by subsection 164(6) can also be difficult or unrealistic for estate executors to satisfy, given the complex and drawn-out estate administration issues that are common in today's estate administration and legal landscape.

This submission recommends that the Department of Finance implement a technical update to align subsection 164(6) with the 36-month time frame found in other estate-related provisions, such as the definition of "graduated rate estate" and the rollover-on-death provisions in subsections 70(6), (9), (9.1), (9.2), and (9.3).

Basic Mechanics of Subsection 164(6)

When an individual dies, there is a deemed disposition of the deceased's capital property at fair market value (FMV), such that any unrealized gains inherent in those assets are realized pursuant to subsection 70(5) (unless the spousal or spousal trust rollover provisions under subsection 70(6) are available). The estate then acquires the asset that is deemed disposed of under subsection 70(5) with a stepped-up adjusted cost base (ACB) equal to the FMV on death. If the asset is subsequently disposed of by the estate or by a beneficiary to whom the estate distributes the assets, the capital gain realized on the disposition is reduced by the amount already recognized by the deceased under subsection 70(5) by way of the stepped-up ACB. This mechanism thus avoids double capital gains taxation.

Since the value of assets can decrease post mortem, it is possible for an estate to realize a capital loss on the disposition of an asset for a value lower than the stepped-up ACB. This results in a capital loss in the estate that cannot be offset against the capital gain recognized by the deceased under subsection 70(5). Unless the estate has other assets with post mortem accrued gains, there is no way to realize the benefit of this capital loss. This results in double taxation. Subsection 164(6) was enacted by Parliament to address this double taxation issue.

Where the deceased held shares in a corporation, the value that was taxed at death can later be subject to a second level of tax. This is because the paid-up capital (PUC) of the deceased's shares remains unchanged by the death event. Even though the deceased incurs a capital gain on death as a result of subsection 70(5), if the estate or a beneficiary later redeems the shares (or winds up the corporation), the proceeds in excess of the PUC are treated as a dividend under section 84, subjecting the estate to a second level of tax on the value that was already taxed on death. To avoid taxing the proceeds as both a dividend and a capital gain, the Act reduces the proceeds of disposition in the calculation of a capital gain or loss by the amount of the dividend deemed under section 84. To the extent that the ACB of the shares of the estate was stepped up by the application of subsection 70(5) to the deceased, a capital loss usually accompanies the section 84 dividend on a share redemption or windup. If this capital loss remains in the estate, the estate often has no ability to use this capital loss, which gives rise to double taxation.

The general mechanics of subsection 164(6) are such that when an asset that is subject to the deemed disposition rules on death is disposed of by the estate, resulting in a capital loss or terminal loss, the loss can be carried back to the terminal tax return and offset against the capital gain (or other income[1]) recognized by the deceased on death, provided that the rules under subsection 164(6) are met, including the timing required for the disposition of the asset by the estate.

Under the current rules in subsection 164(6), if the legal representative of a graduated rate estate (GRE), within the first taxation year of the estate, disposes of capital property such that a net capital loss or

[1] Subsection 111(2).

terminal loss results, the legal representative can elect, in prescribed manner and within prescribed time, to treat the net capital loss as a capital loss of the deceased in their last taxation year and not as a capital loss of the estate. This election eliminates the double taxation issue on the asset that was disposed of by the estate, because the capital gain on death is reduced by the capital loss incurred by the estate. Where a capital loss of an estate arises from a share redemption or windup, the section 84 dividend continues to be taxed in the estate.

Under subsection 164(6), the asset disposition must occur within the first *taxation year* of a GRE in order for the loss to be carried back. A GRE may choose any year-end date within 12 months[2] from the date of death to be its taxation year, which means that the taxation year can be as short as 1 day and as long as 365 days from the date of death. An executor who fails to meet the loss carryback deadline loses the ability to use subsection 164(6) to reduce the impact of double taxation on death.

History of Subsection 164(6)

Subsection 164(6) was first introduced in 1971 under Bill C-259 and enacted in 1974. Under the Act as it was then drafted, subsection 164(6) provided:

> **Where disposition of property by legal representative of deceased taxpayer**
>
> 164(6) Where in the course of administering the estate of a deceased taxpayer, the taxpayer's legal representative has, *within the 12-month period immediately following the death of the taxpayer*,
>
> (a) disposed of capital property of the estate so that the aggregate of amounts each of which is a capital loss from the disposition of any property of the estate exceeds the aggregate of all amounts each of which is a capital gain from the disposition of any property of the estate, or
>
> (b) disposed of all of the depreciable property of a prescribed class of the estate so that the undepreciated capital cost to the estate of property of that class at the end of the first taxation year of the estate is, by virtue of any regulation made under paragraph 20(1)(a), deductible in computing the income of the estate for that year,
>
> the legal representative shall be deemed to have paid, on account of tax under this Part payable by the estate for its first taxation year, an amount equal to the amount, if any, by which
>
> (c) the tax under this Part payable by the deceased taxpayer for the taxation year in which he died
>
> exceeds
>
> (d) the amount that would have been the tax under this Part payable by the deceased taxpayer for the taxation year in which he died if
>
> i. such part of the excess described in paragraph (a) as the legal representative so elects, in prescribed manner and within prescribed time, had been a capital loss of the deceased taxpayer for that year, and
>
> ii. such part of the amount of any deduction described in paragraph (b) (not exceeding the amount that, but for this subsection, would be the non-capital loss of the estate for the year) as the legal representative so elects, in prescribed manner and within prescribed time, had been deducted in computing the income of the deceased taxpayer for that year,
>
> and for the purpose of section 111, in computing the net capital loss and non-capital loss of the estate for its first taxation year,
>
> (e) the part referred to in subparagraph (d)(i) shall be deemed not to have been a loss of the estate, and

[2] Subsection 249(5).

(f) the part referred to in subparagraph (d)(ii) is not deductible in computing any loss of the estate for the year.

In general terms, under the Act as it was then drafted, if the estate disposed of property within 12 months following the death of the taxpayer and the disposition created a net capital loss or terminal loss in the estate, the legal representative could have elected, in prescribed manner and within prescribed time, to carry the loss back to the terminal tax return and have treated it as a loss of the deceased. The excess taxes payable by the deceased, after the loss carryback was taken into account, were then treated as taxes paid by the estate for its first taxation year (that is, the election reduced the taxes owing by the estate or, if no taxes were owing, produced a tax refund to the estate). The 12-month period provided under subsection 164(6) in 1974 was in line with the general framework for the carrying back of losses at that time.

In 1975, subsection 164(6) was amended. The time frame in respect of a disposition of capital property by the estate was changed from the 12-month period immediately following the death of the taxpayer to the *first taxation year* of the estate. This was a significant change in the timing, since the first taxation year of an estate could be as short as one day if the estate selected the day after death as its year-end date. Many executors select December 31 as the year-end date of an estate for ease of accounting; if a person were to die on December 30, the first taxation year of the estate would be one day long.

The Act was further amended in 1983, 1985, 1986, and 1998 to address alignment issues. The amendments, first, aligned subsection 164(6) with the new farm loss rules under section 111; second, required an amended terminal tax return to be filed so that a loss that was carried back would be included in the computations required under the new section 110.6 lifetime capital gains exemption calculations; and third, provided that new subsection 112(3) would not apply to reduce a loss that was transferred under subsection 164(6) to the terminal tax return. The 1986 amendments also removed the deemed payment of taxes by the estate for any reduction of taxes on the terminal tax return as a result of the loss carryback.

The most recent substantial change to the subsection 164(6) rules occurred in 2014, applicable to taxation years starting in 2016, with the introduction of the GRE. Revised subsection 164(6) now provides, "If in the course of administering the graduated rate estate of a taxpayer, the taxpayer's legal representative has, within the first taxation year of the estate, disposed of … ."

The term "graduated rate estate" is a defined term in the Act. It was added by SC 2014, c. 39 and came into force on December 31, 2015. The term is defined in subsection 248(1) as follows:

> **graduated rate estate**, of an individual at any time, means the estate that arose on and as a consequence of the individual's death if
>
> (a) that time is no more than 36 months after the death,
>
> (b) the estate is at that time a testamentary trust,
>
> (c) the individual's Social Insurance Number (or if the individual had not, before the death, been assigned a Social Insurance Number, such other information as is acceptable to the Minister) is provided in the estate's return of income under Part I for the taxation year that includes that time and for each of its earlier taxation years that ended after 2015,
>
> (d) the estate designates itself as the graduated rate estate of the individual in its return of income under Part I for its first taxation year that ends after 2015, and
>
> (e) no other estate designates itself as the graduated rate estate of the individual in a return of income under Part I for a taxation year that ends after 2015;

Therefore, a GRE can exist for a maximum period of 36 months after death.

Loss Carryback Historical Context and Other Sections of the Act

The Income War Tax Act (IWTA) of 1945 provided for a one-year carryback of business losses pursuant to paragraph 5(1)(p). (Capital gains were not taxable in Canada prior to 1972.) When the IWTA was replaced in 1948 by the Income Tax Act, paragraph 5(1)(p) of the IWTA became paragraph 26(d) of the 1948 Act.

This section was subsequently amended and renumbered as paragraph 27(1)(e) in the 1953 Act, and later became what we now know as subsections 111(1) and 111(3). Until 1983, the rules provided for a one-year period for carrying back losses. In 1984, subsection 111(1) was amended to allow for a three-year loss carryback.

Other sections of the Act deal with deemed dispositions on death. For example, on the death of a life interest beneficiary in a life interest trust,[3] the trust has a three-year loss carryback period for net capital losses,[4] which gives trustees three taxation years to effect a redemption and loss carryback strategy to reduce the impact of double taxation on death. This further illustrates that Parliament intended to align the capital gain resulting from a deemed disposition on death with the ability of a taxpayer to carry back a loss that is realized after death, in order to reduce double taxation on death.

In comparison, the current subsection 164(6) loss carryback time frame requiring a disposition within the first taxation year of a GRE stands in sharp contrast, in both historical and current contexts, to the loss carryback rules under other sections of the Act that deal with loss carrybacks. Historically, these sections provided a one-year loss carryback, which was increased to a three-year loss carryback in 1984 with revisions to subparagraph 111(1)(b)(i). As noted earlier, a GRE can choose any taxation year-end date within 12 months from the date of death, which means that the first taxation year of a GRE can be as short as 1 day and as long as 365 days from the date of death. Therefore, the timeline provided under the subsection 164(6) rules is misaligned with the timeline under other sections of the Act that allow for loss carrybacks, and this misalignment can cause undue hardship and unintended results for executors who are unable to meet the first taxation year requirement.

Fact Situation

For the purpose of discussing the impact of the current subsection 164(6) loss carryback requirement on an individual's tax and estate planning, we will consider the following fact situation:

- Travis, a resident of Ontario, died on December 25, 2023.
- At the time of death, Travis owned a personal life insurance policy on his life with a $500,000 death benefit. Taylor (the surviving spouse) was designated as the beneficiary on the policy. Travis also owned shares of Opco, a Canadian-controlled private corporation (CCPC), with an FMV of $1 million and nominal ACB/PUC. The only asset in the corporation is cash of $615,000 and a non-eligible refundable dividend tax on hand (NERDTOH) balance of $385,000. There are no other tax attributes in the corporation.
- Taylor is designated in the will as the sole beneficiary and executor of the estate. She is not financially savvy.
- In order to ease the accounting work required for the estate and to align the tax slips the estate will get, Taylor has selected December 31 as the year-end date of Travis's estate, and has designated the estate to be the GRE of Travis. This means that the first taxation year of the GRE is from December 25, 2023, to December 31, 2023. A T3 trust return was prepared and filed for its first taxation year by the end of March 2024.
- Travis has one adult child, Charlie, whose lifestyle was funded by Travis before his death. Taylor is not the mother of Charlie.
- Charlie is suing the estate under the dependant's relief provisions in Ontario's *Succession Law Reform Act* on the grounds that he was not adequately provided for under the will.
- As a result of the estate litigation, the assets of the estate have been frozen until the litigation is resolved.
- On April 18, 2024, Taylor and Charlie reached an out-of-court settlement. Under the terms of the settlement, Taylor will pay $250,000 of the $500,000 death benefit on the life insurance policy to Charlie. Taylor will retain the remaining amount of the death benefit and the shares of Opco.
- On May 1, 2024, the shares of Opco were redeemed by the estate, resulting in a $1 million non-eligible dividend taxable to the estate and a $1 million capital loss.

[3] Paragraph 104(4)(a).

[4] Paragraph 111(1)(b).

Implications of the Current Subsection 164(6) Rules

The current subsection 164(6) rules require the GRE to dispose of capital property within the first taxation year of the GRE in order to carry back the capital loss. However, in the fact situation described above, the subsection 164(6) strategy is not available to the estate, because the estate has been frozen due to estate litigation issues and the executor unknowingly selected a shortened taxation year, even though a share redemption was carried out within six months of Travis's death. As a result, the executor is left with either a do-nothing strategy or a post mortem pipeline strategy. Under each of these alternative planning scenarios, the estate is left with more taxes and a worse result than the subsection 164(6) strategy. See below for calculations.

	Option 1	**Option 2**	**Option 3**
	No planning – redemption of shares*	**Pipeline****	**Subsection 164(6)**
Deemed disposition on death — ss. 70(5)			
Proceeds of disposition	1,000,000.00	615,000.00	1,000,000.00
Adjusted cost base to Travis	-	-	-
Capital gain	1,000,000.00	615,000.00	1,000,000.00
Less: ss. 64(6) loss carryback	-	-	(1,000,000.00)
Adjusted capital gain	1,000,000.00	615,000.00	-
Taxable capital gain	500,000.00	307,500.00	-
Terminal tax (53.53%)	267,650.00	164,604.75	-
Redemption of shares			
Proceeds of redemption	1,000,000.00		1,000,000.00
Less: paid-up capital	-		-
Deemed dividend — ss. 84(3)	1,000,000.00		1,000,000.00
Personal tax on non-eligible dividend (47.74%)	477,400.00		477,400.00
Adjusted proceeds of redemption	-		-
Adjusted cost base to estate	1,000,000.00		1,000,000.00
Capital loss	(1,000,000.00)		(1,000,000.00)
Repayment of promissory note issued on pipeline		615,000.00	
Personal tax on repayment of promissory note		-	
Total taxes paid (on death and by estate)	745,050.00	164,604.75	477,400.00
Net funds to the estate	254,950.00	450,395.25	522,600.00
Effective tax rate	74.51%	54.96%	47.74%

* Under the current legislation, the estate is not eligible for the subsection 164(6) loss carryback.

** Under a pipeline strategy, refundable dividend tax on hand is trapped in the corporation because no taxable dividend is paid out of the corporation.

Under the "no planning" approach, the effective tax rate is 74.51%; under a pipeline strategy, the effective tax rate is 54.96%. When these rates are compared to the highest marginal tax bracket of 53.53%[5] on

[5] Ontario rates.

regular income, the calculations show that the estate is subject to double taxation. If the subsection 164(6) strategy were available to the estate, the effective tax rate would drop to 47.74%, a rate consistent with that on non-eligible dividends.

We note that the proposal in the 2024 Budget and June 10, 2024, Notice of Ways and Means Motion to increase the capital gains inclusion rate from one-half to two-thirds would further aggravate the double taxation issue. In our example, the proposed increase in the capital gains inclusion rate would lead to an effective tax rate of 81.20% under a do-nothing approach and 58.22% under a pipeline strategy.

Is Double Taxation the Correct Result?

Paragraph 248(28)(a) states that, unless a contrary intention is evident in the Act, no provision of the Act shall be read as requiring an income inclusion for tax purposes to the extent that the amount has already been directly or indirectly included in income for the taxpayer for the year or any preceding taxation year. We note that subsection 248(28) does not apply to prevent double taxation that may arise as a result of a death event, since subsection 248(28) applies only in respect of a particular taxpayer. The double taxation issue arises because the capital gain realized on death under subsection 70(5) cannot be matched with the capital loss realized in the estate (a separate taxpayer from the deceased) on a later disposition of the asset that was held at death. Another provision in the Act is therefore used to match the capital loss in the estate with the capital gain on death—namely, subsection 164(6).

The courts have stated in multiple cases that double taxation, unless explicitly intended and stated as such, is not the intended result:

> Subsection 248(28) (like its predecessor, subsection 4(4), now repealed) was enacted because *Parliament recognized that, in a statute involving as many complex computations as the Income Tax Act, a transaction may fall literally within the scope of two separate provisions and so be counted twice as an income inclusion,* a deduction or a tax credit. *Subsection 248(28) is intended to avoid such double counting unless the Income Tax Act clearly compels such a result.*[6]
>
> There is a general presumption in law against taxing the same income dollars twice. Double taxation can only be considered to exist where it is equitable and/or the language of the taxing Act is clear and unequivocable.[7]
>
> There is a valid concern to prevent the *same amount from being taxed twice, whether in the hands of a single taxpayer* (See *Perrault v. R.* (1978), 78 DTC 6272 (Fed. C.A.), at pages 6277-8.) *or any two "persons"* within the scheme of the particular taxation provision unless explicitly provided for in statute."[8] [Emphasis added.]

The courts have also commented that double taxation occurs where a single payment is taxed twice in the hands of the same taxpayer. Because the deceased is a separate taxpayer from the estate, it is possible to argue that double taxation is the intended result. In our view, however, this argument is incorrect, since subsection 164(6) was introduced to address the double taxation issue that can arise when an asset that was subject to subsection 70(5) is later disposed of by an estate at a loss.

Further, an estate can be seen as a continuation of the deceased, because the estate automatically acquires the assets and liabilities of the deceased. The estate continues until all the assets of the estate are distributed to the estate beneficiaries. In addition, pursuant to the definition of a testamentary trust in subsection 108(1), no one other than the deceased can contribute property to the trust. This means that the assets of a GRE can only be those that were originally stemmed from the assets held by the deceased at death, which lends more weight to the argument that a deceased taxpayer and the estate of the deceased taxpayer should be viewed together when considering double taxation. If this is the case, then subjecting the estate to double taxation is not an equitable result.

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[6] Imperial Oil Limited v. The Queen et al., 2004 FCA 361 (FCA), at paragraph 68.

[7] Allfine Bowlerama Limited v. Minister of National Revenue, 72 DTC 1502 (Tax Review Board).

[8] Carlson & Associates Advertising Ltd v R., [1997] TCJ No. 366, at paragraph 30.

To return to the fact situation, the only strategy that does not lead to double taxation is the subsection 164(6) strategy. This option was not available to the estate in our scenario because the estate was tied up in estate litigation issues and the executor unwittingly created a very short taxation year by selecting a year-end date close to the date of death. If subsection 164(6) provided a three-year loss carryback consistent with the loss carryback rules on net capital losses under paragraph 111(1)(b), the estate would not encounter the double taxation issue noted above.

Realities of Estate Administration

The time required to administer an estate has increased substantially over the last few years. Commonly, a family member close to the deceased is appointed as executor of the estate. That person must deal not only with the emotional grief of losing a loved one, but also with the complexities of administering an estate that are common in today's estate administration and legal landscape.

In some provinces, one of the first duties an executor must carry out is to locate the will (if any) and obtain a probate certificate. Probate involves a court process where the executor provides a listing of all assets and liabilities held by the deceased on death, including the assets' FMV. This may sound straightforward, but often the executor has no idea what assets were held by the deceased. Usually, the deceased's professional advisors are contacted to help. But what happens if the deceased did not have any professional advisors, or if the executor does not know who they were?

Then, assuming that the deceased owned shares of a private corporation, the executor needs to determine whether the deceased's professional advisors are knowledgeable in post mortem tax planning. If they are, it will take time for them to analyze which post mortem tax plan makes the most sense. At a minimum, the executor will need to get financial statements, corporate tax returns, asset valuations, ACB/PUC information, and many other legal documents to help the advisors conduct an appropriate analysis. A business valuator may also need to be hired to help determine the correct corporate values.

Once an appropriate post mortem tax plan is recommended, the executor then needs to agree to the plan, and lawyers need to become involved to execute the proper legal documents. For example, if a Newco needs to be established for a pipeline strategy, or if shares need to be redeemed in a subsection 164(6) strategy, the help of a lawyer to draft the legal documents will be required.

If a subsection 164(6) strategy is recommended, time is of the essence, since all of the steps required to carry out the strategy need to be completed and implemented within the first taxation year of the GRE in order for the strategy to be effective. The amount of time needed to carry out the steps has been increasing over the last few years and, concurrently with delays in obtaining a probate certificate, can be challenging for any executor.

This summary of the steps involved in administering an estate does not even contemplate other issues that may cause a delay in estate administration, including will interpretation, estate litigation, family law issues, dealing with minor beneficiaries and associated government agencies (such as the Office of the Children's Lawyer), intestacy, and cross-border assets. Any one of these issues will result in delays in the administration of the estate and jeopardize the availability of subsection 164(6), since the executor may not be able to complete and implement all the necessary steps within the first taxation year of the estate.

On the basis of the foregoing discussion and analysis, we therefore see a vital need to increase the time frame allowed under subsection 164(6). A longer time frame would align subsection 164(6) with the 36-month time frame found in other estate-related provisions under the Act, such as the GRE definition and the rollover-on-death provisions in subsections 70(6), (9), (9.1), (9.2), and (9.3). A longer time frame would also align subsection 164(6) with the increased time frame required to administer an estate and carry out post mortem tax planning in order to avoid double taxation.

Proposed Amendments

To properly address the concern surrounding double taxation on death, we request that subsection 164(6) of the Act be amended to allow for a loss carryback for any taxation year in which the estate qualifies as a GRE, noting that an estate can only be a GRE for a maximum of 36 months after death. We propose that the wording "within the first taxation year of the estate" be removed from the preamble of

subsection 164(6) and that any references to "for the year" or "in the year" also be removed from the subsection, leaving only the requirement that the estate be a GRE. We propose that the loss carryback be available only for assets that the deceased held at death. Our proposed wording for subsection 164(6) is as follows:

> **Disposition by legal representative of deceased**
>
> 164(6) If in the course of administering the graduated rate estate of a taxpayer, the taxpayer's legal representative has, within the period ending 36 months after the death of the taxpayer,
>
> (a) disposed of capital property of the estate that was acquired by the estate on and as a consequence of the death of the taxpayer so that the total of all amounts each of which is a capital loss from the disposition of a property exceeds the total of all amounts each of which is a capital gain from the disposition of a property, or
>
> (b) disposed of all of the depreciable property of a prescribed class of the estate that was acquired by the estate on and as a consequence of the death of the taxpayer so that the undepreciated capital cost to the estate of property of that class is by virtue of subsection 20(16) or any regulation made under paragraph 20(1)(a), deductible in computing the income of the estate for the year, notwithstanding any other provision of this Act, the following rules apply:
>
> (c) such parts of one or more capital losses of the estate from the disposition of properties (the total of which is not to exceed the excess referred to in paragraph 164(6)(a)) as the legal representative so elects, in prescribed manner and within a prescribed time, are deemed (except for the purpose of subsection 112(3) and this paragraph) to be capital losses of the deceased taxpayer from the disposition of the properties by the taxpayer in the taxpayer's last taxation year and not to be capital losses of the estate from the disposition of those properties,
>
> (d) such part of the amount of any deduction described in paragraph 164(6)(b) (not exceeding the amount that, but for this subsection, would be the total of the non-capital loss and the farm loss of the estate as the legal representative so elects, in prescribed manner and within a prescribed time, shall be deductible in computing the income of the taxpayer for the taxpayer's taxation year in which the taxpayer died and shall not be an amount deductible in computing any loss of the estate,
>
> (e) the legal representative shall, at or before the time prescribed for filing the election referred to in paragraphs 164(6)(c) and 164(6)(d), file an amended return of income for the deceased taxpayer for the taxpayer's taxation year in which the taxpayer died to give effect to the rules in those paragraphs, and
>
> (f) in computing the taxable income of the deceased taxpayer for a taxation year preceding the year in which the taxpayer died, no amount may be deducted in respect of an amount referred to in paragraph 164(6)(c) or 164(6)(d).

Paragraph 152(6)(h) would continue to force a reassessment when a taxpayer's legal representative has submitted an amended return pursuant to paragraph 164(6)(e) where an election is filed to claim a loss carryback.

We would welcome the opportunity to discuss this matter with you in more detail and respond to any questions you may have.