Business Tax Benefits in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

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Posted By: Robert B. Teuber

Practice Area: Business and Corporate Law & Tax

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the "Act"), the third stimulus package, to provide nearly $2 trillion of support to families and businesses during the COVID-19 pandemic. While the Act provides tax relief for both individuals and businesses, this *Legal Update* focuses on the business tax relief provided. von Briesen also released a detailed discussion of the individual tax aspects of the Act which analyzes the benefits to individuals and can be found here.

Business Taxpayer Provisions

Paycheck Protection Program

The Act expanded small business loans under the SBA's existing section 7(a) loan program as a "Paycheck Protection Program." These loans are fully guaranteed by the federal Government and no collateral or personal guarantees are required. A portion of the principal of such loans may be forgiven to the extent the funds were used for payroll costs, interest payments on any mortgage (on real or personal property) incurred before February 15, 2020, rent on any lease executed before February 15, 2020, and utilities (electricity, gas, water, transportation, telephone or internet access) for which services began before February 15, 2020. The amount of any forgiven debt on these loans will not be taxable income to the borrower.

Employee Retention Credit

The Act creates an employee retention credit for employers impacted by the COVID-19 pandemic. An "eligible employer" will be allowed a credit against the employer's payroll tax for each calendar quarter in the amount of 50% of qualified wages paid to each employee in the quarter. The amount of each employee's wages eligible for the credit is limited to $10,000. The credit may only be claimed against the employer's 6.2% share of employment taxes. However, as with the payroll tax credits available under the Families First Coronavirus Response Act ("FFCRA"), if the credit exceeds the employer's share of social security taxes, the excess will be treated as an overpayment and will be refunded to the employer.

An "eligible employer" means an employer that was carrying on a trade or business in 2020 and, as a result of the coronavirus, (1) has had business fully or partially suspended due to the government limiting commerce, travel, or group meetings or (2) the employer has had a greater than 50% reduction in quarterly receipts as compared to the prior year.

Employers with an average number of employees that exceeded 100 in 2019 may only claim the credit with respect to employees who are furloughed or face reduced hours as a result of the closure or reduced gross receipts. Employers with 100 or fewer full-time employees in 2019 may claim the credit for all wages paid to employees.

Additional limitations to this credit include:

1. It cannot be claimed by the government of the United States, the government of any state or political subdivision thereof, or any agency or instrumentality thereof.
2. An employer that receives a Small Business Interruption Loan under section 7(a) of the Small Business Act cannot claim this credit.
3. It only applies to wages paid after March 12, 2020 and before January 1, 2021.
4. It is not allowed for any sick leave or family leave payments required under the FFCRA.

Employer-Side Social Security Payroll Tax Delay
Employers can defer complete remittance of their 6.2% share of Social Security tax for 2020 over two years. Specifically, employers may defer payment of 50% of their Social Security tax liability on wages paid until December 31, 2021; the other 50% until December 31, 2022. A comparable deferral is also available for self-employment taxes, i.e., a self-employed individual may defer the payment of 50% of their 12.4% self-employment taxes (OASDI portion), and pay half of the deferred amount by each of the two dates above. This payroll tax deferral is not limited to private sector employers and payment of the employer's 6.2% share of payroll taxes may also be deferred by public sector employers.

The employer and employee's share of Medicare tax, the employee's share of Social Security and the employee's income tax withholding are not affected by the Act and must be remitted.

The delayed payment of payroll taxes under the Act is not available to an employer that receives a Small Business Interruption Loan under section 7(a) of the Small Business Act.

Net Operating Losses
The Act temporarily repeals the 80% income limitation for Net Operating Loss ("NOL") deductions for years beginning before 2021, allowing companies to fully offset taxable income by such NOL carrybacks or carryforwards. For NOLs arising in 2018, 2019, and 2020, a five-year carryback is now allowed but a taxpayer can elect to forgo the carryback.

Excess Loss Limitations
The Act repeals the Section 461(l) excess loss limitation which was added to the Internal Revenue Code by the 2017 Tax Cuts and Jobs Act ("TCJA"). Section 461(l) disallowed excess business losses of non-corporate taxpayers if the amount of the loss exceeded $250,000 ($500,000 for married taxpayers filing jointly).

AMT Credit
The TCJA eliminated the corporate alternative minimum tax ("AMT"), but refundable AMT credits were still available, subject to certain limits, through tax years ending in 2021 (at that point any remaining AMT credits could be claimed as fully refundable). The Act accelerates the ability of companies to claim those AMT credits so that a company can claim a refund in 2019 for all of its AMT credits.

If a corporation wishes to claim the AMT credit for the 2018 tax year, it will need to file an application for a tentative refund by reason of an election under Code Section 53(e)(5) before December 31, 2020.

Qualified Improvement Property
The TCJA also provided an accelerated depreciation deduction for "qualified improvement property" ("QIP"). QIP is defined generally as any improvement to the interior of a nonresidential building. Normally, such an improvement would be depreciated over 39 years along with the rest of the building. However, the TJCA was supposed to reduce the depreciable life of QIP from 39 years to 15 years. Additionally, the TCJA allowed 100% first-year depreciation deductions for assets of certain depreciable lives, including those with 15-year depreciable lives, which would then allow for the entire amount of the expenditure made on QIP to be taken as an immediate deduction through the use of this accelerated depreciation (rather than having it depreciated over 15 years). Unfortunately, the text of the TCJA forgot to actually give QIP a 15-year depreciable life. The result of that drafting error meant that QIP had to be depreciated for 39 years rather than allowing a taxpayer to expense the full amount in the year the expense was incurred.

The Act provides a technical correction and gives QIP the proper 15-year depreciable life that Congress had intended; the correction is retroactive to January 1, 2018. Accordingly, taxpayers can amend their tax returns for both 2018 and 2019 to realize the benefits of the accelerated depreciation and receive a tax refund.

Interest Limitation
Another change made through the TCJA was the limiting of the maximum amount of interest expense a corporation was allowed to deduct, i.e., 30% of its adjusted taxable income (excess interest expense is then allowed to be carried forward for future tax year deductions). The Act increases that limit to 50% for 2019 and 2020. Given that many businesses may not have taxable income in 2020, the Act also allows a corporation to elect to use its 2019 income for determining its 2020 interest deduction. Combined with the new favorable NOL provisions, a corporation can take an interest deduction in 2020 that would generate a taxable loss (or a larger taxable loss) that could then be carried back to recover taxes paid in earlier years.

Partnerships do not get the same favorable tax treatment of the interest expense deduction. Rather any interest that is disallowed at the partnership level passes through to the partners and is suspended at that level under the normal rules. However, for the 2020 tax year, those partners are able to deduct 50% of the suspended interest (the remaining 50% continues to be suspended until the partnership allocates taxable income or interest income to the partner).

Excise Tax Relief for Alcohol
Any distilled spirits used for or contained in hand sanitizer produced and distributed consistent with FDA rules and regulations will be eligible for a waiver of federal excise tax.

Aviation Excise Tax
The Act temporarily repeals excise tax collected on commercial aviation with respect to transportation of people, transportation of property, and aviation fuel through December 30, 2020.

Additional Guidance Will Be Forthcoming
Additional legislation, regulation and guidance is expected to come from both the federal and state governments.

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