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EY Tax News Update: Global Edition

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Legislation

CARES Act stimulus package has international tax implications

President Trump on 27 March 2020 signed into law the $2.2 trillion bipartisan *Coronavirus Aid, Relief, and Economic Security* (CARES) Act (H.R. 748), which was passed by the House earlier that day and by the Senate on 25 March. The legislation capped many days of around-the-clock negotiations between congressional leaders and the Administration and was the third coronavirus bill to be passed by Congress in a span of several weeks.

President Trump earlier in March signed into law the second coronavirus response bill, the *Families First Coronavirus Response Act* (H.R. 6201), a package of measures to address initial hardships as a result of the pandemic. The first such legislation was a coronavirus appropriations bill, H.R. 6074.

The CARES Act provides for loans and other benefits to businesses small and large, expands unemployment insurance, direct payments to those with wages middle-income and below, new appropriations funding for health care and other priorities. The legislation also includes tax changes like deferrals of employer payroll tax liabilities coupled with an employee retention tax credit and rollbacks of *Tax Cuts and Jobs Act* (TCJA) limitations on net operating losses (NOLs) and the Section 163(j) business interest limitation.

Importantly, the final bill did not include several earlier proposals that were included in a prior Senate Republican draft of the bill, for example, narrowing the application of downward attribution of stock ownership.

The CARES Act includes eight business tax provisions aimed at providing liquidity through:

- crediting against employers' payroll taxes amounts paid in wages to retained workers,
- delaying payment of employer payroll taxes,
- allowing a five-year carryback period for NOLs and temporarily removing the 80% limitation on the use of NOLs,
- allowing NOL relief for noncorporate businesses,
- clarifying AMT refund allowances,
- increasing the allowance for business interest deductions,
- adding a technical correction for qualified improvement property under Section 199A that was enacted by the TCJA, and
- excepting temporarily from alcohol excise taxes businesses that convert to producing hand sanitizers.

Several of the enacted provisions have major implications for multinational corporations.

Changes to NOL rules under Section 172(a)

The CARES Act temporarily suspends the 80% taxable income limitation on the use of a net operating loss to offset taxable income for tax years beginning after 31 December 2017 and before 1 January 2021. Taxpayers may elect to:

- Carry NOLs arising in any tax year beginning after 31 December 2017 and before 1 January 2021, back five years
- Exclude a Section 965 transition tax year from the five-year NOL carryback period

Taxpayers may not use the NOL carryback to directly reduce the amount of Section 965 transition tax incurred in a transition year. Taxpayers may still carry NOLs forward if they decide against carrying them back.

The carryback or carryforward of an NOL may affect a taxpayer's: (1) allowable Section 250 deduction (both against foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI)); (2) allowable foreign tax credits (FTCs); (3) base erosion anti-abuse tax (BEAT) liability; and (4) in some cases, the taxpayer's Section 965 transition tax liability.

Temporary changes to Section 163(j) limitation

The CARES Act generally allows taxpayers to increase the 30% of adjusted taxable income (ATI) limitation on business interest expense to 50% of ATI for any tax year beginning in 2019 or 2020. Taxpayers may elect not to apply the higher 50% limitation. Taxpayers may also elect to use their 2019 ATI (in lieu of 2020 ATI) in their 2020 tax year to calculate their 2020 Section 163(j) limitation. If the additional deduction yields negative tax consequences for another tax provision, such as Section 59A (BEAT), taxpayers may decide not to elect to apply the increased Section 163(j) limitation.

EY's COVID-19 Stimulus Tracker provides updated global tax information

EY's Global Tax Policy Center released the COVID-19 Stimulus Tracker, which provides a snapshot of the policy changes that are being announced in countries around the world in response to the COVID-19 crisis. The COVID-19 Stimulus Tracker, which will be updated approximately every two days, is available on ey.com.

For tax year 2019, partnerships must use the 30% of ATI limitation. The ATI limitation increases to 50% of ATI for partnerships in their 2020 tax years, unless the partnership elects not to apply the higher limitation. The partnership may elect to substitute tax year 2019 ATI for tax year 2020 ATI.

Partners may treat 50% of any excess business interest expense (EBIE) allocated to them from a partnership in tax year 2019 as automatically paid or accrued to them in the partner's 2020 tax year, without further Section 163(j) limitations at the partner level (i.e., the partner can deduct that 50% portion regardless of the partner's ATI). The remaining 50% of 2019 EBIE is subject to the "normal" testing rules for EBIE at the partner level (i.e., the partner needs to receive an allocation of excess taxable income (ETI) from that same partnership in future tax years to potentially free up those amounts). The partner may elect not to apply this special rule.

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The modification to the NOL carryback rules may yield a cash benefit to taxpayers that can use their NOLs. There may, however, be some unanticipated international tax consequences arising from the interaction of modified Section 172(a) with other IRC provisions.

Section 965 transition tax: Carrying an NOL to a pre-transition tax year does not directly impact the amount of a taxpayer's transition tax inclusion. However, the NOL deduction claimed in that carryback year could increase the taxpayer's FTC carryover from that year. The FTC carryover would need to be taken into account in each succeeding tax year under Section 904(c), and a greater FTC carryover could be available in the Section 965 transition tax year (whether 2017 or 2018), thus reducing the taxpayer's transition tax liability.

Section 250 deduction: The CARES Act does not amend the taxable income limitation in Section 250(a)(2), which otherwise reduces the allowable Section 250(a)(1) deduction when the sum of a taxpayer's FDII and GILTI exceeds its taxable income for the year (without regard to Section 250). Effectively, the Section 250(a)(2) limitation may result in taxpayers utilizing a 21% tax attribute (an NOL deduction) against items of income (FDII and GILTI), subject to a lower rate of tax because of the Section 250 deduction.

Foreign tax credit limitation: A greater NOL deduction will reduce a taxpayer's FTC limitation under Section 904, whether the NOL source is foreign or domestic. As previously noted, a taxpayer will generally have a greater FTC carryforward coming out of the NOL carryback year. A domestic-source NOL may create, or increase, an overall domestic loss (ODL) account, which may be beneficial in a subsequent tax year. An ODL account from a pre-*Tax Cuts and Jobs Act* tax year would be subject to the transition rules included in the final FTC regulations (TD 9882). A foreign-source NOL may create, or increase, a separate limitation loss or an overall foreign loss account, which could be detrimental in a subsequent tax year, including in the Section 965 transition tax year. The transition rules in TD 9882 would apply to this account when transitioning from a pre-TCJA tax year to a post-TCJA tax year.

Taxpayers should also consider the tax rate differential between pre-TCJA and post-TCJA tax years. Generally, FTCs carried to pre-TCJA years offset income taxed at 35%, while FTCs utilized in a post-TCJA year will offset income taxed at a maximum 21% rate.

BEAT liability: An NOL carryback to a tax year for which Section 59A is effective could create or increase a taxpayer's BEAT liability. Simply stated, an NOL deduction reduces a taxpayer's regular tax liability, which can create or increase the taxpayer's base erosion minimum tax amount. As a result, a taxpayer that is an applicable taxpayer, as defined for BEAT purposes, and that elects to carry back an NOL may be subject to a BEAT liability depending on its adjusted regular tax liability in the carryback year. This will likely come as a surprise to many taxpayers.

IRS news

IRS expands 15 April tax relief and issues FAQs on extension of filing and payment deadlines, FATCA reporting

In response to COVID-19, the IRS in Notice 2020-18 extended until 15 July 2020, the 15 April due date for filing federal income tax returns. Notice 2020-18 also removed the previously imposed caps on the payment amount that could be postponed so that taxpayers now have until 15 July to pay their entire tax liability without incurring penalties or interest.

Notice 2020-18 superseded Notice 2020-17, issued on 18 March 2020, in which the IRS postponed the 15 April payment deadline until 15 July and imposed certain caps on the amounts subject to relief.)

The IRS on 24 March also posted Frequently Asked Questions (FAQs) on the extension of certain filing and payment deadlines to 15 July 2020 provided in Notice 2020-18.

The FAQs indicate, among other things, that for any taxpayer whose Federal income tax return filing due date has been postponed from 15 April to 15 July 2020, the due date of that taxpayer's Section 965 installment payment has also been postponed to 15 July 2020.

Similarly, for any taxpayer whose Federal income tax return filing deadline has been postponed from 15 April to 15 July 2020, the due date for Form 8991 and the Base Erosion Anti-Abuse Tax (BEAT) payment has been postponed to 15 July 2020. The relief provided by Notice 2020-18 does not generally apply to the filing of information returns (see Rev. Proc. 2018-58, which explains the impact on other filings, etc., from a postponement to file under Section 7805A (which is the authority for Notice 2020-18)).

The IRS also announced on the IRS Foreign Account Tax Compliance Act (FATCA) FAQ website that foreign financial institutions filing a FATCA Report (Form 8966) to the IRS that is generally due on 31 March are granted an extension to file to 15 July 2020. A Form 8809-I, Application for Extension of Time to File FATCA Form 8966 will not be required for this extension.

IRS announces modifications to operations in response to COVID-19

The IRS on 25 March 2020, unveiled a new People First Initiative (IR-2020-59) to address COVID-19, that temporarily adjusts or suspends key compliance programs. The IRS release describes changes to its operations effective (roughly) 1 April through 15 July 2020, although this could be modified or expanded.

Some highlights that are particularly relevant include the following:

- During this period, the IRS will generally not start new examinations, but will continue to work refund claims.
- New examinations may be started, if necessary, to preserve the statute of limitations.
- For existing exams, though IRS examiners will not hold in-person meetings, they will continue their examinations remotely, where possible.
- Appeals employees will also continue to work their cases by phone and videoconference.
- New automatic, systemic liens and levies will be suspended.
- Liens and levies initiated by field revenue officers will be suspended.

IRS issues final Section 901(m) regulations

On 20 March 2020, Treasury and the IRS published final regulations providing guidance on determining the creditability of foreign taxes following covered asset acquisitions (CAAs) under Section 901(m). The final regulations are generally consistent with the prior temporary regulations and the proposed regulations published in December 2016.

Among other things, the final regulations include the three additional categories of transactions treated as covered asset acquisitions contained in the proposed regulations. Importantly, the final regulations modify various definitions to effectively exempt CAAs, to the extent gains and losses with respect to the relevant foreign assets are recognized by members of the domestic Section 901(m) payor or a member of the same consolidated group as the Section 901(m) payor. The final regulations further clarify that Section 901(m) calculations should be made prior to the application of Section 909 in the case of CAAs involving foreign tax credit splitters.

The finalized proposed regulations generally apply to CAAs occurring on or after the date the final regulations are published in the Federal Register.

TIGTA finds major FIRPTA withholding discrepancies

The Treasury Inspector General for Tax Administration (TIGTA) in March 2020 released a report finding that "millions of dollars in discrepancies in tax withholding required by the *Foreign Investment in Real Property Tax Act* (FIRPTA) are not being identified or addressed." The review was meant to assess IRS efforts to verify the accuracy of withholding credits reported on Forms 1040NR and Forms 1120-F. TIGTA found more than $688 million of discrepancies between withholding reported on Forms 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, and the withholding assessed to the buyer's tax account filed during 2017.

The IRS agreed to all 12 of TIGTA's recommendations, but did not agree with TIGTA's outcome numbers, which they consider are overstated.

IRS announces COVID-19 information webpage

The IRS announced a new webpage (www.irs.gov/coronavirus) that consolidates information intended to help taxpayers affected by the coronavirus.

Transfer pricing news

Alignment of transfer pricing regulations to TCJA provisions in relation to IP definition not expected before 2021

The IRS will not be issuing regulations that align the transfer pricing rules to changes introduced by the *Tax Cuts and Jobs Act* (TCJA) in relation to the definition of intangible property before 2021, an IRS official said in early March.

The official was also quoted as saying a regulation that addresses the valuation of transactions on an aggregate basis is expected to be released sometime in 2020.

The TCJA moved the definition of intangible property (IP) from Section 936(h)(3)(B) to Section 367(d)(4) and included goodwill, going-concern value and workforce in place within the definition. The law also confirmed the position the IRS has taken that the Secretary can require IP transfers to be valued on an aggregate basis or on the basis of the realistic alternatives to the transaction.

OECD news

OECD plans to continue BEPS 2.0 project virtually

The OECD in March 2020 released an update on the Base Erosion and Profit Shifting (BEPS) 2.0 project, indicating its intent to continue "full steam." The OECD plans to continue its efforts virtually with the goal of reaching a political agreement at the G20/OECD Inclusive Framework on BEPS plenary meeting that is still planned for Berlin on 1-2 July 2020.

Under the circumstances, it is not clear how much formal public engagement there will be as the OECD and the participating countries further flesh out the details of the approaches under Pillar One and Pillar Two in advance of the July meeting. EY will continue to follow the discussions closely and will report regularly.

OECD releases second annual peer review report on BEPS Action 6, prevention of treaty abuse

On 24 March 2020, the OECD released the second peer review report (the Report) relating to the compliance by members of the Inclusive Framework on BEPS with the minimum standard on BEPS Action 6 for prevention of treaty abuse. The Report includes information available as of 30 June 2019 (the cut-off date) and covers 129 jurisdictions that were members of the Inclusive Framework by the cut-off date.

Overall, the Report concludes that the majority of the Inclusive Framework members have begun to translate their commitment to prevent treaty shopping into actions and are now in the process of modifying their treaty networks. According to the Report, the peer review results show the efficiency of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) in implementing the treaty-related BEPS measures.

The Report also notes that the MLI is by far the preferred tool of the Inclusive Framework members for implementing the BEPS Action 6 minimum standard.

OECD issues IT-tools to support implementation of TRACE, wider exchange of tax information

The OECD has released an XML Schema and User Guide to support the technical implementation of the OECD's Treaty Relief and Compliance Enhancement (TRACE) initiative (the TRACE XML Schema and User Guide). The TRACE XML Schema and User Guide provide guidance on the standardized electronic format to be used for reporting TRACE-related information by financial institutions to tax administrations and for the exchange of information between tax administrations.

It is intended to complement the TRACE Implementation Package, which sets out the procedures, forms and agreements to be put in place to operationalize the TRACE Authorized Intermediary system that was approved by the OECD's Committee on Fiscal Affairs in 2013.

The OECD also released a dedicated XML Schema and User Guide (the Generic Status Message XML Schema and User Guide) that allows tax administrations to provide structured feedback to the sender on errors encountered with respect to tax information exchanged through the Common Transmission System (CTS). The CTS is a secure, encrypted vehicle created by the OECD to enable bilateral exchanges of tax information.

OECD releases CbCR comments

On 9 March 2020, the OECD released the compilation of comments received on the 2020 review of Country-by-Country Reporting (BEPS Action 13 minimum standard). The OECD received 79 contributions totaling 552 pages.

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