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Legislation

US House Republicans eye budget reconciliation legislation in 2025

US House Speaker Mike Johnson (R-LA) and his fellow Republicans are mapping out legislative options and, according to reports, are setting the groundwork for budget reconciliation legislation in 2025, which would be broad in scope and address multiple areas, including tax. The Speaker said budget reconciliation legislation in 2025 would focus on "pro-growth policies" and "regulatory reform, reducing the size and scope of government."

Budget reconciliation generally permits legislation impacting revenues and spending to pass the Senate with 51 votes, rather than the regular 60-vote "filibuster" threshold, with some restrictions.

Though there is apparent unanimity within the Republican Party on the need to extend *Tax Cuts and Jobs Act* (TCJA) provisions, House and Senate Republicans are not as unified on the need to pay for the extensions. House members are more inclined to recognize the need for revenue offsets, while Senators maintain that pro-growth tax provisions do not require pay-fors.

House Ways & Means Chairman Jason Smith (R-MO) has been quoted as saying that some Republicans would support a corporate tax rate increase, although he does not. The Chairman further said he could envision lawmakers coming up with a total of approximately $2.5t in savings but finding $4t would be a "huge task." (The Congressional Budget Office in June estimated the approximate cost of a full TCJA extension to be $4t, not including interest.)

There are a number of tax issues at stake in this year's elections, including: (1) how to address the expiration of TCJA individual and passthrough provisions at the end of 2025 and scheduled changes to business provisions (such as the Global Intangible Low-taxed Income (GILTI), Foreign Derived Intangible Income (FDII), and Base Erosion and Anti-abuse Tax (BEAT) provisions), plus a potential corporate rate increase and any number of other proposals that could be pulled in to pay for those extensions; (2) the OECD global tax agreement, which Republicans in Congress have very vocally opposed; and (3) the *Inflation Reduction Act* energy tax credits.

Courts

Supreme Court upholds Section 965 mandatory repatriation tax

In a closely watched decision, the US Supreme Court in June 2024 held in a 7-2 opinion that Congress may impose a mandatory repatriation tax (MRT) on accumulated and undistributed income of US-controlled foreign corporations under Section 965.

In *Moore v. United States*, No. 22-800 (20 June 2024), the majority declined to rule on whether realization is a constitutional requirement of an income tax, but held that Congress may attribute a business entity's realized and undistributed income to the shareholders or partners of that entity. In doing so, it emphasized that its holding "applies when Congress treats the entity as a pass-through."

In their initial brief, the taxpayers argued that the MRT was unconstitutional because the US Constitution's 16th Amendment requires income to be "realized" before it can be taxed. If the Court agreed, many parts of the Internal Revenue Code potentially could be ruled unconstitutional for the same reason, from the mark-to-market securities rules of Section 475 to Subpart F to pass-through taxation under subchapters K and S.

In contrast, if the Court ruled that no such realization requirement exists, it would open the door for future legislation taxing unrealized appreciation and even wealth. As a result, when oral arguments arrived during the first week of December 2023, it appeared the Court would be presented with a question that could reshape our current and future tax law: does the 16th Amendment of the Constitution contain a realization requirement?

The Court, however, did not address that question. Perhaps realizing the gravity of the question posed, both the taxpayers and the government sought during oral arguments to offer the Court the option of a narrower, less-impactful ruling. For their part, the taxpayers conceded that Subpart F and Subchapters S and K were constitutional for their own specific reasons but insisted that the MRT violated the 16th Amendment by taxing them on income they had never realized.

The government pursued an even narrower option, explaining to the Court that it need not rule on a realization requirement at all; rather, the Court could look to its long-standing precedent to conclude that the MRT was constitutional because Congress may attribute the income that has been realized by a corporation to its shareholders, which is exactly what the Court did.

Regarding the MRT, the Court noted income had clearly been realized but was realized by the controlled foreign corporation, rather than the shareholders/taxpayers. As established by precedent like *Burk-Waggoner Oil Assn. v Hopkins and Burnet v. Leininger*, Congress has a "long-standing practice of taxing the shareholders or partners of a business entity on the entity's undistributed income."

The opinion, however, appears to limit Congress's ability to attribute income from an entity to its owners to those situations where the entity is taxed as a pass-through (i.e., partnerships, S corporations, and controlled foreign corporations); it explicitly states that it does not address the issue of whether Congress could tax both the entity and the owner on the same undistributed income.

As a result, the Court's decision in *Moore* is largely anti-climactic, focusing as it did on "attribution" and leaving the fight over "realization" for another day. In addition, the Court noted in only its second footnote that "our analysis today does not address the distinct issues that would be raised by ... (ii) taxes on holdings, wealth, or net worth; or (iii) taxes on appreciation."

Treasury and IRS news

IRS finalizes regulations on procedure for reporting and payment of stock repurchase excise tax

The IRS on 28 June 2024 released final regulations (TD 10002) on how covered corporations must report and pay the stock repurchase excise tax, which imposes a 1% surcharge on certain corporate stock buybacks occurring after 31 December 2022.

The final regulations adopt the proposed regulations, which were released in April 2024, with some modifications. The final regulations apply to stock repurchase excise tax returns required to be filed after 28 June 2024 (the date the final regulations were filed in the Federal Register). For calendar-year taxpayers, this means they must start reporting and paying the excise tax beginning with their returns due 31 October 2024. The government said they will release the final regulations on computing the excise tax at a later date.

Under the final regulations, any covered corporation that makes a repurchase or is treated as making a repurchase would have to file the return and keep records of the repurchases, exceptions or adjustments, even if they qualify for an exception to the tax. The records would be available to the IRS for inspection, for purposes of determining whether the covered corporation is liable for the tax.

The final regulations exempt real estate investments trusts (REITs) and regulated investment companies (RICs) from the filing requirements but still subject them to the recordkeeping requirements.

The final regulations follow the proposed regulations in requiring reporting the excise tax on Form 720, *Quarterly Federal Excise Tax Return*. Taxpayers must calculate the excise tax on Form 7208, *Excise Tax on Repurchase of Corporate Stock*, which will be released before the filing deadline. Form 7208 must be filed with Form 720 by the due date of the Form 720 for the first full calendar quarter after covered corporation's tax year ends.

IRS releases final digital asset broker reporting regulations and transition relief for certain brokers

Treasury and the IRS on 28 June 2024released final regulations (TD 10000) requiring custodial brokers to report sales and exchanges of digital assets beginning in calendar year 2025. Further, cost basis reporting will be required by certain brokers, for transactions occurring on or after 1 January 2026.

In addition to the broker reporting rules, the final regulations provide rules for calculating basis, gain and loss from digital asset transactions and an optional, aggregate reporting method for certain sales of stablecoins and non-fungible tokens over a de minimis threshold. Importantly, the guidance requires reporting by digital asset brokers providing custodial services and delays the extension of the definition of broker to non-custodial persons that provide facilitative services, while Treasury and the IRS study the issues including decentralized exchanges within the definition of digital asset broker.

The IRS and Treasury also issued three pieces of additional guidance.

[Notice 2024-56](#) provides transition relief from reporting penalties and backup withholding for brokers who are not able to timely and accurately file information returns and furnish payee statements during calendar year 2025 if the broker makes a good faith effort to comply.

Notice 2024-57 identifies six types of digital asset transactions – including staking and digital asset lending – that will not be subject to information reporting until Treasury and the IRS issue further guidance. The IRS cautions that the deferred reporting should not be regarded as a conclusion that such transactions do or do not constitute sales or are otherwise subject to or exempt from tax.

Revenue Procedure 2024-28 creates a safe harbor under Section 1012(c)(1) for allocating the unused basis of digital assets held within each wallet or account of a taxpayer as of 1 January 2025.

US government addresses certain related-party partnership basis-transactions

Treasury and the IRS on 17 June 2024 addressed the issue of certain related-party partnership basis shifting transactions it considers potentially abusive in three pieces of guidance.

In proposed regulations (REG 124593-23), the IRS identified certain partnership related-party basis-adjustment transactions, and substantially similar transactions, as transactions of interest under Reg. Section 1.6011-4(b) that must be reported to the agency on Form 8886, *Reportable Transactions Disclosure Statement*. Material advisors to such transactions would also be required to report them under Section 6111(a), subject to penalties imposed by Section 6707(a) and (b). Material advisors must also maintain a list of all taxpayers for which they acted as a material advisor for a reportable transaction, as required by Section 6112(a).

The IRS on the same day also released a related notice and revenue ruling. In Notice 2024-54, Treasury and the IRS announced they intend to publish two sets of proposed regulations to address certain basis-shifting transactions involving partnerships and related partners. The future regulations in the Notice are proposed to apply to tax years ending on or after 17 June 2024, except that certain of the regulations related to the consolidated return regulations will be applicable at a later time.

In Revenue Ruling 2024-14, the IRS ruled that the codified economic substance doctrine in Section 7701(o) applied to (and was not satisfied in) certain fact patterns involving partnership related-party basis-adjustment transactions under Sections 732(b), 734(b) and 743(b).

US officials comment on pending CAMT

IRS officials in June offered some insights into two of the more eagerly anticipated guidance projects: the corporate alternative minimum tax (CAMT).

An IRS official confirmed that CAMT guidance is at a "very advanced stage" and "incredibly long." According to the official, the proposed regulations will implement various issued notices as well as address new topics. Another IRS official said the coming regulations would address partnership issues, primarily: (1) the determination of distributor share when a corporation holds an interest in a partnership; and (2) the situation where an applicable corporation contributes property to a partnership with built-in gain or loss that is subject to tax nonrecognition, but not nonrecognition for financial statement purposes.

Another topic expected to be addressed in the proposed CAMT regs reportedly includes the situation where an applicable corporation has gains or losses that are diluted or the interest is increased, and whether they are still recognized if it occurs in a nonrecognition transaction.

IRS extends penalty relief for failure to pay estimated CAMT to installment due August 2024

The IRS in Notice 2024-47 waived the penalty under Section 6655 for a corporation's failure to pay estimated tax payments attributable to a portion of the corporation's alternative minimum tax (CAMT) due on or before 15 August 2024, for a tax year beginning in 2024.

This is the third time the IRS has waived the penalty. In June 2023, the IRS waived the penalty for the 2023 tax year. In April 2024, the IRS waived the penalty for the installment due on 15 April 2024, for a tax year beginning in 2024 (and 15 May 2024, for a fiscal-year taxpayer with a tax year beginning in February 2024).

The IRS again cited for the waiver the challenges of determining whether a corporation is subject to CAMT, i.e., an "Applicable Corporation" under Section 59(k) and the amount of a corporation's CAMT liability under Section 55.

The IRS also will modify the instructions to Form 2220, *Underpayment of Estimated Tax by Corporations*, to clarify it will not impose the addition to tax based on a corporation's failure to make estimated tax payments of its CAMT liability for the relevant period.

Keep in mind that although corporations will not be penalized under Section 6655 (failure by corporation to pay estimated income tax) for failing to make estimated payments attributable to CAMT, other additions to tax could apply if a corporation fails to timely pay its CAMT liability when due.

For example, penalties could apply under Section 6651 (failure to file tax return or to pay tax) if the CAMT liability is not paid by the due date (excluding extensions) of the corporation's return. Additionally, taxpayers should also comply with the latest instructions to IRS Form 2220 to avoid a penalty under Section 6655.

IRS clarifies changes to 2023 QI agreement in new FAQs

The IRS in June 2024 added several questions and answers to its Frequently Asked Questions (FAQS) for qualified intermediaries (QIs) on substitute dividends and periodic-review certifications. The new FAQs clarify changes made to the QI Agreement in Revenue Procedure 2022-43. The new QI Agreement applies for QI agreements effective on or after 1 January 2023. The QI agreement established under Revenue Procedure 2017-15 expired on 31 December 2022.

The new FAQs address when a QI must assume primary withholding responsibility for payments of substitute dividends. They also provide general guidance for QIs required to submit certifications for a periodic review period covering 2021, 2022 and 2023.

The new FAQs further give information about the IRS's new QAAMS portal that QIs will be required to use for applying, renewing or terminating their status as QIs.

Tax treaties

US suspends key provisions of US-Russia tax treaty and protocol

The US Treasury on 17 June 2024 announced that it has formally notified the Russian Federation of the suspension of key provisions of the 1992 US-Russia Tax Treaty, along with the suspension of its accompanying protocol, by mutual agreement.

The suspended provisions are paragraph 4 of Article 1 (relating to the exceptions to the savings clause of paragraph 3), Articles 5 through 21 (substantive provisions) and Article 23 (nondiscrimination in taxation matters), as well as the Protocol, which detailed each country's respective rights to tax certain categories of income (these provisions were suspended by Russia in 2023).

According to Treasury's press release, the suspension responds to Russia's notification on 8 August 2023 of its intent to suspend specific provisions in tax treaties with 38 countries, including the United States. Regarding the United States, Russia announced suspension of paragraph 4 of Article 1, Articles 5 through 21 and Article 23 of the US-Russia Tax Treaty and the operation of its accompanying protocol.

Treasury had previously announced the suspension of tax information exchange with Russia in April 2022. The press release indicates the suspension of these provisions will take effect on 16 August 2024 for taxes withheld at source and for other taxes and will continue until otherwise decided by the two governments.

Transfer pricing

US District Court allows enforcement of IRS summons in transfer pricing audit of Eaton

The U.S. Court for the Northern District of Ohio (district court) enforced an IRS summons requesting annual performance evaluations for certain foreign employees as part of a transfer pricing audit (*US v. Eaton Corp.*, No. 1:23-mc-00037 (N.D. Ohio, 16 May 2024)).

The IRS is conducting a transfer pricing audit for 2017, 2018 and 2019 and issued summonses under Section 7602 on 15 February 2023, for employee evaluations for certain domestic employees and employees of Eaton's foreign related parties. On 27 August 2023, the IRS served a summons on Eaton with a similar request under Section 6038A, which requires certain foreign-owned domestic corporations to maintain and provide the IRS with specified information on transactions and related parties.

The district court's opinion underscores that some courts may support the IRS's assertion that it can request documents that "may be relevant" to an audit and that foreign privacy laws, such as EU Privacy Law, may not prohibit the production of such documents when exceptions for public interest apply.

The district court's opinion could broaden the scope of IRS summons authority in similar contexts and clarify the applicability of international privacy laws in US transfer pricing audits. As a result, taxpayers should carefully consider the scope of information that is included in documentation such as personnel records.

OECD developments

OECD/G20 Inclusive Framework releases documents on Pillar One Amount B and Pillar Two

The OECD/G20 Inclusive Framework on BEPS (IF) on 17 June 2024 released a series of documents on the Pillar One Amount B approach for transfer pricing for certain baseline marketing and distribution transactions and the Pillar Two global minimum tax rules.

The two Pillar One Amount B documents included a statement on the definitions of qualifying jurisdictions within the meaning of section 5.2 and 5.3 of the Amount B guidance (which provide for specified adjustments to the Amount B calculations for such jurisdictions) and the definition of covered jurisdictions within scope of the political commitment on Amount B. The two Amount B documents provide current lists of the jurisdictions that are qualified for specified adjustments to the calculations under the Amount B approach and a current list of the jurisdictions that are covered by the political commitment of IF member jurisdictions to respect the outcome of their jurisdictions' application of Amount B.

On the same date, the IF released two new documents on the Pillar Two global minimum tax rules. The first document was the fourth tranche of agreed Administrative Guidance, containing additional details on the allocation of current and deferred taxes, the deferred tax liability recapture rule, divergence between GloBE and accounting carrying values, and the treatment of securitization vehicles. The second Pillar Two release was a brief Question & Answer document on the qualified status of the GloBE rules, including information on the peer review process for determining the qualified status of the GloBE rules of implementing jurisdictions.

There are several implications emanating from these releases.

First, Amount B is not subject to a revenue threshold (in contrast to both Pillar One Amount A and Pillar Two). It is important that companies assess how the jurisdictions that are relevant to their business choose to react to the implementation of Amount B and how this may impact the pricing of in-scope transactions. Companies should also continue to monitor further developments on Amount B in the Inclusive Framework.

Companies in scope of Pillar Two should review the impact of the changes included in the June 2024 Administrative Guidance to identify all items relevant to the operation of the global minimum tax rules in their circumstances. Companies also should monitor how the jurisdictions where they operate reflect the June 2024 Administrative Guidance and all other agreed Administrative Guidance in their domestic Pillar Two legislation.

In addition, it will be important for companies monitor the outcome of the peer review process and the determination of the qualified status of the Income Inclusion Rules and Qualified Domestic Minimum Top-up Taxes (QDMTTs) and (including QDMTT Safe Harbour status) of all relevant jurisdictions.

OECD releases updated FAQs for MNEs participating in ICAP risk assessments

The OECD Forum on Tax Administration on 5 June 202 released updated frequently-asked-questions-and-answers (FAQs) on participating in the International Compliance Assurance Program (ICAP).

ICAP is a voluntary risk assessment and assurance program. Under ICAP, multiple tax administrations come together to simultaneously risk-assess a multinational enterprise (MNE). In return, the program offers MNEs a level of tax assurance that provides certain audit protections by the participating tax administrations regarding the MNE's low-risk covered transactions for a specified period.

Among other things, the updated FAQs clarify how MNEs can use surrogate lead tax administrations (surrogate LTAs) from different jurisdictions, how ICAP can be applied on a segment of an MNE group and the availability of ICAP to taxpayers below the Country-by-Country-Reporting (CbCR) threshold.

In May 2024, the OECD also published information on participating tax administrations, which contains ICAP contact information for each of the twenty-three participating tax administrations. It also contains helpful information for each tax administration such as composition of the ICAP team, covered periods, ICAP scope and limitations, outcome letters and caveats and the approach to ICAP risk assessment process.

Importantly, MNEs should note that there is some flexibility when entering ICAP, either in relation to an LTA or covered segment of the business. It is also good to know that ICAP is an option for smaller MNEs. Participating countries apply ICAP slightly differently, but the information is helpful in understanding the differences. The ICAP handbook provides further details on the program.

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