

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

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On March 27, 2020, Congress passed the Coronavirus Aid, Relief and Economic Security Act (the "**CARES Act**"). This historic \$2 trillion relief package received bipartisan support and is part of the third wave of federal government support as the nation copes with the acute economic fallout from the coronavirus (**COVID-19**) pandemic. The CARES Act, among other things, aims to provide significant aid to businesses and employees. Some of the key business tax provisions are outlined below.

Corporate Net Operating Losses - Limitations and Carrybacks.

- Before the CARES Act, corporate net operating loss ("**NOL**") carryforwards were deductible only to the extent of 80% of taxable income, and NOLs generally could not be carried back to prior tax years. (Congress implemented the NOL carryforward limitation and eliminated NOL carrybacks as part of the Tax Cuts and Jobs Act of 2017 (the "**TCJA**") to help pay for the then newly-reduced corporate tax rate.)
- The CARES Act changes these rules and greatly expands the ability of corporations to use their NOLs to offset taxable income. First, NOLs arising in 2018, 2019, or 2020 generally can be carried back up to five years. (However, an NOL cannot be carried back to or from a year in which the corporation qualified as a real estate investment trust and cannot be carried back to offset foreign subsidiary earnings that are subject to tax under Section 965 of the Internal Revenue Code.) Importantly under the CARES Act, a corporation with NOLs arising in 2018, 2019, or 2020 that paid tax in one or more of the five preceding tax years will be able to immediately file amended returns seeking a refund of taxes paid during such years. Second, for 2020 and prior years, the taxable income limitation has been eliminated so that NOLs can be used to offset 100% of the corporation's taxable income. Third, for 2021 and subsequent years, the taxable income limitation that was created in the TCJA has been relaxed.

Non-Corporate Net Operating Losses - Postponement of Disallowance Rule.

- The CARES Act modifies loss limitations for many non-corporate taxpayers such that non-corporate taxpayers' NOLs are now generally subject to the same rules to which corporations are subject. The CARES Act allows these excess business losses to be claimed in 2018, 2019, and 2020, postponing the disallowance rule until 2021. A non-corporate taxpayer that filed a tax return for 2018 without claiming a deduction for excess business losses will be able to file an amended return claiming a refund.

Acceleration of Corporate AMT Credits.

- Before 2018, corporations were subject to a corporate alternative minimum tax (“**AMT**”). If a corporation was subject to AMT in any year, the amount of AMT was allowed as a credit against the corporation’s regular tax liability in later years when the corporation’s regular tax liability exceeded its tentative minimum tax. The corporate AMT was repealed by the TCJA, and corporations were allowed to claim 50% of the corporation’s unused AMT credits (which offset regular tax liability and are refundable) in 2018, 2019 and 2020 and 100% in 2021, when any remainder became fully refundable.
- The CARES Act accelerates corporate AMT credits by making any unused credits fully refundable in 2019. Additionally, the CARES Act provides an election to obtain the entire refundable credit amount in 2018.

Increase in Business Interest Expense Deduction.

- Before the CARES Act, the deduction for business interest expense for a taxable year was limited to the sum of (1) business interest income, (2) 30% of adjusted taxable income, and (3) qualified floor plan financing interest. Adjusted taxable income means taxable income, computed with several modifications, and generally is equivalent to earnings before interest, taxes, depreciation, and amortization (**EBITDA**). Notably, in 2022 and later years, adjusted taxable income will no longer exclude depreciation, amortization, or depletion.
- The CARES Act increases the amount of interest that can be used to offset a business’s adjusted taxable income. For tax years 2019 and 2020, the CARES Act changes 30% of adjusted taxable income to 50% of adjusted taxable income. This change will allow a larger deduction for business interest expense for those taxable years. Taxpayers have the option to elect out of the increase, and if such an election is made, it may only be revoked with the consent of the Secretary of the Treasury. This election may be helpful for taxpayers that would be subject to the base erosion and anti-avoidance tax (**BEAT**) as a result of the increased amount of deductible interest expense. (Disallowed interest expense can be carried forward indefinitely.)
- Partnerships apply the business interest expense limitation at the partnership level using the partnership’s (as opposed to the partners’) business interest income and adjusted taxable income. Business interest that is limited at the partnership level is allocated to its partners as excess business interest (“**EBI**”).
 - Before the CARES Act, partners could deduct EBI in future taxable years only under certain circumstances, such as when the partnership allocated excess taxable income (“**ETI**”) to the partners.
 - Under the CARES Act, the increase to 50% adjusted taxable income does not apply to the calculation of the partnership’s business interest expense limitation, but beginning in 2019, 50% of each partner’s allocation of EBI is treated as interest paid to or accrued by the partner in 2020 (generally allowing that EBI to be deducted subject to partner-level limitations), while the remaining 50% may be deducted by the partner only as allowed under the prior rules, such as when the

partnership allocates ETI.

- The Cares Act allows a taxpayer to elect to use its 2019 adjusted taxable income for purposes of computing its business interest limitation on its 2020 tax return. This election should benefit businesses whose earnings are negatively impacted by COVID-19 by allowing them to deduct a greater portion of their business interest expense in 2020. Taxpayers should therefore be aware when preparing their 2019 tax return that the calculation of adjusted taxable income on that return and any elections that may affect that calculation could also impact their allowable business interest expense deduction in 2020.

15-Year Recovery Period for Qualified Improvement Property.

- The CARES Act corrects a drafting error in the TCJA regarding qualified improvement property known as the “retail glitch.” Qualified improvement property is any improvement to an interior portion of a building that is nonresidential real property if the improvement is placed in service after the date the building was first placed in service (but excluding an enlargement of the building, an elevator or escalator, or the internal structural framework of the building). The TCJA assigned a 39-year MACRS recovery period to qualified improvement property, instead of the 15-year MACRS recovery period that was intended. This error also had the unintended effect of making qualified improvement property ineligible for bonus depreciation, which only applies to property with a recovery period of 20 years or less. Under the CARES Act, qualified improvement property has a MACRS recovery period of 15 years, effective beginning in 2018.
- A taxpayer that filed a tax return for 2018 utilizing a 39-year MACRS recovery period to qualified improvement property will be able to file an amended return claiming a refund. This correction is intended to provide immediate cash-flow and tax benefits to businesses impacted by COVID-19 such as those in the hospitality, retail and restaurant industries and incentivize businesses in these industries to continue to invest in improvements.

Employer-Related CARES Act Provisions.

- In addition to the above-discussed business tax provisions, the CARES Act also provides several helpful employer-related provisions, including the employee retention credit and the delayed payment of employer payroll taxes, that are addressed [here](#).