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Tax Provisions of the CARES Act

April 1, 2020

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TAX PROVISIONS OF THE CARES ACT

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THOUGHT LEADERSHIP

April 1, 2020

On Friday, March 27, the President signed into law the 880-page *Coronavirus Aid, Relief, and Economic Security Act* ("CARES Act). This was the third phase of major federal legislation created in response to the COVID-19 pandemic. It was preceded by the *Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020*, which set in motion funding for various government agencies; and the *Families First Coronavirus Response Act*, the tax aspects of which we explained in a previous article.

Earlier this week we shared the first round of guidance from the CARES Act, consisting of an explanation of the Paycheck Protection Program, which is a massive new SBA loan program that offers the potential for its loans to be partially or completely forgiven (a program *completely* different from the Economic Injury Disaster Loan program described in the previous *Families First* legislation). Today we added more guidance regarding the mechanics of that program. Our COVID-19 Resource Center is continually being populated with articles by all of BNN's practice groups. The purpose of this publication is to share BNN's insights into the federal tax features of the CARES Act. What follows is the work of numerous BNN tax professionals.

If you would like to discuss these matters further, please contact your BNN advisor at 800.244.7444.

WHAT'S INSIDE

REDUCED AND DEFERRED PAYROLL TAXES FOR EMPLOYERS

Employee Retention Credit and Delayed Payment of Payroll Taxes

The CARES Act provides for delayed payment of certain employer payroll taxes as well as a credit against payroll taxes for employers subject to COVID-19 related closures.

EMPLOYEE RETENTION CREDIT

The CARES Act provides eligible employers with a credit against their Section 3111(a) payroll taxes equal to 50% of the qualified wages paid to each employee in a quarter, up to a maximum of $10,000 in wages. The retention credit is applicable for qualified wages paid from March 13, 2020 through December 31, 2020. The credit is applied against the employment taxes owed as reduced by other credits (including the employment credits from the Families First Coronavirus Response Act) but in the event the Employee Retention Credit exceeds the employment taxes for the quarter, the excess amount will be refunded to the employer.

The credit will be administered through the filing of quarterly payroll tax Form 941. The wage cap is one that limits the overall credit to $5,000 per employee in total, regardless of how many quarters the employee works. The credit reduces only the employer's 6.2% Social Security tax. It does not apply to the 1.45% Medicare tax.

> *BNN observation: It is unclear whether, in cases where this credit exceeds the 6.2% employer tax, the excess will in turn reduce the **employee** share of tax that is remitted, or if it will be refunded separately. Form 941 currently is not constructed to clearly accommodate this credit. But it is clear that the credit can exceed the employer's share of this tax, and we expect more guidance from the IRS soon regarding the mechanics.*

Employers are eligible for the credit if they meet one of two tests. First, they are eligible if they *were carrying on a trade or business during calendar year 2020 whose operations were fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19*. Second, they are eligible starting with the quarter in which they experienced a decline in gross receipts of at least 50% for the calendar quarter as compared to the same calendar quarter in the prior year, and ending with the first calendar quarter beginning after a calendar quarter in which gross receipts are greater than 80% of the gross receipts for the same calendar quarter for the prior year.

Use of the SBA's payroll protection program loan may remove your eligibility for a payroll-based credit or deferral.

For employers with 100 or fewer employees, the credit takes into account all qualified wages up to the $10,000 limit per employee. For employers with more than 100 employees, qualified wages are limited to only wages paid to employees who are unable to provide services.

Tax-exempt organizations that meet the first test described above (full or partial shutdown due to COVID-19) are eligible for the Employee Retention Credit.

In addition to being claimed on qualified wages, the credit can also be claimed for certain health plan expenses that are allocable to these wages.

For businesses considering applying for the forgivable SBA Loan under the Paycheck Protection Program, it is important to note that employers who receive one of these loans are NOT eligible to claim the Employee Retention Credit.

DELAYED PAYMENT OF EMPLOYER PAYROLL TAXES

Another aspect of the CARES Act is the potential for employers to defer the 6.2% employer portion of the Social Security tax. Medicare taxes (as well as federal income tax withholding) are not deferred under these provisions. The payroll tax deferral period extends from March 27, 2020 until December 31, 2020. 50% of the deferred taxes must be deposited by December 31, 2021, and the remaining 50% must be deposited by Dec. 31, 2022.

Self-employed persons can take advantage of this relief provision. A sole-proprietor or an individual who is a service partner of an entity taxed as a partnership can adjust his or her estimated tax payment liabilities for the reduction in the employer portion of their social security tax otherwise due. This may provide a much needed cash flow injection back into small businesses that would otherwise be diverted to make tax distributions to cover this payment obligation. However, deferral means the business owner is still faced with liquidity and needs to pay these taxes down the road (hopefully when business prospects have changed for the better). Because the employer's FICA tax is considered a tax on the employer, the liability should side-step the dreaded "trust fund recovery penalty" if these taxes continue to go unpaid due to continuing financial constraints.

Employers that use payroll service providers or Certified Professional Employer Organizations (CPEOs) and who direct such organizations to defer payment of any applicable employment taxes during the payroll deferral period will be held solely liable for any taxes that have been deferred.

COORDINATION WITH OTHER CARES ACT BENEFITS

The CARES Act provides employers with a choice in the case of an otherwise eligible entity between (1) using the employee retention credit in conjunction with the payroll tax deferral, or (2) qualifying for an SBA forgivable loan to fund payroll costs.

> *BNN observation: It appears that the employee retention credit may be paired with the payroll tax deferral. However, the full benefits of the Payroll Protection Program cannot be paired with the employee retention credit or the payroll tax deferral. There are many open questions concerning the mechanics of this integration. One such question is whether eligible employers who elect to delay payroll taxes and subsequently find they would otherwise be approved for loan forgiveness need to accelerate payment on these delayed payroll taxes. Or, does opting to delay these tax payments eliminate any eligibility for loan forgiveness even before such determination period is complete? IRS guidance would be helpful and is expected. In the meantime, applicants for any of these programs should proceed with caution and become as familiar as possible with the interplay before proceeding.*

Employers should work with their advisors to first determine whether they meet the definition of an "affected business" to see if the Employee Retention Credit is even an option. This requires an analysis of how businesses have been affected by COVID-19 and while the gross receipts test is fairly straightforward, the government shutdown test may not be and will likely require some additional regulatory guidance to help us navigate the myriad of situations businesses are facing. The following chart will help employers consider how the retention credit and payroll tax deferral function and co-exist.

EMPLOYEE/EMPLOYER SCENARIO	EMPLOYEE RETENTION CREDIT	PAYROLL TAX DEFERRAL
Available in Conjunction with SBA 7a Loan	No	No
Employer with 100 employees or FEWER	Credit calculated on ALL qualified wages paid after 3/12/20	Full deferral
Employer with MORE than 100 employees	Credit calculated on qualified wages paid to employees not working due to COVID-19	Full deferral
Business Financial Eligibility	Business must be shutdown by governmental order OR experience a 50% drop in revenue	Applies to all businesses regardless of the economic impact of COVID-19 or financial performance
Self Employed Person Eligibility	No	Yes - Employer Portion of SSDI (6.2%) may be deferred
Maximum Dollar Value Per Employee	$5,000 Credit - 50% of $10,000 MAX Applied on IRS Payroll Form 941 against ER Taxes. Excess Refunded	$8,537.40 - 6.2% of $137,700 SSDI base for 2020. Only applies to wages paid from 3/27/2020 to 12/31/2020
Interplay with Other Tax Incentives	Credit may not be claimed on wages paid for Sick Leave or FMLA under FFCRA	Employer portion of SSDI on any wages are eligible unless ERC is claimed on them
Regulatory Environment	Will require regulatory guidance and additional analysis to confirm eligible businesses and qualified wages	No additional guidance or analysis needed. Clear cut!

CASH PAYMENTS TO INDIVIDUALS

Economic Impact Payments - aka "Recovery Rebates"

Described both as "economic impact payments" and "recovery rebates," the CARES Act promises cash payments to most individual taxpayers, which the IRS plans to provide through direct deposit when possible or checks via mail sometime in the next few weeks.

Qualifying recipients consist of individuals other than dependents of others and nonresident aliens. The payout amounts vary, and are based on 2020 filing status, "Adjusted Gross Income" (AGI) and qualifying children, using estimates based on the most recent 1040 data available (2018 or 2019).

The IRS has not yet explained how low-income retirees who do not file tax returns will qualify for their rebate checks.

Some individuals rarely file returns because their incomes are under the reporting threshold, and for those, the IRS initially and informally said that it would base the payments on data available from other sources, like Social Security records, with no action needed on taxpayers' parts. (The CARES Act legislative language clearly suggests no action is needed as well.) More recently, however, the IRS reversed itself in Pronouncement IR 2020-61 by noting that those who did not file 2018 or 2019 returns would have to provide something to the IRS, consisting of some sort of scaled-back information. The nature and mechanics of that are to be posted on their website soon.

> *BNN observation: It is stunning that the IRS would require something to be filed by low-income taxpayers when Congress made it clear that this would not be required. But the IRS controls the purse strings, so those taxpayers will need to comply if they want a payment. Beware, though, of scammers who may contact you asking for information. Such inquiries will not be legitimate.*

Individuals with incomes over certain levels will receive no payments, and those with incomes close to those levels will receive reduced payments.

The rebates equal $1,200 per qualifying individual (or $2,400 per jointly-filing couple), plus $500 for each qualifying child (generally children under age 17 who also qualify the filer for the child credit). The rebate is then phased out 5% of the amount by which the taxpayer's AGI exceeds $75,000, $112,500, or $150,000, for single, head of household, or joint filers, respectively.

Here is how to compute what you might receive:

	FILING STATUS		
	SINGLE	**HEAD OF HOUSEHOLD**	**MARRIED / JOINTLY**
Is your income this amount or higher? If so, you are ineligible for the rebate. If not, continue below.	99,000	136,500	198,000
Initial amount	1,200	1,200	2,400
+ Add $500 for each child that qualifies for the child credit (generally dependents under age 17)			
= Rebate before limitation			
Enter your AGI			
- Subtract this amount from AGI	75,000	112,500	150,000
= Subtotal (If zero or negative, stop here. Your rebate is not limited. If positive, multiply this amount by 5% and subtract it from the "rebate before limitation." The result is your rebate.)			

Although these payments will arrive soon, technically this rebate is treated as a “refundable” credit of your 2020 tax. Look at it as an additional amount of federal income tax that you can pretend was withheld from your wages. Unfortunately, if someone’s 2018 or 2019 income was higher than 2020’s will be (perhaps due to a 2018/2019 sale of investments or 2020 loss of employment), a person might receive a reduced rebate or none at all in the next few weeks due to the phase-outs described above. However, because these payments are advances of 2020 amounts, a reckoning will be performed on filers’ 2020 Forms 1040, and at that time he or she should receive the difference. For those whose incomes increase in 2020, it is unclear whether excess amounts collected must be paid back, but that appears to be the case.

RETIREMENT PLAN CHANGES

Penalty-Free Retirement Plan Withdrawals and Loans

The CARES Act provides taxpayers “affected by COVID-19” with some relief in the area of retirement plan distributions and loans.

What is the definition of those affected by COVID-19? Affected taxpayers include any individual:

- who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease COVID-19 (by a CDC approved test);
- whose spouse or dependent is diagnosed with the virus or disease; or
- who experiences adverse financial consequences as a result of quarantine, furlough, layoff, reduced work hours, the inability to work due to lack of child care because of the virus or disease, or the closure or reduced hours of a business that is owned or operated by the individual due to the virus or disease.

For these affected taxpayers, the following provisions of the Act allow individuals to use retirement funds, otherwise not accessible, to help supplement income during this difficult time.

RETIREMENT PLAN DISTRIBUTIONS

A coronavirus-related distribution of up to $100,000 from an “eligible retirement plan” made no later than December 31, 2020, is permitted without being subject to the 10% early withdrawal penalty. The limit applies in aggregate to all plans maintained by the employer or a controlled group. The taxpayer may treat the distribution amount as subject to tax ratably over the three taxable periods beginning with the year of distribution. Repayment of the distribution back to the qualified plan is allowed during the three years following the date of distribution, without regard to the yearly cap on retirement plan contributions.

An “eligible retirement plan” is defined as the type of plan that is eligible to accept tax-free rollovers. It includes 401(k) plans, 403(b) plans, governmental 457 plans, and IRAs (including SEP-IRAs and SIMPLE-IRAs). It does not include nongovernmental 457 (b) plans.

RETIREMENT PLAN LOANS

The Act increases the limit on loans from qualified plans to $100,000 (from the previous amount of $50,000). A taxpayer may take a loan from a qualified plan up to the lesser of $100,000 or 100% of the account balance. The increased loan limit is effective for 180 days following the Act’s enactment date. The due date of the outstanding loan balance occurring during the period beginning with the enactment date and ending on December 31, 2020, is delayed for one year, without the accrual of interest. For loans that were incurred before March 27, 2020, repayments required during the period of March 27, 2020 and December 31, 2020 may also be delayed for up to one year without penalty, however, interest will accrue on those earlier loan balances. The delay period is not considered when applying the five-year maximum repayment term applicable to plan loans.

Relaxed early distribution rules allow retirement plans to temporarily replace lost income.

Employer plans may need to be amended to allow for the above hardship provisions. For plans to remain qualified, plan amendments must be made no later than the last day of the plan year than begins on or after January 1, 2022 (December 31, 2022 would be the final date to make plan amendments for a calendar year plan). Governmental plans are provided an additional two years window.

BNN Observation: Please note that the loan provisions apply only to qualified plans such as 401(k), 403(b), and governmental 457 plans; loans may not be taken from IRAs. However, it is possible for a taxpayer to achieve the same result here from an IRA by utilizing the distribution provision from an IRA but returning the contribution to the IRA within the allowed three year window.

Taxpayers are advised to thoroughly consider the long term implications of taking advantage of these hardship withdrawal provisions. Obviously, if under dire circumstances, it’s useful to have these options available. But consider that with a severely reduced market value, loss of future tax-deferred earnings and growth, and loss of principal for withdrawals, available retirement funds will be severely reduced when retirement time actually comes about.

Relaxed Required Minimum Distribution Rules

The recent market volatility and retraction from previously-established highs in the equity markets have had many financial advisors telling their clients to stay the course and keep investing in their retirement portfolios. Unfortunately, that can be difficult when the IRS requires you to pull money out of your retirement savings under a complex set of rules known as the Required Minimum Distribution (RMD) requirements. Up until recently, the age at which an individual was required to take a RMD from their IRA or employer-sponsored retirement account was age 70 ½. The SECURE Act delayed the beginning RMD age until the taxpayer turns age 72. Taxpayers are allowed to defer their first RMD payment until no later than April 1 of the year following attainment of the prescribed age. The Act also requires the balance of inherited IRAs (including Roth IRAs) with designated beneficiaries to be distributed within ten years of the account owner’s death (with certain exceptions).

Under the CARES Act, RMDs from IRAs and qualified employer retirement plans such as 401(k), 403(b), and 457 plans, will be waived. Such waiver applies regardless of whether the taxpayer has been impacted directly by the pandemic. Additionally, the rule pertaining to the mandatory distribution of an inherited IRA balance received by a non-designated beneficiary prior to the IRA owner’s RMD commencement date is waived with respect to counting the 2020 tax year. These distributions must normally be made within 5 years of the former IRA owner’s death.

BNN Observation: Required Minimum Distributions are based on the value of the account balance at the end of the previous year. Recent market declines put additional pressure on the RMD calculation relative to current portfolio balances. The option to skip taking a RMD in 2020 may provide time for financial markets to recover some ground and keep more investment capital working in your portfolio for the time being.

TAX RETURN CHANGES

Use of Net Operating Losses is Expanded

Prior to the *Tax Cuts and Jobs Act* (TCJA), net operating losses (NOLs) of a C Corporation, individual, or trust could be carried back two years and forward 20 years, and could offset 100% of taxable income (90% for Alternative Minimum Taxable Income (AMTI) purposes). TCJA substantially changed these rules by disallowing all carrybacks related to post-2017 NOLs but providing an indefinite carryforward period with limited the use of post-2017 losses when carried forward to 80% of taxable income.

Reinstated NOL carry-backs allow fast access to cash through tax refunds.

The CARES Act temporarily reverses the TCJA changes. NOLs carried forward to tax years beginning before January 1, 2021 (2019 and 2020 tax years for calendar year taxpayers) will be permitted to offset 100% of taxable income. NOLs from 2018, 2019, and 2020 will be permitted to be carried back for up to five years. There are also special rules for REITs, life insurance companies, and for the Code Section 965 year that we are not addressing here.

BNN Observation: As a result of the extended carryback provision, taxpayers can carry back 2018, 2019, and 2020 NOLs to offset pre-TCJA ordinary income that could be taxed at higher rates (35% C Corporations and 39.6% individuals and trusts), thereby generating a current refund and a favorable rate differential. However, Alternative Minimum Tax is currently applicable to carryback claims from 2013 through 2017, so a taxpayer may not receive a full refund of taxes paid for those years.

BNN Observation: The CARES Act does not address Alternative Minimum Tax (AMT) NOL Carryforwards to 2019 and 2020 for individuals (AMT was repealed for corporation beginning after December 31, 2017). Additional guidance is needed to clarify whether AMT NOLs can offset 100% or 80% of AMTI.

Barring any procedural changes from the IRS, a taxpayer can request a refund on Form 1045 (individuals and trusts) and Form 1139 (corporations) which generally results in the processing of the refund in 90 days. In addition, corporations may continue to apply for a faster refund for overpaying estimated taxes for the current year by filing Form 4466.

Taxpayers who choose to forgo the five-year carryback for any NOLs arising in tax years beginning in 2018 and 2019 must make an irrevocable election with the filing of their 2020 tax returns. Taxpayers forgoing the carryback should not forget to make this timely election or NOLs could be permanently lost.

Finally, taxpayers who prepare financial statements in accordance with Generally Accepted Accounting Principles (GAAP) should be aware that these changes may dramatically impact the deferred tax assets and liabilities presented on their financial statements.

Excess Business Losses are Less Restrictive

As part of 2017's *Tax Cuts and Jobs Act* (TCJA), Congress added an additional loss limitation for taxpayers other than C Corporations. Section 461(l) provides that the amount of "net business loss" an individual or trust may use in a year to offset other sources of income is capped at $250,000 if single ($500,000 if married filing jointly). Any excess loss is converted into a net operating loss.

The CARES Act suspends Section 461(l) for tax years beginning prior to January 1, 2021 (tax years 2018, 2019, and 2020 for calendar year taxpayers). Taxpayers who reported a loss limited by this provision in 2018 or 2019 can file an amended return to claim a refund or increase their net operating loss available for carryback. (As discussed in a related piece, certain carrybacks are now allowed again as a result of the CARES Act.)

When Section 461(l) becomes effective again (for tax year beginning after January 1, 2021) the CARES Act modifies the calculation to exclude wages from business income. For some taxpayers, this will at that time cause more losses to be limited than otherwise would have been the case.

The technical corrections do not address whether the taxpayer can look through a partnership or S corporation interest to include the associated business capital gains or losses on a sale of a business interest. Additional guidance is needed to clarify this.

Business Interest Expense Limitations are Relaxed – Sec. 163(j)

As part of the major tax reform signed into law late December 2017, commonly known as *Tax Cuts and Jobs Act* (TCJA), certain businesses were required to limit their business interest deduction. (For a more detailed discussion, read this article: New Limitation on Interest Deductions for Businesses.) In general, the limitation disallows any interest expense that is in excess of 30% of adjusted taxable income plus business interest income. Adjusted taxable income for tax years 2018 through 2021 is taxable income increased by interest expense, depreciation, amortization, depletion and excludes any item not allocable to the business. Beginning in tax years 2022, depreciation, amortization and depletion are not added back for purposes of computing adjusted taxable income. Any disallowed interest is carried forward indefinitely. The limitation is not applicable to certain small businesses.

The CARES Act makes two favorable modifications to the business interest limitation. First, the 30% is increased to 50% of adjusted taxable income for years beginning in 2019 or 2020. A partnership cannot use the increased 50% of adjusted taxable income for the 2019 tax year and must continue to use the existing 30% limit. For partners that were allocated disallowed interest in 2019 from a partnership, unless they elect out, in 2020 the partner will be able to deduct 50% of the limited interest and the other 50% will be subject to the existing rules. The second modification, and maybe of greater benefit, is for tax year 2020: The bill allows businesses to elect to use their **2019** adjusted taxable income to calculate their **2020** business interest limitation. This will be very beneficial for many businesses that are subject to the interest limitation and had endured negative economic impact in 2020. For short taxable years in 2020 the 2019 adjusted taxable income must be prorated by the number of months in the short taxable year over twelve. This modification will allow many suffering businesses to deduct more interest expense than prior law would have allowed. This additional interest expense may result in a greater tax loss and with the CARES Act’s new modification of net operating loss rules, will allow taxpayers the potential carryback of the loss to receive a refund based on the higher federal tax rate that applied prior to TCJA.

These changes related to the business interest deduction will provide more flexibility and less limitations for many businesses at a time when cash flow is crucial. 2019 returns already filed should be reviewed to consider any impact these changes may have. An amended return may be necessary and beneficial for the business and its owners. The bill does not address any other certain features of §163(j), such as the tax shelter rules which require tax syndicates to apply the business interest limitation rules regardless of the size of the company. The bill addresses short taxable years in 2020 but it does not discuss certain transaction such as a corporation joining or leaving a consolidated group or certain other M&A transactions.

Charitable Contributions Can Offset More Income

The CARES Act provides several income tax benefits for charitable contributions made in 2020.

First, individual taxpayers *not* itemizing deductions on their 2020 federal income tax return may take an above-the-line deduction (an adjustment used to arrive at Adjusted Gross Income) up to $300 for cash donations to 501(c)(3) nonprofit organizations. Please note that donations to organizations other than public charities – such as private foundations and supporting organizations and Donor Advised Funds -- do NOT qualify for this deduction.

Also, for taxpayers itemizing their 2020 deductions the CARES Act suspends the percentage limitation on how much of a cash charitable contribution may be deducted on an individual taxpayer's 2020 federal tax return. For contributions originating in 2020, a taxpayer may elect to deduct an amount up to 100% of the taxpayer's Adjusted Gross Income (AGI), effectively reducing taxable income to zero. Similar to the above-the-line deduction, only cash contributions to public charities are eligible for this favorable treatment.

To the extent a taxpayer's contributions in 2020 exceed 100% of their AGI, that excess will carry forward to the following year for up to five additional tax years. Carryover contributions from years before 2020 will continue to be limited in accordance with prior law.

> *BNN Observation: Taxpayers with prior year charitable contribution carryforwards for which 2020 is the fifth and final year of the carryforward period need to be aware that the carryforward amount will be lost if the taxpayer takes advantage of the 100% limitation for 2020 contributions.*

For taxpayers that are C corporations the percentage limitation is increased from 10% to 25%. All other rules discussed above – cash gifts, completed in 2020, to public charities, impact on prior year carryforward amounts – likewise apply.

For C corporations and other businesses that donate food inventory to charity, the percentage limitation is increased from 15% to 25%.

> *BNN Observation: The magnitude of these changes for the 2020 tax year are indicative of the critical need in our communities. Taxpayers have been provided an opportunity to make significant charitable impact and also open up financial and tax favorable opportunities for themselves.*
>
> *Combining a significant charitable contribution, with low market values, may provide a favorable environment for recognizing income such as converting a Traditional IRA to a Roth.*
>
> *Additionally, depressed market values afford an opportunity to harvest losses in taxable accounts to offset gains from earlier on in the year, or potential gains later in the year if markets recover. While it is often a good idea to donate appreciated securities to avoid capital gains and obtain a charitable contribution, the opposite strategy is true with investments that have depreciated in value. Investments with unrealized losses should be sold in order to recognize that loss prior to donating the cash proceeds. (Watch out for the wash sale rules if also picking up substantially similar positions within 30 days.) This would provide the Taxpayer with a "cash" donation that is eligible for the 100% AGI deduction. We encourage you to speak with your BNN tax advisor before undertaking any such strategies.*

Bonus Depreciation is Extended to Qualified Improvement Property

The CARES act finally fixes a well-known qualified improvement property (QIP) "glitch" that was bungled in 2017's *Tax Cuts and Jobs Act* (TCJA). QIP is generally defined as any improvement made to the interior portion of a nonresidential building any time after the building was placed in service. QIP does not include any improvement for which the expenditure is attributable to the enlargement of the building, any elevator or escalator, or the internal structural framework of the building.

In 2017, TCJA legislation inadvertently caused this category of assets to be assigned a depreciable tax life of 39 years and become ineligible for bonus depreciation. In spite of congressional intent to correct this oversight for more than two years, nothing materialized until now. The CARES Act changes the depreciable life back to its pre-TCJA 15 year life and makes QIP eligible for 100% bonus depreciation. As a bonus to taxpayers, the technical correction is retroactive to January 1, 2018, so additional tax benefits can be realized by taxpayers for their 2018 and 2019 tax years.

The "QIP" fix allows immediate write-off of some large asset costs. Its retroactive nature can provide refunds of prior year tax through amended returns.

Unless Treasury issues guidance providing a different mechanism (such as a notice allowing taxpayers to make an automatic change to their method of accounting, which would allow taxpayers to take this change into account when calculating their next estimated income tax payment), taxpayers may have to file an amended return to benefit from this change.

> *BNN Observation: Many partnerships (those that have opted out of the partnership audit rules), corporations (C or S), trusts, and individuals have the ability to file amended returns for 2018 and realize this benefit in the 2018 tax year. Partnerships subject the partnership audit rules which were created by The Bipartisan Budget Act of 2015 ("BBA") currently have to defer those benefits to the tax year in which the amended return is filed and Form 8986 or another form of amended statements are issued to the partners. We are hopeful that the IRS will issue guidance immediately to streamline these benefits for those partners.*

> *BNN Observation: Some taxpayers have made a farming business or real property trade or business election under Section 163(j)(7)(B) and (C), requiring the Alternative Depreciation System (ADS) and disallowing bonus depreciation for certain property. Others have made an election out of bonus depreciation under Section 168(k)(7) for certain asset classes. As the legislation is written, those taxpayers will not be allowed to take bonus depreciation on the QIP, unless Treasury allows them to revisit their prior elections. Furthermore, taxpayers that do not want to make a change may still be forced to amend their 2018 and 2019 tax returns.*

It is important not to forget the state income tax implications of this provision, because many states do not conform to bonus depreciation or allow NOL carrybacks.

Corporate Minimum Tax Credit Use is Expanded

A favorable change in the CARES Act involves the corporate minimum tax credit. The 2017 Tax Cuts and Jobs Act repealed the alternative minimum tax for corporations for tax years after 2017, but allowed any carryover of minimum tax credit to be utilized in 2018 through 2021. The credit utilized would be limited to 50% of the excess of the minimum tax in 2018 through 2020 and the remaining minimum tax credit would be refundable in the corporation's 2021 tax year. The CARES Act accelerates the benefit and allows corporations to claim the fully refundable credit in 2019, or allows a corporation to elect to claim the refundable credit amount for 2018. To claim the credit for 2018 a corporation may amend the 2018 return or file an application for a tentative refund (commonly referred to a quickie refund) to claim the credit for its 2018 tax year. The quickie refund application is typically faster than filing an amended return but must be filed by December 31, 2020. A corporation that wishes to claim the credit on its 2019 return but has already filed its return may file a superseded return, rather than file an amended return, to claim the credit. A superseded return would need to be filed before the original (or extended) due date of the 2019 return. Based on the language in the bill if the carryover minimum tax credit is not claimed on the 2018 or the 2019 return it will be lost.

Corporations with minimum tax credits should review which year to utilize the benefit while considering the interaction with other rules and limitations. That includes 2020 projections, because if a net operating loss is generated in 2020, the potential for carryback will impact the usage of the credit.

TAX-EXEMPT ENTITIES

What Applies, and What Doesn't, to Tax-Exempt Entities

Several provisions of the CARES Act covered above are available to tax-exempt organizations.

SMALL BUSINESS ADMINISTRATION LOANS:

Normally, most non-profit organizations are specifically excluded from eligibility for an SBA loan. Only in rare times, usually in an effort to provide disaster relief, are these loans made available to non-profits.

There are two types of SBA loans available to nonprofit organizations: Economic Injury Disaster Loans (EIDL) and the Paycheck Protection Program (PPP). Both the EIDL and the PPP are available to organizations with 500 or fewer employees. PPP is available to 501(c)(3) and 501(c)(19) organizations; whereas EIDL appears to be available to all nonprofit organizations. The loan amounts, terms and permitted use of the funds differ greatly between the two programs. Additionally, PPP loans generally can be forgiven and treated as a grant if certain provisions are met (such as maintaining payroll between February 15 and June 30), whereas EIDL cannot. PPP loans that are forgiven do not constitute income from an unrelated trade or business so tax-exempt organizations who qualify under the PPP would not be subject to tax on any amount forgiven. It is important to note that the 500 employee count is per person and is not calculated on an FTE basis.

Nonprofits that do not qualify for either loan program due to having more than 500 employees may also apply for resources under the Industry Stabilization Fund if they have 10,000 or fewer employees. This Fund offers a loan and loan guarantee program to organizations that may not otherwise qualify for relief under another program. Unfortunately, the loans are not eligible to be forgiven, The interest rate on these loans is 2% and organizations that use an Industry Stabilization Fund loan must maintain at least 90% of their workforce.

Organizations may apply for a loan under both the EIDL and the PPP; but if the organization has a loan forgiven pursuant to the PPP, doing so will preclude the organization from taking advantage of the payroll tax relief described below.

TAX CREDITS AND DEFERRALS FOR EMPLOYERS

The CARES Act offers two incentive programs for tax-exempt employers to either offset or defer Social Security payroll taxes on their employees. Both were initiated to reduce the burden on cash flow for organizations that continue to maintain payroll through the pandemic crisis.

CARES Act features that provide the fastest access to cash are also extended to qualifying tax-exempt organizations.

The first, the employee retention credit, allows for a credit to reduce payroll tax expense by 50% of an employee's wages up to a maximum of $10,000 in wages (maximum of $5,000 per employee.) In order to qualify for the credit, a business would have had to have been in existence at the start of 2020 and seen a reduction in first quarter revenue of at least 50 percent as compared to the first quarter of 2019. The eligibility for the credit would continue through 2020 for each quarter until the organization's revenue exceeds 80% of the revenue from that same quarter in 2019.

Tax-exempt organizations may also defer payment of social security payroll taxes otherwise due during 2020 that were incurred between March 27, 2020 and December 31, 2020. Half of the deferred payroll taxes would need to be paid by December 31, 2021 with the other half due December 31, 2022.

As mentioned above, the payroll tax credit and deferral are not available to employers who receive a forgivable PPP loan.

CHARITABLE GIVING INCENTIVES:

To incentivize charitable giving, the CARES Act allows individuals who do not itemize to treat up to $300 of their donations to qualified public charities as an above-the-line deduction on their 2020 tax returns. This will allow individuals who normally would not receive any benefit from their charitable donations to receive a dollar-for-dollar reduction of their taxable income up to $300.

For individuals who do itemize their deductions, the CARES Act eliminates the adjusted gross income (AGI) threshold limits on charitable deductions. This will allow itemizers to deduct their charitable donations up to 100% of their AGI for donations made during 2020. To the extent that donors' charitable gifts exceed their AGI in 2020, the excess is available to be carried forward to future tax periods.

Additionally, corporate donors who are traditionally limited to being able to deduct charitable gifts only up to 10% of taxable income are now allowed to deduct up to 25% of their taxable income for cash donations made in 2020. Donations of food inventory are also deductible up to 25% of a business's taxable income.

MISCELLANEOUS/CONCLUSION

There are a number of topics in the CARES Act that are not covered in this article. As noted above, earlier we shared information regarding the enhanced [SBA loan program]. The Act also contains *substantial* material relevant to healthcare providers regarding things like coverage of testing costs, awards for health centers, telehealth resources, and much more. BNN's insight into that information can be found on our [website]. The Act also discusses a number of behind-the-scenes actions, like increased federal funding for state unemployment claims, which are administered by the states; and extension of the tax-free nature of income resulting from an employer's payment of an employee's student loan debt.

This article is limited to federal tax provisions; it does not attempt to cover states' reactions, which undoubtedly will be varied and delayed.

The CARES Act is an unprecedented piece of legislation, providing a massive influx of cash, directly and indirectly, into the hands of individuals and business owners alike. We anticipate much more guidance to be forthcoming, particularly from the IRS, as it determines how to implement what Congress set in motion. When we learn it, we will share it.

For more information, please contact your BNN tax advisor at 800.244.7444.

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