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Private Equity & Business Tax Aspects of the CARES Act

March 27, 2020

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Deferral of Payment of Employer Portion of Social Security Taxes

The Bill defers the due date for payment by employers and self-employed individuals of the employer portion of Social Security taxes otherwise due for periods through December 31, 2020. For 2020, the employer portion of Social Security taxes is 6.2% of wages up to $137,700. The deferred amounts will be payable over the next two years, with 50% payable by December 31, 2021 and the remaining 50% payable by December 31, 2022.

Employee Retention Credit for Employers Subject to Closure Due to COVID-19

The Bill provides a refundable credit against an employer's portion of Social Security taxes equal to 50% of qualified wages paid by employers between March 12, 2020 and December 31, 2020, whose operations were suspended due to a COVID-19-related shut-down order or whose gross receipts declined by more than 50% vs. the same quarter in the prior year. For employers who had more than 100 full-time employees during 2019, qualified wages are wages paid to employees when they are not providing services. For eligible employers who had 100 or fewer full-time employees during 2019, all employee wages qualify for the credit. The Bill uses the Affordable Care Act's definition of "full-time employee" (and so an employer's full-time employees would be calculated in the same manner) and treats members of a controlled group of companies or an affiliated service group as a single employer. Qualified wages are capped at $10,000 per employee, so the credit is capped at $5,000 per employee.

CONTINUED

Modification of Limitations on the Use of Net Operating Losses (NOLs)

The Bill modifies the rules governing the use of NOLs arising in taxable years beginning before January 1, 2021 by:

- Permitting NOLs arising in taxable years 2018, 2019, and 2020 to be carried back up to five taxable years;

- Suspending the 80% of taxable income limitation for use of NOLs to allow NOLs to fully offset taxable income in taxable years 2018, 2019 and 2020 (the 80% limitation, enacted as part of the Tax Cuts and Jobs Act of 2017, applied only to NOLs arising in taxable years beginning after December 31, 2017); and

- Relaxing limitations on excess business losses of noncorporate taxpayers to enable pass-through entities and sole proprietors to benefit from the NOL changes.

The modifications on the use of NOLs to permit NOLs arising in taxable years 2018, 2019 and 2020 to be carried back will free up and give greater certainty to the ability to realize economic benefits from tax assets. Buyers and sellers of corporate portfolio companies should factor the additional benefits into negotiations over control of pre-closing tax returns (and the ability to file amended returns) and inclusion of tax assets in working capital or other adjustments to the purchase price.

Increase of the limitation on deductibility of business interest expense

The Bill modifies the limitation on the deductibility of business interest expense under Section 163(j) for taxable years beginning in 2019 and 2020 by increasing the limitation from 30% of adjusted taxable income to 50%. For taxable years beginning in 2020, taxpayers may elect to use the adjusted taxable income from 2019 for purposes of calculating the limit.

Acceleration of payment of corporate AMT refundable credits from 2018

As part of the TCJA, the corporate alternative minimum tax ("AMT") was eliminated but the portion of the minimum tax credit that was refundable for 2018 was payable over four years. The Bill accelerates the ability of corporate taxpayers to recover these AMT credits. The Bill allows corporate taxpayers to claim this refund through the same manner as an accelerated NOL carryback adjustment under Section 6411(a). Using this procedure, the Internal Revenue Service must process the refund request on a provisional basis within 90 days of receipt of the refund application.

"Retail glitch" correction

The Bill includes a technical correction amendment regarding the definition of "qualified improvement property" for purposes of expensing under Section 168(k). This technical correction fixes the issue known as the "retail glitch," which prohibited expensing under Section 168(k) for certain interior improvements to nonresidential property.

Tax Filing Deadlines

The Internal Revenue Service extended the general due date for filing tax returns and paying taxes to July 15th for individual and corporate taxpayers as described in Notice 2020-18. The Bill does not change or expand the extensions provided by the Internal Revenue Service and consequently the deadline has not been extended for other tax returns and filings (e.g., Section 83(b) elections).

In addition, the due date for applying for a “quickie refund” on Form 4466 for the overpayment of corporate estimated taxes paid in 2019 is April 15th, 2020. Absent further guidance, it’s currently unclear whether the extension of the due date for filing tax returns and paying taxes to July 15th also extends the due date for filing Form 4466. Corporate taxpayers will need to quickly analyze the tax impact of the Bill for the taxable year 2019 in order to obtain a refund for estimated taxes and timely file Form 4466.

Payments to individuals

The Bill provides for direct payments to individuals equal to $1,200 per individual ($2,400 joint return) plus $500 per child, as a one-time refundable credit against an individual’s 2020 tax return. The one-time credit begins to phase out for adjusted taxable income above $75,000 ($150,000 if married and filing jointly) with a complete phase-out if the 2020 adjusted taxable income is $99,000 ($198,000 if married and filing jointly). The Internal Revenue Service is instructed to make the payments as quickly as possible based on the amount of credit that would be available based on 2019 tax returns (or, if 2019 tax returns have not yet been filed, 2018 tax returns).

If you have questions regarding these developments, please contact a member of our Tax team.

TAX TEAM

Louis Marett
Practice Group Leader – Tax
617-248-5091 | lmarett@choate.com

Timothy Becker
Partner
617-248-5141 | tbecker@choate.com

Olivier Léger
Partner
617-248-4058 | oleger@choate.com

Wells Miller
Principal
617-248-4838 | wmiller@choate.com

John Chambers
Senior Associate
617-248-5212 | jchambers@choate.com

Kevin Sarro
Associate
617-248-5114 | ksarro@choate.com