

2020 Post-Filing Season Update

July 24, 2020

Highlights

- ✓ More Massive Legislation on the Horizon
- ✓ Guidance Implementing TCJA Continues to Trickle In
- ✓ Administrative COVID-19 Relief Impacts Investments and benefits for 2020
- ✓ Many Proposed and Final Regulations Issued

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TCJA Implementation Continues; Additional COVID-19 Guidance and Other Highlights From Filing Season

In any other year, July 15 would be the middle of summer vacation, but in 2020, July 15 marked the end of the filing season for the 2019 tax year as a result of the extension of the filing date due to the COVID-19 (coronavirus) pandemic. It goes without saying that 2020 is unlike any other year.

Tax filing season for the 2019 tax year was officially opened on January 27, 2020. The extension of the due date to July 15 gave tax preparers nearly six months to prepare client returns. However, that extra three months included much more work than just preparing returns. Helping clients weather the ongoing economic storm of the pandemic, ensuring compliance with new employee retention credits created by Congress in response to the pandemic, and assisting clients in the acquisition of Paycheck Protection Program loans all added to the workload.

During the extended filing season, the IRS continued to issue guidance not related to the COVID-19 pandemic. Guidance implementing the Tax Cuts and Jobs Act continues to be released, as does other guidance addressing issues unrelated to filing 2019 returns or actions that needed immediate attention. As we do every year, Wolters Kluwer publishes this Special Report on the things you may have missed during this supersized filing season.

LEGISLATION

The most impactful events of the last few months have come from Congress, as two major bills were signed into law. First, the Families First Coronavirus Response Act provided many sectors of the health community with resources to help contain and combat the virus while also providing employees affected by the pandemic with guaranteed paid sick leave. The Coronavirus Aid, Relief, and Economic Security (CARES) Act then provided economic assistance to nearly every sector of the economy, and included tax benefits meant to inject liquidity into the marketplace.

Many of the provisions of these two bills were retroactive to the 2019 tax year, and in some cases the 2018 tax year, and required compliance when preparing returns this year. Others, such as the Paycheck Protection Program, employee retention credits, and direct stimulus payments to taxpayers, required action



this year in order to qualify. More information on these Acts can be found in prior CCH Tax Briefings, in Wolters Kluwer's *Coronavirus (COVID-19) Tax Relief: Law, Explanation & Analysis*, and on CCH® AnswerConnect.

However, as the economy continues to struggle, Congress is expected to provide yet more relief before breaking for recess in August. Also, the House has moved forward on other large pieces of legislation whose current fate is unclear.

“During the extended filing season, the IRS continued to issue guidance not related to the COVID-19 pandemic.”

Cares Act, Round Two

Senate Republicans any day now are expected to unveil their opening bid for a follow-up package to the CARES Act, being dubbed as “CARES 2” or “Phase 4.” Legislative text of the next COVID-19 response bill is expected to be released the week of July 27th. The forthcoming bill is expected, among other things, to enhance the Paycheck Protection Program (PPP) and offer certain tax incentives for small businesses. Another direct individual economic relief payment is also anticipated. While the Trump administration's has been pushing for a payroll tax cut to be included in the text, it appears as though that provision has been dropped due to opposition on both sides of the aisle. The House passed their own version of a CARES 2 bill in May, the \$3 trillion HEROES Act. However, the Senate GOP and White House have indicated a desire for a much lower price tag.

Paycheck Protection Program

The PPP, enacted under the CARES Act, is a seemingly ever-evolving, forgivable small business loan program derived from an unprecedented private/public partnership between certain lending institutions and the U.S. Small Business Administration (SBA). President Trump roughly two months later on June 5, 2020, signed into law the bipartisan Paycheck Protection Program Flexibility Act (PPPFA) of 2020. The PPPFA makes several enhancements to the swiftly implemented loan program, including providing for an extension of the expense forgiveness period from eight-to-24 weeks.

President Trump on July 4 signed into law the bipartisan, untitled S. 4116 (P.L. 116-147), which extends the PPP application period. The legislation pushes out the PPP application window deadline five weeks from June 30 to August 8.

COMMENT. As discussed above, additional PPP relief is expected to be unveiled in Senate Republicans' next economic stimulus package, but how much and how far that second round will extend remains to be seen. Senate Majority Leader Mitch McConnell, R-Ky., has said that a more “targeted second round” of loans will be including in the forthcoming bill.

COMMENT. Notably, it also remains to be seen whether Congress in the next stimulus package will address the deductibility of business expenses related to forgivable PPP loans. Although the IRS stated in Notice 2020-32 that business expenses related to forgivable PPP loans are not deductible, the bipartisan lawmakers who authored the PPP have stated that the IRS departed from Congressional intent on the matter. To that end, the recently introduced bipartisan Small Business Expense Protection Bill (S. 3612) would clarify that the receipt and forgiveness of a PPP loan does not affect the deductibility of ordinary business expenses.

Infrastructure

The Democratic-controlled House, approved on July 1 largely along party lines the INVEST in America Bill (HR 2). The infrastructure bill, which contains numerous tax incentives related to infrastructure, housing, and energy, is not expected to go anywhere in the GOP-controlled Senate.

ACA Enhancement

Additionally, the House cleared, also largely along party lines, Democrats' Patient Protection and Affordable Care Enhancement Bill (HR 1425) on June 29. The Affordable Care Act (ACA) enhancement bill, which contains a prescription manufacture excise tax and premium assistance tax credit enhancements, is also considered DOA in the Senate.

BUSINESS GUIDANCE

Temporary Guidance On Certain Stock Distributions By REITs, RICs

The IRS provided temporary guidance (Rev. Proc. 2020-19) on the treatment of certain stock distributions by publicly offered real estate investment trusts (REITs) and publicly offered regulated investment companies (RICs).

The guidance modifies the safe harbor in Rev. Proc. 2017-45, by temporarily reducing the minimum required aggregate amount of cash that distributee shareholders may receive to not less than 10 percent of the total distribution, in order for the transaction to qualify as a Code Sec. 301 distribution. The modification is effective solely with respect to distributions declared by a publicly offered REIT or RIC on or after April 1, 2020, and on or before December 31, 2020.

To enable publicly offered RICs and publicly offered REITs to conserve capital and thereby enhance their liquidity during the current period of economic disruption, the guidance modifies Rev. Proc. 2017-45 to temporarily allow such REITs and RICs to further limit the amount of cash available to be distributed to their shareholders by reducing the cash limitation percentage to 10 percent.

Proposed Regulations Address Deductibility Of Fines And Penalties

The IRS released proposed regulations (NPRM REG-104591-18) that address changes made to Code Sec. 162(f) by the TCJA. The proposed regulations provide operational and definitional guidance on the deductibility of fines and penalties paid to governmental entities.

Definition Of “Real Property” For Like-Kind Exchanges

Proposed reliance regulations (NPRM REG-117589-18) clarify the definitions of “real property” that qualifies for a like-kind exchange, including incidental personal property. Under the TCJA, like-kind exchanges occurring after 2017 are limited to real property used in a trade or business or for investment.

Under the proposed regulations, real property includes:

- land and improvements to land,
- unsevered crops and other natural products of land, and
- water and air space superjacent to land.

This real property definition language is very similar to the language in many other regulations, but it also includes necessary differences. As under pre-TCJA law, local law definitions are not controlling.

As mentioned above, real property includes improvements to land. Improvements include:

- inherently permanent structures, and
- the structural components of inherently permanent structures.

The regulations are proposed to apply to like-kind exchanges that begin on or after the date they are published

as final regs. However, taxpayers may rely on them for exchanges of real property beginning after December 31, 2017, if the proposed regs are followed consistently and in their entirety.

IRS Amends 199A Regs On Suspended Losses And RICs

The IRS amended final regulations (T.D. 9899) with guidance on the Code Sec. 199A deduction for suspended losses and shareholders of regulated investment companies (RICs). The amendments address the treatment of suspended losses included in qualified business income (QBI), the deduction allowed to a shareholder in a regulated investment company (RIC), and additional rules related to trusts and estates. The IRS had previously issued final and proposed regulations addressing these issues.

Supreme Court Rules State Law Applies To Allocation Of Refunds From Consolidated Returns

The Supreme Court unanimously ruled (*Rodriguez v. FDIC, S Ct*) that state law determines who is entitled to a refund of federal taxes received by a common parent of an affiliated group in absence of a formal or implicit agreement. The court struck down the federal common law principal known as the Bob Richards rule that provided that the refund is presumed to belong to the member whose income and losses generated the refund.

BUSINESS CREDITS

Calculation Of “Average Income” Minimum Set Aside Test For Low Income Housing Credit Explained

Taxpayers claiming the low-income housing credit should apply the “average income” minimum set aside test by reference to the “very low-income” limits calculated by the U.S. Department of Housing and Urban Development (HUD) for purposes of determining eligibility under the HUD Section 8 program. HUD determinations for very low-income housing families are currently used to calculate the low-income housing credit income limits under the alternate “20-50” and “40-60” minimum set-aside tests (Rev. Rul. 2020-4).

Reliance Regulations Clarify Ratable Rehabilitation Credit Amount

Proposed reliance regulations (NPRM REG-124327-19) clarify that the amount of the rehabilitation credit for a qualified rehabilitated building (QRB) is determined as a

single credit in the year the QRB is placed in service. This is the case even though the credit allocated ratably over a five-year period.

Safe Harbors For Renewable Electricity Production And Energy Credits Extended

For purposes of the “beginning of construction” requirement for both the production tax credit for renewable energy facilities and the investment tax credit for energy property, the IRS has (Notice 2020-41):

- extended the Continuity Safe Harbor for projects that began construction in either calendar year 2016 or 2017; and
- extended the 3-1/2 Month Safe Harbor to services or property that the taxpayer pays for on or after September 16, 2019, and receives by October 15, 2020.

Proposed Reliance Regulations Issued On Carbon Sequestration Credits

Proposed reliance regulations (NPRM REG-112339-19) for the Code Sec. 45Q carbon sequestration credit affect those who physically or contractually ensure the capture and disposal of qualified carbon oxide, the use of qualified carbon oxide as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, or utilization of qualified carbon oxide in a way that qualifies for the credit.

COMPENSATION AND BENEFITS

Proposed Regulations Reflect Changes To Wage Withholding, Redesigned W-4

The IRS proposed regulations (NPRM REG-132741-17) with guidance for employers on withholding federal income tax from employee’s wages. The proposed regulations:

- implement recent changes made to Code Secs. 3401 and 3402 by the TCJA; and
- reflect the redesigned 2020 Form W-4, Employee’s Withholding Certificate, and the related wage withholding tables and computational procedures published in IRS Pub. 15-T, Federal Income Tax Withholding Methods.

Definition Of Qualifying Relative For Child-Related Tax Benefits

The IRS has issued proposed regulations (NPRM REG-118997-19) clarifying the definition of a qualifying relative for various tax benefits for tax years 2018 through 2025 in which the dependent exemption amount is zero. During these years, the exemption amount will be inflation ad-

justed as provided in annual IRS guidance in determining whether an individual is a qualifying relative such as for head of household filing status and \$500 child tax credit. Consistent with Notice 2018-70, the proposed regulations provide that in determining whether an individual is a qualifying relative for purposes of various tax provisions in 2018 through 2025 the exemption amount will be the inflation-adjusted. The IRS will publish the exemption amount annually in guidance.

FOREIGN TRANSACTIONS

Reporting Relief For U.S. Individuals’ Transactions With Certain Foreign Trusts

Code Sec. 6048 generally requires annual information reporting of a U.S. person’s transfers of money or other property to, ownership of, and distributions from, foreign trusts. Reporting is not required, however, for transactions with foreign compensatory trusts described in Code Secs. 402(b), 404(a)(4), or 404A. Further, the IRS is authorized to suspend or modify any Code Sec. 6048 reporting requirement if the United States has no significant tax interest in obtaining the required information. The IRS has issued guidance (Rev. Proc. 2020-17) that:

- exempts certain U.S. citizens and residents from Code Sec. 6048 information reporting requirements for their transactions with, and ownership of, certain tax-favored foreign retirement trusts and foreign nonretirement savings trusts; and
- establishes procedures for these individuals to request abatement or refund of penalties assessed or paid under Code Sec. 6677 for failing to comply with the information reporting requirements.

The guidance is effective as of March 16, 2020 (the date the revenue procedure is published in the Internal Revenue Bulletin), and applies to all prior open tax years, subject to the limitations under Code Sec. 6511.

Final Covered Asset Acquisition Rules Adopted

The Treasury and IRS have adopted as final the 2016 proposed regulations on covered assets acquisitions (CAAs) under Code Sec. 901(m) and Code Sec. 704. Proposed regulations issued under Code Sec. 901(m) are adopted with revisions, and the Code Sec. 704 proposed regulations are adopted without revisions. The Code Sec. 901(m) rules were also issued as temporary regulations. The CAA rules impact taxpayers claiming either direct or deemed-paid foreign tax credits.

The proposed regulations added the following three CAA transaction categories which are retained in the final regulations:

- transactions treated as an acquisition of assets for U.S. tax purposes, and as an interest in a fiscally transparent entity for purposes of foreign income tax purposes;
- transactions treated as a partnership distribution of one or more assets, the U.S. basis of which is determined under Code Sec. 732(b), Code Sec. 732(d), or which causes the U.S. basis of the partnership's remaining assets to be adjusted under Code Sec. 734(b), provided the transaction results in an increase in the U.S. basis of one or more of the assets distributed by the partnership or retained by the partnership without a corresponding increase in the foreign basis of such assets; and
- transactions treated as an acquisition of assets for purposes of both U.S. income tax and a foreign income tax, provided the transaction results in an increase in the U.S. basis without a corresponding increase in the foreign basis of one or more assets.

The final regulations provide an exemption for CAAs if a domestic Code Sec. 901 payor or members of its consolidated group recognized the gains or losses or took into account its distributive share of the gains and losses recognized by a partnership for U.S. tax purposes as part of the original CAA. The term "aggregate base difference" is modified to take into account adjustments based on gain or loss recognized with respect to an RFA as a result of a CAA.

Under the foreign basis election in the proposed regulations, a taxpayer can elect to determine base difference as the U.S. basis in the RFA immediately after the CAA less the foreign basis in the RFA immediately after the CAA. Taxpayers may apply the election retroactively to CAAs that occurred on or after January 1, 2011, provided the remaining rules in the proposed regulations were applied retroactively. The final regulations modify the consistency requirement so that it applies only for tax years that remain open. Under a new requirement, deficiencies must be taken into account that would have resulted from the consistent application of the final regulations for a closed tax year.

The final regulations also extend the scope of the de minimis rule, under which a basis difference is not taken into account if:

- the sum of the basis differences for all RFAs is less than the greater of \$10 million or 10 percent of the total U.S. basis or all RFAs after the CAA; or

- the RFA is part of a class of RFAs for which the sum of the basis differences of all RFAs in the class is less than the greater of \$2 million or 10 percent of the total U.S. basis of all RFAs in the class immediately after the CAA.

The final regulations apply to CAAs occurring on or after the date the final regulations are published in the Federal Register. A taxpayer may choose to apply the regulations before they would otherwise apply, provided consistency requirements are met, for tax years open for assessment. Returns for tax years ending before the date the final regulations are published must be filed no later than one year after the publication date. For tax years not open for assessment, appropriate adjustments must be made to account for deficiencies that would have resulted from a consistent application of the rules.

Foreign Tax Credit Transaction Removed As Listed Transaction

The IRS removed transactions that are the same as, or substantially similar to, the foreign tax credit transaction in Notice 2004-20, as "listed transactions" for purposes of the tax shelter requirements, the tax shelter disclosure requirements, and the tax shelter list-maintenance requirements (Notice 2020-19).

Final And Proposed Regulations Address Hybrid Dividends, Arrangements

The IRS finalized regulations (T.D. 9896) on hybrid dividends and other hybrid arrangements, by:

- providing guidance on hybrid dividends and certain amounts paid or accrued under to hybrid arrangements, which generally involve arrangements where U.S. and foreign tax law classify a transaction or entity differently for tax purposes;
- providing rules on dual consolidated losses and entity classifications, that are intended to prevent the same deduction from being claimed under the tax laws of both the United States and a foreign country; and
- requiring information reporting for deductions disallowed under Code Sec. 267A and hybrid dividends under Code Sec. 245A.

The Treasury and IRS proposed regulations (NPRM REG-106013-19) that affect U.S. shareholders of foreign corporations and persons that make payments in connection with certain hybrid transactions. The proposed regulations address:

- the adjustment of hybrid deduction accounts, to take into account earnings and profits of a controlled foreign corporation (CFC) included in U.S. income, other than under Code Sec. 245A(e);
- conduit financing arrangements involving equity interests that give rise to tax benefits under foreign law; and
- certain payments between related CFCs during a disqualified period under Code Sec. 951A and the global intangible low-taxed income (GILTI) regulations.

Final Regulations Issued On FDII And GILTI Deduction

The Treasury and IRS issued final regulations (T.D. 9901) covering the Code Sec. 250 deduction for foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI). Proposed regulations were issued on March 6, 2019 (NPRM REG-104464-18). The final regulations maintain the basic approach and structure of the proposed regulations and provide guidance on computation of the deduction and the determination of FDII, including in the consolidated return context. Additionally, rules requiring the filing of Form 8993, Section 250 Deduction for Foreign-Derived Intangible Income and Global Intangible Low-Taxed Income, are finalized.

COVID-19 GUIDANCE

Guidance On Forbearance Programs Arising From COVID-19

The IRS released guidance (Rev. Proc. 2020-26) on the tax qualification of certain securitization vehicles that hold mortgage loans for which borrowers have participated in forbearance programs arising from the COVID-19 emergency. Specifically, the guidance describes safe harbors under which:

- modifications to certain mortgage loans in connection with a forbearance program are not treated as replacing the unmodified obligation with a newly issued obligation, as giving rise to prohibited transactions, or as manifesting a power to vary for purposes of determining the federal income tax status of certain securitization vehicles that hold the loans; and
- certain securitization vehicles are not treated as having improper knowledge of an anticipated default on the grounds that they acquired a mortgage loan with respect to which the borrower had participated in a forbearance program.

COVID-19 Guidance On Foreign Branch Separate Unit, Form 8858 Obligation

As a result of travel restrictions and disruptions resulting from the global outbreak of COVID-19 (Coronavirus), IRS guidance provided (Rev. Proc. 2020-30) that certain temporarily activities conducted in a foreign country will not be taken into account in determining whether:

- a domestic corporation has a foreign branch separate unit for purposes of the dual consolidated loss rules under Code Sec. 1503(d); or
- a U.S. person has an obligation to file Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs), including an obligation to attach it to a Form 5471 with respect to a controlled foreign corporation, or to a Form 8865 with respect to a controlled foreign partnership.

Guidance On Cafeteria Plans And COVID-19

Due to the COVID-19 outbreak, the IRS provided increased flexibility (Notice 2020-29) with respect to:

- 2020 mid-year elections under a Code Sec. 125 cafeteria plan related to employer-sponsored health coverage, health Flexible Spending Arrangements (health FSAs), and dependent care assistance programs; and
- grace periods to apply unused amounts in health FSAs to medical care expenses incurred through December 31, 2020, and unused amounts in dependent care assistance programs to dependent care expenses incurred through December 31, 2020.

This relief is retroactive to January 1, 2020.

Safe Harbors For Determining Tax Status Of Arrangements That Hold Real Property As Trusts

The IRS released a revenue procedure (Rev. Proc. 2020-34) that describes temporary safe harbors for the purpose of determining the federal tax status of certain arrangements that hold real property as trusts in response to the COVID-19 emergency. Specifically, the Service has provided temporary relief to arrangements that are treated as trusts under Reg. §301.7701-4(c) which are, or have tenants who are, experiencing financial hardship as a result of COVID-19, to allow them to make certain modifications to their mortgages loans and their lease agreements, and to accept additional cash contri-

butions without jeopardizing their tax status as grantor trusts. This revenue procedure also indicates that a cash contribution from one or more new trust interest holders to acquire a trust interest or a non-pro rata cash contribution from one or more current trust interest holders must be treated as a purchase and sale under Code Sec. 1001 of a portion of each non-contributing (or lesser contributing) trust interest holder's proportionate interest in the trust's assets.

Coronavirus-Related Distributions And Plan Loan Guidance

The IRS issued guidance (Notice 2020-50) on coronavirus-related distributions and plan loans. The guidance

- presents the rules set out in Act Sec. 2202 of the CARES Act;
- adds three new categories to the list of individuals who qualify due to adverse financial consequences;
- provides analysis and examples of repayments reporting; and
- includes safe harbors for employee certification and the plan loan payment suspension period.

PRACTICE AND PROCEDURE

User Fee For Offers In Compromise

The IRS released final regulations (T.D. 9894) that increase the user fee for processing an offer in compromise from \$186 to \$205, effective for offers in compromise submitted on or after April 27, 2020.

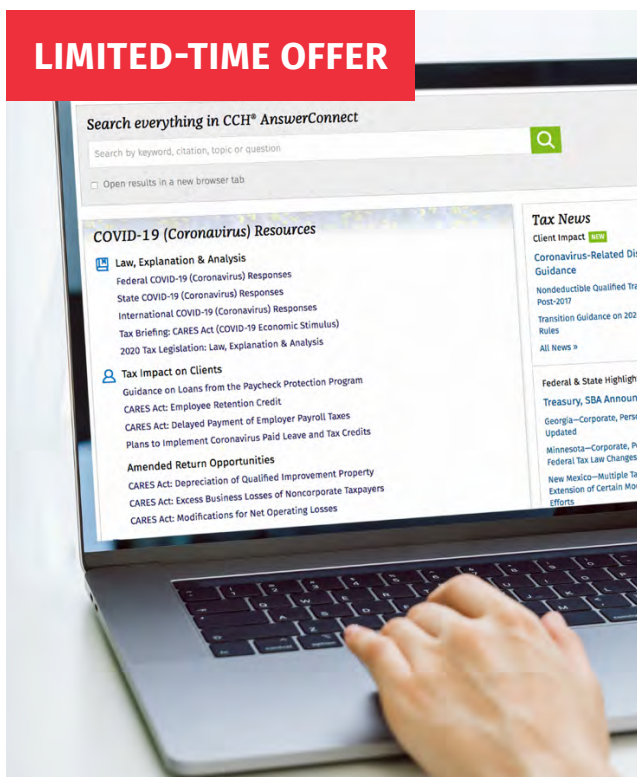
The final regulations also continue to provide exceptions for offers based on doubt as to liability and offers from low-income taxpayers from the user fee, and expand the definition of low-income taxpayer, reflecting recent legislation.

Proposed Regulations Would Reduce PTIN Fee To \$21

The IRS released proposed regulations (NPRM REG-117138-17) that reduce the amount of the user fee to apply for or renew a preparer tax identification number (PTIN). The PTIN fee would be reduced to \$21 per year, down from the current \$33 per year. The reduced fee would apply to PTIN applications and renewals filed on or after the date that is 30 days after the proposed regulations are published as final regulations in the Federal Register.

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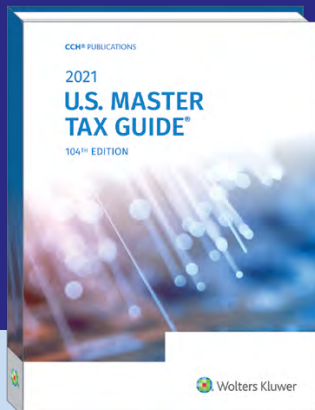
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