WHITEMAN OSTERMAN & HANNA LLP
ATTORNEYS AT LAW

# CARES Act Tax Incentives

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which is designed to provide financial relief to American businesses in response to the economic fallout from the efforts to stem the coronavirus (COVID-19) pandemic. As part of the CARES Act, Congress provides certain tax credits and incentives for businesses.

***Employee Retention Credit for Employers***

The CARES Act provides a refundable payroll tax credit for 50% of wages paid by eligible employers to certain employees during the COVID-19 crisis. The credit is available to employers, including not-for-profits, whose operations have been fully or partially suspended as a result of a government order limiting commerce, travel, or group meetings. The credit is also provided to employers who have experienced a greater than 50% reduction in quarterly receipts, measured on a year-over-year basis. The credit is not available to employers receiving Small Business Interruption Loans under the Payroll Protection Program (see our Notice on Small Business Assistance under the CARES Act).

For employers that had an average number of full-time employees in 2019 of 100 or fewer, all employee wages are eligible, regardless of whether the employee is furloughed. For employers who had a larger average number of full-time employees in 2019, only the wages of employees who are furloughed or face reduced hours as a result of their employers' closure or reduced gross receipts are eligible for the credit. No credit is available with respect to an employee for any period for which the employer is allowed a Work Opportunity Credit with respect to the employee.

For purposes of this credit, the term "wages" includes health benefits provided to the employee. The credit is capped at the first $10,000 in wages paid by the employer to an eligible employee. Wages do not include amounts taken into account for purposes of the payroll credits, for required paid sick leave or required paid family leave in the Families First Coronavirus Act (see our notice on COVID-19 Initial Tax Measures), nor for wages taken into account for the employer credit for paid family and medical leave.

This credit applies to wages paid after March 12, 2020 and before January 1, 2021.

***Delay of Payment of Employer Payroll Taxes***

Employers are required to withhold social security taxes from wages paid to employees. Self-employed individuals are subject to self-employment (SECA) tax. The CARES Act allows taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020.

Thus, notwithstanding any other provision of law, the payment for applicable employment taxes for the "payroll tax deferral period" will not be due before the "applicable date."

For the purpose of this deferral, the term "payroll tax deferral period" means the period beginning on March 27, 2020 and ending before January 1, 2021, and the term "applicable date" means: (a) December 31, 2021, with respect to 50% of the amounts to which the deferral of employment taxes and self-employment taxes, as the case may be, apply, and (b) December 31, 2022, with respect to the remaining 50% of those amounts.

This deferral does not apply to any taxpayer that has had indebtedness forgiven under the Paycheck Protection Program.

The provisions of this deferral apply to the period beginning on March 27, 2020.

***Temporary Repeal of Taxable Income Limitation for Net Operating Losses (NOLs)***

Generally, under Internal Revenue Code (IRC) Section 172(a), the amount of the NOL deduction is equal to the lesser of (a) the aggregate of the NOL carryovers to such year and NOL carrybacks to such year and (b) 80% of taxable income computed without regard to the deduction allowable IRC Section 172. This limitation means that NOLs cannot fully offset income. However, the CARES Act temporarily removes the taxable income limitation to allow an NOL to fully offset income.

This temporary repeal applies to tax years beginning after December 31, 2017, and to tax years beginning on or before December 31, 2017, to which NOLs arising in tax years beginning after December 31, 2017 are carried.

***Modification of Rules Relating to NOL Carrybacks***

Generally, under IRC Section 172(b)(1), except for farming losses and losses of property and casualty insurance companies, an NOL for any tax year is carried forward to each tax year following the tax year of the loss but is not carried back to any tax year preceding the tax year of the loss. However, the CARES Act provides that NOLs arising in a tax year beginning after December 31, 2018 and before January 1, 2021 can be carried back to each of the five tax years preceding the tax year of such loss.

***Modification of Limitation on Losses for Noncorporate Taxpayers***

Generally, IRC Section 461(l)(1) disallows the deduction of excess business losses by noncorporate taxpayers for tax years beginning after December 31, 2017 and ending before

January 1, 2026. An "excess business loss" is the excess of the (a) taxpayer's aggregate trade or business deductions for the tax year over (b) the sum of the taxpayer's aggregate trade or business gross income or gain plus $250,000 (as adjusted for inflation). However, the CARES Act temporarily modifies the loss limitation for noncorporate taxpayers so they can deduct excess business losses arising in 2018, 2019, and 2020.

***Corporate Minimum Tax Credit (MTC) Is Accelerated***

The Tax Cuts and Jobs Act of 2017 (the TCJA) repealed the corporate alternative minimum tax for tax years after 2017. Generally, corporations may claim outstanding MTCs, subject to certain limits, for tax years before 2021, at which time any remaining MTC may be claimed as fully refundable. Thus, the MTC is refundable for any tax year beginning in 2018, 2019, 2020, or 2021, in an amount equal to 50% (100% for tax years beginning in 2021) of the excess MTC for the tax year, over the amount of the credit allowable for the year against regular tax liability. However, the CARES Act changes "2018, 2019, 2020, or 2021" (above) to "2018 or 2019," and changes "(100% for tax years beginning in 2021)" to "(100% for tax years beginning in 2019)." Thus, the CARES Act allows corporations to claim 100% of MTC credits in 2019. Also, the CARES Act provides for an election to take the entire refundable credit amount in 2018.

***Deductibility of Interest Expense Temporarily Increased***

The TCJA generally limited the amount of business interest allowed as a deduction to 30% of adjusted taxable income. However, the CARES Act temporarily and retroactively increases the limitation on the deductibility of interest expense from 30% to 50% for tax years beginning in 2019 and 2020.

Under a special rule for partnerships, the increase in the limitation will not apply to partners in partnerships for 2019, applying only in 2020. For partners that do not elect out, any excess business interest of the partnership for any tax year beginning in 2019 that is allocated to the partner will be treated as follows:

- 50% of the excess business interest will be treated as paid or accrued by the partner in the partner's first tax year beginning in 2020 and is not subject to any limits in 2020; and
- 50% of the excess business interest will be subject to the limitations relating to the usual treatment of excess business interest allocated to partners will remain suspended until the partnership allocates excess taxable income or excess interest income to the partner.

Taxpayers may elect out of the increase, for any tax year, in the time and manner IRS prescribes. Once made, the election can be revoked only with IRS consent. For partnerships, the election must be made by the partnership and can be made only for tax years beginning in 2020. Additionally, taxpayers can elect to calculate the interest limitation for their tax year beginning in 2020 using the adjusted taxable income for their last tax year beginning in 2019 as the relevant base. For partnerships, this election must be made by the partnership.

***Bonus Depreciation Technical Correction for Qualified Improvement Property***

The TCJA allowed a bonus deprecation of 100% for first-year depreciation deductions (100% Bonus Depreciation) for certain qualified property. The TCJA eliminated pre-existing definitions for (a) qualified leasehold improvement property, (b) qualified restaurant property, and (c) qualified retail improvement property. The TJCA replaced those definitions with one category called qualified improvement property (QI Property). A general 15-year recovery period was intended to have been provided for QI Property. However, that specific recovery period failed to be reflected in the statutory text of the TCJA. Thus, under the TCJA, QI Property falls into the 39-year recovery period for nonresidential rental property, making the QI Property category ineligible for 100% Bonus Depreciation. However, the CARES Act provides the anticipated technical correction to the TCJA by specifically designating QI Property as 15-year property for depreciation purposes. This makes QI Property a category eligible for 100% Bonus Depreciation. QI property also is specifically assigned a 20-year class life for the Alternative Depreciation System.

The bonus depreciation technical correction is effective for property placed in service after December 31, 2017.

Whiteman Osterman & Hanna LLP can assist with these issues and more, as you and your business work to navigate the novel and difficult decisions arising from the COVID-19 pandemic. For assistance with tax issues, please contact one of our tax attorneys:


Scott Shimick – SShimick@woh.com
518.487.7678

Robert Reynolds – RReynolds@woh.com
518.487.7779

Leslie Apple – LApple@woh.com
518.487.7770

Vincent L. Valenza - VValenza@woh.com
518.487.7794

Timothy Morrison – TMorrison@woh.com
518.487.7639