3 April 2020

Global Tax Alert

Report on recent US international tax developments - 3 April 2020

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President Trump on 27 March signed into law the *Coronavirus Aid, Relief, and Economic Security Act*, H.R. 748 (CARES Act), which, among other things, includes modifications to the Internal Revenue Code[1] (IRC) that are intended to provide economic relief to those impacted by the COVID-19 pandemic. Two of the tax changes – to the net operating loss (NOL) rules under Section 172(a) and temporary changes to Section 163(j) limitation – will have international tax implications for multinationals.

Briefly, the CARES Act temporarily suspends the 80% taxable income limitation on the use of an NOL to offset taxable income for tax years beginning after 31 December 2017 and before 1 January 2021. Taxpayers may: (i) carry NOLs arising in any tax year beginning after 31 December 2017, and before 1 January 2021, back five years; and (ii) exclude a Section 965 transition tax year from the five-year NOL carryback period. Carrying an NOL to a pre-transition tax year does not directly impact the amount of a taxpayer's Section 965 transition tax inclusion. However, the NOL deduction claimed in that carryback year could increase the taxpayer's foreign tax credit (FTC) carryover from that year. Taxpayers may still waive the carryback and elect to carry NOLs forward if it is more advantageous.

The modification to the NOL carryback rules may yield a cash benefit to taxpayers that can use their NOLs. There may, however, be some unanticipated international tax consequences arising from the interaction of modified

Section 172(a) with other IRC provisions. The carryback or carryforward of an NOL may affect a taxpayer's: (1) allowable Section 250 deduction (both against foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI); (2) allowable FTCs; (3) base erosion anti-abuse tax (BEAT) liability; and (4) in some cases, the taxpayer's Section 965 transition tax liability.

The CARES Act also generally allows taxpayers to increase the 30% of adjusted taxable income (ATI) limitation on business interest expense to 50% of ATI for any tax year beginning in 2019 or 2020. Taxpayers may elect not to apply the higher 50% limitation. Taxpayers may also elect to use their 2019 ATI (in lieu of 2020 ATI) in their 2020 tax year to calculate their 2020 Section 163(j) limitation. If the additional deduction yields negative tax consequences for another tax provision, such as Section 59A (BEAT), taxpayers may decide not to elect to apply the increased Section 163(j) limitation.

For tax year 2019, partnerships must use the 30% of ATI limitation. The ATI limitation increases to 50% of ATI for partnerships in their 2020 tax years, unless the partnership elects not to apply the higher limitation. The partnership may elect to substitute tax year 2019 ATI for tax year 2020 ATI. Further rules apply to the partners of a partnership. See EY Global Tax Alert, *US CARES Act has international tax implications name*, dated 31 March 2020 for details on the international tax implications of the CARES Act.

A senior Internal Revenue Service (IRS) official this week was quoted as saying there are two workstreams developing guidance with respect to the CARES Act NOL amendments. One workstream will address procedural issues, with the second focusing on substantive issues, including the interaction of the NOL changes with international tax provisions.

The IRS has issued interim guidance (SBSE-05-0320-0026) on processing offers in compromise when a taxpayer asks to compromise tax periods involving the Section 965 transition tax. The guidance is for IRS employees when a taxpayer requests (Forms 656 or 656-L) to compromise tax periods that include assessed and/or deferred taxes attributable to the Section 965 transition tax. The guidance is relevant until the Internal Revenue Manual sections are published.

The Organisation for Economic Co-operation and Development (OECD) on 3 April issued recommendations on some of the tax implications of the COVID-19 crisis as they affect cross-border workers, as well as other related cross-border matters. The OECD Secretariat issued guidance on these issues "based on a careful analysis of the international tax treaty rules."

Endnote

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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EYG no. 001734-20Gbl

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