# CARES Act—Tax Provisions for Employers, Businesses

**by Elizabeth G. Roetker - Tuesday, March 31, 2020**

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was approved on March 27, 2020. The CARES Act contains many tax provisions that are aimed to help reduce the effects of the COVID-19 pandemic to taxpayers. The focus of this post is on several business-specific components.

## Employee Retention Tax Credit

The CARES Act provides eligible employers with a refundable payroll tax credit, aimed to increase employee retention during the COVID-19 crisis. Eligible employers may receive a credit for 50% of wages paid to certain employees.

"Eligible employers" include those who have had either (1) their business interrupted due to a government-ordered limitation on commerce, travel, or group meetings; or (2) a decrease in gross receipts of greater than 50% for the quarter when compared to the same quarter last year. "Wages" includes health benefits, capped at $10,000 that the employer pays to an employee. The CARES Act excludes from wages amounts that are included for purposes of the payroll credits under the Families First Coronavirus Act (FFCRA) and the employer credit for paid family and medical leave.

All wages are eligible to be included in the tax credit for employers who had an average of 100 or fewer full-time employees in 2019. If the employer had an average of greater than 100 employees in 2019, only the wages of employees who are furloughed or have reduced hours due to the employer's closure or decrease in gross receipts are eligible for the credit. The credit applies to wages that the eligible employer pays from March 12, 2020, through December 31, 2020.

If an employer is receiving a Small Business Interruption Loan under the CARES Act, the employer is not eligible to receive the employee retention tax credit. In addition, credit is not available with respect to employees for which an employer receives a Work Opportunity Credit under the CARES Act.

The IRS may advance payments to eligible employers and waive related penalties for employers who fail to deposit payroll taxes in anticipation of receiving the credit.

## Deferred Payment of Payroll Taxes

From March 27, 2020, through December 31, 2020, the CARES Act allows employers to defer the payment of applicable employment taxes. Half of the deferred amount will not be due before December 31, 2021, and the remaining half will not be due before December 31, 2022. If an employer makes the deferred payments by those dates, the employer will be considered to have made all deposits of applicable employment taxes that were required during the deferral period in a timely manner.

The ability to defer these taxes will not apply to an employer who has had indebtedness forgiven with respect to a loan under section 7(a)(36) of the Small Business Act.

## Modification of Net Operating Losses

Net Operating Losses ("NOLs") are a tax deduction that is created when a business's expenses are greater than its revenues, and result in negative taxable income. The NOL deduction helps a company's tax year more closely track its business cycle. Under section 172(a) of the Internal Revenue Code of 1986, as amended (the "Code"), NOLs are subject to a taxable-income limitation and cannot fully offset income. Specifically, the amount of the NOL deduction is the lesser of: (1) the aggregate of NOL carryovers to the year and NOL carrybacks to the year; or (2) 80% of taxable income computed without regard to the deduction. Under section 172(b)(1) of the Code, except for certain circumstances, an NOL is carried forward to tax years following the year of the loss, but is not carried back to any tax year before the year of the loss.

The CARES Act affects the NOL deduction in two ways. First, it temporarily removes the taxable income limitation to fully offset income. The amendments apply to tax years beginning after December 31, 2017, and tax years beginning on or before December 31, 2017, to which NOLs in tax years beginning after December 31, 2017 are carried. Second, the CARES Act allows NOLs arising in a tax year after December 31, 2018, and before January 1, 2021, to be carried back to each of the five years before the tax year of the loss. As a result, a taxpayer can apply the NOL against taxable income to get a tax refund.

## Limitations on Losses for Non-Corporate Taxpayers

Section 461(l)(1) of the Code prohibits a non-corporate taxpayer from deducting excess business losses for the period from December 31, 2017, to December 31, 2025. An "excess

business loss" means, for the applicable tax year, the excess of (1) the taxpayer's aggregate trade or business deductions, over (2) the sum of the taxpayer's aggregate trade or business gross income or gain plus $250,000 ($500,000 for joint filers) (as adjusted). The CARES Act temporarily modifies the loss limitation, so that non-corporate taxpayers can deduct excess losses arising in years 2018–2020.

## Acceleration of the Corporate Minimum Tax Credit

Current law allows a corporation (for which the alternative minimum tax was repealed after 2017 under the Tax Cuts and Jobs Act) to claim outstanding minimum tax credits ("MTCs"), subject to certain limits. For any tax year beginning in 2018, 2019, or 2020, MTC is refundable in an amount equal to 50% of the excess MTC, over the amount of the credit allowable against regular tax liability. For tax years beginning in 2021, 100% of the excess MTC is used in the calculation.

The CARES Act adjusts the provision so that 50 % of the excess MTC is used for years 2018 or 2019, and 100% is used for tax years beginning 2019. In other words, the CARES Act permits a corporation to claim 100% of the excess MTC two years earlier, in 2019 rather than 2021.

In addition, the CARES Act allows a corporation to elect to take the entire refundable credit amount in 2018. A claim for credit or refund under this election must be treated as a tentative carryback refund claim under section 6411 of the Code. Taxpayers may file an application for a tentative refund before December 31, 2020, in the manner and on the form prescribed by the IRS. Following receipt of the application, the IRS will determine the amount of the overpayment and apply, credit, or refund the overpayment.

## Increased Deductibility of Interest Expense

Under the Tax Cuts and Jobs Act, the amount of business interest allowed as a deduction, generally speaking, is limited to 30% of adjusted taxable income. The CARES Act temporarily increases the limitation from 30% to 50% for tax years beginning in 2019 and 2020. For partnerships, however, the increase to 50% of adjusted taxable income applies to only 2020—not 2019.

Under a special provision, partners will treat 50% of any excess business interest expense that is allocated to them in a tax year beginning in 2019 as being paid or accrued in the partners' first tax year beginning in 2020, with the remaining 50% subject to the default limitation relating to allocated excess taxable income. A partner may elect out of this special provision.

Taxpayers may elect out of the increased limitation, in a manner prescribed by the IRS. For partnerships, the partnership must make the election, and the election will apply for only tax years beginning in 2020.

The CARES Act recognizes that taxpayers likely will have reduced income in 2020. Accordingly, taxpayers may also elect to calculate the interest limitation for tax years beginning in 2020 using

their 2019 adjusted taxable income. This election is available to partnerships, and must be made by the partnership—not by one or more partners.

## Technical Corrections

Ever opportunistic, the legislature included technical corrections in the CARES Act. In particular, the CARES Act explains that excess business losses exclude any deduction under section 172 or 199A of the Code, or any deductions related to the performance of services as an employee. In addition, for purposes of calculating limitations under section 461(l) of the Code, capital loss deductions are not included, and that the amount of capital gain cannot exceed the lesser of capital gain net income from a trade or business or capital gain net income. This correction follows the rules for NOLs, which do not allow capital losses to offset ordinary income.

The CARES Act also expressly designates qualified improvement property as 15-year property for depreciation purposes. This correction fixes an error under the Tax Cuts and Jobs Act, which failed to include qualified improvement property in the list of properties that are eligible for the 100% deduction. As a result, qualified improvement property is eligible for the 100% bonus depreciation. The CARES Act also assigns qualified improvement property a 20-year class life for the alternative depreciation system under section 168(g)(3)(B) of the Code.

## Bottom Line

The CARES Act provides several ways to alleviate the economic impact of the COVID-19 outbreak for businesses. Check back for updates as additional guidance and interpretation becomes available.

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