Roundup of Recent Tax Developments

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Topics Covered

- Consolidated Appropriations Act, 2021
- Timing of Benefit from PPP Expense Deduction
- Final Simplified Tax Accounting Regulations
- Final Section 451 Regulations
- Proposed Regulations on Centralized Partnership Audit Regime
- QBI Deduction Update
- Other Selected Hot Topics

Consolidated Appropriations Act, 2021

Individual Provisions

Additional 2020 Recovery Rebates

- $600 ($1,200 for married filing jointly), plus $600 per qualifying child
- Phases out starting at $75,000 of MAGI ($150,000 for married filing jointly)
- Available on 2020 return, but Treasury authorized to issue advance payments based on taxpayer's 2019 tax return
- Not required to repay excess if advance payment exceeds allowable credit on return
- If less, difference is a refundable credit

Selected Other Individual Provisions

- Clarification that PPE qualifies for the $250 above-the-line deduction available to Kindergarten through 12th grade teachers
- Excludes certain CARES Act emergency financial aid grants from the gross income of college and university students
- Prior year earned income may be used in determining the refundable CTC and EITC for 2020
- The $300 above-the-line deduction available to nonfilers for cash contributions to qualified charitable organizations is extended to 2021
- The waiver of the 60% of adjusted AGI limit on cash contributions to 50% charities is extended to 2021

Consolidated Appropriations Act, 2021

Business Provisions

PPP Loans

- Expenses paid with the proceeds of a forgiven PPP loan are deductible
- Tax basis and other attributes of the borrower's assets will not be reduced as a result of the loan forgiveness

Economic Injury Disaster Loans ("EIDL")

- Forgiveness of EIDL loans, emergency EIDL grants, and certain loan repayment assistance not included in gross income
- Expenses paid with the amounts not included in gross income are deductible
- Tax basis and other attributes are not be reduced

Depreciation of Certain Residential Rental Property

- 30-year ADS depreciation period available for residential rental property placed in service before January 1, 2018, if
  - the property is held by an electing real property trade or business and,
  - before January 1, 2018, it wasn't subject to the ADS.
- TCJA permits opt-out from Section 163(j) interest limit for nonresidential real property, qualified improvement property and residential rental property in exchange for using ADS
- TCJA reduced ADS recovery period for residential rental property placed in service after December, 2017 from 40 to 30 years

Selected Other Business Provisions

- The 50% limit on the deductibility of business meals and beverages is waived for 2021 and 2022
- Farmers who elected a 2-year carryback of NOLs prior to the CARES Act may retain that carryback instead of the 5-year carryback under the CARES Act

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Selected Tax Extenders

- The 7.5% of AGI threshold for itemizing medical expenses is made permanent after December 31, 2020
- The Work Opportunity Tax Credit is extended through 2025
- The exclusion from gross income for discharge of indebtedness income from qualified principal residence debt up to a $2 million limit ($1 million for married individuals filing separately) is extended through 2025
- The employer credit for paid family and medical leave under IRC Section 45S is extended through 2025
- The change to Section 127 made by the CARES Act adding "eligible student loan repayments" is extended through 2025

Consolidated Appropriations Act, 2021

Selected Payroll Provisions

FFCRA Paid Sick and Family Leave Credits

- Extends refundable credits through March 31, 2021 for employers who provide Emergency Paid Sick Leave and Emergency Family Medical Leave
- Extends the credits available to self-employed individuals, and allows them to use their reported wages from tax year 2019 instead of tax year 2020 to compute the credit
- Excludes leave payments from employer Social Security employment taxes

August 8, 2020, Presidential Memorandum

- Permits the postponement of the withholding, deposit, and payment of the employee's share of Social Security tax (6.2%) on wages and compensation paid from September 1, 2020 through December 31, 2020 for employees whose wages or compensation payable during any biweekly pay period generally is less than $4,000
- IRS issued Notice 2020-65 to provide further guidance on postponing the withholding and remittance of the taxes ratably from wages and compensation paid between January 1, 2021 and April 30, 2021. Penalties, interest, and additional amounts would begin to incur on May 1, 2021.
- The CAA extends the repayment period of the deferred employee taxes through December 31, 2021. It also provides that penalties and interest will not begin to accrue on the deferred amounts until January 1, 2022.

Employee Retention Credit

- The Employer Retention Credit ("ERC") is a refundable payroll tax credit under the CARES Act for 50% of qualified wages (including health care costs) of up to $10,000 per employee for a maximum credit of $5,000 per employee
- The ERC may be claimed for wages paid after March 12, 2020, and before January 1, 2021
- Beginning on January 1, 2021 and through June 30, 2021, the CAA extends and expands the CARES Act provisions

Employee Retention Credit

- Increases the ERC rate from 50% to 70% of qualified wages
- Expands eligibility for the credit by reducing the required year-over-year gross receipts decline from 50% to 20% and provides a safe harbor allowing employers to use prior quarter gross receipts to determine eligibility
- Increases the limit on per-employee creditable wages from $10,000 for the year to $10,000 for each quarter
- Increases the 100-employee delineation for determining the relevant qualified wage base to employers with 500 or fewer employees
- Removes the 30-day wage limitation, allowing employers to, for example, claim the credit for bonus pay to essential workers
- Allows businesses with 500 or fewer employees to advance the credit at any point during the quarter based on wages paid in the same quarter in a previous year
- Provides rules to allow new employers who were not in existence for all or part of 2019 to be able to claim the credit

Employee Retention Credit

The TCDTR also includes the following provisions which are retroactively effective back to March 12, 2020:

- Clarification on the determination of gross receipts for certain tax-exempt organizations
- Reaffirmation of prior IRS guidance that group health plan expenses can be considered qualified wages even when no wages are paid to an employee
- Employers who receive a Paycheck Protection Program (PPP) loan may still qualify for the ERC for wages that are not paid for with forgiven PPP proceeds

Consolidated Appropriations Act, 2021

PPP Loan Expansion
And
Clarification

PPP Loans: Second Draw

The CAA, 2021 gives the following kinds of businesses that received a PPP loan the opportunity to take a second draw of up to $2 million:

- Employ no more than 300 employees per physical location;
- Have used or will use the full amount of their first PPP loan; and
- Demonstrate at least a 25% reduction in gross receipts in the first, second, or third quarter of 2020 relative to the same 2019 quarter.
- Applications submitted on or after January 1, 2021 are eligible to utilize the gross receipts from the fourth quarter of 2020.

PPP Loans: Second Draw

- Second draws may be for up to 2.5 times the average monthly payroll costs in the one year prior to the loan or the calendar year
- However, borrowers in the hospitality or food services industries (NAICS code 72) may receive loans of up to 3.5 times average monthly payroll costs
- Only a single second draw is permitted to an eligible entity

Clarification of Tax Treatment of PPP Loans

- Gross income does not include any amount that would otherwise arise from the forgiveness of a PPP loan
- Deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is forgiven
- The tax basis and other attributes of the borrower's assets will not be reduced as a result of the loan forgiveness
- These provisions are effective as of the date of enactment of the CARES Act, and apply to second draws on PPP loans

Additional PPP Eligible Expenses

Borrowers with loans made under PPP before, on, or after the enactment of these changes are eligible to utilize the utilize forgivable expenses other than borrowers who have already had their loans forgiven.

- Payment for any software, cloud computing, and other human resources and accounting needs.
- Costs related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance.
- Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.
- Personal protective equipment and adaptive investments to help a loan recipient comply with federal health and safety guidelines or any equivalent State and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.

Simplified Application for Loans Under $150,000

- A borrower will receive forgiveness if the borrower signs and submits to the lender a certification that is not more than one page in length, includes a description of the number of employees the borrower was able to retain because of the covered loan, the estimated total amount of the loan spent on payroll costs, and the total loan amount.
- The borrower must also attest that borrower accurately provided the required certification and complied with Paycheck Protection Program loan requirements.
- The SBA is required to create this form within 24 days of enactment and may not require additional materials unless necessary to substantiate revenue loss requirements or satisfy relevant statutory or regulatory requirements.
- Borrowers are required to retain relevant records related to employment for four years and other records for three years.
- The SBA may review and audit these loans to ensure against fraud.

PPP Miscellany

- A borrower may elect a covered period ending at the point of the borrower's choosing between 8 and 24 weeks after loan origination
- Employer-provided group insurance benefits are included in payroll costs (e.g., group life, disability, vision, or dental insurance)
- A business or organization that was not in operation on February 15, 2020 is not eligible for an initial PPP loan or a second draw PPP loan
- A seasonal employer is defined to mean one which (i) operates for no more than seven months in a year, or (ii) earned no more than 1/3 of its receipts in any six months in the prior calendar year

Other Developments

Timing of Benefit from PPP Expense Deduction

- Example of S corporation with loss in 2020 after deducting expenses covered by PPP loan, but insufficient basis to benefit from the loss
- Section 276 of Division N of CAA, 2021 provides that COD income from PPP loan forgiveness will be treated as tax exempt interest increasing basis (meaning in 2021 if that is when forgiveness occurs)
- Is Novoselsky v. Commr., T.C. Memo. 2020-14 a possible exception?

Final Simplified Tax Accounting Regulations

- Relate to small businesses permitted to use the cash method if average annual gross receipts for prior 3 years are $25 million or less
- Permit a taxpayer to elect to use the allocable taxable income or loss of the immediately preceding tax year to determine syndicate status under section 448(d)(3) for the current year
- Remove the 5-year restriction on making automatic method changes for certain situations
- Costs, which are generally required to be capitalized to inventory under section 471(a) but that the taxpayer is not capitalizing in its books and records are not required to be capitalized to inventory for tax purposes

Final Section 451 Regulations

- Provides taxpayers with a method for applying an offset for costs incurred against AFS income inclusions from the future sale of inventory
- Revises the AFS Income Inclusion Rule to reduce AFS revenue by amounts that the taxpayer does not have an enforceable right to recover if the customer terminated its contract on the last day of the year

Proposed Regulations on Centralized Partnership Audit Regime

- Treat QSubs as ineligible partners for purposes of opting out of the centralized partnership audit regime
- Propose procedures for adjusting a partnership-related item that is relevant only to a single partner or a small group of partners
- Clarify how adjustments to items that are not items of income, gain, loss, deduction, or credit (i.e., non-income items) are taken into account
- Provide rules where a partnership ceases to exist before partnership adjustments take effect
- Propose changes to the 2019 final regulations to address the treatment of IRS changes to income taxes, penalties, and additions to tax, etc. of a partnership where such changes are not generally compatible with the centralized partnership audit regime

QBI Deduction Update

- Draft instructions to 2020 Form 8995
  - No longer reference charitable contributions reducing QBI
  - Adds a “QBI Loss Tracking Worksheet for suspended losses
- Schedule K-1 received with no QBI information?
  - Reg. 1.199A-6(b)(3)(iii) states that omitted QBI items are zero
  - Consider filing a Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR)

Other Selected Topics

- Form 1099-NEC returns for 2020 to report nonemployee compensation, nonqualified deferred compensation, payments to attorneys, and cash received for fish
- Form 8915-E required to report coronavirus-related distributions and when over the three years they will pay the tax
- Final like-kind exchange regulations define real property to include the land and anything permanently built on or attached to the land

The End