

April 1, 2020

On March 29, 2020, President Trump signed into law the Coronavirus Aid, Relief, Economic Security Act (CARES) that provides over \$2 trillion in relief to businesses, individuals, states, municipalities and health care providers. Here at Day Seckler, we have attempted to provide what we believe are the most important provisions to our clients, both businesses and individuals.

The situation is developing, before you make any decisions please consult with your tax advisor here at Day Seckler. We will not cover all 880 plus pages of the bill here, only the highlights that we believe are most pertinent to you, our valued client. If you have a specific question, please reach out to us at 845.765.0705.

**This memo today will address the CARES Act's impact on tax law changes as it relates to businesses. The guidelines, rules and regulations behind the CARES Act are currently being written. We will do our best to keep you apprised of these guidelines, rules and regulations but please recognize that this is a fluid situation and our information and advice is only as of today.**

Where to start. In December 2017, the Tax Cuts and Jobs Act was passed and many significant tax laws were changed. Some were favorable – increased expensing of business property, lower income tax rates, and providing a 20% reduction in certain businesses taxable income. Other, such as eliminating the carry back of net operating losses was not so beneficial. But, along comes the CARE Act and we get to learn all over again!

So, here goes, again with the caveat that this is a summary and the specifics are still being developed.

### **Employee Retention Credit for Employers**

Provides a refundable payroll tax credit against the employer's 6.2% share of the Social Security tax for any business, including non-profits, whose operations have been fully or partially suspended as a result of a government order. The credit is also available to businesses who experience a 50% reduction in quarterly receipts, measured on a year-over-year basis.

The credit will be 50% of the qualified wages paid to each employee for the period from March 13, 2020 through December 31, 2020. Any overpayment of taxes will be refunded to the employer. This credit will be taken on your payroll tax returns.

The credit will not be available to businesses who receive an SBA Paycheck Protection loan during this period.

For businesses with an average number of full-time employees in 2019 of less than 100 employees, all employee wages are eligible. For employers with greater than 100 employees, only the wages of employees who are furloughed or face reduced hours are eligible.

Qualified wages will include health plan expenses but will be limited to \$10,000 per employee per quarter.

### **Delay of Payment of Employer Payroll Taxes and Self-Employment Tax**

Employers are allowed to delay the payment of the employer-portion of Social Security taxes (6.2%) which would have been due between March 28, 2020 and January 1, 2021. 50 percent of the delayed payroll taxes will be due December 21, 2021 with the remaining 50 percent due December 31, 2022. This provision also applies to self-employed individuals.

Again, this will not be available to businesses who receive an SBA Paycheck Protection loan during this period.

Additional guidance is expected from the Secretary of Treasury with respect to guidance/regulations to implement this provision.

### **Advance Refunding of Credits (FFCRA)**

This provision actually amends the Families First Coronavirus Response Act enacted in early March. It provides a method for the FFCRA payroll tax credits awarded for paid sick leave and paid FMLA leave to be refunded to the employer in advance. In addition, any failure by an employer to make the required payroll tax deposits because they were waiting on the payroll tax credit will be waived. More guidance related to the procedure to obtain these credits will be forthcoming from the Secretary of Treasury

### **Current Net Operating Loss (NOL) Tax Rules**

Prior to 2018, if a C corporation incurred a NOL in a tax year, it was generally permitted to carry back and use such losses against its income for the prior two tax years. This permitted the corporation to receive a refund for taxes paid for the prior two years. Any NOLs not used against prior year income was generally permitted to be carried forward and used against future income for 20 years. The 2017 Tax Cuts and Jobs Act (the “2017 Act”), generally (i) eliminated the ability to carry back corporate NOLs, and (ii) permitted the corporate NOL arising in tax years beginning after December 31, 2017 to be carried forward indefinitely, limited to 80% of the taxpayer’s income. Certain exceptions to those 2017 Act provisions were provided for certain industries (e.g., farming, certain insurance companies, etc.). The NOL rules existing prior to the 2017 Act continued to apply to NOLs arising prior to the effective date of the 2017 Act.

### **Summary of 2020 NOL Amendments**

The CARES Act allows corporate NOLs arising in a taxable year beginning after December 31, 2017 and before January 1, 2021, to be carried back to each of the five taxable years preceding the taxable year of the loss. No election is required to carry back such NOLs.

- For calendar year corporations, NOLs arising in 2018, 2019 and 2020 are eligible to be carried back to the prior five taxable years, and continue to be carried forward indefinitely.
- The NOL is first carried back to the earliest tax year of the 5-year carryback period, and then to the next succeeding tax year in such carryback period.
- Losses carried forward will now be permitted to offset 100% of taxable income, as opposed to 80% under the 2017 Tax Cuts and Jobs Act.
- The CARES Act does not change the current rule that corporate capital losses are carried back three tax years and carryforward for five tax years.
- Taxpayers may elect to irrevocably waive the entire 5-year carryback period with respect to an NOL.

### **Comments**

- Corporations that incur a 2020 NOL will not realize a tax benefit from the carryback provisions until its 2020 tax year is closed. However, we will need to discuss (i) the 2020 estimated tax payment situation to determine if such situation can be adjusted, and (ii) be prepared to file a refund claim promptly after its 2020-year closes (including pursuing a “quickie refund” on IRS Form 1139, if applicable). Corporations expecting a 2020 NOL should also analyze the possibility of accelerating deductions into 2020 to permit it to carry back such deductions as part of its 2020 NOL and increase any prior year tax refund.

- Corporations with 2018 and 2019 NOLs should promptly review its options to carry back any such NOLs and seek any applicable tax refunds, including amending a pre-2019 return, carrying back a 2019 NOL on the 2019 return if not yet filed, or filing for a tentative refund. We will be actively reaching out to discuss with our clients that we believe will be impacted.
- Note that an NOL carried back to a pre-2018 tax year will typically be more valuable than a carry back to a post-2017 tax year since the maximum pre-2018 corporate federal income tax rate was 35% compared to 21% for post-2017.
- An amended return must be filed no later than 120 days after the enactment of the CARES Act or July 28, 2020.

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

Temporarily suspends the loss limitation to allow all excess business losses to be deducted for 2018, 2019 and 2020.

### **Modification of Limitation on Business Interest**

Allows for a temporary increase in the amount of interest expense that a business can deduct from its taxable income. For tax years beginning in 2019 and 2020 only, a business can deduct its business interest incurred in an amount equal to 50 percent of its adjusted taxable income. This is an increase from the existing limitation of 30 percent. For any taxable year beginning in 2020, a business may elect to substitute the adjusted taxable income for the 2019 taxable year in order to calculate the 2020 deduction

This does not apply to businesses with gross receipts less than \$25 million or farms.

### **Technical Amendments Regarding Qualified Improvement Property Qualified Improvement Property (QIP)**

(QIP) is defined as any improvement made by the taxpayer to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date such building was first placed in service. QIP does not include an enlargement of the building, adding an elevator or escalator, or changing the internal structural framework of the building. This technical amendment corrects a drafting error in the 2017 Tax Cuts and Jobs Act where this property, which was supposed to have a 15-year depreciable life was instead, not assigned a 15-year life, and defaulted to 39-year. That removed QIP from being eligible for 100% bonus depreciation and instead was expensed over 39 years. Quite a difference. This correction, which will be retroactive to January 1, 2018, allows businesses to go back and amend their 2018 and 2019 returns to obtain much needed refunds.

### **Modification of Limitations on Charitable Contributions During 2020**

This provision allows a business to increase the amount it can deduct from its taxable income related to charitable contributions. Previously, charitable expense deductions could not exceed ten percent of the taxable income of the donating business. The CARES Act increases the amount allowed for charitable expense deductions to 25 percent of taxable income.

### **Temporary Exception from Excise Tax for Alcohol Used to Produce Hand Sanitizer**

For tax year 2020, there will be no excise tax assessed to any distilled spirits used or contained in hand sanitizer produced and distributed in a manner consistent with guidance by the Food and Drug Administration.

Again, if you have any specific questions, please call us at 845-765-0705. We hope you and your families are safe.