

# Taxes in the Time of COVID-19

April 6, 2020

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# AGENDA

- FEDERAL BUSINESS TAX UPDATES
- NEW YORK STATE TAX UPDATES
- IRS UPDATES
- Q&A

# FEDERAL BUSINESS TAX UPDATES

# TCJA: NET OPERATING LOSSES

- The deduction for net operating losses (“NOLs”) is limited to the lesser of the available NOL carryovers or 80% of a taxpayer’s pre-NOL deduction taxable income
- Carryback of any NOLs is repealed
- NOLs can be carried forward indefinitely
- These changes apply to losses arising in taxable years beginning after December 31, 2017
  - NOL carryovers arising from prior years are not subject to these limitations

# CARES ACT: NET OPERATING LOSSES

- Section 2303
  - Temporarily suspends, for tax years 2018 through 2020, the taxable income limitation to allow a taxpayer's NOLs to fully offset taxable income.
  - Allows NOLs arising in tax years 2018 through 2020 to be carried back to each of the five tax years preceding the loss year. A taxpayer may elect to forgo the carryback, and instead treat losses arising in those years as NOL carryovers.

# CARES ACT: NET OPERATING LOSSES

- Technical corrections and other changes
  - The 80% limitation is to be calculated based on 80% of taxable income after the use of pre-2018 NOLs
  - Taxable income for purposes of Code section 172(a) is determined without giving effect to the deductions under Code sections 199A or 250
  - For taxpayers with NOLs that arose in a tax year beginning before January 1, 2018 and ending after December 31, 2017, the CARES Act provides that such NOLs are eligible for the two-year carryback and 20-year carryforward that existed prior to the TCJA

# CARES ACT: NET OPERATING LOSSES FOR REITS

- NOLs of a taxpayer may not be carried back to any year in which the taxpayer was a real estate investment trust (REIT)
- NOLs of a REIT may not be carried back to any tax year, regardless of whether the taxpayer was a REIT in that tax year

# CARES ACT: NET OPERATING LOSSES AND CODE SECTION 965

- When a 2018, 2019, or 2020 NOL is carried back to a tax year during which the taxpayer had a Code section 965 inclusion, the taxpayer is deemed to have made the Code section 965(n) election to not use of the NOL against the taxpayer's Code section 965 inclusion.
  - This is automatic; no opt-out is available
- A taxpayer is permitted to choose a modified carryback method whereby the NOL is carried back, but skips over the tax year during which the taxpayer had a Code section 965 inclusion



# NET OPERATING LOSSES

NOL Arising in Tax Years	Eligible for Carryback	Eligible for Carryforward	Eligible to Offset a Percentage of Taxable Income
Beginning on or before December 31, 2017	Two tax years	20 tax years	100% of taxable income
Beginning after December 31, 2017 and beginning before January 1, 2021	Five tax years	Indefinite	100% of taxable income (prior to 2021) 80% of taxable income (after 2020)
Beginning on or after January 1, 2021	No carryback	Indefinite	80% of taxable income

# TCJA: NEW CODE SECTION 461(I)

- New loss limitation rule that applies to all non-corporate taxpayers
- A taxpayer's "excess business loss" will not be allowed for a tax year but must be carried over as part of that taxpayer's net operating loss carryover
- An "excess business loss" is defined as a cumulative loss attributable to the taxpayer's trades or businesses in excess of \$500,000 (joint filers) or \$250,000 (other filers)
  - Indexed for inflation after 2018
- Applies for any taxable year beginning after December 31, 2017 and before January 1, 2026

# CARES ACT: DELAYS APPLICATION OF CODE SECTION 461(I)

- Section 2304
- The CARES Act ***retroactively*** defers the effective date of this rule to tax years beginning after December 31, 2020 and before January 1, 2026.
- A non-corporate taxpayer now can recognize those losses for the 2018, 2019, and 2020 tax years.
  - If a taxpayer had an excess business loss limitation on their 2018 return, a taxpayer should file an amended return to claim the additional loss and potentially receive a refund.

# CARES ACT: TECHNICAL CORRECTIONS TO CODE SECTION 461(I)

- The Code section 461(I) calculation now excludes items which are attributable to the trade or business of performing services as an employee
- NOL deductions under Code section 172 and the deduction under Code section 199A are not taken into account in determining excess business losses
- Deductions for losses from the sale or exchange of capital assets are not taken into account in increasing a Code section 461(I) limitation

# TCJA: CORPORATE AMT

- The TCJA repealed the corporate AMT for tax years beginning after December 31, 2017
- Transition rules were adopted to allow corporations to use remaining minimum tax credits (“MTCs”) before 2022
  - Generally allowed corporations to fully use MTCs against regular tax liability
  - For tax years beginning in 2018, 2019, or 2020, corporations could receive a refundable credit equal to 50% of the excess of the MTC for the tax year over the amount of the credit allowable for the year against regular tax liability
  - For a tax year beginning in 2021, any remaining MTC was fully refundable

# CARES ACT: ACCELERATES REFUNDABLE MTCs

- Section 2305
- The CARES Act accelerates the refundable MTCs so that corporations will take 50% of the remaining amount in 2018 and 100% of the remaining amount in 2019.
- Alternatively, a corporation can elect to claim the entire refundable amount in 2018.

# TCJA: NEW CODE SECTION 163(j)

- “New” Code section 163(j) generally limits a taxpayer’s deduction of business interest for a taxable year to the sum of:
  - (1) taxpayer’s business interest income for the year;
  - (2) 30% of the taxpayer’s adjusted taxable income (“ATI”) for the year; and
  - (3) the taxpayer’s floor plan financing interest for the year
- No grandfathering for existing debt
- Business interest expense that is disallowed as a deduction for the current tax year is carried forward indefinitely and treated as business interest paid or accrued in the following tax year
  - Special rules apply to disallowed business interest expense of partnerships

# TCJA: NEW CODE SECTION 163(j) APPLIED TO PARTNERS

- If a partnership has interest in excess of the limitation, the excess interest is allocated to the partners.
- The excess interest is “suspended” at the partner level until the same partnership allocates excess taxable income or excess business interest income to the partner in a later year.



# CARES ACT: CODE SECTION 163(j) LIMITATION INCREASED

- Section 2306
- The CARES Act temporarily and retroactively increases the general limitation on the deductibility of interest expense from 30% of ATI to 50% of ATI for tax years beginning in 2019 and 2020.
- For partnerships, however, this change only applies to tax years beginning in 2020.

# CARES ACT: CODE SECTION 163(j) 2019 BENEFIT FOR PARTNERS

- Unless they elect not to, partners of partnerships subject to the business interest expense limitation rules would be able to treat 50% of any allocated excess business interest expense from the partnership during 2019 as fully deductible in tax year 2020.
- The remaining 50% of excess business interest expense remains subject to the normal rules under Code section 163(j), meaning it generally remains suspended until the same partnership allocates excess taxable income or excess business interest income to the partner in a later year.

# CARES ACT: 2019 ATI USED FOR 2020

- For a tax year beginning in 2020, a taxpayer may elect to calculate the interest limitation using its ATI from its last tax year beginning in 2019 in lieu of its current-year ATI.
- For partnerships, this election must be made by the partnership.

# TCJA: RETAIL GLITCH

- Due to a drafting error by Congress, the TCJA did not assign a recovery period to “qualified improvement property” (“QIP”), which generally includes improvements made by the taxpayer to the interior of a non-residential building.
- As a result, the statute treated QIP as nonresidential real property with a 39-year recovery period, thereby making QIP ineligible for 100% bonus depreciation.
- Practitioners frequently referred to this as the “retail glitch”.

# CARES ACT: CORRECTS THE RETAIL GLITCH

- Section 2307
- The CARES Act fixes the retail glitch by treating QIP as 15-year property, meaning it allows taxpayers to claim 100% bonus depreciation for such property.
- This fix is retroactive to property placed in service after December 31, 2017, meaning it will allow businesses to amend a prior year return to take advantage of the correction and receive a refund.
- This provides much needed relief to the restaurant, hospitality, and retail industries.

# CARES ACT: TEMPORARY EXCISE TAX EXCEPTION

- Section 2308
- The CARES Act temporarily waives the federal excise tax on any distilled spirits used for, or contained in, hand sanitizer that is produced and distributed in a manner consistent with guidance issued by the Food and Drug Administration.
- This waiver applies for the 2020 calendar year.

# CARES ACT: EMPLOYEE RETENTION CREDIT

- Section 2301
- This provision makes available a refundable payroll tax credit for 50 percent of qualified wages paid or incurred by certain employers to employees from March 13, 2020 through December 31, 2020.
- The credit is limited to the first \$10,000 of compensation, including health benefits, paid to an employee during such period.

# CARES ACT: EMPLOYEE RETENTION CREDIT

- The credit is generally available to employers (1) whose operations were suspended in full or in part, due to the COVID-19 related shut-down order, or (2) whose gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.
- For employers with a 2019 average of more than 100 full-time employees, qualified wages are wages paid to employees who are not working due to COVID-19 related shut-down orders. For smaller employers, all wages qualify for the credit, whether the employer was open or closed during the crisis.
- Special rules apply to tax-exempt entities and otherwise eligible employers are denied the credit if they receive a small business interruption loan authorized under Section 1102 of the CARES Act.



# CARES ACT: EMPLOYEE RETENTION CREDIT

- On March 31, 2020, the IRS released Announcement 2020-62, which provides additional information regarding this credit.
- If the employer's employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting Form 7200, Advance Payment of Employer Credits Due to COVID-19.
  - Draft instructions for Form 7200 also have been released

# CARES ACT: DELAY OF PAYROLL TAXES

- Section 2302
- This provision allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax obligation (6.2%) for the remainder of 2020.
- One-half of the deferred employment tax is required to be paid in each of the following two years ending December 31, 2021 and December 31, 2022.

# CARES ACT: CHARITABLE DEDUCTIONS

- Section 2205
- Individuals
  - Prior law: An individual's deduction for cash contributions to public charities generally was limited to 60% of the individual's adjusted gross income ("AGI")
  - CARES Act: Increases the deductible amount to 100% of the individual's AGI for "qualified contributions", subject to a reduction for other charitable contributions.
- C Corporations
  - Prior law: A C corporation's charitable contribution deduction generally was limited to 10% of its taxable income
  - CARES Act: A C corporation is now entitled to deduct "qualified contributions" of up to 25% of its taxable income, reduced by the amount of any other charitable contributions for which a charitable deduction is allowed
- "Qualified contributions" are defined as cash contributions made during the 2020 calendar year to public charities other than supporting organizations and donor advised funds.

# CARES ACT: EXCLUSION FOR CERTAIN EMPLOYER PAYMENTS OF STUDENT LOANS

- Section 2206
- For 2020 payments to employees, employers may provide a student loan repayment benefit
  - This benefit is provided on a tax-free basis and the benefit is excluded from the employee's income
- The CARES Act does not increase the existing cap on this type of benefit, which currently is \$5,250.

# NEW YORK STATE TAX UPDATES

# NYS TAX DEPARTMENT NOTICE N-20-N

- Pursuant to Executive Order No. 202.12 (March 28, 2020), the Commissioner extended April 15, 2020 filing and payment deadlines until **July 15, 2020** for:
  - Individuals, fiduciaries (estate and trusts), and corporations taxable under Tax Law Articles 9, 9-A, and 33.
  - No forms required for extension.
  - Taxpayers can still request an automatic extension to file return. Returns on extension will due October 15, 2020 (September 15, 2020 for fiduciary income tax returns).
  - Extension requests and payments due July 15, 2020.
  - Previously filed direct debit payments will not be automatically rescheduled (check website for instructions).
  - No extension for remittance of income tax withheld by employers (Form NYS-1).

# DON'T BELIEVE EVERYTHING YOU READ ON THE INTERNET

- The Commissioner did not have this authority until the Governor amended his Disaster Order on March 28. N.Y. Tax Law § 171(28); 20 NYCRR 2401.1.
- Executive Order required as New York corporate and personal income tax returns have statutory deadlines that are not always dependent on federal law.

# NEW YORK STATE SALES TAX

- Penalty and interest may be waived for quarterly and annual filers who were unable to file or pay sales tax returns due March 20.
- Sales Tax Vendors who are required to file returns on a monthly basis and participants in the Promptax program for sales and use tax or prepaid sales tax on fuel are not eligible for this relief.
- Penalty abatement requests handled on a case-by-case basis.
- Online abatement requests available at:  
<https://www.tax.ny.gov/press/alerts/sales-tax-relief-for-covid-19.htm>



# NEW YORK STATE SALES TAX (CONTINUED)

- Possible grounds for abatement (NYS Tax Department Notice N-20-1):
  - Unable to meet tax filing, payment, or other deadlines because key employees were treated or suspected to have COVID-19;
  - Records necessary to meet tax filing, payment, or other deadlines are not available due to the outbreak;
  - Difficulty in meeting tax filing, payment, or other deadlines because of closure orders or similar business disruptions directly resulting from the outbreak;
  - Tax practitioners were unable to complete work to meet tax filing, payment, and other deadlines on behalf of their clients due to the outbreak.

# ONGOING AUDITS

- Field work postponed through April.
- New York State auditors currently managing active audits remotely.
- Correspondence generally handled through:
  - IBM Aspera SendVault (Web Plugin required)
  - [www.etransfer.tax.ny.gov](http://www.etransfer.tax.ny.gov) (back from extinction)
  - Email
  - Fax
- **PRACTICE POINT:** Possible settlement opportunities?

# ONGOING APPEALS

## Agency Operations During COVID-19 Emergency

“Please note that neither the Tribunal nor DTA has the authority to waive statutory deadlines. As such, any petition, exception, or request for an extension of time to file an exception must be filed (postmarked or put in the custody of an authorized delivery carrier) by the current statutory deadline. However, until further notice, the Tribunal and DTA will grant timely extension requests for the filing of briefs and answers.... [A]ll hearings currently scheduled before the Division of Tax Appeals between now and May 8, 2020 will be rescheduled.”

- Normal deadlines (usually 90 days) to file petitions with the Division of Tax Appeals following the issuance of a statutory notice have not been extended.
- Other deadlines—such as the time to file an exception with the Tax Appeals Tribunal or the time to file briefs—may be extended so long as the extension is timely requested.

# ONGOING APPEALS (CONTINUED)

- **ISSUE:** Consistent with Executive Order No. 202.8?

“any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.”

# COLLECTION ACTIONS

- Existing bills are not automatically on hold.
- Taxpayers with:
  - installment payment agreement (IPA) payments,
  - income execution payments, or
  - Other collection-related matters
- Contact the Tax Department and request collection holds.

# NEW YORK CITY

- NYC Department of Finance Memoranda 20-2 & 20-4 (March 19, 2020).
- New York City will waive penalties for city-administered business and excise taxes due between March 16, 2020, and April 25, 2020.
  - No waiver for interest—New York City’s current interest rate is 9%.
  - Penalty abatement requests may be made with late-filed returns or separately, but presumably not upon audit.
  - Memorandum is silent regarding whether elections that are required to be made on a “timely-filed” return will be accepted on a late return.
  - All paper filings under the DOF’s announcement should be marked “COVID-19” on the top center of the first page.
  - **ISSUE:** Will returns and payments (General Corporation Tax; Banking Corporation Tax; Unincorporated Business Tax) statutorily due on March 15 (Sunday) receive relief?

# COMPTROLLER STRINGER OPEN LETTER

- NYC Comptroller Scott Stringer advocates various tax relief measures, including:
  - Two-month suspension of city commercial rent tax payments for ground-floor retail businesses with demonstrated business losses;
  - A limited sales taxes holiday for all restaurants, hotels, and street-level retail stores.

*“These measures would cost the City and the State millions of dollars in lost revenue, on top of the projected lost sales, income and other tax revenues caused by the current crisis — at least \$3 billion in the next six months, according to our estimate — and likely more as long as we are still fighting to contain this pandemic.*”

*But we have no choice. City and State governments are the front line of the response; we see up close what our residents and businesses need, and are best positioned to respond with meaningful help immediately.”*

# NYC TAX APPEALS TRIBUNAL

“Per the Governor's Executive Order 202.8 issued on March 20, 2020 the time limitations relating to the "commencement, filing, or service" in connection with a New York City Tax Appeals Tribunal proceeding are, as of March 20, 2020, tolled until April 19, 2020.”

COMPARE WITH NYS TAX APPEALS TRIBUNAL



# NYS BUDGET

- Measures taken to stem COVID-19 expected to cost state \$10 billion - \$15 billion.
- NYS fiscal year started April 1.
- \$10B spending reduction.
- Middle-income NYS rate cut continues.
- NO rate hikes.
- NO legalized cannabis.
- NO small business tax cuts.

# OTHER SALT CONSIDERATIONS (OPPORTUNITIES?)

- Property Taxes – Valuation decreases?
- Existing Incentive Agreements – Review and revise incentive agreements to avoid clawbacks related to new-hire or retention employment goals; invoke force majeure / material adverse change clauses.
- Withholding Taxes – New withholding requirements based on less travel (withholding thresholds) / more telecommuting.
- Allocation/Payroll Factor Adjustments.
- NOL Carry-Backs (state conformity).
- New York State’s Convenience Rule?

# OTHER SALT CONSIDERATIONS (CONTINUED)

- Day counts.
- Recent domicile moves.
- States and cities around the country are extending filing and payment deadlines - Opportunities to manage cash flow.
- New Jersey has temporarily waived nexus rules for out-of-state corporations with employees working from home in New Jersey.
- Check state administrative sites for current updates.

# IRS UPDATES

# TAX RETURN AND PAYMENT EXTENSIONS

- Notices 2020-17 and 2020-18
  - Automatically extends, to July 15, 2020, the 2019 income tax filing and payment deadlines for taxpayers who file and pay their Federal income taxes on April 15, 2020
    - Applies to all individual, trust, and corporation returns
    - Relief is automatic, taxpayers do not need to file any additional forms or call the IRS to qualify
    - Penalties and interest will begin to accrue on any remaining unpaid balances as of July 16, 2020
    - This relief also includes estimated tax payments for tax year 2020 that are due on April 15, 2020
- Notice 2020-20
  - Automatically extends, to July 15, 2020, the tax return and tax payment due date for all taxpayers who have a federal gift (and generation-skipping transfer) tax return filing and tax payment obligation due on April 15, 2020.
- No extension for estate tax returns, Forms 990, certain information returns, etc.

# IRS PEOPLE FIRST INITIATIVE

- On March 25, 2020, the IRS unveiled its “People First Initiative” in an effort to help people facing the challenges of COVID-19 issues.
- The IRS is taking unprecedented action to ease the burden on people facing tax issues by adjusting some of its normal processes and automated collection systems through July 15, 2020.

# IRS PEOPLE FIRST INITIATIVE

- Lien and levy action suspended
  - Liens and levies (including any seizures of a personal residence) initiated by field revenue officers will be suspended through July 15, 2020. In addition, new automatic, systemic liens and levies will be suspended during this period.

# IRS PEOPLE FIRST INITIATIVE

- Field, Office and Correspondence Audits
  - During this period, the IRS generally will not start new field, office or correspondence examinations. The IRS, however, may start new examinations where deemed necessary to protect the government's interest in preserving the applicable statute of limitations. In-person meetings for current field, office and correspondence examinations will be suspended, but examiners will continue their examinations remotely, where possible.



# IRS PEOPLE FIRST INITIATIVE

- IRS Appeals
- IRS Appeals employees will continue to work their cases. Although Appeals currently is not holding in-person conferences with taxpayers, conferences may be held over the phone or by videoconference. The IRS is encouraging taxpayers to promptly respond to any outstanding requests for information for all cases with IRS Appeals. Importantly, though, no relief has been accorded to extend the time to protest IRS action (e.g., penalty abatement request denial or refund claim disallowance) to IRS Appeals.

# IRS PEOPLE FIRST INITIATIVE

- Statute of Limitations

- The IRS will continue to take steps necessary to protect all applicable statutes of limitations. The IRS is encouraging taxpayers to consent to extend the time to assess tax where statute expirations may be jeopardized during this period. The IRS otherwise will issue a Notice of Deficiency and pursue other similar actions to protect the government's interests. It is important to note that no relief or extension is available with respect to the expiration of the statute of limitations for a taxpayer to claim a refund.

# IRS PEOPLE FIRST INITIATIVE

- Practitioner Priority Service (“PPS”)
  - The IRS reminded practitioners that, depending upon staffing levels and allocations going forward, the wait times for the PPS telephone line may be more significant than normal.
  - The Practitioner Priority Service line now is closed. Also, expect delays for Centralized Authorization File (CAF) number authorizations.

# OTHER IRS CONSIDERATIONS

- Consistent issues with filing IRS powers of attorney with the CAF unit
  - The Taxpayer Advocate Service is aware of this
- Issues with deliveries to various IRS Service Centers
  - We understand FEDEX has been unable to deliver as no one is at the center to receive it
    - The Taxpayer Advocate Service is aware of this

# QUESTIONS?



# CLE CODE

- If you are interested in CLE, please email [hrsocal@hodgsonruss.com](mailto:hrsocal@hodgsonruss.com) with the following code:
- APRIL6TAX

THANK YOU AND STAY SAFE!

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