The Bankler Report

March 30, 2020

INTRODUCTION

On March 27, 2020, just a few hours after passing the US House of Representatives, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). This report deals primarily with business provisions.

Business Provisions:

1. **Small Business Interruption Loan** –This new loan program is available to small businesses (500 or fewer employees) for SBA loans made from March 1, 2020, thru December 31, 2020. The maximum loan amount is four times the average monthly payments (over the last 12 months) that the business paid for payroll, qualified mortgage payments, and rent. However, the maximum loan amount is limited to $10,000,000. Subject to certain conditions, loan recipients will be eligible for loan forgiveness based on the amount equal to the cost of maintaining payroll continuity. The amount of loan forgiveness for the business will be reduced by 1 minus: the average full-time employees per month during the covered period divided by the average full time employees per month during March 1, 2019, through June 30, 2019.

   Observation - Because the law provides that the amount forgiven cannot exceed the outstanding loan, I am suggesting that businesses borrow the maximum allowed. Payments on this loan are also deferred for 12 months. In addition, I believe that if you timely hire or rehire additional employees to prior levels (March 1, 2019, through June 30, 2019) through the end of the year, you could still qualify for the full benefit.

2. **Employee Retention Credit for Employers -** This credit is not available to employers receiving Small Business Interruption Loans referred to above. This provision provides a refundable payroll tax credit for 50% of wages paid by eligible employers to certain employees during the COVID-19 crisis. An eligible employer, including non-profits, are those who have experienced a greater than 50% reduction in quarterly receipts, measured on a year-over-year basis. For employers who had an average number of full-time employees in 2019 of 100 or fewer, all employee wages are eligible, regardless of whether the employee is furloughed. For employers who had a larger average number of full-time employees in 2019, only the wages of employees who are furloughed or face reduced hours as a result of their employers' closure or reduced gross receipts are eligible for the credit. The credit is limited to the first $10,000 in wages. **Effective date.** The credit applies to wages paid after March 12, 2020, and before January 1, 2021.

   Observation - This provision provides assistance for those employers who are either ineligible or unable to obtain the Small Business Interruption loans above. These funds are provided to employers thru a reduction of their payroll tax deposits.

3. **Delay of Payment of Employer Payroll Taxes -** While the deposit rules for the **employee's share of payroll taxes** remain unchanged, the **employer portion** of FICA taxes can be deferred thru the end of 2020. All deferred amounts are due in two equal installments on December 31, 2021 and 2022. This deferral is **NOT AVAILABLE** for businesses that are using SBA Loans designated for payroll. This provision is effective for payrolls beginning on or after March 27, 2020.

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Observation - This provision also provides an "interest free loan" for the **employer portion** of FICA taxes for those employers who are either ineligible or unable to obtain the Small Business Interruption loans above. Self-employed individuals can also defer 50% of their SECA Taxes (the self-employed version of business FICA taxes).

4. **Modification of Net Operating Losses (NOLs) by Corporations -** The Tax Cuts and Jobs Act (TCJA) of 2017 limits Net Operating Losses incurred after 2017 to 80% of current taxable income (instead of 100% under prior law). It also eliminated the ability to carry these NOLs back to prior taxable years. The new law allows the carryback provision to go back to the prior 5 taxable years for losses incurred prior to 2021. This provision now changes the 80% taxable income limitation until 2021. However, in 2021, the 80% limitation will still apply for all NOLs incurred after 2017, while the 100% limitation will still apply to losses incurred prior to 2018.

   Observation - This provision effectively forces businesses to carry back losses to prior years (which can offset the taxes by 100% of taxable income) rather than choose to forego the carryback (due to lack of income, etc.) and carry over the NOL, as you can only use it on up to 80% of taxable income. This means that carryovers could still incur taxes, even if the losses are greater than profits, in that taxes will be paid prior to the utilization of all of the losses.

5. **Modification of Net Operating Losses (NOLs) by Taxpayers other than Corporations -** The TCJA of 2017 limits losses incurred by an active non-corporate business to $250,000 ($500,000 for a joint return). Any excess losses are treated as Net Operating Loss (NOLs) carryforwards in the following year. This provision would retroactively turn off the excess active business loss limitation rule and applies these limits for tax years beginning after December 31, 2020.

   Observation - Taxpayers whose losses were limited last year (2018) should consider amending those tax returns, claiming the excess losses, and receive the applicable refund.

6. **Qualified Improvement Property Technical Correction -** This provision is a technical correction of the 2017 TCJA that would allow the interior improvements of buildings to be (a) currently expensed for qualifying property (classified as 15 year property), or (b) depreciated over 20 years in the case of a real property trade or business.

   Observation - Taxpayers should review their 2018 and 2019 returns to claim those additional depreciation deductions.

This report only discusses specific provisions that we consider to be of general interest to business owners and is not a complete discussion of the law's contents. As with any changes in the tax laws, there are new planning opportunities to be considered. Please feel free to contact us with your specific questions.