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Covid-19, the CARES Act and Tax Planning for Real Estate and Passthrough Businesses

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INTRODUCTION AND BACKGROUND

The pandemic caused by Covid-19 has affected the lives of people across the globe. Widespread lockdowns and government restrictions on travel, commerce, and social gatherings have reduced or temporarily eliminated revenues for many businesses and led to numerous layoffs. The pandemic has had and will continue to create challenging conditions for the real estate industry including, for example, empty hotels, restaurants and offices, delays in construction projects, and missed rent or mortgage payments.

In March, Congress passed stimulus bills to provide emergency relief to individuals and businesses adversely impacted by Covid-19. During that process a number of tax related proposals emerged. Real estate investment trusts (REITs), for example, sought temporary relief from distribution requirements, noting that enforcing those requirements during this unprecedented economic period could force a choice between solvency and maintaining REIT status.[1] In addition, real estate businesses sought to correct a drafting error from the 2017 Tax Act[2] involving qualified improvement property (QIP) (i.e., certain improvements to the interior of a non-residential building that occur after the building is placed in service) that would allow the immediate and full deduction (via bonus depreciation) of the cost of QIP, consistent with other similar tangible personal property.

The first of these federal relief measures—the Coronavirus Preparedness and Response Supplemental Appropriations Act, enacted on March 6, 2020, provided $8.3 billion of emergency funding relief for domestic and global efforts.[3] On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (Families First Act) into law, marking the second major legislative initiative to address Covid-19.[4] The Families First Act included broader economic relief for businesses and workers, such as paid sick leave requirements and related employer tax credits, insurance coverage of coronavirus testing, nutrition assistance for those in need, and unemployment benefits.

Subsequently, Congress passed, and President Trump signed into law, the Coronavirus Aid, Relief,

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This article is current as of April 10, 2020, and therefore does not consider the recently released Rev. Proc. 2020-26 or any other guidance issued from that date forward. The government's response to the crisis is changing rapidly and subject to continued update and clarification. Please continue to review guidance from the IRS and other governmental agencies on these issues as it is released. A further update on the topics discussed in this article will be included in the next issue of the Bloomberg Tax Management Real Estate Journal.

[1] NAREIT, Letter from Tony Edwards to The Honorable David J. Kautter (Mar. 18, 2020), *available at* https://www.reit.com/sites/default/files/Stock_Dividend_Nareit_Treasury_Submission_3-18-20.pdf (asking the U.S. Department of Treasury to allow public REITs to use 90% stock to satisfy their distribution requirement). Generally, publicly offered REITs are allowed to use up to 80% stock to satisfy their distribution requirements under the I.R.C. During the economic crisis beginning in 2008, the IRS issued several revenue procedures allowing the mix of stock and cash to go up to 90%/10%. *See* Rev. Proc. 2017-45.

[2] All references to the "2017 Tax Act" refer to the Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, originally introduced in Congress as the "Tax Cuts and Jobs Act."

[3] Pub. L. No. 116-123.

[4] Pub. L. No. 116-127.

and Economic Security Act (CARES Act).[5] The CARES Act provided $2 trillion of economic stimulus designed to help the United States weather the pandemic's sudden shock to global economic activity.[6] The CARES Act includes direct payments to certain individuals made in the form of immediately available tax credits, payroll tax deferral and credits, and a number of important business tax changes, among other stimulus measures. In addition, the IRS, as well as state taxing authorities, have issued a number of notices deferring tax payment and filing dates as well at other guidance helpful for individuals and the business community.[7] This article discusses the tax-related provisions of the CARES Act and certain other governmental guidance related to the Covid-19 pandemic that may be applicable to real estate and passthrough businesses.

CARES ACT BUSINESS TAX CHANGES

Subtitle C of the CARES Act contains the tax-related ''business provisions'' of the legislation. One of the shortest sections of the law, Subtitle C packs a significant punch for many businesses by temporarily modifying some of the more salient deduction limitations in the I.R.C., including limitations on the deduction of business interest and the use of net operating losses (NOLs) to offset taxable income. The changes may provide significant tax benefits to investors in many passthrough and real estate businesses, through refunds of taxes paid in prior years, reduction in 2019 tax liability, or deferral or reduction of tax obligations for the 2020 tax year. As discussed further below, not all of the business tax changes will create immediate benefits. Further, some benefits are mutually exclusive, some may be administratively difficult for a business to take advantage of without further guidance from the IRS, and some benefits might not be available to certain businesses absent IRS guidance to the contrary.

Retroactive Bonus Depreciation for QIP

A notable and welcome provision of the CARES Act corrects a drafting error introduced by the 2017 Tax Act. The 2017 Tax Act increased the §168(k)[8] deduction for bonus depreciation from 50% to 100% for depreciable assets with a recovery period of 20 years or less. As a result of a drafting error, the 2017 Act failed to provide that QIP would be treated as having a recovery period of 15 years, resulting in QIP defaulting to its longer recovery period of 39 years and rendering it ineligible for bonus depreciation.

Section 2307 of the CARES Act corrects this error by reducing the recovery period of QIP to 15 years, thereby making QIP immediately eligible for bonus depreciation. This correction is retroactive to the effective date of the 2017 Tax Act (January 1, 2018), meaning taxpayers may amend prior year returns to capture the benefit of the fix and receive an immediate refund.

Effect on Electing Real Property Trade or Businesses

Bonus depreciation generally is unavailable to taxpayers in a real estate business that choose to take advantage of the election out of the §163(j) limitation on interest expense available to an ''electing real property trade or business.''[9] Taxpayers that are electing real property trade or businesses would still benefit from the shorter 15 year recovery period (versus 39 years under the 2017 Tax Act). The changes to the recovery period for QIP made by the CARES Act, along with the increase of the §163(j) limitation (discussed below), may have inverted the calculus for certain taxpayers, particularly those that invested heavily in QIP, as to whether to elect out of §163(j) or take bonus depreciation.

By statute, the election out of §163(j) is irrevocable.[10] The IRS has published guidance, however, that will enable taxpayers to undo—or retroactively make—an election out of §163(j) for tax years beginning in 2018, 2019, or 2020.[11] Further, for those taxpayers operating a real estate business through a passthrough entity, the IRS issued Rev. Proc. 2020-23 on April 8, 2020, allowing certain partnerships to amend tax returns for tax years 2018 or 2019 (if filed) and issue new K-1 schedules.

Effect on Partnerships — BBA Concerns

Moreover, for those provisions of the CARES Act that involve amending prior year returns, real estate businesses operating through passthrough entities would have faced a potentially insurmountable hurdle

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[5] Pub. L. No. 116-136.

[6] Pub. L. No. 116-136.

[7] IRS, https://www.irs.gov/newsroom/payment-deadline-extended-to-july-15-2020 (extended to July 15); California, https://www.ftb.ca.gov/about-ftb/newsroom/covid-19/index.html?WT.ac=COVID-19 (extended to July 15); New York, https://www.tax.ny.gov/pdf/notices/n20-2.pdf (extended to July 15).

[8] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[9] §163(j)(7)(A)(ii).

[10] §163(j)(7)(B).

[11] Rev. Proc. 2020-22.

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without further guidance: the partnership audit regime. Under changes to the partnership audit regime made by the Bipartisan Budget Act of 2015, partnerships cannot simply file amended returns for prior years but instead must file an administrative adjustment request (AAR).[12] Partners report favorable adjustments made on an AAR as a supplemental item on their tax return for the year in which in the AAR is filed.[13]

Fortunately, the IRS released guidance on April 8, 2020, allowing partnerships that have filed Form 1065 and furnished all required K-1 schedules for taxable years beginning in 2018 or 2019 to file amended returns for those tax years (with special rules for certain partnerships in special circumstances, such as those under current examination for those tax years).[14] This guidance allows partnerships to take advantage of the new bonus depreciation rules by filing amended returns and allowing their partners to file for an immediate refund. Further, 2018 or 2019 partnership returns amended pursuant to Rev. Proc. 2020-23 do not have to be specifically related to the CARES Act and instead may include other amendments. Taxpayers should act quickly to take advantage of this Rev. Proc., as the window to file a 2018 or 2019 amended return ends on September 30, 2020.[15]

When deciding whether to file amended returns, practitioners should consider whether their partnership agreements give certain partners or investor groups consent rights over filing amended returns. Certain partners may not want to file (or have their investors file) amended returns, for a variety of reasons. Further, although partnerships can now take advantage of bonus depreciation for QIP retroactively even if the partnership previously elected out of the §163(j) limitation,[16] as discussed above, there is still uncertainty regarding whether a partnership may revoke a previously-made real property trade or business election for §163(j) purposes. That is an election out of §163(j) that generally precludes the availability of bonus depreciation, meaning partners will need to weigh the tax benefit of bonus depreciation for QIP against interest deductions not subject to the §163(j) election. This tax benefit analysis may be particularly important for REITs and other investors who do not have a need for additional current year deductions. The Real Estate Roundtable has asked the IRS to consider extending the due date for filing 2018 and 2019 tax returns, reasoning that an extension would enable a passthrough business to file a superseding return, allowing its investors to receive a refund.[17]

Modifications to Section 163(j)

The 2017 Tax Act modified §163(j) to limit the deductibility of business interest expenses, generally capping the interest expense deduction at 30% of adjusted taxable income (ATI) which, for tax years beginning before January 1, 2022, is generally earnings before interest, tax, depreciation, and amortization (EBITDA) with a few adjustments. Any interest expense in excess of the 30% limit is disallowed in the current tax year and carried forward to future tax years as ''excess business interest.'' As discussed above, not all real estate businesses are impacted by this limitation, as some will have elected out of this limitation on interest expense in exchange for longer depreciation periods on certain real property.[18]

Generally

For many passthrough businesses, the CARES Act temporarily modifies §163(j) in three important ways. First, the CARES Act increases the §163(j) limitation to 50% of ATI for the 2020 tax year, allowing taxpayers to deduct a larger amount of interest expense.[19] Second, taxpayers may (but are not required to) use their 2019 ATI to calculate the §163(j) limitation on their 2020 return,[20] which will create a more favorable limitation for taxpayers with higher ATI in 2019 than in 2020 (a highly likely scenario given the recent, sharp economic downturn). Third, in the case of a partnership with excess business interest from 2019, 50% of the excess business interest of each of its partners (unless a partner elects out) will generally be deductible against their tax year 2020 income without regard to the limitations under §163(j).[21]

Taken together, these three temporary modifications should provide immediate tax relief to many taxpay-

[12] §6227(a).

[13] §6225(b); Reg. §301.6227-3(b)(1).

[14] Rev. Proc. 2020-23.

[15] Rev. Proc. 2020-23.

[16] Rev. Proc. 2020-22.

[17] Letter from Jeffrey D. DeBoer, President and CEO of the Real Estate Roundtable, to the Hon. David J. Kautter, Assistant Secretary of Tax Policy, and the Hon. Michael Desmond, Chief Counsel of the IRS (Apr. 4, 2020), *available at* https://www.rer.org/docs/default-source/comment-letters/2020/4-4-20-cares-act-and-prior-returns---rer-ltr.pdf?sfvrsn=63bfbd4f_2.

[18] §163(j)(7)(A)(ii).

[19] CARES Act §2306(a).

[20] CARES Act §2306(a).

[21] To illustrate, assume a partner is allocated $100 of gross income and $100 of business interest (and no other deductions) in 2019 and $50 of gross income and $50 of business interest (and no other deductions) in 2020. For tax year 2019, the partner has $30 of allowable interest deduction, $70 of excess business interest, and $70 of net taxable income. For tax year 2020, the partner is allowed $35 of business interest deduction from 2019 (50% of excess business interest from 2019), $25 of business interest deduction in respect of the 2020 interest expense (the modified

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ers, including many real estate businesses who did not or were not able to elect out of §163(j), through higher interest expense deductions. These deductions could prove especially beneficial for those businesses operating with higher leverage, like some private equity funds. Indeed, for those highly levered operators contemplating restructuring their debt, the higher interest expense deductions may prove vital for offsetting the cancellation of indebtedness income often generated by the modification of the terms of a debt obligation.[22]

State Compliance Concerns

While this article focuses on U.S. federal income taxation, the change to §163(j) presents a state and local tax compliance issue worth noting. Many states conform their tax law regime to the I.R.C., either as of a specific date (static conformity) or simply to the current iteration of the I.R.C. (dynamic conformity). For states with static conformity set to, for example, December 31, 2019, the §163(j) limitation will apply at the 30% level rather than the temporarily modified 50% threshold. Large corporate or passthrough taxpayers will often file state returns in multiple (if not most) states. The now-checkered approach to the §163(j) limitation at the state level could be a compliance nightmare for these filers, requiring computation of pre-and post-CARES Act §163(j) limitations depending on the state, not to mention the recomputation of disallowed carryforwards for each state. Many larger jurisdictions, however, are unlikely to be affected. For example, New York state uses dynamic conformity and will therefore incorporate the CARES Act changes automatically unless a ''decoupling'' decision is made.[23]

Excess Business Losses

Prior to the CARES Act, §461(l) limited an individual's use of business losses (generally to $250,000) against nonbusiness income for tax years after December 31, 2017, and before January 1, 2026. Business losses that are in excess of business income and in excess of $250,000[24] are deemed ''excess business losses'' that may be carried forward to offset business income in future tax years. As an example, prior to the CARES Act, §461(l) would prohibit a partner allocated a large business loss on a Schedule K-1 from using that business loss (other than $250,000) to offset other, nonbusiness income (such as wages or income from investments). This excess business losses limitation materially impacted real estate professionals who were not subject to the passive activity but had significant income from portfolio assets or carried interest from investments in REITS.

The CARES Act suspends the limitation on the use of excess business losses for individuals until tax years beginning after December 31, 2020.[25] According to a Senate Finance Committee summary released the day the CARES Act passed the Senate, the purpose of the provision is to allow individuals and passthrough businesses to utilize excess business losses and access critical cash flow to maintain operations and payroll for their employees.[26]

Unfortunately, only taxpayers with disallowed excess business losses that had positive nonbusiness income in tax years 2018, 2019, or 2020 will benefit. Further, taxpayers that have excess business losses in 2018 (or that have already filed 2019 returns) must amend prior returns to claim the business loss offset (and resulting lower taxable income), and the IRS will need to process and approve any refunds before taxpayers see a cash benefit. Individual taxpayers who take advantage of the delayed filing date for 2019 federal income tax returns (pursuant to Notice 2020-18 and related IRS guidance) may not be prepared to claim the full benefits of the changes to §461(l) until later this year.[27]

Many real estate and passthrough businesses likely will accrue substantial business losses this year, resulting in many individual owners who will qualify for §461(l) relief. As a result of the suspension of the excess business loss provision, these partners may see their taxable nonbusiness income reduced or eliminated for the 2020 tax year, depending on the magnitude of their excess business loss. But taxpayers may not see that benefit until returns are filed in 2021. Further, only those taxpayers who are not subject to the passive activity loss rules and at-risk rules, and only those partners or S corporation shareholders who have

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§163(j) limit), and has a $10 net loss.

[22] §108(e)(10); Reg. §1.1001-3(b).

[23] *See* Publication 20, New York State Tax Guide for New Businesses, *available at* https://www.tax.ny.gov/pdf/publications/multi/pub20.pdf.

[24] §461(l)(3)(A)(ii).

[25] CARES Act §2304. The repeal of the excess business loss change in the CARES Act has already been suggested as a revenue raiser for Joe Biden's student debt relief proposal. *See* Axelrod, *Biden Releases Plans to Expand Medicare, Forgive Student Debt*, The Hill (Apr. 9, 2020), *available at* https://thehill.com/homenews/campaign/492063-biden-releases-plans-to-expand-medicare-forgive-student-debt?amp.

[26] Senate Finance Committee, *Grassley Releases Phase 3 Coronavirus Response Legislation* (Mar. 25, 2020). Summaries are available at https://www.finance.senate.gov/imo/media/doc/CARES%20Act%20Section-by-Section%20(Tax,%20Unemployment%20Insurance).pdf. The summary was originally authored by the Congressional Research Service and released by Senator Charles Grassley's office.

[27] Notice 2020-18.

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sufficient outside basis, can take advantage of these changes.[28]

NOL Limitation Changes

The 2017 Tax Act amended §172 to prohibit the carryback of NOLs and also limited the use of NOL carry forwards so that they can only offset up to 80% of taxable income. The CARES Act amends §172 to once again permit a five-year carryback of NOLs incurred by corporations (other than REITs) in tax years 2018, 2019, and 2020.[29] The CARES Act also temporarily suspends the 80% limitation (including for REITs), allowing taxpayers to use NOLs to fully offset taxable income through the 2020 tax year.

Effect on Passthrough Businesses

Passthrough entities do not stand to benefit directly from changes to the limitations on NOLs. But many owners, and some subsidiaries, of passthrough entities that are C corporation ''blocker'' entities may benefit, depending on the performance of their underlying investments and their resulting income or loss allocations. Notably, the CARES Act changes also permit NOL carrybacks to years in which the corporate tax rate was higher, at 35%. Corporate partners may have attractive carryback opportunities if they have recent NOLs but taxable income from pre-2017 Tax Act years.

REIT Exclusion

As noted above, REITs are explicitly excluded by the CARES Act from this change to the NOL carryback rules. For former REITs, NOLs cannot be carried back to any REIT year. That prohibition on REIT NOL carrybacks applies even if the entity loses its REIT status in the 2020 tax year. Because REITs are not subject to entity-level tax if they fully distribute their taxable income and otherwise comply with the REIT rules, this exclusion does not disadvantage REITs as a practical matter. Unless a REIT is experiencing compliance or other issues, it will have already distributed all or substantially all of its income from prior years to shareholders and an NOL carryback would not result in a tax benefit.

Section 965 Transition Tax

Interestingly, the NOL carryback rules intersect with the 2017 Tax Act's one-time §965 transition tax for taxpayers repatriating cash or other income to the United States. Section 965(h) allowed taxpayers to elect to pay the transition tax in eight total installments—escalating from eight percent of the liability in the first installment to 25% by the eighth installment. The CARES Act states that taxpayers carrying back an NOL to a year that includes a §965 inclusion will be deemed to make an election to not apply the NOL against the transition tax.[30] This is generally helpful because it ensures both that the carrybacks won't supplant other valuable tax attributes and that the carrybacks won't be wasted. The CARES Act further states, with respect to §965, that taxpayers may exclude from the NOL carryback years all such years where the taxpayer has an §965 inclusion. This is a favorable result for taxpayers, because, as at least one commentator notes, the IRS's view is that an NOL carryback used in a §965 inclusion year could be viewed as an advance payment of future installments.[31] In that instance, the taxpayer would not be able to utilize the carryback to generate an immediate tax refund.

GILTI and FDII

NOL carrybacks may also interact with the 2017 Tax Act's new §250 deduction. Section 250 provides a deduction that reduces the tax rate on global intangible low-taxed income (GILTI) and foreign-derived intangible income (FDII). If a taxpayer's U.S. taxable income decreases, the 2017 Tax Act reduces the amount of GILTI or FDII eligible for the §250 deduction proportionately. Where a taxpayer with GILTI or FDII uses an NOL carryback to sharply reduce, or even eliminate, U.S. taxable income, a proportionate decrease in the value of the §250 deduction results. Taxpayers with GILTI or FDII may thus find that the CARES Act NOL carryback change provides less relief than it first appears.[32]

Payroll Tax Changes

Payroll Tax Deferral and PPP Loan Forgiveness

The CARES Act defers the 6.2% Social Security employer payroll taxes imposed under §3111(a) for the period beginning on March 27, 2020, and ending on December 31, 2020.[33] Employers can defer 50% of those taxes until December 31, 2021, and the remain-

[28] *See* §469, §465, §704(d), §1366.

[29] CARES Act §2303.

[30] Section 965(n) already allowed taxpayers to elect not to apply their NOLs to the §965 liability and instead apply other tax attributes, such as foreign tax credits. Rev. Proc. 2020-24 provides guidance on the procedure taxpayers should use regarding the deemed §965(n) election.

[31] Emily L. Foster, *Favorable NOL Carryback Rules Apply to Deemed Repatriations*, Tax Notes (Apr. 6, 2020).

[32] *See also* Siri Bulusu, *Tax Law Changes May Limit Benefit of New Loss Carryback Perk*, Daily Tax Rep. (Apr. 3, 2020).

[33] CARES Act §2302.

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ing 50% until December 31, 2022.[34] Any employers who receive SBA Loan forgiveness under the ''Paycheck Protection Program'' (PPP) are not eligible for this benefit regardless of the extent to which PPP loans are applied to payroll costs.[35] However, all other employers are eligible for deferral.

At the time of writing, uncertainty remains as to exactly how this provision will interact with the PPP. For example, if an employer applies for and receives a PPP Loan, it is unclear if an employer can defer payroll taxes during the period preceding forgiveness of the loan or if the employer is no longer eligible for loan forgiveness if it defers. Similarly, it is uncertain whether that employer would have to deposit any deferred payroll taxes to be eligible for loan forgiveness, or whether it could simply no longer defer payroll taxes after it receives loan forgiveness. Because there is no rational reason why an employer who qualifies for forgiveness would repay the loan, a taxpayer seeking loan forgiveness would be wise to timely pay any employer payroll taxes to avoid interest and penalties for failure to pay.

Passthrough businesses, of course, will only benefit from these provisions to the extent they (or their subsidiaries) have employees, and do not solely pass on profits (or guaranteed payments under §707(c)) to partners. Similarly, for real estate businesses, only employers will be eligible for the employer tax deferral or forgivable PPP Loan—this may exclude property owners to the extent they contract out the operation of their properties to management companies. Property owners and management companies should carefully consider the impact of these relief measures on the allocation of their labor cost under their applicable agreements.

Refundable Employee Retention Tax Credit

Employers who do not obtain PPP Loans[36] qualify for an employment tax credit for each calendar quarter equal to 50% of ''qualified wages'' paid to any eligible employee in 2020, up to $10,000 per employee (a $5,000 credit) for all calendar quarters.[37] An employer is eligible for the credit if, during any calendar quarter of 2020, it either (i) has operations fully or partially suspended by a Covid-19 governmental order limiting commerce, travel or group meetings or (ii) suffers a 50% loss in gross receipts in any fiscal quarter relative to the same quarter in 2019.[38] In the latter case, the employer can continue to claim the credit until the business recovers to 80% of gross receipts relative to the same quarter of 2019.[39] Informal IRS guidance has clarified that ''partially suspended'' operations for purposes of the statute include government limits on ''commerce, travel, or group meetings (for commercial, social, religious, or other purposes)'' due to Covid-19, where the business ''can still continue to operate but not at its normal capacity.''[40] The IRS uses restaurants whose dine-in services are shutdown, but who may still provide carry-out or delivery services, as an example of a ''partially suspended'' operation.[41]

''Qualified wages'' include those wages paid after March 12, 2020, and before January 1, 2021, as well as certain health plan expenses.[42] However, the application of the definition depends in part upon the size of the employer, determined using the average number of employees in 2019, with certain aggregation of affiliates as the same employer.[43] For those with 100 or fewer full-time employees, ***all*** employee wages paid during the applicable period qualify for the credit, whether or not the employee is providing services to the employer.[44] For those with more than 100 full-time employees, qualified wages are only those wages paid by an employer with respect to which an employee is not providing services due to the (i) governmental order or (ii) reduction in business, as described above.[45] Additionally, for these larger employers, qualified wages may not exceed what the em-

[34] CARES Act §2302(a)(1).

[35] CARES Act §2302(a)(3).

[36] CARES Act §2301(j).

[37] CARES Act §2301(a), §2301(b)(1).

[38] CARES Act §2301(c)(2).

[39] CARES Act §2301(c)(2)(B).

[40] IRS, *FAQs: Employee Retention Credit under the CARES Act* (Mar. 31, 2020), *available at* https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act (IRS FAQ).

[41] IRS FAQ.

[42] CARES Act §2301(c)(3).

[43] CARES Act §2301(c)(3)(A), §2301(d).

[44] CARES Act §2301(c)(3)(A).

[45] CARES Act §2301(c)(3)(A)(i). How the limitation to larger employers applies to partially occupied labor is a little unclear. The Senate Finance Committee, on its website, explains that qualified wages include amounts paid to an employee on a reduced schedule based on the excess of the total wages paid to the employee, over the amount the employer would have paid for the reduced hours or services actually provided. United States Senate Committee on Finance, *CARES Act Employee Retention Credit FAQ* (Mar. 31, 2020), *available at* https://www.finance.senate.gov/chairmans-news/cares-act-employee-retention-credit-faq. The IRS has issued form instructions and a notice seemingly requiring a ''cliff effect'' where partially occupied employees of large employers generate no credit. Instructions to IRS Form 7200, *Advance Payment of Employer Credits Due to COVID-19* (March 2020) (explaining that the ''credit is based on qualified wages paid to those employees not providing services''); IR-2020-62 (Mar. 31, 2020), *available at* https://www.irs.gov/newsroom/irs-employee-retention-credit-available-for-many-businesses-financially-impacted-by-covid-19 (''credit is allowed only for wages paid to employees who did not work during the calendar quarter''); and Employee Retention Tax Credit, *available at* https://home.treasury.gov/system/files/136/Employee-Retention-Tax-Credit.pdf (same); *but see* IRS FAQ (determining

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ployee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.[46]

This credit reduces the employer's payroll taxes for the applicable quarter, and the IRS will refund any excess and will even advance payments of the refund to taxpayers who do not have sufficient federal employment tax deposits to pay qualified wages.[47] An anti-duplication rule applies to preclude the taxpayer from claiming both an employee retention credit and work opportunity income tax credit with respect to any employee.[48] Similarly, while the employee retention tax credit can apply to the same employee as with respect to which the employer has claimed qualified sick and family leave employer tax credits under the Families First Act, the employer cannot duplicate the credits with respect to the same wages of an employee.[49]

As noted above, with respect to the payroll tax deferral and PPP Loan forgiveness, only employers are eligible for these tax credits, so advisors should consider where employees reside relative to the property owner. Advisors should review the applicable management agreement allocating labor costs to determine whether the benefit of these employer retention credits is passed along to the property owner or ultimately resides at the management company.

CONCLUSION

The CARES Act provides opportunity for certain real estate and passthrough businesses to obtain critically needed capital to withstand the pandemic's sudden impact. Much of the stimulus operates through generous (if temporary) tax changes. Still, despite the general taxpayer-friendly nature of the CARES Act, as seems inevitable with the I.R.C., traps remain for the unwary. Careful tax planning, coupled with necessary IRS guidance, will be essential in the days and weeks to come for businesses attempting to harness the tax relief available within these provisions.

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credits for larger employers for wages paid ''for time'' that the employee is not providing services). Because the applicable language is determining an amount of wages and expressly contemplates credits for partial suspensions of operations, the Senate Finance Committee's interpretation seems like the better one.

[46] CARES Act §2301(c)(3)(B).

[47] To claim an advance refund of the anticipated credit, taxpayers must file new IRS Form 7200, *Advance Payment of Employer Credits Due to COVID-19*, *available at* https://www.irs.gov/pub/irs-pdf/f7200.pdf.

[48] CARES Act §2301(h)(1).

[49] CARES Act §2301(b)(2).

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