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

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INTRODUCTION

In our recent article[1] we discussed the tax implications of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and certain other governmental guidance related to Covid-19.[2] In this article, we provide an update on IRS and other governmental guidance released following our last article.

QUALIFIED IMPROVEMENT PROPERTY: REV. PROC. 2020-25

The CARES Act corrected a drafting error in the 2017 Tax Act[3] by reducing the recovery period of qualified improvement property (QIP) to 15 years, thereby making it immediately eligible for bonus depreciation.[4] This correction is retroactive to the effective date of the 2017 Tax Act, January 1, 2018, meaning taxpayers may realize the benefit of the correction in prior years and, if applicable, receive a refund of prior year taxes.

On April 17, 2020, the IRS released Rev. Proc. 2020-25, which provides procedural guidance as to how a taxpayer, including a partnership, can implement the technical correction, and make or revoke certain elections related to the correction.[5] In general, the revenue procedure permits a taxpayer to implement the changes in depreciation for QIP [6] placed in service by the taxpayer after December 31, 2017, in its taxable year ending in 2018, 2019, or 2020, by either filing an amended return, filing an administrative adjustment request under §6227 (AAR) (in the case of partnerships that are subject to the centralized partnership audit regime enacted by the Bipartisan Budget Act of 2015 [7] (BBA Partnerships)) or filing a Form 3115 for an automatic accounting method change. A taxpayer that elects to file an amended return must file the amended return for the placed-in-service year on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is be-

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This article is current as of May 10, 2020, and therefore does not consider any guidance issued from that date forward. The government's response to the Covid-19 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.

[1] Chenoweth, Kniesly, and Wilson, *Covid-19, the CARES Act and Tax Planning for Real Estate and Passthrough Businesses*, 36 Tax Mgmt. Real Est. J. No. 4 (Apr. 15, 2020).

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

[3] 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."

[4] CARES Act, §2307.

[5] Specifically, the revenue procedure provides guidance as to how to make a late election, or revoke an election, under §168(g)(7) (election to depreciate under the alternative depreciation system), §168(k)(5) (election to apply special depreciation rules to certain plants), §168(k)(7) (election out of first year bonus depreciation), and §168(k)(10) (election to deduct 50%, instead of 100%, bonus depreciation). 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.

[6] The revenue procedure does not apply to (i) QIP placed in service after December 31, 2017, by an electing real property trade or business (as defined by §163(j)(7)(B)) making a late election, or withdrawing a previously-made election, in accordance with Rev. Proc. 2020-22, or (ii) QIP the basis of which the taxpayer deducts as an expense. Rev. Proc. 2020-25, §3.01(1)–§3.01(2).

[7] Pub. L. No. 114-74.

ing filed. BBA Partnerships electing to file an amended return are required to file the amended return on or before the deadline prescribed under Rev. Proc. 2020-23, i.e., September 29, 2020. BBA Partnerships that choose not to file an amended return as permitted under Rev. Proc. 2020-23, or that cannot file an amended tax return under Rev. Proc. 2020-23 because the placed-in-service year is a taxable year that is not within the scope of Rev. Proc. 2020-23, can file an AAR by October 15, 2021, but in no event later than the applicable period of limitations on making adjustment under §6235 for the reviewed year (as defined in Reg. §301.6241-1(a)(8)). In either case, any collateral adjustments resulting from the change must be made on an original or amended federal return or AAR for any affected succeeding taxable year. Finally, a taxpayer can file a Form 3115 for an automatic accounting method change, and pick up the required adjustments resulting from the change via a §481(a) adjustment. The revenue procedure additionally permits a taxpayer to make certain late elections, or revoke certain elections, with respect to property placed in service during its 2018, 2019, or 2020 taxable year generally in the same manner, though a prior election under §168(g)(7) (election to depreciate under the alternative depreciation system) cannot be revoked by filing a Form 3115.[8]

Partnerships will need to reconsider the benefit of making the elections in light of the technical corrections made by the CARES Act, and in light of their financial position and tax posture, particularly in the context of the current economic climate. In addition, partnerships will need to carefully consider what procedure to use to implement the technical corrections and make/revoke any elections as the different procedures can have meaningful differences. For example, amendments of partnership returns would require each partner of the partnership for the relevant taxable year(s) to amend such partner's tax return. Depending on the number of partners (including whether there are multiple tiers of partnerships) and the tax attributes of the partners, the administrative costs and burden associated with this type of undertaking may in many cases outweigh any tax benefit that could be achieved. If a partner chose not to amend its return in this case, the partner would be treated as taking an inconsistent position with the partnership.[9] Such partner could also potentially be in breach of the partnership agreement if there is a covenant requiring partners to report consistently with the partnership. On the other hand, the partner may have certain protections in the partnership agreement that disallow the partnership from taking any actions that would require a partner to amend its returns. Alternatively, AARs could result in a delay in receiving any benefit, and possibly result in a reduced benefit to the extent the benefit exceeds the tax liability in the tax year in which the benefit is applied (i.e., the year in which the AAR is filed). Depending on the facts, a §481(a) adjustment could result in some partners not being entitled to their share of the benefit, if such partners have transferred all or a portion of their interest in the partnership prior to the year in which the §481(a) adjustment is taken into account. These and other potential consequences relating to the impact of the different procedures should be considered in implementing the technical correction. Further, partnerships who opt to amend prior returns under Rev. Proc. 2020-23 for reasons other than to change their QIP depreciation should also consider whether they would be required to implement the technical correction in such amendments, rather than being entitled to use one of the other options set forth in Rev. Proc. 2020-25.

[8] Rev. Proc. 2020-25, §5.02

[9] *See* Rev. Proc. 2020-23, §3.03.

REIT AND RIC DISTRIBUTION REQUIREMENTS: REV. PROC. 2020-19

Real estate investment trusts (REITs) and regulated investment companies (RICs) must meet certain minimum distribution requirements to maintain their special tax status under subchapter M of the I.R.C.[10] Stock dividends generally do not count toward these distribution requirements[11] unless the shareholder receiving the distribution may elect the receipt of either stock or property (often cash). Reg. §1.305-1(b)(2) makes clear that the rule of §305(b)(1) also applies to REITs and RICs.[12]

The IRS previously created, in Rev. Proc. 2017-45, a safe harbor for publicly offered REITs and publicly owned RICs that generally allows those entities to treat a distribution of stock and cash as counting towards their distribution requirements so long as shareholders can elect between cash and stock and the minimum amount of cash that can be distributed to

[10] *See* §852(a) (RICs), §857(a) (REITs).

[11] Section 852(a) and §857(a) generally provide that RICs and REITs are to determine their compliance with distribution requirements by reference to the dividends paid deduction rules of §561. Section 561 generally sums the dividends paid during the year to determine the dividends paid deduction. §561(a)(1).

[12] In a time of economic crisis, REITs and RICs may seek to conserve capital and enhance liquidity by distributing stock to shareholders in lieu of cash. Section 305(b)(1) and Reg. §1.305-1(b)(2), however, treat stock dividends as those to which §301 applies only if a shareholder has an option to receive stock or cash, leaving open the question of whether a REIT or RIC can limit the amount of cash distributed, effectively providing shareholders with an option to receive all stock or a mix of stock and cash, and still qualify as a dividend to which §301 applies.

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shareholders is no less than 20% of the aggregate amount to be distributed.

Rev. Proc. 2020-19 extends that distribution safe harbor further, lowering the aggregate minimum cash limit to 10% allowing publicly offered REITs and publicly owned RICs to maintain their tax status while conserving more cash. Notably, this is not the first time the IRS lowered the cash limit to 10%.[13]

MORTGAGE FORBEARANCE: REV. PROC. 2020-26

On April 13, 2020, the IRS released Rev. Proc. 2020-26, which provides, among other things, safe harbors under which certain forbearances (and any related modifications) of (i) certain federally backed mortgage loans (including federally backed multifamily mortgage loans) that are made under the CARES Act forbearance program and (ii) other mortgage loans that are made under a forbearance program (that is ''identical or similar'' to the CARES Act forbearance program) for borrowers experiencing a financial hardship due, directly or indirectly, due to the Covid-19 emergency (together, ''Forbearance Loans'') will not be treated under the real estate mortgage investment conduit (REMIC) rules as a deemed reissuance or a prohibited transaction, or cause an investment trust to be treated as a business entity as a result of having a ''power to vary'' its investment.[14] Certain provisions of the revenue procedure are discussed immediately below.

CARES Act, and Private Mortgage Forbearance Programs

Under the CARES Act, from March 27, 2020 (the date of the CARES Act's enactment) to December 31, 2020, borrowers with federally backed mortgage loans (including federally backed multifamily mortgage loans) experiencing hardship due to the Covid-19 pandemic may obtain, upon request, temporary forbearance from payments due on the loans.[15] In addition, other holders or servicers of non-federally backed mortgage loans intend to or have provided forbearances to similarly situated borrowers.

REMIC Qualification – Qualified Mortgages

In connection with forbearance extended to federally and non-federally backed mortgages, commentators expressed concern that the tax rules related to debt modifications could interact with the REMIC rules to disqualify assets that would otherwise be qualified mortgages. In particular, under the REMIC rules, substantially all of the assets of a REMIC must consist of qualified mortgages and permitted investments, as of the close of the third month beginning after its startup day (and at all times after the startup day), subject to certain exceptions.[16] In general, mortgage loans are qualified mortgages only if they are transferred to the REMIC on its startup day in exchange for interests in the REMIC.[17] As a general matter, a modification of a loan that constitutes a ''significant modification'' gives rise to a deemed exchange of the loan for a new loan for federal income tax purposes.[18] A deemed exchange of a qualified mortgage may result in that mortgage no longer constituting a qualified mortgage since the mortgage is no longer treated as being acquired by the REMIC on its startup day, but rather, is treated as being acquired on the date of the deemed exchange.

Rev. Proc. 2020-26 makes clear that forbearance extended to a borrower under a Forbearance Loan (and all related modifications) will not be treated as a deemed reissuance for purposes of the REMIC asset test.[19]

REMIC Prohibited Transaction Rules

REMICs pay tax at a rate equal to 100% of the net income derived from certain prohibited transactions. The disposition of a qualified mortgage is a prohibited transaction[20] (absent certain enumerated exceptions),[21] as is the receipt of income derived from nonqualified assets or permitted investments.[22] Rev. Proc. 2020-26 clarifies that forbearance extended to a borrower under a Forbearance Loan (and all related

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[13] *See*, *e.g*., Rev. Proc. 2010-12 (allowing the minimum cash portion of a REIT or RIC distribution, on an aggregate basis, to be set at 10%, citing as justification the liquidity concerns of many REITs and RICs).

[14] Rev. Proc. 2020-26.

[15] CARES Act, §4022, §4023. The CARES Act requires the borrower's mortgage servicer to provide forbearance for up to 180 days (extended by another 180 days at the borrower's request). CARES Act, §4022(b)(2), §4022(c)(1). During the period of forbearance, the loan shall not accrue fees, penalties, or interest. CARES Act, §4022(b)(3) and §4022(c)(1). During the forbearance period, mortgage servicers cannot charge any penalties, interest, or fees that would not have been charged if the borrower had made payments on time and in full.

[16] §860D(a)(4).

[17] §860G(a)(3)(A). There are exceptions to this general rule.

[18] Reg. §1.001-3(b).

[19] Rev. Proc. 2020-26, §6.01(1). The forbearance also does not cause a deemed reissuance of the REMIC equity interests. Rev. Proc. 2020-26, §6.01(3).

[20] §860F(a)(2)(A).

[21] §860F(a)(2)(A).

[22] §860F(a)(2)(B).

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modifications) will not be treated as a prohibited transaction for purposes of §860F(a)(2).[23]

Additional REMIC Requirements

In general, equity interests of a REMIC must contain fixed terms on the REMIC's startup day, and such terms must unconditionally entitle the holder to receipt of a specified principal amount and interest payments, if any, that are based on a fixed rate.[24] Variable rates are permitted under certain conditions specified in the regulations.[25] Rev. Proc. 2020-26 makes clear that delays and shortfalls in payments associated with or caused by forbearance programs extended to borrowers under a Forbearance Loan will not cause REMIC equity interests to fail the fixed terms requirement of §860G.[26]

REMICs can hold as a permitted investment ''foreclosure property,''[27] subject to certain requirements of §856(e) and the applicable Treasury regulations.[28] Property is not eligible to be treated as ''foreclosure property'' if the REMIC knew or had reason to know that a default would occur as a result of improper knowledge.[29] Under Rev. Proc. 2020-26, if a REMIC acquires a a Forbearance Loan on or after March 27, 2020, the prior forbearance (and all related modifications) will not be treated as evidence that the REMIC had improper knowledge of an anticipated default for this purpose.[30]

Investment Trusts

The forbearance granted to mortgage borrowers under the CARES Act (and similar programs) raised the question of whether an investment trust holding an interest in a pool of mortgages (or holding an interest in a mortgage directly) some or all of which are subject to forbearance will be treated as providing for an impermissible power to ''vary'' the trust's investments thereby resulting in the trust not being classified as an investment trust.[31] Rev. Proc. 2020-26 clarifies that any forbearance extended to a borrower under a Forbearance Loan (and all related modifications) will not manifest a power to ''vary'' investment in the trust for this purpose.[32]

NOL UPDATES

The CARES Act amended §172 to permit a five-year carryback of net operating losses (NOLs) incurred by corporations (other than REITs) in tax years 2018, 2019, and 2020.[33] The CARES Act also temporarily suspended for taxable years through the 2020 tax year the rule limiting the use of NOLs (including for REITs) to 80% of a corporation's taxable income.

Temporary Fax Procedures for Quick Refund Claims

Temporary procedures established by the IRS allow taxpayers to fax any NOL deduction claims under the CARES Act which are made on IRS Form 1139 or 1045, cutting down on mail processing delay caused by Covid-19.[34] These procedures are available starting April 17, 2020, until further notice. On April 30, 2020, the IRS updated this guidance to exclude certain taxpayers who are amending tax returns and at the same time seeking tentative refunds for CARES Act NOL deductions from these updated procedures. According to the updated FAQ, any taxpayers who need to file amended returns via mail delivery before seeking tentative refunds can still timely file hard copies of quick refund applications by using normal procedures and adhering to the extended filing deadlines. Unfortunately, those taxpayers are not eligible for the temporary fax procedures.[35]

If a taxpayer is amending a return by filing Form 1120-X electronically, the taxpayer can use the temporary fax procedures for Form 1139 using the amended amounts. The IRS will not process the tentative refund application on IRS Form 1139 or 1145 until the amended return has been processed and reflected in the taxpayer's account.[36]

Section 965 Guidance

The IRS also issued informal guidance, in the form of a list of FAQs, addressing NOL carrybacks for tax-

[23] Rev. Proc. 2020-26, §6.01(2).

[24] §860(G)(a)(1).

[25] Rev. Proc. 2020-26, §6.01(2).

[26] *See* Rev. Proc. 2020-26, §6.04.

[27] §860G(a)(5)(C).

[28] §860G(a)(8) (defining foreclosure property as that ''which would be foreclosure property under §856(e) (without regard to paragraph (5) thereof)'' if acquired by a REIT).

[29] Reg. §1.856-6(b)(3).

[30] Rev. Proc. 2020-26, §6.03(1).

[31] Reg. §301.7701-4(c)(1).

[32] Rev. Proc. 2020-26, §6.02.

[33] CARES Act, §2303.

[34] IRS, *Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19*, *available at* https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19.

[35] IRS, *Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19* at Questions #8, #9.

[36] IRS, *Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19* at Questions #15, #16.

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payers who have had §965 inclusions.[37] These FAQs advise taxpayers that they may file an election to either waive the entire five-year carryback period or exclude all of the §965 years from the carryback period.[38]

Taxpayers with an NOL arising in a 2017 fiscal tax year who apply for a tentative refund on IRS Form 1139 or 1045 for a carryback of that NOL will be treated as having timely filed if the form is filed by July 27, 2020. Similarly, elections for a 2017 fiscal tax year to waive any NOL carryback period, to reduce any NOL carryback period, or to revoke any election made under §172(b) to waive any NOL carryback period will be treated as timely if filed no later than July 27, 2020.[39]

PAYROLL TAX UPDATES

Payroll Tax Deferral

The CARES Act deferred 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, but this deferral is disallowed for any employers who receive loan forgiveness under the ''Paycheck Protection Program'' (PPP).[40] In informal guidance in the form of an ''FAQ,'' the IRS clarified the position of employers who have applied for or received a PPP loan, but whose loan has not yet been forgiven.[41] These employers may defer deposit and payment of the §3111(a) payroll tax that otherwise would be required to be made beginning on March 27, 2020, through the date the lender issues a decision to forgive the loan in accordance with §1106(g) of the CARES Act, without incurring any failure to deposit or failure to pay penalties. Whenever the employer receives its lender's decision that the PPP loan is forgiven, the employer is no longer eligible for deferral in respect of taxes applicable to payroll paid after such date. The amount of the deposit and payment of the employer's share of social security tax that was deferred through the date that the PPP loan is forgiven continues to be deferred in accordance with §2302 of the CARES Act.[42]

ERC

Employers who do not obtain PPP Loans and who experience certain COVID-19 related hardships may 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. On April 29, 2020, the IRS released an updated series of ''FAQs'' on the employee retention credit.[43] This new guidance is extensive and represents a substantial update of its previous FAQs on the subject. It includes insights into what governmental orders will lead to full or partial suspensions of operations, how to determine when a business is considered to have a significant decline in gross receipts, what constitutes qualified wages, and how to implement the aggregation rules. In addition, the Joint Committee on Taxation issued its report on the CARES Act, which includes a description of the employee retention credit (the ''JCT Report'').[44]

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[37] IRS, *Frequently asked questions about carrybacks of NOLs for taxpayers who have had Section 965 inclusions*, *available at* https://www.irs.gov/newsroom/frequently-asked-questions-about-carrybacks-of-nols-for-taxpayers-who-have-had-section-965-inclusions.

[38] See Note 38, above at Q1. Further, taxpayers carrying back an NOL to a §965 year who are now entitled to a refund for that year (because their income tax liability for the year is fully paid) may disregard the portion of the instructions for IRS Forms 1139 and 1145 prohibiting taxpayers from using those forms to apply for refunds for §965 years. But taxpayers may not receive a refund or credit of any portion of properly applied §965 tax payments unless and until the amount of payments exceeds the entire income tax liability for the §965 year, which includes all installment amounts under §965(h) in subsequent years if a §965(h) election was made. See Note 38, above Q3.

[39] See Note 38, above at Q6. Additionally, in Notice 2020-26, the IRS granted taxpayers a six-month extension of time to file IRS Form 1139 or 1045, as applicable, to apply for a tentative refund from an NOL carryback that arose in a taxable year that began during calendar year 2018 and ended on or before June 30, 2019. This extension of time is limited to requesting a tentative refund to carry back an NOL, and does not extend the time to carry back any other item. Notice 2020-26.

[40] CARES Act, §2302.

[41] IRS, *Deferral of employment tax deposits and payments through December 31, 2020* (Apr. 16, 2020), *available at* https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020.

[42] IRS, *Deferral of employment tax deposits and payments through December 31, 2020*, Question 4.

[43] IRS, *FAQs: Employee Retention Credit under the CARES Act* (Apr. 29, 2020), *available at* https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act.

[44] Joint Committee of Taxation, *Description of the Tax Provisions Of Public Law 116-136, The Coronavirus Aid, Relief, And Economic Security (''CARES'') ACT*, JCX-12R-20 (Apr. 23, 2020), *available at* https://www.jct.gov/publications.html?func=startdown&id=5256. The updated IRS FAQs and the JCT Report conflict in several places. For example, the IRS FAQs include only full-time employees in determining if an employer has 100 works for purposes of the ''qualified wages'' definition. But the JCT Report description discusses ''full-time and full-time equivalent employees.'' These conflicts with the legislative history may call into question whether taxpayers can reasonably rely on the IRS guidance where it diverges from the JCT Report. The IRS advises in the FAQs that additional guidance is forthcoming on the employee retention credit, which may resolve

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Eligible Employers

To be an ''eligible employer,'' a business must either (i) experience a full or partial suspension of operations due to a governmental order limiting commerce, travel, or group meetings, or (ii) suffer a ''significant'' (50%) loss in gross receipts in a fiscal quarter in 2020 relative to the same quarter in 2019.[45] The IRS FAQs expand upon prior guidance regarding when an eligible employer that are ''essential'' businesses are not an ''eligible employers'' under the ''full or partial shutdown due to a government order'' prong of the test.[46] If a governmental order allows the employer to remain open, even though the governmental order requiring non-essential businesses to close may have an effect on the employer's operations, for example, because a stay-at-home order limits the number of customers, this ''essential'' business will not qualify, according the FAQs.[47] Nonetheless, the FAQs provide that an essential business may be considered subject to a full or partial shutdown where governmental orders have caused the business' suppliers to suspend their operations (and they are therefore unable to make deliveries of critical goods or materials).[48] The FAQs also provide that ''voluntary shutdowns'' by employers not subject to a government order do not qualify for this purpose.[49]

Under the FAQs, certain employers that operate in multiple locations and which are subject to state and local governmental orders limiting operations in some, but not all, of these jurisdictions are considered to have a partial suspension of operations.[50] If a business is deemed ''essential'' in one jurisdiction in which it operates, but ordered to close in another, it will be an eligible employer if it has established a uniform policy across all of its locations that complies with local orders and Center for Disease Control and Prevention and Department of Homeland Security recommendations.[51] Lastly, employers who are able to ''continue operations comparable to. . .operations prior to the closure by requiring. . .employees to telework'' are not ''eligible employers'' under the ''full or partial shutdown'' prong according to the IRS FAQs.[52]

If an employer instead qualifies under the ''significant decline in gross receipts'' prong of the test, the IRS FAQs provides that a drop in receipts is itself sufficient. Businesses are not required to establish a connection between the reduced receipts and the pandemic in order to qualify. However, documentation of the drop in receipts must be retained for at least four years.[53]

For purposes of determining an employer's eligibility for and the amount of the credit, all entities that are treated as a single employer under §52(a) or §52(b) (which generally determine when entities are related for purposes of tax credits under §51), or §414(m) or §414(o) (which generally determine when related entities, including affiliated service groups, are treated as a single employer for purposes of retirement and other employee benefit rules) are considered one employer.[54] The FAQs clarify that these rules apply when determining: (i) whether the employer has a trade or business operation that was fully or partially suspended due to a governmental order, (ii) whether the employer has a significant decline in gross receipts, (iii) whether the employer has more than 100 full-time employees and (iv) the PPP loan exclusion.[55] Further, the amount of the credit must be apportioned among members of the aggregated group based on each member's proportionate share of the qualified wages.[56]

Qualified Wages

As discussed in our prior article, previous IRS guidance on the credit seemed to create a ''cliff effect'' for employers with more than 100 full-time employees on average in 2019, whereby only wages paid to fully idle employees qualified, and partially occupied employees did not generate a credit.[57] The updated FAQs and the JCT Report make it clear that

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these issues. Further, the IRS explicitly cautions at the top of the FAQs that the series is ''not included in the Internal Revenue Bulletin, and therefore may not be relied upon as legal authority,'' meaning ''that the information cannot be used to support a legal argument in a court case.''

45 CARES Act, §2301(c)(2).

46 IRS FAQs, Question #30.

47 IRS FAQs, Question #31. This interpretation appears to be part of a narrow interpretation of what shutdowns are ''due to'' a governmental order under §2301(c)(2)(A)(I) of the CARES Act.

48 IRS FAQs, Question #31.

49 IRS FAQs, Question #29.

50 IRS FAQs, Question #36.

51 IRS FAQs, Question #36.

52 IRS FAQs, Question #33. This interpretation is surprising, as paid leave under the Families First Coronavirus Response Act expressly excluded teleworking employees and no such exclusion appears in the CARES Act. Pub. L. No. 116-127, §3102, §5102.

53 IRS FAQs, Question #41.

54 CARES Act, §2301(d).

55 IRS FAQs, Question #28.

56 IRS FAQs, Question #29.

57 *See* 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

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there is no such cliff effect. The credit is available to eligible employers where employees are paid for time they did not work. To determine the reduction in employee services for this purpose, both the JCT Report and the IRS FAQs focus on a reduction in employee hours.[58] The IRS FAQs further distinguish between ''exempt salaried,'' on the one hand, and ''non-exempt salaried'' and hourly employees, on the other, when determining when employees are ''not providing services.''[59] Unfortunately, the updated FAQs provide little guidance as to how employers substantiate salaried employees' reduction in services absent an employer-mandated reduction in hours worked. Although it clarifies that any ''reasonable method'' may be used, reasonable methods do not include an assessment of the employee's productivity levels during the hours the employee is working.[60]

Section 1031 Exchanges

On April 9, 2020, the IRS issued Notice 2020-23, which grants taxpayers who are currently engaged in a §1031 exchange relief from the 45-day identification period and 180-day exchange period deadlines. Any affected taxpayers with a 45-day identification period or a 180-day exchange period expiring on or after April 1, 2020, and before July 15, 2020, will have until July 15, 2020, to complete the identification or exchange, as applicable (assuming the due date, including extensions, of the taxpayer's tax return for the year of the transfer is not before July 15, 2020). This extension is automatic and requires no further action by the taxpayer.

CONCLUSION

As we observed in our prior article, the CARES Act provides tax benefits that allow certain real estate and passthrough businesses to access critically-needed capital. IRS guidance has helped address many of the unanswered questions raised by the CARES Act, but the landscape continues to shift. Additional, potentially-conflicting guidance or future legislation could create new tax planning opportunities or plant new traps for the unwary, making careful review of available guidance as tax returns (e.g., quarterly payroll tax reports) become due more essential than ever.

Credit, *availableat* https://home.treasury.gov/system/files/136/Employee-Retention-Tax-Credit.pdf (same).

[58] JCT Report at 40–41; IRS FAQs, Questions #54 and #55.

[59] IRS FAQs, Questions #54, #55.

[60] IRS FAQs, Questions #54, #55.

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