The Panel

- Gregory Fairbanks, Managing Director, Grant Thornton LLP
- Mireille Khoury, Senior Advisor, IRS (Large Business & International).
- Danielle Rolfes, Partner, KPMG LLP
- Eric Solomon, Partner, Steptoe & Johnson LLP
- David Strong, Managing Director, Crowe LLP
Objectives

• Understand certain business tax provisions in the CARES Act

• Become familiar with the interaction of the CARES Act provisions with other parts of the Internal Revenue Code, particularly the international tax rules.

• Understand the procedural aspects of refund claims and taxpayer elections.
CARES Act

• On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was signed into law

• P.L. 116-136 (H.R. 748)
  • Roughly $2 trillion in economic relief aimed at businesses and individuals affected by coronavirus pandemic
  • In addition, provisions for corporate taxpayers in the CARES Act
  • Key attribute provisions of the CARES Act intended to provide liquidity to businesses affected by the economic downturn
CARES Act Impact to Corporations

• Changes to Net Operating Loss Rules
  • Allowing a five-year carryback period for certain net operating losses (NOLs)
  • Temporarily removing the 80% limitation on the use of NOLs
  • Correcting certain 2017 Tax Cuts and Jobs Act (“TCJA”) effective dates

• Changes to AMT Credit Refund Rules
  • Aimed at accelerating credit refunds
  • Changes to section 163(j)
    • Aimed at lessening the potential effect of section 163(j) in 2019 and 2020
NOL Provisions – Carryback Overview

• **Prior to TCJA**, NOLs ordinarily could be carried back two taxable years and forward 20 taxable years. **Under TCJA**, NOLs generally cannot be carried back but they can be carried forward indefinitely.

• **Under the CARES Act**, NOLs arising in taxable years beginning after December 31, 2017, and before January 1, 2021, may be carried back to each of the five taxable years preceding the taxable year of such loss.
  - NOL usage chronology not altered.
  - No selectivity allowed for years to which carried (but see section 965 discussion).

• **Refunds from NOL carrybacks provide liquidity benefit.**
  - Benefit is “super-charged” given that 21% rate losses may be carried back into 35% rate years
  - Taxpayers might consider adopting various timing strategies, such as changing accounting methods, making a section 165(i) election to claim disaster losses in prior year, adopting a new taxable year (e.g., a Nov. 30 year end)
  - But generally no liquidity benefit for losses / FTCs carried to section 965 inclusion year

• The corporate equity reduction transaction (CERT) rules of former section 172(g), which limited many taxpayers’ ability to carry back NOLs, **do not apply** to the carryback relief.
CARES Act and NOLs

- Temporary Repeal of 80% Limitation
- TCJA (P.L. 115-97)
  - The TCJA revised section 172(a) to provide that NOLs for tax years beginning after December 31, 2017 are usable to offset up to 80% of taxable income.
  - Example: In 2019 taxpayer has taxable income of $200 and an NOL carryover from 2018 of $250. The NOL limit is 80% of $200, or $160. Taxpayer has a recomputed taxable income of $40, tax of $8.40, and an NOL carryover from 2018 into 2020 of $90.
  - Technical issues regarding both effective date for fiscal year taxpayers (see discussion infra) as well as interaction when taxpayer has both pre-TCJA and post-TCJA NOLs (see separate discussion infra).
CARES Act and NOLs

• Temporary Repeal of 80% Limitation
  • Supersedes TCJA provision
  • All NOLs are usable to offset taxable income for tax years beginning before January 1, 2021
  • Thus, restoring pre-TCJA treatment for calendar years 2018, 2019, and 2020
    • As well as fiscal years 2018-2019, 2019-2020, and 2020-2021
  • Revised Example: In 2019 taxpayer has taxable income of $200 and an NOL carryover from 2018 of $250. All 2018 NOL is usable in 2019. Taxpayer has a recomputed taxable income of $0, tax of $0, and an NOL carryover from 2018 into 2020 of $50.
CARES Act and NOLs

- Two-Step Calculation starting in 2021
- TCJA:
  - Unclear how 80% limit is computed if both pre-TCJA and post-TCJA NOLs
  - View of many practitioners
  - Example: Taxpayer has $100 of 2017 NOL, $100 of 2018 NOL, and $200 of 2019 taxable income. Limit on post-TCJA NOL is 80% of $200, or $160. Therefore all 2018 NOL is usable. Taxpayer has revised taxable income of $0. Tax of $0.
- Bluebook
  - Same Example: Taxpayer first offsets 2019 taxable income with pre-TCJA NOL ($200 minus $100). 80% limit applies to this amount (80% of $100, or $80). Therefore only $80 of 2018 NOL is usable ($80 < $100). Taxpayer has revised taxable income of $20. Tax of $4.20.
  - The Bluebook (fn. 903) states that the above result may require statutory technical correction
CARES Act and NOLs

• Two-Step Calculation starting in 2021
  • Adopts the Bluebook’s suggested statutory correction effective for taxable years beginning after December 31, 2020.
  • Revised calculation
    • First use pre-TCJA NOL (tax years beginning before 12/31/2017)
    • Then are allowed the lesser of:
      • NOLs arising after 12/31/2017
      OR
      • 80% of taxable income (without section 199A [qualified business income] or section 250 deductions [FDII and GILTI]) minus pre-TCJA NOLs
CARES Act Post-2020 NOL Usage Example

**Interaction of 80% of taxable income limitation with GILTI/FDII**

**Example 1:**
- 2021 taxable income (excluding GILTI): $1,400
- 2021 GILTI inclusion: $100
- 2018 – 2020 NOL carryforward: $1,800
- Assumes no FDII or interest expenses

<table>
<thead>
<tr>
<th>Step</th>
<th>Calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Taxable income before NOL and section 250 deductions: $1,500</td>
</tr>
<tr>
<td>b.</td>
<td>Allowable NOL deduction: $1,200 ($1,500 x 80%)</td>
</tr>
<tr>
<td>c.</td>
<td>Taxable income before section 250 deduction: $300</td>
</tr>
<tr>
<td>d.</td>
<td>Section 250 deduction for GILTI: $50 ($100 x 50%)</td>
</tr>
<tr>
<td>e.</td>
<td>Net taxable income = $250 ($1,500 - $1,200 - $50)</td>
</tr>
</tbody>
</table>

**Example 2:**
- 2021 taxable income (excluding GILTI): $1,000
- 2021 GILTI inclusion: $500
- 2018 – 2020 NOL carryforward: $1,800
- Assumes no FDII or interest expenses

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<td>c.</td>
<td>Taxable income before section 250 deduction: $300</td>
</tr>
<tr>
<td>d.</td>
<td>Section 250 deduction for GILTI: $150 ($300 x 50%)</td>
</tr>
<tr>
<td>e.</td>
<td>Net taxable income = $150 ($1,500 - $1,200 - $150**)</td>
</tr>
</tbody>
</table>

**Note:** Excess section 250 deduction of $100 (($500 x 50%) - $150) will not be available for future use due to the section 250(a)(2) taxable income limitation.
GILTI Is Not for Losers

• Taxable income limitation on the section 250 deduction, lack of FTC carryforwards, and treatment of tested loss CFCs makes GILTI startlingly pro-cyclical

• Consider the following tax profiles:
  • Current year NOL or overall domestic loss with positive net tested income (e.g., operate through LRDs abroad)
    • If subject to the section 250 taxable income limitation, the unrelated loss would offset the GILTI inclusion, using an attribute that otherwise would generate a 21% benefit (or 35% if loss can be carried back to a pre-TCJA taxable year)
    • If taxpayer is unable to claim GILTI FTCs in the current year, credits are lost (i.e., no ability to carryforward or back)
  • Any hope?
    • Convert tested loss CFCs to \( \geq \$1 \) tested income to avoid wasting deemed tangible income return (“DTIR”)
    • Defer income, accelerate deductions, etc., to manage, to extent possible, to aggregate net tested income of \( \leq \) DTIR
      • But may be too late in the context of an NOL carryback!

• Net aggregated tested loss
  • No tested loss carryover means the deductions comprising a tested loss are lost
  • The “territorial system” for DTIR is inexplicably turned off (no carryovers of DTIR)
  • Again, ideal amount of net aggregate tested income is equal to DTIR. Accelerate income/defer deductions to absorb net losses
CARES Act and NOLs – Carrybacks

• Five year carryback (absent election) for NOLs arising in tax years beginning after December 31, 2017 but before January 1, 2021
  • Calendar year taxpayers: NOLs in 2018, 2019 and 2020 go from no carryback, unlimited carryover (at 80%) to 5 year carryback, unlimited carryover (temporarily at 100% then to 80% in 2021 and thereafter)
  • Fiscal year taxpayers: straddle year from 2017 to 2018 is now effectively treated as a pre-TCJA year, so 2 year carryback and 20 year carryforward with no 80% limit on usage in any tax year

• Unlike 2009 WHBAA that amended section 172(b)(1)(H)
  • Allowed for optional 3, 4, or 5 year carrybacks for 2008/2009 NOLs with the 5th year being haircut to 50% usage
  • Cleansed AMTNOL “taint” (full usage rather than 90% limited)
  • Complicated split waiver elections for consolidated groups
  • Rev. Proc. 2009-52 for compliance guidance from the Service
CARES Act and NOLs – Carrybacks

• Five year carryback (absent election) for NOLs arising in tax years beginning after December 31, 2017 but before January 1, 2021
• Can create rate benefit for carrybacks to 2013-2017
  • Taxpayers might consider adopting various timing strategies, such as changing accounting methods, making a section 165(i) election to claim disaster losses in prior year, adopting a new taxable year (e.g., a Nov. 30 year end)
• Carrybacks can require recalculation of carryback year items, such as:
  • Section 163(j) interest expense limitation (for carrybacks to 2018 and 2019)
  • Section 250 deduction for GILTI/FDII (for carrybacks to 2018 and 2019)
  • Corporate AMT (for carrybacks to 2013-2017)
CARES Act and NOLs – Carrybacks

• Special Rules
  • Life insurance companies treat loss carrybacks to a life insurance company tax year beginning before 1/1/2018 in the same manner as an operations loss carryback (a special type of loss deduction allowed under section 810 as in effect in those years)

• Special rules apply with respect to REITs:
  • No carryback for an NOL for a REIT year
  • No carryback of a non-REIT year NOL to a REIT year
CARES Act and NOLs – Carrybacks

- Waiver of 5 year carryback for applicable tax years
  - Done like any other NOL carryback waiver under section 172(b)(3)
  - Done on a timely filed, original return and is irrevocable
- However, for NOL arising in tax years beginning in 2018 and 2019, such election is due by the tax return due date (including extensions) for the tax year ending after March 27, 2020
  - Rev. Proc. 2020-24 provides guidance on manner of making such waiver. Separate statement for each tax year being waived.
- Waiver of certain section 965 carryback years
  - See discussion infra and Rev. Proc. 2020-24
<table>
<thead>
<tr>
<th>NOL Generated in Tax Years</th>
<th>Eligible for Carryback</th>
<th>Eligible for Carryforward</th>
<th>Eligible to Offset % of Taxable Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning on or before December 31, 2017</td>
<td>2 tax years</td>
<td>20 tax years</td>
<td>100% of taxable income</td>
</tr>
<tr>
<td>Beginning after December 31, 2017 and beginning before January 1, 2021</td>
<td>5 tax years</td>
<td>Indefinite</td>
<td>100% of taxable income (prior to 2021) 80% of taxable income (after 2020)</td>
</tr>
<tr>
<td>Beginning on or after January 1, 2021</td>
<td>Generally, no carryback</td>
<td>Indefinite</td>
<td>80% of taxable income</td>
</tr>
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</table>
CARES Act and NOLs – Carrybacks (Example)

• How to carry back NOLs
  • Example
    • Target, a calendar year taxpayer, was acquired in taxable stock transaction on June 30, 2018 that ended its tax year. Target incurred $20 million NOLs in the period from 1/1/2018 to 6/30/2018. Target had taxable income in the period from 7/1/2018 to 12/31/2018. Target therefore filed a short year, period one tax return showing a post-TCJA NOL of $20 million. Taxpayer used $3 million of the post-TCJA NOL in the post-acquisition 2018 tax year subject to the 80% limit and section 382 limit.
  • Default Treatment
    • Target must amend the post-acquisition 2018 tax year to undo the usage of the $3 million of NOL
    • Target carries the short year, period one $20 million NOL back 5 tax years to 2013 and amends for such year
    • Amended returns appear necessary on a Form 1120X as opposed to a Form 1139
CARES Act and NOLs – Carrybacks

(Example)

- How to elect out of NOL carryback
  - Example (same as previous slide)
    - Target, a calendar year taxpayer, was acquired in taxable stock transaction on June 30, 2018 that ended its tax year. Target incurred $20 million NOLs in the period from 1/1/18 to 6/30/2018. Target had taxable income in the period from 7/1/18 to 12/31/2018. Target therefore filed a short year, period one tax return showing post-TCJA NOL of $20 million. Taxpayer used $3 million of the post-TCJA NOL in the post-acquisition 2018 tax year subject to the 80% limit and section 382 limit.
  - Electing Out of Carryback
    - Target must waive carryback by due date of the 2020 tax return (with extensions)
    - Target must amend the post-acquisition 2018 tax year to reflect full 100% usage of NOL, subject to section 382
    - Target carries the remaining NOL into 2019 (and 2020) without 80% restriction
    - Amended returns appear necessary on a Form 1120X as opposed to a Form 1139
CARES Act and NOLs – Carrybacks

• How to carry back NOLs
  • Notice 2020-26
    • Scope
      • Tax years beginning in 2018 and ending on or before June 30, 2019
      • Only for NOL carrybacks, not for AMTCs or other attributes
    • Procedure
      • May file a Form 1139 if filed within 18 months after the close of the tax year
      • State at top of the Form 1139 “Notice 2020-26, Extension of Time to File Application for Tentative Carryback Adjustment.”
  • Taxpayers may fax Form 1139s starting April 17th, 2020 to 844-249-6236
CARES Act and NOLs – Carrybacks

- Implications of carryback
  - Example (same as earlier slide)
    - Target, a calendar year taxpayer, was acquired in taxable stock transaction on June 30, 2018 that ended its tax year. Target incurred $20 million NOLs in the period from 1/1/18 to 6/30/2018. Target had taxable income in the period from 7/1/18 to 12/31/2018. Target therefore filed a short year, period one tax return showing post-TCJA NOL of $20 million. Taxpayer used $3 million of the post-TCJA NOL in the post-acquisition 2018 tax year subject to the 80% limit and section 382 limit.

- What if the stock purchase agreement is silent on NOL carrybacks? Provisions on amending prior tax returns? How to get seller’s tax information?
- Impact of Reg. section 1.1502-77 agency rules if Target was part of a consolidated group
CARES Act and NOLs – Carrybacks

• AMT effects
  • Example (same as earlier slide)
    • Target has an NOL of $20 million for the short year from 1/1/18 to 6/30/2018. What are the AMT implications of the carryback?
  • TCJA made AMT inapplicable to corporations for tax years beginning after 12/31/2017
  • However, sections 172(e) and 56(d) still apply?
    • Regular NOL of $20 million is carried back 5 years to 2013. Adjustments to regular NOL to arrive at AMTNOL are made (see sections 57 and 58)?
    • If AMTNOL is also $20 million, limit of 90% means only $18 million is usable. Tax of 20% on the difference is $400,000 in 2013. That amount is carried forward as an AMTC and must be tracked to see if used or absorbed in tax years 2014 to 2017
    • AMTC from 2013 of $400,000 is otherwise refundable under section 53(e) as amended by CARES Act in 2018 and 2019
CARES Act and NOLs – Carrybacks

• AMT effects
  • Example (same as earlier slide)
    • Target has an NOL of $20 million for the short year from 1/1/2018 to 6/30/2018. What are the AMT implications of the carryback?
  • Example results
    • Taxpayer amends 2013 tax return on a Form 1120X and accounts for AMT consequences
      • Taxpayer now has a refundable credit in 2018/2019
      • May be eligible to be claimed on a Form 1139
    • Is the favorable extension rule under Reg. section 1.1502-76(c) applicable in determining relief dates for Notice 2020-26? If yes …
      • Taxpayer now has a refundable credit in 2018/2019
      • May be able to claim the credit on the same Form 1139
CARES Act and NOLs – Carrybacks

- SRLY effects
  - Example: Target, a calendar year taxpayer, was acquired in taxable stock transaction by Private Equity, a pass-through entity, on December 31, 2017. Target incurred $20 million of NOLs in 2018. Target was a member of a consolidated group for prior tax years until the date of sale.
  - Seller consolidated group had consolidated taxable income from 2013 through 2017. However, Target has historically had separate company losses since formation. Can Target’s 2018 NOL be carried back to the 2013 tax year?
CARES Act and NOLs – Carrybacks

- SRLY effects
  - Example (same as previous slide): Target, a calendar year taxpayer, was acquired in taxable stock transaction by Private Equity, a pass-through entity, on December 31, 2017. Target incurred $20 million of NOLs in 2018. Target was a member of a consolidated group for prior tax years until the date of sale.
  - Target carries back such NOL to Seller’s consolidated group from 2013 to 2017
  - Target NOL is SRLY to the Seller group
  - Target must calculate a SRLY cumulative register
    - In instant case, if separate company losses for all prior years then cumulative register is negative
    - No ability to carry back NOLs to Seller’s group for 2013 to 2017
CARES Act and NOLs – Carrybacks

- SRLY effects
  - Example: Target incurred $20 million of NOLs in 2018. Target carries back such NOL to one or more previous consolidated groups
  - All prior year consolidated group rules are applicable in determining proper results of NOL usage
    - Which group is entitled to use the loss
    - Reverse acquisition rules
    - Rev. Rul. 82-152 transactions
    - Offspring rules
CARES Act and NOLs – Carrybacks

• NUBIL effects
  • Example: Target incurred $20 million of NOLs in the period from 1/1/2018 to 6/30/2018. Target had (or may have had) a change in ownership sometime between 1/1/2013 to 12/31/2017.
  • If Target had a NUBIG (or neither a NUBIG nor a NUBIL)
    • No additional analysis and $20 million of NOL can be carried back subject to all prior observations
  • If Target had a NUBIL
    • Does any portion of the putative $20 million NOL relate to a deduction that was an RBIL with respect to the Recognition Period for the 382 Change Date?
    • If yes, then the RBIL portion is not eligible for carryback but is carried forward like an NOL vintaged in 2018
      • Presumably that means such RBIL NOL nevertheless carries forward indefinitely with temporarily no 80% limitation against taxable income.
CARES Act and NOLs – Carrybacks

• Corporate Equity Reduction Transactions
  • TCJA
    • TCJA struck old section 172(b)(1)(E)
    • TCJA struck old section 172(h)
    • The above two provisions were the old “CERT” rules
    • The TCJA provisions were effective for tax years ending after December 31, 2017
    • Thus, CERT is repealed for calendar years 2018 onwards. This has not changed.
  • CERT
    • Is either a major stock acquisition (“MSA”) or an excess distribution (“ED”)
      • MSA -- acquisition of another corporation's stock representing 50% or more of the vote or value of the stock
      • ED -- distribution with respect to corporate stock of greater than 150 percent of the average distributions during the past three taxable years or 10 percent of the fair market value of the stock at the beginning of the distribution year
      • If either a MSA or an ED has occurred, NOL carryback is limited by the portion of the NOL that is attributable to the "corporate equity reduction interest loss“ (“CERIL”)
CARES Act and NOLs – Carrybacks

• Corporate Equity Reduction Transactions
  • TCJA
    • The TCJA made the above effective for tax years ending after December 31, 2017
    • Thus, CERT is repealed for calendar years 2018 onwards. This has not changed.
    • For fiscal year taxpayers, under above effective date, CERT also did not apply to fiscal years starting in 2017 but ending in 2018 (after 12/31/2017).

• CARES Act
  • Changes effective date of TCJA provision to tax year beginning after December 31, 2017
  • Therefore, CERT is now resurrected for that fiscal year
CARES Act and NOLs – Carrybacks

• CERT effects
  • Example: Target incurred $20 million of NOLs in the period from 7/1/2017 to 6/30/2018.
    • On its timely filed, original return Target therefore did not carry back that NOL but carried it forward with an infinite lifespan as well as usable without 80% limitation
    • Target may furthermore have used such NOL in fiscal year ending 6/30/2019
  • CARES Act now requires that NOL to be carried back **2 taxable years**
    • Initially may require amending 6/30/19 return
    • Only 2 years because back to pre-TCJA carryback rules, not CARES Act extended rules
  • However, if Target had a CERT in 2017-2018 fiscal year, or in either of the prior two years, then some of the $20 million of NOL may not be carried back
    • Adverse stacking rule to determine CERIL
CARES Act and NOLs – Carrybacks

• Specified Liability Losses (old section 172(f))
  • An SLL was carried back 10 taxable years
  • TCJA
    • The TCJA also struck old section 172(f) – the old rules for Specified Liability Losses (SLLs)
    • The TCJA made the above effective for tax years ending after December 31, 2017
    • Under above effective date, fiscal year starting in 2017 but ending in 2018 (after 12/31/2017) therefore did not have the concept of an SLL

• CARES Act
  • Changes effective date of TCJA rule to tax years beginning after December 31, 2017
  • Therefore, SLL rules are resurrected for the same fiscal year taxpayers (beginning in 2017 and ending in 2018)
CARES Act and NOLs – Carrybacks

• SLL effects
  • Example: Target incurred $20 million of NOLs in the period from 7/1/2017 to 6/30/2018
    • On its timely filed, original return Target therefore did not carry back that NOL but carried it forward with an infinite lifespan as well as usable without 80% limitation
    • Target may furthermore have used such NOL in fiscal year ending 6/30/2019
  • CARES Act now requires that NOL to be carried back 2 tax years
    • Initially may require amending 6/30/19 return
    • Only 2 years because back to pre-TCJA carryback rules, not CARES Act extended rules
• Was any of the $20 million attributable to a SLL? If so, carry back 10 tax years
  • SLLs
    • Product liability or expenses incurred in defending product liability
    • Tort liability from nuclear decommissioning, environmental remediation, workers compensation payments, land reclamation, or dismantling drilling platform
**Interaction of NOL Carrybacks with Foreign Tax Credits**

- Absorption of NOL carryback may “release” FTCs that were previously used and convert them into carryover/back attribute (back 1 year, forward 10)
  - As a result, taxpayers may have a greater FTC carryforward from the NOL carryback year
    - Must file **Form 1120x** to claim newly released credits in carryover year
    - Remember that GILTI FTCs do not carryforward

- NOL carrybacks can also create or increase overall domestic loss (“ODL”), overall foreign loss (“OFL”), and separate limitation loss (“SLL”) accounts based on the ordering rules in Reg. section 1.904(g)-3
  - Extent of effect will depend on the amount and source of the loss –
    - A US-source NOL deduction first offsets domestic income. Any excess offsets foreign income, reducing the FTC limitation and creating or increasing an ODL account that may be recaptured in a subsequent year
    - A foreign-source NOL deduction first offsets foreign income. Any excess offsets domestic income, creating or increasing an OFL account
      - An OFL could be detrimental in a subsequent year
    - Current FTC regulations do not provide transition rules to address the carryback of branch and GILTI separate limitation losses
### NOL Carryback to Pre-TCJA Year

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<tr>
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<tbody>
<tr>
<td><strong>Pre-CARES Act Results</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxable Income / (Loss)</td>
<td>$200</td>
<td>$200</td>
<td></td>
<td>$(400)</td>
</tr>
<tr>
<td>Corporate Tax Rate</td>
<td>35%</td>
<td>35%</td>
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<td>21%</td>
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<tr>
<td>Tentative Tax</td>
<td>$70</td>
<td>$70</td>
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<tr>
<td>Current FTCs</td>
<td>$30</td>
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<tr>
<td>Post-FTC Net Liability</td>
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**Post-CARES Act Results**

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<td>$200</td>
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<td>NOL Carryback</td>
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<td>Refund</td>
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<td>FTC Carryforward (cumulative)</td>
<td>$30</td>
<td>$60</td>
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</table>

— Consider source of NOL deductions and impact on ODL, OFL, and SLL accounts

— NOL carryback results in FTCs that were previously claimed becoming FTC carryforwards that are either:

  - Claimed in their basket in a pre-TCJA year;
  
  - Claimed in a post-TCJA tax year (possibly in another basket, e.g., general to foreign branch); or
  
  - Not claimed because the carryover period expires

— If FTC carryforwards move forward to a post-TCJA year, may affect BEAT liability
### Pre-CARES Act Results

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<thead>
<tr>
<th></th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
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<tbody>
<tr>
<td>Taxable Income / (Loss)</td>
<td>$200</td>
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<td>$(400)</td>
</tr>
<tr>
<td>Corporate Tax Rate</td>
<td>21%</td>
<td>21%</td>
<td>21%</td>
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<tr>
<td>Tentative Tax</td>
<td>$42</td>
<td>$42</td>
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<tr>
<td>Current FTCs allowed (all GILTI)</td>
<td>$12</td>
<td>$12</td>
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<tr>
<td>Post-FTC Net Liability</td>
<td>$30</td>
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### Post-CARES Act Results

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<thead>
<tr>
<th></th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income / (Loss)</td>
<td>$200</td>
<td>$200</td>
<td>$(400)</td>
</tr>
<tr>
<td>NOL Carryback</td>
<td>$(200)</td>
<td>$(200)</td>
<td>$ –</td>
</tr>
<tr>
<td>Refund</td>
<td>$30</td>
<td>$30</td>
<td>$ –</td>
</tr>
<tr>
<td>FTC Carryforward (cumulative)</td>
<td>$0*</td>
<td>$0*</td>
<td>$ –</td>
</tr>
</tbody>
</table>

* No FTC carryforward for excess GILTI FTCs

---

- Taxpayer carries back its 2020 NOL to its 2018 and 2019 taxable years (assume no taxable income in pre-2018 tax years)

- Any GILTI inclusion for 2018 and 2019 is effectively subject to a 21% rate with **NO relief for double tax**!

- Carryback to 2018 and 2019 may result in 21% tax attribute (an NOL deduction) offsetting FDII and GILTI; section 250 deduction eliminated with no future recapture

- GILTI FTCs eliminated with no carryforward

- BEAT liability needs to be reassessed for 2018 and 2019
CARES Act provides two options for how the five-year carryback interacts with a section 965 inclusion year

- Taxpayers may elect to “skip” all section 965 inclusion years as part of the carryback period
- Otherwise, taxpayers are deemed to have made a section 965(n) election to “wall off” the section 965 inclusion from the 2018-2020 NOL carrybacks

**Section 965(n) in TCJA:** Taxpayers could elect on original return to exclude a section 965 inclusion when computing:

(i) a current year NOL for a section 965 inclusion year, or
(ii) the amount of a section 172(a) deduction for a section 965 inclusion year

Thus, under TCJA, a section 965(n) election could create or increase a current year NOL

**CARES Act:** Deemed election means taxpayers can only use an NOL carryback to offset non-section 965 income

- IRS recently indicated that new deemed section 965(n) election only applies to a CARES Act carryback of an NOL into a section 965 inclusion year. Sec. 4.02 of Rev. Proc. 2020-24
- Thus, deemed election does not apply to a loss arising in the section 965 inclusion year; taxpayer stuck with decision from original return. There is some inequity here, so taxpayers likely to lobby for different answer
- Taxpayers that use NOL carrybacks in a section 965 inclusion year are, for now, still stuck with IRS approach to refunds and overpayments vis-à-vis section 965(h) eight-year installment liability
- No refunds for a section 965 inclusion year unless section 965 liability has been fully paid
- Cannot use Form 1139 for a section 965 inclusion year → must file Form 1120x
Even absent the election to skip the section 965 inclusion year, NOL carryback does not decrease section 965 inclusion due to deemed section 965(n) election.
No Election to Skip Section 965 Inclusion Year – NOL Carryback with FTCs

- NOL carryback eliminates 2015 and 2016 taxable income, creating a $40 FTC carryforward to 2017
- These FTCs will be used against the transition tax regardless of whether taxpayer elects to skip the section 965 year for purposes of carrying back the 2020 NOL
- For 2017, the $350 of regular tax previously paid + $60 of newly released credits available to offset the section 965 inclusion would fully pay off the section 965 tax liability, such that a refund should be available—presumably for the excess of $410 over the balance due for the transition tax ($300, less any prior installment payments)

<table>
<thead>
<tr>
<th>Year</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>(5000)</td>
</tr>
<tr>
<td>Carryback</td>
<td>(1000)</td>
<td>(1000)</td>
<td>(1000)</td>
<td>(1000)</td>
<td>(1000)</td>
<td></td>
</tr>
<tr>
<td>Corporate tax rate</td>
<td>35%</td>
<td>35%</td>
<td>35%</td>
<td>21%</td>
<td>21%</td>
<td>21%</td>
</tr>
<tr>
<td>Non-965 tax liability</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>965 Inclusion</td>
<td>3000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax @ 10% after 965(c) Deduction</td>
<td>300</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tentative tax</td>
<td>0</td>
<td>0</td>
<td>300</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>FTCs claimed</td>
<td>20</td>
<td>20</td>
<td>20</td>
<td>60</td>
<td>$10</td>
<td>$10</td>
</tr>
<tr>
<td>FTC carryforward (cumulative)</td>
<td>20</td>
<td>40</td>
<td>0</td>
<td>0*</td>
<td>0*</td>
<td></td>
</tr>
<tr>
<td>Total tax liability</td>
<td>0</td>
<td>0</td>
<td>240</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

* Assumes 2018-2020 taxes were GILTI basket
To Waive or not to Waive

Taxpayers should model both scenarios

• Reasons a taxpayer may want to skip the section 965 inclusion year(s):
  • A section 965 inclusion year is 2018 (because of 11/30 CFCs) and reducing the non-section 965 taxable income adversely impacts the section 250 deduction, section 163(j), or BEAT modified taxable income calculation
    → Profile is more favorable in 2019
  • FTC carryforwards from pre-TCJA years would expire if the NOL is used in the section 965 inclusion year(s)
  • If 2017 is a section 965 inclusion year, using the NOL would result in FTC carryforwards being claimed in a post-TCJA year, which would reduce the regular tax against which BEAT liability is determined
  • While IRS guidance does not allow refunds for overpayments of regular tax liability or section 965 liability for the section 965 inclusion year until the entire liability is paid, refunds of regular tax liability are allowed for future years that are within the 8-year installment window (e.g., 2018 and 2019 after a 2017 section 965 inclusion year)
  • On the other hand, if 2017 is a section 965 inclusion year, the rate arbitrage (21% v. 35%) makes using the NOL generally favorable if the taxpayer does not need the cash
### Election to Skip Section 965 Inclusion Year

Election to skip a section 965 inclusion year could be beneficial if, for example, expiring FTCs are available to offset other taxable income that year or, in a cash crunch, skipping the year facilitates a refund in a subsequent year.

<table>
<thead>
<tr>
<th>Year</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Post-CARES Act Results</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxable Income</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>1000</td>
<td>(4000)</td>
</tr>
<tr>
<td>Carryback</td>
<td>(1000)</td>
<td>(1000)</td>
<td>0</td>
<td>(1000)</td>
<td>(1000)</td>
<td></td>
</tr>
<tr>
<td>Corporate tax rate</td>
<td>35%</td>
<td>35%</td>
<td>35%</td>
<td>21%</td>
<td>21%</td>
<td>21%</td>
</tr>
<tr>
<td>Non-965 tax liability</td>
<td>0</td>
<td>0</td>
<td>350</td>
<td>0</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>965 Inclusion</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3000</td>
</tr>
<tr>
<td>Tax @ 10% after 965(c)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>300</td>
</tr>
<tr>
<td>Tentative tax</td>
<td>0</td>
<td>0</td>
<td>650</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>FTCs claimed</td>
<td>20</td>
<td>20</td>
<td>20</td>
<td>60</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FTC carryforward (cumulative)</td>
<td>20</td>
<td>40</td>
<td>0</td>
<td>0*</td>
<td>0*</td>
<td>0*</td>
</tr>
<tr>
<td>Total tax liability</td>
<td>0</td>
<td>0</td>
<td>590</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Refund</td>
<td>(350)</td>
<td>(350)</td>
<td>0**</td>
<td>(210)</td>
<td>(210)</td>
<td>0</td>
</tr>
</tbody>
</table>

* Assumes 2018-2020 taxes were GILTI basket
** No refund in a section 965 inclusion year until the entire section 965 liability is paid off.
Reassessing Benefit of Section 965(n) Elections for Transition Year Loss

- **Under TCJA,** a section 965(n) election could create or increase a current year NOL.
- **Section 965(n) election** was required to be made on a timely filed return (including extensions). Section 9100 relief is not available.
- **With carrybacks now available from 2018 (a transition year for many), a section 965(n) election may be advantageous.**
  - Rate arbitrage for 2014
  - Avoid BEAT/GILTI/FDII downsides for post-TCJA years
- **But so far guidance indicates a taxpayer is stuck with choice made on the original return.**

### Post-CARES Act Results

<table>
<thead>
<tr>
<th>Year</th>
<th>Taxable Income</th>
<th>Carryback of 2020 NOL</th>
<th>Carryback of 2018 NOL</th>
<th>Corporate tax rate</th>
<th>Non-965 tax liability</th>
<th>965 Inclusion</th>
<th>Tax @ 10% after 965(c) Deduction</th>
<th>Tentative tax</th>
<th>FTCs claimed</th>
<th>FTC carryforward (cumulative)</th>
<th>Total tax liability</th>
<th>Refund</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>1000</td>
<td>(1000)</td>
<td>(1000)</td>
<td>35%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 20 20 20 20 100</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2015</td>
<td>1000</td>
<td>(1000)</td>
<td>(1000)</td>
<td>35%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2016</td>
<td>1000</td>
<td>(1000)</td>
<td>(1000)</td>
<td>35%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2017</td>
<td>1000</td>
<td>(1000)</td>
<td>(1000)</td>
<td>21%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2018</td>
<td>(1000)</td>
<td>0</td>
<td>(1000)</td>
<td>21%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2019</td>
<td>1000</td>
<td>0</td>
<td>0</td>
<td>21%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>0</td>
<td>(350)</td>
</tr>
<tr>
<td>2020</td>
<td>(4000)</td>
<td>0</td>
<td>0</td>
<td>21%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
<td>20 40 60 80 0 0</td>
<td>200</td>
<td>0**</td>
</tr>
</tbody>
</table>

* Assumes 2018-2020 taxes were GILTI basket
** No refund in a section 965 inclusion year until the entire section 965 liability is paid off.
BEAT NOLs – Recap

• Section 59A(c) defines modified taxable income ("MTI") as the taxable income of the taxpayer "without regard to" base erosion tax benefits or the base erosion percentage ("BE%") of any NOL deduction allowed for the year.

• Final BEAT regulations adopt "add-back" approach to calculation of MTI:
  • MTI starts with regular taxable income or loss, with the amount of NOL deductions and interest deductions "locked in".
  • Increased by:
    • Base erosion tax benefits ("BETBs") for the year, plus
    • The portion of an NOL deduction attributable to base erosion tax benefits:
      • Determined based on BE% in the year the NOL arose ("vintage year")
      • As a result, carrying back NOLs to prior years may result in an increased BEAT liability for applicable taxpayers.
  • No BEAT credit carryforwards (in contrast to corporate AMT).
BEAT’s Odd Interaction with Losses

- If current year loss is less than the base erosion tax benefits, an applicable taxpayer’s BEAT liability will be positive, and the full value of the NOL (times the BE%) will be taken into account in determining MTI in the carryover year(s).

<table>
<thead>
<tr>
<th>Loss Year</th>
<th>Carryover Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>TI</td>
<td>BETBs</td>
</tr>
<tr>
<td>$500</td>
<td>$500</td>
</tr>
<tr>
<td>-</td>
<td>500</td>
</tr>
<tr>
<td>(200)</td>
<td>500</td>
</tr>
<tr>
<td>(500)</td>
<td>500</td>
</tr>
</tbody>
</table>

- Taxpayers may escape potential BEAT liability increased by NOL carryforwards if they are not “applicable taxpayers” in the carryover year.
  - NOL deductions are not taken into account in determining the BE% for a carryover year.
  - Ability to carry back a post-TCJA loss to a pre-TCJA year may reduce the BEAT consequences of (i) NOLs with high BE% and (ii) future base erosion tax benefits.

- Incentive to accelerate BETBs into a loss year up until the point that MTI turns positive if the NOL can be carried to a year when the taxpayer is not expected to be an applicable taxpayer.
CARES Act Changes to AMT Credit Refunds

- CARES Act accelerates AMT credit refund into 2019 at the latest
- TCJA – repealed corporate AMT
- TCJA added new section 53(e) to provide for refund of AMTC by 2021
  - Transition rules allowed taxpayers to use remaining AMTC carryovers before 2022
    - Allowed taxpayers in tax years beginning in 2018, 2019, and 2020 to claim a refundable credit equal to 50 percent of the excess of the AMTC over the amount otherwise allowable for the year against regular tax liability
    - In tax years beginning in 2020, the refundable credit amount was 100 percent (i.e., remainder fully refundable)
CARES Act Changes to AMT Credit Refunds

- CARES Act accelerates AMT credit refund into 2019 at the latest
  - Revisions to section 53(e)
    - Now, a 100 percent credit for 2019
    - Alternatively, taxpayers can elect to have the 100 percent credit for 2018
  - Special procedural rules to claim the refund
    - For 2018 returns, refund may be claimed by filing a 2018 Form 1139 and Form 8827 that are completed consistent with the IRS’s online guidance, FAQ 10 (https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19).
      - Form 1139
        - Include at the top “Electing to Take 100% Refundable Credit Amount in 2018 - per CARES Act Section 2305(b)"
        - Complete Lines 1d and 29
      - Form 8227
        - Include at the top “Electing to Take 100% Refundable Credit Amount in 2018 - per CARES Act Section 2305(b)"
        - Complete Line 6 using 100% rather than 50%
  - Per IRS guidance such forms may be faxed starting April 17, 2020 to 844-249-6236

- For 2019 returns, MTCs can be claimed on the return (or on a superseding return if filed before the 2019 tax year return’s due date, as extended)
CARES Act Changes to AMT Credit Refunds

- CARES Act accelerates AMT credit refund into 2019 at the latest
  - Other Considerations
    - Taxpayers that terminated their existence in a non-section 381(a) transaction after 2018, thereby forfeiting any remaining AMTCs, may now have a revived ability to go back and claim their AMTCs for 2018
    - Special consideration should be given to AMT credit allocation among consolidated group members
    - Special consideration is required for short tax years and refund impact
CARES Act Changes to 163(j)

- Under the CARES Act, the 30% of adjusted taxable income ("ATI") limitation on business interest deductions is increased to 50% of ATI for 2019 and 2020
  - Taxpayers may elect not to apply the higher 50% limitation
- Moreover, for its taxable year beginning in 2020, a taxpayer may elect to use its 2019 ATI as its baseline for the limitation in lieu of its 2020 ATI
- Rev. Proc. 2020-22
  - Broader guidance on section 163(j)(7) (beyond the scope of this Webinar)
  - Provides guidance as well on the above elections
    - Timely filed, original return in 2019 or 2020
    - Annual election, therefore it appears no duty of consistency between 2019 and 2020
Partnerships – section 163(j) modifications

For tax years beginning in 2019:
- The partnership determines its section 163(j) limitation as usual based on 30% of ATI + business interest income (BII) and allocates any excess business interest expense (EBIE), excess business interest income (EBII) or excess taxable income (ETI) to its partners.

For tax years beginning in 2020:
- The 30%-of-ATI limit is increased to 50%. Partnership can elect out of this rule.
- Partnership can elect to apply 2019 ATI to compute its 2020 limitation.
  - If 2020 year is a short tax year, partnership’s 2019 ATI will be prorated.
  - This change impacts quarterly estimates being done now.
  - How is 2019 ATI allocated among partners? How does the partnership apply the 11 steps?

Partners in partnerships – section 163(j) modifications

For tax years beginning in 2019:
- Regular rules apply to 2018 EBIE. 2019 ETI is included in partner’s 2019 ATI and partner computes own limitation using 50% of ATI (unless the partner is itself a partnership).

Unless partner elects otherwise, for tax years beginning in 2020:
- Partner treats 50% of the 2019 EBIE as business interest that is “paid or accrued” by the partner without any ETI or EBII allocation.
  - This portion is not subject to any section 163(j) limitation in 2020 that otherwise may have applied at the partner level.
  - This portion also seems to be added back to compute partner’s ATI, giving partner additional increase to 2020 limitation amount. Query whether Treasury will adjust ATI definition to exclude this amount?
- The residual 50% of the 2019 EBIE and any remaining 2018 EBIE is subject to normal rules.
CARES Act Changes to 163(j) – Example

- CARES Act: the 30% of adjusted taxable income ("ATI") limitation on business interest deductions is increased to 50% of ATI for 2019 and 2020.

- Moreover, for its taxable year beginning in 2020, a taxpayer may elect to use its 2019 ATI as its baseline for the limitation in lieu of its 2020 ATI.

<table>
<thead>
<tr>
<th></th>
<th>30% of ATI</th>
<th>50% of ATI</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income Before Interest</td>
<td>1,000</td>
<td>1,000</td>
<td>-</td>
</tr>
<tr>
<td>Interest Expense (Base Erosion Payments)</td>
<td>(300)</td>
<td>(500)</td>
<td>(200)</td>
</tr>
<tr>
<td>Regular Taxable Income</td>
<td>700</td>
<td>500</td>
<td>(200)</td>
</tr>
<tr>
<td>Tax Rate</td>
<td>21%</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td>Income Tax</td>
<td>147</td>
<td>105</td>
<td>(42)</td>
</tr>
<tr>
<td>FTCs</td>
<td>(77)</td>
<td>(77)</td>
<td>-</td>
</tr>
<tr>
<td>Regular Tax Liability</td>
<td>70</td>
<td>28</td>
<td>(42)</td>
</tr>
</tbody>
</table>
If the additional interest deductions allowed are base erosion payments, any benefit to regular tax liability may be offset by an increased BEAT liability.

Thus, interest deductions that would otherwise carry forward may be “wasted”

### CARES Act Changes to 163(j) – BEAT Interaction

<table>
<thead>
<tr>
<th></th>
<th>30% of ATI</th>
<th>50% of ATI</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income Before Interest</td>
<td>1,000</td>
<td>1,000</td>
<td>-</td>
</tr>
<tr>
<td>Interest Expense (Base Erosion Payments)</td>
<td>(300)</td>
<td>(500)</td>
<td>(200)</td>
</tr>
<tr>
<td>Regular Taxable Income</td>
<td>700</td>
<td>500</td>
<td>(200)</td>
</tr>
<tr>
<td>Tax Rate</td>
<td>21%</td>
<td>21%</td>
<td>-</td>
</tr>
<tr>
<td>Income Tax</td>
<td>147</td>
<td>105</td>
<td>(42)</td>
</tr>
<tr>
<td>FTCs</td>
<td>(77)</td>
<td>(77)</td>
<td>-</td>
</tr>
<tr>
<td><strong>Regular Tax Liability</strong></td>
<td><strong>70</strong></td>
<td><strong>28</strong></td>
<td><strong>(42)</strong></td>
</tr>
</tbody>
</table>

Regular Taxable Income
Base Erosion Payments
Modified Taxable Income
10% of Modified Taxable Income
**BEAT Liability**
Total Tax Liability