CARES ACT and PARTNERSHIPS: Navigating Time Sensitive Issues and Refund Opportunities

Tuesday, May 5, 2020 | 1:00 pm Eastern
The Panel

- **Sarah Ritchey Haradon**, Partner, Holland & Hart LLP (*Moderator*)
- **Jon G. Finkelstein**, Principal, KPMG LLP
- **Monisha Santamaria**, Legislation Counsel, Joint Committee of Taxation
- **Shamik Trivedi**, Senior Manager, Grant Thornton LLP
- **Mark Wilensky**, Partner, Meltzer, Lippe, Goldstein & Breitstone, LLP
Procedural Guidance
COVID-19 Filing Relief

- Presidential Declaration of National Emergency on March 13, 2020
- Notice 2020-23 (April 9, 2020) amplifies Notice 2020-18 (which superseded Notice 2020-17), and Notice 2020-20
  - Broadly grants relief and postpones due dates beginning on April 1 to July 15
  - Relies on Treas. Reg. § 301.7508A-1(c)(1)(iv)-(vi) and Rev. Proc. 2018-58 for defining “acts” that are subject to relief
- Effect of Postponement
  - Under Section 7508A and regulations, the postponement period is disregarded (i.e., it’s not an “extension” of time)
  - Extension period runs concurrently with postponement period, so returns filed (including extensions) are still due September 15 or October 15, as the case may be
- Relief is automatic
What’s Extended?

• Nearly all acts to be performed by a taxpayer on and after April 1 and before July 15 are postponed to July 15, 2020
  • Includes certain regulatory elections, filing of certain information returns
• For the government, 30-day postponement of time allowed to assess tax, make notice or demand for payment of tax, collection of tax, bring suit in respect of a liability, etc., for “affected taxpayers” See Treas. Reg. § 301.7508A-1(c)(2)
• Notice 2020-26 separately extends the time for filing Forms 1139 and 1045 to claim tentative refunds by six months for taxable years beginning in 2018 and ending on or before June 30, 2019
  • See also Temporary Fax Procedures for filing Form 1139 (corporate) and Form 1045 (individual)
Partnership-related Provisions for 2019 Tax Returns

- Unextended due date of March 16, 2020 remains for 2019 calendar year partnerships. IRS guidance does not postpone the due date for filing Form 1065 or 7004 from March 16 or information returns from March 31
- If partnership timely extended the due date for filing Form 1065, then return is due on September 15, 2020
- If partnership did not extend the due date for filing Form 1065, then under certain circumstances, Form 1065 may be amended under Rev. Proc. 2020-23
- No postponement of original due date for Forms 1042/1042-S
Bipartisan Budget Act of 2015

- Bipartisan Budget Act of 2015 ("BBA"): Streamlines partnership audit rules into a unitary, centralized set of procedures (Sections 6221 – 6241)
  - Repeals the TEFRA provisions (Sections 6221 – 6234) and Electing Large Partnership rules (Sections 771 – 777; 6240 – 6255)
  - Intended to facilitate collection of tax; expected to result in increased number of partnership audits
- Under the BBA, the default rule is that the partnership, rather than its partners, pays the tax on IRS audit adjustments (Section 6225)
- Alternatively, partnership may “push-out” adjustments to partners (Section 6226)
- BBA rules are effective for partnership taxable years that begin after December 31, 2017. For most partnerships, the 2018 tax year was the first year under the BB
Bipartisan Budget Act of 2015

• All partnerships are subject to the BBA unless:
  • There are 100 or fewer partners; and
  • Each of the partners is an individual, C corporation (or foreign entity treated as a C corporation if domestic), S corporation*, or estate of deceased partner
  • * There are special rules for S corporation partners
• If a partnership meets these requirements, and doesn’t want to be subject to the BBA, it must also timely elect out each year
• If your partnership has a partner that is a disregarded entity, trust, or another passthrough, it’s subject to the BBA
Consistency Requirement: A partner’s return must be consistent with the partnership’s return. If not, the IRS has “math error” authority to make the partner’s return consistent. If a partner’s return is intended to be inconsistent from the partnership’s return, the partner must disclose that inconsistency by filing Form 8082 with his/her/its income tax return. See Section 6222

Example: Partner A receives Schedule K-1 from Partnership X for the 2020 tax year. Partner A disagrees with the characterization of an item of income as being ordinary. Partner A must disclose her intention to treat that income as capital gains on her own return. If she does not, the IRS could “correct” her return and make it consistent with Partnership X’s Schedule K-1, and potentially could impose penalties and interest for the underpayment
Bipartisan Budget Act of 2015

• Prohibition against changing tax return or Schedules K-1
  • Section 6031 governs requirement to file partnership tax return and Schedules K-1
  • Section 6031(b) prohibits partnership from amending Form 1065 or Schedules K-1 except:
    1) Partnership elects out of BBA;
    2) Partnership pays imputed underpayment under default Section 6225 rules;
    3) Push-out statements issued under Section 6226; or
    4) “As otherwise provided by the Secretary”
Administrative Adjustment Requests (AARs): Under the BBA, the only way to amend a partnership tax return is to file an AAR on Forms 8082 and 1065. Adjustments are taken into account in the year in which the AAR is filed. See Section 6227

- Does the adjustment result in an imputed underpayment? If so, partnership may have option to (a) take into account the imputed underpayment when the AAR is filed; or (b) elect to have the Reviewed Year partners take into account the imputed underpayment

- This process can be complex and have unintended consequences for partners

- Section 6235 extends period of limitations for adjustment of AAR by three years

- Have we seen a lot of AARs yet?
Bipartisan Budget Act of 2015

• **AARs (Continued)**
  
  • Partnership files Form 1065 and 8082 and issues an “AAR Statement” to the partners
    
    • Form 8986, “Partner’s Share of Adjustment(s) to Partnership-Related Item(s)”
  
  • Partnership files tracking report to reflect summarized adjustments
    
    • Form 8985, “Pass-Through Statement – Transmittal/Partnership Adjustment Tracking Report”
  
  • Partner must then reflect adjustment in their own returns (or continue pushing out, whatever the case may be)
    
    • Form 8978, “Partner’s Additional Reporting Year Tax”
AARs (continued)

- Partnership that files AAR in 2020 for the 2018 tax year to reflect additional deductions related to CARES Act provisions (e.g., Section 461(l), QIP, etc.) may result in taxable income adjusted lower resulting in refund

- Adjustments are taken into account in 2020 (i.e., the “reporting year”) under Treas. Reg. § 301.6227-3(b). Partnership issues “AAR Statements” to the partners in 2020

- Partner would calculate the adjustment to tax in 2018 year and each subsequent year up to 2020, and then reflect aggregate tax adjustment and “refund” on the 2020 tax return filed in 2021

- Adjustment from 2018 would then reduce tax due for 2020 tax year, but effectively limited to tax paid in

  - What if little or no tax liability in 2020?
Rev. Proc. 2020-23

- Rev. Proc. 2020-23 takes into account AAR requirements of BBA partnerships and the spirit of the CARES Act, with IRS exercising authority under Section 6031(b)(4) to allow a BBA partnership to amend Form 1065 and Schedules K-1 without having to file an AAR.

- Certain retroactive tax benefits would only be realized by partners of BBA partnerships likely in 2021, when most businesses need liquidity now.

- Requirements:
  - Applies to BBA partnerships that filed Form 1065 and furnished Schedules K-1 for tax years beginning in 2018 and 2019 prior to the issuance of the Rev. Proc. on April 8.
• Eligible partnerships may file amended Form 1065 and Schedules K-1 prior to September 30, 2020

• Amended returns may take into account any adjustment, not just CARES Act provisions

• For a partnership already under exam, must notify examiner and provide copy of amended return

• If previously filed AAR, amended return should reflect as adjusted AAR items

• Coordination rule with Notice 2019-46 (regarding application of GILTI proposed regulations)
Special considerations:

- BBA (and consistency rule) still applies. Consider partner obligation to file amended return upon receiving amended Schedule K-1

- Individual partners that must file Form 1040X will be required to so on paper, impacting ability to claim tentative refund on Form 1045 through temporary fax procedures, and overall timeliness of claiming refund

- BBA partnerships can still file AAR and claim benefit of adjustment from 2018 in 2020. Partners will need to weigh impact on 2020 taxable income and estimated tax paid/to be paid

- Timing of filings based on CARES Act / 7508A provisions
Misc. Refund Considerations

- IRS Service Centers generally remained closed except for mission-critical functions
- Forms 1139 and 1045 may be filed by fax through temporary procedures
- Form 4466 due July 15 for calendar year filers; must be paper-filed
- Form 1138 (due July 15?); must be paper-filed
- Forms 1040X must be paper-filed
- Forms 1120X for tax years ending on or before Dec. 31, 2016 must be filed on paper. Subsequent years may be filed electronically
- Amended returns potentially triggering JCT reviews
Example

- Partnership A is cash-strapped and wants to adjust its 2018 tax return to take into account (1) energy credits retroactively passed as extenders and (2) QIP deduction
  - Amended Return: Knowledge and experience with process; allows refund claim to be made immediately. Refund may trigger JCT review. If paper-filed, could take time to process. Partners effectively forced to amend
  - AAR: Little knowledge and experience by partnerships and partners receiving AAR statements. Refund could be limited based on 2020 income and would not be realized until 2021
  - What can be done in 2019?: Potentially file for an accounting method change to reflect additional QIP deduction; deal with energy credits separately through amended return or AAR
- Many factors to consider
## Important Dates

<table>
<thead>
<tr>
<th>Filing</th>
<th>Due Date</th>
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<tbody>
<tr>
<td>Form 1065 / 7004 (unextended)</td>
<td>March 16, 2020</td>
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<tr>
<td>Tentative Refund for 5-year NOL carryback (Forms 1139 or 1045) for tax years beginning after Dec. 31, 2017 and ending on or before June 30, 2019</td>
<td>June 30, 2020</td>
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<tr>
<td>Tentative Refund for 2-year NOL carryback (Forms 1139 or 1045) for tax years beginning in 2017 and ending in 2018</td>
<td>July 25, 2020</td>
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<tr>
<td>Form 1065 / 7004 (extended)</td>
<td>September 15, 2020</td>
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<tr>
<td>Amended 1065 under Rev. Proc. 2020-23</td>
<td>September 30, 2020</td>
</tr>
<tr>
<td>Tentative Refund for 5-year NOL carryback for tax years ending after June 30, 2019</td>
<td>12-months following the close of the tax year</td>
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Path to Access Cash

- **Increase amount of deductions**
  - Qualified improvement property technical correction
  - Temporary increase to business interest expense
  - Disaster losses

- **Temporary removal of barriers to increased deductions**
  - Temporary withdrawal of Section 461(l) excess business loss limitation
  - Temporary removal of 80% taxable income limitation for NOLs

- **Provide flexibility on timing of impact**
  - 5-year carryback for NOLs for tax 2018, 2019 and 2020 tax years (does not apply to REITs) (subject to elections under Rev. Proc. 2020-24)
  - IRS/Treasury guidance related to method changes, RPTB elections, BBA partnership amended returns, and refund requests
### Section 163(j) CARES Act Changes

<table>
<thead>
<tr>
<th></th>
<th>2019 Tax Year</th>
<th>2020 Tax Year</th>
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<tbody>
<tr>
<td>Non-Partnerships</td>
<td>50% of ATI (subject to election out)</td>
<td>50% of ATI (subject to election out)</td>
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<td>Elect to use 2019 ATI (subject to pro ration for short tax year)</td>
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<td>(Including S</td>
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<td>corporations)</td>
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<tr>
<td>Partnerships and</td>
<td>30% of ATI at partnership level</td>
<td>50% of ATI (subject to election out)</td>
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<tr>
<td>Partners</td>
<td></td>
<td>Elect to use 2019 ATI (subject to pro ration for short tax year)</td>
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<tr>
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<td></td>
<td>50% of partner’s 2019 EBIE treated as paid or accrued in 2020 and not subject to Section 163(j) limitation (subject to election out)</td>
</tr>
</tbody>
</table>
Section 163(j) CARES Act Changes

- Partnership vs. Non-Partnership Impact

- Section 163(j) CARES Act changes elections
  - Rev. Proc. 2020-22

- 2019 ATI applied to 2020 partnership limitation
  - Impact of partnership restructurings
  - 11 steps?
Section 163(j) CARES Act Changes

- 50% of 2019 EBIE Deduction
  - Impact of partnership interest dispositions
  - Timing of deduction

- Debt financed distribution interest
  - Awaiting guidance in proposed regulations
  - Notices 89-35, 88-37 and 88-20

- Real property trade or business elections
  - Rev. Proc. 2020-22 – taxpayers may withdraw or make a RPTB election for 2018, 2019 or 2020 on an amended return or administrative adjustment request
  - 10/15/2021 filing deadline (for BBA partnerships, prior to 9/30/2020 for amended return)
Qualified Improvement Property

- **Technical corrections effective as of 1/1/2018**
  - Any improvement “made by the taxpayer” to the interior of a nonresidential building that is placed in service after the building’s initial placed in service date
  - 15-year recovery period under GDS and eligible for bonus depreciation under Section 168(k)
  - 20-year recovery period under ADS

- **Requires change to depreciation methods of QIP placed in service after 2017**
Qualified Improvement Property

- **Rev. Proc. 2020-25**
  - For tax years ending in 2018, 2019 or 2020:
    - Correct QIP depreciation to account for technical correction
    - Retroactively change bonus and ADS elections

- **How are you going to make the change?**
  - Amend 2018, 2019 or 2020 return on or before 10/15/21 (BBA partnerships before 9/30/2020 if filed Form 1065 and issued all Schedules K-1 prior to 4/8/2020 under Rev. Proc. 2020-23)
  - Administrative adjustment request
  - automatic method change on Form 3115 and Section 481 adjustment (not for Section 163(j) RPTB election changes under Rev. Proc. 2020-22 or withdrawal of ADS election)
Disaster Losses under Section 165(i)

• Taxpayer may claim certain deductible losses in the tax year immediately preceding the tax year in which loss sustained

• Requirements
  • President declares a specified geographic region as qualifying for emergency or disaster assistance under the Stafford Act
  • Taxpayer sustains an otherwise deductible loss under Section 165(a) within the disaster area
  • The loss is “attributable to” the declared disaster

• COVID-19 declared a nationwide emergency pursuant to Section 501(b) of the Stafford Act on March 13, 2020
  • Covers 50 states, District of Columbia, five territories and one tribe
Disaster Losses under Section 165(i)

- Taxpayer must have tax basis in a tangible or intangible asset or capitalized expenses
  - Store closure
  - Abandonment of leasehold improvements
  - Sale or exchange of business property
  - Disposal of inventory or other property that is unsellable or unusable
  - Worthless securities
  - Abandonment of business deals with capitalized costs

- Does not apply to deductible expenses such as employee compensation, severance, or bad debt deductions
- Must demonstrate COVID-19 as strong contributing factor to loss recognition
Disaster Losses under Section 165(i)

- **Loss claimed on 2019 original or amended return**
  - Must be done no later than six months after unextended due date for 2020 return
  - Appears to be a partnership level election

- **Passthroughs Issues**
  - Consider impact on 2019 tax determinations
  - Impact on allocations and tax distributions
  - Fiduciary duty issues
REAL ESTATE RELATED OPPORTUNITIES AND GUIDANCE
Retroactive Cost Segregation Opportunities

- Possibility of NOL carrybacks and immediate refunds may be incentive for retroactive cost segregation study for real property acquired in prior tax years
  - May not be available if assets originally described in Section 1060 asset allocation agreement. See Peco Foods, Inc., T.C. Memo. 2012-18, aff’d, (11th Cir. 2013) [2013-2 U.S.T.C. Para. 50,412]
  - May be less beneficial for 1031 replacement property having low tax basis
- Re-classify 27.5-year or 39-year real property as personal property with shorter useful life
- File Form 3115 reporting Change in Accounting Method together with timely filed 2019 tax return claiming cumulative allowable depreciation from prior years since acquisition
SALT Cost if States De-Couple from CARES Act, Bonus Depreciation

• For example: New York State and New York City De-Couples from CARES Act

• No NOL Carrybacks
  • For personal income tax purposes, New York State and New York City de-couple from “any amendments made to the Code after March 1, 2020” for taxable years beginning prior to 2022
  • Top NYS personal income tax marginal rate: 8.82%
  • Top NYC personal resident tax marginal rate: 3.876%
  • Significant SALT disadvantage to NOL carrybacks as compared to carrying NOLs forward

• No Bonus Depreciation
  • For NYS and NYC purposes, Qualified Improvement Property continues to have 39-year recovery period
COVID-19 Postponement of Section 1031 Deadlines

• Notice 2020-23 – Postpones “Specified Time-Sensitive Actions” due to be performed on or after April 1 and before July 15 have until July 15, 2020

• Taxpayers have sought clarification whether Notice 2020-23 allows taxpayers to elect to apply Section 17 of Rev. Proc. 2018-58 applicable to Section 1031 Exchanges
COVID-19 Postponement of Section 1031 Deadlines

- Under Section 17 of Rev. Proc. 2018-58, if relinquished property transferred on or before the date of the federally declared disaster, then:
  - (i) 45-day identification period deadline falling after the date of disaster is postponed by 120 days or, if later, to the last day of the general disaster extension period (the “disaster period end date”)
  - (ii) 180-day exchange period deadline falling after the date of disaster is postponed by 120 days or, if later, to the disaster period end date
COVID-19 Postponement of Section 1031 Deadlines

• Under Section 17 of Rev. Proc. 2018-58, if relinquished property transferred on or before the date of the federally declared disaster, then:
  • (iii) 45-day identification period deadline falling before the date of disaster is postponed by 120 days or, if later, the disaster period end date if the identified replacement property is substantially damaged by the disaster
  • No postponement period may be extended beyond (i) the due date (including extensions) of the taxpayer’s return for the year of transfer or (ii) one year
Example (1): Flood on 5/31

Sale—5/15
45-day ID Deadline—6/29

+120 days

Sale—5/15
180-day Exchange Deadline—11/11

+120 days
COVID-19 Postponement of Section 1031 Deadlines

- When did the disaster period start?
  - Notice 2020-23 appears to set the start of the disaster period as 4/1/20, but earlier dates seem more appropriate:
  - 1/20/20, the date of FEMA emergency declarations in all states
  - 3/13/20, the date of the President’s emergency declaration

- When does disaster period end?
  - Notice 2020-23 arbitrarily seems to set the end of the disaster period as 7/15/20
  - Application of Section 7508A(d): mandatory postponements for federally declared disasters until the latest date of the incident period plus 60 days
  - Is the President’s declaration of an “emergency” equivalent to the declaration of a “disaster”?
COVID-19 Postponement of Section 1031 Deadlines

• What is the date of disaster?
  • Presumably treat each date while the emergency is ongoing as a new date of disaster
COVID-19 Postponement of Section 1031 Deadlines

• If Section 17 of Rev. Proc. 2018-58 is not applicable, then Notice 2020-23 would appear to provide only as follows:
  • 45-day identification period deadline falling within 4/1/20 to 7/14/20 is extended until 7/15/20
  • 180-day exchange period deadline falling within 4/1/20 to 7/14/20 is extended until 7/15/20
  • Deadlines falling outside the period are not extended
Example (2): Sale During COVID-19 Emergency on 5/15

Sale—5/15
45-day ID Deadline—6/29
Until 7/15

Sale—5/15
180-day Exchange Deadline—11/11
Not Extended
COVID-19 Postponement of Section 1031 Deadlines

• If Section 17 of Rev. Proc. 2018-58 is applicable, IRS should clarify how to apply.

• Under one view, taxpayers get the benefit of a 120-day postponement (or until 7/15/20, if later) only for deadlines falling within disaster period:
  • 45-day identification period deadline falling within the disaster period extended until later of (i) 7/15/20 or (ii) 120 days after otherwise applicable deadline (i.e., allowing 165-day identification period).
  • 180-day exchange period deadline falling within disaster period extended until the later of (i) 7/15/20 or 120 days after otherwise applicable deadline (i.e., 300-day replacement period).
COVID-19 Disaster Losses—Rev. Proc. 2018-58, Section 17—Alternative #1

Example (3): Sale During COVID-19 Emergency on 5/15

Sale—5/15
45-day ID Deadline—6/29
+120 days

180-day Exchange Deadline—11/11

Sale—5/15
Not Extended
COVID-19 Postponement of Section 1031 Deadlines

- Under another view, taxpayers get the benefit of a 120-day postponement (or until 7/15/20, if later) for deadlines falling on or after the start of the disaster period (each day in the disaster period treated as if a new disaster):
  - 45-day identification period deadline falling on or after the start of the disaster period extended until later of (i) 7/15/20 or (ii) 120 days after otherwise applicable deadline (i.e., allowing 165-day identification period)
  - 180-day exchange period deadline falling on or after the start of the disaster period extended until the later of (i) 7/15/20 or 120 days after otherwise applicable deadline (i.e., 300-day replacement period)

Example (4): Sale During COVID-19 Emergency on 5/15

Sale—5/15
45-day ID
Deadline—6/29
+120 days

180-day Exchange
Deadline—11/11
+120 days
COVID-19 Postponement of Other Real Estate Related Deadlines

• Notice 2020-23:
  • Qualified Opportunity Zones: Extension of the 180-day period to invest capital gains into a qualified opportunity fund
  • Low Income Housing Tax Credit Extensions from Rev. Proc. 2018-58
  • Historic Tax Credit Extensions from Rev. Proc. 2018-58
Questions?

All attendees can submit questions via the Q&A feature on the webinar interface