NOLs were originally enacted by the TCJA and apply to taxable years beginning after December 31, 2017.

The Bill would eliminate the 80% taxable income limitation for NOLs utilized in taxable years beginning before January 1, 2021, and the current 80% limitation would be reinstated for taxable years beginning after December 31, 2020.

The Bill also provides a 5-year carryback period for NOLs incurred in taxable years beginning after December 31, 2017 and before January 1, 2021 (unless waived by the taxpayer). This carryback provision would allow taxpayers who have incurred losses in any of the past two years, or will incur a loss this year, to obtain a refund of taxes paid in the five years preceding the year of the loss. Special rules apply to REITs and life insurance companies, and with respect to the interplay between NOL carrybacks and any liability a taxpayer had under Section 965 of the Code (the 2017 transition tax relating to untaxed earnings of certain foreign corporations).

The 5-year carryback provision temporarily addresses a criticism of the TCJA, namely that prohibiting NOL carrybacks deprives companies of a needed source of liquidity in down business cycles. Taxpayers would claim a refund under the carryback provision by filing an IRS Form 1045 (for individuals, estates and trusts) or IRS Form 1139 (for corporations). The IRS generally will process the refund request within 90 days (or the last day of the month in which the tax return reflecting the NOL is due, including extensions, if later).

> ***Winston takeaway: Many purchase agreements in the M&A context provide for payment to sellers of tax refunds for pre-closing tax periods. Due to extraordinary expenses related to the acquisition, an acquired corporation may have NOL carryforwards from the pre-closing tax period. Corporations that have been acquired during the 2018-2020 tax periods should carefully analyze the tax refund provisions, if any, in the relevant purchase agreement before carrying back any NOLs to taxable years prior to the acquisition.***

Temporary Relaxation of Business Interest Deduction Limitations

Section 163(j) of the Code, relating to limitations on deductions for interest expense, was amended as part of the TCJA. In general, business interest expense deductions in any taxable year currently are limited to 30% of the business's adjusted taxable income for the year. Although not precise, for taxable years beginning before January 1, 2022, adjusted taxable income essentially equates to earnings before interest, tax, depreciation, and amortization ("EBITDA"), as used in the general sense and not how most banks use it (as it starts from taxable income, not book, and does not add back unusual or non-recurring cash charged). The Bill would change the 30% adjusted taxable income limitation to 50% for taxable years beginning in 2019 and 2020, allowing additional interest expense to be deducted for those years. In addition, a taxpayer would be permitted to elect to use its 2019 adjusted taxable income in making its Section 163(j) calculation for 2020. This election would be useful to businesses that see a reduction in EBITDA in 2020 because of the COVID-19 pandemic.

The relaxation of the Section 163(j) limitation would not apply to partnerships for taxable years beginning in 2019. Rather, unless a taxpayer elected out, 50% of a partner's allocable share of a partnership's excess business interest expense for 2019 (i.e., interest expense that would otherwise be nondeductible by the partner under Section 163(j)), is allowed as an interest deduction for 2020 without limitation. The remaining 50% of such excess business interest expense would remain subject to the normal Section 163(j) limitation.

> ***Winston takeaway: The relaxation of the Section 163(j) rules and the temporary 5-year NOL carryback provision provide an avenue for liquidity for corporations that expect significant tax losses in 2020 as a result of the COVID-19 pandemic, although a large portion of that liquidity may be deferred until corporations file their 2020 U.S. federal income tax returns in 2021. In particular, the election to use a higher 2019 adjusted taxable income number in making a corporation's 2020 Section 163(j) interest deduction calculation will maximize a corporation's potential NOL in 2020. That NOL can then be carried back to obtain refunds for taxes paid for tax years 2015 through 2019.***

Temporary Rollback of Limitations Relating to Excess Business Losses of Individuals, Trusts and Estates

The TCJA added Section 461(l) to the Code as an additional limitation on the use of losses by noncorporate taxpayers. This section disallows any excess business losses of taxpayers, other than corporations, for taxable years beginning after December 31, 2017 and before January 1, 2026. Disallowed losses are treated as NOLs in the following taxable year, subject to the 80% limitation described above. The Bill would modify the effective dates of this provision to apply only to excess business losses incurred in taxable years beginning after December 31, 2020 and before January 1, 2026. Taxpayers impacted by the excess business loss rules in 2018 (and taxpayers who have already filed their 2019 tax return) could amend their 2018 (or 2019) tax returns to claim any resulting refund.

The Retail Glitch Fix

The Bill would also fix the so-called "retail glitch" of the TCJA. The TCJA attempted to combine various definitions of "improvement property" into a single definition of "qualified improvement property." Qualified improvement property was intended to have a 15-year depreciable life thereby allowing taxpayers to deduct 100% of capital expenditures made on these improvements under the expensing provision of the TCJA. The "glitch" lay in the fact that the legislation failed to assign qualified improvement property a 15-year depreciable life. This meant that such improvements are treated as having a 39-year depreciable life under current law and therefore are not eligible for immediate expensing. The Bill would fix this glitch and thereby allow taxpayers to fully deduct expenditures made on qualified improvement property. The effective date of this provision is retroactive as if it were included in the TCJA.

Corporate Alternative Minimum Tax Credits

The Bill also accelerates the recovery period for corporate alternative minimum tax ("AMT") credits. Under the TCJA, which repealed the corporate AMT, corporate AMT credits for prior years were recoverable over a 4-year period. The new recovery period for these credits would be treated to have occurred in the 2018 and 2019 taxable years.

Proposal Not Included

A prior version of the Bill included a technical correction to the TCJA relating to the repeal of the limitation on "downward attribution" that applied for purposes of determining whether a foreign corporation qualified as a controlled foreign corporation. This technical correction was not included in the final Bill passed by the Senate. As a result, current law relating to such downward attribution will continue to apply.

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