Miller & Chevalier

TAX TAKE: Crumblin' Down – Will Congress Address the Pending Phase-Out of Bonus Depreciation?

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While Build Back Better Act (BBBA) negotiations continue to be on hold, there has been increased focus on finding a legislative vehicle to address the traditional tax "extenders" package of provisions that expired at the end of 2021 and the significant changes to two key Tax Cuts and Jobs Act (TCJA) provisions that also went into effect at the end of last year:

- The transition from the full deductibility of research and development expenditures to a five- or 15-year amortization schedule
- The shift from EBITDA to EBIT for purposes of calculating the section 163(j) interest expense deduction limitation

Looking beyond the need to address these provisions retroactively, Congress will soon face not only the 2022 tax extenders package, but also the beginning of the scheduled phase-out of 100 percent bonus depreciation scheduled to begin in 2023, which provides for an 80 percent deduction for property placed in service in 2023, a 60 percent deduction for property placed in service in 2024, a 40 percent deduction for property placed in service in 2025, and a 20 percent deduction for property placed in service in 2026, before sunsetting for tax years beginning in 2027.

Given the importance of bonus depreciation to capital investment, job creation, and the overall economy – particularly as the effects of the COVID-19 pandemic continue, it is hoped that 100 percent bonus depreciation will be extended before the phase-down begins next year. Permanent extension of 100 percent bonus depreciation has been proposed in both House and Senate bills. While the cost of permanent extension may be prohibitive in the current fiscal environment, Congress will hopefully provide at least a multi-year extension to allow taxpayers to make critical capital investment decisions with certainty as to the cost recovery of such investments.

It is interesting to note that the benefits of bonus depreciation would effectively be eliminated for most taxpayers if the corporate book income minimum tax as proposed in the House-passed BBBA is enacted. Thus, we may be in the unfortunate situation where Congress is giving with one hand, and taking away with the other. **#TaxTake**

Upcoming Speaking Engagements and Events

On March 3, Jorge and Marc will moderate "Floyd's Panel: Legislative Update" at the Federal Bar Association's 46th Annual Tax Law Conference.

In the News

Law360 reported on Loren's discussion at the ABA Tax Section's midyear meeting on the potential implications of Congress's inability pass modifications to the GILTI provision. Loren explained the modifications to GILTI are required for compliance with the global minimum tax standard under Pillar Two of OECD's plan. She noted the inability to reform GILTI could have acute consequences for foreign-parented multinationals with U.S. subsidiaries that own controlled foreign corporations (CFCs). "**There are some real implications to not having GILTI be compliant for those who are below the U.S. structure essentially, because you still have no mechanism to take into account those taxes that are paid**," Loren said.

Tax Notes reported on comments made by Loren at the ABA Section of Taxation virtual meeting regarding the possible impacts of OECD's draft rules on Pillar 1 Amount A. Loren said the new rules' effects on tax treaties between the U.S. and other countries could cause multinational enterprises' administrative burdens to increase in unanticipated ways. "**[W]e start looking at dispute resolution mechanisms that are currently in place through our treaty network, and then kind of telescope that to the breadth of**

countries and jurisdictions that are going to be involved with regard to reallocating these profits..." Loren said. "Of course, in that mix of countries might be jurisdictions with whom we don't have tax treaties."

In *Tax Notes*, Marc discussed a possible way forward for rolling back R&D amortization. Although relief was provided in BBBA, Marc said the pending China competition bill may provide a path forward. "**It may be you have time to see how Build Back Better Act plays out before you get to a point....then maybe USICA will still be going on**."
