



Tax

## Tax News & Views

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### No progress on Senate extenders bill as lawmakers adjourn for Memorial Day

The Senate adjourned for its week-long Memorial Day recess May 22 without reaching an agreement on how to advance legislation that would renew for two years 55 tax extenders provisions that expired at the end of 2013.

The chamber took up the extenders package last week. But it was pulled from the floor on May 15 after Republicans, who were locked in a dispute with Majority Leader Harry Reid, D-Nev., over whether they would be able to offer amendments, blocked a procedural motion that would have allowed it to move forward. (For prior coverage, see *Tax News & Views*, Vol. 15, No. 19, May 16, 2014.) Senate leaders, along with Finance Committee Chairman Ron Wyden, D-Ore., and ranking member Orrin Hatch, R-Utah, met in the ensuing days in an attempt to craft an agreement allowing a limited number of amendments to be offered to the bill. But Hatch told reporters May 21 that he and Wyden still were at odds over how to proceed.

**URL:** [http://newsletters.usdbriefs.com/2014/Tax/TNV/140516\\_1.html](http://newsletters.usdbriefs.com/2014/Tax/TNV/140516_1.html)

Over 160 amendments had been filed as of press time by Democrats and Republicans alike; but the chief sticking point appears to be a Republican-sponsored provision that would repeal the medical device excise tax enacted in the Patient Protection and Affordable Care Act (PPACA). Wyden told reporters May 20 that he opposed allowing a vote on that amendment because it was not germane to the underlying extenders package; but he noted that that he would be willing to consider amendments directly related to the now-expired tax provisions, such as proposals to shrink or even eliminate the wind production tax credit or alternative fuels credits.

For his part, Reid has stated that he will not allow a vote on proposals to repeal the medical device excise tax or other provisions enacted in the PPACA. In a May 22 speech on the Senate floor, however, he said that he would be “more than happy to return to the tax extender bill” if Republicans offer “a reasonable list of germane amendments.”

Hatch told reporters May 21 that he continues to confer with colleagues on both sides of the aisle in an effort to find a path forward but conceded that coming to a resolution is “going to take a little bit of time.”

“We’ve got an agreement that we’re going to work through it,” he said.

The Senate will be back in session on June 2.

As approved by the Finance Committee in April, the tax extenders legislation would, among other provisions, retroactively extend through 2015 an expanded version of research credit; the subpart F active financing exception and lookthrough rule for payments between related controlled foreign corporations; increased section 179 expensing limits; the beginning-of-

construction date for renewable power facilities eligible to claim the electricity production credit or investment credit in lieu of the production credit; and 15-year straight-line cost recovery for qualified leasehold improvements, qualified restaurant buildings and improvements, and qualified retail improvements. (For prior coverage, see *Tax News & Views*, Vol. 15, No. 15, Apr. 4, 2014.) The package includes no significant revenue offsets and would increase federal deficits by an estimated \$85 billion over 10 years, according to the Joint Committee on Taxation (JCT) staff.

**URL:** [http://newsletters.usdbriefs.com/2014/Tax/TNV/140404\\_1.html](http://newsletters.usdbriefs.com/2014/Tax/TNV/140404_1.html)

Wyden has consistently said that he intends to use the tax extenders package as a “bridge to tax reform” and that this “will be the last tax extenders bill the [Finance] Committee takes up” while he is chairman.

### House pursues permanent extenders

Across the Capitol, House Republicans signaled the next steps in their strategy to make certain tax extenders provisions permanent and allow others to remain expired. Ways and Means Committee Chairman Dave Camp, R-Mich., told reporters May 21 that taxwriters could mark up a second batch of permanent tax extenders bills shortly after the House returns from its Memorial Day recess on May 28. (The chamber will be in session from May 28-30 and then adjourn for a district work period the week of June 2.)

Although nothing had been officially scheduled as of press time, news reports indicate that Ways and Means could mark up legislation to permanently extend bonus depreciation and various charitable giving incentives on May 29.

Late last month, the Ways and Means Committee approved six separate bills – all unoffset – that would permanently extend a modified version of the research and experimentation (R&E) tax credit, the subpart F exception for active financing income, lookthrough rules for payments between related controlled foreign corporations, the five-year recognition period for built-in gains tax for S corporations, the basis adjustment for stock of an S corporation making charitable contributions of property, and the enhanced expensing limit and phase-out threshold for small businesses under section 179.

The lack of offsets for these bills proved to be a point of contention for Ways and Means Democrats during the April 29 committee mark-up. (The JCT staff estimated their combined 10-year cost at \$310 billion.) Cost will likely remain an issue for Democratic taxwriters if, as expected, the next round of extenders bills is also unpaid-for. It is worth noting, however, that when the permanent R&E credit was approved in the House earlier this month, 62 Democrats crossed party lines to vote in favor of the measure. (For details, see *Tax News & Views*, Vol. 15, No. 18, May 9, 2014.)

**URL:** [http://newsletters.usdbriefs.com/2014/Tax/TNV/140509\\_1.html](http://newsletters.usdbriefs.com/2014/Tax/TNV/140509_1.html)

**Another floor vote soon?** – Ways and Means Committee member Jim Renacci, R-Ohio, told reporters on May 22 that the permanent section 179 expensing provision is likely to be the next extender to come up for a vote on the House floor after the Memorial Day break – possibly as early as May 29.

### Quick House-Senate agreement unlikely

Given the stalemate in the Senate and the different approaches that the two chambers are taking to address extenders, enactment of a final agreement appears unlikely before the November 4 elections.

House Ways and Means Committee member Charles Boustany, R-La., told an audience at an event off Capitol Hill May 21 that “the prospects of going to conference before the [post-election] lame-duck session are bleak, but not out of the realm of possibility.”

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## Levin brothers introduce retroactive anti-inversion bills; Wyden backs rule changes as part of tax reform

Efforts by congressional Democrats to tighten the provisions of section 7874 continued this week as Senate Permanent Subcommittee on Investigations Chairman Carl Levin, D-Mich., and his brother, House Ways and Means Committee ranking member Sander Levin, D-Mich., introduced similar bills that would retroactively hinder the ability of U.S. companies to incorporate overseas in so-called inversion transactions. Meanwhile, Senate Finance Committee Chairman Ron Wyden, D-Ore., reiterated his own commitment to addressing inversions retroactively but stated that a legislative fix likely would not be enacted outside of comprehensive tax reform.

### Background

Concern over inversions in the late 1990s and early 2000s led Congress to enact section 7874 in 2004. Under that provision, if a foreign corporation acquires, directly or indirectly, substantially all of the properties of a U.S. corporation, the foreign corporation will be treated as a domestic corporation if the continuing ownership of the legacy shareholders in the U.S. corporation exceeds 80 percent by vote or value. If the ownership of the legacy shareholders in the U.S. corporation exceeds 60 percent (but is less than 80 percent), the foreign corporation will not be treated as a domestic corporation, but it will lose some U.S. tax benefits. (Section 7874 also applies to the acquisition of substantially all of the assets consisting of a trade or business of a domestic partnership.)

Critics have claimed that section 7874 is not strong enough, but Congress has not seriously revisited the issue since the current rules were enacted a decade ago. Earlier this year, President Obama's fiscal 2015 budget included a provision that would tighten section 7874 by changing the 80 percent test to 50 percent and eliminating the 60 percent test entirely. The proposal was largely ignored at the time, but a handful of high-profile proposed inversion transactions have captured the interest of some lawmakers in recent weeks, leading Senate Finance Chairman Wyden to pen an op-ed in *The Wall Street Journal* on May 9 in which he called for changes to section 7874 – including a 50 percent continuing-ownership test – that would be effective for transactions on or after May 8, 2014. Sen. Levin announced plans to introduce his own legislation in the Senate, with his brother sponsoring a companion bill in the House. (For prior coverage, see *Tax News & Views*, Vol. 15, No. 18, May 9, 2014.).

URL: [http://newsletters.usdbriefs.com/2014/Tax/TNV/140509\\_3.html](http://newsletters.usdbriefs.com/2014/Tax/TNV/140509_3.html)

### Levin bills

Both Levin bills, which were introduced on May 20, would treat a foreign corporation as a domestic corporation if it meets one of two tests. The first test is based on continuing ownership of legacy shareholders, but the bills would drop the threshold from 80 percent to 50 percent.

The second test would be based on management and control, without regard to continuing ownership by legacy shareholders of a domestic corporation. Under this provision, any foreign corporation that is directly or indirectly managed and controlled primarily in the United States and has significant domestic business activities would be treated as a domestic entity for U.S. tax purposes if it acquires, directly or indirectly, substantially all of the properties of a U.S. corporation. (Section 7874, as modified by the Levin bills, would also apply to both (1) the acquisition of substantially all of the assets consisting of a trade or business of a domestic partnership and (2) the acquisition of substantially all of the assets of a domestic partnership, without regard to whether such assets constitute a trade or business.)

The bills would direct the Treasury Secretary to issue regulations providing that management and control would be treated as occurring primarily in the United States if “substantially all of the executive officers and senior management of the expanded affiliated group who exercise day-to-day responsibility for making decisions involving strategic, financial, and operational policies of the expanded affiliated group are based or primarily located within the United States.” Further, a group would be considered to have significant domestic business activities if at least 25 percent of its employees, employee compensation, assets, or income is located in or derived from the United States.

The bills include an exception for companies with substantial business activities in the foreign country of incorporation. The term “substantial business activities” would be defined as it is under current regulations, but the Treasury Secretary would have authority to increase the threshold percentages.

**Retroactive effective date** – As introduced, both the Senate and House versions of the bill would be effective for transactions completed after May 8, 2014 – the date that Finance Committee Chairman Wyden had proposed in his *Wall Street Journal* piece. (Sen. Levin had previously indicated that his legislation would be effective on the date of introduction. For prior coverage, see *Tax News & Views*, Vol. 15, No. 19, May 16, 2014.)  
[URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140516\\_2.html](http://newsletters.usdbriefs.com/2014/Tax/TNV/140516_2.html)

**Senate version includes sunset provision** – The Senate version of the bill also adds a May 9, 2016, sunset date. Sen. Levin explained in a May 20 floor statement that enacting temporary legislation would address the immediate concerns about inversions and give lawmakers time to adopt a permanent solution as a part of tax reform.

“Our Treasury is bleeding, and this bill is first aid for the tax code. A two-year moratorium on inversions that do not meet our tougher standard stops the bleeding while we debate the comprehensive tax reform that most of us believe is desirable,” he said.

The text of the House version of the bill, however, contains no sunset or limiting language, so that proposal would be permanent if enacted as drafted.

### Wyden clarifies inversion plans

The Senate bill currently includes 19 Democratic co-sponsors, notably taxwriters Jay Rockefeller of West Virginia, Ben Cardin of Maryland, Debbie Stabenow of Michigan, and Bill Nelson of Florida. One name missing from that roster is Finance Committee Chairman Wyden, who told reporters May 20 that he would work to adjust the inversion rules in the context of tax reform rather than through freestanding legislation.

Although his op-ed in *The Wall Street Journal* had generally been construed as an announcement that he would introduce an anti-inversion proposal of his own, Wyden explained that he wrote the piece to “put everybody on notice what the rule would be as part of tax reform.” Wyden indicated that he still intended to pursue a retroactive effective date for any changes to the inversion rules, however.

Wyden also noted that the Finance Committee would hold a series of hearings on tax reform issues – including one that would address international taxation and inversions – but he did not indicate when those hearings would take place.

### Outlook

While the introduction of the two Levin bills will garner some press attention, their prospects for enactment are uncertain – especially as House and Senate Republicans have so far shown little appetite for addressing inversions outside of a tax code overhaul that lowers corporate tax rates and embraces a territorial system for taxing income of U.S. multinationals. However, this is an issue that needs to be followed closely. An increase in the number of companies attempting inversions could put additional political pressure on lawmakers to act. Congress has two must-pass tax bills on its agenda this year: the highway trust funds will need to be replenished this summer and extenders legislation is expected to be addressed later in 2014. Senate Democrats could seek to force votes on anti-inversion provisions by including them as offsets in one or both of these bills.

It is also worth noting that Congress has a mixed record when it comes to proposing and approving legislation with a retroactive effective date. Generally, this outcome occurs only when the chairmen of *both* taxwriting panels are committed to that approach. Although Finance Committee Chairman Wyden continues to support changing the inversion rules retroactively, Ways and Means Committee Chairman Dave Camp, R-Mich., has not embraced the notion of a retroactive effective date and Finance Committee ranking Republican Orrin Hatch of Utah has rejected it outright.

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**Have a question?**

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