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US Tax Court sides with Amazon in intangibles transfer case

The US Tax Court in its March 23 opinion *Amazon.com, Inc. v. Commissioner*, T.C., No. 31197-12, 148 T.C. No. 8, 3/23/17, found the IRS's approach to valuing a cost sharing buy-in payment to be arbitrary, capricious, and unreasonable.

The Tax Court specifically addressed the following three issues under the 1995 cost sharing regulations:

1. The price of a buy- in payment;
2. The price of other intangible transfers; and
3. The subsequent allocation of certain intangible development costs (IDCs).

All three issues arose in relation to a cost sharing arrangement (CSA) that was entered into as part of a 2004 restructuring by Amazon.com Inc. (Amazon US) and its Luxembourg subsidiary. Also at issue was whether a claw-

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back provision contained in the CSA for stock-based compensation (SBC) was operative in light of the Tax Court's decision in *Altera Corp. v. Commissioner*, 145 T.C. 91. The years before the court were 2005 and 2006.

It should be noted that, on January 5, 2009, the IRS and Treasury redesignated the regulations at issue in the *Amazon* case as Treas. Reg. §1.482-7A, and at the same time promulgated new temporary cost sharing regulations that were designated as Treas. Reg. §1.482-7T (T.D. 9441, 74 Fed. Reg. 352). The IRS and Treasury later issued final regulations on December 22, 2011 (T.D. 9568, 76 Fed. Reg. 80090), which adopted the effective date of the temporary regulations.

Therefore, the opinion of the Tax Court in Amazon is limited to transactions before January 5, 2009, and is not directly applicable to cost sharing transactions that are governed by the post-2009 temporary and final regulations.

Buy-in payment and intangible transfers

In this case, the IRS proposed to value the buy-in and other intangible transfers in the aggregate using a discounted cash flow analysis (DCF) with a perpetual life. The Tax Court held that the IRS's approach to valuing the intangible transfers was arbitrary, capricious, and unreasonable. Affirming its decision in *Veritas Software Corp. v. Commissioner*, 133 T.C. 297, the Tax Court rejected IRS attempts to distinguish or overrule Veritas and held:

- The intangibles at issue did not have a perpetual useful life;
- The buy-in payment was not "akin to a sale;"
- The workforce in place, goodwill, and going concern value should be excluded when determining the buy-in payment;
- The intangibles at issue should not be valued in the aggregate; and
- The transferred website technology decayed in value over its useful life.

The Tax Court rejected the IRS's attempt to value the transferred intangibles in the aggregate. Under the aggregation principle, analyzing the combined effect of multiple transactions in the aggregate may be appropriate if combining the transactions provides the most reliable measure of an arm's length result. The Tax Court rejected the use of aggregation in this case, because such an analysis would have effectively combined:

1. Preexisting intangibles, which were the subject of the buy-in; and
2. Subsequently developed intangibles, which were co-owned by the cost share participants.

In addition, the Tax Court found that aggregation would combine compensable intangibles (website technology, trademarks, and customer intangibles) and non-compensable residual business assets, such as workforce in place, goodwill, and going concern value.[1]

The Tax Court rejected the IRS's contention that the "realistic alternatives" principle articulated in Treas. Reg. §1.482-1(f)(2)(ii)(A) supported the IRS's application of the DCF. Under the realistic alternatives principle, the commissioner of the Internal Revenue Service is authorized to consider realistic alternatives to determine if the controlled transaction is arm's length. The IRS contended that the realistic alternative for Amazon US was to keep ownership of the IP and develop it further. This view lends support to the "akin-to-a-sale" position that the IRS argued. Based on the IRS regulations, the Tax Court concluded that the realistic alternatives considered must be consistent with the form of the transaction chosen by the taxpayer. In this case, assuming that Amazon US did not enter into the cost share arrangement was not a realistic alternative to the CSA.

The Tax Court also rejected the IRS's use of a perpetual life, maintaining that this was incompatible with the CSA requirement to compensate the transferor for preexisting intangibles. The Tax Court held that the use of a perpetual life would include subsequently developed intangibles as well as preexisting intangibles. This, according to the Tax Court, was inconsistent with the applicable 1995 cost sharing regulations.

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[1] As the Tax Court noted, the definition of intangible property in the cost sharing regulations in effect for 2005 and 2006 is nearly identical to the definition of intangible property contained in IRC §936(h)(3)(B), which is cross-referenced in IRC §367(d).

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The Tax Court determined that the comparable uncontrolled transaction (CUT) method was the most reliable method to value the intangible transfers. Both Amazon US and the IRS presented CUTs to support their theories of the case. After adjusting the CUTs:

- The court determined that the required buy-in payments for the website technology was a royalty of 3.05 percent of sales decayed over seven years and with a 3.5-year "tail" of 0.40 percent. The court based its decay function on detailed expert testimony concerning the life of Amazon US's website technology.
- The court valued the trademarks at 0.75 percent of sales over 20 years with no decay rate. The court took the following into consideration in determining the value of the trademarks:
    - The high recognition of the trademarks in Europe at the time of transfer;
    - The fact that the value of the trademarks over time would be dependent on the success of the Luxembourg investment in cost shared intangibles; and
    - The Luxembourg contribution to the value of the trademarks prior to the transfer.
- Finally, the European customer information was valued at a relatively nominal amount given the churn of customers.

Intangible development costs

The IRS asserted that 100 percent of the costs attributable to certain cost centers were allocable to the CSA cost pool. At trial, Amazon US established that the employees in those cost centers engaged in substantial non-IDC activities. The Tax Court agreed that less than 100 percent of those cost centers were properly allocable to the CSA cost pool.

Stock-based compensation costs

The CSA executed by Amazon US and its Luxembourg subsidiary included SBC costs in the cost pool in accordance with the IRC §482 regulations governing the years at issue. Amazon US, like other taxpayers, included a provision in the CSA whereby those costs would be "clawed back" in the event the regulations were held to be invalid. However, that provision would take effect only if certain contingencies occurred, such as the regulation in question being invalidated by a "final decision in a court of law." In *Altera Corp. v. Commissioner*, 145 T.C. 91, the Tax Court invalidated the SBC rule at issue, which was contained in Treas. Reg. §1.482- 7(d)(2) (as amended in 2004).[2] The Tax Court's decision was appealed to the US Court of Appeals for the Ninth Circuit on February 19, 2016. Because that case remains pending on appeal, the court held the CSA's claw-back provision was not operative by its own terms during the years at issue.

Conclusion

The Tax Court in *Veritas* and *Amazon* limited its decision to issues arising under the 1995 cost sharing regulations. The subsequent cost sharing regulations replaced the concept of a "buy-in" payment with the concept of a platform contribution transaction (*i.e.*, any right, resources, or capabilities). The latter concept has a much more expansive definition of what is compensable compared to just the preexisting IRC §936(h)(3)(B) intangibles at issue under the 1995 regulations.

At the same time, the income method of Treas. Reg. §1.482- 7(g)(4) (as amended in 2011) specifically relies on two critical concepts that were contained in the 1995 cost sharing regulations but that, as applied, were rejected by the Tax Court in Amazon, namely:

1. Aggregated valuation; and
2. The realistic alternatives principle.

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[2] As noted above, Treas. Reg. §1.482-7 was redesignated Treas. Reg. §1.482-7A with the promulgation of T.D. 9441, 2009-7 I.R.B. 460. The years at issue in *Amazon*, though, were 2005 and 2006. For that reason, the prior designation has been used here.

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Tax Compliance for Business Travelers to the US: More difficult, but more important than ever

Today's global workforce is constantly crossing borders – whether international or interstate – leading to more extensive employee and employer tax reporting and payment obligations. These business travelers are employees who travel for a variety of reasons, including project-based travel, visits to suppliers or customers, or to attend training or business meetings. The destinations for such travel can be as varied as the length of the trip. The duration of a business traveler's trip may be only a day, several weeks, or multiple months, but due to policy and tax requirements, typically not more than a year.

Business travelers are frequently not on a company's radar for tracking, neither by Human Resources nor covered under short-term assignment policies. This leads to a state of anxiety among many employers as they struggle to identify their business traveler population, traveler destinations, their tax compliance requirements, and the extent of any other tax obligations. It is clear that more can be done to manage these requirements if the employer wants to protect its reputation in the US, and limit potential penalties and other consequences associated with non-compliance.

This article will highlight the complexity of employer compliance with the state and Federal tax requirements associated with travel to the US.

For the rest of the article, we will follow an employee of XYZ UK Limited as he travels to the United States from the United Kingdom for a duration of two weeks. While in the United States, the employee spends one week in New York City, including a visit to the stock exchange to sound the opening bell, and then spends one week in South Carolina to attend business meetings with colleagues of XYZ US Inc., a branch entity of XYZ UK Limited. The question posed for discussion is whether this business traveler is subject to federal income tax, US social security taxes, state income tax in New York and/or South Carolina, and whether the reimbursed expenses paid for the trip are taxable to the employee.

Are business travelers subject to tax at their destination?

Federal Income Taxes: To paraphrase Benjamin Franklin, there are only two certainties in life: death and taxes. Business travelers are no exception to this axiom. An international business traveler is subject to US tax if the business traveler is engaged in business in the United States during the tax year for more than 90 days or if the wages attributable to such services performed exceed USD 3,000.[3]

The wages attributable to service in the US are calculated by allocating an employee's compensation based on the number of US workdays. Let's revisit our business traveler from XYZ UK Limited: if he worked a total of 240 days during the year and ten of those workdays were in the US, the US-sourced income would be his total compensation multiplied by a faction of 10/240. Assuming an annual salary of USD 100,000, the employee would have USD 4,167 of US-sourced income. For many business travelers, the USD 3,000 limit amount can be exceeded quickly, resulting in an individual income tax obligation as well as reporting and withholding obligations for the company.

However, under some circumstances, relief may be available to a nonresident alien from a country with which the United States has an income tax treaty. Among other purposes, tax treaties serve to simplify the tax obligations of residents of one country who engage in business in the other contracting country. Effectively, the treaties generally provide that tax for income related to employment will only be owed to the country in which the person resides if certain conditions are met.

Every tax treaty is different and requires individual analysis. However, though it is necessary to review the provisions of the relevant treaty given the variation among the conditions, there is consistency among most treaties in the treatment of compensation received by a business traveler for services performed in the United States.

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[3] IRC § 861(a)(3) excludes from the definition of US-sourced income any compensation paid to a nonresident alien for performance of services for a non-US company if the individual is present in the US for fewer than 90 days and the total compensation for that period does not exceed USD 3,000 in aggregate.

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There are typically three conditions that need to be satisfied for the treaty relief to apply. First, the nonresident alien must be present in the United States for less than a specified threshold. Commonly, this day threshold requires a nonresident alien not to exceed 183 days in a rolling 12-month period.[4] Second, treaties often require that the cost of remuneration paid to a nonresident alien be borne by an employer that is not resident in the US. Finally, for treaty relief to be available, the remuneration paid to a business traveler cannot be borne by a permanent establishment that the employer has in the US.

Though subject to some variation, income tax treaties generally define a permanent establishment to include a fixed place of business through which a foreign enterprise carries on its business.[5] In examining whether business travelers may create a permanent establishment, certain business traveler activities pose a higher likelihood of being viewed as a permanent establishment than others.

For example, an executive concluding contracts and negotiating transactions on the company's behalf in a foreign country would pose a high risk of creating permanent establishment in that country. Though not an exhaustive list, certain key considerations should be examined to deter- mine whether a permanent establishment has been set up; these include whether there is a fixed place of business, whether employees are receiving commissions or are in revenue-generating roles, and whether contracts are negotiated or concluded by the employee in the host country. As discussed above, the existence of a permanent establishment in a business traveler's destination country will render the income tax treaty's relief inapplicable.

Social Security Taxes: Though income tax treaties may provide for relief from income tax, they do not provide for relief from Federal Insurance Contributions Act (FICA) taxes; namely, social security (old-age, survivors, and disability insurance) and Medicare (hospital insurance). To the extent a business traveler earns wages for services performed in the United States, such amounts are subject to FICA tax with no *de minimis* threshold. That is to say, a business traveler and his or her employer owes FICA taxes from day one, dollar one unless a separate social security treaty is in place.

Social security treaties are commonly referred to as totalization agreements and the United States has entered into such agreements with several countries to avoid double taxation with respect to FICA taxes.[6] To avail oneself to the relief provided by the totalization agreements, a business traveler must obtain a Certificate of Coverage from the traveler's home country and present that document to the United States employer.[7]

State Taxes: Business travelers in the United States – whether individuals traveling into the US from a foreign country or local US residents traveling interstate – need to be aware of state income tax issues. For inbound international travelers, whether they are subject to state income tax is dependent upon whether a tax treaty is available to provide relief from federal income tax and whether the destination state recognizes the treaty relief. Some states honor the provisions of tax treaties and others do not.[8] Although states are not permitted to enter into agreements with nations, many states use federal taxable income as the starting point for determining state income tax liability. To the extent a state uses federal taxable income as the starting point and treaty relief is available, a business traveler will not have a state income tax liability.

It should also be noted that US resident business travelers may have additional nonresident state income tax obligations. Unlike international travelers, and other than a handful of states with reciprocal income tax agreements, domestic business travelers find no relief from income tax treaties. Rather, each state is empowered to enact its own threshold on when a nonresident business traveler may be obligated to file a tax return and when that traveler's

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[4] Older treaties may refer to 183 days in a calendar or fiscal year, rather than the rolling 12-month period.
[5] *See*, *e.g.*, United States – United Kingdom Income Tax Convention, Article 5, Permanent Establishment (defining the term permanent establishment as well as specific activities that are excluded).
[6] IRC § 3101(c) provides that "wages received by or paid to an individual shall be exempt from [FICA taxes] to the extent that such wages are subject under such agreement exclusively to the laws applicable to the social security system of such foreign country." IRC § 3111(c) provides similar relief for employers. *See also* https://www.irs.gov/individuals/international-taxpayers/totalization-agreements for listing of current countries with which the United States has a totalization agreement.
[7] Rev. Proc. 80-56; 1980-2 C.B. 851.
[8] For example, California does not provide an exclusion for income excluded at the federal level due to an income tax treaty, but New York does recognize treaty relief.

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employer may have a withholding and reporting obligation. In many states taxation will occur from the first day of presence in that state.

Efforts have been made by members of Congress to simplify these rules by implementing a 30- day threshold for all states, but to date these attempts have been unsuccessful and it remains up to each state to set their own rules.[9]

Are a business traveler's travel expense reimbursements taxable?

In general, expenses incurred by business travelers (e.g., airfare, hotels, meals while traveling) are considered to be deductible business expenses and thus are not considered taxable income to the employee when the employee is working "away from home".[10] However, the determination of whether an employee is "away from home" is dependent upon whether the destination is considered a temporary, rather than non-temporary, work location. To the extent the destination is considered a non-temporary work location, expenses incurred in traveling there would be considered nondeductible commuting expenses.

A temporary work location is a location at which the employee works or performs services on a temporary basis. If employment at a work location is realistically expected to last (and does in fact last) for one year or less, the employment is temporary in the absence of facts and circumstances indicating otherwise. If employment at a work location is realistically expected to last for more than one year, the employment is not temporary, regardless of whether it actually exceeds one year.[11] Going back to our example of the business traveler from XYZ UK Limited, the US would be considered to be a temporary work location because the work was only expected to last two weeks.

In addition to the temporary and non-temporary rules, the IRS has issued guidance that seeks to assess whether an employee's performance of services at a location is so infrequent or sporadic that the location should be treated as though it is temporary even if there is a realistic expectation of working at that location for more than one year.[12]

If there is an initial realistic expectation that an employee will perform services at a work location for a period exceeding one year, but for no more than 35 workdays during each of the calendar years within that period, then employment at that location may be treated as temporary. Even if our hypothetical employee from XYZ UK Limited was scheduled to continue to travel to the US periodically for the next few years, the travel expenses could still be considered nontaxable if each year the employee will be in the US for fewer than 35 days.

What is required to file a US tax return?

All individuals filing a tax return must have a US tax identification number (TIN).[13] Most US citizens and residents use their Social Security Number as their TIN. However, business travelers to the US are not always eligible to obtain a Social Security Number, dependent on the type of visa used to travel, and must instead obtain an Individual Taxpayer Identification Number (ITIN). The process to obtain an ITIN has become increasingly difficult over the past few years as the IRS and Congress have attempted to curb perceived abuse of the system via fraudulent applications. These attempts have made the process more burdensome for business travelers to comply with the requirement to file a US return.

An ITIN application must include supporting documentation to verify the individual's identity and residency status to the IRS and there are a variety of methods through which this verification may be achieved. The first two options are for ITIN applicants to apply in-person at an IRS center or provide a copy of their passport which has been certified by the issue agency.

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[9] On March 22, 2017 the Judiciary Committee of the US House of Representatives approved H.R. 1393, the Mobile Workforce State Income Tax Simplification Act of 2017, which would restrict states from imposing income tax on nonresidents, unless the individual works in that state for more than 30 days during the year. Similar versions of this legislation passed the full House in May 2012 and again in September 2016, but ultimately were not brought to a vote in the Senate and were not enacted. A floor vote on the current House bill has not yet been scheduled.
[10] IRC § 162(a)(2); *see also* Treas. Reg. §1.162-2.
[11] Rev. Rul. 93-86, 1993-2 C.B. 71.
[12] Chief Counsel Memorandum 200026025.
[13] IRC § 6109(a).

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Generally the certified copy is issued by the passport authorities in the individual's home country or a consulate which that country has in the US. A third option is to utilize the services of various Certified Acceptance Agents (CAAs), which greatly simplifies the application process by allowing the CAA to review the passport without the need to obtain a certified copy. Many accounting firms and other financial service providers have obtained CAA status to assist their clients. How- ever, legislation passed in 2016 removed this third option for applicants who reside overseas.[14] Most business travelers are now required to apply for an ITIN in-person at an IRS center or via mail, including a certified copy of their passport.

Why should employers take action now?

Tax authorities both at the Federal and certain state levels are targeting business travelers and their employers due both to the high level of noncompliance and to raise additional revenue. By lever- aging corporate data available during routine audits, such as travel records and expense reports, the tax agents are identifying nonresident business travelers within their borders. Of particular interest to companies with business travelers inbound to the United States, the IRS Foreign Payments Practice group is focused on enforcing the withholding and information reporting rules and regulations pertaining to nonresident aliens and foreign entities. With increased communication and coordination between immigration and tax authorities, individual business travelers are also facing heightened enforcement.

As important, employers that proactively manage the tax consequences of business travel to the United States can frequently reduce the tax burden. As discussed above, there are tools that employers and employees can use to reduce state, Federal, and social security taxes – if they plan in advance.

Due to enhanced enforcement efforts facing both employees and employers, now is the time to take the next steps towards compliance and cost reduction.

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Transferable State Tax Credits and Incentives: An important element of tax planning

In today's economic environment, credits and incentives are a valuable element of a company's tax planning approach. Typically, credits are statutory tax-based offsets that are used by federal, state and local governments to incentivize and encourage business activity that benefits the jurisdiction. For example, a statutory-based credit may provide that a manufacturing company purchasing at least $500,000 in machinery and equipment during a tax year in that state is eligible to claim a 3% tax credit on its state income tax return. A number of states are also utilizing discretionary credits that require taxpayers to apply and seek approval prior to engaging in the qualifying activities.

Incentives, typically discretionary in nature and requiring negotiation with a state or local government agency, are tax and/or financial offsets that jurisdictions use to entice business activity and investment, particularly when a company is considering multiple jurisdictions for its capital or labor investment. Activities for which discretionary incentives may be available include job creation, skills-based training, investments in green technology and investments in capital equipment.

A taxing jurisdiction generally determines the amount of incentives to offer based on a variety of factors including the type of investment, the potential impact to the jurisdiction, and the needs of the area where the investment is projected to occur. For example, a jurisdiction may offer a taxpayer hiring 250 employees at an average wage of $20 per hour an employment grant worth $4,000 per new employee, provided the company also pays at least 65% of the health insurance premiums for those new hires.

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[14] PATH Act, P.L. 114-113, 12/18/2015, § 203, which amended IRC § 6109 by adding IRC § 6109(i)(1), limiting the use of a CAA to taxpayers who reside in the US.

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Credits and incentives analysis

Companies seeking to reduce current or projected state tax liabilities will generally take two approaches to credits and incentives planning. The first is a liability-based approach, where companies review their largest state tax liabilities and then research to determine the potential tax credits and incentives that might be available in those particular jurisdictions. The company will then review the criteria for each credit or incentive to determine whether it might qualify for benefits and, if so, then apply for or claim the credit or incentive accordingly.

The second approach is an activity-based approach. Companies identify where they are engaging (or projected to engage) in activities that generally qualify for credits and incentives (*e.g.*, increased hiring, expanding facilities, etc.) and analyze whether those states offer incentives that fit those activities. If so, then the taxpayers may seek to apply for or claim the credit or incentive accordingly.

While these two approaches are sufficient for many companies, some companies may have potential qualifying activities in states where minimal or no tax liability exists. Companies that find themselves in this situation should consider whether transferable credits are potentially available.

What are transferable credits?

Many states offer credits that can be transferred or sold to other taxpayers. These credits can then be used by the purchasing taxpayer ("transferee") to offset its current or future tax liability. The transferee does not typically need to engage in the type of qualifying activity that generated the credit. For example, a transferee engaged in retail activity may be able to use a purchased film credit to reduce its corporate income tax liability. Transferrable credits may be offered for sale through online exchange websites, independent brokers that bring interested parties together, or through business-to-business relationships.

Depending on the credit and the state, transferrable credits can either be sold in full to one taxpayer or can be divided up and sold to multiple taxpayers. State-by-state provisions also determine whether a credit can be resold or reassigned by the transferee to another taxpayer and, if so, how many times. In some instances, transferrable credits may also be used to offset more than one type of tax.

For example, Pennsylvania's research and development credit can offset several different taxes and can be sold in whole or divided up and sold to multiple taxpayers. For illustrative purposes, this means that three different taxpayers could purchase part of a credit from the same transferor and could use it to offset three different taxes. One transferee could use the credit against its individual income tax liability, the second could apply it against its insurance premium tax liability and the third could apply it against its corporate income tax liability.

Practically speaking, transfer or assignment of credits is usually effectuated by a purchase agreement pursuant to which the purchaser/transferee agrees to pay a discounted price (*e.g.*, $0.90/$1 of credit), which typically varies depending on the overall supply and demand for transferrable credits in the particular jurisdiction, the type of credit, whether it has been audited or certified by the state prior to the transfer, and the tax years for which the credits can be utilized. For the seller/transferor, the ability to sell credits (even at a discount) provides cash flow advantages in instances where a company may not otherwise be able to achieve a tax benefit from generated credits. For the purchaser/transferee, buying credits provides a company without qualifying activities the ability to use tax credits to offset its current and future tax liability.

Who should consider selling transferable credits?

- Companies that are not paying tax in a state because they are operating at a loss, have NOL carryforwards or that have other non-transferrable credits that are otherwise offsetting their tax liability (*e.g.*, research and development credits).
- Start-up companies for which no taxable income is expected for some time, but that are making significant investments of capital and labor.

Who should consider purchasing transferable credits?

- Companies with significant tax liabilities in states for which little or no qualifying activity is anticipated.

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- Profitable companies with a significant customer base in single-sales-factor apportionment states but minimal property or payroll in those states.
- Companies undergoing transactions or acquisitions that are projected to trigger increased state tax liabilities.

What types of transferrable credits exist?

Many states offer low-income housing credits, historic property rehabilitation credits, brownfield credits, alternative energy credits, and film credits that may be transferred or assigned by the real estate or film ventures that generated such credits. In addition, transferrable or assignable research and development, job creation and capital investment credits are available to a broad range of taxpayers, as noted below.

Research and development: Examples of states with transferrable research and development credits include the following:

- **Arkansas:** In-House Research by Targeted Business Income Tax Credit[15]
- **North Dakota:** Research Expense Credit[16]
- **New Jersey:** Research and Development Tax Credit[17]
- **Pennsylvania:** Research and Development Tax Credit[18]

Job creation: Other examples of states with transferrable credits are those listed below, which provide companies that are expanding/hiring with the opportunity to monetize their job creation credits through transfer.

- **Florida:** Capital Investment Credit[19]
- **Arkansas:** Targeted Business Payroll Income Tax Credit[20]
- **Missouri:** Quality Jobs Act[21] and New and Expanded Business Facility Credit[22]
- **New Jersey:** Grow New Jersey Assistance Program Credit[23]
- **New Mexico:** Rural Job Tax Credit[24]

Capital investment: For those companies acquiring new facilities, expanding existing facilities or investing in new capital equipment, the following are examples of states offering transferable credits for capital investment.

- **Florida:** Capital Investment Tax Credit[25]
- **Idaho:** Broadband Equipment Investment Credit[26]
- **Missouri:** New and Expanded Business Facility Credit[27]
- **New Jersey:** Urban Transit Hub Tax Credit[28] and Economic Redevelopment and Growth (ERG) Credit[29]

Survey of transferrable credits in Georgia, New Jersey and Pennsylvania

Georgia has a myriad of transferable credits, and allows most of its credits to be transferred between related entities. Additionally, it offers several credits that can be transferred to unrelated taxpayers, including the Tax Credit for Film,

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[15] Ark. Code Ann. § 15-4-2708(c)(2).
[16] N.D. Cent. Code § 57-38-30.5.8.
[17] N.J. Stat. Ann. § 34.1B-7.42.a.a.
[18] 72 Pa. Stat. Ann. § 8704-B(d).
[19] Fla. Stat. Ann. § 220.191(2)(c).
[20] Ark. Code Ann. § 15-4-2709.
[21] Mo. Rev. Stat. § 620.1881.9.
[22] Mo. Rev. Stat. § 135.110.14.
[23] N.J. Stat. Ann. § 34.1B-248.
[24] N.M. Stat. Ann. § 7-2E-1.1.F.
[25] Fla. Stat. Ann. § 220.191(2)(c).
[26] Idaho Code Ann. § 63-3029I(9).
[27] Mo. Rev. Stat. § 135.110.14.
[28] N.J. Stat. Ann. § 34.1B-209.1.
[29] N.J. Stat. Ann. § 52.27D-489f(4).

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Video, or Digital Production in State;[30] the Tax Credit for Donation of Real Property;[31] and the Tax Credit for the Rehabilitation of Historic Structures.[32] These credits can be offset against the Georgia corporate income tax and the individual income tax and can be split up and sold/assigned to multiple related or unrelated parties. The statutes applicable to these Georgia credits generally do not allow a transferee to resell or transfer the credits to unrelated parties.

New Jersey offers at least eight transferable credits including the Business Retention and Relocation Assistance Grant (BRRAG);[33] the Grow New Jersey Assistance Program Credit;[34] the Film Production Tax Credit;[35] the Urban Transit Hub Tax Credit;[36] the Research and Development Tax Credit Program;[37] the Economic Redevelopment and Growth (ERG) Program[38] and the Digital Media Tax Credit Program.[39] In addition, legislation signed by New Jersey's Governor Christie on January 11, 2016, allowed taxpayers to convert their approved cash grants under the Business Employment Incentive Program (BEIP) to refundable tax credits, which can then be sold or assigned.[40]

New Jersey's transferable credits can generally be divided among multiple transferees and can be re-sold by the original transferee and subsequent transferees multiple times. The converted BEIP credits, however, cannot be re-sold. It should be noted that the BRRAG expired on September 18, 2013, while the Digital Media Tax Credit and Film Production Tax Credits both expired on July 1, 2015.[41] Under these three programs, no new credits can be generated; however, these credits may still be available for purchase or sale.

Pennsylvania offers at least seven transferable credits, all of which are currently active with no upcoming sunset provisions. These are the Keystone Innovation Zone Tax Credit (KIZ);[42] the Keystone Special Development Zone (KSDZ) Program;[43] the Film Production Tax Credit;[44] the Neighborhood Assistance Program Tax Credit;[45] the Research and Development Tax Credit;[46] the Resource Enhancement and Protection (REAP) Credit;[47] and the Historic Rehabilitation Credit.[48] With the exception of the Historic Rehabilitation Credit, all the credits can be divided and sold to multiple transferees.

Pennsylvania does not allow any of its transferable credits to be transferred again or sold by the transferees after the initial transfer or purchase. The credits can all offset the corporate net income tax and personal income tax, with some available to offset other taxes such as the bank and trust company shares tax, insurance premiums tax, capital stock-franchise tax, mutual thrift institutions tax, gross receipts tax and title insurance company shares tax.

It should be noted that legislation enacted in July 2016 modified, expanded, and, in some cases, added credits for Pennsylvania tax purposes.[49]

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[30] Ga. Code Ann. § 48-7-40.26(g).
[31] Ga. Code Ann. § 48-7-29.12(d.1).
[32] Ga. Code Ann. § 48-7-29.8(e)(2).
[33] N.J. Stat. Ann. § 34.1B-120.2.
[34] N.J. Stat. Ann. § 34.1B-248.
[35] N.J. Stat. Ann. § 54.10A-5.39.d.
[36] N.J. Stat. Ann. § 34.1B-209.1.
[37] N.J. Stat. Ann. § 34.1B-7.42.a.a.
[38] N.J. Stat. Ann. § 52.27D-489f(4).
[39] N.J. Stat. Ann. § 54.10A-5.39.d.
[40] N.J. Pub. L. 2015, ch. 194.
[41] N.J. Stat. Ann. § 34.1B-114.b; N.J. Stat. Ann. § 54.10A-5.39.
[42] 72 Pa. Stat. Ann. § 8906-F(g).
[43] Keystone Special Development Zone Program Guidelines, August 2016, http://dced.pa.gov/download/keystone-special-development-zone-guidelines-2016/?wpdmdl=65702.
[44] 72 Pa. Stat. Ann. § 8705-D(e).
[45] 72 Pa. Stat. Ann. § 8904-A(d).
[46] 72 Pa. Stat. Ann. § 8704-B(d).
[47] 72 Pa. Stat. Ann. § 8703-E(d).
[48] 72 Pa. Stat. Ann. § 8705-H(d).
[49] P.A. P.L. 526, No. 84.

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Conclusion

Companies should analyze transferable credits as part of a holistic approach to managing their current and future tax liabilities balancing potential tax benefits against cash flow needs that could be addressed by selling transferable credits. Companies should consult with their tax advisors for planning considerations in these areas given their specific needs and set of facts.

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State implications of 6-month extension available for TY16 calendar year-end corporations – change from previously announced 5-month extension

The Internal Revenue Service (IRS) has now provided TY16 calendar year-end corporations a 6-month extension of time to file, making the extended due date for these corporations (including Real Estate Investment Trusts (REITs), Regulated Investment Companies (RICs), and other entities filing Form 1120-series income tax returns) October 15, rather than September 15, if a Form 7004 is timely filed. *See* also 6-Month Extension Period for Calendar Year C Corporations.
URL: https://www.irs.gov/uac/rda-2017-02-08-2016-form-7004

Implications for TY16 state income tax compliance

The original/extended TY16 due date for C corporation state returns now falls on the SAME day as the original/extended due date for the federal return in significantly more states than in prior years (where previously the state due date may have been one month after the federal due date). The IRS provision for an October 15 extended due date for TY16 calendar year- end Form 1120-series income tax returns reinforces the need for the federal tax return preparation to be closely coordinated with the state tax compliance in order to timely meet TY16 state due dates.

In this context, certain states which have conformed to the original federal due date for TY16 state tax returns (*e.g.*, April 18 for calendar year taxpayers) may have a q-1, 2017 estimated payment due date that falls *one month prior* (*e.g.*, March 15 for calendar year taxpayers.) Taxpayers that anticipate filing a 2016 extension request and including a q-1, 2017 estimated payment, may wish to give consideration to filing the combined q-1, 2017 state estimate/2016 state extension *by March 15* (or otherwise by the 15th day of the third month after the end of the tax year for fiscal year taxpayers.)

The American Health Care Act has failed: What happens now?

On Friday, March 24, the House Speaker Paul Ryan cancelled the planned vote on the American Health Care Act (AHCA), a bill the House Republicans introduced on March 6, 2017 that they hoped to send to President Trump for signature in a few short weeks. The bill would have repealed and replaced key provisions of the Affordable Care Act (ACA) and made significant changes to federal funding for Medicaid.

After weeks of discussion amongst Republicans, with many moderate and more conservative blocs of the party in disagreement about how to proceed, the most recent concessions added in over the last days of debate were unable to bring the two factions together for the final vote. The amendments that House leadership added last minute would have moved more power to the states to decide the essential health benefits package that worked best for their markets. It also would have allowed states to accept block grant or per-capita-cap funding for their Medicaid programs. Finally, it would have given additional funding to support mental health, maternity, newborn, and substance abuse coverage. The Congressional Budget Office (CBO) projected that the AHCA, as amended, would have reduced the federal deficit by $150 billion and increased the number of uninsured by 24 million by 2026.

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Since the passage of the ACA in 2010, many Congressional Republicans have been promising to repeal the law, and President Trump said the day he was sworn into office that repealing and replacing the ACA would be one of his administration's main priorities. Now that the AHCA has failed, much of official Washington spent the past weekend engaged in the blame game or in post-mortem analysis asking, "What happened?"

But many across the country and in the health care sectors are asking, "What happens now?"

At a health care presentation last week, I heard a commentator remark, "I am concerned if the repeal bill passes. But I am equally concerned if it does not." That comment has stayed with me over the past few days. Why? Because the health care community is currently operating under the ACA and needs to understand what, if any, changes are to be expected. Stakeholders need to prepare for 2018 enrollment in relatively short order, and they are grappling with finding ways to keep individuals insured, boost the insurance markets, control premium growth, and continue their investments to improve the quality of care for their patients.

No one knows yet what, if any, agreements or changes to the ACA might emerge in the coming weeks with President Trump and Congress.

For now, the ACA is the law of the land with pressing annual deadlines. And other looming health issues will require attention by Congress and the regulators this year. Recent actions by President Trump, Secretary of the US Department of Health and Human Services (HHS) Tom Price, and recently confirmed Administrator of the US Centers for Medicare and Medicaid Services (CMS) Seema Verma may give us an idea of what the administration might do next.

For one, HHS could use its administrative powers to "reduce the burden" of the ACA on health care stakeholders. As one of the first moves after Secretary Tom Price was confirmed, HHS on February 15, 2017 released a proposed rule intended to provide health insurers greater certainty about the individual and small group markets in the 2018 benefit year under the ACA. Days later, a CMS division proposed providing plans with more time to file products for the federally-facilitated Exchanges in order to allow time to modify products in response to the proposed changes (See *Reg Pulse Blog*, February 20, 2017). We may see additional rules issued in the coming weeks.
URL: https://regpulseblog.com/2017/02/20/cms-releases-proposed-rule-intended-to-provide-more-certainty-on-health-insurance-markets-extends-deadlines-for-plans-to-file-products-with-exchanges/?id=us:2em:3na:usic:awa:tax:041717

Secretary Price and Administrator Verma have also recently highlighted levers that states have to stabilize their markets. Earlier this month, they both sent a letter to governors saying they promise to remove barriers and give states more flexibility in the design of their Medicaid programs. They also said that HHS will conduct a full review of Medicaid managed care regulations (See *Health Care Current*, May 3, 2016) and will delay enforcement of the Home and Community-Based Services rule. They said that CMS recommends states use Section 1115 waivers to encourage non-disabled adults to obtain and keep employment. For individual and small-group plans, HHS Secretary Tom Price sent a letter to governors saying they should use Section 1332 State Innovation waivers to slow premium growth and stabilize the markets. He held out as an example Alaska's 1332 waiver request to fund a state-operated high-risk pool and reinsurance program.
URL: https://www2.deloitte.com/content/www/us/en/pages/life-sciences-and-health-care/articles/health-care-current-may3-2016.html?id=us:2em:3na:usic:awa:tax:041717

Several pieces of "must pass" legislation are up this year, and they may be used as vehicles to pass additional changes to the ACA, especially if the repeal effort remains stalled. The Continuing Resolution passed by Congress in December 2016 expires on April 28, 2017. Congress will need to make critical decisions about federal funding for agencies and programs. One issue many health plans are keenly watching is whether Congress will step in and appropriate funds for the cost-sharing reduction subsidies for low-income individuals under the ACA, an issue that has been in debate in the courts. Congress will need to address reauthorization and funding for the Children's Health Insurance Program (CHIP), which is set to expire in September this year. This program provides critical funding to the states for children's health programs alongside Medicaid. Many state governors and providers are eager to see the program funded as soon as possible before September to assist them in their annual planning. For life sciences companies, the reauthorization of industry "user fees" to assist the approval processes at the US Food and Drug Administration (FDA) are also set to expire in September.

The administration and Congress have a lengthy list of health care issues that are still a priority. For one, we are nearly four months into the first performance year for the Medicare Access and CHIP Reauthorization Act of 2015

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(MACRA). Health care leaders should not mistake the federal government's attention on repeal and replace as a sign that it is neglecting its efforts to move toward value-based care across the system. Moreover, throughout the debate of AHCA, several lawmakers called for a bipartisan effort to tackle one of the biggest spending drivers in our system today: health care costs. And if Congress decides to move forward with tax reform next, health care stakeholders may be wise to watch for tax changes to many health care related provisions such as premium assistance tax credits, health savings accounts, or the tax-favored treatment of employer-sponsored health care.

In the end, the legislative process to repeal and replace the ACA may be stalled, but the work of health care is never done. In many travels around the country, I have been encouraged by how many in the health care community remain resilient and operate with resolve in the midst of uncertainty. It is a good reminder of how much of our community's and our own health care is still within our hands while we continue to watch Washington for what's next.

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Calendars to watch

Each edition, be sure to mark your calendars for some of the more important events (recent and upcoming) as well as tax developments making in impact on businesses investing into the United States.

Recent and Upcoming Activities

April 19 — **Dbriefs webcast:** Special Edition: Health care reform in America – What's next for employers?
Register
URL: https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2017/dbriefs-health-care-reform-in-america-whats-next-for-employers.html?id=us:2em:3na:usic:awa:tax:041717

April 20 — **Dbriefs webcast:** IRS Large Business & International Division campaigns – A technical analysis
Register
URL: https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2017/dbriefs-irs-large-business-international-division-campaigns-technical-analyses.html?id=us:2em:3na:usic:awa:tax:041717

April 12 — **Dbriefs webcast:** Tax data analytics – Trends in 2017
Register
URL: https://www2.deloitte.com/content/www/us/en/pages/dbriefs-webcasts/events/april/2017/dbriefs-tax-data-analytics-trends-in-2017.html?id=us:2em:3na:usic:awa:tax:041717

May 3 — **Dbriefs webcast:** Post-merger integration tax strategies – Capturing synergies in a rapidly changing world
Register
URL: https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/may/2017/dbriefs-post-merger-integration-tax-strategies-capturing-synergies-in-rapidly-changing-world.html?id=us:2em:3na:usic:awa:tax:041717

May 10 — **Dbriefs webcast:** The Mutual Agreement Procedure process – Preparing to resolve double taxation
Register
URL: https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/may/2017/dbriefs-the-mutual-agreement-procedure-process-preparing-to-resolve-double-taxation.html?id=us:2em:3na:usic:awa:tax:041717

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May 11	**Dbriefs webcast:** Global tax compliance and statutory accounting reporting – Emerging trends and developments Register **URL:** https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/may/2017/dbriefs-global-tax-compliance-and-statutory-accounting-reporting-emerging-trends-and-developments.html
May 17	**Dbriefs webcast:** Quarterly federal tax roundup – A passthroughs update Register **URL:** https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/may/2017/dbriefs-quarterly-federal-tax-roundup-passthroughs-update.html?id=us:2em:3na:usic:awa:tax:041717

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