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CARES Act: Immediate Tax Relief for Real Estate Investors

With reportedly overwhelming requests for relief under the Paycheck Protection Program, FTI has been advising clients to understand other relevant provisions of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act that can provide (almost) immediate relief in the form of tax refunds, even for prior years that have been filed with the IRS.

As part of the CARES Act, corporations are now able to carry back net operating losses (“NOLs”) from 2018, 2019 and 2020 to the previous five taxable years. For corporations, including taxable REIT subsidiaries (“TRSs”) and U.S. blocker corporations (for non-U.S. investors), that had a 2018 net operating loss, an immediate carryback action can be taken to get much-needed cash refunds in the door. The analysis can be complex, since there are certain interrelated provisions that should be considered. For example, the higher corporate tax rates which apply to the pre-2018 tax years are an added benefit that should be considered in the carryback analysis, as well as in relation to certain elective provisions in the CARES Act. Furthermore, to the extent 2019 is also a loss year, immediate preparation of 2019 corporate tax returns takes on added urgency. Even so, while taxpayers are no doubt eager to get the process moving, we await the much-needed guidance on the horizon. The IRS has issued some of that guidance with Notice 2020-26, which will allow corporate taxpayers to carry 2018 NOLs back using the “quick refund” Form 1139.

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There are certainly other less obvious provisions with regard to carryback claims – for example, the acquiring corporations in a merger/acquisition may be able to carry back NOLs to pre-merger/acquisition years. (However, the details of the purchase and sale agreement would have to be scrutinized to determine the true owner of the refund.)

Additionally, the CARES Act included provisions for accelerated depreciation and increased interest expense deductions for qualified investment property. These changes also create a layer of complexity for corporations and need to be carefully considered to be most tax efficient, i.e. secure the highest refund. These provisions require additional guidance from the IRS, which we all eagerly await.

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