Federation of Tax Administrators
9.14.2021
MEMORANDUM
Build Back Better Act
House Ways and Means Markup
Tax Provisions

Background

Earlier this year, President Biden unveiled the 'Build Back Better Plan,' a multi trillion-dollar proposal that would provide federal relief (American Rescue Plan Act, P.L. 117-2), invest in our nation's infrastructure (American Jobs Plan; Infrastructure Investment and Jobs Act (IIJA)), and invest in a wide range of social programs (American Families Plan). By mid-July 2021, Congress had rolled many of the proposals of the American Families Plan into what is now known as the Build Back Better Act (BBBA) – a $3.5 trillion social investment package. The BBBA is currently under 13 House committee jurisdictions which has followed the reconciliation process, available to Congress to pass legislation quickly, as outlined below:

- Both the House and Senate must agree on a budget resolution that includes directives for specified committees. A budget resolution is exempt from filibuster in the Senate, needing only a simple majority for approval and must be related to legislation that relates to spending, revenue, or the federal debt limit.
- Each House and Senate committee that received reconciliation instructions marks up and approves legislation consistent with its reconciliation directives. ***Under the current 50-50 Senate, it is expected that Senate Finance Chairman Ron Wyden (D-OR) is in close negotiations with Senate Democratic Leadership on legislation that would later be in conference with House-passed legislation.***
- Both the House and Senate Budget Committees collect the reconciliation submissions from each committee that receives instructions, packages them together without change into one bill, and reports that bill to their respective chamber. ***For BBBA, the House Ways and Means Committee reported their reconciliation bill to the House Budget Committee on September 15.***
- The House and Senate then debate and, possibly, amend the reconciliation bills. The House can prohibit amendments to a reconciliation bill, while the Senate must allow an unlimited number of amendments to be offered and voted on.
- A House-Senate conference committee produces one single compromise reconciliation bill, which the House and Senate then pass and the President signs into law.

To pay for the large expansion in social spending, House Ways and Means Committee Chairman Richard Neal (D-MA1) introduced legislation that provides $2.1 trillion in tax increases on corporations and high-income earners. The legislation was passed out of committee, 24-19, on largely party-line vote with Congresswoman Stephanie Murphy (D-FL7) voting against her party. Over the course of the several day markup, the Committee agreed to a variety of tax increases, but did not include capital gains tax on the appreciated assets held by wealthy individuals until death. Democrats are still searching for a consensus on a proposed IRS bank reporting requirement and an approach on the $10,000 federal deduction cap on state and local tax (SALT) put into place under P.L. 115-97, the Tax Cuts and Jobs Act (TCJA).

Reps. Bill Pascrell (D-NJ9) and Tom Suozzi (D-NY3) reached a deal with Chairman Neal during the committee markup this week that reiterated their commitment to finding some SALT solution. Critics of the SALT cap repeal have publicly shared their concern that a full repeal would benefit the wealthy. A coalition of House Democrats from New York, New Jersey, and states with high SALT rates have said they won't support a reconciliation package without SALT cap relief and several progressive lawmakers have been hesitant to embrace a cut. As the legislation moves to the House Rules Committee before receiving floor time, it is rumored that the repeal could be included as an amendment with a possible two-year sunset to help BBBA's score as more centrist by-in will be needed to move the legislation forward.

Many in Washington believe Congressional Democrats are unable to pass a full $3.5 trillion package, as desired by progressives, because of resistance from the centrists. Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) are key Members that could either drastically reduce the scope of the legislation as its being crafted, or completely halt it. In the days surrounding the Ways and Means markup, President Biden has directly engaged with Manchin and Sinema to find room for negotiation to move the package forward. Meanwhile Wyden has indicated he would like to address partnership's tax planning and potential income-shifting. Wyden has expressed that partnership tax rules are too complicated to audit properly and will likely be a part of current Senate negotiations. Final Senate text has yet to be released.

Speaker Pelosi has indicated that she would like the legislation to be on the House floor for full consideration by September 27. This is an ambitious goal since the House will also need to schedule time to consider IIJA as well as raising the federal debt ceiling and funding the government before the September 30 deadline. Senate action has largely focused negotiations between committee chairs and Leadership. Given the 50-50 split in the Senate, we should not expect a markup in Senate Finance and a likely scenario is that legislation could head straight to conference without going through regular procedure. There is a growing recognition that next steps forward on BBBA could take some time, lasting into the following calendar year.

BBBA Key Tax Provisions

While this legislation is far from final, BBBA is estimated by the Congressional Budget Office to increase next tax revenue by $700 billion over the next ten years. Some other key provisions include the following:

Corporate Tax: Replaces the flat corporate income tax rate with a graduated rate structure – 18% on the first $400,000 of income; 21% on income up to $5 million; and 26.5% on income beyond $5 million. The graduated benefit rate phases out for corporations making over $10 million and personal services corporations are not eligible for graduated rates. Domestic dividends receiving deduction is adjusted to hold constant tax on domestic corporate-to-corporate dividends. Effective date: taxable years ending after December 31, 2021.

Interest Expense of International Financial Reporting Groups: Adds section 163(n) limits the interest deduction of certain domestic corporations which are members in an international financial reporting group to be an allowable percentage of 110% of the net interest expense. An allocable share of the domestic corporation's net interest expense is the portion of the expense which bears the same ration to the total group expense as the corporation's EBITDA bears to the group's total EBITDA. Effective Date: Taxable years beginning after December 31, 2021.

Outbound International Provisions: Increases the tax on global intangible low-taxed income (GILTI) to 37.5% by reducing the deduction available for the levy under IRC Section 205. Foreign-Derived Intangible Income (FDII) increases to 21.2% because of the reduction of the Section 205 deduction. GILTI tax regime is calculated by determining the total liability in each country where a U.S. shareholder resides and pay taxes on a foreign-controlled corporation. Dividend exemption and foreign tax credit provisions are applied retroactively and foreign tax-credit carrybacks are eliminated but excess credits are allowed to be carried forward for less than then 10 years. Effective Date: A transition rule is provided for taxable years that include but do not end on December 31, 2021

Inbound International Provisions: Base Erosion Anti-Abuse Tax (BEAT) is amended by allowing for the full value of tax credits, eliminating the cost of goods sold exception, and exempting payments from the BEAT tax if the effective foreign tax rate is not lower that the BEAT tax rate. BEAT rates increase to 12.5% in taxable years beginning after December 23, 2023 and before January 1, 2026; and 15% in any taxable year beginning after December 31, 2025. Except for the increased BEAT rates, the BEAT provisions are effective for taxable years beginning after December 31, 2021.

Other Business Provisions: Starting in tax years after December 31, 2021, BBBA amends section 199A by capping passthrough deduction at $500,000 for a joint return, $400,000 for an individual return, $250,000 for a married individual filing a separate return, and $10, 000 for a trust of estate. BBBA also increases the capital gains rate to 25% and a transition rule provides that the preexisting statutory rate of 20% continues to apply to gains and losses for the portion of the taxable year prior to introduction date. Extends the NIIT to income derived in the ordinary course of trade or business for taxpayers with incomes greater than $500,000 (married)/$400,000 (single).

Tobacco Taxes: The bill prohibits importers from claiming a drawback of duties, taxes, and fees paid on tobacco products even if those same products or their commercial equivalents are later exported and removed from the country. It also makes several changes to excise taxes for tobacco products, including increases on cigarettes, small cigars and roll-your own tobacco, a change to a per-pound tax on large cigars and new taxes on single-use smokeless tobacco and taxable nicotine. The tax increases for cigarettes, small cigars and smokeless tobacco are effective in calendar quarters after date of enactment. The tax increases for large cigars, discrete single-use units and taxable nicotine are effective 180 days after date of enactment. The prohibition on refunds of duties, taxes, and fees paid on imports is made retroactive to 2018, even if those payments were later lawfully claimed as drawbacks.

Internal Revenue Service (IRS) Support: $79 billion is provided for the IRS to improve enforcement tools. None of the funds can be used to increase taxes on taxpayers with income under $400,000.

Additional Resources:

- Legislative Text
- Section-BY-Section

For questions, please contact FTA staff

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