US Congress passes 1-Year retroactive "extenders" package

December 17, 2014

It's been called "a terrible way to make tax policy" and "not that great a deal for families, individuals, and businesses"--and that's just by its supporters. Still, even though far from ideal, the "Tax Increase Prevention Act of 2014" is an early Christmas present for taxpayers.

The bill seamlessly extends 50 tax provisions that expired earlier this year through the end of 2014. A couple of expiring provisions get a prospective extension: certain multiemployer defined benefit pension plan provisions that expire at the end of 2014 would be extended through the end of 2015. The bill also includes the popular Achieving a Better Life Experience Act (or "ABLE" Act) which permits the creation of special tax-exempt accounts for individuals with disabilities.

For a chart listing which expired and expiring tax provisions are extended by the bill (and which are not), along with all of the other tax provisions in the bill, see below.

What the Extender Package Means in the Short Term

It may not be feasible to undertake a year's worth of R&D between now and the end of the year to take advantage of the extended research credit, but there is still a small window of time to take advantage of certain extended provisions.

- If you are considering the purchase of business equipment, you may want to do so before the end of the month to take advantage of the increased section 179 expensing (if you are a small business) or "bonus depreciation" (if you are a larger business).
- If you are a US multinational and have been deferring a dividend payment from a controlled foreign corporation (or "CFC") to another CFC while you waited to see whether the CFC look-through rule of section 954(c)(6) would be extended, now is the time to pay that dividend.
- If you were considering a charitable contribution and were waiting to see if any of the expired charitable contribution extenders would be extended, you can act now.
- If you have been holding off on making qualified energy improvements to see if section 25C has been extended, your reason for proscratination is over.

Of course, because the extensions are retroactive, actions taken earlier this year qualify for the extended provisions as well. So, those who bet that their provision would be extended retroactively will be rewarded--unless they relate to electric scooters (section 30C(g)(2)), certain health insurance costs (section 30D(g)), qualified refinery property (section 179C(c)), or New York Liberty Zone bonds, provisions that were not extended by the bill. Still, retroactive extension provides little practical value to those who rely on those extenders, such as the wind energy production tax credit, where it is not commercially feasible to take significant actions prior to extension.

What the Extender Package Means in the Long Term

For many taxpayers, the new year will begin just as the old year did, with their not knowing whether or when the tax provisions that expired at midnight on New Year's Eve will be extended. However, the one-year extension in the Tax Increase Prevention Act necessarily means that Congress will take up the expired tax provisions in 2015. Indeed, the fact that Congress extended the provisions for just one year clearly indicates that Congress intends to spend next year scrutinizing the provisions. That heightened scrutiny may be good news for proponents of provisions that came close to being made permanent in the negotiations earlier this month, since another concerted try for permanence is likely next year. On the other hand, the heightened scrutiny may be bad news for those provisions that have generated opposition and controversy. Despite the recent history of retroactive extensions, tax writers in Congress could warn affected taxpayers early in 2015 not to count on a provision being extended again. Such a warning would particularly impact those provisions which require significant lead-time before a qualifying investment can be made and with respect to which taxpayers are reluctant to act without the certainty of extension.

The biggest question is how this expected scrutiny of extenders fits into the likely debate next year over tax reform. The extenders' position is an uneasy one. Traditionally, the debate on extenders has been how they fit into the current Internal Revenue Code: in other words, does a particular provision deserve to be part of permanent tax law or should it be allowed to lapse as merely a temporary departure from permanent tax law? Any conclusion to that inquiry inherently reflects the goals and policy of current tax law. Tax reform, on the other hand, is a debate about whether and how the Internal Revenue Code should be changed to reflect different tax policies and goals. Thus, temporary provisions like extenders effectively have to pass muster under both current tax policy and future tax policy. So, even if an extender met the first test, i.e., Congress concluded that a particular extender deserved to be made permanent in light of current tax policy, that newly-minted permanence would not protect that provision if all similar tax expenditures are being eliminated in the course of tax reform. For example, several extenders relate to depreciation and cost recovery. If Congress were to make a high-level decision about lengthening depreciation schedules as part of tax reform--a common element to many tax reform plans--that change in underlying "permanent" law would make certain extenders obsolete and change the analysis of those that were still relevant.

So, why fight over permanence if permanence means little if everything is on the table in tax reform? The answer lies in the fact that extenders have historically been extended, at least in recent years, without revenue offsets. If Congress seeks to do revenue-neutral tax reform, then extension of temporary provisions have to be "paid for" if they are included in new tax system. That constraint makes revenue-neutral tax reform harder to achieve because taxpayers will naturally evaluate the new, reformed tax system by comparing it to today's tax code (with its temporary provisions) rather than comparing it to the hypothetical tax code that would exist in the future with all the expiring tax provisions having lapsed. Such an apples-to-oranges comparison makes the proposed tax reform appear to have "eliminated" even more existing incentives and benefits than it really did to achieve lower rates. Thus, on a fundamental level, the fight over whether an extender is made permanent or not is really a fight over the baseline for tax reform. It is no indication that an extender will survive tax reform (if it happens) unscathed.

It's a confusing situation with no obvious answer. No wonder Congress puts it off as long as it can each year.

"Extenders" and other tax provisions in H.R. 5771,

the Tax Increase Prevention Act of 2014

Expired provisions

Provision (Section of Internal Revenue Code)	Provision Currently No Longer Applies to	The "Tax Increase Prevention Act of 2014" (H.R. 5771) as passed by House on December 3, 2014, and the Senate on December 16, 2014
Credit for certain nonbusiness energy property (section 25C(g))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Alternative fuel vehicle refueling property (non-hydrogen refueling property) (section 30C(g)(2))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Credit for two- or three-wheeled plug-in electric vehicles (section 30D(g))	Property acquired after 12/31/13	Not extended
Credit for health insurance costs of eligible individuals (section 35(b)(1))	Months beginning after 12/31/13	Not extended
Second generation biofuel producer credit (section 40(b)(6)(J))	Production after 12/31/13	Extends through 2014, retroactive to expiration
Incentives for biodiesel and renewable diesel (sections 40A, 6426(c)(6), and 6427(e)(6)(B))	Fuel sold or used after 12/31/13	Extends through 2014, retroactive to expiration
Research and experimentation tax credit (section 41(h)(1)(B))	Amounts paid or incurred after 12/31/13	Extends through 2014, retroactive to expiration
Determination of applicable percentage of low income housing tax credit (section 42)	Allocations made after 12/31/13	Extends through 2014, retroactive to expiration
Placed-in-service date for wind and certain other renewable resource facilities eligible to claim electricity production credit (section 45(d))	Construction beginning after 12/31/13	Extends through 2014, retroactive to expiration
Credit for production of Indian coal (section 45(e)(10)(A))	Coal produced after 12/31/13	Extends through 2014, retroactive to expiration
Indian employment tax credit (section 45A(f))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
New markets tax credit (section 45D(f)(1))	New allocations for calendar years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Credit for certain expenditures for maintaining railroad tracks (section 45G(f))	Expenditures paid or incurred during taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Credit for construction of new energy efficient homes (section 45L(g))	Qualified new energy efficient homes acquired after 12/31/13	Extends through 2014, retroactive to expiration
Credit for energy efficient appliances (section 45M(b))	Appliances purchased after 12/31/13	Extends through 2014, retroactive to expiration
Mine rescue team training credit (section 45N)	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration

Employer wage credit for activated military reservists (section 45P)	Payments made after 12/31/13	Extends through 2014, retroactive to expiration
Work opportunity tax credit (section 51(c)(4))	Wages paid or incurred for individuals beginning work after 12/31/13	Extends through 2014, retroactive to expiration
Allocation of bond limitation on Qualified Zone Academy Bonds (section 54E(c)(1))	Obligations issued after 12/31/13	Extends through 2014, retroactive to expiration
Deduction for certain expenses of elementary and secondary school teachers (section 62(a)(2)(D))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Discharge of indebtedness on principal residence (section 108(a)(1)(E))	Discharges of indebtedness beginning after 12/31/13	Extends through 2014, retroactive to expiration
Parity for exclusion for employer-provided mass transit and parking benefits (section 132(f))	Months after 12/31/13	Extends through 2014, retroactive to expiration
Treatment of military basic housing allowances under low-income housing credit (section 142(d))	Distributions after 12/31/13	Extends through 2014, retroactive to expiration
Deduction for mortgage insurance premiums (section 163(h)(3)(E))	Amounts paid or accrued after 12/31/13	Extends through 2014, retroactive to expiration
Deduction for State and local general sales taxes (section 164(b)(5))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
3-year depreciation for race horses two-years old or younger (section 168(e)(3)(A))	Horses placed in service after 12/31/13	Extends through 2014, retroactive to expiration
15-year straight-line cost recovery for qualified leasehold improvements, qualified restaurant buildings and improvements, and qualified retail improvements (section 168(e)(3)(E))	Qualified retail improvement property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
7-year recovery period for motorsports entertainment complexes (section 168(i)(15))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Accelerated depreciation for business property on an Indian reservation (section 168(j)(8))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
50% "bonus" depreciation and election to accelerate AMT credits in lieu of bonus depreciation (sections 168(k) and 460(c)(6)(B))	Property acquired after 12/31/13	Extends through 2014, retroactive to expiration, with special rule for round 4 extension property
Special depreciation allowance for cellulosic biofuel plant property (section 168(l))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Special rules for contributions of capital gain real property made for conservation purposes (sections 170(b)(1)(E) and (b)(2)(B))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Enhanced charitable deduction for contributions of food inventory (section 170(e)(3)(C))	Contributions made after 12/31/13	Extends through 2014, retroactive to expiration
Increase in expensing to $500,000/$2,000,000 and expansion of definition of section 179 property (sections 179(b)(1), (b)(2), (d), and (f))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Deduction to expense certain refineries	Property placed in service	Not extended

(section 179C(c))	after 12/31/13	
Deduction for energy-efficient commercial buildings (section 179D(h))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Election to expense advanced mine safety equipment (section 179E(a))	Property placed in service after 12/31/13	Extends through 2014, retroactive to expiration
Special expensing rules for certain film and television productions (section 181(f))	Qualified film and television productions commencing after 12/31/13	Extends through 2014, retroactive to expiration
Deduction allowable with respect to income attributable to domestic production activities in Puerto Rico (section 199(d)(8))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Above-the-line deduction for qualified tuition and related expenses (section 222(e))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Tax-free distributions from individual retirement plans for charitable purposes (section 408(d)(8))	Distributions made in taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Special rule for sales or dispositions to implement FERC or State electric restructuring policy (section 451(i))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Modification of tax treatment of certain payments to controlling exempt organizations (section 512(b)(13)(E)(iv))	Payments received or accrued after 12/31/13	Extends through 2014, retroactive to expiration
Favorable treatment of certain dividends of RICs to foreign investors (sections 871(k)(1)(C) and (k)(2)(C))	Dividends with respect to any taxable year of the RIC beginning after 12/31/13	Extends through 2014, retroactive to expiration
RIC qualified investment entity treatment under FIRPTA (section 897(h)(4))	After 12/31/13	Extends through 2014, retroactive to expiration
Exceptions under subpart F for active financing income (sections 953(e)(10) and 954(h)(9))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Look-through treatment of payments between CFCs under the foreign personal holding company rules (section 954(c)(6))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
100% exclusion for qualified small business stock (section 1202(a)(4))	Stock acquired after 12/31/13	Extends through 2014, retroactive to expiration
Basis adjustment to stock of S corporations making charitable contributions of property (section 1367(a))	Contributions made after 12/31/13	Extends through 2014, retroactive to expiration
Reduction in S corporation recognition period for built-in gains tax (section 1374(d)(7))	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Empowerment zone tax incentives (sections 1202(a)(2), 1391, 1394, 1396, 1397A, and 1397B)	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
Incentives for alternative fuel and alternative fuel mixtures (sections 6426(d)(5) and (e)(3) and 6427(e)(6)(C))	Fuel without liquefied hydrogen sold or used after 12/31/13; fuel involving liquefied hydrogen sold or used after 9/30/14	Extends through 2014, retroactive to expiration

Temporary increase in limit on cover over of rum excise tax revenues (from $10.50 to $13.25 per proof gallon) to Puerto Rico and the Virgin Islands (section 7652(f))	Articles brought into the United States after 12/31/13	Extends through 2014, retroactive to expiration
Economic development credit for American Samoa (Section 119 of P.L.109-432)	Taxable years beginning after 12/31/13	Extends through 2014, retroactive to expiration
New York Liberty Zone tax-exempt bond financing (section 1400L(d)(2)(D))	Bonds issued after 12/31/13	Not extended

Expiring provisions

Provision (Section of Internal Revenue Code)	Provision Will Not Be Available for	The "Tax Increase Prevention Act of 2014" (H.R. 5771) as passed by House on December 3, 2014, and the Senate on December 16, 2014
Alternative motor vehicle credit for qualified fuel cell motor vehicles (section 30B(k)(1))	Property purchased after 12/31/14	Not extended
Alternative (hydrogen) fuel vehicle refueling property (section 30C(g)(1))	Property placed in service after 12/31/14	Not extended
Automatic amortization extension for multiemployer defined benefit pension plans (section 431(d)(1)(C))	Applications submitted after 12/31/14	Extends through 2015
Additional funding rules for multiemployer defined benefit pension plans in endangered or critical status (section 432 and section 221(c) of P.L.109-280)	Plan years beginning after 12/31/14	Extends through 2015
Special shortfall funding rules for multiemployer defined benefit pension plans (section 201(b) and section 221(c) of P.L.109-280)	Plan years beginning after 12/31/14	Extends through 2015
Internet Tax Moratorium (title XI of division C of P. L. 105-277, as extended by section 126 of P.L. 113-164)	Periods after December 11, 2014	Exended through October 1, 2015, by section 624 of Division E of the "Consolidated and Further Continuing Appropriations Act, 2015."

Other tax provisions

Provision	Description	The "Tax Increase Prevention Act of 2014" (H.R. 5771) as passed by House on December 3, 2014, and the Senate on December 16, 2014
Technical Corrections and "Deadwood"	Technical corrections are noncontroversial corrections to previous tax bills and deadwood refers to deletion of obsolete and expired text	Included

ABLE Act Provisions	Permits creation of "Achieving a Better Life Experience" Accounts that provide certain tax and other benefits to individuals with disabilities	Included
Increased threshold for Joint Committee on Taxation review of refunds and credits	The threshold for JCT review of corporate refunds and credits would be increased to $5 million	Included
Increase in Inland Waterways Trust Fund financing rate	The per gallon excise tax would increase to 29 cents from its current rate of 20 cents	Included (as offset to ABLE Act)
New rules for Certified Professional Employer Organizations	Professional Employer Organizations certified by the IRS would become solely responsible for a customer's employment taxes	Included (as offset to ABLE Act)
Exclusion of CFC dividends from personal holding company income	Dividends from controlled foreign corporations would no longer trigger 20% tax on personal holding company income	Included (as offset to ABLE Act)
Inflation adjustment for civil tax penalties	Certain fixed dollar civil penalties in the Internal Revenue Code would be indexed for inflation	Included (as offset to ABLE Act)
Increase in continuous levy	Treasury Department would be permitted to impose a 30% (up from 15%) levy on payments to Medicare providers with unpaid taxes	Included (as offset to ABLE Act)

Your Key Contacts

John L. Harrington
Partner, Washington, DC
D +1 202 408 6352
M +1 703 801 7097
john.harrington@dentons.com

Marc D. Teitelbaum
Partner, New York
D +1 212 768 6749
M +1 917 903 7888
marc.teitelbaum@dentons.com