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In This Issue:

First 50 Days: Executive Branch Appointments and Covid Relief in the Spotlight

After being sworn into office on January 20, President Biden began his first term by making key appointments to the executive branch agencies that would be responsible for effectuating the administration's policy agenda. Among the many appointments that President Biden will make, tax departments and practitioners should pay particular attention to the incoming personnel at the US Department of the Treasury ("Treasury"). These key appointments offer insight into the policy positions that the administration could take with respect to regulatory changes, international taxation, and other key considerations for taxpayers.

Similarly, with a Democratic majority in both the US House of Representatives and US Senate, both chambers focused their early efforts on immediately passing a stimulus package to mitigate the economic effects of the Covid-19 pandemic and provide relief for businesses and individuals.

This article provides Baker's insights into key Biden Administration appointments who will play an integral part in shaping the administration's tax agenda and discusses the American Rescue Plan Act of 2021, which President Biden signed into law on March 11, 2021, his 51st day in office.

Key Treasury Appointments

Janet Yellen was confirmed by the Senate on January 25, 2021 as the 78th Secretary of the Treasury. As many readers know, Secretary Yellen has extensive government experience: she served as Chair of the Council of Economic Advisers between 1997 and 1999 and held a number of positions with the Federal Reserve before serving as Chair of the Federal Reserve Board of Governors from 2014 to 2018. Secretary Yellen began sharing her views on key tax matters as early as the Senate Finance Committee hearing on her nomination, where she suggested that an increase in the corporate tax rate may be appropriate, though it is not on the administration's list of immediate priorities. Additionally, Secretary Yellen noted the administration's desire to amend portions of the Tax Cuts and Jobs Act of 2017 ("TCJA").

Regarding international taxation, Secretary Yellen has acknowledged the new challenges facing the global economy and committed to engaging in "multilateral discussions on both pillars within the OECD/G20 Inclusive Framework, overcoming existing disagreements, and finding workable solutions in a fair and judicious manner." At her first meeting of G20 Finance Ministers and central bankers, Secretary Yellen informed her counterparts that the United States would no longer insist on a "safe harbor" in the Pillar I negotiations — a statement that was generally interpreted by her counterparts as a positive sign and an indication of the US's willingness to actively engage in negotiating Pillars I and II.

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Upcoming Tax Events

SALT Savvy: Coast-to-Coast Updates
►April 7, 2021

International VAT Conference 2021
►April 20-22, 2021

To review the complete Tax Events Calendar visit www.bakermckenzie.com/tax/event

President Biden's preference for tax nominees and staff with previous government experience and bipartisan relationships extends to Treasury's Office of Tax Policy. Lily Batchelder was recently nominated for Assistant Secretary for Tax Policy. At the time of publication, Ms. Batchelder's confirmation hearing date had not yet been scheduled. As Assistant Secretary, Ms. Batchelder will be responsible for overseeing the Office of Tax Policy — the office with the primary responsibility to develop and implement tax policy, negotiate bilateral agreements and international treaties, and work with the IRS to promulgate Treasury regulations and other tax guidance. Immediately prior to joining Treasury, Ms. Batchelder was the Robert C. Kopple Family Professor of Taxation at New York University School of Law, where her scholarship focused on business tax reform, wealth transfer taxes, and individual income taxes. Like Secretary Yellen, Ms. Batchelder has prior government experience; she served as Deputy Director of the White House National Economic Council and Deputy Assistant to President Obama from 2014 to 2015. From 2010 to 2014, she served as Majority Chief Tax Counsel for the US Senate Committee on Finance. Until Ms. Batchelder is confirmed, Mark Mazur will continue serving as Acting Assistant Secretary for Tax Policy in a reprise of his role as Assistant Secretary in the final years of the Obama Administration.

Other key members of the Office of Tax Policy with prior government experience include Jeffrey Van Hove (Counselor for Regulatory Affairs), Itai Grinberg (Deputy Assistant Secretary for Multilateral Negotiations), Jose Murillo (Deputy Assistant Secretary for International Tax Affairs), and Tom West (Deputy Assistant Secretary for Business Tax). Rounding out the front office are Rebecca Kysar (Counselor to the Assistant Secretary) and Kimberly Clausing (Deputy Assistant Secretary, Tax Analysis). Tim Skud continues to serve as Deputy Assistant Secretary for Tax, Trade and Tariff Policy, a position he has held for many years.

Finally, Aruna Kalyanam is the Deputy Assistant Secretary for Tax and Budget in the Office of Legislative Affairs. Prior to joining Treasury, Ms. Kalyanam spent more than 20 years on Capitol Hill, where she most recently served as the Deputy Chief Tax Counsel and Staff Director for the US House Committee on Ways and Means.

The significant growth in the size of the staff in the Office of Tax Policy and the addition of a Deputy Assistant Secretary responsible for tax matters in the Office of Legislative Affairs demonstrates that tax is a high priority for the Biden Administration. In particular, Ms. Kalyanam's role indicates that the Biden administration has significant tax legislative plans. Furthermore, splitting the role of Deputy Assistant Secretary for International Matters (held by Chip Harter in the Trump Administration) into two separate positions — one focused on international tax guidance and the other focused on multilateral organizations and treaties — suggests a significant investment on the part of the Biden Administration in the OECD/IF negotiations on Pillars I and II.

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Now that the American Rescue Plan of 2021 has been enacted, we can expect Treasury to shift its focus to finalizing the President's budget and its accompanying tax legislative proposals and engaging with the OECD on Pillars I and II. We expect the Biden Administration to resume the practice of issuing a "Greenbook" that describes the President's tax legislative proposals in detail, accompanied by a revenue estimate for each proposal. We think that it is likely that the Greenbook will be released in April or May, although that timing is subject to change.

American Rescue Plan Act of 2021

As President Biden continues to staff key positions within his administration and implement some of his early policy proposals, both chambers of Congress finalized a $1.9 trillion stimulus package to mitigate the financial impact of the ongoing Covid-19 pandemic and invest in the economy. The American Rescue Plan Act (the "ARP" or the "Act") of 2021 received a final congressional vote on March 10, 2021 — President Biden's 50th day in office — and was signed into law on March 11, 2021. Although Congress used the reconciliation process to enact the ARP, President Biden and Congressional Democrats have a second opportunity to use reconciliation in 2021.

Under Title IX of the ARP, Congress authorized a third round of stimulus payments to individuals, extended unemployment benefits, and expanded a number of tax credits and rebates for individuals. The Act allows certain individuals to claim a recovery rebate as a credit against the taxes related to unemployment benefits. The Act also revises several other credits for individuals to either broaden access, increase the credit amount, or both, including the Child Tax Credit and the Earned Income Tax Credit.

Key tax provisions of interest to businesses in the Act include:

- Extension of the Employee Retention Credit ("ERC") through December 31, 2021, and the Families First Coronavirus Response Act paid leave credit through September 30, 2021,
- Amendments to Section 6050W to reduce the dollar threshold (to $600) and eliminate the 200 transaction threshold for when third party settlement organizations ("TPSOs") are required to file information returns, effective for returns for calendar year 2022,
- Expansion of the Section 162(m) limitation on deducting certain employee compensation for years beginning after 2026,
- Repealing Section 864(f), worldwide interest allocation, for taxable years beginning after December 31, 2020, and
- Extension of limitation on excess business losses of non-corporate taxpayers.

Congress first enacted the ERC, under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), and expanded it in the Consolidated Appropriations Act of 2020 by increasing the amount of the available credit, lowering the threshold for employer eligibility to claim the credit, and expanding the time period for which the credit is available. The ARP further extends the ERC by making the credit available for Q3 and Q4 of 2021.

In addition, Congress expanded the limitation on deducting employee remuneration greater than $1 million. Under current law, a publicly-traded company's deduction for employee compensation is capped at $1 million for compensation paid to the CEO, CFO, and the top three highest compensated officers. The Act expands that list to include an additional top five highest paid employees (beyond the CEO, CFO and top three highest compensated) for tax years beginning after December 31, 2026.

Looking Ahead

While the Treasury Department will turn its attention to issuing guidance implementing the Act and finalizing the tax proposals that will be published in the Biden Administration's first Greenbook, Congress has multiple legislative priorities that currently are under consideration, many of which provide an opportunity for additional tax legislation. If Congress's next major legislative effort focuses on infrastructure, as many observers anticipate, it is likely that tax provisions related to energy credits and incentives will be considered for inclusion. The tax writing committees also are also examining the impact of international tax provisions on US businesses, and international tax reform and other business tax changes may be on the agenda later this year. We expect 2021 to be a busy year for tax proposals, both from a regulatory and legislative standpoint, and taxpayers should be prepared for a flurry of activity.

By: Alexandra Minkovich and Don Crawford, Washington, DC

Tax Court Clarifies Section 6751(b) in Penalty Approval Cases

The Tax Court has decided two cases further interpreting the section 6751(b) procedural requirements requiring supervisory approval for assessing penalties. Section 6751(b)(1) provides that "[n]o penalty under [the Internal Revenue Code] shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination . . . ." Congress enacted this provision in response to concerns that revenue agents might threaten to impose penalties during an examination to compel taxpayers to settle. *See* S. Rept. No. 105-174, at 65 (1998). In short, the provision prevents the IRS from improperly using penalties as bargaining chips during the examination process. The Tax Court's new case law clarifies the evolving interpretation of section 6751(b), which has been discussed in previous Tax News and Developments Newsletters from February 2020, March 2019, and July 2018. Those prior newsletters discussed, among others, the court cases *Chai v. Comm'r*, 851 F.3d 190 (2nd Cir. 2017), *Graev v. Comm'r*, 149 T.C. 485 (2017), and *Clay v. Comm'r*, 152 T.C. No. 13 (2019). In *Chai* and *Clay*, the courts rejected penalties assessed by the IRS because the IRS did not comply with section 6751(b). In *Chai*, the Second Circuit held that written supervisory approval was a necessary element of proof for penalty assessment, and the IRS failed to meet its burden of proof. Seeking uniformity with the Second Circuit, the Tax Court in *Graev* held that supervisory approval of the initial determination was necessary to impose a penalty under section 6751. In *Clay*, the Tax Court found supervisory approval occurred after the initial determination of proposed penalties had been communicated to the taxpayers, so supervisory approval was not timely under section 6751(b).

In *Oropeza v. Comm'r*, 155 T.C. No. 9 (2020), the court addressed whether a Form 4549, commonly known as a revenue agent report ("RAR"), and an accompanying Letter 5153 constituted an "initial determination" for purposes of section 6751(b). The RAR informed the taxpayer that the IRS had asserted penalties, and the January 14, 2015 Letter 5153 accompanying the RAR gave the taxpayer three options: accept the adjustments set forth in the RAR, sign a Form 872 limitations period extension and go to Appeals, or receive a notice of deficiency. This letter made clear that the IRS' Exam division had concluded its work and "had made a definite decision to assert penalties." The same day the revenue agent mailed the Letter 5153, the revenue agent submitted the Civil Penalty Approval Form to the agent's immediate supervisor, who signed the Civil Penalty Approval Form authorizing the penalty about two weeks later on January 29, 2015. On May 6, 2015, the IRS issued the taxpayer a notice of deficiency.

The IRS argued the notice of deficiency constituted the "initial determination" under section 6751(b), and the IRS satisfied section 6751(b) procedural requirements because a supervisor approved the penalty before the May 2015 notice of deficiency. The Tax Court rejected this interpretation, holding instead that "depending on how a particular examination is conducted, the taxpayer may receive this [penalty] notification in a notice of deficiency, or he may receive the notification in a document that the IRS sent him at an earlier date." The Tax Court concluded that the January 14, 2015 Letter 5153 constituted the "initial determination" of the penalty, and the IRS did not secure supervisory approval for the penalty until January 29, 2015. Thus, the penalty approval was untimely.

The court reasoned that analysis of initial determinations must center on the IRS communication to the taxpayer and not on the subjective intentions of IRS personnel regarding impositions of penalties. Because the RAR in *Oropeza* asserted four grounds for imposing a penalty, the taxpayer would have logically read the RAR as imposing a penalty based on four alternative grounds. The RAR "made clear that the Examination Division had concluded its work and had made a definite decision to assert penalties" and, thus, embodied an initial determination requiring prior supervisory approval.

In *Beland v. Comm'r*, 156 T.C. No. 5 (2021), the Tax Court addressed whether an RAR presented to a taxpayer during a closing conference meeting constituted an "initial determination" for purposes of section 6751(b). During an August 2015 meeting, which constituted the taxpayer's closing conference, a revenue agent presented the taxpayer with an RAR containing a fraud penalty, though the revenue agent claimed she presented the RAR for discussion purposes. The taxpayer did not agree to the fraud penalty and declined to sign the RAR or Form 872 to extend the limitations period. The revenue agent then closed the case and sent a Civil Penalty Approval Form containing the fraud penalty to her supervisor for signature. On September 1, 2015, the IRS issued a notice of deficiency to the taxpayer that included the fraud penalty and the same RAR discussed with the taxpayer at the August 2015 meeting.

Building on *Oropeza*, the Tax Court held that the RAR as presented in the closing conference constituted an initial determination for the purposes of section 6751(b) because the RAR presented the taxpayer with "an opportunity, if not expectation, to legally bind [taxpayer] to [a penalty] assessment." The Tax Court clarified that the term "initial determination" for a penalty assessment "denotes a communication with a high degree of concreteness and formality" and represents a "consequential moment of IRS action." The court rejected limiting "initial determinations" to documents delivered by mail. The Tax Court concluded that the completed RAR given to the taxpayer during the August 2015 meeting, coupled with the context surrounding its presentation, represented a "consequential moment" in which the revenue agent formally communicated her initial determination under section 6751(b)(1) that the taxpayer should be subject to the fraud penalty. Because the revenue agent failed to obtain supervisory approval before presenting the RAR to the taxpayer, the penalty approval was untimely.

The IRS also argued that the RAR could not be an initial determination because the taxpayer did not have appeal rights when the IRS presented the RAR to the taxpayer. The court rejected this argument, holding that while appeal rights may be an indication of an initial determination, they were not a necessary component of one. *Oropeza* and *Beland* demonstrate the right to appeal is not a necessary component of an initial determination. Thus, taxpayers are able to use the supervisory-approval defense even if not afforded the right to appeal. Furthermore, it is not necessary that a revenue agent formerly end the examination process by closing a case and issuing a notice of deficiency for a taxpayer to assert the supervisory-approval defense. If a taxpayer is presented with a document communicating a penalty that can be reasonably understood as already fixed, the taxpayer can argue that an IRS supervisor must have approved the penalty by that point in time.

By: Jonathan Talley, Chicago and Chengwen Tse, Palo Alto

The Texas Third Court of Appeals Changes Course in *Hegar v. El Paso Electric Co.*

In groundbreaking news, the Texas Third Court of Appeals has withdrawn its earlier opinion and issued a new opinion in the *Hegar v. El Paso Electric Co.* case, allowing a taxpayer to assert all of its arguments against the Comptroller's sales tax assessment. The case attracted widespread attention because the court had previously required certain of the taxpayer's arguments to be excluded on the basis that the taxpayer did not adequately raise those specific arguments in its redetermination request prior to its administrative hearing. However, the reissued *en banc* decision reversed the court's prior decision and, instead determined that the taxpayer had reasonably set forth all of its arguments in its redetermination request as originally submitted. This decision is an important win for Texas taxpayers because it means that taxpayers will not be strictly tied to extremely specific claims as set forth in a redetermination request, and will continue to be permitted some latitude in their arguments at the administrative level so long as those taxpayers can tie their arguments back to their general contentions in the redetermination request.

For more information on these and other recent state and local tax updates, please see "*The Texas Third Court of Appeals Changes Course in Hegar v. El Paso Electric Co.*" on the SALT Savvy blog, available at www.saltsavvy.com.

By: Jimmy Lucas, Dallas

If at First You Don't Succeed, Try Again: New York Proposes Yet Another Data Tax

New York legislators have proposed a new data tax that would tax the collection of personal data for commercial purposes. The proposal, which is contained in New York Senate Bill 4959, continues the trend of states seeking to tax digital activities and data. If enacted, this tax would raise serious constitutional concerns involving the Commerce Clause, the Foreign Commerce Clause, and potentially the Takings Clause of the US Constitution.

For more information, please see "*If at First You Don't Succeed, Try Again: New York Proposes Yet Another Data Tax*" on the SALT Savvy blog, available at www.saltsavvy.com.

By: Kelsey Muraoka, New York

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Texas Lawmaker Introduces Digital Ad Tax Bill: How Does It Stack Up to Maryland's?

Texas has now joined the growing number of states proposing digital advertising taxes that we have covered previously on SALT Savvy, including Maryland's first-in-the-nation digital advertising tax law and other proposals from Connecticut, New York, and Montana. If enacted, this new Texas bill would take effect in 2022.

For more information, please see "*Texas Lawmaker Introduces Digital Ad Tax Bill: How Does It Stack Up to Maryland's?*" on the SALT Savvy blog, available at www.saltsavvy.com.

By: Joshua Lin, New York

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