BRACEWELL

INSIGHTS

Extenders Mean Groundhog Day for Congressional Taxwriters

June 29, 2018

*By: **Liam P. Donovan***

The estimable Chairman of the Ways and Means Committee has had it with the annual "extenders" charade. House tax-writers will sort through the list of temporary tax provisions and determine once and for all what deserves to be part of the newly reformed code.

The burden is now on this committee to decide which of these provisions are worthwhile to find a way to pay for their permanent extension and to let the others expire. Each of the expiring provisions has its supporters. However, not all of these provisions have survived on their own merits. Some have enjoyed free rides as stowaways on the annual extenders package. The free ride stops here.

The Chairman in question? Dan Rostenkowski, Democrat of Illinois. The year? 1988.

As we know, the free ride didn't stop there. In fact, thirty years and eighteen legislative extensions later, the original list of eight provisions has grown to 26.

All of which is to say Congressional tax-writers have had tough words for extenders provisions as far back as their inception. Then, as now, the eight expiring provisions were tucked away in a broader must-pass vehicle, in this case a set of technical fixes to the 1986 Tax Reform Act.

So what has changed in the meantime? And could this really be the year that the extenders' luck runs out?

The extenders themselves are a veritable island of misfit toys, ranging from the stimulative, to the parochial, to the downright random. And while some have stronger patrons than others, their real power lies in the aggregate. While each enjoy narrow, discrete constituencies, taken together they present a formidable coalition that cuts across geographic, ideological, and partisan lines. Horse-racing, NASCAR, and Puerto Rican rum may not seem like lobbying titans, but over the years their preferences have proved hard to kill.

Nonetheless, the House of Representatives is currently seeking to pare down the package and make extenders a thing of the past. The first challenge will be determining which provisions should be made permanent and which should be allowed to lapse or otherwise wind down.

Chairman Brady's three part test is simple: first, determine which provisions are still needed after tax reform; second, to the extent these measures encourage economic growth and competitiveness under the new code, we should consider making them permanent; and third, what are stakeholders willing to give up in exchange for making them permanent.

The first two criteria are straightforward enough—to merit extension, there must be a sound tax policy argument. This is an easier case to make for energy efficient building incentives under Section 179D than, say, an American Samoa Economic Development Credit that amounts to a direct $10 million subsidy to a ***single tuna processor***. Some provisions simply don't pass the eye test. The third is more tricky. Stakeholders are accustomed to a free ride, albeit one with twists, turns, and the occasional retroactive renewal. What price are the willing to pay for long-term certainty?

For their part, House tax-writers seem to be taking this exercise seriously. While little has occurred publicly since a mid-March subcommittee hearing, committee staff continue to work on recommendations while the Congressional scorekeepers assess the revenue impact of different scenarios. We may see a House package released by Ways and Means as early as this Summer that lays out a plan.

Congress actually has a decent model for how to sort through these provisions in the 2015 PATH Act that was enacted with the end of year omnibus package. With the PATH Act, Congress created three distinct categories according to their perceived merits. Of the 52 extenders at that time, the PATH Act made 22 of the broadest individual and businesses provisions permanent for the first time. Four other popular policies were given a five-year extension. And while none of the many energy incentives were made permanent, tax credits for wind and solar were granted a multi-year phase-down. In the end, the PATH Act did not amount to the "extenders bill to end all extenders bills" it was initially conceived as, but it succeeded in separating the tax policy wheat from the chaff, ultimately cutting the list in half. Expect the House to employ the tiered approach of the PATH Act, albeit with a higher bar for permanence.

Next comes the hard part. For any such package to become law, it needs 60 votes in the U.S. Senate. If the upstart People's House is hot to scrap these temporary policies, the more genteel upper chamber is poised to play its traditional role as the saucer that cools the tea. Senate Republicans expressly ducked consideration of extender provisions in their version of tax reform, even those the House-passed bill sought to renew. It turns out that debating which tax breaks to cut and which to keep opens up a whole new can of political worms.

At the end of the day, Congress' default move is kicking the can. In the wake of the bruising fight over the Tax Cuts and Jobs Act, there is little appetite for debating tax policy, even the simplest technical corrections. That said, with extenders already half a year past their expiration, Congress has little choice but to act, one way or another. If the House can propose a serious and orderly plan to resolve the extender dilemma, one that avoids running afoul of powerful stakeholders—or worse, powerful Senators—there is hope of a compromise hitching a ride on an end of year spending bill.

But does the free ride stop here? Don't bet on it.