Are AMT Credit Refunds Subject to Limitation?

by Mark R. Hoffenberg and Stephen M. Marencik

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In this report, Hoffenberg and Marencik explain that although incorporation of the alternative minimum tax refundable credit amount is still generally a boon to corporations, in many situations the section 383 limitation coupled with the customary operation of section 6401 may limit a corporation’s ability to generate an actual cash refund. This report represents the views of the authors only and does not necessarily represent the views or professional advice of KPMG.

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On December 20, 2017, the House passed its version of the Tax Cuts and Jobs Act (P.L. 115-97) by a vote of 224 to 201, and the final bill was signed into law by the president on December 22. Along with a significant rate reduction for corporations from 35 percent to 21 percent, the TCJA repealed the alternative minimum tax for corporations effective for tax years beginning after 2017.¹

Repeal of Corporate AMT

Section 12001(a) of the act repeals the AMT for corporations by amending section 55(a), the operative provision previously responsible for imposing AMT on corporations. Section 55(a) previously provided:

There is hereby imposed (in addition to any other tax imposed by this subtitle) a tax equal to the excess (if any) of —

(1) the tentative minimum tax for the taxable year, over

(2) the regular tax for the taxable year.

To exempt corporations from the purview of the AMT, section 55(a) was amended by striking “There” and inserting “In the case of a taxpayer other than a corporation, there. . . .” Other conforming adjustments were also made to the code to ensure that elements of the AMT would not continue to apply to corporations.²

The act also modified the credit available for prior-year minimum tax liability of corporations.³ Broadening of the tax base under the AMT

¹The corporate AMT previously was imposed on corporations to the extent that their tentative minimum tax liability exceeded their regular tax liability, with tentative minimum tax computed at a rate of 20 percent on the corporation’s alternative minimum taxable income exceeding $40,000 (subject to phaseout). AMTI is a taxpayer’s taxable income broadened through the backing out of some preference items (e.g., accelerated depreciation of some property placed in service before 1987) and timing adjustments (e.g., slower rates of cost recovery). Other adjustments and rules applied to reduce the amount of the net operating loss available to corporate taxpayers to 90 percent of AMTI (determined before the NOL deduction) and disallowing various nonrefundable business credits permitted under the regular tax regime. Many other rules applied. See sections 55 through 58.

²See P.L. 115-97, section 12001(b).

³See id. at section 12002.
through various timing adjustments compelled the need for an AMT credit that would generally allow taxpayers to apply taxes paid under the AMT as a credit against regular taxes imposed on the taxpayer in subsequent years. For example, in tax years beginning before 2018, corporations subject to AMT were required to reduce the cost recovery of plant, property, and equipment. That adjustment generally had the effect of reducing cost recovery in earlier years relative to the amount of cost recovery available under the regular tax system. If the corporation fell outside the scope of the AMT in a subsequent tax year, accelerated cost recovery under the regular tax system would yield comparatively fewer deductions. The AMT credit was the mechanism that ensured the corporation could achieve the tax effect of aggregate cost recovery deductions equal to the full cost of the capital expenditure over the asset’s class life. To address timing differences and other adjustments under the AMT, old section 53 gave taxpayers an indefinite credit carryforward equal to AMT paid in prior years.

Old Section 53 and Related Provisions

Section 53(a) provides that “there shall be allowed as a credit against the tax imposed by this chapter for any taxable year an amount equal to the minimum tax credit for such year.” Whether a credit is allowed turns in part on the definition of minimum tax credit in section 53(b). It generally defines minimum tax credit for any tax year as the excess of “(1) the adjusted net minimum tax imposed for all prior taxable years beginning after 1986, over (2) the amount allowable as a credit under [section 53(a)] for such prior taxable years.” Therefore, the minimum tax credit is essentially the net minimum tax imposed during all prior periods over the amount allowable as a credit under section 53(a) for those prior years.

Section 53(c) then modifies the amount allowable under section 53(a), such that the amount of the minimum tax credit cannot reduce the taxpayer’s regular tax liability below the taxpayer’s potential AMT liability for the tax year in which the credit is claimed. Section 53(c) allows credit use only for the excess of the taxpayer’s regular tax liability (after being reduced by other credits allowable under the code) over the taxpayer’s tentative minimum tax for the year. For purposes of section 53, the terms “net minimum tax” and “tentative minimum tax” derive meaning from section 55 (the general operative AMT provision).

The AMT credit therefore could be carried forward indefinitely and used subject to section 53(c) and other applicable limitations set forth in the code. One limitation is imposed by section 383, which applies to corporations carrying forward excess credits consisting of unused general business credits (subpart D credits), any unused minimum tax credit under section 53 (subpart G credits), and other tax attributes. Very generally, the limitation under sections 382 (the companion provision to section 383 that applies to some loss carryforwards) and 383 are intended to restrict the monetization of tax attributes of one corporation (that is, a loss corporation) by another profitable corporation. Sections 382 and 383 impose an annual limitation on the extent to which a corporation’s taxable income and tax liability can absorb losses and credits if the corporation has experienced an ownership change of more than 50 percent of its stock during a rolling three-year testing period. The annual limitation is generally computed by multiplying the adjusted equity value of the acquired company immediately before the ownership change by the applicable federal rate in effect at the time of the ownership change. The annual limitation is then further adjusted for specific built-in gain or loss items.

Although sections 382 and 383 limit the use of some losses and credits of a loss corporation, they do not limit or restrict a corporation’s ability to carry those tax attributes forward to future tax

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1 Under the regular tax regime, a corporation’s cost recovery deductions for a particular asset generally are greater in earlier tax years and comparatively less in later years. Therefore, a corporation that falls outside the purview of the AMT in the latter half of an asset’s recovery period would benefit from comparatively lower cost recovery deductions under the regular tax system since the amount of the deductions would be diminished because of accelerated cost recovery permitted under the regular tax system in earlier years.

2 The minimum tax credit is colloquially referred to as the AMT credit. This report will often refer to the minimum tax credit as the AMT credit for ease of discussion.

3 There are numerous other adjustments to the annual limitation imposed under sections 382 and 383; however, a detailed discussion of sections 382 and 383 is beyond the scope of this report.
years. The section 382 limitation only restricts the amount of pre-change losses that can offset income in a tax year; it does not prevent the unused portion of the pre-change loss from being carried forward because, for section 172(b) loss carryforward purposes, section 382(l)(2) limits the amount of taxable income to the section 382 limitation for the year reduced by the unused pre-change losses for tax years preceding the loss year.

As a general matter, section 172(b) provides that if an NOL is generated in a prior year (year 1), the amount that carries into a subsequent year (year 3) is the amount of the year 1 NOL less taxable income for the tax year (year 2) reduced by NOLs carried forward from before year 1. The general section 172(b) formula does not work when interacting with section 382 because, absent section 382(l)(2), taxable income might exceed the section 382 limit, resulting in an NOL reduction for section 172(b) purposes that exceeds the amount of the NOL actually absorbed. Section 382(l)(2) instead provides that the amount of the NOL carried to year 3 is the year 1 NOL reduced by an amount that does not exceed the section 382 limitation (reduced by unused pre-change losses from years before year 1). The flush language in section 382(l)(2)(A) prescribes a similar rule for credit carryforwards that would limit the reduction of section 383 limited credits to an amount not greater than the section 383 limitation (reduced by the unused pre-change credits from prior tax years).

Below is a simple example of the mechanics and operation of sections 53 and 383 before tax reform:

**Example 1:** Assume Corp. X paid AMT of $75 in year 1 and AMT of $25 in year 2. On the first day of year 3, Corp. X experienced an ownership change within the meaning of section 382, resulting in a $10 annual limitation on credits. In year 3, Corp. X has a regular tax liability of $45 and a tentative minimum tax liability of $30. Assume Corp. X has no other tax attributes.

Section 53(b) calculates the minimum tax credit for year 3 as $100, which is the excess of the $100 of adjusted net minimum tax imposed for all prior tax years beginning after 1986 more than $0 (the amount allowable as a credit under section 53(a) for those prior tax years). The limitation on AMT credits under section 53(c) is $15 or the extent to which Corp. X’s regular tax liability of $45 exceeds its tentative minimum tax liability of $30 in year 3. Therefore, absent any further limitation, the AMT credit allowed in year 3 would be $15.

However, because Corp. X experienced an ownership change on the first day of year 3, the entire amount of its AMT credit carryforward is subject to an annual limitation of $10 under sections 382 and 383. Therefore, the AMT credit allowed in year 3 under section 53(a) is $10.

Corp. X will continue to carry forward AMT credits equal to an amount determined under section 53(b) and taking into account the flush language in section 382(l)(2)(A) (as necessary). As such, Corp. X’s AMT credit carryforward is the adjusted net minimum tax imposed for all prior tax years beginning after 1986 ($100) over the amount allowable as a credit under section 53(a) for prior tax years (year 3). It is not immediately obvious whether the word “allowable” takes a limitation under section 383 into account. Here, however, the result should be the same either because “allowable” takes section 383 into account or because the flush language in section 382(l)(2)(A) applies to limit the reduction for credit carryforward purposes to the amount of the section 383 limitation. Thus, the amount of the tax

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7 The second sentence of section 172(b)(2) specifically provides, “The portion of such loss which shall be carried forward to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried” (emphasis added).

8 For example, if a loss corporation has a year 1 NOL of $100 that is subject to a section 382 limit of $10, and taxable income before losses in year 2 is $100, then, without section 382(l)(2), the loss corporation would absorb $10 of the NOL in year 2, and no portion of the NOL would be carried forward because, for section 172(b) purposes that exceeds the amount of the NOL actually absorbed.

9 Under the facts in the example supra note 8, section 382(l)(2) provides that the amount carried to year 3 is $100 less $10, or $90. If there were also $8 of NOL from year 0 (a tax year before year 1), the year 0 NOL would be absorbed first in year 2, so that the NOL from year 1 going into year 3 would be $100 less the net of the section 382 limitation of $10 less unused pre-change losses from years before year 1 of $8, or $89.

10 The flush language in section 382(l)(2)(A) provides: “Similar rules shall apply in the case of any credit or loss subject to limitation under section 383.”

11 As a technical matter, the annual limitation is determined under section 382 and then applied to AMT credits under section 383.
liability that absorbed the pre-change AMT credits of Corp. X should not exceed the $10 section 383 limitation for that year. The AMT credit available in year 4 is therefore $90.

Revisions to Section 53, New Section 53(e)

With the TCJA’s repeal of the corporate AMT came the question of what should be done with existing AMT credit carryforwards. The House version of the TCJA and ultimately the conference agreement embraced continued use of the AMT credit to offset a corporation’s regular tax liability. Also, a portion of the AMT credit exceeding the amount used to offset regular tax liability would be refundable for any tax year beginning after 2017 and before 2022. According to the conference committee’s joint explanatory statement, “Thus, the full amount of the minimum tax credit will be allowed in taxable years beginning before 2022.”

Section 12002 of the TCJA permits a refund through new section 53(e), which provides:

(e) Portion of credit treated as refundable.

(1) In general. — In the case of any taxable year of a corporation beginning in 2018, 2019, 2020, or 2021, the limitation under subsection (c) shall be increased by the AMT refundable credit amount for such year.

(2) AMT refundable credit amount. — For purposes of paragraph (1), the AMT refundable credit amount is an amount equal to 50 percent (100 percent in the case of a taxable year beginning in 2021) of the excess (if any) of —

(A) the minimum tax credit determined under subsection (b) for the taxable year, over

(B) the minimum tax credit allowed under subsection (a) for such year (before the application of this subsection for such year).

(3) Credit refundable. — For purposes of this title (other than this section), the credit allowed by reason of this subsection shall be treated as a credit allowed under subpart C (and not this subpart).

Also, section 12001 of the TCJA amends the definition of tentative minimum tax in section 53(d)(2) by inserting “except that in the case of a corporation, the tentative minimum tax shall be treated as zero” at the end of that subsection. Other rules apply to prorate the AMT refundable credit amount for short tax years.12

Therefore, for purposes of the AMT credit, the section 53(c) limitation for a corporation is equal to its regular tax liability for that year increased by the AMT refundable credit amount.13 The AMT refundable credit amount is equal to 50 percent or 100 percent of any excess of the minimum tax credit determined under section 53(b) less the minimum tax credit allowed under section 53(a).14 For federal income tax purposes, that portion is then treated as a refundable credit under subpart C.15 For a situation in which no portion of the AMT credit carryforward is limited under sections 382 and 383, the result is seemingly straightforward, as illustrated below.

Example 2: Same facts as Example 1, except that no ownership change occurs in year 3, and thus no limitation under sections 382 and 383 applies to Corp. X. Also assume that year 3 is a tax year beginning in 2018.

The section 53(b) minimum tax credit for year 3 is still $100 (equal to the aggregate uncredited amount of AMT imposed in years 1 and 2). However, the section 53(c) limitation is no longer $15. First, Corp. X's tentative minimum tax liability is zero rather than $30 under section 53(d)(2). Second, Corp. X’s section 53(c) limitation is increased by the AMT refundable credit amount, which is equal to 50 percent of the excess of $100 over the $45 of regular tax the AMT credit is available to offset under section 53(a).16

Accordingly, the section 53(c) limitation for Corp. X in year 3 is $72.50, which is the sum of the regular tax liability of $45 reduced by zero and the

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12 See section 53(e)(4).
13 Section 53(e)(1).
14 Section 53(e)(2).
15 Section 53(e)(3).
16 Under section 53(d)(2), tentative minimum tax is reduced to zero, and thus the full $45 of regular tax liability is available to be offset.
The AMT refundable credit amount of $27.50 (50 percent of $55).

The AMT credit available in year 4 is $27.50.

**Impact of Section 383 on AMT Refundable Credit**

If AMT credits are subject to limitation under section 383, at least three threshold questions arise under section 53(e). First, is the increase to the section 53(c) limitation by way of section 53(e) subject to the application of section 383? If the increase under section 53(e) is subject to limitation, the full AMT refundable credit amount would not necessarily give rise to a refund.

**Example 3:** Same facts as Example 1, except that year 3 is a tax year beginning in 2018, and Corp. X’s regular tax liability is zero.

The section 53(b) minimum tax credit for year 3 is still $100 (equal to the aggregate uncredited amount of AMT imposed in years 1 and 2). Corp. X’s initial section 53(c) limitation of zero is increased by the AMT refundable credit amount of $50, which is equal to 50 percent of $100 (that is, the unreduced amount of Corp. X’s minimum tax credit because no portion of the AMT credit was otherwise allowed under section 53(a)). Accordingly, the section 53(c) limitation for Corp. X in year 3 is $50, which may be refundable in whole, or alternatively, only in part if the section 383 limitation of $10 applies to the section 53(e) increase.

The IRS answered this question in ILM 201126029. In the memorandum, the agency considered whether a corporation’s election under former section 168(k)(4) to increase its section 53(c) limitation and treat a portion of the AMT credit as refundable was subject to limitation under section 383 in a tax year in which the corporation had no regular tax liability. Before the TCJA, and only for some tax years, corporations were permitted to increase the amount of their general business credit limitations under section 38(e) and AMT credit limitation under section 53(c) in lieu of electing to immediately expense a portion of specified capital expenditures under section 168(k)(1).

Under section 168(k)(4)(F), the increase to the limitations under sections 38(c) and 53(c) was usually treated as refundable credits.

Generally, AMT credits of a corporation that has experienced an ownership change may be used in a post-change year but not in excess of the amount of tax liability attributable to an amount of the corporation’s taxable income as does not exceed the amount of the corporation’s unused section 382 limitation. The regulations under section 383 further explain that “the amount of regular tax liability of a new loss corporation for any post-change year that may be offset by pre-change credits shall not exceed the amount of the section credit limitation for the post-change year.” In ILM 201126029, the IRS acknowledged that the language of the code and regulations thereunder make clear that section 383 applies to limit the use of credits as an offset to regular tax liability. The IRS further acknowledged that section 383 does not apply when the corporation has no regular tax liability in the tax year at issue and is seeking a refund for the credits without offsetting regular tax liability. The IRS therefore concluded that the refundable AMT credit resulting from a section 168(k)(4) election is not subject to section 383.

Under the rationale of ILM 201126029, it therefore appears that the increase for the AMT refundable credit amount under section 53(e) should not be limited under section 383. Returning to the facts of Example 3, it appears that the AMT refundable credit amount of $50 should not be subject to the section 383 limitation of $10, and Corp. X should receive a refund of $50.

A second threshold question arises because corporate taxpayers must determine the amount of the credit “allowed” under section 53(a) since section 53(e)(2)(B) uses this amount to determine the excess on which the AMT refundable credit amount is computed. Does the amount allowed under section 53(a) take into account a limitation under section 383 or the potentially larger amount of the section 53(b) AMT credit carryforward?

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18 The section 382 limitation is the amount of taxable income that can absorb NOLs in a tax year. The section 383 limitation applicable to AMT credits essentially is the tax-effected amount of the section 382 limitation available after reduction for the absorption of NOLs, capital loss carryforwards, and foreign tax credits.

19 Reg. section 1.383-1(d) (emphasis added).
subject to limitation under section 53(c)? At least initially, the amount is unclear.

Example 4: Same facts as Example 1, except that year 3 is a tax year beginning in 2018.

If intended to consider the limitations under both sections 53(c) and 383, the amount allowed under section 53(a) in year 3 would be $10, which is the lesser of the section 53(c) limitation and the section 383 limitation. The amount of the AMT refundable credit amount would be $45, which is 50 percent of the excess of the minimum tax credit (that is, $100, equal to the aggregate uncredited amount of AMT imposed in years 1 and 2) reduced by the $10 amount allowed. Thus, Corp. X would increase its section 53(c) limitation by $45.

Conversely, if the amount allowed under section 53(a) were intended to consider only the limitation under section 53(c) (unaffected by the section 383 limitation), the amount allowed in year 3 would be $45. In turn, the amount of the AMT refundable credit amount would be $27.50, which is 50 percent of the excess of the minimum tax credit (that is, $100, equal to the aggregate uncredited amount of AMT imposed in years 1 and 2) reduced by the $45 amount allowed. Thus, Corp. X would increase its section 53(c) limitation by only $27.50.

Whether the amount allowed under section 53(a) were considered only the limitation under section 53(c) (unaffected by the section 383 limitation), the amount allowed in year 3 could therefore affect the amount of the refund arising under section 53(e). Further, if section 53(a) does not consider the section 383 limitation, a portion of the AMT credit not exceeding the extent by which the corporation’s 2021 regular tax liability exceeds the applicable section 383 limitation could be carried forward beyond 2021, as illustrated below.

Example 5: Corp. Y generates $20 of regular tax liability in 2021, which, for illustrative purposes, is assumed to be the amount allowed under section 53(a). Also assume that Corp. Y has an AMT credit carryforward of $50 for 2021 that is subject to a section 382 limitation of $5.

If section 53(a) does not consider the section 383 limitation, the amount allowed in 2021 would be $20, and the AMT refundable credit amount would be $30, which is 100 percent of the excess of the minimum tax credit of $50 reduced by the $20 amount allowed. Corp. Y would increase its section 53(c) limitation of $20 by $30; however, only $5 of AMT credit would be available to offset tax liability because of the $5 limitation under section 383, and only $30 of the AMT credit might be refundable. Therefore, at least $15 of AMT credit would be unused and presumably would be carried forward to 2022.20

One unsatisfactory argument in support of section 53(a), taking into account a limitation under section 383 is that if the section 383 limitation is not taken into account, then the purpose of the section 53(b) carryforward computation would be confused. Recall that the carryforward computation under section 53(b) reduces the amount of the AMT credit available in a given tax year by the amount allowable as a credit under section 53(a) in prior tax years. One might argue that an allowable amount exceeding the amount of the AMT credit actually reflected on the tax return as an offset to tax liability (that is, the section 383 limited amount) would result in AMT credit carryforward leakage to the extent of the excess.21 However, that argument fails because the flush language in section 382(l)(2)(A) provides a mechanism for addressing this potential leakage by limiting the reduction for section 53(b)(2) carryforward purposes to the section 383 limitation. And there appears to be nothing in section 382, section 383, or the TCJA that would extend a similar governor for purposes of assessing the allowable amount under section 53(e)(2).

The more compelling argument is that the language of section 53(e)(2)(B) requires an interpretation of “allowed” that incorporates limitations not directly referenced in section 53(a), including the limitation in section 383. The amount allowed under section 53(a) is clearly

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20 The remainder of this report explains why the AMT refundable credit amount is only potentially refundable and details the effect on the AMT credit carryforward in the future.

21 Regarding Example 4, the argument would be that the amount allowed under section 53(a) should not be the full $45 because if this was the allowable amount under section 53(b)(2), it would cause the minimum tax credit available in subsequent years ($27.50) to be understated relative to the amount actually used to offset tax liability ($10) plus the AMT refundable credit amount ($27.50).
affected by the limitation in section 53(c), which provides that the amount “allowable” must take the section 53(c) limitation into account.\(^{22}\) Therefore, the reference to the “minimum tax credit allowed under subsection (a)” in section 53(e)(2)(B) must also take the section 53(c) limitation into account. However, there is no indication that the minimum tax credit allowed under section 53(e)(2)(B) should not also take other, extraneous limitations into account.\(^{23}\)

While the excess amount in section 53(e)(2) is calculated by reference to the amount “allowed” rather than the amount “used” (the operative verb in section 383), the drafters’ verb choice is not dispositive. Based on the conference committee’s joint explanatory statement, the drafters intended that “the full amount of the minimum tax credit . . . be allowed in taxable years beginning before 2022.” As demonstrated in Example 5, full allowance of the AMT credit before 2022 would often not be achieved if “allowed” under section 53(a) were not limited to the section 383 limitation (if it is the lesser of the limitations). If “allowed” were to consider the limitation in section 383, the distortive effects that are inconsistent with the description in the joint explanatory statement would be minimized in many cases.

Finally, interpreting “allowed” under section 53(a) and (e)(2) to account for the section 383 limitation would not cause the flush language in section 382(l)(2)(A) to have no independent significance — an interpretation that, under the rule against surplusage, might support the alternative reading. As discussed above, the flush language provides a mechanism through which the AMT credit carryforward amount would be adjusted to account for a restrictive section 383 limitation if “allowed” in section 53(b) did not incorporate that limitation. The argument would follow that if “allowed” already includes the effect of sections 382 and 383, what is the purpose of section 382(l)(2)(A)? That argument fails because section 382(l)(2)(A) has significance beyond AMT credits, most notably in the context of general business credit carryforwards. Section 38(c) limits the availability of general business credits to the amount by which a taxpayer’s net income tax liability exceeds the greater of the tentative minimum tax for the tax year over 25 percent of so much of that taxpayer’s net regular tax liability as exceeds $25,000. Section 39(a)(1) further provides that the excess of the sum of general business credit carryforwards and general business credits generated in the tax year over the section 38(c) limitation may be carried back one year or carried forward for 20 years. In this instance, the flush language in section 382(l)(2)(A) appears to be the only mechanism that would permit the excess calculation in section 39(a)(1) to be adjusted for a section 383 limitation that is more restrictive than the section 38(c) limitation. Therefore, at a minimum, the flush language in section 382(l)(2)(A) operates to prevent general business credit carryforward leakage and does not constitute surplusage.

While not free from doubt and although some ambiguity persists, we think the better answer is that “allowed” for purposes of section 53(a), and in turn for purposes of section 53(e)(2), should be given meaning by reading the statute as a whole under the canon of noscitur a sociis. Whether an AMT credit is allowed should account for all applicable limitations, including a limitation under section 383.

The third — and in our estimation, most challenging — threshold question posed by section 53(e) is the manner in which the refund is computed when the AMT credit is limited under section 383. If a corporation’s regular tax liability exceeds its section 383 limitation, the amount of the excess should appear as the tax liability before credits on the corporation’s federal income tax return (before any potential AMT refundable credit amount). Section 383 likely fully limits the extent to which the AMT refundable credit amount can be used to offset the regular tax liability because the annual section 383 limitation has already been used in full (a direct consequence of computing the AMT refundable credit amount after taking into account the amount of the AMT credit allowed under section 53(a)). Therefore, it appears that the tax liability

\(^{22}\) Section 53(c) provides that “the credit allowable under subsection (a) shall not exceed the excess (if any) of the taxpayer’s regular tax liability less the tentative minimum tax for the year.

\(^{23}\) “Allowed” might not be so broadly interpreted if section 53(e)(2)(B) specifically referenced the section 53(c) limitation. For example, “allowed” in section 53(e)(2)(B) could not be so expansively read if “after taking into account the limitation under subsection (c)” had been inserted after “the minimum tax credit allowed under subsection (a).”
must be paid despite availability of the AMT refundable credit amount.

Example 6: Same facts as Example 4.

Having determined that the reference to the amount allowed under section 53(a) should consider the section 383 limitation of $10, the AMT refundable credit amount in year 3 would be 50 percent of $90, which would increase the section 53(c) limitation by $45 and constitute a potentially refundable amount.

However, because of the $10 limitation under section 383, the regular tax liability of $45 would be reduced by only $10 to $35, and no portion of the AMT refundable credit amount would be eligible to offset the remaining tax liability of $35 because the full section 383 limitation has already been fully absorbed.

To complicate matters further, section 53(e)(3) simply provides that “the credit allowed by reason of [section 53(e)] shall be treated as a credit allowed under subpart C (and not this subpart).” The act does not further revise the code to account for the AMT refundable credit amount, so we are left to consider treatment of the credit under the rules applicable to refundable credits before tax reform. Although one might have thought that the full AMT refundable credit amount ($45 in Example 6) should be eligible as a refund, that does not appear to be the case.

The refund mechanism for refundable credits under subpart C is described in section 6401. Section 6401(b)(1), as modified by H.R. 1, provides that “if the amount allowable as credits under subpart C . . . (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, D, and G of such part IV), the amount of such excess shall be considered an overpayment.”24 The portion constituting an overpayment may then be refunded in cash to the taxpayer or applied against the taxpayer’s future (or past due) income tax liability.25

Importantly, section 6401 appears to provide that only the amount by which the AMT refundable credit amount exceeds income taxes imposed constitutes an overpayment eligible to be refunded to the taxpayer under section 6402. As a result, it appears that the net cash position of corporate taxpayers is twice adversely affected by the section 383 limitation on the amount of the regular tax liability eligible to absorb the AMT credit under section 383. Specifically, the section 383 limitation appears to preserve the tax liability and reduce the amount of the refund.

Example 7: Same facts as Example 6.

Recall that the $10 limitation under section 383 has limited absorption of the AMT credit to $10, resulting in a $35 tax liability to Corp. X. Also recall that the AMT refundable credit amount was determined to be $45, which is the excess of $100 minimum tax credits less $10 of AMT credits allowed ($90) multiplied by 50 percent.

Section 6401(b)(1) appears to limit the amount of the AMT refundable credit amount (a subpart C refundable credit) treated as an overpayment to $10, which is the excess of the $45 AMT refundable credit amount over Corp. X’s $35 tax liability. Because under section 6402 the amount of the refund is limited to the amount of the overpayment, it appears that only $10 will be refunded to Corp. X.

Also, although not free from doubt, it appears that only the amount of the AMT credit used to offset tax liability ($10) and actually resulting in a refundable overpayment ($10) would constitute amounts allowable as a credit in prior tax years for purposes of section 53(b). Thus, it appears that Corp. X would carry forward AMT credits of $80 to year 4.

Consequences Beyond 2021

An additional collateral consequence of the apparent mechanics of sections 53(e) and 6041 is that a section 383 limitation could also extend AMT credit use beyond 2021, which seems to be inconsistent with the legislative intent to allow “the full amount of the minimum tax credit . . . in taxable years beginning before 2022.” As discussed above, section 53(e) expressly applies to any tax year of a corporation beginning in 2018, 2019, 2020, or 2021, but apparently not to tax years beginning after 2021. It therefore appears that any portion of the AMT credit carried forward beyond 2021 would not be eligible for refund and, while

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24 Section 13404(c)(4) of H.R. 1 amended section 6401(b)(1) by “striking ‘G, H, I, and J’ and inserting ‘and G.’”
25 See generally section 6402.
not free from doubt, would be available subject to
the pretax reform limitations on its use.\textsuperscript{26}

\textbf{Example 8:} Corp. Z generates $35 of regular
tax liability in 2021 and has an AMT credit
carryforward of $100 in 2021 that is subject to a
section 382 limitation of $15.

Having determined that the reference to the
amount allowed under section 53(a) should likely
consider the section 383 limitation, the amount
allowed in 2021 is $15, and the AMT refundable
credit amount would be $85 (that is, 100 percent of
the excess of the minimum tax credit of $100
reduced by the $15 amount allowed). Corp. Z
increases its section 53(c) limitation of $35 by $85
to $120; however, only $15 of AMT credit would
be available to offset tax liability because of the
$15 limitation under section 383. Corp. Z’s 2021
tax liability is reduced from $35 to $20. Although
the AMT refundable credit amount is $85, section
6401(b)(1) limits the amount treated as an
everoverpayment to $65, which is the excess of the $85
AMT refundable credit amount over Corp. Z’s $20
tax liability.

As a result, only $80 of Corp. Z’s AMT credit
carryforward is used in 2021 (that is, $15 as an
offset of the tax liability and $65 as a refund). It
appears that the residual $20 of AMT credits is
carried forward to 2022, a year in which the AMT
refundable credit is no longer available.

Therefore, Corp. Z’s AMT credit carryforward of
$20 appears to be available to offset regular tax
liability subject to a section 383 limitation of $15 in
the future.

\textbf{Sequestration and the AMT Refundable Credit}

The AMT refundable credit amount is also
subject to sequestration, which permanently
reduces the amount of the cash refund to
corporations by the sequestration rate in effect for
the fiscal year in which the credit is processed.
The Balanced Budget and Emergency Deficit
Control Act of 1985, as amended, provides
automatic spending cuts (referred to as
sequestration) if some total discretionary
appropriations exceed budget totals.\textsuperscript{27} Most

\textsuperscript{26}For purposes of the section 53(c) limitation, a corporation’s
tentative minimum tax liability would still be zero.
\textsuperscript{27}See Congressional Budget Office, “Sequestration Update Report for
Fiscal Year 2017” (Aug. 2017). Sequestration, which has been
extended several times, was most recently extended by the Bipartisan Budget Act
of 2018 through fiscal year 2027. See P.L. 115-123.
\textsuperscript{28}2 U.S.C. section 905.
\textsuperscript{29}Id.
\textsuperscript{30}Sequestration applies to refundable AMT credits of corporations
arising by way of section 168(k)(4), which, very generally, permitted
corporations to increase their section 53(c) limitation in lieu of deducting
additional depreciation under section 168(k)(1). Section 168(k)(1) was
repealed by the TCJA. See P.L. 115-97, section 12001(b)(13). AMT credit
refunds processed on or after October 1, 2016, and on or before
September 30, 2017 (and regardless of when the IRS received the original
or amended tax return) were subject to sequestration at a rate of 6.9
percent. See IRS, “Effect of Sequestration on the Alternative Minimum
Tax Credit for Corporations” (Sept. 2017).
\textsuperscript{31}Id.

recently, budget sequestration began on March 1,
2013, with cuts scheduled to continue through
2027.\textsuperscript{28}

Some programs and activities are exempt
from sequestration under section 255 of the 1985
act.\textsuperscript{29} Under section 255(d), “payments to
individuals made pursuant to provisions of the
Internal Revenue Code of 1986 establishing
refundable tax credits shall be exempt from
reduction under any order issued under this
part.”\textsuperscript{30} However, the exemption does not apply to
payments to corporations attributable to
refundable income tax credits, so sequestration
likely applies to any AMT refundable credit
amount under section 53(e).\textsuperscript{31} The sequestration
rate for the fiscal year ending September 30, 2018,
is 6.6 percent, which is consistent with a year-
over-year decrease to the sequestration rate.\textsuperscript{32}

Sequestration is not scheduled to apply to fiscal
years beginning after October 1, 2021. Although
the reduction and eventual elimination of the
sequestration rate would increase the cash benefit
associated with the AMT refundable credit
amount in later tax years, time value of money
and the eventual phaseout of the AMT refundable
credit amount would mitigate any cash benefit
associated with planning that might delay
refunds attributable to the AMT refundable credit
amount until a later tax year.

\textbf{Conclusion}

Although the incorporation of the AMT
refundable credit amount is still generally a boon
to corporations, in many situations, the section 383 limitation coupled with the customary
operation of section 6401 may limit a corporation’s ability to generate an actual cash refund. This includes instances in which a corporation experienced a section 382 ownership change because of trading of its stock, as well as instances in which a corporation acquires greater than 50 percent of the stock of a target corporation having significant AMT credit carryforwards in a taxable stock purchase. Absent additional guidance confirming the refundability of the AMT refundable credit amount in instances in which an actual tax liability is owed by the corporation seeking a refund or modification to section 6401, acquiring corporations seeking to monetize a target corporation’s AMT credit carryforward should diligently forecast their post-acquisition regular tax liability and calculate the amount of any section 383 limitation. Further, if the legislative intent was to allow all corporations to use their AMT credit carryforwards before 2022 and avoid the apparent complexity of section 53(e), guidance harmonizing sections 53(e), 383, and 6401 should be issued.

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