

June 04, 2018

## The New Federal Tax Law and Its Implications for Settling Environmental Enforcement Actions

The recently enacted federal Tax Cuts and Jobs Act (TCJA) impacts the tax deductibility of costs incurred to resolve federal, state, and local government environmental enforcement actions. Before the TCJA, it was generally understood that expenses incurred to resolve an environmental enforcement case were often not deductible as a business expense. However, the recently enacted TCJA includes two exceptions to this general rule of non-deductibility: (1) payments which constitute “restitution (including remediation of property) for damage or harm which was or may be caused by the violation of any law or the potential violation of any law” and (2) payments/costs incurred “to come into compliance with any law which was violated or otherwise involved...”

There are qualifiers for claiming deductibility of such payments, including that the document resolving the enforcement action state that the payment/costs were for one of the two purposes described above. Also, the government entity must file a form with the IRS delineating the amount of the settlement value which is for restitution and the amount to achieve compliance, however this requirement has been temporarily suspended by the IRS. Historically, the federal government has often required settlement documents in environmental actions to disclaim the ability to claim tax deductibility for costs incurred under the settlement. However, settlements with state and local government are usually silent on the topic.

There remains much uncertainty as to the impact of these changes under the TCJA. How will IRS treat costs incurred for a supplemental environmental project? A mitigation project? For new pollution control equipment required under a consent decree or EPA administrative order? New training for employees?

### Related Practices

Environmental & Natural Resources  
Environmental Compliance Counseling  
& Advocacy

On May 25, 2018, the EPA/USDOJ answered some of these questions by filing a proposed consent decree in federal district court that includes language allowing for some of the defendant's compliance costs to be deductible under the TCJA. This appears to be the first time that the USEPA/USDOJ has used this provision in a federal court settlement. The consent decree allows for the deduction of significant capital costs that will be incurred to install pollution control equipment under the settlement.

If you have any questions with respect to the deductibility of settlement expenses, please do not hesitate to contact your Michael Best attorney.

### **Related People**

#### **Taylor Fritsch**

Associate

[ttfritsch@michaelbest.com](mailto:ttfritsch@michaelbest.com)

T 608.257.7471

#### **Todd Palmer**

Partner

[tepalmer@michaelbest.com](mailto:tepalmer@michaelbest.com)

T 608.283.4432