Does Broader Tax Overhaul Spell Doom for U.S. Patent Box?

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The once-hot proposal to create a “patent box” lowering tax rates related to valuable intellectual property has fallen off the political radar as Congress mulls a more comprehensive tax system overhaul.

The idea seemed destined for enactment in 2015, with bipartisan support and a furious lobbying campaign from technology firms hoping to bring their patents, copyrights and other valuable intangible assets back home. The policy would grant a lower tax rate for returns determined to be derived from qualifying intangible assets. The Organization for Economic Cooperation and Development in its 2015 initiative on tax avoidance said the policy, common in Europe, isn’t a “harmful tax practice” so long as the intangible assets are linked to research and development in the same jurisdiction.

But then the November elections gave Republicans control of the White House and Congress, and lawmakers are now focusing on taking advantage of a chance to do a comprehensive, system-wide tax overhaul. House Republicans are now pushing a plan, released in June, that would shift the U.S. into a territorial system with a lower rate and a destination-based taxation regime, and the patent box has fallen off the radar as a political issue—for now.

“If we were to do something within the framework of the current tax code, it would be applicable, especially in a more narrow way if we were just doing business tax reform,” said Rep. Charles Boustany (R-La.), who co-authored an “innovation box” proposal in 2015. “Now that we’re going comprehensive, it’s just not necessary.”

Part of the push for patent box legislation came from the OECD’s recent work defining how it can be a legitimate tax practice. By requiring that a patent box be linked to real brick-and-mortar research activity, the OECD raised fears that the U.S., if it didn’t offer its own version of the incentive, would lose not only tax revenue but jobs to Europe.

Not everyone believes the idea is finished.

“Although it’s not in the blueprint, I still think it’s part of the mix,” said Jorge Castro of Castro Strategies LLC in Washington and a former Internal Revenue Service official and congressional tax counsel. “It still has bipartisan support. I still think there will be a significant amount of lobbying around the patent box.”

If the political momentum of the House Republican plan fades and lawmakers look toward a simpler tax plan, a patent box may be one of the ideas that becomes part of a compromise.

Ike Brannon, a visiting fellow at the Cato Institute and a patent box supporter, noted that even if the U.S. lowers its corporate rate to 15 percent or 20 percent, other countries could lure valuable IP away with single-digit rates.

“I do think if we do some kind of tax reform, there will be some kind of IP box,” Brannon said. “I think people realize that kind of capital is very mobile, and it’s attached to a lot of jobs.”

Boustany said he hopes lowering the corporate tax rate will alleviate most of the problems with tax competition related to mobile income.

“I think the approach that’s being taken is to go to a territorial system with a low corporate rate,” Boustany said. “A low corporate tax rate takes some pressure off the intangible side.”