RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

"Recent developments are just like ancient history, except they happened less long ago."

By

Bruce A. McGovern
Professor of Law and Director, Tax Clinic
South Texas College of Law Houston
Houston, Texas 77002
Tele: 713-646-2920
e-mail: bmcgovern@stcl.edu

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Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Associate Professor of Law, Georgia State University College of Law, Atlanta, GA.

I. ACCOUNTING 2

II. BUSINESS INCOME AND DEDUCTIONS 2

A. Income 2
B. Deductible Expenses versus Capitalization 2
C. Reasonable Compensation 2
D. Miscellaneous Deductions 3
E. Depreciation & Amortization 8
F. Credits 8
G. Natural Resources Deductions & Credits 8
H. Loss Transactions, Bad Debts, and NOLs 8
I. At-Risk and Passive Activity Losses 8

III. INVESTMENT GAIN AND INCOME 8

IV. COMPENSATION ISSUES 8

A. Fringe Benefits 8
B. Qualified Deferred Compensation Plans 8
C. Nonqualified Deferred Compensation, Section 83, and Stock Options 8
D. Individual Retirement Accounts 8

V. PERSONAL INCOME AND DEDUCTIONS 10

A. Rates 10
B. Miscellaneous Income 10
C. Hobby Losses and § 280A Home Office and Vacation Homes 11
D. Deductions and Credits for Personal Expenses 11
E. Divorce Tax Issues 13
F. Education 13
G. Alternative Minimum Tax 13

VI. CORPORATIONS 13

A. Entity and Formation 13
B. Distributions and Redemptions 13
C. Liquidations 13
D. S Corporations 13

E. Mergers, Acquisitions and Reorganizations 13
F. Corporate Divisions 13
G. Affiliated Corporations and Consolidated Returns 13
H. Miscellaneous Corporate Issues 14

VII. PARTNERSHIPS 14
A. Formation and Taxable Years 14
B. Allocations of Distributive Share, Partnership Debt, and Outside Basis 14
C. Distributions and Transactions Between the Partnership and Partners 16
D. Sales of Partnership Interests, Liquidations and Mergers 17
E. Inside Basis Adjustments 17
F. Partnership Audit Rules 17
G. Miscellaneous 17

VIII. TAX SHELTERS 17

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING 17
A. Exempt Organizations 17
B. Charitable Giving 17

X. TAX PROCEDURE 20
A. Interest, Penalties, and Prosecutions 20
B. Discovery: Summonses and FOIA 20
C. Litigation Costs 20
D. Statutory Notice of Deficiency 20
E. Statute of Limitations 20
F. Liens and Collections 20
G. Innocent Spouse 20
H. Miscellaneous 20

XI. WITHHOLDING AND EXCISE TAXES 22

XII. TAX LEGISLATION 22

XIII. TRUSTS, ESTATES & GIFTS 22

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

1. Could we see compensation levels of top corporate officers actually decline? Code § 162(m) limits to $1 million the deduction of publicly traded corporations for compensation to covered employees (generally, certain top corporate officers). Certain types of compensation are not subject to this limit and are not taken into account in determining whether compensation exceeds $1 million, including remuneration payable (1) on a commission basis, or (2) solely on account of attainment of one or more performance-based goals if certain approval requirements are met ("performance-based compensation"). The 2017 Tax Cuts and Jobs Act, § 13601, amended Code § 162(m) to eliminate the exceptions for commissions and performance-based compensation. Accordingly, such compensation must be taken into account in determining the amount of compensation with respect to a covered employee for a taxable year that exceeds $1 million and therefore is not deductible. The legislation also amended the definition of "covered employee" in four ways: (1) the statutory definition now includes the principal executive officer and principal financial officer (whereas formerly the statutory definition referred only to the chief executive officer), (2) the definition includes persons who served as principal executive officer or principal financial officer *at* *any time during the taxable year* (rather than at the end of the year), (3) the definition includes officers whose compensation must be reported to shareholders under the Securities Exchange Act of 1934 by reason of their being among the *three* highest compensated officers (rather than four highest compensated officers), and (4) the definition now includes a person who was a covered employee for any preceding taxable year beginning after 2016 (which means the limit applies to compensation paid after termination of employment or after the employee's death). Finally, the legislation expands the category of corporations subject to the § 162(m) limit by defining "publicly traded corporation" to include foreign corporations publicly traded through American depositary receipts (ADRs) and certain large private corporations and S corporations. These changes apply to taxable years beginning after 2017. A transition rule provides that the changes do not apply to remuneration provided pursuant to a written binding contract that was in effect on November 2, 2017 as long as the contract is not materially modified after that date. Compensation provided pursuant to a renewal of a grandfathered contract is subject to the new rules.

a. Initial guidance on amended § 162(m). Notice 2018-68, 2018-36 I.R.B. 418 (8/21/18). The IRS has provided guidance on certain aspects of the amendments made to § 162(m) by the 2017 Tax Cuts and Jobs Act. Very generally, the notice addresses the amended rules for identifying covered employees and the operation of the grandfather rule for remuneration provided pursuant to a written binding contract that was in effect on November 2, 2017, including when such a contract will be considered materially modified so that it is no longer grandfathered. Treasury and the IRS expect to issue proposed regulations under § 162(m) that will incorporate the guidance provided in this notice.

D. Miscellaneous Deductions

1. Standard mileage rates for 2018. Notice 2018-3, 2018-2 I.R.B. 285 (12/14/17). The standard mileage rate for business miles in 2018 goes up to 54.5 cents per mile (from 53.5 cents in 2017) and the medical/moving rate goes up to 18 cents per mile (from 17 cents in 2017). The charitable mileage rate remains fixed by § 170(i) at 14 cents. The portion of the business standard mileage rate treated as depreciation is 25 cents per mile for 2018 (unchanged from 2017).

a. Minor changes to reflect the 2017 Tax Cuts and Jobs Act. Notice 2018-42, 2018-24 I.R.B. 750 (5/25/18). This notice modifies Notice 2018-3. 2018-2 I.R.B. 285 (12/14/17) to reflect changes made by Congress in the 2017 Tax Cuts and Jobs Act. Specifically, the notice clarifies that (1) the business standard mileage rate listed in Notice 2018-3 cannot be used to claim an itemized deduction for unreimbursed employee travel expenses because Congress disallowed miscellaneous itemized deductions for 2018, and (2) the standard mileage rate for moving is not applicable for the use of an automobile as part of a move because Congress disallowed the deduction of moving expenses for 2018 (except for members of the military on active duty who move pursuant to military orders, who can still use the standard mileage rate for moving). The notice also modifies Notice 2018-3 to reflect the 2017 Tax Cuts and Jobs Act's increase to the depreciation limitations for passenger automobiles placed in service after December 31, 2017. Notice 2018-3 had identified a maximum standard automobile cost of $27,300 for passenger automobiles and $31,000 for trucks and vans for purposes of computing the allowance under a fixed and variable rate (FAVR) plan. This notice provides that the maximum standard automobile cost may not exceed $50,000 for passenger automobiles (including trucks and vans) placed in service after December 31, 2017.

2. Rats! We knew that we should have been architects or engineers instead of tax advisors. The 2017 Tax Cuts and Jobs Act, § 11011, added § 199A, thereby creating an unprecedented, new deduction for trade or business (and certain other) income earned by sole proprietors, partners of partnerships (including members of LLCs taxed as partnerships or as sole proprietorships), and shareholders of S corporations. The Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division T, § 101 ("CAA 2018"), signed by the President on March 23, 2018, amended § 199A principally to address issues related to agricultural or hotricultural cooperatives. New § 199A is intended to put owners of flow-through entities (but also including sole proprietorships) on par with C corporations that will benefit from the new reduced 21% corporate tax rate; however, in our view, the new provision actually makes many flow-through businesses even more tax-favored than they were under pre-TCJA law.

Big Picture. Oversimplifying a bit to preserve our readers' (and the authors') sanity, new § 199A essentially grants a special 20 percent deduction for "qualified business income" (principally, trade or business income, but not wages) of certain taxpayers (but not most personal service providers except those falling below an income threshold). In effect, then, new § 199A reduces the top marginal rate of certain taxpayers with respect to their trade or business income (but not wages) by 20 percent (i.e., the maximum 37 percent rate becomes 29.6 percent on qualifying business income assuming the taxpayer is not excluded from the benefits of the new statute). Most high-earning (over $415,000 taxable income if married filing jointly) professional service providers (including lawyers, accountants, investment advisors, physicians, etc., but *not* architects or engineers) are excluded from the benefits of new § 199A. Of course, the actual operation of new § 199A is considerably more complicated, but the highlights (lowlights?) are as summarized above.

Effective dates. Section 199A applies to taxable years beginning after 2017 and before 2026.

Initial Observations. Our initial, high-level observations of new § 199A are set forth below:

1. *How § 199A applies.* New § 199A is applied at the individual level of any qualifying taxpayer by first requiring a calculation of taxable income excluding the deduction allowed by § 199A and then allowing a special deduction of 20 percent of qualified business income against taxable income to determine a taxpayer's ultimate federal income tax liability. Thus, the deduction is *not* an above-the-line deduction allowed in determining adjusted gross income; it is a deduction that reduces taxable income. The deduction is available both to those who itemize deductions and those who take the standard deduction. The deduction cannot exceed the amount of the taxpayer's taxable income reduced by net capital gain. The § 199A deduction applies for income tax purposes; it does *not* reduce self-employment taxes. Query what states that piggyback off federal taxable income will do with respect to new § 199A. Presumably, the deduction will be disallowed for state income tax purposes.

2. *Eligible taxpayers.* Section 199A(a) provides that the deduction is available to "a taxpayer other than a corporation." The deduction of § 199A is available to individuals, estates, and trusts. For S corporation shareholders and partners, the deduction applies at the shareholder or partner level. Section 199A(f)(4) directs Treasury to issue regulations that address the application of § 199A to tiered entities.

3. *Qualified trades or businesses (or, what's so special about architect and engineers?)—§ 199A(d).* One component of the § 199A deduction is 20 percent of the taxpayer's qualified business income. To have qualified business income, the taxpayer must be engaged in a qualified trade or business, which is defined as any trade or business *other than* (1) the trade or business of performing services as an employee, or (2) a specified service trade or business. A specified service trade or business is defined (by reference to Code § 1202(e)(3)(A)) as "any trade or business involving the performance of services in the fields of health, … law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees." Architects and engineers must be special, because they are excluded from the definition of a specified service trade or business. There is no reasoned explanation for this exclusion in the 2017 TCJA Conference Report. *Note:* taxpayers whose taxable income, determined without regard to the § 199A deduction, is below a specified threshold are not subject to the exclusion for specified service trades or businesses, i.e., these taxpayers can take the § 199A deduction even if they are doctors, lawyers, accountants etc. The thresholds are $315,000 for married taxpayers filing jointly and $157,500 for all other taxpayers. (These figures will be adjusted for inflation in years beginning after 2018.) Taxpayers whose taxable income exceeds these thresholds are subject to a phased reduction of the benefit of the § 199A deduction until taxable income reaches $415,000 for joint filers and $207,500 for all other taxpayers, at which point the service business cannot be treated as a qualified trade or business.

4. *Qualified business income—§ 199A(c).* One component of the § 199A deduction is 20 percent of the taxpayer's qualified business income, which is generally defined as the net amount from a qualified trade or business of items of income, gain, deduction, and loss included or allowed

in determining taxable income. Excluded from the definition are: (1) income not effectively connected with the conduct of a trade or business in the United States, (2) specified investment-related items of income, gain, deduction, or loss, (3) amounts paid to an S corporation shareholder that are reasonable compensation, (4) guaranteed payments to a partner for services, (5) to the extent provided in regulations, payments to a partner for services rendered other than in the partner's capacity as a partner, and (6) qualified REIT dividends or qualified publicly traded partnership income (because these two categories are separate components of the § 199A deduction).

5. *Determination of the amount of the § 199A deduction—§ 199A(a)-(b).* Given the much-touted simplification thrust of the 2017 Tax Cuts and Jobs Act, determining the amount of a taxpayer's § 199A deduction is surprisingly complex. One way to approach the calculation is to think of the § 199A deduction as the sum of two buckets, subject to one limitation. *Bucket 1* is the sum of the following from all of the taxpayer's qualified trades or businesses, determined separately for each qualified trade or business: the lesser of (1) 20 percent of the qualified trade or business income with respect to the trade or business, or (2) the greater of (a) 50 percent of the W–2 wages with respect to the qualified trade or business, or (b) the sum of 25 percent of the W–2 wages with respect to the qualified trade or business, plus 2.5 percent of the unadjusted basis immediately after acquisition of all qualified property. (*Note:* this W-2 wages and capital limitation *does not apply* to taxpayers whose taxable income is below the $157,500/$315,000 thresholds mentioned earlier in connection with the definition of a qualified trade or business. For taxpayers below the thresholds, Bucket 1 is simply 20 percent of the qualified trade or business income. For taxpayers above the thresholds, the wage and capital limitation phases in and fully applies once taxable income reaches $207,500/$415,000.) *Bucket 2* is 20 percent of the sum of the taxpayer's qualified REIT dividends and qualified publicly traded partnership income. The *limitation* is that the sum of Buckets 1 and 2 cannot exceed the amount of the taxpayer's taxable income reduced by the taxpayer's net capital gain. Thus, a taxpayer's § 199A deduction is determined by adding together Buckets 1 and 2 and applying the limitation.

6. *Revised rules for cooperatives and their patrons.* The Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division T, § 101, signed by the President on March 23, 2018, amended § 199A to fix what was commonly referred to as the "grain glitch." Under 199A as originally enacted, farmers selling goods to agricultural cooperatives were permitted to claim a deduction effectively equal to 20 percent of gross sales, while farmers selling goods to independent buyers effectively could claim a deduction equal to 20 percent of net income. Some independent buyers argued that this difference created an unintended market preference for producers to sell to agricultural cooperatives. Under the amended version of § 199A, agricultural cooperatives would determine their deduction under rules set forth in § 199A(g) that are similar to those in old (and now repealed) section § 199. The § 199A deduction of an agricultural cooperative is equal to 9 percent of the lesser of (1) the cooperative's qualified production activities income, or (2) taxable income calculated without regard to specified items. The cooperative's § 199A deduction cannot exceed 50 percent of the W-2 wages paid of the cooperative. A cooperative can pass its § 199A deduction through to their farmer patrons. In addition, the legislation modified the original version of § 199A to eliminate the 20-percent deduction for qualified cooperative dividends received by a taxpayer other than a corporation. Instead, under the amended statute, taxpayers are entitled to a deduction equal to the lesser of 20 percent of net income recognized from agricultural and horticultural commodity sales or their overall taxable income, subject to a wage and capital limitation.

7. *An incentive for business profits rather than wages.* Given a choice, most taxpayers who qualify for the § 199A deduction would prefer to be compensated as an independent contractor (i.e., 1099 contractor) rather than as an employee (i.e., W-2 wages), unless employer-provided benefits dictate otherwise because, to the extent such compensation is "qualified business income," a taxpayer may benefit from the 20 percent deduction authorized by § 199A.

8. *The "Edwards/Gingrich loophole" for S corporations becomes more attractive.* New § 199A exacerbates the games currently played by S corporation shareholders regarding minimizing

compensation income (salaries and bonuses) and maximizing residual income from the operations of the S corporation. For qualifying S corporation shareholders, minimizing compensation income not only will save on the Medicare portion of payroll taxes, but also will maximize any deduction available under new § 199A.

a. Let the games begin! Treasury and the IRS have issued proposed regulations under § 199A. REG-107892-18, Qualified Business Income, 83 F.R. 40884 (8/16/18). The Treasury Department and the IRS have published proposed regulations under § 199A. The proposed regulations address the following six general areas. In addition, Prop. Reg. § 1.643(f)-1 provides anti-avoidance rules for multiple trusts.

Operational rules. Prop. Reg. § 1.199A-1 provides guidance on the determination of the § 199A deduction. The operational rules define certain key terms, including qualified business income, qualified REIT dividends, qualified publicly traded partnership income, specified service trade or business, and W-2 wages. According to Prop. Reg. § 1.199A-1(b)(13), a "trade or business" is "a section 162 trade or business other than performing services as an employee." In addition, if tangible or intangible property is rented or licensed to a trade or business that is commonly controlled (within the meaning of Prop. Reg. § 1.199A-1(b)(1)(i)), then the rental or licensing activity is treated as a trade or business for purposes of § 199A even if the rental or licensing activity would not, on its own, rise to the level of a trade or business. The operational rules also provide guidance on computation of the § 199A deduction for those with taxable income below and above the $157,500/$315,000 thresholds mentioned earlier as well as rules for determining the carryover of negative amounts of qualified business income and negative amounts of combined qualified REIT dividends and qualified publicly traded partnership income. The proposed regulations clarify that, if a taxpayer has an overall loss from combined qualified REIT dividends and qualified publicly traded partnership income, the overall loss does not affect the amount of the taxpayer's qualified business income and instead is carried forward separately to offset qualified REIT dividends and qualified publicly traded partnership income in the succeeding year. The operational rules also provide rules that apply in certain special situations, such as Prop. Reg. § 1.199A-1(e)(1), which clarifies that the § 199A deduction has no effect on the adjusted basis of a partner's partnership interest or the adjusted basis of an S corporation shareholder's stock basis.

Determination of W-2 Wages and the Unadjusted Basis of Property. Prop. Reg. § 1.199A-2 provides rules for determining the amount of W-2 wages and the unadjusted basis immediately after acquisition (UBIA) of qualified property. The amount of W-2 wages and the UBIA of qualified property are relevant to taxpayers whose taxable incomes exceed the $157,500/$315,000 thresholds mentioned earlier. For taxpayers with taxable income in excess of these limits, one component of their § 199A deduction (*Bucket 1* described earlier) is the lesser of (1) 20 percent of the qualified trade or business income with respect to the trade or business, or (2) the greater of (a) 50 percent of the W-2 wages with respect to the qualified trade or business, or (b) the sum of 25 percent of the W-2 wages with respect to the qualified trade or business, plus 2.5 percent of the UBIA of all qualified property. The rules of Prop. Reg. § 1.199A-2 regarding W-2 wages generally follow the rules under former § 199 (the now-repealed domestic production activities deduction) but, unlike the rules under former § 199, the W-2 wage limitation in § 199A applies separately for each trade or business. The amount of W-2 wages allocable to each trade or business generally is determined according to the amount of deductions for those wages allocated to each trade or business. Wages must be "properly allocable" to qualified business income to be taken into account for purposes of § 199A, which means that the associated wage expense must be taken into account in determining qualified business income. In the case of partnerships and S corporations, a partner or S corporation shareholder's allocable share of wages must be determined in the same manner as that person's share of wage expenses. The proposed regulations provide special rules for application of the W-2 wage limitation to situations in which a taxpayer acquires or disposes of a trade or business. Simultaneously with the issuance of these proposed regulations, the IRS issued Notice 2018-64, 2018-35 I.R.B. 347 (8/8/18), which contains a proposed revenue procedure that provides guidance on methods for calculating W–2 wages for purposes of § 199A. The proposed regulations also provide guidance on determining the UBIA of qualified property. Prop. Reg. § 1.199A-2(c)(1) restates the statutory definition of qualified property, which is depreciable tangible property that is (1) held by, and available for use in, a trade or business at the close of the taxable year, (2) used in the production of qualified business income, and (3) for which the depreciable period has not ended before the close of the taxable year. The proposed regulations clarify that UBIA is determined without regard to both depreciation and amounts that a taxpayer elects to treat as an expense (e.g., pursuant to § 179, 179B, or 179C) and that UBIA is determined as of the date the property is placed in service. Special rules address property transferred with a principal purpose of increasing the § 199A deduction, like-kind exchanges under § 1031, involuntary conversions under § 1033, subsequent improvements to qualified property, and allocation of UBIA among partners and S corporation shareholders.

Qualified Business Income, Qualified REIT Dividends, and Qualified Publicly Traded Partnership Income. Prop. Reg. § 1.199A-3 provides guidance on the determination of the components of the § 199A deduction: qualified business income (QBI), qualified REIT dividends, and qualified publicly traded partnership (PTP) income. The proposed regulations generally restate the statutory definitions of these terms. Among other significant rules, the proposed regulations clarify that **(1)** gain or loss treated as ordinary income under § 751 is considered attributable to the trade or business conducted by the partnership and therefore can be QBI if the other requirements of § 199A are satisfied, **(2)** §1231 gain or loss is *not* QBI if the § 1231 "hotchpot" analysis results in these items becoming long-term capital gains and losses, and that §1231 gain or loss *is* QBI if the § 1231 analysis results in these items becoming ordinary (assuming all other requirements of § 199A are met), **(3)** losses previously suspended under §§ 465, 469, 704(d), or 1366(d) that are allowed in the current year are treated as items attributable to the trade or business in the current year, except that such losses carried over from taxable years ending before January 1, 2018, are not taken into account in a later year for purposes of computing QBI, and **(4)** net operating losses carried over from prior years are *not* taken into account in determining QBI for the current year, except that losses disallowed in a prior year by § 461(*l*) (the provision enacted by the 2017 TCJA that denies excess business losses for noncorporate taxpayers) *are* taken into account in determining QBI for the current year.

Aggregation Rules. Prop. Reg. § 1.199A-4 permits, but does not require, taxpayers to aggregate trades or businesses for purposes of determining the § 199A deduction if the requirements in Prop. Reg. § 1.199A-4(b)(1) are satisfied. Treasury and the IRS declined to adopt the existing aggregation rules in Reg. § 1.469-4 that apply for purposes of the passive activity loss rules on the basis that those rules, which apply to "activities" rather than trades or businesses and which serve purposes somewhat different from those of § 199A, are inappropriate. Instead, the proposed regulations permit aggregation if the following five requirements are met: **(1)** the same person, or group of persons, directly or indirectly owns a majority interest in each of the businesses to be aggregated, **(2)** the required level of ownership exists for the majority of the taxable year in which the items attributable to the trade or business are included in income, **(3)** all of the items attributable to each trade or business to be aggregated are reported on returns with the same taxable year (not taking into account short taxable years), **(4)** none of the aggregated businesses is a specified service trade or business, and **(5)** the trades or businesses to be aggregated meet at least two of three factors designed to demonstrate that the businesses really are part of a larger, integrated trade or business. The proposed regulations also impose a consistency rule under which an individual who aggregates trades or businesses must consistently report the aggregated trades or businesses in subsequent taxable years. In addition, the proposed regulations require that taxpayers attach to the relevant return a disclosure statement that identifies the trades or businesses that are aggregated.

Specified Service Trade or Business. Prop. Reg. § 1.199A-5 provides extensive guidance on the meaning of the term "specified service trade or business." For purposes of § 199A, a qualified trade or business is any trade or business *other than* (1) the trade or business of performing services as an employee, or (2) a specified service trade or business. Code § 199A(d)(2) defines a specified service trade or business (by reference to Code § 1202(e)(3)(A)) as "any trade or business involving the performance of services in the fields of health, … law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees." Architects and engineers are excluded. For taxpayers whose taxable incomes are below the $157,500/$315,000 thresholds mentioned earlier, a business is a qualified trade or business even if it is a specified service trade or business. The proposed regulations provide guidance on what is means to be considered providing services in each of these categories. Regarding the last category, the proposed regulations state that a trade or business in which the principal asset is the reputation or skill of one or more employees means any trade or business that consists of one or more of the following: (1) a trade or business in which a person receives fees, compensation, or other income for endorsing products or services, (2) a trade or business in which a person licenses or receives fees (or other income) for use of an individual's image, likeness, name, signature, voice, trademark, or symbols associated with that person's identity, or (3) receiving fees or other income for appearing at an event or on radio, television, or another media format. The proposed regulations set forth several examples. The proposed regulations also create a de minimis rule under which a trade or business (determined before application of the aggregation rules) is not a specified service trade or business if it has gross receipts of $25 million or less and less than 10 percent of its gross receipts is attributable the performance of services in a specified service trade or business, or if it has more than $25 million in gross receipts and less than 5 percent of its gross receipts is attributable the performance of services in a specified service trade or business.

Special Rules for Passthrough Entities, Publicly Traded Partnerships, Trusts, and Estates. Prop. Reg. § 1.199-6 provides guidance for passthrough entities, publicly traded partnerships trusts, and estates may need to follow in determining the § 199A deduction of the entity or its owners. The proposed regulations provide computational steps for passthrough entities and publicly traded partnerships, and special rules for applying § 199A to trusts and decedents' estates.

Effective Dates. The proposed regulations generally are proposed to apply to taxable years ending after the date of publication of final regulations in the Federal Register. Nevertheless, taxpayers can rely on the proposed regulations in their entirety until final regulations are published. However, to prevent abuse, certain provisions of the proposed regulations are proposed to apply to taxable years ending after December 17, 2017, the date of enactment of the 2017 TCJA. In addition, Prop. Reg. § 1.643(f)-1, which provides anti-avoidance rules for multiple trusts, is proposed to apply to taxable years ending after August 16, 2018.

b. The IRS has issued a proposed revenue procedure that provides guidance on methods for calculating W-2 wages for purposes of § 199A. Notice 2018-64, 2018-35 I.R.B. 347 (8/8/18). This proposed revenue procedure provides three methods for calculating "W-2 wages" as that term is defined in § 199A(b)(4) and Reg. § 1.199A-2. The first method (the unmodified Box method) allows for a simplified calculation while the second and third methods (the modified Box 1 method and the tracking wages method) provide greater accuracy. The methods are substantially similar to the methods provided in Rev. Proc. 2006-47, 2006-2 C.B. 869, which applied for purposes of former Code § 199A. The IRS has requested comments on the proposed revenue procedure. The proposed revenue procedure is proposed to apply generally to taxable years ending after December 31, 2017.

E. Depreciation & Amortization

F. Credits

G. Natural Resources Deductions & Credits

H. Loss Transactions, Bad Debts, and NOLs

I. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

A. Fringe Benefits

B. Qualified Deferred Compensation Plans

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

1. Relief for certain closed defined benefit pension plans. Notice 2014-5, 2014-2 I.R.B. 276 (12/13/13). This notice provides temporary nondiscrimination relief for certain "closed" defined benefit pension plans (i.e., those that provide ongoing accruals but that have been amended to limit those accruals to some or all of the employees who participated in the plan on a specified date). Typically, new hires are offered only a defined contribution plan, and the closed defined benefit plan has an increased proportion of highly compensated employees.

a. The relief is extended to plan years beginning before 2017. Notice 2015-28, 2015-14 I.R.B. 848 (3/19/15). This notice extends for an additional year the temporary nondiscrimination relief originally provided in Notice 2014-5, 2014-2 I.R.B. 276 (12/13/13), by applying that relief to plan years beginning before 2017. The notice cautions that all remaining provisions of the nondiscrimination regulations under § 401(a)(4) (including the rules relating to the timing of plan amendments under Reg. § 1.401(a)(4)-5) continue to apply. Treasury and the IRS anticipate issuing proposed amendments to the § 401(a)(4) regulations that would be finalized and apply after the relief under Notice 2014-5 and this notice expires.

b. Proposed regulations provide nondiscrimination relief for certain closed plans and formulas and make other changes. REG-125761-14, Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements, 81 F.R. 4976 (1/29/16). The Treasury Department and the IRS have published proposed amendments to the regulations under § 401(a)(4), which provides generally that a plan is a qualified plan only if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees. The proposed regulations modify a number of provisions in the existing regulations under § 401(a)(4) to address situations and plan designs that were not contemplated in the development of the existing regulations. Many of the changes in the proposed regulations provide nondiscrimination relief for certain closed plans and formulas, but the proposed regulations also include other changes that are not limited to closed plans and formulas. The proposed amendments generally would apply to plan years beginning on or after the date of publication of final regulations and, subject to some significant exceptions, taxpayers are permitted to apply the provisions of the proposed regulations for plan years beginning on or after 1/1/14.

c. The relief is extended to plan years beginning before 2018. Notice 2016-57, 2016-40 I.R.B. 432 (9/19/16). This notice extends for an additional year the temporary nondiscrimination relief originally provided in Notice 2014-5, 2014-2 I.R.B. 276 (12/13/13), by applying that relief to plan years beginning before 2018. The IRS has done so because it anticipates that the proposed regulations (REG-125761-14, Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements, 81 F.R. 4976 (1/29/16)) will not be published as final regulations in time for plan sponsors to make plan design decisions based on the final regulations before expiration of the relief provided under Notice 2014-5 (as extended by Notice 2015-28). Therefore, the IRS has extended the relief for an additional year.

d. The relief is extended to plan years beginning before 2019. Notice 2017-45, 2017-38 I.R.B. 232 (8/31/17). This notice extends for an additional year the temporary nondiscrimination relief originally provided in Notice 2014-5, 2014-2 I.R.B. 276 (12/13/13), by applying that relief to plan years beginning before 2019. The IRS has done so because it anticipates that the proposed regulations (REG-125761-14, Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements, 81 F.R. 4976 (1/29/16)) will not be published as final regulations in time for plan sponsors to make plan design decisions based on the final regulations before expiration of the relief provided under Notice 2014-5 (as last extended by Notice 2016-57). Therefore, the IRS has extended the relief for an additional year.

e. The relief is extended to plan years beginning before 2020. Notice 2018-69, 2018-37 I.R.B. 426 (8/24/18). This notice extends for an additional year the temporary nondiscrimination relief originally provided in Notice 2014-5, 2014-2 I.R.B. 276 (12/13/13), by applying that relief to plan years beginning before 2020. The IRS has done so because it anticipates that the proposed regulations (REG-125761-14, Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements, 81 F.R. 4976 (1/29/16)) will not be published as final regulations in time for plan sponsors to make plan design decisions based on the final regulations before expiration of the relief provided under Notice 2014-5 (as last extended by Notice 2017-45). Therefore, the IRS has extended the relief for an additional year.

V. PERSONAL INCOME AND DEDUCTIONS

A. Rates

B. Miscellaneous Income

1. Provisions of the 2017 Tax Cuts and Jobs Act that affect ABLE accounts.

a. Designated beneficiaries of ABLE accounts can contribute an additional amount and are eligible for the saver's credit. Code § 529A, enacted by the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014 (which became Division A of the Tax Increase Prevention Act of 2014), provides a tax-favored savings account for certain individuals with disabilities—the ABLE account. ABLE accounts permit certain individuals who became disabled before reaching age 26 and their families to contribute amounts to meet expenses related to the designated beneficiary's disability without affecting the beneficiary's eligibility for Supplemental Security Income, Medicaid, and other public benefits. ABLE accounts are modeled on § 529 accounts that are used to save for college education. Like § 529 accounts, ABLE accounts must be established pursuant to a state program, contributions to ABLE accounts are not tax deductible, the earnings of the ABLE account are not subject to taxation, and distributions from ABLE accounts are not included in the designated beneficiary's income to the extent they are used for qualified expenses related to the disability. Aggregate contributions to an ABLE account from all contributors cannot exceed the annual per-donee gift tax exclusion ($15,000 in 2018). The 2017 Tax Cuts and Jobs Act, § 11024, amended Code § 529A to increase this contribution limit for contributions made before 2026. Under the increased limit, once the overall limitation on contributions is reached, an ABLE account's designated beneficiary who is an employee (as defined) can contribute an additional amount equal to the lesser of: (1) the compensation includible in the beneficiary's income for the year, or (2) the federal poverty line for a one-person household as determined for the immediately preceding year ($12,486 for a single individual under age 65 in 2016). A designated beneficiary is considered to be an employee for this purpose only if the person is an employee with respect to whom no contribution is made to a defined contribution plan, an annuity contract described in § 403(b), or an eligible deferred compensation plan described in § 527. The legislation also makes designated beneficiaries of ABLE accounts who contribute eligible for the saver's credit of § 25B for contributions made before 2026. Both amendments are effective for taxable years beginning after December 22, 2017, the date of enactment.

b. Tax-free rollovers are permitted from a § 529 college savings account to an ABLE account. The 2017 Tax Cuts and Jobs Act, § 11025, amends Code § 529 to permit amounts in a § 529 account to be rolled over without penalty to an ABLE account if the owner of the ABLE account is the designated beneficiary of the § 529 account or a member of the designated beneficiary's family. Amounts rolled over pursuant to this provision, together with any other contributions to the ABLE account, are taken into account for purposes of the limit on aggregate contributions to the ABLE account. Any amount rolled over that exceeds this limitation is included in the gross income of the distributee in the manner provided by § 72. This provision applies to distributions from a § 529 account after December 22, 2017 (the date of enactment) that are transferred within 60 days and before 2026 to an ABLE account.

c. Guidance is forthcoming on tax-free rollovers from a § 529 college savings account to an ABLE account. Notice 2018-58, 2018-33 I.R.B. 305 (07/30/18). In this notice, the IRS has announced that Treasury and the IRS intend to issue proposed regulations that will provide, pursuant to the 2017 amendment of § 529, that distributions from a § 529 account made after December 22, 2017, and before January 1, 2026, to the ABLE account of the designated beneficiary of that § 529 account (or family member of that designated beneficiary) are not subject to income tax if two requirements are met. **First**, the distributed funds must be contributed to the ABLE account within 60 days after their withdrawal from the § 529 account. **Second**, the distributed funds, when added to all other contributions made to the ABLE account for the taxable year that are subject to the limitation under § 529A(b)(2)(B)(i) must not exceed that limitation. Generally, the limitation under

§ 529A(b)(2)(B)(i) is the annual gift tax exclusion under § 2503(b) plus, for beneficiaries who are employees, the lower of the beneficiary's taxable compensation or the federal poverty line for a one-person household as determined for the immediately preceding year. The notice provides that taxpayers, beneficiaries, and administrators of § 529 accounts and ABLE accounts can rely on this guidance before the proposed regulations are issued.

d. More guidance is forthcoming on the increased contribution limits for beneficiaries of ABLE accounts who are employed or self-employed. Notice 2018-62 , 2018-34 I.R.B. 316 (08/03/18). The 2017 Tax Cuts and Jobs Act, § 11024, amended Code § 529A to increase the contribution limit under § 529A(b)(2)(B) for contributions made to an ABLE account before 2026. Under the increased limit, once the overall limitation on contributions is reached, an ABLE account's designated beneficiary who is an employee (as defined) can contribute an additional amount equal to the lesser of: (1) the compensation includible in the beneficiary's income for the year, or (2) the federal poverty line for a one-person household as determined for the immediately preceding year ($12,486 for a single individual under age 65 in 2016). In this notice, the IRS has announced that Treasury and the IRS intend to issue proposed regulations that will (1) confirm that the employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements for additional contributions are met and for maintaining adequate records for that purpose; (2) provide that ABLE programs may allow a designated beneficiary to certify under penalties of perjury that he or she is a designated beneficiary described in § 529A(b)(7) and that his or her contributions do not exceed the increased limit set forth in § 529A(b)(2)(B)(ii); (3) clarify that the relevant federal poverty guidelines for purposes of the increased contribution limit are those updated periodically in the Federal Register by the U.S. Department of Health and Human Services for the state in which the beneficiary resides, and (4) provide that a program will not be treated as a qualified ABLE program if it accepts contributions that are not in cash or that exceed the contribution limits in § 529A(b)(2)(B). Because ABLE programs may need to adjust their systems and account documents to be in compliance with regulatory requirements, and because some necessary changes might require state legislative action, Treasury and the IRS anticipate that final regulations will provide transition relief to allow adequate time for any necessary changes.

C. <u>Hobby Losses and § 280A Home Office and Vacation Homes</u>

D. <u>Deductions and Credits for Personal Expenses</u>

1. Has the federal deduction for your high property or state income taxes made them easier to bear? Brace yourself! The deduction for state and local taxes not paid or accrued in carrying on a trade or business or an income-producing activity is limited to $10,000. The 2017 Tax Cuts and Jobs Act, § 11042, amended Code § 164(b) by adding § 164(b)(6). For individual taxpayers, this provision generally (1) eliminates the deduction for foreign real property taxes, and (2) limits to $10,000 ($5,000 for married individuals filing separately) a taxpayer's itemized deductions on Schedule A for the aggregate of state or local property taxes, income taxes, and sales taxes deducted in lieu of income taxes. This provision applies to taxable years beginning after 2017 and before 2026. The provision does *not* affect the deduction of state or local property taxes or sales taxes that are paid or accrued in carrying on a trade or business or an income-producing activity (i.e., an activity described in § 212) that are properly deductible on Schedules C, E, or F. For example, property taxes imposed on residential rental property will continue to be deductible. With respect to income taxes, an individual can deduct only *foreign* income taxes paid or accrued in carrying on a trade or business or an income-producing activity. As under current law, an individual cannot deduct state or local income taxes as a business expense even if the individual is engaged in a trade or business as a sole proprietor. *See* Reg. § 1.62-1T(d).

a. The IRS is not going to give blue states a pass on creative workarounds to the new $10,000 limitation on the personal deduction for state and local taxes. Notice 2018-54, 2018-23 I.R.B. (05/23/18). In response to new § 164(b)(6), many states—including Connecticut, New Jersey, and New York—have enacted workarounds to the $10,000 limitation. For instance, New Jersey reportedly has enacted legislation giving property owners a special tax credit against otherwise assessable property taxes if the owner makes a contribution to charitable funds designated by local governments. Connecticut reportedly has enacted a new provision that taxes the income of passthrough entities such as S corporations and partnerships, but allows the shareholders or members a corresponding tax credit against certain state and local taxes assessed against them individually. Notice 2018-54 announces that the IRS and Treasury are aware of these workarounds and that proposed regulations will be issued to "make clear that the requirements of the Internal Revenue Code, informed by substance-over-form principles, govern the federal income tax treatment of such transfers." In other words blue states, don't bank on a charitable contribution or a flow-through income tax substituting for otherwise assessable state and local taxes to avoid new § 164(b)(6).

b. And like Rameses II in *The Ten Commandments*, Treasury says, "So let it be written; so let it (finally!) be done." REG-112176-18, Contributions in Exchange for State and Local Tax Credits, 83 F.R. 43563 (8/27/18). Moving swiftly, Treasury has published proposed regulations under § 170 that purport to close the door on any state-enacted workarounds to new § 164(b)(6). Prop. Reg. § 1.170A-1(h)(3) generally requires taxpayers to reduce the amount of any federal income tax charitable contribution deduction by the amount of any corresponding state or local tax *credit* the taxpayer receives or expects to receive. The proposed regulations further provide that a corresponding state or local tax *deduction* normally will not reduce the taxpayer's federal deduction provided the state and local deduction does not exceed the taxpayer's federal deduction. To the extent the state and local charitable deduction exceeds the taxpayer's federal deduction, the taxpayer's federal deduction is reduced. Finally, the proposed regulations provide an exception whereby the taxpayer's federal charitable contribution deduction is not reduced if the corresponding state or local credit does not exceed 15 percent of the taxpayer's federal deduction. Three examples illustrate the application of the proposed regulation:

- *Example 1*. A, an individual, makes a payment of $1,000 to X, an entity listed in section 170(c). In exchange for the payment, A receives or expects to receive a state tax credit of 70% of the amount of A's payment to X. Under paragraph (h)(3)(i) of this section, A's charitable contribution deduction is reduced by $700 (70% × $1,000). This reduction occurs regardless of whether A is able to claim the state tax credit in that year. Thus, A's charitable contribution deduction for the $1,000 payment to X may not exceed $300.

- *Example 2*. B, an individual, transfers a painting to Y, an entity listed in section 170(c). At the time of the transfer, the painting has a fair market value of $100,000. In exchange for the painting, B receives or expects to receive a state tax credit equal to 10% of the fair market value of the painting. Under paragraph (h)(3)(vi) of this section, B is not required to apply the general rule of paragraph (h)(3)(i) of this section because the amount of the tax credit received or expected to be received by B does not exceed 15% of the fair market value of the property transferred to Y. Accordingly, the amount of B's charitable contribution deduction for the transfer of the painting is not reduced under paragraph (h)(3)(i) of this section.

- *Example 3*. C, an individual, makes a payment of $1,000 to Z, an entity listed in section 170(c). In exchange for the payment, under state M law, C is entitled to receive a state tax deduction equal to the amount paid by C to Z. Under paragraph (h)(3)(ii)(A) of this section, C is not required to reduce its charitable contribution deduction under section 170(a) on account of the state tax deduction.

The proposed regulation is effective for charitable contributions made after August 27, 2018.

- **On the other hand . . . .** The looming trouble spot here is how taxpayers and the IRS discern the difference between abusive "workarounds" enacted in response to new § 164(b)(6) and legitimate state and local tax credit programs such as the Georgia Rural Hospital Tax Credit that preceded TCJA. The Georgia Rural Hospital Tax Credit program was enacted in 2017 to combat the closure of many rural hospitals in Georgia due to financial difficulties. Under the program, individuals and corporations making contributions to designated rural hospitals receive a 90% dollar-for-dollar tax credit against their Georgia state income tax liability. Is the Georgia Rural Hospital Tax Credit program adversely affected by proposed regulations under § 164(b)(6)? In our view, the answer is "yes" and a Georgia taxpayer's federal charitable contribution deduction for a donation to a Georgia rural hospital is reduced by 90 percent. This follows because the proposed regulations do not condition the reduction in a taxpayer's federal charitable contribution deduction on whether the taxpayer's state and local deduction otherwise would exceed the $10,000 cap of new § 164(b)(6). We note, however, that it may be possible under state or local law for a taxpayer to waive any corresponding state or local tax credit and thereby claim a full charitable contribution for federal income tax purposes. *See* Rev. Rul. 67-246, 1967-2 C.B. 104.

E. <u>Divorce Tax Issues</u>

F. <u>Education</u>

1. Private elementary and secondary schools have a new incentive to raise tuition: up to $10,000 per year can be withdrawn tax-free from § 529 accounts to pay it. The 2017 Tax Cuts and Jobs Act, § 11032, amended Code § 529(c) by adding § 529(c)(7), which permits tax-free distributions from § 529 accounts to pay "expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school." The limit on distributions for this purpose is $10,000 during the taxable year, which applies per student, not per account. Thus, if a student is a designated beneficiary of more than one § 529 account, the student can receive only $10,000 free of tax for this purpose in a given year regardless of whether the funds are distributed from multiple accounts. This provision applies to distributions occurring after 2017.

a. Breaking news! "Elementary or secondary" school means kindergarten through grade 12. Notice 2018-58, 2018-33 I.R.B. 305 (07/30/18). In this notice, the IRS has announced that Treasury and the IRS intend to issue proposed regulations regarding § 529 accounts that will provide, pursuant to the 2017 enactment of new § 529(c)(7), that (1) tuition in connection with a designated beneficiary's enrollment or attendance at an elementary or secondary public, private, or religious school constitutes a qualified higher education expense, and therefore amounts can be withdrawn tax-free to pay it, but that such tax-free distributions are limited to a total of $10,000 per year per designated beneficiary, regardless of whether the funds are distributed from multiple § 529 accounts, and (2) the term "elementary or secondary" means kindergarten through grade 12 as determined under state law, which is consistent with the definition set forth in § 530(b)(3)(B) for Coverdell education savings accounts. The notice also provides that the proposed regulations will address the recontribution of refunded qualified higher education expenses, which might occur, for example, if a student drops a class and receives a refund of tuition. Under § 529(c)(3)(D) (enacted by the 2015 PATH Act), the portion of a distribution that is refunded to an individual who is the beneficiary of a § 529 account by an eligible educational institution is not subject to income tax to the extent the refund is recontributed to a § 529 account of which that individual is the beneficiary not later than 60 days after the date of the refund and does not exceed the refunded amount. The proposed regulations will provide that the entire recontributed amount will be treated as principal (rather than earnings), which is a rule of administrative convenience that avoids certain complexities that otherwise would arise under the rules governing rollovers previously set forth in Notice 2001-81, 2001-52 I.R.B. 617. The notice provides that taxpayers, beneficiaries, and administrators of § 529 accounts can rely on this guidance before the proposed regulations are issued.

G. <u>Alternative Minimum Tax</u>

VI. <u>CORPORATIONS</u>

A. <u>Entity and Formation</u>

B. <u>Distributions and Redemptions</u>

C. <u>Liquidations</u>

D. <u>S Corporations</u>

E. <u>Mergers, Acquisitions and Reorganizations</u>

F. <u>Corporate Divisions</u>

G. <u>Affiliated Corporations and Consolidated Returns</u>

H. Miscellaneous Corporate Issues

1. ♪♬"Shed a tear 'cause I'm missin' you … All we need is just a little patience"♪♬ Treasury and the IRS propose to withdraw the final regulations regarding documentation issued under § 385, but they may be back in modified form. REG-130244-17, Proposed Removal of Section 385 Documentation Regulations, 83 F.R. 48265 (9/24/18). Treasury and the IRS have issued a notice of proposed rulemaking that would remove the final regulations issued in 2016 setting forth minimum documentation requirements that ordinarily must be satisfied for certain related-party interests in a corporation to be treated as indebtedness for federal tax purposes.

Documentation Regulations. In 2016, Treasury and the IRS published Reg. § 1.385-2, which provides detailed requirements for documentation and financial analysis of instruments issued as indebtedness between related parties similar to what generally would be expected on issuance of debt instruments between unrelated parties. *See* T.D. 9790, Treatment of Certain Interests in Corporations as Stock or Indebtedness, 81 F.R. 72858 (10/21/16). Under this regulation, for an instrument to be treated as debt, documentation and information must be developed at the time an instrument is issued to demonstrate (1) a binding obligation to repay a fixed or determinable sum certain on demand or at one or more fixed dates, (2) that the creditor has the typical legal rights of a creditor to enforce the terms of the instrument including rights to trigger a default and accelerate payments, (3) a reasonable expectation that the issuer intends and would be able to repay, such as cash flow projections, financial statements, business forecasts, asset appraisals, determinations of debt-to-equity and other relevant financial ratios of the issuer (compared to industry averages), and (4) timely evidence of an on-going debtor-creditor relationship. Reg. § 1.385-2(c)(2). The documentation rules generally apply only to interests among members of an "expanded group" (very generally, an affiliated group within the meaning of § 1504(a) connected through stock possessing 80 percent of *either* voting power *or* value) if, on the date the interest is created, (1) the stock of any member of the expanded group is publicly traded, (2) all or any portion of the expanded group's financial results are reported on financial statements with total assets exceeding $100 million, or (3) the expanded group's financial results are reported on financial statements that reflect annual total revenue that exceeds $50 million. The documentation rules do not apply to intercompany obligations among members of a consolidated group. Reg. § 1.385-2 originally was to apply to interests issued or deemed issued on or after January 1, 2018. In Notice 2017-36, 33 I.R.B. 208 (7/28/17), due to concerns expressed by taxpayers that the applicability date of the proposed regulations did not give taxpayers sufficient time to develop processes to comply with the documentation requirements, the IRS announced that Reg. § 1.385-2 would be amended to apply only to interests issued or deemed issued on or after January 1, 2019.

Withdrawal of the Documentation Regulations. On April 21, 2017, President Trump issued Executive Order 13789 directing the Secretary of the Treasury to review "all significant tax regulations" issued on or after January 1, 2016, that "impose an undue financial burden," "add undue complexity," or "exceed [the IRS's] statutory authority," and to submit two reports to the President. The second report, issued by Treasury Secretary Mnuchin on October 2, 2017, recommended certain actions with respect to eight sets of regulations, one of which was the documentation rules set forth in the regulations under § 385. Treasury and the IRS now have proposed to withdraw the documentation rules, which are found primarily in Reg. § 1.385-2. The preamble to these proposed regulations states that Treasury and the IRS will continue to study the issues addressed by the documentation rules and may propose a modified version of them. Any revised regulation setting forth documentation requirements "would be substantially simplified and streamlined to reduce the burden on U.S. corporations and yet would still require sufficient documentation and other information for tax administration purposes." The proposed withdrawal will be effective on the date these proposed regulations are published as final regulations.

VII. PARTNERSHIPS

A. Formation and Taxable Years

B. Allocations of Distributive Share, Partnership Debt, and Outside Basis

1. They were just kidding! Treasury and the IRS have proposed to remove temporary regulations regarding the allocation of partnership liabilities for purposes of the § 707

disguised sale rules. REG-131186-17, Proposed Removal of Temporary Regulations on a Partner's Share of a Partnership Liability for Disguised Sale Purposes, 83 F.R. 28397 (6/19/18). In 2016, Treasury and the IRS published temporary regulations (707 Temporary Regulations) regarding the allocation of partnership liabilities for purposes of applying the disguised sale rules of § 707. T.D. 9788, Liabilities Recognized as Recourse Partnership Liabilities Under Section 752, 81 F.R. 69282 (10/5/16). On April 21, 2017, President Trump issued Executive Order 13789 directing the Secretary of the Treasury to review "all significant tax regulations" issued on or after January 1, 2016, that "impose an undue financial burden," "add undue complexity," or "exceed [the IRS's] statutory authority," and to submit two reports to the President. The second report, issued by Treasury Secretary Mnuchin on October 2, 2017, recommended certain actions with respect to eight sets of regulations, one of which was the 707 Temporary Regulations. The second report stated that the novel approach implemented in the 707 Temporary Regulations should be studied systematically and that the Treasury Department and the IRS therefore would consider removing the 707 Temporary Regulations and reinstating prior regulations. Treasury and the IRS now have proposed to do so.

The 707 Temporary Regulations Issued in 2016. Temp. Reg. § 1.707-5T(a)(2), published in 2016, provides that, for purposes of the disguised sale rules, a partner's share of any partnership liabilities, regardless of whether they are recourse or nonrecourse under Reg. § 1.752-1 through 1.752-3, must be allocated by applying the same percentage used to determine the partner's share of "excess nonrecourse liabilities" under Reg. § 1.752-3(a)(3), "but such share shall not exceed the partner's share of the partnership liability under section 752 and applicable regulations (as limited in the application of § 1.752-3(a)(3) to this paragraph (a)(2))." Reg. § 1.752-3(a)(3) (as amended in T.D. 9787, 81 F.R. 69291 (10/5/16)), provides that, for purposes of the disguised sale rules of Reg. § 1.707-5(a)(2), a partner's share of an excess nonrecourse liability is determined solely in accordance with the partner's interest in partnership profits and that the significant item method, alternative method, and additional method do not apply. The combined effect of these rules is that, for purposes of the disguised sale rules, and regardless of whether a liability is recourse or nonrecourse, (1) a contributing partner's share of a partnership liability is determined solely by the partner's share of partnership profits and cannot be determined either under the other methods normally authorized for allocating excess nonrecourse liabilities or with reference to that partner's economic risk of loss under Reg. § 1.752-2, and (2) no portion of any partnership liability for which another partner bears the risk of loss can be allocated to the contributing partner under the profit-share method. Treasury and the IRS expressed the belief that, for purposes of the disguised sale rules, this allocation method reflects the overall economic arrangement of the partners. According to the preamble to the 707 Temporary Regulations, "[i]n most cases, a partnership will satisfy its liabilities with partnership profits, the partnership's assets do not become worthless, and the payment obligations of partners or related persons are not called upon." These rules were designed to be the death knell of leveraged partnership disguised sale transactions ala *Canal Corp. v. Commissioner*, 135 T.C. 199 (2010), to which reference is made in the 2016 preamble.

The Proposed Withdrawal of the 707 Temporary Regulations. The Treasury Department and the IRS have proposed to remove the 707 Temporary Regulations and to reinstate the regulations under § 1.707-5(a)(2) as in effect prior to the 707 Temporary Regulations. Under those prior rules, (1) a partner's share of a partnership's recourse liability is the partner's share of the liability under § 752 and the regulations thereunder, i.e., recourse liabilities are allocated for purposes of the disguised sale rules under the normal rules for allocating recourse liabilities, and (2) nonrecourse liabilities are allocated by applying the same percentage used to determine the partner's share of "excess nonrecourse liabilities" under Reg. § 1.752-3(a)(3), which means that a contributing partner's share of a nonrecourse liability is determined for purposes of the disguised sale rules solely by the partner's share of partnership profits and that the significant item method, alternative method, and additional method do not apply. The proposed regulations also would reinstate the rule in former Reg. § 1.707-5(a)(2)(i) and (ii) for so-called § 1.752-7 contingent liabilities that a partnership liability is a recourse or nonrecourse liability to the extent that the obligation would be a recourse liability under Reg. § 1.752-1(a)(1) or a nonrecourse liability under § 1.752-1(a)(2), respectively, if the liability was treated as a partnership liability for purposes of section 752. The preamble to the proposed regulations indicates that "[t]he Treasury Department and the IRS continue to study the issue of the effect of contingent liabilities with respect to section 707, as well as other sections of the Code." Finally, the proposed regulations would reinstate Examples 2, 3, 7, and 8 under Reg. § 1.752-1-5(f) with a modification to the language in Example 3 to reflect an amendment made in 2016 to Reg. § 1.707-5(a)(3) regarding an anticipated reduction in a partner's share of a liability that is not subject to the entrepreneurial risks of partnership operations.

Temporary Regulations on Bottom Dollar Guarantees Unaffected. The proposed regulations do *not* propose to withdraw Temp. Reg. § 1.752-2T(b)(3), issued in 2016, which addresses so-called bottom-dollar guarantees. Under Reg. § 1.752-2, a partnership liability is recourse to the extent that any partner or related person bears the economic risk of loss (EROL) for the liability. A partner or related person bears the EROL to the extent the partner or related person would have a payment obligation if the partnership liquidated in a worst-case scenario in which all partnership liabilities are due and all partnership assets generally are worthless. In 2016, along with the 707 Temporary Regulations, Treasury and the IRS issued Temp. Reg. § 1.752-2T(b)(3), which (like the final regulation that preceded it) provides that "[t]he determination of the extent to which a partner or related person has an obligation to make a payment under [Reg. § 1.752-2(b)(1)] is based on the facts and circumstances at the time of the determination," and that "[a]ll statutory and contractual obligations relating to the partnership liability are taken into account." However, the Temp. Reg. § 1.752-2T(b)(3) carves out an exception under which "bottom dollar" guarantees and indemnities (or their equivalent, termed "bottom dollar payments") will not be recognized. The second report mentioned earlier, issued by Treasury Secretary Mnuchin on October 2, 2017, stated that Treasury and the IRS believe that Temp. Reg. § 1.752-2T(b)(3) concerning bottom dollar payment obligations does not meaningfully increase regulatory burdens and should be retained to prevent abuses. Accordingly, the proposed regulations do not propose to withdraw Temp. Reg. § 1.752-2T(b)(3).

Effective Date. The 707 Temporary Regulations are proposed to be removed thirty days following the date that these proposed regulations are published as final regulations. The amendments to Reg. § 1.707-5 are proposed to apply to any transaction with respect to which all transfers occur on or after thirty days following the date these proposed regulations are published as final regulations. Nevertheless, taxpayers can apply these proposed regulations instead of the 707 Temporary Regulations to any transaction with respect to which all transfers occur on or after January 3, 2017.

C. <u>Distributions and Transactions Between the Partnership and Partners</u>

1. No, you May not. T.D. 9833, Partnership Transactions Involving Equity Interests of a Partner, 83 F.R. 26580 (6/8/18). The Treasury Department and the IRS have finalized, with only minor, nonsubstantive changes, Temp. Reg. § 1.337(d)-3T, Temp. Reg. § 1.732-1T(c), and corresponding proposed regulations issued in 2015. *See* T.D. 9722, Partnership Transactions Involving Equity Interests of a Partner, 80 F.R. 33402 (6/12/15). These regulations are intended to prevent a corporate partner from avoiding recognition under § 311(b) of corporate-level gain through transactions with a partnership involving equity interests of the corporate partner. An example of the type of transaction—commonly called a "May Company" transaction—is as follows: A corporation enters into a partnership and contributes appreciated property. The partnership then acquires stock of that corporate partner, and later makes a liquidating distribution of this stock to the corporate partner. Under § 731(a), the corporate partner does not recognize gain on the partnership's distribution of its stock. By means of this transaction, the corporation has disposed of the appreciated property it formerly held and acquired its own stock, permanently avoiding its gain in the appreciated property. If the corporation had directly exchanged the appreciated property for its own stock, § 311(b) would have required the corporation to recognize gain upon the exchange. Under the regulations, if a transaction has the effect of an exchange by a corporate partner of its interest in appreciated property for an interest in stock of the corporate partner owned, acquired, or distributed by a partnership (a "Section 337(d) Transaction"), the corporate partner must recognize gain under a "deemed redemption" rule.

Deemed Redemption Rule. Under the deemed redemption rule, a corporate partner in a partnership that engages in a Section 337(d) Transaction must recognize gain at the time, and to the extent, that the corporate partner's interest in appreciated property (other than stock of the corporate partner) is reduced in exchange for an increased interest in stock of the corporate partner. The complicated deemed redemption rule is triggered by the partnership's purchase of stock of a corporate partner (or stock or other equity interests of any corporation that controls the corporate partner within the meaning of § 304(c), except that § 318(a)(1) and (3) do not apply for that purpose); gain recognition can be triggered without a subsequent distribution. The regulations provide general principles that apply in determining the amount of appreciated property effectively exchanged for stock of the corporate partner. The corporate partner's economic interest with respect to both the stock of the corporate partner and all other appreciated property of the partnership must be determined based on all facts and circumstances, including the allocation and distribution rights set forth in the partnership agreement. The gain from the hypothetical sale used to compute gain under the deemed redemption rule is determined by applying the principles of § 704(c). The corporate partner's recognition of gain from a Section 337(d) Transaction triggers two basis adjustments. First, the partnership increases its adjusted basis in the appreciated property that is treated as the subject of a Section 337(d) Transaction by the amount of gain that the corporate partner recognizes with respect to that property as a result of the Section 337(d) Transaction regardless of whether the partnership has a § 754 election in effect. Second, the basis of the corporate partner's interest in the partnership is increased by the amount of gain the corporate partner recognizes. In limited circumstances, a partnership's acquisition of stock of the corporate partner does not have the effect of an exchange of appreciated property for that stock. For example, if a partnership with an operating business uses the cash generated in that business to purchase stock of the corporate partner, the deemed redemption rule does not apply because the corporate partner's share in appreciated property has not been reduced, and thus no exchange has occurred. The rules also do not apply if all interests in the partnership's capital and profits are held by members of an affiliated group (defined in § 1504(a)) that includes the corporate partner.

Distribution of Corporate Partner's Stock. A distribution of the corporate partner's stock to the corporate partner by the partnership also can trigger gain recognition. In addition to any gain previously recognized under the deemed redemption rule, if stock of a corporate partner is distributed to the corporate partner, the corporate partner must recognize gain to the extent that the partnership's basis in the distributed stock exceeds the corporate partner's basis in its partnership interest (as reduced by any cash distributed in the transaction) immediately before the distribution.

De Minimis Exception. The rules described above do not apply if a de minimis exception is satisfied. The de minimis exception applies if three conditions are met: (1) the corporate partner and any related persons own less than 5 percent of the partnership, (2) the partnership holds stock of the corporate partner worth less than 2 percent of the value of the partnership's gross assets, including stock of the corporate partner, and (3) the partnership has never, at any time, held more than $1 million in stock of the corporate partner or more than 2 percent of any particular class of stock of the corporate partner.

Effective Date. The final regulations apply to transactions that occur on or after June 12, 2015.

D. Sales of Partnership Interests, Liquidations and Mergers

E. Inside Basis Adjustments

F. Partnership Audit Rules

G. Miscellaneous

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

B. Charitable Giving

1. Used underwear is just not worth what it "used" to be! T.D. 9836, Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions, 83 F.R. 36417 (7/30/18). The Treasury Department and the IRS have finalized, with only minor changes, proposed regulations (which addressed the deductibility of "good condition" but used clothing and other household items, among other things) (REG-140029-07, Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions, 73 F.R 45908 (8/7/8)) regarding substantiation and reporting requirements for cash and noncash charitable contributions. The proposed and now final regulations [principally, Reg. §§ 1.170A-15 through 1.170A-18] reflect the enactment of certain provisions of the American Jobs Creation Act of 2004

[§ 170(f)(11) and (12)] and the Pension Protection Act of 2006 [§ 170(f)(16) and (17)]. Section 170(f) contains numerous limitations on the charitable contribution deduction with respect to donations of certain items of property (e.g., remainder interests, partial interests, insurance policies, used vehicles, stuffed animals, used clothing and household goods, etc.). Complicating matters further, § 170 also contains three distinct subsections [§ 170(f)(8), (11), and (17)] pertaining to substantiation and recordkeeping requirements for both cash and "noncash" (i.e., property) contributions. The proposed and now final regulations attempt to clarify and reconcile several of the foregoing limitations in § 170 with the distinct substantiation and recordkeeping rules in § 170. The five major changes from the proposed regulations (REG-140029-07) are as follows. **One,** due to the Tax Court's decision in *Crimi v. Commissioner*, T.C. Memo 2013-51 (reasonable-cause is inherently facts and circumstances specific), the final regulations do not provide a standard for a "reasonable-cause" excuse for failure to meet the substantiation requirements. **Two,** when substantiating noncash contributions that exceed $500, a donor can treat similar items contributed during the tax year as one property. **Three,** the substantiation requirements apply to carryover years as well as the year of donation. Four, if a Form 8323 is required in connection with a donation, the appraiser's taxpayer identification number (or EIN of the appraiser's business) must be included. **Lastly,** the final regulations clarify that a completed Form 8323 does not substitute for any required contemporaneous written acknowledgment. Thankfully, no changes were made to the rules regarding donations of used clothing, so we can continue to take a deduction (albeit small) for donations of old underwear. The final regulations are effective for contributions made after July 30, 2018. For further details, read on.

Cash or Monetary Contributions. Reg. § 1.170A-15 provides that the substantiation requirements of § 170(f)(17) regarding *cash or monetary contributions of less than $250* may be met if the taxpayer has one of two items: (i) a "bank record" (a monthly bank statement with a photocopy or image obtained from the bank of the front of the check indicating the name of the charity, or a credit card statement for contributions made via credit card), or (ii) a "written communication" (essentially, a receipt) from the charity showing the name of the charity, the date of the contribution, and the amount of the contribution. Separate contributions of less than $250 made during a year are not aggregated for this purpose. See Reg. § 1.170a-13(F)(1). Notwithstanding the foregoing, a written communication is not required to substantiate contributions of less than $250 to certain charitable trusts (*see* Reg. § 1.170A-15(g)); however, if the contribution is $250 or more, a "contemporaneous written acknowledgment" (see below) from the charitable trust apparently is required. Further, a written communication from a charity is not necessary to substantiate unreimbursed, out-of-pocket" expenses of less than $250 incurred incident to the rendition of services to a charitable organization; however, taxpayers must maintain records of such expenses. For *cash or monetary contributions of $250 or more*, pursuant to § 170(f)(8), the minimal "bank record" or "written communication" requirement must be met plus the donor must have a so-called "contemporaneous written acknowledgment" from the charity indicating the name of the donor, whether the charity provided goods or services in exchange for the contribution, and the amount of the contribution. The contemporaneous written acknowledgment may be electronic and, in general, is "contemporary" if it is delivered to the taxpayer before the taxpayer files a return for the year of the contribution. Further, the contemporaneous written acknowledgment may substitute for the minimal "written communication" requirement for cash or monetary contributions under $250 (and, as a practical matter, almost always will be provided in lieu of a receipt) if it also shows the date of the contribution. For unreimbursed "out of pocket" expenses of $250 or more, a donor may meet the substantiation requirement by having a written record of each such expense and a contemporaneous statement by the charity describing the services and indicating whether goods or services were provided to the taxpayer in return for the expense. A contribution made by payroll deduction may be substantiated by (i) a pay stub, Form W-2, or other document furnished by the employer that sets forth the amount withheld during the taxable year for payment to a charity, together with (ii) a pledge card or other document prepared by or at the direction of the charity that shows the name of the organization.

Noncash Contributions. Reg. § 1.170A-16 provides that for *noncash contributions of less than $250*, a taxpayer must substantiate the deduction with a "written communication" (essentially, a receipt) from the charity showing the name and address of the charity, the date of the contribution, and an adequate description of the property (*see* Reg. § 1.170A-16(a)(iii) for what is considered "adequate," especially for securities). If obtaining a written communication from the charity is impractical (such as for contributions made at unattended drop sites), then a taxpayer must substantiate the donation with "reliable written records" (generally, the same information as a charity-provided receipt, but see Reg. § 1.170A-16(a)(2) for details). For *noncash contributions of $250 or more up to $500*, the taxpayer must substantiate such contributions with a contemporary written acknowledgment from the charity. For *noncash contributions of more than $500 but not more than $5,000*, substantiation requires a contemporaneous written acknowledgment plus a properly completed Form 8283 (Section A) (which requires detailed information concerning the property contributed, including the taxpayer's cost or other basis in the property). For *noncash contributions of more than $5,000*, substantiation requires a contemporaneous written acknowledgment, a "qualified appraisal" prepared by a "qualified appraiser," and a properly completed Form 8283 (Section B); however, a qualified appraisal is not required for publicly-traded securities and certain other readily-valuable property. *See* Reg. § 1.170A-16(d)(2). For *noncash contributions of more than $500,000*, substantiation requires that all of the above requirements be met plus the qualified appraisal must be attached to the taxpayer's return claiming the deduction.

Qualified appraisal and qualified appraiser. Reg. § 1.170A-17 sets forth the detailed requirements for a "qualified appraisal" and a "qualified appraiser." These requirements did not change significantly from those set forth in the proposed regulations; however, in order to provide appraisers with a reasonable amount of time to meet new education and experience requirements, the final regulations under § 1.170A-17 apply only to contributions made after January 1, 2019.

2. Deduction for charitable contribution of façade easement denied to long-term lessee of building. Harbor Lofts Associates v. Commissioner, 151 T.C. No. 3 (8/27/18). The Tax Court has held that a taxpayer with a long-term lease of two historic buildings was not entitled to a charitable contribution deduction for donating façade easements over the buildings to a historical preservation organization. The taxpayer was a partnership that had leased the buildings for a 47-year term from the fee owner, the Economic Development & Industrial Corporation of Lynn ("EDIC"), a public corporation authorized under Massachusetts law. The 47-year lease between the taxpayer and EDIC made the taxpayer responsible for all insurance, utility, maintenance, and other costs associated with occupying the buildings and entitled the taxpayer to a portion of any proceeds if the land and buildings were taken under eminent domain. The taxpayer-lessee and EDIC jointly contributed the façade easement to the historical preservation organization in December of 2009. The taxpayer then claimed a charitable contribution deduction of almost $4.5 million on its 2009 return. On audit, the IRS challenged the claimed charitable contribution deduction arguing that, although the façade easement may have been "granted in perpetuity" by EDIC, the taxpayer's contribution of a façade easement essentially was a waiver of the taxpayer's "time-limited" contract rights. Thus, the taxpayer did not make a contribution of a "qualified real property interest" as required by § 170(h)(2)(C). In response, the taxpayer argued that by jointly contributing the façade easement with the fee owner, EDIC, the "granted in perpetuity" requirement was met and that the taxpayer's long-term leasehold interest in the façade of the buildings coupled with EDIC's fee interest equated with a "qualified real property interest." Moreover, the taxpayer argued that it should be treated as the equitable and tax owner of the buildings due to the nature of the long-term lease. The Tax Court (Judge Buch) denied the taxpayer's charitable contribution deduction. Judge Buch concluded that, under Massachusetts law, the taxpayer held only a leasehold interest, not a fee interest, and that Massachusetts law characterized the taxpayer's leasehold interest as personal property. Judge Buch further reasoned that the taxpayer's leasehold was a personal property right, not a "qualified real property interest" within the meaning of § 170(h)(2)(C). Judge Buch also determined that, in any even,t the taxpayer was incapable of granting a perpetual restriction over the façade of the buildings because the taxpayer did not hold perpetual rights. Judge Buch distinguished the facts in this case from one in which tenants-in-common grant deductible conservation easements due to the fact that EDIC and the taxpayer were not tenants in common, but rather lessor and lessee under Massachusetts law. Finally, Judge Buch ruled that, even if the taxpayer were considered the equitable owner of the buildings for federal income tax purposes, the façade easement granted by the taxpayer was not a "grant in perpetuity" because it was limited by the 47-year term of the lease.

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

B. Discovery: Summonses and FOIA

1. Citing § 7611, purported church exorcises devilish IRS summons. The lesson for the IRS? For God's sake, get the "John Hancock" of at least the TE/GE Commissioner before sending a church tax inquiry or examination notice under § 7611! United States v. Bible Study Time, Inc., 295 F.Supp.3d 606 (3/13/18). The District Court of South Carolina stayed a summons enforcement action because the IRS failed to substantially comply with the notice requirements of § 7611(a) (church tax inquiries and examinations). The taxpayer, Bible Study Time, Inc., purported to be a church. The IRS issued a summons to the taxpayer in connection with an inquiry and examination of the taxpayer's tax-exempt status as a church. [Previously, the taxpayer had failed in its efforts to quash several IRS third-party summonses issued to the taxpayer's banks. *See Bible Study Time, Inc. v. United States*, 240 F.Supp.3d 409 (D.S.C. 2017).] Under § 7611, the IRS must navigate certain procedural and notice rules prior to conducting a church tax inquiry or examination. One such rule requires an "appropriate high-level Treasury official" to sign off before a church tax inquiry or examination can begin. *See* § 7611(a). Furthermore, § 7611(e) provides that "any proceeding to compel compliance with respect to any church tax inquiry or examination shall be stayed until the court finds that all practicable steps to correct the noncompliance have been taken." Due largely to the IRS's reorganization begun in 1998 and Congress's failure to update § 7611 thereafter (as well as Treasury's failure to update interpreting regulations), the law is unclear as to who is an "appropriate high-level Treasury official" within the meaning of § 7611. *See generally United States v. Living Word Christian Center*, 102 A.F.T.R.2d 2008-7220 (D. Minn. 2008) (IRS Director of Exempt Organizations, Examinations, is not an "appropriate high-level Treasury official). In this case, the IRS Tax-Exempt/Governmental Entities ("TE/GE") Commissioner and the Director, Exempt Organizations ("DEO"), who reports to the TE/GE Commissioner, had signed off on an "Approval Cover Sheet" for the § 7611 notice, but for reasons that are unclear, only the DEO signed the actual § 7611 notice itself. The IRS compounded this error by failing to communicate to the taxpayer that the TE/GE Commissioner had signed the "Approval Cover Sheet," a fact which the taxpayer discovered only after contesting the summons. In response to the IRS's summons enforcement action, the taxpayer argued that the DEO was not of sufficiently high rank to comply with § 7611 and that even if the TE/GE Commissioner was of high enough rank, the IRS's failure to communicate that fact violated § 7611. The IRS argued that the DEO was of sufficient rank, but regardless the TE/GE Commissioner's signature on the § 7611 Approval Cover Sheet "substantially complied" (see § 7611(e)(1)) with § 7611, making the summons enforceable. Ultimately, after noting the IRS's reorganization during and after 1998 and the resulting ambiguity created under § 7611, the District Court of South Carolina (Judge Currie) ruled as follows: (i) pursuant to Delegation Order 193 (Nov. 8, 2000), the TE/GE Commissioner is of sufficiently high rank to sign a § 7611 notice; (ii) the DEO is not of sufficiently high rank; and (iii) the IRS's failure to communicate the TE/GE Commissioner's authorization under § 7611 to the taxpayer requires a stay of the summons enforcement proceeding until the TE/GE Commissioner signs and delivers the actual § 7611 notice to the taxpayer.

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

F. Liens and Collections

G. Innocent Spouse

H. Miscellaneous

1. The IRS has provided extensions of filing and payment due dates for those affected by California wildfires, flooding, mudflows and debris flows. In news release CA-2018-1 (1/17/18), the IRS has extended to April 30, 2018, several filing and payment due dates for those affected by the wildfires, flooding, mudflows and debris flows that took place beginning on Dececember 4, 2017, in parts of California. The relief is available to individuals and businesses in the counties of Los Angeles, San Diego, Santa Barbara, and Ventura. The due dates extended include the January 16, 2018, due date for quarterly estimated tax payments and the April 17, 2018, due date for 2017 individual returns. More generally, taxpayers have until April 30, 2018, to file most tax returns (including individual, corporate, and estate and trust income tax returns; partnership returns, S corporation returns, and trust returns; estate, gift, and generation-skipping transfer tax returns; and employment and certain excise tax returns; annual information returns of tax-exempt organizations; and employment and certain excise tax returns), that have either an original or extended due date occurring on or after December 4, 2017, and before April 30, 2018. The IRS will automatically provide filing and penalty relief to any taxpayer with an address of record in one of these disaster areas. Taxpayers in one of these areas who receive a notice from the IRS regarding a late-filing or late-payment penalty should contact the IRS at the number listed on the notice to have the penalty abated. Affected taxpayers who reside or have a business located outside the covered disaster area must call the IRS disaster hotline at 866-562-5227 to request this tax relief.

a. The IRS has extended several filing and payment deadlines for those affected by wildfires and high winds that began July 23, 2018, in parts of California. In news release CA-2018-11 (8/6/18), the IRS has extended to November 30, 2018, several filing and payment due dates that occurred beginning on July 23, 2018, for those in areas affected by wildfires and high winds that began July 23, 2018 in parts of California. The relief is available to individuals and businesses in Lake and Shasta Counties, to relief workers who live elsewhere who are affiliated with a recognized government or philanthropic organization assisting in relief efforts in the covered areas, and to those visiting the areas who are killed or injured as a result of the disaster. The due dates extended include (1) the September 17, 2018, due date for quarterly estimated tax payments; (2) the September 17, 2018, due date for certain returns, such as those for calendar-year partnerships that filed timely extension requests for 2017; (3) the October 15, 2018, due date for 2017 individual returns for individuals who filed timely extension requests; (4) the October 31, 2018, due date for quarterly payroll and excise tax returns; (5) the November 15, 2018, due date for 2017 returns of calendar-year tax-exempt organizations that filed timely extension requests, and (6) due dates on or after after July 23, 2018, and before November 30, 2018 for the filing of Form 5500 series returns. The IRS will automatically provide filing and penalty relief to any taxpayer with an address of record in one of these disaster areas. Taxpayers in one of these areas who receive a notice from the IRS regarding a late-filing or late-payment penalty should contact the IRS at the number listed on the notice to have the penalty abated.

b. The IRS has provided extensions of filing and payment due dates for those in areas affected by Hurricane Florence. In news releases IR-2018-187 (9/15/18) and SC-2018-01 (9/24/18), the IRS has provided relief from several filing and payment deadlines to those in areas affected by Hurricane Florence. The relief is available to individuals and businesses in parts of North Carolina and South Carolina, to relief workers affiliated with a recognized government or philanthropic organization assisting in relief efforts in the covered areas, and to those visiting the areas who are killed or injured as a result of the disaster.

Deadlines extended to January 31, 2019. For those in affected areas, the following due dates have been extended to January 31, 2019: (1) the September 17, 2018, and January 15, 2019, due dates for quarterly estimated tax payments; (2) the September 17, 2018, due date for certain returns, such as those for calendar-year partnerships that filed timely extension requests for 2017; (3) the October 15, 2018, due date for 2017 individual returns for individuals who filed timely extension requests; (4) the October 31, 2018, due date for quarterly payroll and excise tax returns; (5) the November 15, 2018, due date for 2017 returns of calendar-year tax-exempt organizations that filed timely extension requests, and (6) due dates after September 7, 2018, and before January 31, 2019 for the filing of Form 5500 series returns. *Note:* individuals who filed a timely request for an extension of time to file their 2017 returns do not obtain any relief for tax payments related to the 2017 return because those payments were due on April 18, 2018.

Waiver of late-deposit penalties for federal payroll and excise taxes. For those in affected areas, the IRS has waived late-deposit penalties for federal payroll and excise taxes due on or after September 7, 2018, and before September 24, 2018, as long as the deposits are made by September 24, 2018.

Relief provided automatically. The IRS will automatically provide filing and penalty relief to any taxpayer with an address of record in one of the designated disaster areas. Taxpayers in one of these areas who receive a notice from the IRS regarding a late-filing or late-payment penalty should contact the IRS at the number listed on the notice to have the penalty abated. In contrast, affected taxpayers who reside or have a business outside the covered disaster area must call the IRS to request relief.

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

XIII. TRUSTS, ESTATES & GIFTS