RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

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

By

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The Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94 ("2020 Further Consolidated Appropriations Act"), enacted on December 20, 2019, repealed the taxes commonly known as the medical device tax and the Cadillac tax, modified the rules for contributions to and distributions from certain retirement plans, temporarily extended several expired or expiring provisions, and provided tax relief to those in areas affected by certain natural disasters. This outline discusses the provisions of this legislation that in our judgment, are the most important.

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

D. Miscellaneous Deductions

1. A retroactive incentive to make commercial buildings energy efficient. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 130 of the 2020 Further Consolidated Appropriations Act, retroactively extended the § 179D deduction for the cost of energy efficient commercial building property. Generally, these are improvements designed to reduce energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of a commercial building by 50 percent or more in comparison to certain standards. The lifetime limit on deductions under § 179D is $1.80 per square foot. This provision had expired for property placed in service after December 31, 2017. As extended, the deduction is available for property placed in service before January 1, 2021.

E. Depreciation & Amortization

1. We suppose it makes sense that racehorses have a swift recovery period. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 114 of the 2020 Further Consolidated Appropriations Act, retroactively extended the § 168(e)(3)(A)(i) classification of racehorses as 3-year MACRS property so that the classification applies to racehorses placed in service before January 1, 2021. A racehorse placed in service after December 31, 2020, qualifies for the 3-year recovery period only if it is more than two years old when placed in service. This provision allowing classification of all racehorses as 3-year property regardless of age had expired for racehorses placed in service after December 31, 2017.

2. Good news for those who placed motorsports entertainment complexes in service during 2018 and 2019 or who will do so in 2020. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 115 of the 2020 Further Consolidated Appropriations Act, retroactively extended the § 168(e)(3)(C)(ii) classification of motorsports entertainment complexes as 7-year property to include property placed in service through December 31, 2020. *See* § 168(i)(15)(D). Such property is depreciable over a 7-year recovery period using the straight-line method. This provision had expired for property placed in service after December 31, 2017.

F. Credits

1. A three-year credit for small employers that implement automatic contribution arrangements. A provision of the SECURE Act, Division O, Title I, § 105 of the 2020 Further Consolidated Appropriations Act, added new Code § 45T, which provides a $500 credit to certain small employers that implement an eligible automatic contribution arrangement (as defined in § 414(w)(3)) in a qualified employer plan (as defined in § 4972(d)). Generally, an automatic contribution arrangement allows an employer automatically to deduct elective deferrals from an employee's wages unless the employee makes an election not to contribute or to contribute a different amount. The credit is available for each of three years to an "eligible employer," which is defined in § 408(p)(2)(C)(i) as an employer that has 100 or fewer employees who received at least $5,000 of compensation from the employer for the preceding year. An eligible employer can include the credit among the credits that are components of the general business credit under § 38(b). New § 45T applies to taxable years beginning after December 31, 2019.

2. Congress gives a "thumbs up" to new energy efficient homes. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 129 of the 2020 Further Consolidated Appropriations Act, retroactively extended the § 45L credit of $2,000 or $1,000 (depending on the projected level of fuel consumption) an eligible contractor can claim for each qualified new energy efficient home constructed by the contractor and acquired by a person from the contractor for use as a residence during the tax year. As extended, the credit is available for homes acquired before January 1, 2021. This provision had expired for homes acquired after December 31, 2017.

3. Congress has extended through 2020 the credit for employers that pay wages to certain employees during periods of family and medical leave. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 142 of the 2020 Further Consolidated Appropriations Act, extended through December 31, 2020, Code § 45S, which was enacted by the 2017 Tax Cuts and Jobs Act. Section 45S provides that an "eligible employer" can include the "paid family and medical leave credit" among the credits that are components of the general business credit under § 38(b). The credit is equal to a percentage of the amount of wages paid to "qualifying employees" during periods in which the employees are on family and medical leave. The credit is available against both the regular tax and the alternative minimum tax.

Amount of the credit. To be eligible for the credit, the employer must pay during the period of leave at a rate that is at least 50 percent of the wages normally paid to the employee. The credit is 12.5 percent of the wages paid, increased by 0.25 percentage points for each percentage point by which the rate of payment exceeds 50 percent. The maximum credit is 25 percent of wages. Thus, if an employer pays an employee at a rate that is 60 percent of the employee's normal wages, the credit is 15 percent of wages paid (12.5 percent plus 2.5 percentage points). The credit reaches 25 percent when the employer pays at a rate that is 100 percent of employee's normal wages. The credit cannot exceed the amount derived from multiplying the employee's normal hourly rate by the number of hours for which the employee takes leave. The compensation of salaried employees is to be prorated to an hourly wage under regulations to be issued by the Treasury Department. The maximum amount of leave for any employee that can be taken into account for purposes of the credit is twelve weeks per taxable year.

Eligible employer. An eligible employer is defined as one who has in place a written policy that (1) allows all full-time "qualifying employees" not less than two weeks of annual paid family and medical leave, and that allows all part-time qualifying employees a commensurate amount of leave on a pro rata basis, and (2) requires that the rate of payment under the program is not less than 50 percent of the wages normally paid to the employee.

Eligible employee. An eligible employee is defined as any employee as defined in section 3(e) of the Fair Labor Standards Act of 1938 who has been employed by the employer for one year or more and who, for the preceding year, had compensation not in excess of 60 percent of the compensation threshold for highly compensated employees. For 2019, the threshold for highly compensated employees (see § 414(q)(1)(B)) was $125,000. Thus, for purposes of determining the credit in 2020, an employee is an eligible employee only if his or her compensation for 2019 did not exceed $75,000 ($125,000 * 60 percent).

Family and medical leave. The term "family and medical leave" is defined as leave described under sections 102(a)(1)(a)-(e) or 102(a)(3) of the Family and Medical Leave Act of 1993. (Generally, these provisions describe leave provided because of the birth or adoption of a child, because of a serious health condition of the employee or certain family members, or because of the need to care for a service member with a serious injury or illness.) If an employer provides paid leave as vacation leave, personal leave, or other medical or sick leave, this paid leave is not considered to be family and medical leave.

No double benefit. Pursuant to Code § 280C(a), no deduction is allowed for the portion of wages paid to an employee for which this new credit is taken. Thus, if an employer pays $10,000 to an employee and takes a credit for 25 percent, or $2,500, the employer could deduct as a business expense only $7,500 of the wages.

Effective date. The credit is available for wages paid in taxable years beginning after December 31, 2017, and before January 1, 2021.

4. Employers who retained employees despite becoming inoperable in areas affected by qualfied disasters are eligible for a 40 percent employee retention credit. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 203 of the 2020 Further Consolidated Appropriations Act, provides that an "eligible employer" can include "the 2018 through 2019 qualified disaster employee retention credit" among the credits that are components of the general business credit under § 38(b). The credit is equal to 40 percent of "qualified wages" for each "eligible employee." The cap on the amount of qualified wages of an employee that can be taken into account is $6,000 (reduced by the amount of qualified wages with respect to the employee that may be taken into account for any prior taxable year). Thus, the maximum credit per employee is $2,400. An *eligible employer* is an employer that conducted an active trade or business in a qualified disaster zone at any time during the incident period of the relevant qualified disaster, if the trade or business became inoperable at any time during the period beginning on the first day of the incident period of the qualified disaster and ending on December 20, 2019 (the date of enactment) as a result of damage sustained by reason of such qualified disaster. The term *eligible employee* is defined as an employee whose principal place of employment with an eligible employer, determined immediately before the relevant qualified disaster, was in the disaster zone of that qualified disaster. The term *qualified wages* means wages (as defined in § 51(c)(1), but without regard to § 3306(b)(2)(B)) paid or incurred by an eligible employer with respect to an eligible employee during the period beginning on the date the trade or business first became inoperable at the employee's principal place of employment and ending on the earlier of (1) the date on which the trade or business resumed significant operations at the principal place of employment, or (2) the date that is 150 days after the last day of the incident period of the relevant qualified disaster. Wages can be qualified wages regardless of whether the employee performed no services, performed services at a different location, or performed services at the employee's principal place of employment before significant operations resumed. An employee is not considered an eligible employee if the employer is allowed a credit with respect to the employee under § 51(a), i.e., an eligible employer cannot claim the 40 percent credit with respect to an employee for any period if the employer is allowed a Work Opportunity Tax Credit with respect to the employee under § 51 for that period.

Several key terms are defined in Division Q, Title II, § 201 of the 2020 Further Consolidated Appropriations Act. These are as follows:

1. The term "*incident period*" with respect to any qualified disaster is the period specified by FEMA as the period during which the disaster occurred, except that the period cannot be treated as beginning before January 1, 2018, or ending after January 19, 2020 (the date that is 30 days after the date of enactment of the legislation).
2. The term "*qualified disaster zone*" is the portion of the qualified disaster area determined by the President to warrant individual or individual and public assistance from the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to the qualified disaster area.
3. The term "*qualified disaster area*" is an area with respect to which the President declared a major disaster from January 1, 2018, through February 18, 2020 (the date that is 60 days the date of enactment of the legislation), under section 401 of the Stafford Act if the incident period of the disaster began on or before December 20, 2019 (the date of enactment). To avoid providing double benefits, the legislation excludes the California wildfire disaster area, for which similar relief was provided by the Bipartisan Budget Act of 2018.
4. "The term '*qualified disaster*' means, with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area."

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

1. The cap on elective deferrals to § 401(k) plans pursuant to automatic contribtuion arrangements is now 15 percent. A provision of the SECURE Act, Division O, Title 1, § 102 of the 2020 Further Consolidated Appropriations Act, amended Code § 401(k)(13)(C)(iii) to increase from 10 percent to 15 percent the cap on elective deferrals to a § 401(k) plan under an automatic contribution arrangement. An automatic contribution arrangement allows an employer automatically to deduct elective deferrals from an employee's wages unless the employee makes an election not to contribute or to contribute a different amount. This change applies to plan years beginning after December 31, 2019.

2. Congress has increased the age at which RMDs must begin to 72. A provision of the SECURE Act, Division O, Title I, § 114 of the 2020 Further Consolidated Appropriations Act, amended Code § 401(a)(9)(C)(i)(I) to increase the age at which required minimum distributions (RMDs) from a qualified plan (including IRAs) must begin from 70-½ to 72. Pursuant to this amendment, RMDs must begin by April 1 of the calendar year following the later of the calendar year in which the employee attains age 72 or, in the case of an employer plan, the calendar year in which the employee retires. This latter portion of the rule allowing deferral of RMDs from employer plans until retirement does not apply to a 5-percent owner (as defined in § 416). The increase in the age at which RMDs must begin until age 72 applies to distributions required to be made after December 31, 2019, with respect to individuals who attain age 70-½ after such date.

3. No more stretching out RMDs from non-spousal inherited qualified retirement accounts. A provision of the SECURE Act, Division O, Title IV, § 401 of the 2020 Further Consolidated Appropriations Act amended Code § 401(a)(9)(E) to modify the required minimum distribution (RMD) rules for inherited retirement accounts (defined contribution plans and IRAs). The amendments require all funds to be distributed by the end of the 10th calendar year following the year of death. There is no requirement to withdraw any minimum amount before that date. The current rules, which permit taking RMDs over many years, continue to apply to a designated beneficiary who is (1) a surviving spouse, (2) a child of the participant who has not reached the age of majority, (3) disabled within the meaning of § 72(m)(7), (4) a chronically ill individual within the meaning of § 7702B(c)(2) with some modifications, or (5) an individual not in any of the preceding categories who is not more than 10 years younger than the deceased individual These changes generally apply to distributions with respect to those who who die after December 31, 2019.

4. Penalty-free withdrawals for birth or adoption. A provision of the SECURE Act, Division O, Title I, § 113 of the 2020 Further Consolidated Appropriations Act, amended Code § 72(t)(2) to add new § 72(t)(2)(H), which provides for penalty-free withdrawals from "applicable eligible retirement plans" for a "qualified birth or adoption distribution." A "qualified birth or adoption distribution" is defined as "any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which a child of the individual is born or on which the legal adoption by the individual of an eligible adoptee is finalized." A distribution can be treated as qualifying only if the taxpayer includes the name, age, and taxpayer identification number of the child on the taxpayer's tax return for the taxable year. The maximum penalty-free distribution is $5,000 per individual per birth or adoption. This change applies to distributions made after Dec. 31, 2019.

5. Loans from qualified employer plans are treated as taxable distributions if they are made through the use of credit cards or similar arrangangements. A provision of the SECURE Act, Division O, Title 1, § 108 of the 2020 Further Consolidated Appropriations Act, amended Code § 72(p)(2) to redesignate § 72(p)(2)(D) as § 72(p)(2)(E) and to add new § 72(p)(2)(D), which provides an additional requirement for a loan from a qualified employer plan to avoid being treated as a taxable distribution. Under § 72(p)(1), a loan from a qualified employer plan is treated as a distribution unless it meets certain requirements se forth in § 72(p)(2). One requirement (provided in § 72(p)(2)(A)) is that the loan must not exceed the lesser of (1) $50,000 or (2) the greater of one-half of the present value of the employee's nonforfeitable accrued benefit or $10,000. A second requirement (provided in § 72(p)(2)(B)) is that the loan must be repaid within five years. A third requirement (provided in § 72(p)(2)(C) is that substantially level amortization of the loan (with payments not less frequently than quarterly) must take place over the term of the loan. New § 72(p)(2)(D) provides a fourth requirement, which is that the loan must not be "made through the use of any credit card or any other similar arrangement." This requirmement applies to loans made after December 20, 2019, the date of enactment.

6. Congress has made access to retirement plan funds easier for survivors of certain natural disasters. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 202 of the 2020 Further Consolidated Appropriations Act, provides special rules that apply to distributions from qualified employer plans and IRAs and to loans from qualified employer plans for survivors of certain natural disasters.

Qualified Disaster Distributions. Section 202(a) of the legislation provides four special rules for "qualified disaster distributions." **First**, the legislation provides that qualified disaster distributions up to an aggregate amount of $100,000 for each qualified disaster are not subject to the normal 10-percent additional tax of § 72(t) that applies to distributions to a taxpayer who has not reached age 59-1/2. **Second**, the legislation provides that, unless the taxpayer elects otherwise, any income resulting from a qualified disaster distribution is reported ratably over the three-year period beginning with the year of the distribution. **Third**, the legislation permits the recipient of a qualified disaster distribution to contribute up to the amount of the distribution to a qualified employer plan or IRA that would be eligible to receive a rollover contribution of the distribution. The contribution need not be made to the same plan from which the distribution was received, and must be made during the three-year period beginning on the day after the date on which the distribution was received. If contributed within the required three-year period, the distribution and contribution are treated as made in a direct trustee-to-trustee transfer within 60 days of the distribution. The apparent intent of this rule is to permit the taxpayer to exclude the distribution from gross income to the extent it is recontributed within the required period. Because the recontribution might take place in a later tax year than the distribution, presumably a taxpayer would include the distribution in gross income in the year received and then file an amended return for the distribution year upon making the recontribution. **Fourth**, qualified disaster distributions are not treated as eligible rollover distributions for purposes of the withholding rules, and therefore are not subject to the normal 20 percent withholding that applies to eligible rollover distributions under § 3405(c). A *qualified disaster distribution* is defined as any distribution from an eligible retirement plan as defined in § 402(c)(8)(B) (which includes qualified employer plans and IRAs) that was made: (1) before June 17, 2020 (the date that is 180 days after December 20, 2019, the date of enactment of the legislation), (2) on or after the first day of the incident period of a qualified disaster, and (3) to an individual whose principal place of abode at any time during the incident period of the qualified disaster was located in the qualified disaster area of that qualified disaster and who sustained an economic loss by reason of that qualified disaster.

Recontributions of Withdrawals Made for Home Purchases. Section 202(b) of the legislation permits an individual who received a "qualified distribution" to contribute up to the amount of the distribution to a qualified employer plan or IRA that would be eligible to receive a rollover contribution of the distribution. A qualified distribution is a hardship distribution that an individual received from a qualified employer plan or IRA during the period that is 180 days before the first day of the incident period of the relevant qualified disaster and ending on the date that is 30 days after the last day of the incident period that was to be used to purchase or construct a principal residence in a qualified disaster area that was not purchased or constructed on account of the qualified disaster. The contribution need not be made to the same plan from which the distribution was received, and must be made during the "applicable period," which is the period beginning on the first day of the incident period of the qualified disaster and ending on the date that is 30 days after the last day of the incident period. The distribution and contribution are treated as made in a direct trustee-to-trustee transfer within 60 days of the distribution. The apparent intent of this rule is to permit the taxpayer to exclude the distribution from gross income to the extent it is recontributed within the required period.

Loans. For qualified individuals, section 202(c) of the legislation increases the limit on loans from qualified employer plans and permits repayment over a longer period of time. Normally, under § 72(p), a loan from a qualified employer plan is treated as a distribution unless it meets certain requirements. One requirement is that the loan must not exceed the lesser of (1) $50,000 or (2) the greater of one-half of the present value of the employee's nonforfeitable accrued benefit or $10,000. A second requirement is that the loan must be repaid within five years. In the case of a loan made to a "qualified individual" during the period from December 20, 2019 (the date of enactment) through June 16, 2020 (the 180-day period beginning on the date of enactment), the legislation increases the limit on loans to the lesser of (1) $100,000 or (2) the greater of *all* of the present value of the employee's nonforfeitable accrued benefit or $10,000. The legislation also provides that, if a qualified individual has an outstanding plan loan on the first day of the incident period of a qualified disaster with a due date for any repayment occurring during the period beginning on the first day of the incident period and ending on the date which is 180 days after the last day of the incident period, then the due date is delayed for one year. If an individual takes advantage of this delay, then any subsequent repayments are adjusted to reflect the delay in payment and interest accruing during the delay. This appears to require reamortization of the loan. A *qualified individual* is defined as an individual whose principal place of abode at any time during the incident period of a qualified disaster is located in the qualified disaster area with respect to that qualified disaster and who sustained an economic loss by reason of the qualified disaster.

Defined Terms. Several key terms are defined in Division Q, Title II, § 201 of the 2020 Further Consolidated Appropriations Act. These are as follows:

1. The term "*incident period*" with respect to any qualified disaster is the period specified by FEMA as the period during which the disaster occurred, except that the period cannot be treated as beginning before January 1, 2018, or ending after January 19, 2020 (the date that is 30 days after the date of enactment of the legislation).

2. The term "*qualified disaster zone*" is the portion of the qualified disaster area determined by the President to warrant individual or individual and public assistance from the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to the qualified disaster area.

3. The term "*qualified disaster area*" is an area with respect to which the President declared a major disaster from January 1, 2018, through February 18, 2020 (the date that is 60 days the date of enactment of the legislation), under section 401 of the Stafford Act if the incident period of the disaster began on or before December 20, 2019 (the date of enactment). To avoid providing double benefits, the legislation excludes the California wildfire disaster area, for which similar relief was provided by the Bipartisan Budget Act of 2018.

4. "The term '*qualified disaster*' means, with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area."

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

D. Individual Retirement Accounts

1. Amounts paid to an individual to aid in the pursuit of graduate or postdoctoral study and included in the individual's gross income are now treated as compensation for purposes of contributing to an IRA. A provision of the SECURE Act, Division O, Title 1, § 106 of the 2020 Further Consolidated Appropriations Act, amended Code § 219(f)(1) to provide that amounts paid to an individual to aid in the pursuit of graduate or postdoctoral study and included in the individual's gross income are now treated as compensation for purposes of the limit on contributing to an IRA. Such amounts would include taxable stipends and non-tuition fellowship payments received by graduate and postdoctoral students. This change applies to taxable years beginning after December 31, 2019.

2. ♪♫I don't know, but I've been told, if you [contribute to an IRA] you'll never grow old.♫♪ Congress has eliminated the age restriction for contributions to traditional IRAs. A provision of the SECURE Act, Division O, Title I, § 107 of the 2020 Further Consolidated Appropriations Act, repealed former Code § 219(d)(1). The effect of this change is to eliminate the age restriction (age 70-½) for contributions to traditional IRAs. The legislation also amends § 408(d)(8)(A), which allows taxpayers who are age 70-½ or older to make tax-free distributions to a charity from an IRA of up to $100,000 per year, to reduce a taxpayer's ability to take such tax-free distibutions for a charity by the amount of deductible IRA contribtuions made after age 70-½. The reduction in the $100,000 annual limit under § 408(d)(8)(A) is the amount by which the taxpayer's aggregate deductible contributions to an IRA made after age 70-½ exceed the aggregate reductions of the $100,000 limit in all prior taxable years. These changes apply to contributions and distributions made for taxable years beginning after December 31, 2019.

V. PERSONAL INCOME AND DEDUCTIONS

A. Rates

B. Miscellaneous Income

1. Congress has extended through 2020 the exclusion for discharge of qualified principal residence indebtedness. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 101 of the 2020 Further Consolidated Appropriations Act, retroactively extended through December 31, 2020 the § 108(a)(1)(E) exclusion for up to $2 million ($1 million for married individuals filing separately) of income from the cancellation of qualified principal residence indebtedness. Thus, the exclusion applies for calendar years 2018, 2019, and 2020. Amendment of 2018 returns might be necessary.

C. Hobby Losses and § 280A Home Office and Vacation Homes

D. Deductions and Credits for Personal Expenses

1. Extension of the 7.5 percent threshold for deduction of medical expenses through 2020. Prior to the 2017 Tax Cuts and Jobs Act, medical expenses generally were deductible only to the extent they exceeded 10 percent of a taxpayer's adjusted gross income. For taxable years beginning after 2012 and ending before 2017, this threshold was reduced to 7.5 percent if the taxpayer or the taxpayer's spouse had attained age 65 by the close of the year. The 2017 Tax Cuts and Jobs Act, § 11027, amended § 213(f) to provide that the 7.5 percent threshold applies to all taxpayers for taxable years beginning after 2016 and ending before 2019, i.e., to calendar years 2017 and 2018. Further, the legislation provided that this threshold applies for purposed of both the regular tax and the alternative minimum tax. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 103 of the 2020 Further Consolidated Appropriations Act, retroactively extended this reduced threshold to taxable years beginning before January 1, 2021, i.e., to calendar years 2019 and 2020.

2. Mortgage insurance premiums paid through 2020 remain deductible . A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 102 of the 2020 Further Consolidated Appropriations Act, retroactively extended through December 31, 2020, the § 163(h)(3)(E) deduction (subject to the pre-existing limitations) for mortgage insurance premiums paid or accrued in connection with acquisition indebtedness with respect to a qualified residence of the taxpayer. Thus, these premiums are deductible for calendar years 2018, 2019, and 2020. Amendment of 2018 returns might be necessary.

3. A retroactive deduction for paying your child's college tuition. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title I, § 104 of the 2020 Further Consolidated Appropriations Act, retroactively extended through December 31, 2020, the § 222 above-the-line deduction for individuals of a limited amount ($0, $2,000, or $4,000, depending on the taxpayer's adjusted gross income) of qualified tuition and related expenses for higher education of the taxpayer, the taxpayer's spouse, or dependents. Thus, this deduction is available for calendar years 2018, 2019, and 2020. Amendment of 2018 returns might be necessary.

4. Deducting casualty losses arising in qualified disaster areas just got easier. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 204(b) of the 2020 Further Consolidated Appropriations Act provides special rules for disaster losses in qualified disaster areas. Normally, a personal casualty loss is deductible only to the extent that it exceeds $100 and only to the extent the sum of all personal casualty losses exceeds 10 percent of adjusted gross income. The legislation provides that a "net disaster loss" is deductible only to the extent it exceeds $500 (rather than $100) and is deductible without regard to the normal 10-percent-of-AGI threshold. An individual with a net disaster loss can deduct the sum of any non-disaster personal casualty losses, which remain subject to the $100 and 10 percent thresholds, and the net disaster loss. For example, if an individual has AGI of $90,000, a non-disaster-related casualty loss of $10,000 from the theft of a personal car, and a net disaster loss of $50,000, then the individual can deduct $900 of the theft loss ($10,000 reduced by $100 reduced by 10 percent of AGI) and can deduct $49,500 of the net disaster loss ($10,000 reduced by $500). The deduction for the net disaster loss is available both to those who itemize their deductions and those who do not. For those who do not itemize, the standard deduction is increased by the amount of the net disaster loss. The disallowance of the standard deduction for purposes of determining alternative minimum taxable income does not apply to this increased portion of the standard deduction.

A net disaster loss is defined as the amount by which "qualified disaster-related personal casualty losses" exceed personal casualty gains. A qualified disaster-related personal casualty loss is a loss described in § 165(c)(3) (which generally defines casualty losses) that arises in a qualified disaster area on or after the first day of the incident period of the relevant qualified disaster and that is attributable to the qualified disaster.

- Rev. Proc. 2018-8, 2018-2 I.R.B. 286 (12/13/17), provides safe harbor methods that individual taxpayers can use in determining the amount of their casualty and theft losses for their personal-use residential real property and personal belongings. Additional safe harbor methods are available in the case of casualty and theft losses occurring as a result of any federally declared disaster. The IRS will not challenge an individual's determination of the decrease in fair market value of personal-use residential real property or personal belongings if the individual qualifies for and uses one of the safe harbor methods described in the revenue procedure. The revenue procedure is effective December 13, 2017.

Several key terms are defined in Division Q, Title II, § 201 of the 2020 Further Consolidated Appropriations Act. These are as follows:

1. The term "*incident period*" with respect to any qualified disaster is the period specified by FEMA as the period during which the disaster occurred, except that the period cannot be treated as beginning before January 1, 2018, or ending after January 19, 2020 (the date that is 30 days after the date of enactment of the legislation).
2. The term "*qualified disaster zone*" is the portion of the qualified disaster area determined by the President to warrant individual or individual and public assistance from the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to the qualified disaster area.
3. The term "*qualified disaster area*" is an area with respect to which the President declared a major disaster from January 1, 2018, through February 18, 2020 (the date that is 60 days the date of enactment of the legislation), under section 401 of the Stafford Act if the incident period of the disaster began on or before December 20, 2019 (the date of enactment). To avoid providing double benefits, the legislation excludes the California wildfire disaster area, for which similar relief was provided by the Bipartisan Budget Act of 2018.
4. "The term '*qualified disaster*' means, with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area."

5. Those affected by qualfied disasters can use prior-year earned income to determine their earned income tax credit and child tax credit. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 204(c) of the 2020 Further Consolidated Appropriations Act provides that a "qualified individual" can elect to use prior-year earned income for purposes of determining the individual's earned income tax credit under § 32 and child tax credit under § 24. The election is available for qualified individuals whose earned income for the "applicable tax year" is lower than their earned income for the preceding tax year. A *qualified individual* is defined as an individual whose principal place of abode at any time during the incident period of any qualified disasterwas located (1) in the qualified disaster zone with respect to the qualified disaster, or (2) outside the qualified disaster zone, but within the qualified disaster area with rspect to the disaster, if the individual was displaced from his or her principal place of abode by reason of the qualified disaster. The term *applicable tax year* is defined differently for qualified individuals in these two categories. For those in the second category (those outside a qualified disaster zone who are displaced), the applicable tax year is any taxable year that includes any portion of the period during which they were displaced. For those in the first category (those within a qualified disaster zone), the applicable tax year is any taxable year date that includes any portion of the incident period of the qualified disaster. If a qualified individual makes this election, it applies for purpose of both the earned income tax credit and the child tax credit. For married couples filing a joint return, the election is available if either spouse is a qualified individual, and the earned income for the preceding year is the sum of the earned income in the preceding year of both spouses.

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

F. Education

1. Amounts can be withdrawn tax-free from § 529 accounts to pay expenses of apprenticeship programs and an aggregate amount of $10,000 can be withdrawn tax-free from § 529 accounts to repay qualified education loans of the beneficiary or a sibling. A provision of the SECURE Act, Division O, Title 3, § 302 of the 2020 Further Consolidated Appropriations Act, amended Code § 529 to add § 529(c)(8), which permits tax-free distributions from § 529 accounts to pay "expenses for fees, books, supplies, and equipment required for the participation of a designated beneficiary in an apprenticeship program" registered under the National Apprenticeship Act. The legislation also added § 529(c)(9), which permits tax-free distributions from § 529 accounts to pay "principal or interest on any qualified education loan (as defined in section 221(d)) of the designated beneficiary or a sibling of the designated beneficiary." The limit on distributions for repayment of educational loans is *an aggregate* of $10,000. Amounts withdrawn to pay a sibling's educational loans count against the sibling's aggregate $10,000 limit, not the limit of the designated beneficiary. To the extent that amounts withdrawn tax-free from a § 529 account are used to pay interest on an educational loan, the taxpayer's deduction for student loan interest under § 221 is reduced. These changes apply to distributions made after December 31, 2018.

G. Alternative Minimum Tax

VI. CORPORATIONS

VII. PARTNERSHIPS

A. Formation and Taxable Years

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

C. Distributions and Transactions Between the Partnership and Partners

D. Sales of Partnership Interests, Liquidations and Mergers

E. Inside Basis Adjustments

F. Partnership Audit Rules

G. Miscellaneous

1. Relief for not reporting negative tax capital accounts. Notice 2019-20, 2019-14 I.R.B. 927 (3/7/19). The updated 2018 Instructions for Form 1065 and accompanying Schedule K-1 now require a partnership that does not report tax basis capital accounts to its partners to report, on line 20 of Schedule K-1 (Form 1065) using code AH, the amount of a partner's tax basis capital both at the beginning of the year and at the end of the year if either amount is negative. Aware that some taxpayers and their advisors may not have been prepared to comply with this new requirement for 2018 returns, the IRS, in Notice 2019-20, has provided limited relief. Specifically, the IRS will waive penalties (1) under § 6722 for failure to furnish a partner a Schedule K-1 (Form 1065) and under § 6698 for failure to file a Schedule K-1 (Form 1065) with a partnership return, (2) under § 6038 for failure to furnish a Schedule K-1 (Form 8865), and (3) under any other section of the Code for failure to file or furnish a Schedule K-1 or any other form or statement, for any penalty that arises solely as a result of failing to include negative tax basis capital account information provided the following conditions are met:

1. The Schedule K-1 or other applicable form or statement is timely filed, including extensions, with the IRS; is timely furnished to the appropriate partner, if applicable; and contains all other required information.
2. The person or partnership required to file the Schedule K-1 or other applicable form or statement files with the IRS, no later than one year after the original, unextended due date of the form to which the Schedule K-1 or other applicable form or statement must be attached, a schedule setting forth, for each partner for which negative tax basis capital account information is required: (a) the partnership's name and Employer Identification Number, if any, and

Reference ID Number, if any; (b) the partner's name, address, and taxpayer identification number; and (c) the amount of the partner's tax basis capital account at the beginning and end of the tax year at issue.

The above-described supplemental schedule should be captioned "Filed Under Notice 2019-20" in accordance with instructions and additional guidance posted by the IRS on www.IRS.gov. The due date for this supplemental schedule is determined without consideration of any extensions, automatic or otherwise, that may apply to the due date for the form itself. Furthermore, the schedule should be sent to the address listed in the Notice, and the penalty relief applies only for taxable years beginning after December 31, 2017, but before January 1, 2019.

a. The IRS has issued FAQ guidance on negative tax basis capital account reporting. The IRS has issued guidance on the requirement to report negative tax basis capital account information in the form of frequently asked questions (FAQs) on its website. The FAQs are available at ***https://www.irs.gov/businesses/partnerships/form-1065-frequently-asked-questions***.

Definition and calculation of tax basis capital accounts. In the FAQs, the IRS explains that "[a] partner's tax basis capital account (sometimes referred to simply as 'tax capital') represents its equity as calculated using tax principles, not based on GAAP, § 704(b), or other principles." The FAQs provide guidance on the calculation of a partner's tax basis capital account. A partner's tax basis capital account is *increased by the amount of money and the adjusted basis of any property contributed* by the partner to the partnership (less any liabilities assumed by the partnership or to which the property is subject) and is *decreased by the amount of money and the adjusted basis of any property distributed by the partnership to the partner* (less any liabilities assumed by the partner or to which the property is subject). The partner's tax basis capital account is increased by certain items, such as the partner's distributive share of partnership income and gain, and is decreased by certain items, such as the partner's distributive share of partnership losses and deductions. The FAQs make clear that a partner's tax basis capital account is not the same as a partner's basis in the partnership interest (outside basis) because outside basis includes the partner's share of partnership liabilities, whereas a partner's tax basis capital account does not.

Effect of § 7*54 Elections and Revaluations of Partnership Property*. If a partnership has a § 754 election in effect, then it increases or decreases the adjusted basis of partnership property pursuant to § 743(b) when there is a transfer of a partnership interest or pursuant to § 734(b) when there is a distribution by the partnership. These adjustments can also be triggered when the partnership does not have a § 754 election in effect but has a substantial built-in loss and a transfer of a partnership interest occurs (§ 743(b) basis adjustment) or experiences a substantial basis reduction in connection with a distribution (§ 734(b) basis adjustment). The FAQs clarify that a partner's tax basis capital account *is increased or decreased by a partner's share of basis adjustments under § 743(b) and § 734(b).* In contrast, according to the FAQs, *revaluations of partnership property* pursuant to § 704 (such as upon the entry of a new partner) *do not affect the tax basis of partnership property or a partner's tax basis capital account*.

Examples. The FAQs provide the following examples of the calculation of a partner's tax basis capital account:

> *Example 1:* A contributes $100 in cash and B contributes unencumbered, nondepreciable property with a fair market value (FMV) of $100 and an adjusted tax basis of $30 to newly formed Partnership AB. A's initial tax basis capital account is $100 and B's initial tax basis capital account is $30.
>
> *Example 2:* The facts are the same as in Example 1, except B contributes nondepreciable property with a FMV of $100, an adjusted tax basis of $30, and subject to a liability of $20. B's initial tax basis capital account is $10 ($30 adjusted tax basis of property contributed, less the $20 liability to which the property was subject).
>
> *Example 3:* The facts are the same as in Example 1, except in Year 1, the partnership earns $100 of taxable income and $50 of tax-exempt income. A and B are each allocated $50 of the taxable income and $25 of the tax-exempt income by the

partnership. At the end of Year 1, A's tax basis capital account is increased by $75, to $175, and B's tax basis capital account is increased by $75, to $105.

Example 4: The facts are the same as in Example 3. Additionally, in Year 2, the partnership has $30 of taxable loss and $20 of expenditures which are not deductible in computing partnership taxable income and which are not capital expenditures. A and B are each allocated $15 of the taxable loss and $10 of the expenditures which are not deductible in computing partnership taxable income and which are not capital expenditures. At the end of Year 2, A's tax basis capital account is decreased by $25, to $150, and B's tax basis capital account is decreased by $25, to $80.

Example 5: On January 1, 2019, A and B each contribute $100 in cash to a newly formed partnership. On the same day, the partnership borrows $800 and purchases Asset X, qualified property for purposes of §168(k), for $1,000. Assume that the partnership properly allocates the $800 liability equally to A and B under §752. Immediately after the partnership acquires Asset X, both A and B have tax basis capital accounts of $100 and outside bases of $500 ($100 cash contributed, plus $400 share of partnership liabilities under §752). In 2019, the partnership recognizes $1,000 of tax depreciation under §168(k) with respect to Asset X; the partnership allocates $500 of the tax depreciation to A and $500 of the tax depreciation to B. On December 31, 2019, A and B both have tax basis capital accounts of negative $400 ($100 cash contributed, less $500 share of tax depreciation) and outside bases of zero ($100 cash contributed, plus $400 share of partnership liabilities under § 752, and less $500 of share tax depreciation).

Tax Basis Capital Account of a Partner Who Acquires the Partnership Interest from Another Partner. A partner who acquires a partnership interest from another partner, such as by purchase or in a non-recognition transaction, has a tax basis capital account immediately after the transfer equal to the transferring partner's tax basis capital account immediately before the transfer with respect to the portion of the interest transferred. However, any § 743(b) basis adjustment the transferring partner may have is not transferred to the acquiring partner. Instead, if the partnership has a §754 election in effect, the tax basis capital account of the acquiring partner is increased or decreased by the positive or negative adjustment to the tax basis of partnership property under §743(b) as a result of the transfer.

Safe Harbor Method for Determining a Partner's Tax Basis Capital Account. The FAQs provide a safe harbor method for determining a partner's tax basis capital account. Under this method, "[p]artnerships may calculate a partner's tax basis capital account by subtracting the partner's share of partnership liabilities under § 752 from the partner's outside basis (safe harbor approach). If a partnership elects to use the safe harbor approach, the partnership must report the negative tax basis capital account information as equal to the excess, if any, of the partner's share of partnership liabilities under § 752 over the partner's outside basis."

Certain partnerships are exempt from reporting negative tax basis capital accounts. Partnerships that satisfy four conditions (those provided in question 4 on Schedule B to Form 1065) do not have to comply with the requirement to report negative tax basis capital account information. This is because a partnership that satisfies these conditions is not required to complete item L on Schedule K-1. The four conditions are: **(1)** the partnership's total receipts for the tax year were less than $250,000; **(2)** the partnership's total assets at the end of the tax year were less than $1 million; **(3)** Schedules K-1 are filed with the return and furnished to the partners on or before the due date (including extensions) for the partnership return; and **(4)** the partnership is not filing and is not required to file Schedule M-3.

b. The IRS has issued a draft of revised Form 1065 and Schedule K-1 for 2019. IR-2019-160 (9/30/19). The IRS has issued a draft of the partnership tax return, Form 1065, and accompanying Schedule K-1 for 2019. The IRS has also released draft instructions for the 2019 Form 1065 and draft instructions for the 2019 Schedule K-1. Compared to the 2018 versions, the 2019 versions reflect several significant changes that likely will require a substantial amount of time in many cases on the part of those preparing the return to ensure compliance. Among the significant changes are the following:

- *Reporting of tax basis capital accounts for each partner on Schedule K-1.* Previous versions of Schedule K-1 gave partnerships the option to report a partner's capital accounts on a tax basis, in accordance with GAAP, as § 704(b) book capital accounts, or on some "other" basis. Tax basis capital accounts were required beginning in 2018 only if a partner's tax capital account at the beginning or end of the year was negative. The 2019 draft Schedule K-1 requires partnerships to report each partner's capital account on a tax basis regardless of whether the account is negative. For partnerships that have not historically reported tax basis capital accounts, this requirement would appear to involve recalculating tax capital accounts in prior years and rolling them forward.

- *Reporting a partner's share of net unrecognized § 704(c) gain or loss on Schedule K-1.* Previous versions of Schedule K-1 required reporting whether a partner had contributed property with a built-in gain or built-in loss in the year of contribution. The 2019 draft Schedule K-1 still requires partnerships to report whether a partner contributed property with a built-in gain or loss, but adds new item N in Part II, which requires reporting the "Partner's Share of Net Unrecognized Section 704(c) Gain or (Loss)." This means that a partnership must report on an annual basis any unrecognized gain or loss that would be allocated to the partner under § 704(c) (if the partnership were to sell its assets) as a result of either the partner contributing property with a fair market value that differs from its adjusted basis or the revaluation of partnership property (such as a revaluation occurring upon the admission of a new partner).

- *Separation of guaranteed payments for capital and services.* Previous versions of Schedule K-1 required reporting a single category of guaranteed payments to a partner. The 2019 draft Schedule K-1 refines this category in item 4 of Part III and requires separate reporting of guaranteed payments for services, guaranteed payments for capital, and the total of these two categories.

- *Reporting on Schedule K-1 more than one activity for purposes of the at risk and passive activity loss rules.* Items 21 and 22 have been added to Part III of Schedule K-1 to require the partnership to check a box if the partnership has more than one activity for purposes of the at-risk or passive activity loss rules. The 2019 draft instructions for Form 1065 indicate that the partnership also must provide an attached statement for each activity with detailed information for each activity to allow the partner to apply correctly the at-risk and passive activity loss rules.

- *Section 199A deduction moved to supplemental statement.* The 2018 version of Schedule K-1 required reporting information relevant to the partner's § 199A deduction in item 20 of Part III with specific codes. The draft 2019 instructions for Form 1065 provide that, for partners receiving information relevant to their § 199A deduction, only code Z should be used in box 20 along with an asterisk and STMT to indicate that the information appears on an attached statement. According to the instructions, among other items, the statement must include the partner's distributive share of: (1) qualified items of income, gain, deduction, and loss; (2) W-2 wages; (3) unadjusted basis immediately after acquisition of qualified property; (4) qualified publicly traded partnership items; and (5) § 199A dividends (qualified REIT dividends). The statement also must report whether any of the partnership's trades or businesses are specified service trades or businesses and identify any trades or businesses that are aggregated.

- *Disregarded entity as a new category of partner on Schedule K-1.* Previous versions of Schedule K-1 required the partnership to indicate whether the partner was domestic or foreign. The 2019 draft Schedule K-1 adds a new category in item H of Part II in which the partnership must indicate whether the partner is a disregarded entity and, if so, the partner's taxpayer identification number and type of entity.

c. The IRS has postponed the requirements to use tax basis capital accounts for Schedule K-1 and to report detailed information for purposes of the at-risk rules and has clarified certain other reporting requirements. Notice 2019-66, 2019-52 I.R.B. 1509 (12/9/19). In response to comments expressing concern that those required to file Form 1065 and Schedule K-1 might be unable to comply in a timely manner with the requirement to report capital accounts on a tax basis for 2019, the Treasury Department and the IRS have deferred this requirement, which will now apply to partnership tax years beginning on and after January 1, 2020. According to the notice:

> This means that partnerships and other persons may continue to report partner capital accounts on Forms 1065, Schedule K-1, Item L, or 8865, Schedule K-1, Item F, using any method available in 2018 (tax basis, Section 704(b), GAAP, or any other method) for 2019. These partnerships and other persons must include a statement identifying the method upon which a partner's capital account is reported.

The requirement to report capital accounts for 2019 using any method available in 2018 includes the requirement that partnerships that do not report tax basis capital accounts to partners must report, on line 20 of Schedule K-1 (Form 1065) using code AH, the amount of a partner's tax basis capital both at the beginning of the year and at the end of the year if either amount is negative.

The draft 2019 Schedule K-1 included Items 21 and 22 in Part III to require the partnership to check a box if the partnership has more than one activity for purposes of the at-risk or passive activity loss rules. The 2019 draft instructions for Form 1065 also required a partnership to provide an attached statement for each activity with detailed information for each activity to allow the partner to apply correctly the at-risk and passive activity loss rules. In response to comments expressing concern that those required to file Form 1065 and Schedule K-1 might be unable to comply in a timely manner with the requirement to provide this detailed information in an attached statement, the notice defers this requirement. This requirement now will apply to partnership tax years beginning on and after January 1, 2020. The notice leaves in place for 2019 the requirement that a box be checked in Items 21 and 22 in Part III of Schedule K-1 if the partnership has more than one activity for purposes of the at-risk or passive activity loss rules.

The notice leaves in place for 2019 the requirement that a partnership must report on an annual basis a partner's share of "net unrecognized Section 704(c) gain or loss." The draft 2019 instructions for Schedule K-1, however, had not defined the term "net unrecognized Section 704(c) gain or loss." The notice defines this term as "the partner's share of the net (net means aggregate or sum) of all unrecognized gains or losses under section 704(c) of the Code (Section 704(c)) in partnership property, including Section 704(c) gains and losses arising from revaluations of partnership property." This definition applies solely for purposes of completing 2019 forms. The notice clarifies that publicly traded partnerships need not report net unrecognized § 704(c) gain for 2019 and future years until further notice. The notice also indicates that commenters had requested additional guidance on § 704(c) computations, especially on issues such as those addressed in Notice 2009-70, 2009-34 I.R.B. 255, which solicited comments on the rules relating to the creation and maintenance of multiple layers of forward and reverse section § 704(c) gain and loss to partnerships and tiered partnerships. Notice 2019-66 provides that, "[f]or purposes of reporting for 2019, partnerships and other persons should generally resolve these issues in a reasonable manner, consistent with prior years' practice for purposes of applying Section 704(c) to partners."

The notice provides that taxpayers who follow the provisions of the notice will not be subject to any penalty for reporting in accordance with the guidance it provides.

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. <u>Exempt Organizations</u>

1. Oh goody! Changes to the UBTI rules! The 2017 Tax Cuts and Jobs Act, §§ 13702 and 13703, also made certain changes to the determination of unrelated business taxable income ("UBTI") with respect to tax-exempt organizations. Most tax-exempt organizations are subject to federal income tax at regular rates (corporate rates for exempt corporations and trust rates for exempt trusts) on net income (i.e., after permissible deductions) from a trade or business, regularly carried on, that is unrelated to the organization's exempt purpose (other than its need for revenue). Exceptions exist for most types of passive, investment income as well as for narrow categories of other types of income (e.g., thrift store sales). *See* §§ 511-514. The rationale behind the changes to the UBIT rules was to put tax-exempt organizations on par with taxable organizations with respect to certain types of compensation and fringe benefits. Because, however, disallowing deductions for fringe benefits such as parking and transportation expenses (which is what the 2017 Tax Cuts and Jobs Act, § 13304(c), did by adding § 274(a)(4)) does not work for exempt organizations which do not normally pay tax, Congress did something weird. Specifically, Congress decided to arbitrarily increase an exempt organization's unrelated business income (even if such income was otherwise zero) by the value of the fringe benefits the organization provides to employees. Sounds like a simple solution, right? *Wrong! See below.*

Stop using good UBI money to chase bad UBI money! Under pre-TCJA law, if an exempt organization had unrelated business income ("UBI") from one activity, but unrelated losses from another activity, then the income and losses could offset, meaning that the organization would report zero or even negative UBI. Congress apparently doesn't like this result, so under new § 512(a)(6) income and losses from separate unrelated businesses no longer may be aggregated. This new UBI provision is effective for taxable years beginning after 2017, thus giving fiscal year nonprofits some time to plan. Moreover, under a special transition rule, unrelated business income net operating losses arising in a taxable year beginning before January 1, 2018, that are carried forward to a taxable year beginning on or after such date, are not subject to § 512(a)(6).

Congress doesn't like using UBI to help fund fringe benefits, so when your organization's highly-compensated employees are pumping iron at the charity's free gym, you can pump up your UBI too. Under new § 512(a)(7), an organization's unrelated business taxable income is increased by the amount of any expenses paid or incurred by the organization that are not deductible because of the limitations of § 274 for (i) qualified transportation fringe benefits (as defined in § 132(f)); (ii) a parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)); or (iii) any on-premises athletic facility (as defined in § 132(j)(4)(B)). New § 512(a)(7) is effective for amounts paid or incurred after 2017, so affected tax-exempt organizations need to deal with this change immediately. The IRS has granted some relief, though, in the form of Notice 2018-100, 2018-52 I.R.B. 1074 (12/10/18), discussed further below. Moreover, Notice 2018-100 clarifies that with respect to on-premises athletic facilities UBI is increased under § 512(a)(7) only if the benefits provided discriminate in favor of highly-compensated employees.

Perhaps worth noting here: Because the TCJA reduced the top federal income tax rate on C corporations to 21 percent, it likewise reduced to 21 percent the top rate on UBI of tax-exempt organizations formed as nonprofit corporations, which are the vast majority. So, the news for tax-exempts is not all bad.

a. A tax law oxymoron: nonprofit trades or businesses. Huh? Notice 2018-67, 2018-36 I.R.B. 409 (8/21/18). Organizations described in §§ 401(a) (pension and retirement plans) and 501(c) (charitable and certain other entities) generally are exempt from federal income taxation. Nevertheless, §§ 511 through 514 impose federal income tax upon the "unrelated business taxable income" ("UBTI") of such organizations including for this purpose state colleges and universities. The principal sources of UBTI are §§ 512 and 513 "unrelated trade or business" gross income (minus deductions properly attributable thereto) and § 514 "unrelated debt-financed income" (minus deductions), including a partner's allocable share of income from a partnership generating UBTI. Prior to TCJA, exempt organizations could aggregate income and losses from unrelated trades or businesses before determining annual UBTI potentially subject to tax. Excess losses (if any) after aggregating all UBTI-related items of an exempt organization created a net operating loss subject to the rules of § 172. [See Reg. § 1.512(a)-1(a) prior to enactment of TCJA. After TCJA, § 172 permits only carryforwards.] Effective for taxable years beginning after 2017, however, TCJA added new § 512(a)(6) to disaggregate unrelated trades or businesses of exempt organizations for purposes of determining UBTI. Specifically, new § 512(a)(6) provides that for any exempt organization with more than one unrelated trade or business: (1) UBTI must be computed separately (including for purposes of determining any net operating loss deduction) for each such unrelated "trade or business;" and (2) total annual UBTI is equal to (i) the sum of positive UBTI from each such separate "trade or business" minus (ii) the specific $1,000 deduction allowed by § 512(b)(12). Under a special transition rule, unrelated business income net operating losses arising in a taxable year beginning before January 1, 2018 and carried forward to a taxable year beginning on or after such date, are not subject to new § 512(a)(6).

Now we get to the crux of the matter. The logical result of new § 512(a)(6) is that every exempt organization must segregate its unrelated trade or business income and losses for purposes of determining its annual UBTI. Yet, Treasury and IRS have never defined separate "trades or businesses" for this purpose or, frankly, for any other federal income tax purpose. Further complicating matters, TCJA also enacted a related subsection, new § 512(a)(7), that increases an exempt organization's UBTI by expenses for which a deduction is disallowed under certain provisions of §§ 274 and 132 (specified transportation, parking, and athletic facility fringe benefits) *unless* the expense is "directly connected with an unrelated trade or business which is regularly carried on by the organization." Thus, new § 512(a)(7) also requires identification of each unrelated "trade or business" of an exempt organization, but § 512(a)(7) has the further deleterious effect of potentially creating UBTI for an exempt organization that otherwise has no unrelated trade or business. In Notice 2018-67, Treasury and IRS take the first step toward providing guidance with respect to both § 512(a)(6) and (7) and delineating separate trades or businesses for UBIT purposes.

What's in the Notice? Aside from requesting comments, Notice 2018-67 is lengthy (36 pages) and contains thirteen different "SECTIONS," ten of which address substantive, technical aspects of new § 512(a)(6) and (7). The high points are summarized below, but Notice 2018-67 is a must-read for tax advisors to § 501(c) organizations, state colleges and universities, and § 401(a) pension and retirement plans, especially where those entities have UBTI from partnership interests they hold as investments. To summarize:

(1) *General Rule*. Until proposed regulations are published, all exempt organizations affected by the changes to § 512(a)(6) and (7) may rely upon a "reasonable, good-faith interpretation" of §§ 511 through 514, considering all relevant facts and circumstances, for purposes of determining whether the organization has more than one unrelated trade or business. Because of the way § 512(a)(6) operates, exempt organizations will be inclined to conclude that they have only one unrelated trade or business, but that is not easy to do given the so-called "fragmentation" principle of § 513(c) and Reg. § 1.513-1(b). For example, advertising income earned by an exempt organization (e.g., National Geographic) from ads placed in the organization's periodical is UBTI even if subscription income is not UBTI. For an exempt organization this general rule includes using a reasonable, good-faith interpretation when determining: (a) whether to separate debt-financed income described in §§ 512(b)(4) and 514; (b) whether to separate income from a controlled entity described in § 512(b)(13); and (c) whether to separate insurance income earned through a controlled foreign corporation as described in § 512(b)(17). The use of the 6-digit code North American Industry Classification System ("NAICS") for segregating trades or businesses will be considered a reasonable, good-faith interpretation until regulations are proposed.

(2) *Partnership Interests*. In general, partnership activities are attributable to partners such that holding a partnership interest can result in multiple lines of UBTI being considered allocable to an exempt organization partner. Until proposed regulations are issued, however, exempt organizations (other than § 501(c)(7) social clubs) may rely upon either of two rules for aggregating multiple lines of UBTI from a partnership, including UBTI attributable to lower-tier partnerships and unrelated debt-financed income:

- The "interim rule" that permits the aggregation of multiple lines of UBTI from an exempt organization's interest in a single partnership if the partnership meets either a "de minimis test" or a "control test." The de minimis test generally is met if the exempt organization partner holds a 2 percent or less capital and profits interest in a partnership. The control test generally is met if the exempt organization partner holds a 20 percent or less capital interest in a partnership and does not have "control or influence" over the partnership. Control or influence over a partnership is determined based upon all relevant facts and circumstances. For purposes of determining an exempt organization's percentage interest in a partnership under the interim rule, partnership interests held by disqualified persons (as defined in § 4958), supporting organizations (as defined in § 509(a)(3)), and controlled entities (as defined in § 512(b)(13)(D)) must be considered.

- The "transition rule" that permits the aggregation of multiple lines of UBTI from an exempt organization's interest in a single partnership if the interest was acquired prior to August 21, 2018. For example, if an organization has a 35 percent interest in a partnership [acquired] prior to August 21, 2018, it can treat the partnership as being in a single unrelated trade or business even if the partnership's investments generated UBTI from various lower-tier partnerships that were engaged in multiple types of trades or businesses (or, presumably, from debt-financed income).

(3) *IRC § 512(a)(7)*. Income under § 512(a)(7) [i.e., the UBIT increase for expenses not directly connected with an unrelated trade or business regularly carried on by the organization and for which a deduction is disallowed under certain provisions of §§ 274 and 132 (specified transportation, parking, and athletic facility fringe benefits)] is not income from a trade or business for purposes of § 512(a)(6). Thus, such UBIT appears to be entirely separate from § 512(a)(6) income and therefore not offset by any deductions or losses.

(4) *GILTI*. An exempt organization's inclusion of global intangible low-taxed income ("GILTI") under § 951A is treated as a dividend which is not UBTI (pursuant to § 512(b)(1)) unless it is debt-financed (and thus included in UBIT under § 512(b)(4)).

b. Guidance on determining the increase to UBTI for employer-provided parking. Notice 2018-99, 2018-52 I.R.B. 1067 (12/10/18). In this notice, the IRS announced that Treasury and the IRS will issue proposed regulations under §§ 274 and 512 that will include guidance on determining the calculation of increased unrelated business taxable income (UBTI) of tax-exempt organizations that provide qualified transportation fringes (and also the nondeductible parking expenses and other expenses for qualified transportation fringes provided by non-tax-exempt employers). Until further guidance is issued, employers that own or lease parking facilities where their employees park can rely on interim guidance provided in the notice to determine the increase in the amount of UBTI under § 512(a)(7) attributable to nondeductible parking expenses. The guidance in the notice for determining the increase in UBTI mirrors the guidance for determining the nondeductible parking expenses of non-tax-exempt employers summarized earlier in this outline. The notice explains that an increase to UBTI is not required "to the extent the amount paid or incurred is directly connected with an unrelated trade or business that is regularly carried on by the organization" because, in such a case, the expenses for qualified transportation fringes are disallowed by § 274(a)(4) as a deduction in calculating the UBTI of the unrelated trade or business. The notice confirms that the effect of the increase in UBTI can be to require a tax-exempt organization to file Form 990-T, Exempt Organization Business Income Tax Return, if the organization's gross income included in computing UBTI is $1,000 or more. The rules for determining the increase in UBTI are illustrated by examples 9 and 10 in the notice.

c. Never had UBTI or paid estimated taxes thereon? Not to worry, says the IRS. Notice 2018-100, 2018-52 I.R.B. 1074 (12/10/18). Prior to the enactment of § 512(a)(7), many if not most § 501(c)(3) organizations had never reported UBTI or paid any unrelated business income tax ("UBIT") thereon. Organizations that owe UBIT are required to pay estimated taxes or suffer penalties. See IRC § 6655(c) and (d)(1)(A). Furthermore, because these organizations have never paid UBIT, they would not be eligible for the safe harbor exclusion for estimated taxes under § 6655(d)(1) (estimated payments equal to prior year's UBIT). Accordingly, with new § 512(a)(7) catching most tax-exempt organizations off guard, the IRS has decided "in the interest of sound tax administration" (in other words, to prevent another Boston Tea Party) to waive the penalty for failure to make estimated UBIT payments for such exempt organizations. Note, however, the penalty waiver is limited to "tax-exempt organizations that provide qualified transportation fringes (as defined in § 132(f)) and any parking facility used in connection with qualified parking (as defined in §132(f)(5)(C)) to an employee to the extent that the underpayment of estimated income tax results from enactment of [§§ 13304(c) and 13703 of the 2017 Tax Cuts and Jobs Act]." Furthermore, the relief is available only to a tax-exempt organization that was not required to file a Form 990-T (the UBIT form) for the taxable year immediately preceding the organization's first taxable year ending after December 31, 2017. Notice 2018-100 does not address the possibility of estimated UBIT payments attributable to discriminatory on-premises athletic facilities. To avail themselves of the relief granted by the Notice, exempt organizations must write "Notice 2018-100" on the top of the organization's Form 990-T.

d. Much Ado About Nothing. Congress has repealed with retroactive effect the increase to UBTI for nondeductible fringe benefits provided by tax-exempt organizations. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title III,

§ 302 of the 2020 Further Consolidated Appropriations Act, repealed Code § 512(a)(7). Under former § 512(a)(7), a tax-exempt organization's unrelated business taxable income was increased by the amount of any expenses paid or incurred by the organization that were not deductible because of the limitations of § 274 for (i) qualified transportation fringe benefits (as defined in § 132(f)); (ii) a parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)); or (iii) any on-premises athletic facility (as defined in § 132(j)(4)(B)). The repeal is effective retroactively as if the repeal had been part of the 2017 TCJA. In other words, § 512(a)(7) never took effect. Tax-exempt organizations should be entitled to a refund of any UBIT paid pursuant to former § 512(a)(7).

B. Charitable Giving

1. Taxpayers have a greater ability to deduct charitable contributions for relief efforts in areas affected by qualified disasters. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 204(a) of the 2020 Further Consolidated Appropriations Act, provides special rules for charitable contributions for relief efforts in qualified disaster areas. Normally, the limit that applies to the deduction for most charitable contributions by individuals is 50 percent of the taxpayer's contribution base, which, generally speaking, is adjusted gross income. Lower limits can apply depending on the type of recipient and the type of property contributed. The limit that applies to the deduction for most charitable contributions by corporations generally is 10 percent of taxable income. Contributions that exceed these limits generally can be carried forward five years. The legislation provides that "qualified contributions" by an individual are not subject to the normal limits, and instead are allowed up to the amount by which the taxpayer's contribution base (AGI) exceeds the other charitable contributions the taxpayer makes, i.e., those subject to the normal limit. In effect, this permits individual taxpayers to deduct qualified contributions up to 100 percent of the taxpayer's contribution base (AGI) after taking into account other charitable contributions. For corporations, the limit on qualified contributions is the amount by which the corporation's taxable income exceeds the corporation's other charitable contributions, i.e., the corporation can deduct qualified contributions up to 100 percent of taxable income after taking into account other charitable contributions. Qualified contributions by an individual or a corporation that that exceed the relevant limit can be carried forward five years. A *qualified contribution* is defined as a charitable contribution (as defined in § 170(c)) that meets three requirements: (1) the contribution must be paid in cash to an organization described in § 170(b)(1)(A) during the period beginning on January 1, 2018, and ending on February 18, 2020 (60 days after the date of enactment), for relief efforts in a qualified disaster area, (2) the taxpayer must obtain from the organization a contemporaneous written acknowledgment that the contribution was used (or will be used) for such relief efforts, and (3) the taxpayer must elect the application of this special rule. For partnerships or S corporations, the election is made separately by each partner or shareholder. The legislation does not specify the manner of making the election. Presumably, taking the deduction on the return will constitute an election.

Several key terms are defined in Division Q, Title II, § 201 of the 2020 Further Consolidated Appropriations Act. These are as follows:

1. The term "*incident period*" with respect to any qualified disaster is the period specified by FEMA as the period during which the disaster occurred, except that the period cannot be treated as beginning before January 1, 2018, or ending after January 19, 2020 (the date that is 30 days after the date of enactment of the legislation).
2. The term "*qualified disaster zone*" is the portion of the qualified disaster area determined by the President to warrant individual or individual and public assistance from the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to the qualified disaster area.
3. The term "*qualified disaster area*" is an area with respect to which the President declared a major disaster from January 1, 2018, through February 18, 2020 (the date that is 60 days the date of enactment of the legislation), under section 401 of the Stafford Act if the incident period of the disaster began on or before December 20, 2019 (the date of enactment). To avoid providing double benefits, the legislation excludes the California wildfire disaster area, for which similar relief was provided by the Bipartisan Budget Act of 2018.

4. "The term '*qualified disaster*' means, with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area."

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

1. Sending one frivolous amended Form 1040X and later sending six photocopies of the same amended Form 1040X results in only one $5,000 frivolous return penalty, not six more. Kestin v. Commissioner, 153 T.C. No. 2 (8/29/19). After correctly reporting her wages as includible in gross income on her initial federal income tax return on Form 1040, the taxpayer submitted a frivolous amended return on Form 1040X in which she reported no tax due on her wage income. The IRS responded with Letter 3176C inviting the taxpayer to correct the Form 1040X to avoid a $5,000 frivolous filing penalty under § 6702(a). In response, the taxpayer sent six separate letters to varying branches of the IRS each contaning a photocopy of her initial Form 1040X. This resulted in the IRS imposing six additonal $5,000 frivolous filing penalties. Upon her request, the IRS granted the taxpayer a collection due process (CDP) hearing, following which the IRS issued a notice of determination (NOD) sustaining the imposition of all seven penalties. Dissatisfied with her outcome, the taxpayer petitioned the Tax Court pro se challenging the income tax and the six additional $5,000 penalties imposed based on the photocopies of the amended return that she had sent to the IRS. Judge Gustafson quickly rejected as frivolous the taxpayer's claim that her wages were not includible in income and focused on whether the six additional frivolous filing penalties under § 6702(a) were warranted. The court quoted from it recent decision in *Gregory v. Commissioner*, 152 T.C. No. 7 (3/13/19), in which the court had explained:

> Under what is commonly called the Beard test, for example, a return must meet the following criteria: "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." [quoting *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).]

If a document does not constitute a "return" under the *Beard* test, the document might fail to trigger various results that follow from the filing of a return. For example, a document that is not a return does not start the running of the limitations period on assessment of tax. The court held that the taxpayer's originally filed Form 1040X was not a return under the *Beard* test because it was not an "honest and reasonable attempt to satisfy the requirements of the tax law" under the third element of *Beard*. Nevertheless, according to the court, the frivolous filing penalty of § 6702(a) is imposed when a person files "what purports to be a return," and because the taxpayer's original Form 1040X purported to be a return and met the other conditions set forth in § 6702(a), the IRS had correctly imposed the frivolous filing penalty with respect to this document. The court then addressed whether any of the six photocopies of the original Form 1040X "purported to be a return" within the meaning of § 6702(a). The court concluded that none of the copies purported to be a return. The court distinguished its holding in *Whitaker v. Commissioner*, T.C. Memo. 2017-192, which upheld two § 6702(a) frivolous filing penalties when the taxpayer submitted two sequential Forms 1040. Each of the two Forms 1040 in *Whitaker* bore the taxpayer's original signature and each had different attachments. Unlike the returns submitted in *Whitaker*, the taxpayer in this case had submitted only photocopies of her returns, none of which contained an original signature and all of which were plainly marked or referenced as copies. These distinctions were sufficient for the court to hold that the photocopies did not "purport[] to be a return" and therefore were not subject to penalties under § 6702(a). The opinion does include a notable caveat indicating that not all copies of returns are immune from a § 6702(a) penalty. The court suggested that it could not rule out the possibility that a frivolous filing penalty would be upheld if, in response to an IRS notice that no return is on file, a taxpayer were to submit a photocopy of a return that the taxpayer alleges to have filed previously. The court also rejected the taxpayer's arguments that the IRS was precluded from imposing the penalties by § 6751(b). Section 6751(b) requires that the initial determination of the assessment of a penalty be "personally approved (in writing) by the immediate supervisor of the individual making such determination." Specifically, the court held that the Letters 3176C sent by the IRS inviting the taxpayer to correct her Form 1040X were not unapproved initial determinations of the penalties. The court also rejected the taxpayer's challenges to the validity of the notice of federal tax lien and the CDP notice sent by the IRS.

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

1. A mandatory 60-day extension of certain deadlines for those affected by federally delcared disasters. A provision of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title II, § 205 of the 2020 Further Consolidated Appropriations Act, provides a mandatory 60-day extention of certain deadlines for those affected by federally declared natural disasters. Prior to the legislation, § 7508A(a) authorized the Secretary of the Treasury to specify a period of time of up to one year that is disregarded in determining an affected taxpayer's compliance with deadlines such as those for filing returns and paying tax, an affected taxpayer's liability for interest and penalties, and an affected taxpayer's entitlement to a credit or refund. The legislation adds new § 7508A(d), which provides a mandatory 60-day extension for qualified taxpayers. A qualified taxpayer is defined to include those whose principal residence or principal place of business (other than performing services as an employee) is located in a disaster area, relief workers working for recongnized government or philanthropic organizations to assist in a disaster area, those whose records are are located in a disaster area, and those visiting a disaster area who are killed or injured as a result of the disaster. For this purpose, the term "disaster area" is defined in § 165(i)(5), which generally defines a disaster area as any area determined to warrant assistance by reason of any disaster determined by the President to warrant assistance by the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

F. Liens and Collections

1. The Tax Court declines jurisdiction in a case where the notice of federal tax lien was sent to the proper address and received by taxpayer. Atlantic Pacific Management Group, LLC v. Commissioner, 152 T.C. No. 17 (6/20/19). The petitioner, Atlantic Pacific Management Group, LLC (Atlantic) failed to file partnership information returns for two consecutive years. The IRS filed a notice of federal tax lien, sent a notice of federal tax lien filing to Atlantic, and assessed late filing penalties for both years. The notice of federal tax lien notified Atlantic of its right to request a collection due process (CDP) hearing. Though the notice was delivered and signed for, Atlantic did not timely request a CDP hearing and, although it submitted a late request for a CDP hearing, the IRS closed the case without conducting a CDP (or equivalent) hearing. The IRS also did not issue a notice of determination. In general, under § 6320(a)(3)(B) and (b)(1), after receiving a notice of federal tax lien, a taxpayer has a thirty-day period within which to request a CDP hearing with the IRS Office of Appeals, following which IRS Appeals will issue a notice of determination. Once IRS Appeals issues the notice of determination, the taxpayer, pursuant to §§ 6320(c) and 6330(d)(1), can seek judicial review by filing a petition with the Tax Court. Notwithstanding that Atlantic had neither timely filed for a CDP hearing nor received a notice of determination, Atlantic filed a petition with the Tax Court asserting that the court should follow its holding in *Buffano v. Commissioner,* T.C. Memo 2007-32. In *Buffano*, the court held that, when jurisdiction is lacking, the court must nevertheless analyze the underlying facts to decide the proper basis for dismissal. Specifically, Atlantic argued that it had been deprived of its right to a CDP hearing and that the court should dismiss due to the IRS's failure to issue a valid notice of federal tax lien. The IRS, on the other hand, argued that the court should overrule its decision in *Buffano* and dismiss for lack of jurisdiction because the IRS had not issued a notice of determination. The court declined to adopt either of the parties' arguments, opting instead to "address some discrepancies in caselaw surrounding [the Court's] authority to determine whether requirements were complied with when determining jurisdiction." In doing so, the court distinguished *Buffano*. In *Buffano*, the taxpayer had failed to submit a timely request for a CDP hearing and had failed to show up for an equivalent hearing granted by the IRS. The court in *Buffano* dismissed and invalidated the underlying levy notice because it had not been mailed to the appropriate address. The court distinguished the lack of notice to the taxpayer in *Buffano* from Atlantic's actual receipt of proper notice. The court concluded that it lacked jurisdiction because no notice of determination had been issued. The court rejected Atlantic's final argument that § 7803(a)(3), the statutory taxpayer bill of rights (TBOR) enacted as part of the Protecting Americans from Tax Hikes Act of 2015, conferred jurisdiction on the court. According to Atlantic, § 7803(a)(3) gave "it a right to be heard and to appeal decisions of respondent to an independent forum." Unimpressed with this argument, the court held that § 7803(a)(3) provides no independent relief or additional rights to taxpayers and confers no power on the court to extend the deadline for requesting a CDP hearing beyond the thirty days prescribed by § 6320.

- The court's holding regarding the TBOR is consistent with *Moya v. Commissioner*, 152 T.C. No. 11 (4/17/19), in which the court held that the TBOR adopted by the IRS in 2014 did not add to a taxpayer's rights but merely "consolidat[ed] and articulat[ed] in 10 easily understood expressions rights enjoyed by taxpayers and found in the Internal Revenue Code and in other IRS guidance," and with *Facebook, Inc. v. Internal Revenue Service*, 121 A.F.T.R.2d 2018-1752 (N.D. Cal. 5/14/18), in which the court held that the statutory TBOR in § 7803(a)(3) did not grant taxpayers new, enforceable rights.

G. Innocent Spouse

H. Miscellaneous

1. When the IRS fails to review all evidence related to a whistleblower award, the Tax Court may grant the IRS's motion to remand the case back to the IRS to conserve the court's resources. Whistleblower 769-16W v. Commissioner, 152 T.C. No. 10 (4/11/19). Pursuant to § 7623, the petitioner initially applied for seven separate whistleblower awards in relation to a tax-avoidance scheme allegedly perpetrated by various taxpayers. In late 2011, after referring the petitioner's claims to the IRS's Large Business and International (LB&I) Division, LB&I concluded that when the claims for award were submitted, the IRS was aware of the tax-avoidance scheme and each of the reported taxpayers was already under examination. Over the course of the same general time period, the petitioner provided a congressional committee responsible for investigations with similar information regarding the tax-avoidance scheme in relation to the same taxpayers. The petitioner later applied for additional whistleblower awards in relation to additional taxpayers. In 2014 (date unclear), the congressional committee issued its report regarding the tax-avoidance scheme to the IRS. Thereafter, the IRS Whistleblower Office issued a final determination summarily denying all of petitioner's claims indicating the information provided by petitioner did not result in any action or change in position taken by the IRS. On appeal to the Tax Court, the petitioner objected to, among other things, the IRS's motion to remand the case back to the IRS because, as conceded by the IRS, the Whistleblower Office had not considered whether the IRS might have proceeded on the basis of information the petitioner brought to the IRS's attention as part of the congressional committee report. In a unanimous, reviewed opinion by Judge Thornton in a case of first impression, the Tax Court granted the IRS's motion to remand the case to the IRS. Remanidn to the IRS is appropriate, the court held, where the IRS identifies substantial concerns related to its ruling and where the remand will conserve the court's resources. The court cautioned that remand will be granted only if the petitioner will not be unduly prejudiced. In coming to these conclusions, the court relied on its recent decision in *Kasper v. Commissioner*, 150 T.C. No. 2 (1/9/18), in which the court held that its standard of review in a whistleblower case is for abuse of discretion. The court in *Kasper* also noted that it examines requests for innocent spouse relief under § 6015 under a de novo standard of review. In contrast, the court's standard of review is for abuse of discretion in both collection due process (CDP) cases and whistleblower cases. Thus, while the court may remand a CDP case for abuse of discretion, cases arising under § 6015 are reviewed de novo and are not subject to remand. Cases in the latter category are reviewed de novo because they "are not a 'review' of the Commissioner's determination in a hearing but are instead an action begun in this Court." *Friday v. Commissioner*, 124 T.C. at 222 (fn. ref. omitted). Again citing its decision in *Kasper*, the court further held that, in reviewing whistleblower award determinations for abuse of discretion, the court will not substitute its judgment for that of the Whistleblower Office. Instead, the court decides "whether the agency's decision was 'based on an erroneous view of the law or a clearly erroneous assessment of the facts.'" The court then adopted the standard set forth by the U.S. Supreme Court in *Camp v. Pitts*, 411 U.S. 138 (1973), for remanding a case to an administrative agency as follows:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

411 U.S. at 142. Thus, under *Camp*, the Tax Court may now remand cases to the Whistleblower Office for further consideration. Because any appeal of this case will be considered by the U.S. Court of Appeals for the District of Columbia Circuit, the Court turned to *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), to explain the manner in which discretion should be used in granting motions to remand:

> We generally grant an agency's motion to remand so long as "the agency intends to take further action with respect to agency decision on review." Remand has the benefit of allowing "agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." Remand may also be appropriate if the agency's motion is made in response to "intervening events outside the agency's control, for example, a new legal decision or passage of new legislation." Alternatively, "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018).

These considerations, the court reasoned, supported granting the IRS's motion to remand.

XI. WITHHOLDING AND EXCISE TAXES

A. Employment Taxes

B. Self-employment Taxes

C. Excise Taxes

1. Congress has repealed the Cadillac Tax. Division N, Title I, § 503 of the 2020 Further Consolidated Appropriations Act repealed § 4980I, which imposed a 40 percent excise tax on the amount by which the cost of group health coverage provided by an employer (referred to as "applicable coverage") exceeded an applicable dollar limit. This excise tax was commonly referred to as the Cadillac Tax. The repeal is effective for taxable years beginning after December 31, 2019.

2. Congress has repealed the medical device tax. Division N, Title I, § 501 of the 2020 Further Consolidated Appropriations Act repealed the 2.3 percent excise tax on medical devices of § 4191 for sales of medical devices after December 31, 2019.

XII. TAX LEGISLATION

A. Enacted

1. The Further Consolidated Appropriations Act produces a hodgepodge of tax provisions. The Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, was signed by the President on December 20, 2019. This legislation repealed the taxes commonly known as the medical device tax and the Cadillac tax, modified the rules for contributions to and distributions from certain retirement plans, temporarily extended several expired or expiring provisions, and provided tax relief to those in areas affected by certain natural disasters.