Recent Developments in Federal Income Taxation

Bruce A. McGovern
Professor of Law and Director, Tax Clinic
South Texas College of Law Houston
Houston, Texas

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To obtain today's outline:
https://tinyurl.com/outline06-2021

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Qualified Transportation Fringes Disallowed
2017 TCJA § 13304
Outline: item D.1, page 2

- No deduction for qualified transportation fringes (employee parking, transit passes, transportation in commuter highway vehicle)
  - Applies to amounts paid or incurred after 2017
  - Ability of employees to exclude transportation fringes not affected
  - Exception: qualified bicycle commuting reimbursements before 2026 are:
    - Deductible by employer
    - Included in income of the employee
- Interim guidance: Notice 2018-99, 2018-52 I.R.B. 1067 (12/10/18).

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Final Regs.-Qualified Transportation Fringes
T.D. 9939, 85 F.R. 81391 (12/16/20)
Outline: item D.1.b, page 3

- Final regulations issued December 2020.
- Reg. § 1.274-13 implements the § 274(a)(4) disallowance of deductions for qualified transportation fringes.
- Refines and expands the guidance in Notice 2018-99.
- Generally apply to taxable years that begin on or after December 16, 2020.
  - For prior taxable years that begin after December 31, 2017, taxpayers can rely on the June 2020 proposed regulations or, alternatively, can rely on the guidance in Notice 2018-99.

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Final Regs.-Qualified Transportation Fringes
T.D. 9939, 85 F.R. 81391 (12/16/20)
Outline: item D.1.b, page 3

- Taxpayer who pays third parties for employee parking:
  - Section 274(a) does not disallow amounts an *employer pays to third parties for employee parking* in excess of the § 132(f)(2) monthly limitation on exclusion ($270 for 2020 and 2021), and employer must treat excess amount as compensation and wages to the employee.
- If a taxpayer owns or leases parking facilities where employees park, the nondeductible portion of the cost of providing parking can be calculated using:
  - General rule (based on a reasonable interpretation of section 274(a)(4))
  - Qualified parking limit methodology
    - § 132(f)(2) monthly limitation on the employee's exclusion * number of spaces used by employees during peak demand period * number of months in tax year (e.g., 10 employees * $270 *12 = $32,400 disallowed
  - Primary use methodology (4-step method in Notice 2018-99)
  - Cost per space methodology

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Final Regs-Revised § 162(f)
T.D. 9946, 86 F.R. 4970 (1/19/21)
Outline: item D.2, page 5

- The 2017 TCJA amended § 162(f) to disallow business deductions:
  - for any amount paid or incurred (whether by suit, agreement, or otherwise) to, or at the direction of, a government or governmental entity in relation to the violation of any law or the investigation or inquiry by such government or entity into the potential violation of any law.
- Rationale for the 2017 amendment of § 162(f) is unclear
- Final regulations under § 162(f):
  - Provide guidance on exceptions to the disallowance, including:
    - Amounts paid as restitution
    - Amounts paid to come into compliance
  - To meet either of the exceptions above, the taxpayer must satisfy:
    - Establishment requirement
    - Identification requirement

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San Jose Wellness v. Commissioner, 156 T.C. No. 4 (2/17/21)

Outline: item D.3, page 7

- Section 280E disallows any deduction or credit otherwise allowable if:
  - such amount is "paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances …."
- The taxpayer, a corporation, was engaged in a medical marijuana business in California.
- Issues:
  1. Does § 280E disallow deductions for depreciation?
  2. Does § 280E disallow deductions for charitable contributions?
- Held: (1) Yes. Depreciation is "paid or incurred during the taxable year" and is subject to § 280E. (2) Yes. The taxpayer's charitable contributions were paid or incurred "in carrying on any trade or business" and are disallowed by § 280E.

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Final Regs. Defining "Real Property" T.D. 9935, 85 F.R. 77,365 (12/2/20)

Outline: item E.1, page 8

- Final regulations define the term "real property" for purposes of the like-kind exchange rules of § 1031.
- Generally, the regulations define the term "real property" to include:
  - Land and permanent improvements to land (e.g., buildings)
    - Improvements to land include inherently permanent structures (e.g., stadiums) and the structural components of inherently permanent structures (e.g., escalators; sprinkler systems; cell towers).
  - Unsevered crops and other natural products of land
  - Water and air space superjacent to land.
- Real property also includes:
  - Intangible interests in real property (e.g., leasehold interests, land use permits).
  - Assets considered real property under state law (e.g., water pipeline). Reg. § 1.1031(a)-3(b) Ex. 10 (exchange of water pipeline for cell towers qualifies).
- A multi-factor test applies for personal property affixed to real property (e.g., large, indoor sculpture in atrium of building qualifies).

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TCJA New Section 1061 and Carried Interests TD 9945, Guidance Under § 1061 (1/19/21)

Outline: item B.1, page 9

- New § 1061 introduced three-year holding period for carried interests in partnerships (and allocations with respect thereto) to qualify for preferential LTCG rates.
- Final regulations issued 1/19/21.
  - Thirty-four defined terms created in regs.
  - Basically, transmutes otherwise LTCG into STCG to extent gain exceeds gain from property held three years or more.
  - In other words, regs "back out" the § 1061 gain.
  - Does not apply to transmute § 1231 gain even if held less than three years.
  - Doubles down on S corporation loophole (sure to be litigated).

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Exempt Organization Developments

Outline: item A.1, pages 11-12

- Changes Affecting Exempt Organizations
  - "Phubit" tax of § 512(a)(7) retroactively repealed. Taxpayer Certainty and Disaster Tax Relief Act of 2019, Division Q, Title III, § 302 of the 2020 Further Consolidated Appropriations Act.
  - Final regs issued under § 6033 regarding annual information return requirements.
  - Final regs issued on UBIT silo rules of § 512(a)(6) (Dec. 2020).
  - Final regs issued on new § 4960 regarding 21% excise tax on exempt org compensation over $1 million annually, but regulations confirm that term "ATEO" does not include state colleges and universities (Jan. 2021).

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Beland v. Commissioner
156 T.C. No. 5 (3/1/2021)
Outline Item A.1, page 13

- Issue: Whether the IRS complied with the requirement of § 6751(b)(1) 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."
- Held: No.
  - The court concluded that the IRS made its initial determination of the assessment of penalties when the IRS revenue agent presented Form 4549, Income Tax Examination Changes, during a closing conference with taxpayers.
  - Because this initial determination to assert penalties occurred before the supervisor signed the Civil Penalty Approval Form, the IRS had failed to satisfy its burden of production under § 6751(b) and the taxpayer, therefore, was not liable for a fraud penalty.

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Ramey v. Commissioner,
156 T.C. No. 1 (1/14/21)
Outline: item F.1, page 14

- The IRS mailed a notice of intent to levy to the taxpayer by certified mail, return receipt requested.
  - Taxpayer had 30 days, until August 12, 2018, to request a collection due process (CDP) hearing by mailing Form 12153.
- Taxpayer did not challenge the address to which the notice of intent to levy was sent.
  - But maintained that several businesses used this address and that the person who signed for the notice was not affiliated with the taxpayer.
- Taxpayer mailed Form 12153 after date for requesting a CDP hearing and received "equivalent hearing" upholding the proposed collection activity
- Issue: did the notice of intent to levy trigger the running of the 30-day period to request a CDP hearing?
- Held: Yes. Under § 6330(a)(2), the focus is on whether the IRS sent the notice by certified or registered mail, not on taxpayer's receipt.

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