August 2022 Update Memorandum for

Miller & Maine's

The Fundamentals of Federal Taxation: Problems and Materials

(5th ed. 2018)

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Introductory Note

During the COVID-19 pandemic, Congress passed and the President signed into law several pieces of legislation targeted at supporting and stabilizing the economy. These acts included provisions for tax relief and provided various tax incentives for individuals and businesses. The focus of the recent Inflation Reduction Act of 2022 (IRA) was health care, clean energy, climate investments, and deficit reduction. The IRA included numerous tax credits for businesses and consumers.

This update memorandum provides a brief summary of those changes, as well as other recent tax developments, relevant to the contents of our casebook, THE FUNDAMENTALS OF FEDERAL TAXATION: PROBLEMS AND MATERIALS (5th ed. 2018).

Chapter 2: Gross Income

Page 22: *3. Long-Standing Administrative Practices*

During the COVID-19 pandemic, Congress provided cash payments to many Americans (i.e., up to $1,200 for an eligible individual plus $500 for a qualifying child) to provide much needed liquidity for a struggling economy. Later, Congress provided for additional cash payments modeled after the first round of cash payments. *See, e.g.,* American Rescue Plan Act of 2021, P.L. 117-2 (providing an additional $1,400 payment to certain individuals). Many recipients questioned whether the cash payments would be taxable (i.e., included in gross income). The answer is "no" because these economic impact payments were really advanced refunds of a fully refundable tax credit (with eligibility and credit amounts based on information from prior tax returns). Refundable tax credits are discussed more fully in the chapter dealing with credits.

Page 43: In the last paragraph of "*1. General Framework,*" 39.6% should read as 37%:

As will be explained in Chapter 14, the Tax Cuts and Jobs Act of 2017 (TCJA) temporarily capped the top rate bracket at 37%. IRC § 1(j)(2). In the illustration, the annual depreciation deductions of approximately $36,000 would produce an annual tax savings of $13,320 assuming the taxpayer was in the 37% tax rate bracket.

Chapter 3: Gains and Losses from Dealings in Property

Page 53: Add to Related Matters:

- **Sports Teams' Player Contracts**. Professional sports teams often trade players. These "sales or other dispositions" of personnel contracts would seem to produce gain or loss based on the difference between the value of the contract received and the adjusted basis of the contract exchanged. In Rev. Proc. 2019-18, 2019-18 I.R.B. 1077 (Apr. 11, 2019), however, the IRS provided a safe harbor for a professional sports team to treat certain personnel contracts as having a *zero value* for purposes of determining gain or loss from such trades. Thus, unless cash is thrown in the deal, a team making a trade does not realize gain or loss from the trade. The IRS provided the safe harbor because valuation of professional sports personnel contracts fluctuates and is highly subjective and was the source of disputes between sports teams and the IRS.

Chapter 4: Gifts and Inheritances

Page 57: In *"1. Exclusion for Inter Vivos Gifts,"* note the following:

For recent cases involving payments from members of a congregation to a pastor, see Brown v. Commissioner, T.C. Memo 2019-69; Felton v. Commissioner, T.C. Memo 2018-168. Do these cases help answer Problem 1(e) at the beginning of the chapter?

Pages 60-61: In *"2. Property Acquired by Inheritance,"* note the following:

The section 1014 basis step up rule requires heirs to determine the value of inherited property. Valuation is not always easy. *See* Estate of Michael J. Jackson, T.C. Memo 2021-48 (holding Jackson's assets were worth $111 million, even though the estate reported a value of $7.2 million and the IRS suggested a value of $1.125 billion).

Page 69: At end of Related Matters, add the following new bullet:

- **Income in Respect of Decedent (IRD) Exceptions to Sections 102 and 1014.** Sometimes, income is earned by a decedent prior to death, but not collected until after death. The earned but uncollected income would not be reported on the decedent's final income tax return. Instead the income is treated as "income in respect of a decedent" (IRD), which is taxed to the actual recipient (the decedent's beneficiaries) in the year of receipt. IRC § 691. A traditional retirement account, for example, is IRD. As a result, a designated beneficiary who inherits a retirement account will not receive a basis step up under section 1014. *See* § 1014(c). Instead the beneficiary will step into the employee/decedent's shoes for tax purposes, which means that any distributions will be taxable to the beneficiary. Retirement accounts are addressed in Chapter 36.

Chapter 5: Discharge of Indebtedness

Pages 71 & 72: References to section 61(a)(12) should be to section 61(a)(11):

The Tax Cuts and Jobs Act of 2017 (TCJA) prospectively repealed section 61(a)(8), which included alimony in gross income, for divorces after 2018. As a result, section 61(a)(12) was redesignated section 61(a)(11) starting in 2019. Moving forward, income from discharge of indebtedness in included under section 61(a)(11).

Pages 73-74: In "B. Bankruptcy and Insolvency Exceptions," note the following:

In determining insolvency, asset ownership is not always defined based on formal title. *See* Hamilton v. Commissioner, 955 F.3d 1169 (10th Cir. 2020) (holding funds deposited into son's account were included in computing parents' insolvency under section 108; because parents retained effective control over these funds, they were included in parents assets, and, thus, parents were not insolvent).

Other Exceptions: The American Rescue Plan Act of 2021 added an expanded exclusion of forgiven student loans that applies to loans discharged after 2020 and before 2026. IRC § 108(f)(5). Covered debt is not limited to federal student loans. The exclusion applies whether the loan provided for postsecondary educational expenses was provided through the educational institution or directly to the borrower. Certain private education loans and loans made by certain educational organizations qualify for the special rule.

Page 84: Add the following to the second bullet on Section 108(a)(1)(E):

The exclusion for discharge of qualified principal residence indebtedness has been extended five years to debt discharged before 2026. The amount excludable, however, is limited to $750,000 ($375,000 for married individuals filing separately). IRC § 108(h)(2).

Chapter 7: Business Expenses

Page 108: in "4. Trade or Business," add the following in connection with discussion of the *Groetzinger* test:

Gambling losses are deductible only to the extent of gambling winnings. IRC § 165(d), as amended by the TCJA. For 2018 through 2025, deductible gambling losses include any deduction otherwise allowed for federal income tax purposes, not just the actual cost of wagers. *Id*.

Pages 111-112: At the end of "G. Section 163(j)—Business Interest," add the following:

Congress increased the business interest deduction limit under section 163(j) from 30 percent to 50 percent of the taxpayer's adjusted taxable income (ATI) for the 2019 and 2020 tax years, in response to the COVID-19 pandemic. This temporary change was designed to help businesses who need additional liquidity.

Page 112: H. Section 280E—The Curious Case of Legalized Marijuana

The Tax Court recently held that section 280E is not a penalty provision and therefore does not violate the Eighth Amendment's prohibition on excessive fines. Northern California Small Business Assistants, Inc. v. Commissioner, 253 T.C. No. 4 (Oct. 23, 2019). The court also rejected the taxpayer's arguments that section 280E (1) does not apply to items deductible under sections other than section 162, and (2) does not apply to marijuana businesses that operate legally under state law.

Page 112: I. Entertainment, Meal and Transportation Expenses

Although expenses for *entertainment* are not deductible, *meals (i.e., food and beverage items)* provided in connection with an entertainment activity are deductible so long as the meals meet certain requirements and are purchased separately (or the cost is separately stated on a bill or receipt). IRC § 274(k)(2); Treas. Reg. § 1.274-12(a); IRS Notice 2018-76, 2018-42 I.R.B. 599 (noting conditions that must be satisfied for deductibility). The amount of the meals deduction is generally limited to 50% of the cost, unless an exception applies. IRC § 274(n). Note that the 50% limit does not apply to business meals provided by restaurants in 2021 or 2022. IRC § 274(n)(2)(D), as added by the Taxpayer Certainty and Disaster Tax Relief Act of 2020. See IRS Notice 2021-25, 2021-17 I.R.B. 1118 (clarifying what qualifies as a "restaurant"). This temporary provision was designed to help the restaurant industry, which suffered during the COVID-19 pandemic. Thus, business meals furnished by restaurants in 2021 and 2022 are fully deductible provided usual requirements are met (e.g., the expense is ordinary and necessary, is not lavish or extravagant, the taxpayer and current or potential business associate are present, and the meal is separately stated if provided in conjunction with entertainment).

Page 125: Add to the last bullet on Confidential Sexual Harassment Settlements:

A strict reading of section 162(q) suggests that the limitation on the deduction of attorney's fees applies to the payee as well as the payor of the settlement. However, the IRS has stated on its website (without issuing an official ruling) that the provision does not apply to plaintiffs. *See* Section 162(q) FAQ, available at https://www.irs.gov/newsroom/section-162q-faq. *See also* Tax Notes, Mar. 11, 2019, at 1255.

Page 125: Add the following new bullet in Related Matters:

- **Double Dipping**. During the COVID-19 pandemic, many small businesses received forgivable SBA loans under the CARES Act. These forgiven loans are excluded from the borrower's gross income and not considered cancellation of debt for income tax purposes. A question that has arisen is whether business expenses remain deductible under section 162 to the extent they were funded by such forgivable loans. The IRS took the position that expenses funded by forgivable SBA loans are not deductible. *See* IRS Notice 2020-32. But recent legislation overrides the result in the IRS Notice. Specifically, a taxpayer may deduct payment of business expenses even if the expenses were paid for with proceeds from forgiven loans. In your opinion, does it make sense to take away a deduction (e.g., for reasonable salaries) because it was funded by a tax exempt source (e.g., a forgivable SBA loan)? Consider a sole proprietor using municipal bond interest, which is excluded from gross income under section 103, to pay salary to a worker.

Chapter 9: Depreciation and Amortization

Page 148: Applicable Recovery Period

The Tax Cuts and Jobs Act of 2017 (TCJA) *intended* to assign a 15-year recovery period to "qualified improvement property." But under a technical error (failure to make a statutory change in section 168), qualified improvement property placed in service after 2017 did not get the short recovery period, but instead had to be depreciated as 39-year nonresidential real property. (Because the 15-year recovery period failed to take effect, qualified improvement property placed in service after 2017 also failed to qualify for certain bonus depreciation rules discussed later in this chapter.) Under the CARES Act, however, the technical glitch is fixed and 15-year recovery period is retroactively assigned to qualified improvement property. IRC § 168(e)(3)(E)(vii), as added by CARES Act. As a result, qualified improvement property placed in service after 2017 is depreciated over 15 years. (Alternatively, the property qualifies for 100 percent bonus depreciation if additional requirements are met.)

Pages 151-153: B. Bonus Depreciation

In 2022, the aggregate cost of any section 179 property that a taxpayer elects to treat as an expense cannot exceed $1,080,000. This limit is reduced (but not below zero) by the amount by which the cost of section 179 property placed in service in 2022 exceeds $2,700,000.

As noted above, the CARES Act made a retroactive technical "fix" so that a 15-year recovery is assigned to "qualified improvement property." IRC § 168(e)(3)(E)(vii), as added by CARES Act. As a result, such property qualifies for 100 percent bonus depreciation if all bonus requirements are met. For the definition of qualified improvement property, see IRC § 168(e); Treas. Reg. § 1.168(b)-1(a)(5).

Chapter 11: Other Deductible Personal Expenses

Page 188: E. Medical Expenses:

Earlier acts had temporarily reduced the threshold for deducting medical expenses from 10% to 7.5% of the taxpayer's adjusted gross income (AGI). IRC § 213(a). The 7.5 percent AGI threshold has now been made permanent. Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 101, P.L. 116-260. In short, for tax years beginning after 2020, the deduction may be claimed to the extent that the expenses exceed 7.5% (not 10%) of AGI.

Page 193: V. Related Matters:

Reference to section 222 should be deleted as the provision has been repealed.

Chapter 12: The Deduction Hierarchy

Page 197: III. Overview

A general comment: The CARES Act created an above-the-line deduction for certain charitable contributions in 2020. More specifically, an individual who did not itemize deductions could deduct up to $300 in cash contributions made to public charities (e.g., churches, nonprofit schools, nonprofit medical institutions, etc.) as an above-the-line deduction in arriving at adjusted gross income (AGI). IRC § 62(a)(22), (f)(1), as added by the CARES Act. Thus, an individual could claim a limited charitable deduction even though she did not itemize. For 2021, an individual who did not itemize could similarly deduct up to $300 in cash contributions. Note however, that the 2021 deduction could be claimed in calculating taxable income (not adjusted gross income (AGI)). Thus, technically, the 2021 deduction was not an above the line deduction. Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 212, P.L. 116-260. Regarding 2021, note the repeal of I.R.C. § 62(a)(22) and note new I.R.C. § 170(p).

Page 198: In "A. Itemized Deductions versus the Standard Deduction," note the following:

In 2022, the standard deduction is $25,900 for married individuals filing joint returns and surviving spouses, and $12,950 for unmarried individuals (other than surviving spouses and heads of households). The additional standard deduction amount for the aged or the blind is $1,400. Rev. Proc. 2021-45.

Page 203: Regarding "IV. Materials," note the following:

Family law practitioners should note that Form 8332 is important for the noncustodial parent to receive both child credits and dependency deductions for children. For illustration, see Bethune v. Commissioner, T.C. Memo 2020-96 (holding against the taxpayer who could not show that a district court order conformed to the substance of the Form 8332; the regulations require that a taxpayer file Form 8332 or an alternative statement conforming to the form's substance when the tax return is filed).

Page 205: In "V. Related Matters," add the following new bullet:

- **Teacher's Classroom Expense Deduction**. Eligible teachers may claim an above-the-line deduction of up to $250 for certain unreimbursed expenses. IRC § 62(a)(2)(D), (d). Eligible expenses include those paid to purchase books, supplies, computer equipment, and supplementary materials used in the classroom. Note that the Treasury Department was recently directed to issue regulations or other guidance that would include personal protective equipment, disinfectant, and other supplies used for the prevention of spread of COVID-19. COVID-Related Tax Relief Act of 2020, § 275, P.L. 116-260.

Chapter 13: Timing Rules and Related Principles

Page 226: In "V. Related Matters," note the following in the last bullet:

The IRS guidance in Rev. Proc. 2004-34 has essentially been codified in IRC § 451(c).

Chapter 14: Ordinary Tax Rates and Taxpayer Classification

Page 234: In "D. Alternative Minimum Tax," note the following:

In 2022, the inflation-adjusted AMT exemption amounts are $118,100 for joint filers, $75,900 for unmarried individuals, and $59,050 for married individuals filing separate returns. Rev. Proc. 2021-45.

Page 235: In "D. Alternative Minimum Tax," add the following at the end:

Recently, the Inflation Reduction Act of 2022 added a 15% corporate AMT, calculated on adjusted financial statement income for corporations with profits in excess of $1 billion.

Pages 235-236: In "IV. Materials," note the following:

The inflation-adjusted tax rate tables for 2022 can be found in Rev. Proc. 2021-45.

Page 237: Add the following to the bullet on The Kiddie Tax:

Congress has now repealed section 1(j)(4) (added by the TCJA), which temporarily modified the *Kiddie Tax* by apply applying the rates of tax applicable to trusts to the unearned income of children. This means that the law prior to the TCJA is now back in effect. *See* 2020 Further Consolidated Appropriations Act, § 501. In sum, the Kiddie Tax subjects unearned income of children under the age of 18 to the child's parents' marginal tax rate no matter what the source of the income.

Chapter 15: Tax Credits

Page 239: In Problem 1, note the following:

Ignore the last sentence before part (a) of the problem, as section 25A no longer calls for inflation adjustments.

Page 241: In "1. The Dependent Care Credit," note the following:

Of historical note, The American Rescue Plan Act of 2021, P.L. 117-2 (enacted in March 2021) increased the dependent care credit for 2021 only. The top credit percentage increased from 35% to 50%. Plus, eligible taxpayers could claim dependent care expenses of up to $8,000 for one qualifying child (up from $3,000 before 2021) or $16,000 for two or more qualifying individuals (up from $6,000 before 2021). Most importantly, the adjusted gross income (AGI) level at which the credit percentage is reduced was raised substantially from $15,000 to $125,000, allowing more people to qualify for the new maximum 50% credit rate. Beyond $125,000, the 50% credit percentage was reduced as income increased. Note that in 2021, for the first time, the credit was fully refundable, which means families could claim it even if they don't owe any taxes.

Pages 241-242: In "*2. The Child Tax Credit and the Partial Credit for Other Dependents*," note the following:

Of historical note, The American Rescue Plan Act of 2021 expanded the child tax credit for 2021 only. It increased the amount of the credit (from $2,000 per child to $3,000 per child for dependents ages 6 through 17 and $3,600 for dependents ages 5 and under), made it available for 17-year old dependents, made it fully refundable (before only $1,400 was refundable), and made it possible for families to get 50% of it in advance during the last half of 2021 (estimated from the 2020 tax return). The maximum credit was available to taxpayers with a modified adjusted gross income (AGI) of $75,000 or less for singles and $150,000 or less for joint filers). Above these income thresholds, the extra amount above the original $2,000 credit (either $1,000 or $1,600) was reduced by $50 for every $1,000 of modified AGI.

Pages 242-243: In "*3. The Hope Scholarship Credit and the Lifetime Learning Credit*," please note the following:

The Hope Scholarship Credit is now called the American Opportunity Tax Credit. The credit is partially refundable. IRC § 25A(i). In addition, the references to IRC § 25A(d), (i)(4) should be to IRC § 25A(d)(1)-(2), and the reference to IRC § 25A(h)(2) should just be to IRC § 25A(h).

Beginning in 2021, the income threshold for claiming the Lifetime Learning Credit is increased to be the same as for the American Opportunity Tax Credit. IRC § 25A(d)(1), as added by the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Therefore, beginning in 2021, the credit amount of both credits phases out ratably for taxpayers with modified AGI between $80,000 and $90,000 ($160,000 and $180,000 for joint filers). These amounts are *not* adjusted for inflation.

Page 244: In *"2. The Earned Income Credit,"* please note the following:

The earned income tax credit was recently expanded for 2021 and future years. IRC § 32, as amended by the American Rescue Plan of 2021. Some of the changes were made permanent. For example, taxpayers who have investment income can claim the credit (the limit on investment income is increased from $3,650 to $10,000). The $10,000 limit is indexed for inflation. For 2021 only, the earned income credit was expanded by decreasing the minimum age for taxpayers without children (from 25 to 19) and eliminating the maximum age. The amount of income at which the credit is maximized is increased and the phase-out amount is increased as well.

Page 245: Add at the end of IV. Related Matters, the following new bullets:

- **Recovery Rebate Credits (Economic Impact Payments) for Individuals**. In response to the COVID-19 crisis, Congress enacted the "Recovery Rebate Credit." IRC § 6428, as added by the CARES Act. The maximum credit was $1,200 for each eligible individual, plus $500 for each qualifying child. IRC § 6428(a), (d). Soon after enactment, in 2020, the IRS made advanced refunds of the credit via economic impact payments to eligible taxpayers, with eligibility and credit amounts based on tax information from 2018 or 2019. While the economic impact payments were based on earlier tax returns, the credit actually applied to the 2020 tax year, and the advance refund reduced the amount of the credit for the 2020 tax year. The Recovery Rebate Credit was a fully refundable personal credit. IRC § 6428(b). However, it was phased out if a taxpayer's adjusted gross income (AGI) exceeded a threshold amount. IRC § 6428(c).

- **Additional Recovery Rebate Credits**. Congress passed "Additional Recovery Rebate Credits" distributed via economic impact payments. These Additional Recovery Rebate Credits were modeled after the original Recovery Rebate Credits discussed above, with some exceptions. *See* IRC § 6428A, as added by the COVID-19-Related Tax Relief Act of 2020. *See also* American Rescue Plan Act of 2021, P.L. 117-2 (providing the third round of economic impact payments of up to $1,400).
- **Employer Tax Credits and Self-Employment Tax Credits for Paid Sick and Family Leave**. Under the Families First Coronavirus Response Act (different from the CARES Act), eligible employers could receive a refundable payroll credit for required paid sick leave or family leave paid to an employee who could not work due to COVID-19. P.L. 116-127, §§ 7001, 7003. In addition, self-employed individuals could claim a refundable credit for a qualified sick leave or family leave equivalent amount if they could not work due COVID-19. P.L. 116-127, §§ 7002, 7004. The credits were "equivalent" to those available to an eligible employer who paid required paid sick or family leave to an employee who could not work due to COVID-19. These business credits, which had unique rules and limitations, are beyond the scope of this course. [The credits for paid sick and family leave were extended to September 30, 2021. American Rescue Plan Act of 2021.]
- **Tax Credits to Address Climate Change.** In August 2022, Congress passed and the President signed into law the Inflation Reduction Act of 2022 (IRA), which will invest $369 billion in climate and clean energy programs. Using mostly carrots, not sticks, the historic legislation provided numerous clean energy and efficiency incentives for individuals mostly in the form of tax credits for renewable energy. Considering the historical significance of the IRA, a few credits are worthy of separate treatment here.
  - ***Energy Efficient Home Improvement Credit***. Prior to enactment of the IRA, a 10% tax credit (subject to a $500 per taxpayer lifetime limit) was available for qualified energy-efficient improvements and expenditures on a taxpayer's primary residence. The IRA extended this credit through 2032 and made some important modifications. Most notably, the credit rate was increased to 30%, and is allowed for expenditures made on any dwelling unit used by the taxpayer. With some exceptions, there is now an annual $1,200 per-taxpayer limit and a $600 per-item limit. *See* IRC § 25C.
  - ***Residential Clean Energy Credit***. Prior to enactment of the IRA, a soon-to-expire tax credit was available for the purchase of solar electric property, solar water heating property, geothermal heat pump property and other eligible property. The IRA extended the credit through 2034. The credit rate is 30% through 2032, and then is reduced to 26% in 2033 and 22% in 2034. *See* IRC § 25D.
  - ***"New" Clean Vehicle Credit.*** Prior to the IRA, buyers of qualifying plug-in electric vehicles (EVs) could claim a nonrefundable credit of up to $7,500 (phased out once a manufacturer had sold 200,000 qualifying vehicles). The IRA kept the credit but

modified it somewhat. For new clean vehicles (plug-in EVs made in North America with a battery capacity of at least 7 kilowatt hours (this will include some hybrids) and fuel cell vehicles), the maximum credit per vehicle is $7,500 ($3,750 if a "critical minerals" requirement is met and $3,750 if a "battery components" requirement is met). The IRA eliminated the per-manufacturer limit. However, this once-per-year credit is allowed only for EVs that have a manufacturer's suggested retail price of no more than $55,000 ($80,000 for vans, pickup trucks, and SUVs), and is disallowed for certain high-income earners. It expires after 2032. *See* IRC § 30D.

- ***"Used" Clean Vehicle Credit***. In a welcomed policy shift, the IRA extended the Clean Vehicle Credit to buyers of previously-owned plug-in EVs. The credit is $4,000, limited to 30% of the vehicle's purchase price. As with the credit for new EVs, there are various limits. For example, this once-every-three-years credit is allowed for EVs that are at least two years old and sold by a dealer on the vehicle's first transfer, and for EVs with a sale price of $25,000 or less. The credit is disallowed for taxpayers above modified AGI thresholds ($75,000 in the case of single filers and $150,000 in the case of joint filers), using the lesser of modified AGI in the current year or prior year. It also expires after 2032. *See* IRC § 25E.

Example. Taxpayer, who is single and had AGI of $45,000 last year, is interested in purchasing a 2017 BMW i3, which is listed by the local BMW dealer for $26,900. As long as Taxpayer buys the EV from the dealer for $25,000 or less (and this is the first transfer of the qualifying vehicle), she should be entitled to a tax credit of $4,000 (which is well below 30% of the purchase price). Even if Taxpayer's AGI for the current year ends up being higher than the $75,000 AGI threshold, she should be ok as her AGI last year was below the threshold.

The summary above highlights a few of the climate change credits for individuals. The IRA also included numerous provisions for businesses, aimed at most everything from boosting domestic manufacturing of solar panels and batteries to incentivizing green hydrogen production. (Some credits for businesses are addressed in Chapter 37.) It is predicted that the IRA will result in a 40% emissions reduction by 2030.

Chapter 17: Capital Gains and Losses

Page 256: In "b. Trade or Business Property—Section 1221(a)(2)," note the following:

An important factor in determining whether a taxpayer held land for investment (a capital asset) or for development (not a capital asset), is how the taxpayer self-reports land activity in years prior to sale. *See* Musselwhite v. Commissioner, T.C. Memo 2022-57 (holding loss was a capital loss because taxpayer consistently reported for years holding the lots for investment and not development). *Cf.* Sugar Land Ranch Dev., LLC v. Commissioner, T.C. Memo 2018-21 (holding taxpayers successfully transformed from developers into investors and were, thus, entitled to capital gains treatment on sales of property).

Page 260: In "5. *Determining the Appropriate Capital Gains Rate on "Net Capital Gain*," note the following:

For 2022, the taxable income breakpoint between the 0% and 15% rate is $41,675 for unmarried individuals ($83,350 for joint filers). The breakpoint between the 15% and 20% rates is $459,750 for unmarried individuals ($517,200 for joint filers). Rev. Proc. 2021-45.

Chapter 18: Quasi-Capital Assets

Page 274: In "A. Transactions to Which Section 1231 Applies," note the following:

For a recent case holding that a sale of real property produced a capital loss (capital asset that did not involve an ongoing trade or business) and not ordinary loss (real property used in a trade or business), see Keefe v. Commissioner, 966 F.3d 107 (2d Cir. 2020).

Chapter 20: The Charitable Contribution Deduction

Page 295: In "*3. Sections 170(b)(1)(A) & (B),*" add the following at the end of the section:

As noted in the text, the Tax Cuts and Jobs Act of 2017 (TCJA) increased the AGI limitation for charitable contributions of cash made by individuals to public charities to 60% (up from 50%). IRC § 170(b)(1)(G). The CARES Act, however, suspended the 60% limitation and raised it to 100% for qualified charitable contributions in 2020 in response to the COVID-19 (coronavirus) crisis. And, the Taxpayer Certainty and Disaster Tax Relief Act of 2020 extended the suspension for an additional year (2021). *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 213, P.L. 116-260. Thus, for 2020 and 2021, an individual could deduct charitable contributions in cash to public charities as long as the contributions did not exceed the individual's contribution base (100%). Consistent with other carry forward rules in section 170, an individual could carry forward for five years any qualified cash contributions that exceeds her contribution base. P.L. 116-136, § 2205; P.L. 116-260, 213.

Page 298: In "E. Substantiation," note the following:

It is very important to comply with applicable regulations in substantiating charitable contributions. For illustration, see Loube v. Commissioner, T.C. Memo 2020-3 (holding taxpayers failed to comply with applicable Treas. Reg. § 1.170A-13 by failing to provide the cost or adjusted basis of donated property; although the taxpayers attached a Form 8283, "Noncash

Charitable Contributions, and their appraisal, the form left out information on the form, such as cost of the property, appraiser's signature, and identity of the donee).

Page 312: At the end of Related Matters, add the following new bullet:

Deduction Hierarchy. Recall from Chapter 12 that the deduction under section 170 (relating to charitable contributions) is an itemized deduction. IRC § 67(b)(4). For tax years beginning in 2020 only, however, an eligible individual could claim an above-the-line deduction in computing AGI of up to $300 for any qualified charitable contribution. IRC § 62(a)(22), as added by CARES Act. For this purpose, an eligible individual was someone who did not claim any itemized deductions, and a qualified charitable contribution was a cash contribution to a public charity described in section 170(b)(1)(A) (i.e., church, nonprofit educational institution, nonprofit medical institution, etc.). IRC § 62(f).

Chapter 24: Like Kind Exchanges

Page 360: At the end of Related Matters, add the following new bullet:

- **Qualified Opportunity Zones.** The TCJA added Code sections 1400Z-1 and 1400Z-2. These provisions provide tax benefits to taxpayers who realize capital gains and invest them in certain funds ('qualified opportunity funds") that invest in businesses and real estate located in economically distressed communities. *See* IRS Notice 2019-42, 2019-29 I.R.B. 352 (June 25, 2019) (providing list of "qualified opportunity zones" by state). More specifically, a taxpayer can defer capital gains to the extent they ae invested in a qualified opportunity fund within 180 days. If that investment is held for at least five years, the taxpayer can exclude from gross income 10% of the *original deferred gain*. If held for at least seven years, the taxpayer can exclude an additional 5% (for a total of 15% of the *original deferred gain*). Any remaining deferred capital gain is taxed on the earlier of (1) the date the investment in the fund is sold or (2) December 31, 2026. For investments in a qualified opportunity fund held for at least 10 years, the taxpayer may elect to exclude from gross income any gain from *post-acquisition appreciation*. In 2020, the Treasury and IRS issued regulations.

Chapter 27: Limitations on Deductions

Pages 389-390: In "E. Limitation on Excess Business Losses," add the following at the end of the section:

The CARES Act deferred the effective date of section 461(l) for three years (specifically, the limitation on excess business losses is postponed for tax years beginning in 2018, 2019, and

2020). The limitation, which is discussed in the main text, applies for tax years beginning after 2020. IRC § 461(l), as amended by CARES Act.

As noted in the main text, the Tax Cuts and Jobs Act (TCJA) made significant changes to the net operating loss (NOL) rules of section 172. Specifically, under the TCJA, NOLs arising in 2018 and later are carried forward indefinitely; in addition NOLs may only reduce 80 percent of a taxpayer's taxable income in a carryforward year. The CARES Act changed these rules temporarily in response to the COVID-19 crisis. First, the CARES Act created a five-year carryback rule. In other words, any NOL arising in 2018, 2019, or 2020 may be carried back five years. IRC § 172(b)(1)(D), as added by CARES Act. The carryforward period for NOLs remains unlimited. Second, the CARES Act suspended the 80 percent taxable income limitation for NOLs for 2018, 2019, and 2020. IRC § 172(a)(1), as amended by CARES Act. Again, these changes were temporary. The normal NOL rules are reinstated in tax years beginning after 2020 (e.g., NOLs arising in 2021 may not be carried back).

Page 394: In the bullet on "Gambling Losses," note the following:

For tax years 2018 through 2025, this limitation also applies to expenses incurred in connection with gambling activities (and not just the actual costs of wagers).

Chapter 28: Intellectual Property Development and Acquisitions

Page 397: In "a. Section 263 Override," note the following:

Section 174, as amended by the Tax Cuts and Jobs Act of 2017, now requires amortization of software developments costs over five years.

Page 398: In "b. Section 263A Override," note the following:

The section 181 election to claim an expense deduction for qualified film, television, or live theatrical production costs was recently extended five years and applies to productions commencing before 2026. Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 116, P.L. 116-260. [Note Congress recently expanded sectin 168(k) "bonus depreciation" for qualified film, television, and live theatrical production costs. IRC § 168(k), discussed in Chapter 9. So there are currently two options for expensing such costs—section 181 and section 168(k). Again, both are temporary provisions.]

Page 399: In "2. Deductibility under Section 174—Research and Experimental Expenditures," note the following:

As noted in the text, the TCJA repealed section 174(a) (immediate expensing) for tax years beginning in 2022. Specified research and experimental expenditures (including software development costs) must now be amortized ratably over a five-year period. Some commentators believe that congressional failure to address the law change could result in economic harm. Indeed, bipartisan support for amending the law exists, and legislation has been introduced that would reverse the TCJA changes. We believe that Congress will eventually reinstate section 174 expensing. But it did not happen in the recent Inflation Reduction Act of 2022.

Chapter 33: Education Benefits and Costs

Page 484: In "B. Scholarships and Fellowships," add the following at the end of the section:

Higher education institutions are allowed to use certain funds federally allocated to them to award emergency financial aid grants to support students impacted by the COVID-19 pandemic. These emergency financial aid grants are excluded from the student's gross income. COVID-Related Tax Relief Act of 2020, § 277(a), P.L. 116-260. The gross income exclusion does not apply to any part of the grant received for services (e.g., teaching or research). *Id*. § 277(c). The grants will not reduce the amount of qualified tuition expenses for purposes of calculating the American Opportunity and Lifetime Learning Credits.

Page 485: *2. Educational Assistance Programs*

In a recent development, Congress expanded temporarily the type of educational assistance an employee can exclude from gross income under section 127. Specifically, payments by an employer to either an employee or a lender to be applied toward an employee's student loans can be excluded from gross income. IRC § 127(c)(1)(B), as added the CARES Act. The payments can be of principal or interest on any qualified education loan incurred by the employee for his or her education (not for education of a child). The exclusion applies to payments made before 2026. Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 120, P.L. 116-260. The $5,250 cap still applies, and it applies to both the new student loan repayment benefit, as well as other educational assistance (e.g., tuition, fees, books) provided. IRC § 127(a)(2).

Pages 485-486: *1. Deductibility of Interest*

For 2022, the $2,500 maximum deduction for interest paid on qualified education loans under section 221 begins to phase out for taxpayers with modified adjusted gross income in excess of $70,000 ($145,000 for joint returns), and is completely phased out for taxpayers with modified adjusted gross income of $85,000 or more ($175,000 or more for joint returns). Rev. Proc. 2021-45.

Page 486: ***2. Forgiveness of Student Loans***

Congress recently expanded the exclusion for student loans discharged in 2021 through 2025. IRC § 108(f)(5). Eligible loans is interpreted broadly, and includes certain private education loans. *See* IRC § 108(f)(5)(B). The IRS has advised lenders and servicers of these loans that they are not required to, and should not, file information returns or payee statements (i.e., IRS Form 1099-C) reporting an applicable discharge of student debt to the IRS or to the borrower. IRS Notice 2022-1

Page 487: In "E. Special Credits and Deduction for Qualified Tuition and Related Expenses," please note the following corrections:

The references to IRC § 25(h)(2) and (i)(4) and (i)(5) are obsolete. Section 25A(h) was recently stricken. Section 25A(i) deals with the portion of the credit that is refundable.

Beginning in 2021, the income thresholds for claiming the Lifetime Learning Credit are increased to be the same as for the American Opportunity Tax Credit. IRC § 25A(d)(1), as added by the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Therefore, beginning in 2021, the credit amount for both credits phases out ratably for taxpayers with modified AGI between $80,000 and $90,000 ($160,000 and $180,000 for joint filers). These amounts are *not* adjusted for inflation.

Also, beginning in 2021, the section 222 above-the-line deduction for qualified tuition and related expenses is repealed. IRC §§ 62(a)(18) and 222, stricken by the 2020 Taxpayer Certainty Act. (The Taxpayer Certainty and Disaster Tax Relief Act of 2019 had retroactively extended through December 31, 2020 the section 222 above-the-line deduction of qualified tuition and related expenses for higher education of the taxpayer (or taxpayer's spouse or dependents)). Again, repeal of the qualified tuition deduction was replaced by increased phase out limits for the Lifetime Learning Credit discussed above.

Page 488: ***2. Section 529: Qualified Tuition Programs***

Section 529 was recently amended to permit tax-free distributions from section 529 accounts to pay expenses of apprenticeship programs. IRC § 529(c)(8), as added by the SECURE Act. The provision was also amended to permit up to $10,000 of tax-free distributions to repay qualified education loans of the beneficiary or a sibling. IRC § 529(c)(9), as added by the SECURE Act.

Page 489-490: At the end of "H. Coordination Rules," add the following:

As noted above, certain employer student loan payments are excluded from income under the CARES Act. Note, however, that no deduction is allowed under section 221 for student loan interest payments paid by the employer that are excluded from the employee's income. IRC § 221(e)(1), as amended by CARES Act.

Chapter 34: Personal Injury Recoveries and Punitive Damages

Page 496: Add the following cite in the last paragraph:

See Priv. Ltr. Rul. 201950004 (ruling settlement received by a donor egg recipient from a fertility clinic was excludible from gross income; taxpayer's infant suffered from physical, cognitive, and behavioral disabilities stemming from a genetic condition, and the clinic failed to test for the gene that caused the genetic disorder).

See also Doyle v. Commissioner, T.C. Memo 2019-8 (Feb. 6, 2019) (holding damages received by a taxpayer who was terminated from his job were for emotional distress and therefore included in gross income). The court rejected the taxpayer's argument that "one can't' really distinguish symptoms of emotional distress from symptoms of other physical injuries or sicknesses because '[p]hysical relates to both the body and mind which are inseparable in a person.'" The court concluded that the taxpayer "may well be right ontologically, but not legally."

Chapter 35: Attorney's Fees

Page 535: In Related Matters, add to the bullet on Confidential Sexual Harassment Settlements, the following:

A strict reading of section 162(q) indicates the limitation on the deduction of attorney's fees applies to the payee as well as the payor of the settlement. However, the IRS has stated on its website (without issuing an official ruling) that the provision does not apply to plaintiffs. *See* Section 162(q) FAQ, available at https://www.irs.gov/newsroom/section-162q-faq. *See also* Tax Notes, Mar. 11, 2019, at 1255.

Chapter 36: Retirement Resources and Deferred Compensation

Page 545: in "C. Social Security," note the following:

In 2022, the average monthly benefit was $1,657, and the maximum monthly benefit was $3,345. The latest figures on benefits may be found at www.ssa.gov.

Page 545: In "*1. Eligibility,*" note the following:

In 2022, a person received one credit for each $1,510 of earnings, up to a maximum of four credits per year.

Page 551: At the end of Related Matters, add the following new bullet:

CARES Act Changes. The CARES Act made numerous changes affecting retirement plans:

- The 10% early-withdrawal penalty under section 72(t) was waived for any qualified coronavirus-related distribution from a retirement plan. P.L. 116-136, § 2202(a)(1). (Note that this type of relief is often granted by Congress in response to major disasters, such as hurricanes.) To qualify as a "coronavirus-related distribution," it had to have been made from an eligible retirement plan between March 27 – December 31, 2020, to an individual who was diagnosed (or who has a spouse or dependent diagnosed) with coronavirus, or who experienced adverse financial consequences as a result of the coronavirus. *Id*. § 2202(a)(4). The portion of a distribution that was includible in income was reported over a three-year period (unless elected otherwise). *Id*. § 2202(a)(5). However, under a three-year rollover provision, a person who received a coronavirus-related distribution could recontribute the amount to an eligible retirement plan within three years with the result that the original distribution was not subject to tax. *Id*. § 2202(a)(3).
- Generally, a loan from a qualified retirement plan to a participant is treated as a distribution and included in gross income unless the loan does not exceed $50,000 or 50 percent of the value of the participant's vested benefits under the plan (whichever is less). IRC § 72(p). The CARES Act increased the threshold limit on loans to $100,000 or 100% of the value of the participant's benefits. P.L. 116-136, § 2202(b)(1). The loan, however, must have been made between March 27 – December 31, 2020, to an individual who was diagnosed with coronavirus (or whose spouse or dependent is diagnosed) or who experienced adverse financial consequences as a result of the coronavirus. P.L. 116-136, § 2202(a)(4).
- Retirement plans and IRAs must meet required minimum distribution (RMD) requirements to qualify for tax-favored status. IRC § 401(a)(9). For 2020 only, the required minimum distribution (RMD) requirements were suspended with respect to deferred contribution plans, including IRAs. IRC § 401(a)(9), as added by CARES Act. Note the Act waived all RMDs for 2020 regardless of whether the taxpayer had been impacted by the pandemic.

Chapter 37: Overview of Entity Taxation

Page 555: In "1. C Corporations," note the following development:

Wealthy corporations with more than $1 billion in profits (reported to shareholders on financial statements) are subject to a new 15% alternative minimum tax. IRC § 55(b), as amended by the

Inflation Reduction Act of 2022. The 15% rate is below the 21% flat rate, but some of the largest corporations have been able to pay well below that in recent years due to various tax credits and loopholes.

Pages 563-565: D. The Deduction for Qualified Business Income—Section 199A

In 2019, the Treasury Department and the IRS finalized regulations under section 199A, which was enacted by the Tax Cuts and Jobs Act of 2017 (TCJA). These regulations provide various rules for determining the deduction, including extensive guidance on the meaning of the term "specified service trade or business." Also in 2019, the IRS issued Rev. Proc. 2019-38, which provides a safe harbor under which a rental real estate enterprise will be treated as a "trade or business" solely for purposes of section 199A and the new regulations thereunder. 2019-42 I.R.B. 942 (Sept. 24, 2019).

For 2022, the threshold amount under section 199A(e)(2) is $340,100 for joint filers and $170,050 for single filers. Rev. Proc. 2021-45.

Page: 568: Add a new "Related Matters" section:

- **Environmental Credits for Businesses**. The Inflation Reduction Act of 2022 (IRA) is expected to have a dramatic impact on the development and financing of U.S. clean energy projects. Chapter 15 introduced several climate change credits for *individuals*. A number of targeted incentives are available for *businesses*, including:
  - *Production and Investment Tax Credits*. The IRA extended the Production Tax Credit (PTC) to wind, solar, and geothermal projects beginning construction before 2025. IRC § 45 (allowing a credit of 1.5 cents, adjusted for inflation, per kWh produced by a taxpayer). A "bonus" 10% PTC is available if certain facility components are produced in the United States or if the project is located in an "energy community." The Investment Tax Credit (ITC) was also extended by the IRA --specifically, for certain projects beginning construction before 2025. IRC § 48.
  - *Clean Electricity Production and Investment Tax Credits*. Beginning in 2025, the PTC and ITC discussed above are supplemented by an expanded Clean Electricity Production Credit (CEPTC) (applicable to emission-free electricity generation) and Clean Electricity Investment Credit (CEITC) (applicable to emission-free electricity generation and storage). IRC §§ 45Y, 48E. These two credits—CEPTC and CEITC—will remain in effect until 2032 or when annual greenhouse gas emissions is 25% or less of such emissions in 2022, whichever comes later.
  - *Manufacturing Production Credit*. The IRA created a manufacturing tax credit (Advanced Manufacturing Production Credit, or AMPTC) for PV cells, solar modules, wind energy components, battery cells, and other eligible equipment produced in the United States and sold in 2023 through 2032. IRC § 45X.

- *Direct Pay and Transferability*. Eligible entities may elect a direct pay option, which treats the generated tax credits discussed above as a tax payment. In a dramatic policy move, the IRA allows a party claiming the federal tax credits to transfer such credits to an unrelated party, with the proceeds not included in the transferor's income.

Chapter 40: Overview of International Income Taxation

Page 608: Replace the "Related Matters" bullet with the following new bullet:

- **OECD's Base Erosion and Profits (BEPS) Project**. Base erosion due to profit shifting is not merely a U.S. concern. Other countries around the world are also looking hard at what multinationals are doing and discussing measures to close tax loopholes. In 2015, the Organization for Economic Cooperation and Development (OECD) delivered a number of recommendations on how to deal with base erosion and profit shifting (BEPS Project). *See* OECD, BEPS 2015 Final Reports, Oct. 5, 2015, *available at* www.oecd.org/tax/beps-2015-final-reports.htm. The final BEPS Project reports, issued in October 2015, make concrete action plan recommendations to help nations address the problems of income shifting. Most recommendations attempt to tax profits where value is added and to promote greater tax transparency with increased information exchange between tax authorities. Action Item #1 of the BEPS Project related to taxation of the digital economy. The action took a wait-and-see approach, however, so the OECD has recently taken on the topic again in what is referred to as BEPS 2.0. In 2021, over 135 countries and jurisdictions joined a new two-pillar plan to address tax challenges arising from the digital economy. Pillar Two of the plan sets a global minimum tax rate (15%) that targets large multinational groups. It should be noted that there is inconsistency between this minimum tax and the new alternative corporate minimum tax of 15% (on financial statement income of companies with more than $1 billion of income) added by the Inflation Reduction Act of 2022.

Chapter 41: Overview of Estate and Gift Taxation

Page 613: 4. *The Unified Credit*

For 2022, the basic exclusion amount is $12,060,000 for determining the amount of the unified credit against estate tax under section 2010. Rev. Proc. 2021-45.

Page 614: *1. The Annual Exclusion*

For 2022, the annual exclusion amount is $16,000. Rev. Proc. 2021-45.

Page 621: Add the following bullets to V. Related Matters:

- **Use It or Lose It**. The TCJA only increased the basic exclusion amount to $10,000,000 temporarily. The increase is scheduled to sunset on January 1, 2026, and fall back to $5,000,000. IRC § 2010(c)(3)(C). This introduces an additional level of complexity into the planning process since the unified credit can be used during life as well as at death. Thus, the question naturally arises, what if the credit was used during life to shelter more gifts than the credit amount that is permitted by the law on the date of death. The regulations provide that there will be no clawback of the credit on the date of death. Treas. Reg. § 20.2010-1(c). Nor will there be any credit remaining to shelter any bequests from tax. *See* Treas. Reg. § 20.2010-1(c)(2)(i) ex.1. This is a use-it-or-lose it situation. This creates some incentive to make inter vivos gifts in advance of 2026 when the credit is slated to fall back. There is a downside. If those gifts are of appreciated property, the donee will take a carryover basis rather than a stepped up basis. The deceased spousal unused exclusion amount also provides an interesting wrinkle. If the taxpayer's spouse dies before 2026, the regulations provide that the DSUE amount will be fixed on that date and will not decline even if the taxpayer dies after 2026. *See* Treas. Reg. § 20.2010-1(c)(2)(iii) ex.3. The taxpayer's basic exclusion amount, on the other hand, will fall to the post 2026 level. *Id*.
- **Rights of Publicity**. With the recent death of several celebrities, the valuation of postmortem rights of publicity for estate tax purposes has gained particular attention. *See, e.g*., Marie Sapirie, *But Honey I'm Rich on Personality: Publicity Rights and Estate Taxes*, TAX NOTES TODAY (May 5, 2016). Recently, the Tax Court determined for estate tax purposes that the value of Michael Jackson's image and likeness was $4 million, and his interest in the music publishing catalog of his (and others') compositions was $107 million. *See* Estate of Michael Jackson v. Commissioner, T.C. Memo 2021-48. Prince's estate and the IRS recently reached a settlement over the value of Prince's estate. *See* https://s3.amazonaws.com/pdfs.taxnotes.com/2022/2022-1752_TNTCourts_Estate-Notice-of-Motion.pdf. *See also* Estate of Prince R. Nelson, No. 11442-20. According to the IRS, Prince's estate undervalued various assets, including Prince's share of music compositions and rights of publicity. Kristen A. Parillo, *Filing Illuminates Prince Estate's Tax Court Settlement*, Tax Notes Federal Today (Jan. 19, 2022).
- **Income Tax Planning**. The TCJA increased the inflation-adjusted estate tax basic exemption amount to $10 million on a temporary basis. This has major crossover impact on income tax planning. Indeed, for many clients, tax planning strategies will shift from federal estate tax avoidance to federal income tax reduction (e.g., avoiding income tax, deferring income taxation to a later year, transmuting ordinary income into capital gain income). Of course, the basis step up rules of section 1014 are now front and center for many. Clients may actually want to increase value of assets to get a higher basis step up for their heirs. *See* John A. Miller & Jeffrey A. Maine, *Wealth Transfer Tax Planning After the Tax Cuts and Jobs Act*, 46 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1411 (2021).

Chapter 42: Tax Practice and Procedure

Page 624: A. Tax Returns

As a result of the COVID-19 emergency, the Treasury Department and IRS have extended the due dates for filing individual federal income tax returns. For 2019, the government extended the due date for filing (and for making federal income tax payments otherwise due) from April 15, 2020 to July 15, 2020. Penalties, interest, or additions to tax for failure to file the returns or pay the taxes did not accrue until July 16, 2020. A taxpayer did not have to be impacted by COVID-19 to qualify for the extension; any person with a return or payment due on April 15, 2020, was eligible for the automatic relief. The payment extension was unprecedented, and amounted to a 90-day interest-free loan from the government! For 2020, the filing deadline was also extended—until May 17, 2021.

Page 625: B. The Examination Process and Settlements

IRS audits have declined over the past decade. The Inflation Reduction Act of 2022, however, recently included nearly $80 billion in funding for the IRS, with much of that going to beefed-up enforcement and audits.