ROUNDUP OF RECENT TAX DEVELOPMENTS

By: William E. Sigler, Esq.

I. AROUND THE IRS

A. Direct-File Program (IR-2023-192)

1. Details of IRS' direct-file pilot program for the 2024 filing season.

    a. Online, interview-based service giving taxpayers a free option to file their individual federal tax returns directly with the IRS.

    b. Does not include state tax returns.

2. Limited by:

    a. State where the taxpayer resides.

    b. Small group of states with specified types of income, credits, and deductions.

3. December 20, 2023, IRS Blog Post:

    a. Identify verification will be provided through ID.me

    b. Taxpayers who have previously been verified by ID.me can skip being verified again.

    c. Taxpayers can opt to have their identify verified via a live chat at the outset of the ID verification process instead of submitting a selfie that matches a government-issued ID.

4. Alaska ceased to be a participant due to the dividend paid to its citizens from the state's surplus oil and gas revenues.

5. That left 12 participating states:

    a. 4 with state-level income taxes.

    b. 8 without.

6. Arizona, Massachusetts and New York had their federal tax return data imported from the IRS's direct-file system into a state direct-file system.

7. California has a direct-file system, but couldn't integrate with the IRS.

8. 140,803 taxpayers ended up filing their returns through this service.

9. IRS has announced that it will make Direct File a permanent option starting with the 2025 tax season. (IR-2024-151, May 30, 2024)

10. Inviting all states to partner with Direct File next year.

11. Based on survey data:

    a. Taxpayers liked using Direct File.

    b. Direct Filed made filing easier.

    c. Direct File served as a catalyst for the IRS' digital transformation.

    d. Provided IRS with an opportunity to test customer service innovations on a larger scale.

B. Free File Program (IR-2024-145)

1. "Free File" is a partnership between the IRS and eight tax preparation software companies providing free online tax preparation and filing software on IRS.gov.

2. IRS has extended Free File through 2029.

3. This was its 22nd filing season.

4. Usage increased this year from 2.7 million tax returns to 2.9 million.

C. Digital Assets.

1. Form 1099-DA, *Digital Asset Proceeds from Broker Transactions*.

a. Draft version of this new form released by IRS.

b. Intended for 2025 tax year.

c. Beginning in 2025, brokers are required to report proceeds digital asset sales.

d. Basis is also required to be reported, but brokers can check box 10a if it is unknown, or the digital assets were acquired prior to 1/1/2023 or sold prior to 1/1/2026.

e. Taxpayers may be required to recognize gain.

D. Business Tax Account.

1. Launched by IRS last fall with funding from the Inflation Reduction Act (FS-2024-27, August 19, 2024)

2. Goal:

a. Check tax history.

b. Make payments.

c. View notices.

d. Authorize powers of attorney.

e. Conduct other business with the IRS.

3. Who can use:

a. Sole proprietor with an EIN.

b. Individual partner or shareholder with both:

i. Social Security number or individual tax i.d. (ITIN).

ii. Schedule K-1

- 2012-2023 for partners.
- 2006-2023 for shareholders.

4. Access coming to:

a. LLC reporting business income on a Schedule C.

b. C and S corporations.

c. Partnerships.

d. Tax-exempt organizations.

e. Government agencies.

E. Multi-Factor Authentication (IR-2024-201)

1. IRS reminder that multi-factor authentication (MFA) is now a federal requirement for tax professionals.

2. Requirement arises under Federal Trade Commission rules intended to protect client's sensitive information.

3. Must have:

a. Username

b. MFA

4. Examples:

a. Token or random number sequence sent to cell phone.

b. Fingerprint or facial scan.

F. Security Plan

1. Tax professionals are also required to have a written security plan ("WISP").

2. Required under the Gramm-Leach-Bliley Act.

3. IRS has published a sample template.

4. See, IRS Publication 5708 (Revised August 2024), *Creating a Written Information Security Plan for your Tax & Accounting Practice*.

G. New Initiatives

1. IR-2024046:

a. IRS announced plans to begin dozens of audits on business aircraft involving personal use.

2. IR-2024-56:

a. New effort focused on high-income taxpayers who failed to file federal income tax returns.

b. More than 125,000 instances since 2017 identified.

II. INDIVIDUALS

A. IRS Wipes Away $1 Billion in Penalties

1. IRS announced December 19, 2023:

a. $1 billion in automatic penalty relief to about 4.7 million taxpayers and businesses whose tax year 2020 and 2021 tax returns were affected by pandemic disruptions in notifications.

b. Although the IRS had paused much of its automated collection activity, failure-to-pay penalties continued to accrue over the past 22 months.

c. Taxpayers who already paid failure-to-pay penalties will also automatically be given a refund, or, if applicable, have that amount applied as a credit toward another existing tax liability.

2. IRS sent letters (LT38, *Reminder, Notice Resumption*) to affected taxpayers to:

a. Remind taxpayers of their outstanding tax liability.

b. Inform them of the penalty relief.

c. Present different options for paying tax liabilities.

3. Caveats:

a. Failure-to-pay penalties for relevant taxpayers resumed on April 1, 2024.

b. The relief is capped at taxpayers who were assessed less than $100,000 in tax.

B. Student Loan Repayment

1. CARES Act:

a. Employers can contribute up to $5,250 per year toward student loan repayments.

b. Excluded from income / subject to payroll tax.

c. Requires written policy / compliance with Section 127 (qualified educational assistance programs).

d. Sunsets December 31, 2025.

C. Student Loan Forgiveness Exclusion (*IRC §108(f)(5)*)

1. American Rescue Plan Act of 2021:

a. Excludes from gross income.

b. Discharge of indebtedness income relating to student loan debt.

i. Including private student loans.

ii. Unless student is required to provide services to the discharging lender.

c. Effective for 2021-2025.

D. Premium Tax Credit (*IRC §36B*)

1. Background: Premium Tax Credit (PTC)

a. Refundable credit design to subsidize health insurance purchased through an Exchange.

b. Based on percentage of income the cost of premiums represents ranging from:

i. 2% of income for those below 133% of the federal poverty line, to

ii. 9.5% of income for those at 400% of the federal poverty line.

2. Background: Advanced Premium Tax Credit (APTC)

a. Taxpayer signs up for insurance through the exchange using prior year tax information.

b. Exchange then pays an amount to the health insurance provider.

c. Health insurance provider reduces the monthly health insurance premium paid by taxpayer.

d. Advance received reduces the PTC allowed on the tax return.

3. American Rescue Plan Act of 2021

a. Changes the percentages to increase the affordability of health insurance for 2021 and 2022.

b. Also makes the PTC available to taxpayers with income above 400% of the federal poverty line if cost of premiums would exceed 8.5% of household income.

c. Extended for 3 years through 2025 by the Inflation Reduction Act of 2022.

4. Form 8962, Premium Tax Credit: (IR-2024-54)

   a. Required to reconcile advance payments of the Premium Tax Credit.

   b. IRS Reminder:

      i. Electronically filed tax returns will be rejected if a Form 8962 is required, but the Form 8962 is not completed in the software and filed with the return.

      ii. To correct, must refile the complete return with the Form 8962 and attach a written explanation for its absence.

      iii. Previously, the IRS would correspond with the taxpayer instead of rejecting the electronically filed return.

E. COVID-19 Expenses and Preventive Care

1. Generally, an HDHP is not permitted to provide benefits until the minimum deductible for the year is met.

2. Section 223(c)(2)(C) contains an exception for preventive care.

3. Notice 2020-15 created an exception for testing and treatment related to COVID-19.

4. The COVID-19 emergency ended on May 11, 2023.

5. Notice 2023-37 indicates that Notice 2020-15 will continue to apply only for plan years ending on or before December 31, 2024.

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F. Medical Expenses (IR-2024-65)

1. Reminder that personal expenses for general health and wellness are not deductible as medical expenses.

2. They are also not reimbursable from FSAs, HSAs, HRAs or MSAs.

3. Getting a note from a doctor does not make a wellness expense deductible.

4. Example:

a. Advertisement stating that pre-tax dollars from an FSA can be used to purchase health food sold by the company to control blood sugar.

b. Company, for a fee, will provide a "doctor's note" that can be submitted to the FSA.

G. New TIP Reporting Program

1. Notice 2023-13

a. Contains a proposed Revenue Procedure.

b. Service Industry Tip Compliance Agreement ("SITCA") Program.

2. Designed to take advantage of:

a. Point-of-sale systems.

b. Time and attendance systems.

c. Electronic payment settlement methods.

3. Features:

a. Replaces current programs.

b. Requires an annual report.

c. Protects employers from liability under the rules defining tips as part of an employee's pay.

4. Effective:

a. Voluntary.

b. Other programs would sunset at the end of the first full calendar year after the Revenue Procedure is published.

c. Doesn't affect the Gaming Industry Tip Compliance ("GITCA") Program.

H. Supervisory Penalty Approval (REG-121709-19)

1. Background:

a. IRC §6751(b) requires the immediate supervisor of a revenue agent to approve the determination of a penalty.

b. IRC §6751(b)(2) exempts penalties automatically calculated by electronic means.

c. Courts have been inconsistent particularly with respect to the timing of the approval requirement.

2. Proposed Regulations Adopt Three Timing Rules:

a. For penalties appearing in a pre-assessment notice, must be no earlier than the date of the notice.

b. For penalties raised in the Tax Court after a petition is filed, must be obtained before the court is asked to determine the penalty.

c. For penalties assessed without prior opportunity for Tax Court review, may be any time before assessment.

III. CASES - INDIVIDUALS

A. Fraud by a Paid Tax Preparer (*Murrin*, T.C. Memo. 2024-10)

1. Issue:

a. Whether the exception under Section 6501(c) to the 3-year statute of limitations applies when the taxpayer did not intend to evade tax, but the return prepare did.

2. Facts:

a. Unbeknownst to the taxpayers, their paid tax preparer placed fraudulent entries on their joint return and two partnership returns.

b. Occurred during tax years 1993-1990, but not discovered by the IRS until much later, and a notice of deficiency was issued in 2019.

3. Law:

a. The Tax Court previously held in *Allen*, 128 T.C. 42 (2007) that Section 6501(c) applies where a tax return preparer prepares a false return with the intent to evade tax.

b. The taxpayer, citing *BASR P'ship v. United States*, 795 F.3d 1338 (Fed. Cir. 2015), asked the Tax Court to reconsider.

4. Result:

a. Holding for the IRS, the Tax Court declined to reconsider *Allen* on the basis that each of the three judges on the panel wrote separate

opinions in *BASR*, and it was unclear which judge's interpretation of Section 6501(c) would prevail.

B. Workers' Compensation Offset (*Ecret*, T.C. Memo. 2024-23)

1. Background:

a. Workers' compensation is excludable under Section 104(a)(1).

b. Up to 85% of Social Security is taxable under Section 86.

c. Social Security is limited to 80% of Average Current Earnings ("ACE").

d. Workers' compensation substituted for Social Security is taxable under Section 86(d)(3).

2. Facts:

a. Taxpayer received $42,000 in workers' compensation.

b. Her ACE for the year was $48,708.

c. She was entitled to $19,866 in Social Security, but received only $6,120 due to the workers' compensation offset.

d. She argued that she should only be taxed on the Social Security.

3. Result:

a. Court disagreed holding that she was required to treat a portion of her otherwise excludable workers compensation as taxable Social Security benefit.

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C. Equitable Relief under IRC 6015(f) (*Jurries,* TC Summary Opinion 2024-6, May 22, 2024)

1. Issue:

   a. Is equitable relief for fraud available if you have the opportunity to review a tax return but don't?

2. Facts:

   a. Husband had a high school education and a W-2 job where his employer provided a vehicle and paid all the expenses.

   b. Wife had a college education, prepared the couple's return using Turbo Tax, and filed it without providing the husband a copy.

   c. Husband knew he could have asked to see a copy, or he could have logged into his Turbo Tax account to review it.

   d. Wife deducted $42,181 in unreimbursed employee expenses largely related to husband's employer-provided vehicle.

   e. IRS issued a $12,500 refund.

   f. The return was later audited.

   g. Husband requested innocent spouse relief under Section 6015, pursuant to which the IRS allocated the unreimbursed employee expenses as if they both filed separate returns.

   h. Husband then requested equitable relief under Section 6015(f) for the unreimbursed employee expenses allocated to him.

3. Requirements for Equitable Relief (Rev. Proc. 2013-34):

a. The requesting spouse filed a joint return for the taxable year for which he or she seeks relief;

b. Relief is not available under Section 6015(b) or (c);

c. The claim for relief is timely;

d. No assets were transferred between the spouses as part of a fraudulent scheme;

e. The non-requesting spouse did not transfer disqualified assets to the requesting spouse;

f. The requesting spouse did not knowingly participate in the filing of a fraudulent return; and

g. Absent certain exceptions, including fraud by the non-requesting spouse, the tax liability from which the requesting spouse seeks relief is attributable to an item of the non-requesting spouse.

4. Result:

a. The husband met the first 6 requirements, but not the 7th, and didn't qualify for the fraud exception.

b. Wife did not conceal the return.

c. A portion of the refund was deposited into the husband's checking account.

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D. Innocent Spouse Relief (*Catherine L. LaRosa v. Commissioner of Internal Revenue,* 163 T.C. No. 2 (July 17, 2024))

1. Issue:

a. IRS issued an erroneous refund consisting solely of interest.

b. After successfully litigating to recover the erroneous refund, the IRS attempted to collect the liability.

c. Mrs. LaRosa sought innocent spouse relief under IRC §6015(f), which the IRS denied, claiming relief is only available for unpaid taxes or deficiencies, not erroneous refunds of interest.

2. Result:

a. Innocent spouse relief under IRC §6015(f) is applicable only for unpaid taxes or deficiencies.

b. An erroneous refund consisting solely of interest does not qualify as an unpaid tax or a deficiency.

c. IRC §6611 (interest on overpayments) never treats interest as a tax.

d. Mrs. LaRosa is not eligible for innocent spouse relief under IRC §6015(f).

E. Gambling Loss Allowed (*Tolstov*, T.C. Summary 2024-19)

1. Cohan Rule (*Cohan v. Commr.,* 39 F.2d 540 (2d Cir. 1930)):

a. Court should estimate deductions if taxpayer:

i. Demonstrates expense actually incurred.

ii. But, unable to substantiate amount.

iii. Provided that court has some reasonable evidentiary basis on which to base an estimate.

2. Facts:

a. Compulsive slot machine gambler.

b. No log of gambling activities as required by Rev. Proc. 77-29.

c. Statement from casino showed "coin in" of $105,063.

d. Reported $61,929 of gambling winnings per Form W-2G received from casino.

e. Claimed $61,929 of gambling losses.

3. Court:

a. Allowed $61,929 of gambling losses.

4. Reasoning:

a. Taxpayer exhausted $40,000 of equity in home.

b. Taxpayer had few other assets and no accessions to wealth.

c. "Virtual certainty" that taxpayer placed many losing bets.

d. Satisfied that taxpayer attempted in good faith to obtain substantiation from third parties.

IV. BUSINESS

A. Limitation on Excess Business Losses of Non-Corporate Taxpayers

1. TCJA limited the deduction of non-corporate business losses in excess of $250,000 ($500,000 MFJ), adjusted annually for inflation, for tax years beginning before 1/1/2026.

2. CARES Act temporarily suspended the limitation for 2018-2020.

3. ARP extends the limitation on excess business losses to tax years beginning before 1/1/2027.

4. Inflation Reduction Act of 2022 extends it further to tax years beginning after 2026 and before 2029.

5. An excess business loss is:

   a. The taxpayer's aggregate deductions for the tax year from the taxpayer's trades or businesses, determined without regard to whether or not such deductions are disallowed for such tax year under the excess business loss limitation; over

   b. The sum of –

      i. The taxpayer's aggregate gross income or gain for the tax year from such trades or businesses, plus

      ii. $250,000, adjusted annually for inflation in tax years after 2018.

   c. For 2021, the amount is $262,000 ($524,000 for joint returns).

   d. For 2022, the amount is $270,000 ($540,000 for joint returns).

e. For 2023, the amount is $289,000 ($578,000 for joint returns).

f. For 2024, the amount is $305,000 ($610,000 for joint returns).

6. Example:

a. Facts: For 2024, Sam, a single taxpayer, has $1 million of gross income and $1.4 million of deductions from a retail business that is not a passive activity.

b. Question: What is his excess business loss?

c. Answer: His excess business loss is $95,000 ($1,400,000 – [$1,000,000 + $305,000]). Sam must treat his excess business loss of $130,000 as an NOL carryforward to 2025.

B. Employee Retention Credit

1. Overview

a. Eligibility:

i. A full or partial suspension of operations due to orders from an appropriate government authority during 2020 or the first three quarters of 2021.

ii. A significant decline in gross receipts during 2020 or a decline in gross receipts in the first three quarters of 2021.

- For 2020, less than 50% of gross receipts in same calendar quarter as 2019.
- For 2021, less than 80% of gross receipts in same calendar quarter as 2019.

iii. Qualification as a "recovery startup business" in the third or fourth quarter of 2021.

b. Wages Eligible:

i. Claimed on wages paid between March 13, 2020 and December 31, 2021.

- For 2020, 50% of qualified wages ($10,000 per employee for the year including health care expenses).
- For 2021, 70% of qualified wages ($10,000 per employee per calendar quarter including health care expenses).

ii. Claim the credit by amending affected Forms 941, Employer's Federal Quarterly Tax Returns.

2. Supply Chain Issues:

a. Example of an area of concern.

b. Addressed in new FAQs added on July 28, 2023.

i. Government order caused supplier to suspend operations;

ii. Could not obtain supplier's goods or materials elsewhere (regardless of cost); and

iii. Resulted in full or partial suspension of business operations.

3. September 14, 2023 (IR-2023-169):

a. Immediate moratorium on processing ERC claims at least through December 31, 2023.

b. Payouts will continue though, albeit at a slower pace.

c. Result of concern about "honest small business owners being scammed" by promotors claiming contingency fees, e.g., 25% of the refund.

d. Both specially trained auditors and IRS Criminal Investigation division are actively working to identify fraudsters.

4. October 19, 2023 (IR-2023-193):

a. IRS announced a special withdrawal process to help those who filed an ERC claim and are concerned about its accuracy.

b. Allows certain employers that filed an ERC claim but have not yet received a refund to withdraw their submission and avoid future repayment, interest and penalties.

c. Withdrawing a fraudulent claim will not protect against potential criminal investigation and prosecution.

d. With stricter compliance reviews in place, existing ERC claims will go from a standard processing goal of 90 days to 180 days – or longer if the claim faces further review or audit.

e. The IRS may also seek additional documentation from the taxpayer to ensure the claim is legitimate.

f. To use the ERC claim withdrawal process, all of the following must apply:

i. The claim was made on an adjusted employment return (Forms 941-X, 943-X, 944-X, CT-1X).

ii. The adjusted return was filed only to claim the ERC, and there are no other adjustments.

iii. The entire amount of the ERC claim is withdrawn.

iv. The IRS has not paid the claim, or the IRS has paid the claim, but they haven't cashed or deposited the refund check.

g. Those who received a refund check, but haven't cashed or deposited it, can still withdraw their claim. They should mail the voided check with their withdrawal request using the instructions at IRS.gov/withdrawmyerc.

h. Taxpayers who are not eligible to use the withdrawal process can reduce or eliminate their ERC claim by filing an amended return.

i. To take advantage of the claim withdrawal procedure, follow the special instructions at IRS.gov/withdrawmyerc.

5. December 21, 2023 (IR-2023-247):

a. IRS announced the first ERC Voluntary Disclosure Program.

b. Allows employers who erroneously claimed an employee retention credit to repay 80% of the credit they received.

c. Must identify any advisers or tax preparers who helped them with their claim to qualify for the program.

d. Interested employers had to apply to the ERC Voluntary Disclosure Program by March 22, 2024.

e. Employers who are unable to repay the required 80% of the credit may be considered for an installment agreement.

f. The IRS will not charge program participants interest or penalties if able to pay the 80%.

6. First ERC Voluntary Disclosure Program - Additional Requirements:

   a. Must not be under a criminal investigation.

   b. Must not be under an IRS employment examination for the period they are applying.

   c. Must not have received an IRS notice and demand for repayment of any part of the ERC.

   d. IRS must not have received information from a third party or an enforcement action that the employer is not in compliance.

   e. To apply:

      i. File Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program.

      ii. Employers who outsource their payroll must apply through the third party.

7. June 20, 2024 (IR-2024-169):

   a. Processed 28,000 claims received prior to September 2023, worth $2.2 billion.

   b. Denied 14,000 claims received prior to September 2023, worth $1 billion.

   c. Finding 10-20% of claims clearly erroneous.

   d. Another 60-70% show an “unacceptable” level of risk.

e. Plan to deny “tens of thousands”.

f. 50,000 valid ERC claims filed before September 14, 2023, will be expedited for payment.

8. August 8, 2024 (IR-2024-203):

a. Will begin processing claims filed between September 14, 2023, and January 31, 2024.

b. Considered low-risk i.e., minimal concern for accuracy.

c. Expected to send out an initial batch of payments in September 2024.

d. Additional payments following in the subsequent weeks.

9. August 15, 2024 (IR-2024-212):

a. *Second ERC Voluntary Disclosure Program*:

i. Similar to first, but businesses now must repay 85% of the ERC funds received, instead of 80%.

ii. To “nudge” those on the fence, IRS is sending out 30,000 new letters covering $1 billion in “improper” ERC claims.

iii. Indicated as last opportunity to make a voluntary disclosure.

10. September 26, 2024 (IR-2024-246):

a. New program for third party payors (e.g., payroll companies) to correct ERC claims they filed on behalf of clients.

b. If a third party payor filed an ERC claim, and the client has since determined that it is ineligible, then it's the third party payor that needs to correct it.

c. Applies to claims filed on or before January 31, 2024.

d. Accessed through www.irs.gov.

C. New Form 7217 for Partnership Distributions (Form 7217, Partner's Report of Property Distributed by a Partnership (IRC 732))

1. Background:

a. Current distribution:

i. Does not completely retire a partner's interest in the partnership.

ii.. Can reduce either the partner's capital account or partnership interest.

iii. Gain not recognized unless money is distributed.

iv. Gain recognized only if money distributed exceeds partner's adjusted basis in the partnership.

v. Partner's basis in property received is same as partnership's adjusted basis in the property.

vi. Property's basis is limited to the partner's basis in the partnership reduced by any money received in the distribution.

2. Liquidating Distribution:

   a. Retires a partner's interest in the partnership.

   b. Includes a series of payments made as part of a liquidation.

   c. Gain recognized to the extent money distributed exceeds the partner's adjusted basis in his or partnership interest.

   d. Loss recognized if cash, unrealized receivables or inventory received is less than the partner's adjusted basis.

   e. Cannot recognize a loss if any other property is received.

3. Form 7217:

   a. Beginning for tax year 2024.

   b. Must be filed by any partner receiving a distribution of property from a partnership in a liquidating or non-liquidating distribution in order to report the basis of the distributed property, including an adjustment required by IRC 732(a)(2) or (b).

   c. Must be filed regardless of whether there is an adjustment as a result of the distribution.

   d. Not filed if only money or marketable securities treated as money is distributed.

   e. Not filed to report a guaranteed payment under IRC 707.

   f. Must be attached to the partner's tax return for the year the property is actually (not constructively) received.

D. Limited Partner Exception

1. Background:

a. IRC §1402(a)(13), enacted in 1977, generally excludes a limited partner's share of partnership income or loss from SECA tax.

b. The exclusion does not apply to guaranteed payments.

c. The IRS proposed regulations a couple of times, most recently in 1997, but they stalled when Congress imposed a temporary moratorium.

d. The 1997 proposed regulations were based on factors involving liability, management and participation.

2. Developments:

a. The courts have largely been left to sort out limited partner status.

b. For example, in *Renkemeyer* attorneys who actively participated in an LLP were found not to be limited partners.

c. In 2018, a SECA compliance program was launched focusing on partnerships operating in the asset management, financial services, private equity and hedge fund industries.

d. A guidance project has now appeared on the 2023-2024 priority guidance plan released September 29, 2023.

E. Limited Partner Exception to Self-Employment Tax

1. Soroban Capital Partners LP v Commissioner, Docket Nods. 16217-22 and 16218-22:

a. Two tax court petitions filed in July 2022.

b. Involve limited partners in a NY hedge fund who received guaranteed payments for services, but not in their capacities as limited partners where they were prohibited from taking part in the hedge fund's management.

c. They were contesting the IRS' position that the amounts excluded in their capacity as limited partners (approx.. $141 million for 2016 and 2017) should have been included in net earnings from self-employment.

d. Practitioners were eyeing this case to see whether it resolves the limited partner issue (or, at least, whether a state-law limited partner is also a limited partner for self-employment tax purposes without also having to meet the functional test of *Renkemeyer*.

e. On November 28, 2023, the U.S. Tax Court issued its opinion:

i. Held that a "functional analysis test" must be applied in determining whether the limited partner exception to the imposition of SECA tax under section 1402(a)(13) applies to limited partners

ii. Thus, a limited a partner in a limited partnership is not per se excluded from SECA tax

F. Information Returns: E-Filing

1. E-Filing Requirement:

Prior to 2023	250 or More	Applied Separately Per Type
Beginning 2023	10 or More	Applies to All Returns Filed by a Business

2. Includes W-2 e-filed with Social Security.

3. Includes All Forms 1099 that business can e-file through the Information Returns Intake System ("IRIS").

G. Information Returns: Safe Harbor Correction (TD 9984, December 19, 2023)

1. IRC 6721 – Penalty for failure to file correct information return.

   a. $250 for each return.

   b. $100 if corrected by August 1st of the year.

   c. $50 if corrected within 30 days after the required filing date.

   d. Maximum penalty $3,000,000.

2. Final Regulations – De Minimis Error Safe Harbor

   a. Number of returns limited to greater of 10 or ½ of 1%.

   b. Considered de minimis if error is not more than $100.

   c. In the case of tax withheld, the error can't be more than $25.

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3. Exception:

a. Safe harbor doesn't apply if person being provided the statement elects out.

b. Must elect out no later than 30 days after date statement is required to be provided or October 15th.

c. Copy of election must be provided to filer.

H. Form 8300

1. IR-2023-157:

a. Starting January 1, 2024, businesses are required to e-file Form 8300, *Report of Cash Payments over $10,000*.

b. Exceptions:

i. Fewer than 10 information returns for the calendar year.

ii. Can request a waiver for hardship by filing Form 8508, but the waiver applies to all information returns.

V. CASES - BUSINESS

A. Taxation of Unrealized Income (*Moore v. United States,* U.S. Supreme Court Docket #22-800)

1. Issue:

a. Constitutionality of taxing the deemed repatriation of earnings under IRC §965 enacted by the TCJA of 2017.

2. Background:

   a. Taxpayer invested in an Indian company that was a controlled foreign corporation.

   b. IRC §965 deems the accumulated post-1986 deferred foreign income to be Subpart F income for 2017 or 2018, depending on its taxable year end.

3. Taxpayer's Argument:

   a. IRC §965 is an unapportioned direct tax that is not an income tax, thus violating the apportionment clause in the U.S. Constitution.

   b. Essentially, the argument is that a tax on unrealized income is unconstitutional.

4. Government's Argument:

   a. There is no blanket constitutional ban on Congress's disregarding corporate form to facilitate taxation of shareholders' income.

5. Ramifications:

   a. Subpart F.

   b. Tax on global intangible low-taxed income (GILTI).

   c. New book minimum tax.

   d. Mark-to-market for securities dealers.

   e. Constructive sales, such as equity swaps.

   f. Taxation of derivatives.

6. Revenue Effects:

   a. If GILTI is struck down, perhaps $350 billion over the next 10 years.

   b. Another $75 billion over the same period of Subpart F is repealed.

7. Supreme Court's Decision:

   a. The mandatory repatriation tax does not exceed Congress' constitutional authority.

   b. Article I of the Constitution authorizes direct taxes on persons and property, and indirect taxes on activities and transactions.

   c. While direct taxes must be apportioned among the states according to population, indirect taxes only need to be "uniform throughout the United States."

   d. The holding is narrow and limited to pass-through entities.

   e. It does not attempt to address whether realization is a constitutional requirement for an income tax.

B. Power of Federal Agencies (*Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)

1. Background:

   a. Magnuson-Stevens Act requires fisheries operating within 200 nautical miles off the U.S. coast to allow federal observers onboard its vessels to collect data for preventing overfishing.

   b. The National Marine Fisheries Service adopted a rule requiring the fishing industry to pay the salaries of the observers.

c. A group of fisheries from New England are challenging the National Marine Fisheries Service's interpretation of the Magnuson-Stevens Act.

d. The Supreme Court previously ruled in *Chevron U.S.A., Inc. v. Natural Resources Defenses Council, Inc.,* 467 U.S. 837 (1984), that courts must defer to the authority of an administrative agency's interpretation of a statute whenever both the intent of Congress was ambiguous and the agency's interpretation is reasonable or permissible.

e. Lower courts upheld the agency action based on *Chevron*.

2. Supreme Court Holding:

a. Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

b. Overrules *Chevron*.

c. Potentially wide-ranging consequences.

C. Deadline to Sue for Harm Caused by an Agency (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 603 U.S. ____ (2024)

1. Issue:

a. Whether a challenge to the validity of a rule must be brought within six years of the rule's issuance – or instead within six years of when the rule first injures the particular plaintiff challenging the rule.

2. Holding:

a. The statute of limitations does not start running until the particular plaintiff has been harmed by the agency action.

D. Cost of Goods Sold (*Villa,* T.C. Memo. 2023-15)

1. Issue:

a. To what extent must gross receipts be reduced by cost of goods sold?

2. Facts:

a. Taxpayer built fences as a contractor.

b. Only included income reported to him on a 1099-MISC.

c. Used cash withdrawals for business and personal expenses.

d. Wanted to apply the ratio between COGs and gross receipts on a recent job to determine the COGS on his unreported income.

3. Law:

a. While deductions from gross income (e.g., for ordinary and necessary business expenses) are a matter of legislative grace, the reduction of gross receipts by the cost of goods sold is mandatory under the Sixteenth Amendment (*Doyle v. Mitchell Bros.*, 247 U.S. 179 (1918); Reg. 1.61-3(a)).

b. The "Cohan Rule" allows courts to estimate deductible expenses if there is a reasonable basis (*Cohan v. Commr.,* 39 F.2d 540 (2d Cir. 1930)).

c. But, the court "bears heavily if it chooses upon the taxpayer whose inexactitude is of his own making."

d. The rule doesn't apply to the strict substantiation requirements of Section 274(d), such as expenses for transportation, lodging and meals.

e. The Tax Court has extended the rule to COGS.

4. Result:

a. The court found the taxpayer's testimony credible regarding his other recent job.

b. However, that ratio doesn't apply to determining the portion of cash withdrawals used for personal expenses.

c. Moreover, some of the estimated COGS might have been included in the labor and expenses already allowed by the IRS.

d. As a result, the court only allowed 50% of the cash withdrawals as COGS.

E. Employment Taxes (*Taylor*, T.C. Memo. 2024-33)

1. Issue:

a. Are poor math skills an excuse for failing to pay employment taxes?

2. Facts:

a. Taxpayers was the CEO and sole shareholder of the company.

b. Delegated many business and financial responsibilities.

c. One such person, the company's CPA, embezzled $1-2 million.

3. Law:

   a. Section 6672(a) provides that anyone who is required to collect and pay over any federal tax and who willfully fails to do so is liable for a penalty equal to the amount of the tax.

4. Result:

   a. CEO liable.

   b. According to the court, the issue is the taxpayer's authority to control the company's obligation to pay its employment taxes, not whether the CEO personally took responsibility.

   c. Didn't help that the CEO used amounts recovered from an insurance company and a bank to pay personal expenses and a bonus, instead of the employment taxes.

F. Shoebox of Receipts Does Not a Deduction Make (*Wright,* T.C. Summary Opinion 2024-9, June 10, 2024)

1. Background:

   a. Taxpayer owned an S corporation and several Schedule C businesses.

   b. Challenged an audit in which the IRS allowed some deductions and disallowed others.

   c. Taxpayers provided the court:

      i. 44 exhibits containing 1,882 pages.

      ii. Included copies of thousands of bills, receipts, etc.

iii. Some contained adding machine tapes which didn't always up.

iv. Separate deductions were taken in some cases for both the restaurant receipt and the credit card invoice.

2. Result:

a. The court said it would not undertake the task of sorting through thousands of exhibits in an attempt to see whether the taxpayer providing adequate substantiation to counter the IRS' adjustments.

b. Court likened the taxpayer's approach to the "shoebox" method of attaching photocopies of receipts to numerous adding machine tapes without making any effort to link the items to a deductible trade or business expense that is in dispute.

G. Substantiating Deductions (*Patricia Marcello Anderson et. al. v. Commissioner*, T.C. Memo. 2024-95)

1. Issue:

a. Can accounting records (cash disbursements journals and account registers) be used to substantiated reported business expenses where evidence of actual payment is too voluminous to produce?

2. Facts:

a. Taxpayers were self-employed, engaged in company management, commercial real estate, and the medical industry.

b. Failed to file returns for several years, so the IRS prepared substitute returns.

c. Taxpayer provided accounting records to evidence deductions, because the boxes containing the records of actual payment were claimed to be too voluminous to produce or tied up in other litigation.

3. Result: Court Disallowed the Deductions

a. Treating profit and loss statements without source documents is argument – not evidence.

i. *See, e.g., Barrios v. Commissioner*, T.C. Memo. 2023-32.

b. Because proper record keeping was feasible and, apparently, proper records were maintained, Court declined to exercise its authority under the *Cohan* doctrine, to estimate the taxpayer's expenditures.

i. *See, Vanicek v. Commissioner*, 85 T.C. 731, 742-43 (1985) (citing, *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930)).

H. Second Class of Stock (*Maggard*, T.C. Memo 2024-77)

1. Facts:

a. Taxpayer, an inventor, formed an S corporation with an investor.

b. Taxpayer owned 40% and the investor 60%.

c. The investor later sold 40% of his interest to one person, and 20% to another.

d. Those two persons began misappropriating funds by inflating their expense reimbursements and taking disproportionate distributions from the company's earning.

e. Taxpayer sued for embezzlement claiming over $1 million in damages.

f. The case eventually settled.

2. Tax Court:

   a. Taxpayer filed a tax court petition claiming the unequal distributions had created a second class of stock revoking the S election.

3. Result:

   a. The disproportionate distributions did not create a second class of stock.

   b. Under the regulations, you look at the shareholders' rights under the corporation's governing documents, not what the shareholders actually do.

   c. Taxpayer must include in income a proportionate share of the corporation's earnings despite the disproportionate distributions made to the two other shareholders.

I. Prior Year Depreciation Does Not Establish Basis (*Pak*, T.C. Memo 2024-86)

1. Facts:

   a. Taxpayer owned and operated a Japanese steakhouse.

   b. Paid for a substantial build-out, but had no records.

   c. Paid preparer filed a 2008 tax return showing depreciation on these improvements.

   d. Taxpayer prepared his own returns in some of the ensuing years.

   e. Some years showed no depreciation deductions.

   f. No returns filed for 2014-2016.

2. IRS:

   a. Prepared substitute returns.

   b. Taxpayer hired CPA who extrapolated depreciation deductions from basis figures reported on 2008 return.

   c. IRS did not accept any of the returns.

3. Cohan Rule (*Cohan v. Commr.*, 39 F.2d 540 (2d Cir. 1930)):

   a. Court should estimate deductions.

   b. Assuming it has a reasonable evidentiary basis.

   c. Yet, bearing heavily on a taxpayer "whose inexactitude is of his own making."

4. Court:

   a. Satisfied taxpayer had incurred expenses for a buildout.

   b. Recognized that the statute has run on the 2008 return and what it reveals about basis for 2008.

   c. But, not binding on subsequent years, and court unwilling to accept the 2008 return without "corroborating evidence."

   d. Found taxpayer entitled to depreciation deductions based on ½ of the basis estimates reported on the 2008 return.

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VI. INFLATION REDUCTION ACT

A. Inflation Reduction Act of 2022

1. Many Tax Credits and Related Provisions:

   a. Clean Energy Tax Credits.

   b. Carbon Management.

   c. Residential Energy Efficiency.

   d. Energy Innovation.

   e. Offshore Wind and Oil & Gas Systems.

   f. Community Investment and Energy Justice.

   g. Investments in the Permitting Process.

   h. Clean Energy Financing.

   i. Agriculture & Forestry.

B. Prevailing Wage and Apprenticeship Requirements (IR-2024-168)

1. Increased credit amounts and deductions may be available to certain taxpayers satisfying prevailing wage and apprenticeship requirements.

   a. Increased credits: IRC §30C, 45, 45Q, 45V, 45Y, 45Z, 48, 48C and 48E.

   b. Increased deductions: IRC §179D.

   c. Increased credits also available under IRC §45L and 45U if just a prevailing wage requirement is satisfied.

2. The prevailing wage requirement is met if laborers and mechanics are paid at rates not less than the prevailing rates for construction, alteration or repair of similar character in the locality where the facility is located as determined by the Secretary of Labor.

C. Survey of the Tax Credits

1. New Advanced Manufacturing Production Tax Credit (IRC §45X).

a. Tax credit for the production of clean energy technology components that are produced in the United States or by a U.S. possession.

b. Eligible components include solar components, wind turbine and offshore wind components, inverters, many battery components, and the critical minerals needed to produce these components.

c. Begins to phase out in 2029 and phases out completely in 2032.

2. Extension of Energy Investment Tax Credit (IRC §48)

a. Extends the existing energy investment tax credit for applicable energy projects.

b. Ends in 2024 for most technologies and is replaced by the new tech-neutral Clean Electricity ITC (48E), which begins in 2025.

c. Extends date of construction in most cases to 2024 and maintains a 10% or 30% credit.

3. New Clean Electricity Investment Tax Credit (IRC §48E)

a. This newly established ITC replaces the Energy ITC once it phases out at the end of 2024.

b. 48E is an emissions-based incentive that is neutral and flexible between clean electricity technologies.

c. Taxpayers choose between a PTC (45Y) and an ITC (48E).

4. Credit for Residential Clean Energy (IRC §25D)

a. Extends credit through 2034 for residential solar, wind, geothermal, and biomass fuel.

b. Maintains the previous credit rate but adjusts the project dates.

c. Applies a 30% credit for projects started between 2022 and 2032.

d. Credit decreases to 26% for projects started in 2033 and 22% for projects started in 2034.

e. Expands eligibility to battery storage technology.

5. Credit for Energy Efficiency Home Improvements (IRC §25C)

a. Extends credit for energy efficiency home improvements through 2032.

b. Increases credit from 10% to 30%.

c. Replaces lifetime cap on credits with a $1,200 annual credit limit, including $600 for windows and $500 for doors.

d. Increases limit to $2,000 for heat pumps and biomass stoves.

e. Removes eligibility for roofs.

f. Updates language to reflect advances in energy efficiency.

g. Expands credit to cover the cost of home energy audits up to $150 and electrical panel upgrades up to $600.

6. Credit for Builders of New Energy-Efficient Homes (IRC §45L)

a. Eligible contractors who build or substantially reconstruct qualified new energy-efficient homes may be able to claim tax credits up to $5,000 per home.

b. Preliminary guidance may be found in Notice 2023-65.

7. Home Energy Performance-Based Whole House Rebates (HOMES)

a. $4.3 billion through 2031 to DOE to help state energy offices implement a HOMES rebate program to provide rebates to homeowners and aggregators for whole-house energy saving retrofits.

b. Additional funding can be provided to low- and moderate-income individuals, who earn less than 80% of the area median income.

8. High-Efficiency Electric Home Rebate Program

a. $4.5 billion through 2031 for grants from DOE to States and Tribes to implement a high-efficiency electric home rebate program.

b. Provides up to $14,000 per household including $8,000 for heat pumps, $1,750 for heat pump water heaters, and $840 for electric stoves.

c. Also includes rebates for improvements to electrical panels or wiring and home insulation or sealant.

d. Eligible recipients must fall below 150% of the area median income.

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9. New Commercial Clean Vehicle Credit (IRC §45W)

   a. For class 1-3 (under 14,000 lbs.) vehicles for commercial use, creates a $7,500 tax credit tax for the purchase of electric vehicles or other qualified clean vehicles.

   b. For class 4 and above (over 14,000 lbs.) vehicles for commercial use, increases the credit to $40,000.

   c. The credit is equal to the lesser of:

      i. 15 percent of the basis in the vehicle, or

      ii. The incremental cost of the vehicle.

   d. The credit is capped at $7,500 for qualifying vehicles with weight ratings of under 14,000 pounds and $40,000 for all other vehicles.

10. New Consumer Clean Vehicle Credit (IRC §30D)

   a. Maintains the existing $7,500 consumer credit for the purchase of a qualified new clean vehicle, including electric vehicles, plug-in hybrids, and hydrogen fuel cell vehicles.

   b. Maximum of $80,000 per vehicle for vans, SUVs and pickups and $55,000 for other vehicles.

   c. Income eligibility limit of $150,000 or $300,000 for joint filers.

   d. Eliminates the previous manufacturer quota, which phased out the tax credit for manufacturers as they neared 200,000 clean vehicles sold.

   e. Final assembly must occur in the United States.

f. About half the credit or $3,750 is based on where the battery components are made or assembled, e.g. ---

i. 40% for EVs that go on sale before 2024.

ii. 50% for EVs that go on sale in 2024.

iii. 60% for EVs that go on sale in 2025.

iv. 70% for EVs that go on sale in 2026.

v. 80% for EVs that go on sale after December 31, 2026.

g. Just like battery components, the credit has requirements based on where the raw materials used in the battery come from that must be met to qualify for half of the credit or $3,750:

i. 40% of “critical minerals” through end of 2023.

ii. 50% in 2024.

iii. 60% in 2025.

iv. 70% in 2026.

v. 80% after 2026.

11. New Consumer Previously Owned Clean Vehicle Credit (IRC §25E)

a. Tax credit for the purchase of previously owned clean non-commercial vehicles, including electric vehicles and plug-in hybrids.

b. Credit is equal to the lesser of $4,000 or 30% of the vehicle cost.

c. Sets a maximum sale price of $25,000.

d. Model must be at least 2 years older than the year of sale.

e. Implements an income eligibility limit of $75,000 or $150,000 for joint filers.

D. Reporting Rules for Clean Vehicle Credits

1. Rev. Proc. 2022-42, released December 12, 2022:

a. Initial guidance on how auto manufacturers and dealers can qualify their cars available for clean vehicle credits.

b. Manufacturers generally must enter into written agreements with the IRS agreeing to make periodic written reports with VIN numbers for each vehicle sold.

c. Sellers likewise must make reports about each sale in order for the new or used vehicles sold to be eligible for the tax incentives.

E. Transferability of EV Credit at Point of Sale (REG-113064-23)

1. Under proposed regulations issued October 6, 2023, starting January 2024 qualified taxpayers will be able to transfer the section 30D and section 25E tax credits, worth up to $7,000 for the purchase of a new electric vehicle and $4,500 for a used electric vehicle, respectively, directly to the car dealer at the point of sale.

2. "Allows consumers to reduce the up-front cost of a clean vehicle, expanding consumer choices and helping car dealers expand their business."

3. Treat the transfer as being repaid by the consumer to the dealer as part of the purchase price of the vehicle, thereby not affecting the dealer's tax liability.

4. Consumers looking to take advantage of the credit must attest to being under the eligible income threshold.

5. Car dealers must register under a new website, the "IRS Energy Credits Online Portal," to take part in the program.

F. Final Electric Vehicle Regulations (IR-2024-131)

1. May 6, 2024 – Final regulations issued on tax credits under Section 30D for new clean vehicles and under Section 25E for previously owned clean vehicles.

   a. Includes rules for taxpayers transferring new or previously owned clean vehicle credits to dealers eligible to receive advance payments.

   b. Process for dealers to become eligible to receive advance payments.

   c. Rules for manufacturers to determine whether battery components and critical minerals are "foreign entity of concern" compliant.

2. June 8, 2024 – Rev. Proc. 2024-26, issued updating and expanding procedures for qualified manufacturer and seller reporting.

G. Transferability of Other Credits (IRC 6418; TD 9992, 4/30/2024)

1. Background:

   a. For tax years beginning after December 31, 2022, taxpayers may elect under IRC 6418 to transfer eligible tax credits to an unrelated third party.

b. Under the election:

i. The transferee gets the credit.

ii. The amount received by the transferor is excludable from gross income.

iii. The election is made at the partnership or S corporation level.

c. Investors and developers are structuring and negotiating transactions to transfer energy tax credits.

2. Eleven Credits Eligible:

a. Credits for alternative fuel vehicle refueling property (Section 30C).

b. Renewable electricity production credit (Section 45).

c. Credit for carbon dioxide sequestration (Section 45Q).

d. Zero-emission nuclear power production credit (Section 45U).

e. Clean hydrogen production credit (Section 45V).

f. Advanced manufacturing production credit (Section 45X).

g. Clean energy production credit (Section 45Y).

h. Clean fuel production credit (Section 45Z).

i. Energy investment tax credit (Section 48).

j. Qualifying advanced energy project credit (Section 48C).

k. Clean electricity investment credit (Section 48E).

3. Final Regulations:

   a. Election must be made on an original (i.e., not amended) return filed by the due date, including extensions.

   b. Once made, cannot be revoked.

   c. IRS online pre-filing registration process required to get a registration number for the eligible credit property.

   d. Recapture may apply if the qualifying energy asset is disposed of, sold, or ceases operations within the first five years after being placed in service.

   e. A transferee claiming more credits than are allowable may be liable for a tax equal to the excess, plus 20%.

H. Clean Energy Tax Credit Scam (IR-2024-182)

1. IRS warned taxpayers on July 10, 2024, about falling victim to a new emerging scam involving buying clean energy tax credits.

2. Unscrupulous tax return preparers are targeting individual 1040 filers and having them improperly claim energy credits that offset income from other sources like wages, Social Security and retirement withdrawals.

3. Individuals purchasing tax credits are subject to the passive activity loss rules.

4. Thus, they can generally only use the purchased credits to offset income from a passive activity.

VII. CORPORATE TRANSPARENCY ACT

A. Corporate Transparency Act

1. National Defense Authorization Act for Fiscal Year 2021 (NDAA).

2. NDAA included significant reforms to the U.S. anti-money laundering and countering the financing of terrorism regime.

3. Division F of the NDAA consists of the Anti-Money Laundering Act of 2020, which includes the Corporate Transparency Act (CTA).

4. Congress enacted the CTA to establish uniform beneficial ownership information reporting requirements to improve transparency for national security, intelligence, and law enforcement agencies in their efforts to detect and prevent money laundering and terrorist financing.

5. On September 29, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued regulations regarding the beneficial ownership reporting requirements.

6. The final rulemaking is effective January 1, 2024.

7. Reporting companies created or registered before January 1, 2024, will have one year (until January 1, 2025) to file their initial reports.

8. Reporting companies created or registered after January 1, 2024, will have 30 days after creation or registration to file their initial reports.

9. FINCEN has issued a Notice of Proposed Rule Making that would extend the 30-day period to 90 days for new entities created in 2024.

10. Several Exemptions:

a. Financial institutions or certain issuers of securities in heavily regulated industries (e.g., banks, credit unions, broker-dealers, money services businesses registered with FinCEN, and issuers registered with the U.S. Securities and Exchange Commission).

c. "Large operating companies."

i. Entity that employs more than 20 full time employees in the U.S.,

ii. Has an operating presence at a physical office within the U.S., and

iii. Filed a federal income tax or information return in the U.S. for the previous year demonstrating more than $5,000,000 in gross receipts or sales.

d. Other types of legal entities, including certain trusts, will be excluded to the extent that they are not created by the filing of a document with a secretary of state or similar office.

11. A "reporting company" is a corporation, limited liability company, or other similar entity that is:

a. Created by the filing of a document with a secretary of state or similar office, or

b. Formed under the law of a foreign country and registered to do business in the U.S. by the filing of a document with a secretary of state or a similar office.

Note: There is no dollar minimum or profit motive requirement.

c. Examples:

i. Single owner S corporation or single member LLC filing a Schedule C.

ii. A hobby that generates no profits if it is registered as an LLC for liability protection purposes.

12. A "beneficial owner" is an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:

a. Exercises substantial control over the entity, or

b. Owns or controls not less than 25 percent of the ownership interests of the entity.

c. Examples:

i. Senior officer of the reporting company;

ii. Having authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); or

iii. Directing, determining, or having substantial influence over important decisions made by the reporting company.

13. In addition to reporting information about itself and its beneficial owners, and entity created on or after January 1, 2024, must also report information about its "company applicants."

a. The individual who directly files the document that creates or first registers the reporting company.

b. The individual primarily responsible for directing the filing of the relevant document.

c. There can be up to two persons who qualify as company applicants.

14. Penalties for Noncompliance:

a. Civil Penalties:

i. Not more than $500 for each day that the violation continues.

b. Criminal Penalties:

i. Fines of not more than $10,000, and

ii. Imprisonment for not more than two years, or both.

c. Separate from the CTA, persons could face criminal liability under the federal criminal code, which prohibits knowingly and willfully providing false information or concealing a material fact to any of the three branches of the federal government.

15. Examples:

a. Example #1:

i. Facts: You are the sole owner and the president of an LLC.

ii. Question: Are you the beneficial owner?

iii. Answer: You are the beneficial owner because you exercise substantial control as the senior officer, you own more than 25%, and no one else exercises substantial control.

b. Example No. 2:

i. Facts: A, B and C own 50%, 40% and 10%, respectively, of a company, and D serves as president.

ii. Question: Who are the beneficial owners?

iii. Answer: A & B are beneficial owners because they own more than 25%. D is a beneficial owner because he exercises substantial control as a senior officer. C is not a beneficial owner.

c. Example No. 3:

i. Facts: Four individuals each own 25% of a company, and four additional persons serve as CEO, CFO, COO and general counsel.

ii. Question: Who are the beneficial owners?

iii. Answer: All eight are beneficial owners.

d. Example No. 4:

i. Facts: Person A prepares and files a document through an online portal creating a new company.

ii. Question: Who is the company applicant?

iii. Answer: Person A

e. Example No. 5:

i. Facts: Person A prepared a document creating a new company and directs person B to file it using an online portal.

ii. Question: Who is the company applicant?

iii. Answer: Persons A and B.

16. The Beneficial Ownership Information Registry began accepting reports on January 1, 2024.

17. Website for reporting: https://boiefiling.fincen.gov/.

18. Company must report:

    a. Name

    b. Tradenames

    c. U.S. address

    d. Jurisdiction of formation

    e. EIN / TIN

19. Information required to be reported on beneficial owners and company applicants:

    a. Name

    b. Date of birth

    c. Address

    d. The identifying number and issuer from either a non-expired U.S. driver's license, a non-expired U.S. passport, or a non-expired identification document issued by a State (including a U.S. territory or possession), local government, or Indian tribe. If none of those documents exist, a non-expired foreign passport can be used. An image of the document must also be submitted.

20. Several challenges to the CTA have been made based on Constitutional grounds:

    a. Perhaps the farthest along is *National Small Business Association v. Yellen*, 5:22-cv-1448-LCB (N.D. Ala. Mar. 1, 2024) where the District Court held the CTA unconstitutional because it cannot be justified as an exercise of Congress' enumerated powers.

    b. The Treasury has appealed the case to the 11th Circuit.

21. *Moody v. NetChoice, NetChoice v. Paxton*, 144 S.Ct. 2383 (July 1, 2024)

    a. Seemingly unrelated to the CTA, NetChoice challenged Florida and Texas statutes limiting social media companies from filtering, prioritizing, and labeling users' posts based on First Amendment grounds.

    b. NetChoice obtained preliminary injunctions from the District Courts, which the 11th Circuit upheld and the 5th Circuit reversed, resulting in an appeal to the Supreme Court to resolve the conflict.

    c. Writing for the majority, Justice Elena Kagan held that for First Amendment purposes:

        i. Plaintiffs must meet the burden of showing "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep;

        ii. But, "the bar is even higher for facial challenges on other grounds – those plaintiffs must show "that no set of circumstances exists under which the [law] would be valid," or that the law "lacks a 'plainly legitimate sweep.'"

22. Meanwhile, back to *National Small Business Association v. Yellen:*

    a. The Treasury has filed a supplemental brief based on the Supreme Court's decision in *NetChoice* asking the 11th Circuit to reverse the District Court in *National Small Business Association*.

    b. The NSBU filed its own supplemental brief arguing that NetChoice is inapplicable because its not a "facial challenge" that is being made to the CTA, but a claim that Congress exceeded its powers in enacting the CTA.

VIII. RETIREMENT

A. Proposed Regulations on RMD's (*REG-105954-20)*

1. Issued on February 23, 2022, under the SECURE Act.

2. Address two important issues relating to RMDs.

    a. Delay in RBD to age 72*.

    b. 10-year limit on RMDs after death.

3. Distributions taken in 2021 can be based on a "reasonable interpretation of the law."

    *now age 73 beginning 2023 under SECURE 2.0.

4. Eligible Designated Beneficiary ("EDB")

    a. The participant's surviving spouse.

    b. The employee's child who has not yet reached the "age of majority".

    c. "Disabled."

d. "Chronically ill."

e. Not more than 10 years younger than the participant.

5. Death before RBD:

Beneficiary	Distribution Period
Not a "designated beneficiary"	5-year rule
Designated beneficiary, but not an EBD	10-year rule
EBD	Life Expectancy

6. Death after RBD:

Beneficiary	Distribution Period
Not a "designated beneficiary"	5-year rule
Designated beneficiary, but not an EBD	Life Expectancy for 10 years with balance distributed in 10th year
EBD	Life Expectancy

7. "Age of Majority" – age 21

8. "Disability"

a. Unable to engage in substantial gainful activity.

b. A medically determinable physical or mental impairment that results in marked and severe functional limitations, and that can be expected to result in death or to be of long-continued and indefinite duration.

c. Social Security Administration determination.

9. "Chronically ill"

a. Unable to perform at least two activities of daily living (such as eating, toileting, and dressing) without substantial assistance for a lengthy, indefinite period.

b. Plan receives documentation of that status by October 31 of the year following the year of the employee's death.

Note: The determination of disability or chronically ill is made as of the date the employee dies.

10. Examples

a. Example No. 1

i. Facts: Ed names his nephew, Adam, as beneficiary of his 401(k) account. Ed dies March 2, 2023. Adam is involved in an accident September 15, 2023, and as a result is chronically ill.

ii. Question: Is Adam an EDB?

iii. Answer: Adam is not an EDB because he was not chronically ill when Ed died.

b. Example No. 2

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i. Facts: Marie names her daughter, Donna, as beneficiary of her 403(b) account. When Marie dies at age 40, Donna is only 10 years old. At that time, she is not Disabled. However, five years later, Donna becomes disabled.

ii. Question: Is Donna an EDB?

iii. Answer: Donna is an EDB, because she is Marie's child who has not reached the age of majority. Ten years after Donna turns 21, the plan must distribute the entire account to Donna. Had she been disabled when Marie died, Donna would have been able to continue taking distributions throughout her life or life expectancy.

11. Trusts as Beneficiaries

a. Previously, the regulations treated a trust as being, at most, one designated beneficiary, with an age equal to that of the oldest beneficiary of the trust.

b. In Private Letter Rulings, the IRS had allowed a more generous policy, particularly with regard to so-called "look-through" trusts.

c. The Proposal codifies those trust rules, and thereby expands available estate planning techniques.

d. If a trust satisfies the look-through rules, then the beneficiaries of the trust are considered designated beneficiaries.

12. Special Needs Trusts:

a. SECURE Act 2.0 includes a clarification that a third-party special needs trust (e.g., a trust established by a parent for a child with a

disability) may have a charitable organization as the remainder beneficiary.

b. Concern was that it might precluded qualification for lifetime distributions to the disabled beneficiary of the SNT after the account holder's death.

c. Effective starting in 2023.

13. 50% Penalty Tax Relief

a. Penalty applies if a participant or beneficiary does not take an RMD.

b. RMD rules require the participant or his/her estate to take an RMD for the year of death in the same manner as if the participant lived until the end of the year – i.e., by December 31 of the year of death.

c. Proposed regs would waive the penalty provided that the beneficiary takes the RMD no later than his or her tax return due date (with extensions).

Note; SECURE 2.0 Act reduces the penalty to 25%. In addition, the penalty drops down to 10% if you take the necessary RMD by the end of the second year following the year it was due.

14. Effective Date of the Proposed Regulations was January 1, 2022.

15. Notice 2022-53 provides that:

a. The final RMD regulations will apply no earlier than 2023.

b. A defined contribution plan will not be treated as having failed to satisfy the RMD rules under Code Section 401(a)(9), as amended by the SECURE Act, merely because it did not make a "specified RMD."

c. If a beneficiary did not take a "specified RMD" the IRS will not assert that the 50% excise tax applies, and will refund any excise tax that has already been paid for a missed RMD in 2021.

16. A "Specified RMD" is defined as :

a. Any distribution that would be required to be made in 2021 or 2022, under a plan or IRA if that distribution would be required to be made to:

i. A designated beneficiary of an employee or IRA owner if the employee or IRA owner died in 2020 or 2021, and on or after their required beginning date, and the designated beneficiary is not an eligible designated beneficiary taking distributions under the life expectancy rule, or

ii. A beneficiary of an eligible designated beneficiary if the eligible designated beneficiary died in 2020 or 2021, and they were taking distributions under the life expectancy rule.

B. Transition Relief

1. Background:

a. Prior to SECURE 2.0, a person born in 1951 would attain age 72 in 2023, so 2023 RMD would due by April 1, 2024, and the 2024 RMD by December 31, 2024.

b. After SECURE 2.0, the person would attain age 73 in 2024, so 2024 RMD would due by April 1, 2025, and the 2025 RMD by December 31, 2025.

2. Notice 2022-53:

   a. Final regulations would apply no earlier than 2023.

   b. Taxpayers who did not take a specified RMD in 2021 or 2022 would not be subject to a penalty.

3. Notice 2023-54:

   a. Final regulations would apply no earlier than 2024.

   b. Taxpayers who did not take a specified RMD in 2023 would not be subject to a penalty.

   c. Any distributions made between January 1, 2023 and July 31, 2023, that were characterized as RMDs, but aren't under the new rules, could be rolled over by September 30, 2023.

4. Notice 2024-35:

   a. Final regulations will apply for 2025 and beyond.

   b. Taxpayers who did not take a specified RMD in 2024 would not be subject to a penalty.

   c. Also applies to IRA owners who died in 2020, 2021, 2022 or 2023 where the designated beneficiary is not an eligible designated beneficiary taking distributions over his/her life expectancy.

C. Final Regulations on RMD's

1. Effective Date:

   a. Final Regs are applicable beginning with the 2025 calendar year.

b. Years before 2025 require a good faith interpretation of the SECURE Acts and SECURE 2.0 changes.

c. 2022 proposed regulations represent a good faith interpretation of the SECURE Act rules.

2. Required Minimum Distribution Ages:

Effective for Individuals Attaining	**RMD Age**	
Age 70% before 1/1/2020 (born before July 1, 1949)	70%	Prior to the SECURE Act*
Age 70% after 12/31/2019 and age 72 before 1/1/2023 (born on or after July 1, 1949 and before January 1, 1951)	72	Change with the SECURE Act
Age 72 after 12/31/2022 and age 73 before 1/1/2033 (born on or after January 1, 1951 and before January 1, 1960**)	73	Change with the SECURE 2.0 Act
Age 73 after 12/31/2032 (born on or after January 1, 1960)	75	Change with the SECURE 2.0 Act

** The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)*

*** The proposed RMD regulations clarify that the applicable RMD age for individuals born in 1959 is age 73.*

3. Eligible Designated Beneficiaries ("EBD"):

   a. An individual is considered the surviving spouse of a participant as of the date of the participant's death.

   b. The definition of child includes a stepchild, an adopted child, and an eligible foster child. The age of majority to be utilized in conjunction with the definition of whether a beneficiary is an EDB will be age 21.

   c. A disabled individual is an EDB if, as of the date of the participant's death, the individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration. The final regulations include a safe harbor definition of disability, where an individual considered disabled by the Social Security Administration as of the date of the participant's death will be deemed to meet the disability criteria of an EDB. The regulations create simplified requirements for an individual under the age of 18 to be considered disabled ("marked and severe functional limitations" rather than an inability to engage in substantial gainful activity).

   d. A chronically ill individual is an EDB if, as of the date of the participant's death, that individual is unable to perform (without substantial assistance from another individual) at least two activities of daily living for a period that is indefinite and reasonably expected

to be lengthy in nature as of the date of a certification, which is to be provided by a licensed health care practitioner. An individual who is an EDB because of disability or chronic illness must provide the plan administrator with acceptable documentation no later than October 31 of the calendar year following the calendar year of the participant's death.

e. The determination of whether an individual is 10 years younger is based on actual dates of birth, not based on attained ages at the end of the calendar year.

4. RMDs for EBDs:

a. Participant died prior to RBD:

i. The account is paid over the life expectancy of the EDB, provided that the first EMD is distributed by December 31 of the calendar year following the calendar year in which the participant died.

b. Participant died on or after RBD:

i. RMD must satisfy the "at least as rapidly" methodology (using the life expectancy of the participant or EDB, based on whoever was younger in the year of the participant's death).

5. Special Rules:

a. Spouse is the sole EDB and the participant dies before RBD:

i. The spouse may defer taking RMDs until the later of December 31 of the calendar year following the calendar year of the participant's death or December 31 of the calendar year

in which the participant would have reached the applicable age.

ii. If a participant dies before the RBD and the spousal beneficiary's first RMD over life expectancy commences in or after 2024, a spousal beneficiary is deemed to have irrevocably elected to have RMDs calculated using the Uniform Lifetime Table, if permitted under the plan.

b. Minor child is an EDB and reaches age 21:

i. The child is considered to have reached the age of majority in the year that that child reaches age 21. Once the child is no longer a minor, the entire account must be distributed to the child by December 31 of the 10th calendar year after the calendar year of the child's majority, unless the child satisfies other EDB criteria.

6. Individuals who are beneficiaries, but not EDBs"

a. The final regulations retain the concept of a designated beneficiary, defined as an individual entitled to receive a portion of the participant's interest in the account.

b. Since only an individual can be a designated beneficiary, a participant who names a non-living entity as beneficiary is treated as having no designated beneficiary for RMD purposes.

c. Examples:

i. Participant's estate

ii. Charities

iii. Trusts that do not qualify as see-through trusts under the final regulations.

d. Participant died prior to RBD:

i. The entire account must be distributed by December 31 of the calendar year containing the 10th anniversary of the participant's death.

e. Participant died on or after RBD:

i. RMD must satisfy the "at least as rapidly" methodology of the RMB during the participant's lifetime (using the life expectancy of the participant or designated beneficiary, based on whoever was younger in the year of the participant's death); and

ii. Entire account must be distributed by December 31 of the 10th calendar year after the calendar year of the participant's death.

7. No designated beneficiary:

a. Participant died prior to RBD:

i. The entire account must be distributed by December 31 of the 5th calendar year after the calendar year of the participant's death.

b. Participant died on or after RBD:

i. RMDs continue based on the life expectancy of the participant.

8. See-through trusts as beneficiaries:

   a. Two types:

      i. Conduit trust

      ii. Accumulation Trust

   b. RMDs are based on the oldest beneficiary's life expectancy, but changes have been made in the final regulations to the separate share rules:

      i. A trust can use the separate share rule if it qualifies as an immediately divided trust

      ii. Upon the participant's death, the immediately divided trust is split into subtrusts and is thereupon terminated

      iii. The main trust and the subtrusts must all be see-through trusts

      iv. There can be no discretion as to how the participant's balance will be allocated to the subtrusts after death

   c. Requirements:

      i. Trust is a valid trust under state law.

      ii. Trust is irrevocable or will become irrevocable upon the death of the participant.

      iii. Beneficiaries of the trust are identifiable from the trust instrument.

iv. Trust Documentation has been provided to the plan administrator.

- New rule: Trustee can provide list of trust beneficiaries with description of conditions on entitlement to benefits instead of the actual trust
- New rule: A trust that is a beneficiary of an IRA is not required to provide documentation

9. Deaths before the SECURE effective date:

a. Only one designated beneficiary who was alive on the SECURE effective date:

i. Following the death of that designated beneficiary, the remaining account must be distributed by December 31st of the 10th calendar year following the calendar year of the death of that designated beneficiary.

b. More than one designated beneficiary who was alive on the SECURE effective date:

i. The remaining account must be distributed by December 31st of the 10th calendar year following the calendar year of the death of the oldest designated beneficiary unless separate accounting rules apply.

c.. Spouse was the sole designated beneficiary, was alive on the SECURE effective date, and dies before the participant would have attained RBD.

i. The remaining account must be distributed to the spouse's designated beneficiary by December 31st of the 10th calendar year following the death of the spouse.

Note: The distribution of the account within the 10-year period is determined in accordance with IRS Notice 2020-51, which provided guidance for the waiver of the 2020 RMD for certain beneficiaries in accordance with the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

10. Automatic waivers of 25% excise tax:

a. Under SECURE 2.0, the 50% excise tax on the amount that is not taken timely as an RMD is reduced to 25%.

b. The excise tax is reduced to 10% for taxpayers who receive a corrective distribution and file a return reflecting the distribution by the earliest of:

i. The date a notice of deficiency is mailed.

ii. The date on which the excise tax is assessed.

iii. The last day of the second taxable year that begins after the end of the taxable year in which the excise tax is imposed.

11. Two additional automatic waivers in final regs:

a. Participant dies before RBD and the participant's EDB did not affirmatively elect to take RMD over life expectancy:

i. An EDB who has not satisfied the RMD requirements may elect the 10-year payout rule no later than December 31 of the 9th calendar year following the calendar year of the

participant's death, provided that the entire account is distributed to the EDB by December 31 of the 10th calendar year following the year of the participant's death.

b. Participant died on or after RBD and failed to satisfy the RMD in the calendar year of the participant's death:

i. The beneficiary must take the RMD attributable to the year of the participant's death no later than later of the beneficiary's federal individual income tax filing deadline (including extensions) for the tax year containing the calendar year of the participant's death or the end of the following calendar year.

IX. CASES – RETIREMENT

A. Sale of Stock to an ESOP (*Edward L. Berman, et al. v. Commissioner*, 163 T.C. No. 1 (July 15, 2024)

1. Issue:

a. Whether gains from the sale of stock to an ESOP, deferred under IRC §1042, can be recognized under the installment method after engaging in transactions that trigger gain recognition.

2. Facts:

a. In 2002, taxpayers sold stock to an ESOP, deferring the gains under IRC §1042.

b. In 2003, they reported purchasing Qualified Replacement Property (QRP) to defer recognition of the gains.

c. Later in 2003, they engaged in transactions using their QRP as collateral, which were deemed sales, requiring gain recognition under IRC §1042(e).

d. The IRS issued deficiency notices for 2003-2008, arguing the gains should be recognized in full for 2003.

e. Taxpayers argued for installment sale reporting under IRC §453, claiming their gains should be recognized proportionally as payments were received.

3. Result:

a. Taxpayers made valid elections under IRC §1042 to defer gains from the 2002 stock sales.

b. Gains recognized due to the 2003 sale of QRP are determined under the installment method as per IRC §453.

c. The gains recognized in 2003 and 2004 are determined proportionally to the payments received in those years.

d. The IRS's position that §1042(e) should exclusively determine gain recognition was rejected; the installment method applies unless affirmatively elected otherwise.

B. ERISA Prohibited Transaction Rules (*Cunningham v. Cornell Univ.,* U.S., No. 23-1007, cert. granted 10/4/24)

1. Issue: What benefit plan participants must allege in order to show that an arrangement between a plan and its service provider violates ERISA's prohibited transaction rules.

2. Facts: Lawsuit by 28,000 employees at Cornell University claiming their retirement plans were charged excessive record-keeping fees.

3. Law: ERISA Section 406(a)(1)(C) prohibits a plan fiduciary from "engag[ing] in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest.

4. Cornell University Workers (Eighth & Ninth Circuits):

    a. Plaintiff need only allege an arrangement in which plan payments are exchanged for services by an interested party.

5. Cornell University (Second Circuit):

    a. A prohibited transaction claim based on money paid to a retirement plan service provider must include allegations that the services were unnecessary or that the compensation was unreasonable.

6. Third, Seventh and Tenth Circuits:

    a. Plaintiffs to plead the existence of a transaction with a plan service provider along with an additional requirement that the transaction benefits a "party of interest" (3rd Circuit), involves a pre-existing relationship (10th Circuit) or includes self-dealing (7th Circuit).

7. Plan Fiduciary Concerns:

    a. The pleading standards of the 8th and 9th Circuit will make agreements with plan service providers and plan sponsors presumptively unlawful and invite protracted and expensive litigation.

b. A plaintiff alleging a prohibited transaction under ERISA §406 should have to do more than merely allege facts that the transaction meets the technical elements of a party-in-interest transaction.

c. A plaintiff should also be required to plausibly allege facts showing that ERISA §408's statutory exemptions do not apply.

C. Excise Tax on Excess Contributions (*Couturier*, 162 T.C. No. 4 (2024)

1. Issue: The statute of limitations for the 6% excise tax on excess contributions to IRAs.

2. Facts:

a. In 2016, the IRS issued two notices of deficiency. One for 2004-2008 and the other for 2009-2014 totaling $8,476,705 plus penalties.

b. Although the taxpayer did not file a Form 5329, he did timely file his Form 1040.

3. Law:

a. Section 4973 imposes a 6% excise tax on excess contributions to IRAs.

b. Section 6501 generally requires the IRS to assess tax within 3 years after the return is filed.

c. In *Paschall v. Commr.,* 137 T.C. 8 (2011), the Tax Court held that a Form 1040 filed without a Form 5329 reporting the excise tax did not start the running of the statute of limitations.

4. Secure Act 2.0:

a. In 2022, Congress amended Section 6501 to provide that the filing of Form 1040 will start the running of the statue of limitations even if Form 5329 is not filed.

b. However, it also increased the statute of limitations to 6 years.

c. These changes took effect "on the date of enactment."

5. Result:

a. The changes did not apply to the taxpayer who was liable for the assessments.

X. SECURE ACT 2.O

A. SECURE Act 2.0

1. Included within the Consolidated Appropriations Act, 2023.

2. Called SECURE ACT 2.0 because it builds on the changes made by the *Setting Every Community Up for Retirement Enhancement Act of 2019* (SECURE Act).

3. Originated as three separate bills:

a. SECURING A STRONG RETIREMENT ACT (H.R. 2954) passed by the House of Representatives on March 29, 2022.

b. RETIREMENT IMPROVEMENT AND SAVINGS ENHANCEMENT TO SUPPLEMENT HEALTHY INVESTMENTS FOR THE NEST EGG (RISE & SHINE) ACT (S. 4353) approved by the Senate Health, Education, Labor, and Pensions Committee on June 15, 2022.

c. ENHANCING AMERICAN RETIREMENT NOW (EARN) ACT approved by the Senate Finance Committee on June 22, 2022.

B. SECURE Act 2.0: Retirement Plans

1. Auto-enrollment

a. Mandatory for new plans starting in 2025.

b. At least 3% of salary, no higher than 10%.

c. Escalates at 1% per year of service up to a minimum of 10% and a maximum of 15%.

d. An employee can opt out.

e. Employers with 10 or fewer employees exempt.

2. The 10-50% nonrefundable saver's credit for contributions to retirement plans, IRAs and ABLE accounts is replaced.

a. New 50% federal match of non-Roth contributions deposited into taxpayer's plan by Treasury.

b. Phases out at certain income thresholds.

c. Maximum $2,000.

d. Effective after 12/31/2026.

3. Start-up Cost Credit for New Plans:

a. Employers with 50 or fewer employees.

i. Goes from 50% to 100% for 3 years.

ii. Max $5,000 per year.

b. Employers with 51-100 employees.

i. 50%.

ii. Max $5,000 per year.

c. Additional credit for up to $1,000 of employer matching.

4. SEP/SIMPLE Plan:

a. Employers may make additional discretionary contributions to SIMPLE plans.

i. Up to 10% of compensation.

ii. Maximum of $5,000 (indexed).

iii. Begins 2024.

b. Annual deferral and catch-up limits to SIMPLE plans increased by 10% starting in 2024 for employers with 25 or fewer employees.

c. Employers of domestic employees (e.g., nannies) may provide benefits under a SEP starting in 2023.

5. Long-term Part-Time Workers:

a. Employees working 500+ hours in 2 consecutive years must be eligible to defer.

b. Also applies to 403(b) plans

c. Begins 2025.

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Note: Under SECURE 1.0 there was a similar 3-year rule starting in 2024.

6. Pension-linked ("sidecar") emergency savings accounts:

   a. Employers may automatically opt NHCEs into emergency savings accounts.

   b. No more than 3% of salary.

   c. $2,500 cap.

   d. Contributions over limit can be stopped or directed to Roth account.

   e. Treated as Roth elective deferrals and may be matched up to the cap.

   f. Up to 4 no-fee, no-tax withdrawals available per year.

   g. Upon separation, account balance may be taken as cash or rolled into a Roth plan or IRA.

   h. Begins 2024.

7. Cash-Out Distributions:

   a. Currently, plan sponsors may "cash out" terminated participant balances under $5,000 and, unless the participant elects otherwise, rollover cash outs over $1,000 to an established IRA.

   b. Starting in 2024, $5,000 is increased to $7,000.

   c. An automatic portability provider ("APP") will be permitted to rollover an automatic cash out IRA established with a participant's prior employer-sponsored retirement plan into a subsequent eligible

defined contribution employer-sponsored retirement plan, provided that:

i. The individual is an active participant in the subsequent plan;

ii. The participant was given notice and did not opt out of the transaction; and

iii. The APP acknowledges fiduciary status and meets certain other requirements.

8. Other Retirement Plan Changes:

a. Employees making "qualified student loan payments" can have those payments matched in the retirement plan starting in 2024.

b. Catch-up contributions increase to $10,000 in 2025 for participants age 600-63.

c. 10% early distribution penalty waived for certain unforeseeable personal or family emergency expenses.

i. One distribution up to $1,000 per year.

ii. Option to repay within 3 years.

iii. Begins 2028.

d. Certain barriers to the availability of life annuities in qualified plans and IRAs eased starting in 2023.

e. Qualified longevity annuity contracts:

i. 25% of account balance limited eliminated.

ii. Cap raised to $200,000.

iii. Begins immediately.

f. Starting in 2023, new 401(k) plans sponsored by sole proprietors or single-member LLCs may allow certain deferral contributions up to the date of the employer's tax return filing date for the first year of the plan.

g. Starting in 2024, discretionary plan amendments increasing benefits may be adopted by the due date of the employer's tax return.

h. Effective immediately, early distributions to terminally ill individuals are exempt from the 10% premature distribution penalty.

i. A surviving spouse is currently allowed to elect to treat a deceased IRA owner's IRA as the surviving spouse's own IRA RMD purposes. Starting in 2024, this option is extended to qualified plans.

j. Starting 3 years after enactment, distributions up to $2,500 per year to pay premiums on long-term care insurance contracts are exempt from the 10% premature distribution penalty.

k. Roth IRAs are currently exempt from the RMD rules. Starting in 2024, this exemption is extended to Roth amounts in qualified plans.

l. Starting in 2023, a SEP and a SIMPLE IRA are permitted to be designated as Roth IRAs.

m. Plans may allow employees to designate employer matching or nonelective contributions as Roth contributions (effective immediately).

n. All catch-up contributions to qualified plans must be made on a Roth basis.

i. Exception for participants whose prior year wages do not exceed $145,000 (indexed).

ii. Not applicable to SIMPLE IRAs and SEP plans.

iii. This was one of the primary revenue raisers to get the Act within the 10-year budget window by which legislation is "scored" for cost purposes.

o. Notice 2023-62 indicates that the first two years after December 31, 2023, will be treated as an administrative transition period, so the foregoing requirement will apply beginning after December 31, 2025.

C. SECURE Act 2.0: Individual Retirement Accounts (IRA)

1. Required Minimum Distributions (RMDs):

a. Increase in required minimum distribution age:

i. Age 73 starting January 1, 2023.

ii. Age 75 starting January 1, 2033.

b. Beginning in 2023, the penalty for not taking an RMD is reduced from 50% to 25%, and decreased even further to 10% if corrected during a 2-year window.

2. IRA Charitable Donations:

a. Currently, individuals age 70-1/2 and older may transfer up to $100,000 per year from an IRA to a public charity or private operating foundation.

b. Expanded to permit a one-time election to transfer up to $50,000 to a qualifying charitable remainder annuity trust, a charitable remainder unitrust, or a charitable gift annuity.

c. The $50,000 and $100,000 limits will be indexed for inflation.

d. Effective for taxable years ending after the date of enactment.

3. Other IRA Changes:

a. Catch-up limit for those age 50 and older is inflation indexed after December 31, 2023.

b. Beneficiaries of 529 college savings accounts are permitted tax and penalty free rollovers of up to $35,000 over their lifetime to ROTH IRAs starting in 2024.

c. Effective immediately, corrective distributions of excess contributions to an IRA are no longer subject to the 10% premature distribution penalty.

D. SECURE Act 2.0: Emergency/Domestic Abuse (Notice 2024-55)

1. Guidance on new exceptions to the 10% additional tax for emergency personal expense distributions and domestic abuse victim distributions.

2. Background:

a. 10% additional tax on distributions from qualified retirement plans unless the distribution qualifies for an exception in IRC Section 72(t)(2).

b. Applies only to the portion of the distribution includible in gross income.

c. "Qualified retirement plan" means 401(k) profit-sharing plans, 403(b) plans (including 403(b) annuity contracts), individual retirement accounts, and individual retirement annuities.

3. Traditional Exceptions:

a. Distribution made on or after the date on which the individual attains age 59 ½.

b. Distribution made to a beneficiary or estate of an individual on or after an individual's death.

c. Distribution which is attributable to an individual being disabled.

d. Distribution that is part of a series of substantially equal periodic payments made for the life/life expectancy of the individual or the joint lives/joint life expectancies of an individual and the individual's designated beneficiary.

e. Distribution made to an individual after a separation from service after reaching age 55.

4. New Exceptions:

a. #1 – Emergency Personal Expense Distribution

i. Not more than one distribution per calendar year.

ii. Maximum amount in any calendar year is $1,000.

iii. Not permitted to take another during the next 3 calendar years unless:

- Emergency distribution is fully repaid, or

- The total amount of the individual's contributions after the emergency distribution is at least equal to the amount of the unpaid emergency distribution.

b. #2 – Domestic Abuse Victim Distributions

i. Any distribution from an eligible retirement plan to a domestic abuse victim if made during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner.

ii. Lesser of $10,000 (indexed for inflation) or 50% of the vested benefit of the individual under the plan.

iii. May repay any portion or all of the distribution received during the 3-year period beginning the day after the distribution was received.

iv. Individual must certify eligibility and that distribution is made within the 1-year period.

5. Plan Amendment:

a. Required, but discretionary with plan sponsor.

i. Emergency Personal Expense Distributions.

ii. Domestic Abuse Victim Distributions.

b. If plan not amended, individual can still "self-claim" deduction.

c. i.e., treat the distribution on their tax return as if the plan had been amended to allow those distributions.

E. Overpayments from Retirement Plans (Notice 2024-77 (October 15, 2024))

1. Background:

a. "Inadvertent benefit overpayment":

i. Exceeds amount allowed under the plan; or

ii. Is made before allowed under the terms of the plan.

b. Does not include payments to disqualified persons.

c. SECURE 2.0 provides that inadvertent benefit overpayments will not cause a plan to lose its tax-qualification or fail ERISA.

d. Overpayment is treated as an eligible rollover distribution.

e. Plan must either seek recovery of the overpayment or reduce the individual's benefits.

2. Guidance:

a. While a corrective payment generally is not required for an inadvertent benefit overpayment, other failures may occur as the result of an inadvertent benefit overpayment that could require a corrective payment – examples:

i. IRC Section 414(aa)(3) may require an employer to make a corrective payment to prevent or restore an impermissible forfeiture in accordance with IRC Section 411.

ii. If a failure under IRC Section 436 occurs due to an inadvertent benefit overpayment, the plan sponsor must make a corrective payment.

b. Rollovers.

   i. An individual who receives an inadvertent benefit overpayment and rolls over that overpayment pursuant to a direct or 60-day rollover will keep the tax-favored status of the overpayment for the portion of it for which a recoupment is not sought.

   ii. The portion of an inadvertent benefit overpayment for which recoupment is sought that is not returned to the plan is not treated as an eligible rollover distribution.

c. Plan Amendments.

   i. A plan amendment to increase past benefit payments in a manner that results in a violation of IRC Section 401(a)(17) or 415 for a past year is not permitted.

   ii. However, an amendment to increase past benefits under IRC Section 414(aa)(1)(B) that results in a failure under IRC Section 436 for a past year is permitted if contributions are made in accordance with Rev. Proc. 2021-30.

d. A plan sponsor may self-correct an inadvertent benefit overpayment if certain requirements are met.

e. Bottom line: Employers do not have to make corrective contributions for overpayments in many situations that contributions were previously required.

F. Student Loan Payments (Notice 2024-63)

1. What:

a. Employer match of a participant's qualified student loan payment (QSLP).

b. 401(k) plans, 403(b) plans, SIMPLE IRA plans, government section 457(b) plans.

c. Not a plan contribution, although treated as a contribution for purposes of meeting the matching contribution rules.

2. QSLP:

a. Repayment of a qualified education loan incurred by the employee to pay qualified higher education expenses of the employee, spouse or dependents.

b. Doesn't exceed plan limitations when aggregated with other contributions.

c. Certified by the employee.

XI. ESTATE PLANNING

A. Proposed Clawback Regs (*REG-118913-21*)

1. TCJA doubled the estate and gift tax exemption from $5 million to $10 million, inflation adjusted until Jan. 1, 2026.

2. However, it wasn't clear under TCJA what happens if the taxpayer makes gifts while the higher exemption is in place and then dies after the higher exemption sunsets and the exemption is lower.

3. Reg. 20.2010-1(c)(1), published November 26, 2019, provided relief from the "clawback".

4. Proposed regs released April 26, 2022, would exclude certain transactions from the anti-clawback rules.

5. Proposed Regs would exclude:

   a. Transfers where the donor retains a life estate or other powers or interests described in Sections 2035 through 2038 and Sec. 2042, including gifts made within three years of death and life insurance policies with reversionary interests.

   b. Enforceable gifts of promissory notes if the promissory note has not yet been paid.

   c. Gifts of interests in family partnerships and LLCs under Sec. 2701 where the senior generation maintains a preferred equity interest.

   d. Gifts of interest in trusts, including GRATs and QPRTs, subject to the special valuation rules of Sec. 2702.

   e. The relinquishment of an interest involving any of the above transactions within eighteen months of the donor's death.

6. Example:

   a. Facts: Rob makes a completed gift of a promissory note in the amount of $9,000,000 on January 1, 2023. The promissory note is Rob's only lifetime gift, and it remains unpaid as of the date of Rob's death on January 1, 2026, at which time the lifetime exemption amount for estate tax purposes has been adjusted to $6,800,000.

   b. Question: Is the note includible in Rob's estate?

c. Answer: The note is treated as includible in Rob's gross estate, and the anti-clawback rules do not apply to the original gift of the note in 2023. As a result, Rob's estate tax is calculated using the reduced $6,800,000 lifetime exemption amount.

7. Two Exceptions to the Proposed Regs:

a. Transfers where the portion subject to gift tax is less than 5% of the total value of the transfer.

b. Relinquishments of interests that are triggered by either the passage of time or the death of an individual if provided for in the terms of the original instrument effectuating the transfer.

B. Proposed Estate Administration Regulations

1. Published June 28, 2022 under Section 2053: (87 Fed. Reg. 38331 (Federal Register; Guidance Under Section 2053 Regarding Deduction for Interest Expense and Amounts Paid Under a Personal Guarantee, Certain Substantiation Requirements, and Applicability of Present Value Concepts)

a. Provide guidance on the use of present-value principles in determining the amount deductible by an estate for funeral expenses, administration expenses and certain claims against the estate;

b. Provide guidance on the deductibility of interest expense accruing on tax and penalties owed by an estate and interest expense accruing on certain loan obligations incurred by an estate;

c. Amend and clarify the requirements for substantiating the value of a claim against an estate that's deductible in certain cases; and

d. Provide guidance on the deductibility of amounts paid under a decedent's personal guarantee.

C. Present Value Principles Used to Determining Amount Deductible Under Section 2053

1. The Proposed Regulations:

a. Require calculating the present value of the amount of a deductible claim or expense that isn't paid or to be paid on or before the third anniversary of the decedent's date of death.

b. The discount rate to be used is the applicable federal rate determined under IRC Section 1274(d) for the month in which the decedent's date of death occurs, compounded annually.

c. Require a supporting statement to be filed with the Form 706 estate tax return showing any calculations of present value.

d. Provide that the expected date or dates of payment generally must be identified in a written appraisal document.

D. Deductibility of Interest on Unpaid Estate Tax

1. Background:

a. Section 2053(c)(1)(D) states that no deduction is allowed for interest payable under Section 6601 (underpayments) because of an election under Section 6166 to pay estate tax in installments.

b. Reg. §20.2053-3(a) permits the deduction of expenses actually and necessarily incurred in the administration of an estate.

c. Reg. §2053-1(b)(2) states that only expenses that are bona fide in nature are deductible.

2. Proposed Regulations under Section 2053: (REG – 130975-08, June 28, 2022)

a. Allows "non-section 6166 interest" to be deducted as an administrative expense if it is "bona fide".

b. Section 6163 deferral when value of a remainder or reversionary interest is includible in the gross estate, but the value is not available.

c. Underpayment of a tax or deficiency.

3. "Non-section 6166 interest" may also be deductible if it meets the "actually and necessarily incurred" test, but that depends on the facts and circumstances.

E. Interest on Graegin Loans

1. A Graegin loan is a loan to the estate in order to facilitate the payment of estate taxes and other expenses of the administration of the estate, the interest of which is deductible under Section 2053(a)(2) of the Code (*Estate of Graegin v. Commissioner*, T.C. Memo. 1988-477).

2. The idea behind the Graegin loan is that the full amount of the interest that will be paid over term of the loan is taken as a current deduction, dollar for dollar, from the gross estate.

3. Example:

a. If an estate borrows $10 million at 5% interest on a ten-year note, the loan can be structured with all principal and interest deferred until a balloon payment at the end of the term.

b. Up front, the entire $5 million of interest ($10 million x 5% x 10 = $5 million) would be deductible from the gross estate, creating an estate tax savings of at least $2 million (these loans by their terms cannot be prepaid (unless at that time all interest payable on the full note would be due).

4. The Proposed Regulations

a. Provide that interest expense is deductible *only if*, among other things, the loan's terms are ***actually and necessarily incurred*** in the administration of the decedent's estate and are ***essential*** to the proper settlement of the decedent's estate.

b. Provide a nonexclusive list of factors to consider in determining whether interest expense payable pursuant to such a loan obligation of an estate satisfies the applicable requirements, e.g.:

i. Whether the loan obligation is entered into by the executor with a lender who isn't a substantial beneficiary of the decedent's estate (or an entity controlled by such a beneficiary) at a time when there's no available alternative to obtain the necessary liquid funds to satisfy estate obligations.

ii. If the loan obligation carried an extended loan term with a single balloon payment that doesn't correspond with the estate's ability to satisfy the loan.

c. In those cases, the interest accruing on the loan isn't necessarily incurred in the administration of the estate and therefore isn't deductible.

F. Substantiating Value of Claims Against Estate

1. The proposed regulations revisit the "qualified appraiser" and "qualified appraisal" requirements in the context of valuing claims against an estate.

2. The proposed regulations require a written appraisal that adequately reflects the current value of the claim when the Form 706 estate tax return is being completed.

3. The current value of the claim should take into account post-death events occurring prior to the time a deduction is claimed, as well as those events reasonably anticipated to occur.

G. Claims Based on Decedent's Personal Guarantee

1. Under the Proposed Regulations, claims based on a decedent's personal guarantee of another's debt must be:

   a. Bona fide, and

   b. In exchange for adequate and full consideration in money or money's worth (as opposed to gratuitous, even if enforceable under applicable state law).

2. In addition, the estate's right of contribution or reimbursement, if any, will reduce the amount deductible.

3. Test Provided Under the Proposed Regulations:

   a. A decedent's agreement to guarantee a bona fide debt of an entity in which the decedent had control (within the meaning of IRC Section 2701(b)(2)) at the time of the guarantee satisfies the requirement that the agreement be in exchange for adequate and full consideration in money or money's worth.

4. Alternative Test:

   a. If, at the time the guarantee is given, the maximum liability of the decedent under the guarantee didn't exceed the fair market value of the decedent's interest in the entity.

5. Potential Negative Inference:

   a. A decedent's personal guarantee in circumstances that fall outside these circumstances may not give rise to an estate tax deduction, even though the decedent may have had a substantial interest in the entity.

H. Basis Consistency Final Regulations (T.D. 9991 (September 17, 2024))

1. Consistent Basis Requirement under IRC 1014(f):

   a. Taxpayer's initial basis in property acquired from a decedent cannot exceed:

      i. The property's final value for estate tax purposes; or

      ii. If no final value has been determined, then the basis is the property's reported value on the federal estate tax return or on Form 8971.

   b. Requirement applies until the entire property is sold, exchanged, or otherwise disposed of in a recognition transaction for income tax purposes or the property becomes includible in another gross estate.

2. Required Information Return:

   a. Form 8971.

b. Filed with IRS (and Schedule A with beneficiaries) on or before the earlier of:

i. 30 days after the due date of the estate tax return or

ii. 30 days after the date on which the estate tax return is filed with the IRS.

c. If a beneficiary acquires property after the due date of the estate tax return, the Statement must be furnished to the beneficiary by January 31 of the year following the acquisition of that property.

d. Executors have a duty to supplement the Information Return or Statements upon the receipt, discovery, or acquisition of information that causes the information to be incorrect of incomplete.

3. Penalties:

a. May be imposed under:

i. Reg. §301.6721-1(h)(2)(xii) for filing an incorrect Information Return; and

ii. Reg. §301.6722-1(e)(2)(xxxv) for filing incorrect Statements (i.e., Schedule A).

b. In addition, an accuracy-related penalty can be imposed under Reg. §1.6662-9 on the portion of the underpayment of tax relating to property subject to the consistent basis requirement that is attributable to an inconsistent basis.

4. Effective Date:

a. Final Regs are effective for estate tax returns filed after September 17, 2024.

b. But, the basis consistency requirements in general apply to estate tax returns filed after July 31, 2015, which is the date Section 2004 of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Public Law 114-41, 129 Stat. 443, enacted sections 1014(f), 6035, 6662(b)(8), 6662(k), 6724(d)(1)(D), and 6724(d)(2)(II) of the Internal Revenue Code.

XII. CASES – ESTATE PLANNING

A. Buy-Sell Agreements & Life Insurance (*Connelly v. United States*, 602 U.S. ____ (2024)

1. Facts:

a. Mike & Tom Connelly were sole shareholders.

b. Mike and Tom collectively owned 500 shares.

i. Mike owned 385.9 shares (77.18%).

ii. Tom owned 114.1 shares (22.82).

c. Buy-sell agreement provided two ways of determining stock value:

i. Certificate of Agreed Value.

ii. Appraisal.

d. Neither were utilized.

e. Company maintained $3.5 million in life insurance, and when Mike died it paid $3 million to his estate.

f. During the audit, the company obtained an appraisal from its CPA who valued the company at $3.86 million simply because that amount multiplied by Mike's interest equaled the $3 million paid.

2. Estate's Arguments:

a. The price paid for Mike's shares was determined pursuant to the buy-sell agreement.

b. The liability to Mike under the buy-sell agreement offsets the proceeds from the policy.

3. Lower Court:

a. The price was not determined under the buy-sell agreement.

b. It was simply the result of an agreement between Tom and Mike's estate.

c. Finding in favor of the IRS, the court reasoned that a hypothetical buyer of the company would end up with either of the following:

i. A company worth $6.86 million (assuming the proceeds are retained by the company), or6

ii. $3 million in cash and a company worth $3.86 million following the redemption of the portion of the shares acquired that represented Mike's interest.

d. In effect, a hypothetical willing buyer would not factor a company's redemption obligation in its assessment of the value of the company,

because in purchasing the entire company, the buyer would have all the shares that would be redeemed under the redemption obligation and then the redemption obligation would be to itself.

4. Appeal to the Supreme Court

   a. The U.S. Supreme Court granted review of *Connelly* on December 13, 2023.

   b. Connelly created a split with other circuits, particularly the 11th Circuit in *Estate of Blount v. Commr.*, 428 F.3d 1398 (2005).

   c. In *Blount*, the 11th Circuit held that a closely held company's obligation to redeem shares offset the life insurance proceeds.

5. Supreme Court:

   a. Upheld the lower court in *Connelly*, and overruled *Blount*.

   b. Held that a corporation's contractual obligation to redeem shares is not necessarily a liability that reduces a corporation's value for purposes of the federal estate tax.

   c. Sticking point for the Court appears to have been the result implicit in the estate's position that the company's redemption of Mike's shares left Tom with a larger ownership stake in a company with the same value as before the redemption.

   d. According to the Court, "That cannot be right: A corporation that pays out $3 million to redeem shares should be worth less than before the redemption."

XIII. MICHIGAN

A. Phase-Out of Retirement Tax

1. Background:

   a. Signed into law on March 7, 2023.

   b. Phases out the state's "retirement tax" over four years.

   c. Allows taxpayers to choose between the current limitations on the deductibility of retirement and pension income or the limitations specified in the new law.

Tax Year	Retiree Date of Birth	Phase-in Subtraction
2023	Jan. 1, 1946 – Dec. 31, 1958	Up to 25%
2024	Jan. 1, 1946 – Dec. 31, 1962	Up to 50%
2025	Jan. 1, 1946 – Dec. 31, 1966	Up to 75%
2026	N/A	Up to 100%

2. Example: 2023 Tax Year

   a. Those born in 1945 or before: There is no change. You can still deduct the full amount of the allowable deduction. For the 2023 tax year, it's $61,518 for single returns and $123,036 for joint returns.

   b. Those born between 1946-1952: You can choose between the maximum deduction of:

i. $20,000 for single returns and $40,000 for joint returns (the previous provisions of the Income Tax Act of 1967), or

ii. Up to 25% of the maximum amount of the allowable deduction for those born in 1945 or before, which for the 2023 tax year would equal a deduction of $15,379.50 for a single return and $30,759 for a joint return.

c. Those born between 1953-1958 who are 67 years of age or older: You can choose between the maximum deduction of:

i. $20,000 for single returns and $40,000 for joint returns (the previous provisions of the Income Tax Act of 1978), or

ii. Up to 25% of the maximum amount of the allowable deduction for those born in 1945 or before, which for the 2023 tax year equals $15, 379.50 for a single return and $30,759 for a joint return.

d. Those born between 1953-1958 who are 66 years of age or younger: You are not eligible for a deduction under the Income Tax Act of 1967 but do qualify under Public Act (PA) 4 of 2023 to deduct up to 25% of the maximum amount of the allowable deduction for those born in 1945 or before, which for the 2023 tax year equals $15,379.50 for a single return and $30,759 for a joint return.

e. Those born in 1959 and after: You are not eligible for a deduction in the 2023 tax year.

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B. Flow-Through Entity Tax

1. Background:

a. Allows owners of Flow-Through Entities (S-Corporations & Partnerships) the option to pay and deduct their state and local income taxes at the business-entity level instead of individually.

b. Mirrors the so-called State and Local Tax (SALT) cap workaround enacted by several other states and is designed to avoid the $10,000 federal limit on individual itemized deductions for state and local taxes.

2. Developments:

a. According to a notice issued on April 14, 2023, taxpayer must apply for an extension of time to file its annual flow-through entity tax return, even if the taxpayer was granted an extension on their federal return.

b. Because of the reduction in the personal income tax rate for tax year 2023, the FTE tax rate is likewise reduced to 4.05% for all flow-through entities with tax years beginning in 2023.

c. However, since the income tax rate in effect for 2024 under MCL 206.51 is 4.25%, the FTE tax rate for 2024 is also 4.25%.

d. Affected persons should review and adjust their estimated payments, if necessary.

e. Overpayments in 2023 will be credited to 2024.

C. Reporting Adjustments from Partnership Level Audits

1. L. 2022, S248 (P.A. 148) ("2022 Public Act 148") (see, *State Tax Update*, 07/21/2022), created Chapter 18 within Part 3 of the Income Tax Act.

2. Generally, Chapter 18 requires final federal adjustments that arise from a partnership level audit or administrative adjustment request subject to the federal Bipartisan Budget Act (BBA) of 2015 to be reported and paid in one of two ways:

   a. The partnership may report adjustments to members, who must then separately report and pay their share of the applicable Michigan income tax due (i.e., the "push out" method) or,

   b. The partnership may elect to report and pay any applicable Michigan income tax on behalf of its members (i.e., the "pay up" method).

3. Reporting Deadlines:

   a. A 90-day deadline:

      i. For partnerships that "push out" adjustments, to report to each direct partner their share of the adjustments and, if applicable, pay any Michigan income tax on behalf of direct partners previously included on a composite return; and

      ii. For all partnerships to report certain preliminary information about the adjustments to the Department if it will be making the "pay up" election.

   b. A 180-day deadline:

      i. For direct members of a partnership under the "push out" method, to report their share of adjustments to the

Department and to pay the Michigan income tax owed on those adjustments; and

ii. For a partnership that made the "pay up" election, to pay the collective Michigan income tax owed on those adjustments.

4. Effective Date: (Notice Regarding the Implementation of 2022 Public Act 148, Mich. Dept. Treas., 08/26/2022)

a. Chapter 18 is generally applicable for the reporting of certain federal adjustments for tax years beginning on and after January 1, 2018.

b. Because PA 148 was also given retroactive effect, Chapter 18 also applies to federal adjustments that have a "final determination date" both prior to and after its date of enactment.

c. The 90-day and 180-day deadlines referenced above were treated as beginning on January 1, 2023, for any federal adjustment subject to Chapter 18 that had a "final determination date" prior to that date.

5. Annual Report: (Michigan Treasury Update, Mich. Dept. Treas., 09/01/2023

a. The Michigan Federal Adjustments Report ("FAR") for Partnerships and Other Flow-Through Entities ("FAR for partnerships") must be used by partnerships subject to PA 148 to report information and adjustments to Treasury.

b. The FAR for partnerships is an interactive Excel document that collects the necessary information about adjustments and partners and reports the partnership's tax due or refund.

c. It is expected that completed reports will be uploaded through Michigan Treasury Online (MTO) beginning in 2024.

6. Payments or Refund Claims:

   a. Under the "Pay Up" method, tax, penalty, and interest due from partnerships are paid using MTO.

   b. Under the "Push Out" method, partnerships are responsible for paying or seeking a refund on behalf of all partners that participated in a composite return (Form 807) filed for the reviewed tax year.

   c. These partnerships should use Partnership Audit Adjustments Payment Voucher (Form 5839) to make payments.

7. Reporting Obligations of Partners:

   a. Partners (or members of another flow-through entity in a tiered structure) that receive pushed-out Michigan adjustments from their partnership or other flow-through entity will have reporting obligations to Treasury.

   b. In addition, partners will pay tax, penalty and interest to Treasury or make a refund request, whichever is applicable.

   c. Information about these pushed-out adjustments comes from the partnership; there is no associated Treasury form.

   d. Partners should then fulfill their obligations to Treasury under the procedures specific to the partner's income tax.

   e. For a partner subject to the Corporate Income Tax (CIT), the partner should file an amended CIT return (Form 4892) for the reviewed tax year and pay tax or request a refund as they would for any other CIT amended return.

f. For a partner subject to the individual income tax – including individuals, trusts, and estates and excluding anyone who participated in a composite return for the reviewed tax year – tax, penalty, and interest due should be paid using a paper check and the Form 5839 voucher.

D. Credit Card Surcharge Subject to Sales Tax (Michigan Department of Treasury Update (May 2024)

1. Background:

a. Seller accepting a credit card payment pays a fee or percentage of the payment to the processor (e.g., Visa or Mastercard).

b. Example: Processor takes a $1 fee on a restaurant credit charge of $50.

c. Some sellers are passing the fee along to the customer turning the $50 charge into $51.

2. Issue: Is the $1 subject to sales tax?

3. Law: Sales price includes "serviced cost[s] . . . And any other expense of the seller." MCL 205.51(1)(d)(2)

4. Result: The fee is subject to sales tax.

E. Officer Liability for Unpaid Withholding Tax (*Mertz v. Dept. of Treasury*, Mich. Ct. App., Dkt. No. 365480 (June 13, 2024)

1. Facts:

a. Petitioner was controller of a company purchased by a successor.

b. As controller, petitioner signed checks, tax returns, etc.

c. Using those records, Treasury "bookended" petitioner's involvement in corporate tax matters during the period of the unpaid withholding tax.

d. Petitioner presented little evidence to the contrary, instead challenging his willfulness and whether Treasury established the "prima facie" evidence required to find someone liable as a responsible party under RAB 2015-23.

2. Responsible Person:

a. Officer of the business.

b. Controlled, supervised, or was responsible for the filing of returns or payment of taxes.

c. Was an officer during the "time period of default".

d. "Willfully" failed to file a return or pay the tax due.

3. Result:

a. Court of Appeals affirmed the Tax Tribunal's decision upholding the Treasury's assessment of corporate officer liability under MCL 205.27a(5)

XIV. CITY OF DETROIT

A. Withholding (News & Events Digest: August 2023, Mich. Dept. Treas., 08/31/2023)

1. State law requires that a withholding employer in any city where the Michigan Department of Treasury (Treasury) administers taxes must file a

return and pay the tax withheld for each calendar month by the end of the 15th day of the following month.

2. Effective January 1, 2024, employers are required to file and pay their City of Detroit withholding tax monthly.

3. State law also requires employers to file an annual City of Detroit Income Withholding Reconciliation (Form 5321) before February 28 of the immediately following calendar year.

4. City Withholding Tax forms and documents have been updated to reflect the new monthly filings. The forms will only be available online or through applicable software vendors. Paper forms and booklets will no longer be printed and mailed to employers.

5. Treasury implemented an electronic payment system that accepts debit and credit cards, or Automated Clearing House (ACH) or Electronic Fund Transfer (EFT) payments.

6. Debit and credit card payments have a service fee, while ACH or EFT payments do not.

7. Taxpayers interested in using a fee-free EFT payment method must submit a City of Detroit Electronic Funds Transfer Debit Applications, Account Update (Form 5473).

B. City Income Tax Administration

1. Notice Regarding Amendment of the City Income Tax Act, Mich. Dept. Treas., 02/14/2024

a. The Michigan Department of Treasury has issued a release explaining changes enacted in 2023 and effective February 13, 2024.

b. For cities that have engaged the Department to administer their income tax, the legislation:

   i. Allows employers to voluntarily register to withhold on the compensation of their employees who reside in that city;

   ii. Expands a city's lien and levy authority to taxpayers (including business entity taxpayers) working or living in such a city; and

   iii. Modifies the procedures for appealing a notice of intent to assess, a refund denial, or a credit audit.