ROUNDUP OF RECENT TAX DEVELOPMENTS

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I. INDIVIDUALS

A. Noncustodial Parent Rules (*Hicks, Jr.*, T.C. Memo, 2022-10, 2/23/2022).

1. Section 152(e)

a. Treats child as qualifying child of noncustodial parent.

b. Shifts right to claim dependency exemption and Child Tax Credit.

2. Two conditions:

a. Custodial Parent “signs a written declaration”.

b. Noncustodial parent “attaches” it to his/her return.

3. Background:

a. “Shared parenting plan” signed by unmarried couple.

b. Subsequently modified by court order.

c. Taxpayer filed return claiming dependency exemption and Child Tax Credits.

d. No attachments, e.g., Form 8832, *Release/Revocation of Claim to Exemption for Child by Custodial Parent.*

4. Court determination

a. Shared Parenting Plan remains in effect.

b. Regardless of subsequent court orders.

B. Health and Dependent Care Flexible Spending Arrangements.

1. Health FSAs

a. Employees can contribute up to $2,850 in 2022.

b. Including a limited-purpose FSA restricted to dental and vision care, which can be used in tandem with an HAS.

2. Dependent Care FSAs.

a. Set by statute, but not adjusted annually for inflation.

b. $5,000 in MFJ in 2022.

c. $2,500 in MFS in 2022.

d. The limits had been $10,500 (MFJ) and $5,250 (MFS) in 2021 under the American Rescue Plan act of 2021.

3. Prior Law

a. 2 ½ month grace period for health or dependent care FSAs

b. Health FSAs can additionally allow participants to roll over up to $550 of unused funds.

4. Consolidated Appropriations Act, 2021 (*Notice 2021-15*).

   a. Health and dependent care FSA participants can carry over unused balances:

      i. From 2020 into 2021

      ii. From 2021 into 2022

   b. Grace period for spending unused FSA funds extended to 12 months for 2020 and 2021.

   c. Employees who stopped participating in a health FSA during 2020 or 2021 may continue to be reimbursed through the end of the plan year in which their participation terminates, including grace periods.

   d. Prior to CAA, a qualifying child generally had to be under age 13.

   e. CAA changed age 13 to age 14 for plan years in which the regular enrollment period was on or before 1/31/2020 or, if the employee had an unused balance for that plan year, the subsequent plan year.

   d. Dependent care FSA funds that would have been excluded from income if used during 2020 or 2021 are excluded and not considered wages for 2021 and 2022, respectively. (*Notice 2021-26*)

   e. As a result, unused amounts carried over are not taken into account in determining the annual limit applicable in the following year.

C. Premium Tax Credit

1. Premium Tax Credit (*IRC §36B*).

   a. Refundable credit design to subsidized 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. 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.

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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.

   d. Current regulations under Section 36B provide that if self-only coverage is affordable for an employee, then it is also affordable for the employee's spouse and dependents if filing a joint return.

   e. Proposed regulations would base the affordability of employer sponsored minimum essential coverage on the employee's share of the cost covering the employee those family members.

D. Election Required to Itemize Deductions (*Salter*, T.C. Memo. 2022-029, 4/5/2022).

1. Background:

   a. Taxpayer claimed to have filed a return, but had no record.

   b. Filed an amended return claiming itemized deduction.

2. Tax Court:

   a. Section 63(e)(2) – election to itemize is made on return.

   b. Section 63(e)(3) – permits a change of election

   c. But, since no return was filed, no election to itemize was made and no change is permitted.

E. Charitable Contribution Substantiation Requirements (*Albrecht*, T.C. Memo. 2022-53, 5/25/2022).

1. Background:

   a. Taxpayer made large contribution of native American artifacts to the Wheelwright Museum of the American Indian in NM.

   b. A 5-page "Deed of Gift" was executed.

   c. It stated that the gift was 'unconditional and irrevocable" unless otherwise stated in the "Gift Agreement".

   d. No "Gift Agreement" was provided by the Museum.

2. IRS:

   a. Denied deduction.

   b. Did not contest that no consideration was given by the museum for the gift.

   c. Determination was based on Deed of Gift not specifying that no goods or services were provided in exchange for the gift.

3. Court:

   a. Agreed finding that reference to a 'Gift Agreement" prevented a finding that no goods or services were provided.

F. Employer Leave-Based Donation Program

1. Employer leave-based donation program:

   a. Employees can forego vacation, sick or personal leave.

   b. In exchange for employer making cash payments to Section 170(c) charitable organizations.

2. Notice 2022-28:

   a. Permits payments to qualified charities to aid victims of the Russian invasion of Ukraine.

   b. Payments must be made prior to January 1, 2023.

3. Employee not treated as constructively receiving:

   a. Grosse income, or

   b. Wages

4. Employer may deduct donations as:

   a. Charitable contribution under Section 170(c), or

   b. Business expense under Section 162.

G. 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.

2. Effective for 2021-2025.

H. Employer Not Required to Provide Correct Tax Advice (*Schneiter,* U.S. Court of Federal Claims, 4/7/2022).

1. Background:

   a. Taxpayer was an employee of the Department of Defense.

   b. Moved between stations and relied on tax advice regarding the deduction of moving expenses.

   c. The advice overlooked the changes made in 2017 by TCJA.

2. Court:

   a. Although the government provided tax advice, there was no indication that it had an obligation to provide accurate tax advice.

II. BUSINESS.

A. Limitation on Excess Business Losses of Non-Corporate Taxpayers *(IRC §461(l)*

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. Thus, the limitation applies to 2021.

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

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

B. Tax Home for Business Purposes (*Harwood*, T.C. Memo. 2022-8, 2/15/2022).

1. Background:

a. Taxpayer was a steamfitter on construction projects in Washington and Oregon.

b. He lived in Yakima where he was a member of the union and had most of his jobs.

c. During the years in question, he had jobs for 5 different employers that required him to be away from home.

d. He deducted travel expenses incurred in commuting on weekends between his home and the jobsite.

2. Law:

   a. A taxpayer must be away from home to deduct reasonable and necessary travel expenses.

   b. Courts have generally interpreted a taxpayer's home to refer to the vicinity of a taxpayer's principal place of business, rather than his personal residence.

   c. But, under Rev. Rul. 73-529 a taxpayer's residence may be treated as his tax home if his principal place of business is temporary rather than indefinite.

3. IRS:

   a. Taxpayer had no business reason for living in Yakima.

4. Court:

   a. Disagreed.

   b. Taxpayer was a member of the local union and almost all of his work during the years at issue were in the union's footprint.

   c. Therefore, the taxpayer was "away from home" for purposes of being able to deduct travel expenses.

5. Side Note:

   a. The case involved an employee deducting unreimbursed employee business expenses which are temporarily nondeductible under TCJA.

   b. Same rules would apply for the travel expenses of a self-employed individual.

C. Cash Payments for Contract Labor Deductible (*Spencer*, T.C Summary 2022-8, 6/7/2022).

1. Background:

a. Taxpayer deducted contract labor expenses

	SCHEDULE C	CANCELLED CHECKS
2016	$112,800	$36,205
2017	$72,000	$47,265

b. Testified that he paid 12 workers on average $300 to $400 per week.

c. Did not identify workers, but also produced bank records showing $67,000 of cash withdrawals in 2016 and $130,000 in 2017.

2. Law:

a. Reg. §1.6001-1(a): Taxpayers are required to maintain books and records sufficient to establish income and deductions.

b. *Cohan*, 2nd Cir. 1930: Tax Court disfavors a taxpayer "whose inexactitude is of his own making".

3. Tax Court

a. Found documentation lacking, but testimony credible.

b. Allowed deduction of $46,800 in 2016 and $19,500 in 2017.

D. Reasonable Compensation (*Clary Hood, Inc.*, T.C. Memo. 2022-15, 3/2/2022).

1. Background

a. Taxpayer owned a C corporation involved in land grading and excavating for construction projects.

b. Sustained losses during 2009-2011 which were partially offset by reductions in his salary.

c. In 2014, an outside CPA firm did a compensation study and determined that the taxpayer had been undercompensated during the period of 2000 through 2016 by $5 million.

d. After a board meeting in 2015, the taxpayer was granted a $5 million bonus.

2. Result:

a. When asked why he considered it acceptable to take out so much money in 2015 when he had been reluctant to do so in the past, the taxpayer testified that he needed to start getting money out of the company from an income tax perspective in anticipation of a possible sale of the company.

b. Court concluded that taxpayer had not adequately established that the amount paid was both reasonable and paid solely as compensation for services.

E. Improper Worker Classification (*Pediatric Impressions Home Health, Inc.*, T.C. Memo 2022-35 (Tax Ct.).

1. Background:

a. Pediatric Impressions Home Health (PIHH) provides in-home nursing services.

b. Before 2016, it employed approx. 99 nurses.

c. Starting in 2016, it began treating many of them as contractors.

d. Notwithstanding, the following practices continued:

i. PIHH performed background checks.

ii. PIHH supplied contracts for indefinite period.

iii. PIHH could fire nurses, but two weeks' notice was required for nurses to quit.

iv. PIHH had contracts with insurance companies and received payments.

v. PIHH set work schedules.

vi. Patient's physician provided "plan of care" and PIHH ensured nurses followed it.

vii. PIHH required nurses to attend in-service training sessions.

viii. PIHH represented to patients and physicians that nurses worked for PIHH.

2. IRS Position:

   a. PIHH improperly classified nurses for 2016-2018.

   b. Assessed:

      i. $171,488 in additional employment taxes.

      ii. $3,255 failure to deposit penalty (Section 6656).

      iii. $34,298 accuracy penalty (Section 6662(a)).

3. Tax Court:

   a. Reviewed:

      i. Degree of control.

      ii. Opportunity for profit.

      iii. Relative investments.

      iv. Permanency of relationship.

      v. Skill and initiative required to perform job.

   b. Concluded nurses were common law employees and upheld penalties.

F. Mileage Log Must be Contemporaneous (*Wolpert*, T.C. Memo. 2022-070, 7/7/2022).

1. Background

   a. Taxpayer traveled for his consulting business.

   b. Deducted car and truck expenses on Schedule C.

   c. Produced a computer-generated spreadsheet instead of a contemporaneous log.

2. Court.

   a. Substantiation requirements of Section 274(d) not satisfied.

   b. Not contemporaneous.

G. Improperly Forgiven PPP Loans (Ltr. Rule. 202237010, 8/19/2022).

1. Background:

   a. Taxpayer made representations that conditions for forgiveness of a PPP loan were satisfied.

   b. Did not factually satisfy the condition.

   c. As a result, PPP loan was improperly forgiven.

2. Question:

   a. Can taxpayer exclude the forgiven loan from gross income?

3. Answer:

   a. Loan forgiveness is taxable if it does not satisfy any of the exclusion form income rules.

H. Settlement Not Due to Physical Injury. (*Dern*, T.C. Memo. 2022-90, 8/30/2022)

1. Background:

   a. Taxpayer agreed to settlement with former employer.

   b. “for alleged personal injuries, costs, penalties, and all other damages and claims”

   c. “for and on account of [the taxpayer’s] claims alleging compensatory damages, emotional injuries, penalties, and punitive damages”.

2. Court:

   a. Settlement was taxable.

   b. To justify exclusion from income under Section 104(a)(2), the settlement must be in lieu of damages for physical injuries or physical sickness.

I. S Corporation Expense Not Deductible on Shareholder's Return (T.C. Memo, 2022-97, 9/21/2022).

1. Background:

   a. Taxpayers owned an S corporation.

   b. Made direct payments of property and utility expenses.

   c. Claimed deductions on their personal returns.

   d. Contended in court that the payments should be treated as capital contributions which the S corporation would then be entitled to deduct.

2. Court:

   a. A taxpayer cannot deduct expenses paid on behalf of another taxpayer.

   b. Income of S Corporation must be matched at corporate level against expenses incurred to produce that income before the net income can flow through to the shareholders.

   c. That matching is accomplished by reporting the income and expenses on the S corporation's return.

J. Penalty Relief for 2019 and 2020 Returns (Notice 2022-36).

1. IRS is providing relief from certain failure-to-file penalties with respect to returns for the 2019 and 2020 tax years.

2. Part of the ongoing COVID-19 pandemic relief declared by the President as a national emergency on March 13, 2020.

3. Abatement is automatic.

4. Provided that the returns were filed before September 30, 2022.

K. Relief for S Corporations.

1. Rev. Proc. 2022-19 allows S corporations and their shareholders to obtain relief in six frequently-encountered areas without requesting a private letter ruling.

2. The IRS identified these issues as not affecting the validity or continuation of a corporation's election to be treated as an S corporation or to treat its corporate subsidiary as a qualified subchapter S subsidiary (QSub).

3. Six key areas are:

a. The one class of stock requirement and governing provisions, including "principal purpose" conditions;

b. Disproportionate distributions;

c. Certain inadvertent errors on or omissions from Forms 2553 (S election) or Form 8869 (QSub election), which Rev. Proc. 2013-130 and Rev. Proc. 2004-35 do not address;

d. Missing administrative acceptance letters for an S election or QSub election;

e. Federal income tax return filings inconsistent with an S election or a QSub election; and

f. Potential retroactive corrections of nonidentical governing provisions (e.g., rights to distributions or liquidation proceeds that are not identical among shareholders).

4. Rev. Proc. 2022-19 details the areas in which the IRS will not ordinarily issue a PLR and, in doing so, amplifies and modifies Rev. Proc. 2022-3.

5. The appendices to Rev. Proc. 2022-19 provide a sample corporate governing provision statement and a sample shareholder statement.

6. An officer and affected shareholders must complete and sign these statements to rely on Rev. Proc. 2022-19 for relief related to retroactive corrections of nonidentical governing provisions.

7. Rev. Proc. 2022-19 is effective October 11, 2022, and includes a transition rule for pending PLRs.

III. MISCELLANEOUS

A. Inflation Reduction Act of 2022

1. Signed into Law on August 16, 2022.

a. New 15% corporate AMT on C corporations with more than $1 billion in adjusted financial statement income, as defined under Section 56A (i.e., book income).

b. Extends limitation on excess business losses of noncorporate taxpayers through tax years beginning before 2029.

c. Adds a 1% excise tax on repurchases of stock after 2022 by publicly traded companies.

2. 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. Accounting Services for Russians Banned.

   1. U.S. Department of Treasury Office of Foreign Assets Control (OFAC), in a press release dated May 8, 2022, has determined that providing the following services to any person in the Russian Federation is prohibited under Executive Order (EO) 14071:

      a. Accounting.

      b. Trust and Corporate Formation.

      c. Management Consulting.

   2. Subject to sanctions under EO 14024.

C. Section 754 Election (TD 9963, 8/5/2022).

1. Section 754 elections require that the basis of partnership property be adjusted for:

a. Distributions, as provided in Section 734; and

b. Transfers, as provided in Section 743.

2. IRS has issued final regulations eliminating a requirement in the proposed regulations that a Section 754 election filed with a partnership return be signed by a partner.

D. Chief Counsel has Final Say on Innocent Spouse Relief (*Delponte*, 158 T.C. No. 7, 5/5/2022).

1. Background:

a. Wife separated from husband in 2000.

b. Husband sold tax-avoidance strategies.

c. IRS issued deficiencies for 1999, 2000 and 2001.

d. Husband and wife filed joint during those years, but husband did not tell wife about the notices of deficiency.

e. IRS issued another notice of deficiency in 2005, and three more in 2009.

f. Husband filed petition claiming innocent spouse relief.

g. Wife first learned of the deficiencies in 2010, hired an attorney, and ratified the petition.

2. Procedure:

   a. IRS Office of Chief Counsel referred issue to IRS' Cincinnati Centralized Innocent Spouse Operation (CCISO).

   b. CCISO concluded that wife should be granted relief.

   c. Instead of accepting conclusion, Office of Chief Counsel requested that wife participate in a *Branerton* conference (*Branerton*, 61 T.C. 691 (1974)) to exchange documents and information and evaluate claim for relief.

3. Wife's Position:

   a. IRS had delegated innocent spouse relief to CCISO.

   b. Chief Counsel's job is to defend CCISO's determination.

4. Chief Counsel:

   a. It is their responsibility for deciding what positions the IRS takes in litigation.

5. Tax Court:

   a. Decided with Chief Counsel.

   b. Tax Court basically saying wife should have cooperated with Chief Counsel and followed through on all the proper procedures before going to Tax Court.

E. Crowdfunding.

1. Form 1099-K, *Payment Card and Third-Party Network Transactions*. (FS-2022-20)

a. Required to be filed with IRS and issued to persons receiving funds from a crowdfunding campaign.

b. Prior to 2022, threshold met if payments to recipient exceed $20,000 from more than 200 donations.

c. Beginning in 2022, required if payments exceed $600 regardless of the number of donations,

d. Exception if contributors do not receive any goods or services in exchange for their contributions.

F. Mandatory Repatriation Tax Constitutional (*Moore*, 9th Circuit Court of Appeals, 6/7/2022).

1. Background:

a. Taxpayers owned more than 50% of a foreign corporation (a "CFC").

b. Under prior law, they did not pay tax on foreign earnings until they were distributed.

c. TCJA created the one-time Mandatory Repatriation Tax (MRT).

i. Imposed on U.S. persons owning 10% or more of a CFC.

ii. CFC profits after 1986, regardless of whether earnings are distributed.

d. Taxpayers challenged constitutionally.

2. Court Decision:

   a. The MRT is consistent with the Apportionment Clause of the U.S. Constitution.

   b. Direct tax that is apportioned among the states by population.

   c. Realization doesn't determine a tax's constitutionality.

   d. No constitutional bar to Congress disregarding the corporate form to facilitate taxing a shareholder's income.

   e. Retroactive effect does not violate the Fifth Amendment Due Process Clause.

G. 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. 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).

    b. “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.

    c. 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.

10. 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.

11. 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

12. Examples:

    a. Senior officer of the reporting company;

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

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

13. 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,

IV. RETIREMENT

A. Proposed Regulations on RMD's

1. Issued on February 23, 2022, under the SECURE Act. (*REG-105954-20)*

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".

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

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.

10. 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.

11. 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 beneficiary takes the RMD no later than his or her tax return due date (with extensions).

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

13. 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.

14. A "Specified RMD" is defined as:

    a. Any distribution that would be required to be made in 2021 or 2022.

        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. Cryptocurrency

1. DOL Compliance Assistance Release No. 2022-01, dated March 10, 2022

    a. 401(k) plan participant-directed investments in cryptocurrencies.

    b. "Cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option" to the investment menu of a self-directed 401(k) plan.

    c. Calls into question the availability of cryptocurrencies through a plan's brokerage window.

C. Arbitration of ERISA Claims (*Hawkins v Cintas Corporation, No. 21-3156, dated 4/27/2022)*.

1. Sixth Circuit has held that claims for breach of fiduciary duty under §502(a)(2) of ERISA, belong to the plan.

2. Plaintiffs asserting such claims for alleged harm to their individual retirement accounts in defined contribution plans may not be compelled to arbitrate those claims absent the plan's consent.

3. Arbitration cause was contained in the participants' employment agreements.

D. SECURE Act 2.0

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

2. Three 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 (RISH & 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.

3. Have a bi-partisan support and are currently going through the reconciliation process, so final legislation is possible by the end of 2022.

4. Retirement Plans:

   a. The House and Senate would increase the small employer plan start-up credit for employers with up to 50 employees (House) or 25 employees (Senate).

   b. Long-term part-time workers were given the opportunity to participate in retirement plans after three years in the original SECURE Act. All three bills reduce this to two years, effectively changing the original SECURE Act rule retroactively.

   c. Currently, automatic enrollment and automatic escalation of contributions are allowed, but not required. The House bill requires many plan sponsors to automatically enroll employee with a 3-10% savings requirement for all new 401(k) and 403(b) plans. Though popular, neither Senate bills took this topic up, so its fate is uncertain.

   d. The House and Senate both include a provision for helping those paying off student loans to start retirement savings by qualifying for employer matching contributions. Qualified student loan payments would count as an elective deferral for match purposes. In other words, the employee pays toward their student loan and the employer makes a matching contribution as if it were a plan contribution.

5. Individual Retirement Accounts (IRAs)

   a. The IRA catch-up limit has been set at $1,000 since 2006. The House and Senate both propose indexing catch-up contributions in the same manner as regular IRA contributions. The catch up would have an increased limit sometime between ages 60 and 64, although the House bill and EARN Act each define a slightly different age range.

   b. In the House and Senate versions, a Roth option would become available for SEP (Simplified Employee Pension) and SIMPLE (Savings Incentive Match Plan for Employees) IRAs, opening up the opportunity to make after-tax contributions. Employers would also have the option to designate matching contributions as Roth.

   c. Qualified Charitable Distributions (QCDs) from IRAs currently $100,000 annually, would be indexed for inflation. In addition, IRA owners may elect a new one-timed $50,000 (indexed) QCD to a charitable remainder annuity trust, charitable remainder trust, or charitable gift annuity.

6. Required Minimum Distributions (RMDs)

   a. The required minimum distribution age would increase from 72 to 75 in SECURE 2.0, allowing savings to grow for longer. The House bill gradually increases over several years with age 73 in 2023, 74 in 2030 and 75 in 2033, whereas the Senate proposes one jump from 72 to 75 in 2032.

   b. Both bills reduce the penalty for not taking RMDs on time. If an individual corrects a shortfall during a two-year window, the excise tax due would be 10% of the shortfall rather than the 50% due today.

V. 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 interests 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. 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 interest 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 the Proposed Estate Administration Regulations:

1. 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.

2. 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.

3. 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 under the Proposed Estate Administration Regulations.

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 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, 6/28/2022):

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

      i.. Section 6161 extension for reasonable cause.

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

      iii. Underpayment of a tax or deficiency.

   b. "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 under the Proposed Estate Administration Regulations.

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 $2mm (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 under the Proposed Estate Administration Regulations.

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 under the Proposed Estate Administration Regulations.

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. Simplified Method to Extend Time for Making Portability Election.

1. Effective July 8, 2022, the IRS issued Revenue Procedure 2022-32 to supersede Revenue Procedure 2017-34:

    a. Allows for a late estate tax exemption portability election to be made up to five (5) years from a deceased spouse's death.

    b. Previously, this window was only two (2) years from the deceased spouse's death.

2. Requirements:

   a. The decedent:

      i. Was survived by a spouse;

      ii. Died after December 31, 2010; and

      iii. Was a citizen or resident of the United States on his or her death.

   b. The estate must not be required to file an Estate Tax Return;

   c. An Estate Tax Return was not timely filed; and

   d. All the requirements for relief under Revenue Procedure 2022-32 are satisfied.

3. Requirements for Relief Under Rev. Proc. 2022-32:

   a. The executor must file with the IRS a complete and properly prepared Estate Tax Return on or before the fifth (5^{th}) anniversary of the decedent's death.

   b. The executor states at the top of the Estate Tax Return that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER §2010(c)(5)(A)"

4. Note: If the 5-year window in Rev. Proc. 2022-32 has passed, the surviving spouse can still request late election relief in a Private Letter Ruling from the IRS.

VI. MICHIGAN

A. 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 for partnerships adjustments 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).

2. 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.

3. 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 will further apply to federal adjustments that have a "final determination date" both prior to and after its date of enactment.

c. It is expected that the procedures for reporting federal adjustments under Chapter 18 will be available no later than January 1, 2023.

d. The 90-day and 180-day deadlines referenced above will be treated as beginning on January 1, 2023, for any federal adjustment subject to Chapter 18 that has a "final determination date" prior to that date.

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B. Michigan Taxation of Forgiven Student Loans. (Student Loan Forgiveness Not Subject to Income Tax in Michigan, Mich. Dept. Treas., 09/28/2022)

1. On August 24, 2022, the President announced that:

a. The U.S. Department of Education will provide up to $20,000 in debt cancellation to Pell Grant recipients with loans held by the Department of Education, and

b. Up to $10,000 in debt cancellation to non-Pell Grant recipients if the borrower's individual income is less than $125,000 ($250,000 for households).

2. The Michigan Department of Treasury subsequently issued guidance that forgiven student loans will not be subject to income tax in Michigan.

VII. CITY OF DETROIT

A. Nexus with Detroit (*Apex Laboratories International Inc. v City of Detroit*, Mich. Tax Tribunal, Dkt. No. 16-000724-R, 08/19/2022).

1. Background:

a. City asserted a nexus with the taxpayer for city income tax purposes.

b. Taxpayer's activities as a passive holding company were minimal.

c. Deposition testimony established that the taxpayer's listing of a Detroit address on documents was for "administrative convenience".

d. The Michigan Tax Tribunal previously ruled that there was an insufficient nexus for city income tax purposes.

e. The case was remanded for the Tribunal to review its decision after the U.S. Supreme Court's decision in *Wayfair*.

2. Law:

   a. Tribunal's previous determination was decided prior to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

   b. Tribunal had based its decision on the "physical presence" standard enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992).

   c. The Tribunal note that in wake of *Wayfair*, while the physical nexus is still good law, the U.S. Supreme Court ruled that a business could acquire an economic nexus regardless of where the business, employees or warehouses are located.

3. Ruling:

   a. The taxpayer lacked nexus with the city under the Commerce Clause because it was neither physically nor virtually present within the city.

   b. the taxpayer did not:

      i. Avail itself of the Detroit marketplace,

      ii. Its contacts with the city were minimal,

      iii. Those of its agents were excluded by the City of Detroit's Income Tax Ordinance, and

      iv. Overall its activities did not rise to the level of directed economic activity that occurred in *Wayfair*.

B. Federal Class Action Involving Untimely Mailing of Assessment Notices (*Howard, et al. v. City of Detroit, et al*., U.S. Ct. App. (6th Cir.), Dkt. No. 21-1261, 7/11/2022).

1. The U.S. Court of Appeals for the Sixth Circuit has held that a federal class action brought by Detroit homeowners challenging the untimely mailing of their property tax assessment notices can proceed:

   a. Although various news outlets reported the extension, Detroit did not distribute individualized mailings to homeowners to inform them of the extended review period or the waiver of the Board of Assessors protest requirement.

   b. the Court found that Detroit did not take reasonable steps to ensure this information would reach individual taxpayers,

   c. The inconsistent Michigan state court precedents do not "convincingly demonstrate" that the relief appellants seek is available in state court.