2023 Update Memorandum For

FEDERAL INCOME TAXATION OF BUSINESS ORGANIZATIONS

SIXTH EDITION

by

MARTIN J. MCMAHON, JR.
Professor of Law Emeritus
University of Florida Levin College of Law

DANIEL L. SIMMONS
Professor of Law Emeritus
UC Davis School of Law

CHARLENE D. LUKE
Hubert C. Hurst Eminent Scholar Chair and Professor of Law
University of Florida Levin College of Law

BRET WELLS
Professor of Law
University of Houston Law Center

FOUNDATION PRESS
2023

PREFACE

This 2023 Update to Federal Income Taxation of Business Organizations provides users of the text with materials reflecting developments in federal income taxation of corporations since April 30, 2019, and of partnerships as of March 31, 2020 (the dates as of which the materials in the text are current). This update is current as of July 1, 2023.

MARTIN J. MCMAHON, JR.
DANIEL L. SIMMONS
CHARLENE D. LUKE
BRET WELLS

July 2023

TABLE OF CONTENTS

TABLE OF INTERNAL REVENUE CODE SECTIONS

TABLE OF TREASURY REGULATIONS

PROPOSED REGULATIONS

TABLE OF CASES

TABLE OF NOTICES AND RULINGS

2023 Update Memorandum

FEDERAL INCOME TAXATION OF BUSINESS ORGANIZATIONS

PART 1

TAXATION OF CORPORATIONS AND SHAREHOLDERS

CHAPTER 3

THE CAPITAL STRUCTURE OF THE CORPORATION

SECTION 1. DEBT VERSUS EQUITY

A. CLASSIFICATION OF DEBT OR EQUITY

DETAILED ANALYSIS 1: THE NATURE OF THE INQUIRY

1.1. *Generally*

Page 156:

Replace the last three sentences of the second to last paragraph with the following:

In general, the 2016 § 385 regulations focused on implementing documentation requirements and on characterizing arrangements between certain related entities. They were, however, subject to significant criticism, and the documentation requirements of Treas.Reg. § 1.385–2 were removed without ever having taken effect. T.D. 9880, 84 Fed. Reg. 59,297 (Nov. 4, 2019). Nevertheless, in 2020, other portions of the regulations were finalized without any material change. Even with the issuance of final regulations under § 385, however, judicial authority will continue to govern in areas not controlled by the regulations (such as closely held businesses), and in many instances the regulations require taxpayers to look at existing judicial authority. See Treas.Reg. § 1.385-1(b).

DETAILED ANALYSIS 7: CONVERTIBLE OBLIGATIONS, HYBRID SECURITIES, AND OTHER FINANCIAL INSTRUMENTS

7.1. *Convertible Obligations*

Page 168:

After second paragraph, add the following paragraph:

In Notice 94–47, 1994–1 C.B. 357, the IRS further clarified the scope of Rev.Rul. 85-119. In this Notice, the IRS said that Rev. Rul. 85–119 would not apply in situations where the instrument "has terms substantially identical to the [Rev.Rul. 85–119] notes except for a provision that requires the holder to accept payment of principal solely in stock of the issuer (or, in certain circumstances, a related party)." Likewise, the IRS stated that "an instrument does not qualify as debt if it has terms substantially identical to the [Rev.Rul. 85–119] notes except that (a) the right to elect cash is structured to ensure that the holder would choose the stock, or (b) the instrument is nominally payable in cash but does not, in substance, give the holder the right to receive cash because, for example, the instrument is secured by the stock and is nonrecourse to the issuer."

DETAILED ANALYSIS 8: SECTION 385 REGULATIONS

Page 170:

In the first full paragraph after the second sentence, add the following:

These regulations were finalized without significant change in 2020. See T.D. 9897, Treatment of Certain Interests in Corporations as Stock or Indebtedness, 85 Fed. Reg. 28,867 (May 14, 2020).

Page 170:

Delete the last full paragraph. [Note: the documentation requirements of Treas. Reg. § 1.385-2 were deleted in T.D. 9880, 84 Fed. Reg. 59,297 (Nov. 4, 2019).]

Page 171–72:

Replace the final paragraph of page 171 (and block quotation over to page 172) with the following:

In May 2020, the Treasury Department and the IRS issued final regulations (TD 9897, 85 Fed. Reg. 28,867 (May 14, 2020)) that adopt without substantive change the 2016 proposed regulations under § 385. The final regulations address the treatment of qualified short-term debt instruments, controlled partnerships, and consolidated groups under the so-called Distribution Regulations; these regulations recharacterize a debt instrument issued by a domestic corporation as stock if the instrument is issued to a member of the domestic corporation's expanded group in a distribution, in exchange for related-party stock, or in exchange for property in certain asset reorganizations. Although the 2016 proposed regulations cross-referenced temporary regulations that expired on October 13, 2019, taxpayers were permitted to rely on the 2016 proposed rules if they applied the rules consistently and in their entirety.

DETAILED ANALYSIS 9: LIMITATION ON BUSINESS INTEREST DEDUCTION

Page 172:

Replace the second full paragraph of Detailed Analysis 9. Limitation on Business Interest, with the following two paragraphs:

During 2020 and 2021, Treasury adopted final Regulations relating to implementation of § 163(j), and it has indicated it will continue to study the need for further regulatory guidance. See T.D. 9943, 86 Fed. Reg. 5496 (Jan. 19, 2021); T.D. 9905, 85 Fed. Reg. 56,686 (Sept. 14, 2020).

Business interest means any interest paid or accrued on indebtedness properly allocable to a trade or business. Business interest income means the amount of interest includible in the gross income of the taxpayer for the taxable year that is properly allocable to a trade or business. Reg. § 1.163(j)–6(j). Floor plan financing interest is defined as interest paid to finance motor vehicles that are held for sale or lease.

B. DEDUCTIONS FOR LOSS OF INVESTMENT IN A CORPORATION

DETAILED ANALYSIS 2. BUSINESS VERSUS NONBUSINESS BAD DEBT

Page 177:

In the second full paragraph, delete the first two sentences and substitute the following:

Loss incurred by a noncorporate creditor-investor on an advance that qualifies as a debt, and hence is not a contribution to capital, that is not evidenced by a security, is deductible as an ordinary loss only if the advance qualifies as a business bad debt. A bad debt is a business bad debt only if the creditor-investor is engaged in a trade or business and has established the necessary degree of connection between the debt and the business to qualify the debt as a business bad debt.

CHAPTER 4

DIVIDEND DISTRIBUTIONS

SECTION 4. DISGUISED DIVIDENDS

DETAILED ANALYSIS 2. COMPENSATION TO SHAREHOLDERS

2.1. Salary and Bonuses

Page 246:

After the first full paragraph, add the following case summary.

When payment for services is not reasonable in amount and bears a close relationship to the stockholdings of the officers or employees, Treas.Reg § 1.162–7(b)(1) provides that "it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock." In Aspro, Inc. v. Commissioner, T.C. Memo. 2021-8 (2021), the Tax Court concluded that purported management fees were in fact disguised dividends based on multiple factors, including the following: (1) the corporation lacked a dividend-paying history; (2) the amounts paid out as management fees roughly corresponded to shareholders' respective interests in the corporation; (3) some of the shareholders were holding companies that did not actually perform the claimed services; (4) the payments were made at the end of the year rather than throughout the year; (5) the corporation had relatively little taxable income after deducting the fees; and (6) the process for setting the fees was unstructured and was not set in advance of services being performed. The Eighth Circuit affirmed, finding that the payments to the employees were disguised dividends for several reasons, including that Aspro had not paid dividends since the 1970s and that the management fees were roughly proportional to the ownership interests of these two shareholders. The corporation failed to demonstrate that the management fees were reasonable in amount. As to the management fees paid to the corporation's president, the Eighth Circuit noted that "Aspro paid the management fees as lump sums at the end of the tax year even though the purported services were performed throughout the year, had an unstructured process of setting the management fees that did not relate to the services performed, and had a relatively small amount of taxable income after deducting the management fees." Aspro, Inc. v. Commissioner, 32 F.4th 673 (8th Cir. 2022).

CHAPTER 5

STOCK REDEMPTIONS

Page 344:

After the carryover paragraph from page 343, add a new Section 8 as follows:

SECTION 8. EXCISE TAX ON STOCK BUYBACKS

The Inflation Reduction Act of 2022 added a new, nondeductible 1% excise tax on certain stock buybacks. I.R.C. §§ 4501(a), 275(a)(6).; No committee reports were issued, but the enacted legislation is substantially similar to previous proposals in the Stock Buyback Accountability Act of 2021 and the Build Back Better Act of 2021. In a press release relating to an earlier proposal, Senator Wyden stated,

> Rather than investing in their workers, mega-corporations used the windfall from Republicans' 2017 tax cuts to juice their stock prices and reward their wealthiest investors and their executives through massive stock buybacks[.] Even as millions of families struggled through the pandemic, corporate stock buybacks are once-again nearing all-time highs. Stock buybacks are currently heavily favored by the tax code, despite their skewed benefits for the very top and potential for insider game-playing. Our bill simply ends this preferential treatment and encourages mega-corporations to invest in their workers. (*Sens. Brown, Wyden Announce Bill to Tax Stock Buybacks*, 2021 TAX NOTES TODAY FED. 175-14.)

Whether § 4501 will accomplish these goals is far from clear.

Under the statute, the excise tax applies to the fair market value of certain stock repurchases by "covered" corporations. I.R.C. § 4501(a). A covered corporation is any domestic corporation the stock of which is traded on an established securities market, as defined by § 7704(b)(1). I.R.C. § 4501(b). Under an anti-abuse rule, a covered corporation is subject to the excise tax for repurchases made by corporations or partnerships in which it owns more than 50%, directly or indirectly. I.R.C. § 4501(c)(2) (using vote or value for corporations and capital or profits interests for partnerships). Additional rules apply to a domestic affiliate corporation that acquires stock of its foreign parent corporation. I.R.C. § 4501(d).

Under the statute, § 317(b) redemptions will be treated as repurchases (§ 4501(c)(1)), but statutory or regulatory exceptions may apply to reduce or eliminate the ultimate application of the excise tax. See I.R.C. § 4501(f) (providing broad regulatory authority to Treasury). Although Regulations have not yet been proposed, Notice 2023-2, 2023-3 I.R.B. 374, provides interim guidance.

Notice 2023-2 provides, for example, that deemed redemptions required by § 304(a)(1) (discussed in Chapter 5, Section 6) are not treated as repurchases. Section 4501(e)(3) contains a de minimis rule that excludes repurchase from the excise tax if they do not exceed $1 million during the taxable year. Section 4501(e) provides additional exceptions, including ones relating to employee stock ownership plans, real estate investment trusts, and securities dealers.

Of greatest relevance to this Chapter, § 4501(e)(6) provides the excise tax does not apply to the extent repurchases are treated as dividends. As Chapter 5 makes clear, determining the extent to which a redemption is treated as a dividend is not particularly simple. Consider also whether the corporation redeeming the stock will have ready access to the information needed to apply some of the § 302 tests. Notice 2023-2 attempts to address these issues by imposing the presumption that "a repurchase to which § 302 . . . applies is presumed to be subject to § 302(a) . . . (and, therefore, is presumed ineligible for the exception . . .)." In other words, the Notice presumes that redemptions are not taxed as dividends and instead are subject to the excise tax.

The corporation may, however, rebut this presumption "with regard to a specific shareholder solely by establishing with sufficient evidence that the shareholder treats the repurchase as a dividend on the shareholder's Federal income tax return." The Notice specifies that a corporation will provide sufficient evidence that a shareholder treats a repurchase as a dividend by meeting four listed requirements: (1) the corporation must provide that the redemption constitutes a dividend on information reporting to the redeemed shareholder; (2) the corporation must obtain a certificate from the shareholder that the redemption is treated as a § 301 distribution, "including evidence that applicable withholding occurred if required"; (3) the corporation must have "no knowledge of facts that would indicate that the certification is incorrect"; and (4) the corporation must demonstrate it has sufficient earnings and profits to treat the redemption taxed under § 301 as a dividend."

In addition to the exceptions provided in § 4501(e), before the excise tax is applied, the fair market value of non-excepted stock repurchases is reduced by the fair market value of newly issued stock. I.R.C. § 4501(c)(3). This adjustment is termed the "netting rule" in Notice 2023-2, which contains numerous rules and restrictions on when newly issued stock may be used to reduce the "stock repurchase excise base." Many of these rules are aimed at harmonizing the § 4501(e) exceptions with the netting rule to prevent double or inconsistent benefits. For example, Notice 2023-2 provides that the stock deemed issued under § 304(a)(1) does not count as an issuance that will reduce the excise tax base—a sound result since, as described above, the deemed redemption of those deemed shares is excluded from the excise tax base.

Computing the excise tax requires a determination of fair market value for not only the repurchased stock but also for any newly issued stock eligible to be used in applying the netting rule. At first glance, this may seem easy enough given the "established securities market" language of § 4501(a), but it is important to note that this market prerequisite applies to the *covered corporation* and not to the particular stock that has been repurchased or issued. An example in Notice 2023-2 indicates that redemption of non-traded preferred stock is included in the excise tax base if the corporation has common stock that trades on an established securities market. Notice 2023-2 contains guidance regarding how to measure fair market value when stock is traded and the relevant facts and circumstances that apply when stock is not traded.

The excise tax applies not only to § 317(b) redemptions but also "to any transaction determined by the Secretary to be economically similar to" a § 317(b) redemption. I.R.C. § 4501(c)(1)(B). The Notice contains multiple rules and examples relating to liquidations and reorganizations, the nuances of which will be described once more formal guidance has been issued.

CHAPTER 7

CORPORATE LIQUIDATIONS

SECTION 4. LIQUIDATION OF SUBSIDIARY CORPORATIONS-SECTION 332

DETAILED ANALYSIS 1. EIGHTY PERCENT CONTROL REQUIREMENT AND TAX PLANNING

Page 419

Add new: paragraph 1.3 *Possible Overlap with Section 368(a)(1)(C) Reorganization*.

As will be further addressed in Chapter 10, Treas.Reg. § 1.368–2(d)(4) currently allows reorganizations to qualify for nonrecognition treatment under § 368(a)(1)(C) even if stock of the target corporation were previously owned and not acquired as part of the reorganization. As a result of this regulatory change, it is now possible for an upstream liquidation of a subsidiary into its parent corporation to qualify as a reorganization under § 368(a)(1)(C) whereas that possibility did not exist under the Treasury regulations at the time of the *Granite Trust* decision. However, in order for the subsidiary's liquidation to qualify as a tax-free reorganization under § 368(a)(1)(C), another requirement is that the parent corporation must acquire "substantially all" of the properties of the liquidating subsidiary as part of the transaction. If the parent corporation acquires only 70% of the pro rata assets of the liquidating subsidiary, this substantially all requirement is unlikely to be met under the case law. Thus, the outcome under the precise facts in *Granite Trust* would likely remain unchanged even under this Regulation. If, however, a parent corporation were to receive more than 70% of the liquidating subsidiary's operating assets but less than 80% of the liquidating subsidiary's operating assets, it is more possible the receipt of operating assets of the liquidating subsidiary would satisfy the "substantially all" standard. If it does, then the *Granite Trust* outcome would be supplanted for that fact pattern, and nonrecognition treatment would be afforded in the reorganization provisions.

PART 2

CORPORATE ACQUISITION TECHNIQUES

CHAPTER 8

TAXABLE ACQUISITIONS: THE PURCHASE AND SALE OF A CORPORATE BUSINESS

SECTION 1. ASSET SALES AND ACQUI SITIONS

DETAILED ANALYSIS 2. LIABILITIES

Page 442

After *2. Liabilities* and before the text, add a new title: *2.1 General*.

Page 443

At the end of the paragraph carried over from pg. 442:

In Hoops L.P. v. Commissioner, T.C. Memo 2022-9, an NBA owner sold its NBA franchise along with $12.6 million of contingent deferred compensation liabilities to a buyer. The contingent deferred compensation liabilities were contractually required to be made in future years and related to prior years of service, but no deduction had been allowed to the seller because the employee had not yet included these amounts into income as required by § 404(a)(5). The Tax Court held that the seller was required to include the net present value of these contingent deferred compensation liabilities as sales proceeds in the year of the sale. However, the Tax Court then held that the seller was not allowed an offsetting deduction in the year of sale. According to the Tax Court, the contingent liability relating to deferred compensation could only be deducted when the particular basketball player included those amounts into income. The Tax Court distinguished *Commercial Security Bank* by saying that case did not involve deferred compensation subject to § 404(a)(5). The Tax Court did not address whether the seller would be allowed a deduction in a later year when the deferred compensation is included into the basketball players' income. That outcome arguably is a correct inference given the Tax Court's reasoning in the case, but the Tax Court did not explicitly reach that issue as those later years were not before the court.

Page 444

At the end of the first full paragraph and before 3. Taxable Cash Merger, add new 2.2 *Effect of Indemnification Agreement* :

If the seller indemnifies the buyer for an actual or a contingent liability in an asset sale or a §338(h)(10) stock sale, then no assumption of the obligation is considered to have occurred. Instead, the accrual or payment of the obligation by the seller provides the seller with a deduction when the all-events and economic performance tests are met as though no acquisition had occurred at all. See Shannonhouse Estate v. Commissioner, 21 T.C. 422 (1953). In addition, the buyer has no taxable income and the seller's payment has no net effect on the buyer's basis in the purchased assets (i.e., buyer's basis increase for directly paying an obligation is offset by receipt of the indemnity payment).

If stock in a target corporation is sold and a contingent liability remains with the target corporation, then the obligations should be reflected in the stock's purchase price if the contingency is known by the buyer at the time of the target stock acquisition. Moreover, since the target corporation continues without change, there are no special consequences when the target corporation pays its contingent obligations, and thus it is entitled to deduct or capitalize the amount in accordance with its usual tax accounting rules. If, however, the selling shareholder indemnifies the buying shareholder for a target corporation's contingent liability in a stock sale of the target corporation, then the selling shareholder is deemed to contribute the indemnity payment to the target corporation. This deemed contribution to the target corporation relates back to the prior sale with the consequence that the seller's retroactive increase in the seller's stock basis creates a capital loss for the selling shareholder in the year when the indemnity obligation accrues and economic performance occurs. The target corporation has no taxable income or gain on the receipt of the indemnity payment made by the selling shareholder, and the target corporation is entitled to claim a deduction for its payment of its contingent liability. See Rev. Rul. 83-73, 1983-1 C.B. 84; G.C.M. 38977 (Apr. 4, 1982) (discussing additional primary authorities, including VCA Corporation v. United States, 566 F.2d 1192 (Ct. Cl. 1977); and Rev. Rul. 58-374, 1958-2 C.B. 396). There is no impact on the buyer's stock basis in the target stock as a result of this indemnity payment in this context.

CHAPTER 9

DISTRIBUTIONS MADE IN CONNECTION WITH THE SALE OF A CORPORATE BUSINESS: "BOOTSTRAP" ACQUISITIONS

SECTION 2. BOOTSTRAP TRANSACTIONS INVOLVING CORPORATIONS

Page 491:

Delete the first full paragraph and substitute the following:

The IRS will closely scrutinize such a dividend payment and, depending on the particular facts, may assert that a dividend is in fact additional purchase price and therefore yields capital gain that is not eligible for the § 243 deduction. As the materials that follow will highlight, the results in the courts have been mixed.

SECTION 3. BOOTSTRAP SALE TO CHARITABLE ORGANIZATION

DETAILED ANALYSIS 1. STEP TRANSACTION DOCTRINE

Page 506:

After the carryover paragraph from page 505, add the following new paragraph:

The application of the *Palmer* and *Grover* line of authority that restricts the application of the step transaction doctrine to only the binding commitment test in the context of a bootstrap donation of appreciated property to a charity was upheld in the context of a donation of appreciated nonpublic stock to a donor advised fund in Dickinson v. Commissioner, T.C. Memo 2020-128. In *Dickinson*, the taxpayer irrevocably transferred appreciated stock in a private corporation to a donor advised fund that was a charitable organization described in § 501(c)(3). The donor advised fund had standing directives to immediately liquidate any nonpublic stock. In this context, the IRS argued that neither *Palmer*, *Grover*, nor its concession in Rev.Rul. 78–197 should be applied to supplant the application of the step transaction doctrine in the context of a donation of appreciated stock to donor advised funds where the donor advised fund has standing instructions to immediately liquidate donated nonpublic stock. The Tax Court disagreed, stating that Rev.Rul. 78–197 did not articulate the test for resolving anticipatory assignment of income issues and that *Palmer* and *Grove* should apply without reservation to a donation of appreciated stock to a donor advised fund as long as the donor had made an absolute gift of the appreciated stock at a time when the corporation was not legally obligated to make a redemption even when the corporation in fact did redeem the appreciated stock immediately after its donation. The Tax Court's refusal to apply step transaction principles, except where the binding commitment test is implicated, circumscribes that doctrine's application in the context of a bootstrap donation to charity even when the charitable organization is a donor advised fund.

CHAPTER 10

TAX-FREE ACQUISITION REORGANIZATIONS

SECTION 2. REORGANIZATION FUNDAMENTALS & TYPE (A) REORGANIZATIONS

A. OVERVIEW

DETAILED ANALYSIS: 1. THE DEFINITION OF "STATUTORY MERGER"

1.1 Mergers Involving a Disregarded Entity

Page 519:

Replace the second sentence of the first paragraph, but keep the footnote 3 at the end of that sentence, with the following:

Subject to very limited exceptions, each combining entity (a term that does not include disregarded entities) of the acquired combining unit must simultaneously cease its separate legal existence for all purposes.

D. TAX RESULTS TO THE PARTIES TO A TYPE (A) REORGANIZATION

(1) TARGET SHAREHOLDERS AND SECURITY HOLDERS

DETAILED ANALYSIS: 6. PREFERRED STOCK

6.1 Nonqualified Preferred Stock

Page 573–74:

Replace last paragraph on page 573 that carries over to page 574 with the following:

Because nonqualified preferred stock received in an exchange will not be treated as stock or securities but, instead, will be treated as boot, the receipt of nonqualified preferred stock will result in recognition of gain under § 356 unless a specified exception applies. Whereas in a § 351 exchange nonqualified stock is treated as boot in all events, § 354(a)(2)(C)(i) and § 356(e)(2) provide that nonqualified preferred stock is treated as stock rather than as other property in cases where the nonqualified preferred stock is received in exchange for other nonqualified preferred stock. In these cases, the receipt of nonqualified preferred stock will not result in recognition of gain under § 356. Treas.Regs. §§ 1.354–1(f) and 1.356–7(b) provide additional rules to deal with various aspects of exchanges where nonqualified preferred stock is received in a reorganization and the preferred stock that was surrendered was not itself nonqualified preferred stock. These additional rules apply only when the reason that the preferred stock surrendered was not nonqualified preferred stock on issuance was that it was subject to repurchase rights or obligations exercisable only after more than 20 years had passed from the date of issuance or the likelihood of redemption or purchase at any time was low enough. Further, under the general rule in the Regulations, the nonrecognition rules apply only if nonqualified preferred stock that is received in the exchange is "substantially identical" to the original preferred stock surrendered in the exchange. Stock is considered to be substantially identical if two conditions are met: First, the stock received does not contain any terms which, in relation to the terms of the stock previously held, decrease the period in which a redemption or purchase right will be exercised, increase the likelihood that such a right will be exercised, or accelerate the timing of the returns from the stock instrument (including the receipt of dividends or other distributions). Second, as a result of the receipt of the stock, the exercise of the right or obligation does not become more likely than not to occur within a 20-year period beginning on the issue date of the stock previously held.

SECTION 6. ACQUISITIVE TYPE (D) REORGANIZATIONS

DETAILED ANALYSIS

Page 642

New 2.2.2. Allocation of Earnings and Profits in Acquisitive Type (D) Reorganizations.

As indicated in *Atlas Tool*, the Tax Court held in that case that the amount treated as a dividend under § 356(a)(2) is limited to the earnings and profits of the transferor corporation. The Third Circuit affirmed the Tax Court decision including this aspect of the decision. The IRS had contended that dividend treatment should be tested based on the combined earnings and profits of the transferee and the acquiring corporation. The IRS position is set forth in Rev.Rul. 70-240, 1970-1 C.B. 81. In Davant v. Commissioner, 366 F.2d 874 (5th Cir. 1966), the Fifth Circuit agreed with the government's position by utilizing the combined earnings and profits of both the transferee and the acquiring corporation for purposes of determining whether boot was a dividend. In Simon v. Commissioner, 43 T.C.M. 269 (1982), the Tax Court stated that it continues to believe that the correct approach is to look solely to the earnings and profits of the transferee corporation, but because an appeal in that case would be lodged to the Fifth Circuit the Tax Court looked to the combined earnings and profits of both the transferee and the acquirer corporation. Thus, at present, there is a split in the circuits on this issue. And, what is more, it appears that the Tax Court remains convinced that its decision in *Atlas Tool* that was affirmed by the Third Circuit is the correct resolution of this question for cases outside the Fifth Circuit.

SECTION 9. JUDICIAL DOCTRINES AND LIMITATIONS

B. STEP TRANSACTION DOCTRINE

Page 682

At the end of the seventh line, add the following:

The regulations under Treas.Reg. § 1.368-1(c) require the existence of a "plan of reorganization," but the regulations are otherwise silent on the underlying facts that must exist for such a plan to exist. In PLR 202128001, a taxpayer represented that it would take five years to complete its own plan of reorganization due to the expected time it would take to obtain the necessary regulatory approvals in foreign jurisdictions. The IRS favorably ruled that a plan of reorganization existed notwithstanding that the plan of reorganization would take five years to complete and notwithstanding that there was no binding commitment for the taxpayer to complete those steps. The IRS's willingness to favorably rule that a taxpayer's plan of reorganization could extend to a five-year period without the existence of a binding commitment demonstrates that the determination of whether a plan of reorganization exists is ultimately a facts and circumstances analysis.

C. STEP TRANSACTION DOCTRINE AND THE INTERACTION OF SECTIONS 338 AND 368

DETAILED ANALYSIS 1. REVENUE RULING 2001-46 AND REVENUE RULING 2008-25:

Page 692:

Replace the third full paragraph with the following:

Finally, compare the results in Rev.Rul. 2001–46 with Treas.Reg. § 1.338(h)(10)–1(e) Examples 11 and 12. In those examples, the transaction would have represented a tax-free § 368(a)(1)(A) reorganization by reason of the step transaction doctrine. However, Treas.Reg. § 1.338(h)(10)–1(c)(2) provides that if the taxpayer makes an affirmative election to apply § 338, then the step transaction doctrine is supplanted, and the transaction is treated as a taxable asset acquisition under § 338. Thus, once a taxpayer has made a § 338 election, the transaction is then treated as a taxable acquisition subject to § 338, and the separate steps are given independent significance in accordance with the prescriptive rules set forth under § 338. Thus, the step transaction doctrine is supplanted once the taxpayer elects to apply § 338. This approach is in accord with Rev.Rul. 90-95, which was discussed in Chapter 8, as well as in the excerpt provided in this Chapter 10 of Rev.Rul. 2001–46.

PART 3.

NONACQUISITIVE REORGANIZATIONS

CHAPTER 12

CORPORATE DIVISIONS: SPIN-OFFS, SPLIT-OFFS AND SPLIT-UPS

SECTION 2. "ACTIVE CONDUCT OF A TRADE OR BUSINESS," "DEVICE," AND OTHER LIMITATIONS

B. ACTIVE TRADE OR BUSINESS

DETAILED ANALYSIS 1. ACTIVE TRADE OR BUSINESS

1.1 WHAT IS A TRADE OR BUSINESS?

Page 754

At the end of 1.1 *What Is a Trade or Business?*, add the following additional paragraph:

Although the determination of an active trade or business has always been a facts and circumstances analysis, the IRS made this even clearer in recent pronouncements. Historically, the IRS had maintained a bright line standard indicating that a business could not be an active trade or business unless it collected income from its activities. See Rev. Rul. 57–464, 1957–2 C.B. 244; Rev.Rul. 57–492, 1957–2 C.B. 247. However, in Rev.Rul. 2019–9, 2019–14 I.R.B. 925, the IRS indicated that it was suspending these two rulings and would study whether a substantial business could be an active trade or business even though it had yet to generate income. One could imagine a pharmaceutical business or some other technology business where substantial assets and employees are engaged in ongoing business activity but have not yet produced a profit. Since its issuance of Rev. Rul. 2019–9, the IRS has issued several favorable private rulings where it found that a corporation met the active trade or business requirement of § 355(b) even though the corporation's activities had yet to generate any actual income. See, e.g., PLR 202150004 (Dec. 21, 2021); PLR 202009002 (Sept. 4, 2019).

SECTION 5. DIVISIVE DISTRIBUTIONS IN CONNECTION WITH ACQUISITIONS

DETAILED ANALYSIS 1. ASPECTS OF SECTION 355(e):

1.3 Corporate Level Issues

Page 832:

After first full paragraph, add the following paragraph:

The application of § 355(e) and § 355(f) becomes more complicated if there are internal restructurings prior to the divisive transaction that is the subject of a later § 355 distribution. In T.D. 9888, 84 Fed. Reg. 69,308 (Dec. 18, 2019), the Treasury issued final Regulations on how to apply § 355(e) and § 355(f) in the context of predecessor and successor entities to the distributing corporation and to the controlled subsidiary that are parties to the § 355 distribution. Treas.Reg. § 1.355–8(b)(2) defines a *potential* predecessor as a corporation other than the distributing corporation or the controlled corporation *if either* (1) as part of a plan, the corporation transfers property to a potential predecessor, the distributing corporation, or a member of the same expanded affiliated group in a transaction described by § 381 or (2) immediately after completion of the plan, the corporation is a member of the same expanded affiliate group as the distributing corporation. (Section 381 is covered in detail in Chapter 13, Section 1.) Only a *potential* predecessor can become an *actual* predecessor. For that to occur, Treas.Reg. § 1.355–8(a)(3) provides that the potential predecessor (1) must transfer property to the controlled corporation in a tax-deferred transaction as part of a plan for a future § 355 distribution, or (2) must transfer property to the distributing corporation in a tax-deferred transaction as part of a plan for a further § 355 distribution.

Page 833:

After the second full paragraph, add the following:

1.3.2 *Synthetic § 355 Distributions*

Section 355(e)(4)(D) provides that references in § 355(e) to the distributing or controlled corporation apply also to any predecessor or successor of each. In order to fulfill the goals of § 355(e), the Treasury believes that it should apply § 355(e) whenever a § 355 distribution accomplishes a "synthetic spin-off" of the assets that are transferred by a "divided corporation" to the distributing corporation or to the controlled corporation and a § 355 distribution occurs thereafter. See T.D. 9888, 84 Fed. Reg. 69,308 (Dec. 18, 2019). The Treasury's concern is perhaps best understood by considering a base example, which appears in the preamble to the Regulations. A synthetic spin-off could be achieved through the following series of transactions occurring pursuant to a plan: (1) a corporation (P) merges into a distributing corporation in a § 368(a)(1)(A) reorganization, (2) the distributing corporation contributes some (but not all) of P's assets to a controlled subsidiary in a § 368(a)(1)(D) reorganization, and (3) the distributing corporation thereafter distributes all of the stock of the controlled corporation in a § 355 distribution. In this base case example, the divided corporation (that is, P) could have separated its assets in a nonrecognition transaction without gain or loss. But, if the divided corporation had been in the position of being itself a distributing corporation and had attempted to separate its assets between itself and a controlled subsidiary and then distributed its controlled subsidiary in a § 355 distribution, the result would have been that § 355(e) clearly would have applied.

In light of this economically equivalent alternative path, Treasury was concerned that § 355(e) and its strictures could be side-stepped by having a predecessor corporation separate its assets in nonrecognition transactions with the distributing corporation and the controlled subsidiary prior to a § 355 distribution. Thus, Treas.Reg. § 1.355–8 seeks to apply § 355(e) to a § 355 distribution if a predecessor of the distributing corporation divided its assets between the distributing corporation and the controlled corporation as part of a plan to accomplish a 50% acquisition of the predecessor's relevant assets. The Regulations achieve this goal by treating the divided corporation in the base case example as a predecessor of the distributing corporation and applies § 355(e) in that context.

Treas.Reg. § 1.355–8(a)(3) asserts that § 355(e) applies to a § 355 distribution if, as part of a plan, some of the assets of a predecessor of a distributing corporation are transferred directly or indirectly to controlled corporation without full recognition of gain and the § 355 distribution accomplishes a division of the assets of the *actual* predecessor of the distributing corporation. Only a *potential* predecessor can become an *actual* predecessor. A corporation is a *potential* predecessor corporation if it transfers property to the distributing corporation in a § 381-covered transaction. Treas.Reg. § 1.355–8(b)(2)(ii)(A)(1). (Section 381 is covered in detail in Chapter 13, Section 1.) Two pre-distribution requirements and one post-distribution requirement must be satisfied for a potential predecessor to be a predecessor of distributing corporation. Treas.Reg. § 1.355–8(b)(1)(i).

The two pre-distribution requirements consist of a "relevant property" requirement and a "reflection of basis" requirement. The term "relevant property" generally refers to any property held by the potential predecessor at any point during the plan period (that is, the period that ends immediately after the § 355 distribution and begins on the earliest date on which any part of the plan is agreed to or understood, arranged, or substantially negotiated). See Treas.Reg. § 1.355-8(b)(2)(iv). The relevant property requirement is satisfied if, before the § 355 distribution and as part of a plan, any distributed stock in controlled had been acquired by distributing corporation in an exchange for interests in relevant property held by controlled immediately before the distribution and built-in gain in the relevant property was not recognized in full at any point during the period of the plan. The first pre-distribution test is also met if, as part of a plan, the controlled stock is relevant property and is distributed; controlled stock would be relevant property if the potential predecessor owned stock in the controlled. Accordingly, in the absence of a plan, a predecessor of the distributing corporation cannot exist for purposes of § 355(e). If the basis in the stock of the controlled corporation is determined in whole or in part by the basis in relevant property (or if the controlled corporation stock is itself relevant property), then the reflection of basis, pre-distribution requirement is met. Treas.Reg. § 1.355–8(b)(1)(ii). If, however, during the plan period the controlled stock had already been distributed in a § 355(e)-governed distribution or transferred in a transaction in which the gain built into it had been recognized in full, the reflection of basis test is not satisfied.

The post-distribution requirement is satisfied if there is a division of relevant property between the controlled subsidiary that is the subject of the § 355 distribution and the distributing corporation so that there is a segregation of the relevant property before the controlled corporation stock is distributed in a § 355 transaction. Treas.Reg. § 1.355–8(b)(1)(iii).

Under the general requirements of § 355(e), the distributing corporation recognizes all the gain in its controlled stock, but in the situation of a synthetic structure, that could lead to more gain being recognized than should be, depending on where the relevant assets end up in the overall structure. As a result, Treas.Reg. § 1.355–8 has a limitation on the amount of gain that must be recognized, with the calculation dependent on whether, as part of a plan, the predecessor corporation of the distributing corporation or the distributing corporation is the subject of a 50% or greater acquisition. Treas.Reg. § 1.355–8(e). The amount of gain is never greater than the gain recognition required under § 355(e) more generally, which the regulation refers to as the "statutory recognition amount." To determine the percentage of acquisition, each owner's interest is compared between the owner's direct or indirect interest immediately before the § 381 transaction with the interest immediately after the § 381 transaction. If there is a 50% or greater acquisition of the predecessor corporation of the distributing corporation, the amount of gain required to be recognized under § 355(e) is limited to the gain in the relevant property that was separated from the predecessor corporation—i.e., moved to the controlled corporation. Treas.Reg. § 1.355–8(e)(2). On the other hand, if the § 355 distribution creates a 50% or greater acquisition of the distributing corporation, then the amount of gain recognized is instead limited to the excess of the statutory recognition amount over the amount of gain built into the property moved from the predecessor to the controlled. These rules apply whether or not the distributing corporation ever directly held the separated, relevant property.

Additional situations may also trigger these rules. For example, a synthetic § 355 distribution can exist with respect to a predecessor of a *controlled* corporation if the predecessor corporation transfers assets to the controlled corporation in a § 381 transaction and the predecessor corporation remains in existence after the transfer so that a separation of relevant assets occurs in that context. Treas.Reg. § 1.355–8(c)(1). The regulations also contain rules for how to handle multiple predecessors or a series of predecessors.

Page 835:

Problem Set 7

Add the following new problem:

4. (a) Xavier owns 100% of the stock of Peach Corp., which holds multiple assets. Yuri owns 100% of the Durian Corp. The following steps occur as part of a plan: Peach Corp. merges into the Durian Corp. in a valid Type A reorganization under § 368. Immediately after the merger, Xavier and Yuri own 10% and 90%, respectively, of the stock of Durian Corp. Durian Corp. then contributes to Chayote Corp., a corporation controlled by Durian, one of its assets (Asset 1) acquired from Peach Corp. in the Type A merger. At the time of the contribution, Asset 1 has a basis of $60,000 and a fair market value of $165,000. Prior to the exchange of Asset 1 by Durian for cash and Chayote stock, Durian Corp.'s basis in Chayote was $90,000 and the value of the Chayote stock was $150,000. In exchange for Asset 1, Durian Corp. receives additional stock in Chayote Corp. and cash of $15,000. Duran Corp. distributes all the Chayote Corp. stock (but not the cash) to Xavier and Yuri, pro rata. Assume that Durian's exchange with Chayote followed by the distribution of Chayote stock constitute a valid divisive Type D reorganization.

(b) The facts are the same as in 4(a) above except that the merger of Peach Corp. into Durian Corp. occurred before the existence of a plan.

(c) The facts are the same as in Problem 4(a) except for two changes. First, Durian Corp. does not contribute Asset 1 to Chayote; instead, Durian Corp. continues to own Asset 1 throughout the relevant period. Second, prior to the merger of Peach Corp. into Durian Corp., Peach Corp. owned 65% of Chayote Corp. (Block 1 stock), and Durian Corp. owned the remaining 35% of Chayote Corp. (Block 2 stock). As part of a plan, after Type A merger of Peach Corp. into Durian Corp., the stock of Chayote Corp. became 100% owned Durian Corp. In a qualifying § 355 distribution, Durian Corp. distributed the Chayote stock, with Xavier receiving 90% and Yuri receiving 10% percent. Prior to the § 355 distribution of the Chayote stock, Durian's ownership was as follows: (i) Block 1 shares had an aggregate basis of $30,000 and fair market value of $35,000 and (ii) Block 2 shares had an aggregate basis of $10,000 and a fair market value of $65,000.

(d) Xavier owns 100% of Peach Corp. and Yuri owns 100% of Durian Corp. Peach Corp. held multiple assets, including Asset 1, Asset 2, and Asset 3. Instead of a merger occurring between Peach Corp. and Durian Corp., the following instead occurs all as part of a prearranged plan. First, in an exchange qualifying under § 351 and as joint transferors, Peach Corp. transfers Asset 1 and Asset 2 to Durian Corp. and Yuri transfers other property Durian Corp. Immediately after the § 351 exchange, Peach Corp. owns 10% of Durian Corp., and Yuri owns 90% of Durian. Second, Durian Corp. contributes Asset 1 to Chayote Corp., a corporation controlled by Durian, in exchange for additional Chayote stock. And third, Durian distributes all of the Chayote stock to Peach Corp. and to Yuri, pro rata. Durian Corp. continues to hold Asset 2 directly, and Peach Corp. continues to hold Asset 3 directly. Assume that Durian's exchange with Chayote followed by the distribution of Chayote stock constitute a valid divisive Type D reorganization. Immediately before the § 355 distribution, Asset 1 has a basis of $60,000 and a fair market value of $165,000, and the stock of the Controlled Corporation held by the Distributing Corporation has a basis of $150,000 and a fair market value of $300,000. Following the § 355 distribution, and as part of the same plan, Zeus acquires 51% of the stock of Peach Corp.

PART 4.

CORPORATE ATTRIBUTES IN REORGANIZATIONS AND OTHER TRANSACTIONS

CHAPTER 13

CARRYOVER AND LIMITATION OF CORPORATE TAX ATTRIBUTES

SECTION 2. LIMITATION ON NET OPERATING LOSS CARRYOVERS FOLLOWING A CHANGE IN CORPORATE OWNERSHIP

DETAILED ANALYSIS 3. COMPUTING THE SECTION 382 LIMITATION

2.3.1. Identifying Five Percent Stockholders

Page 876

At the end of the paragraph carried over from page 876, add the following:

In PLR 202146003 (Nov. 19, 2021), a public corporation proposed to acquire another public corporation. In the ruling, the parties stipulated that certain acquiring shareholders also owned less stock of the target corporation, creating an overlapping public group. The acquiring corporation had no actual knowledge regarding members of the overlapping public group other than knowledge obtained through (a) corporate records of acquiring and target; (b) a survey of relevant SEC filings, and (c) additional information obtained through "Written Questionaires" to potential overlapping public group shareholders. After determining that this information indicated that there was an overlapping ownership, the IRS accepted that shares issued to the overlapping group would not be counted as a part of an ownership change.

3.1 Valuing the Loss Corporation

- **Page 885**

At the end of the last full paragraph, substitute the following for the last sentence:

Section 382(*l*)(1)(B) provides that, except as otherwise provided in Regulations, any capital contribution within 2 years of the date of an ownership change shall be treated as part of a forbidden plan. Even though § 382(*l*)(1)(B) clearly contemplates a presumption for capital contributions made within a two-year period, the provision also authorizes the Treasury Department to prescribe a different rule. In Notice 2008-78, 2008-2 C.B. 851, Treasury did just that. Notice 2008-78 states that the government will apply a facts and circumstances test in all situations and will not apply the statutory two-year presumption to determine whether the capitalization of the loss corporation that occurred prior to an ownership change was part of a plan to inappropriately adjust the § 382(b) limitation calculation. Although Regulations have not been issued yet, taxpayers are entitled to rely on the facts and circumstances test set forth in Notice 2008-78 pending the issuance of final regulations.

3.3 *Built-In Gains and Losses*

Page 888:

After the first full paragraph, insert the following:

As previously mentioned, the approach taken in Notice 2003–65, 2004–40 I.R.B. 747, particularly the so-called § 338 wasting asset methodology, generally was favorable to taxpayers with a NUBIG as that § 338 wasting asset methodology allowed an adjustment to the realized built-in gain (RBIG) based on a hypothetical sale and subsequent hypothetical cost recovery regardless of whether any actual realized gains occurred. Under the § 338 wasting asset methodology, items of RBIG (and RBIL) generally are computed by comparing the loss corporation's actual items of income, gain, etc. during the recognition period with those that would have been recognized if a § 338 election had been made with respect to a hypothetical purchase. The § 338 approach thus allows loss corporations to "create" RBIG even without a realization event. This treatment under the § 338 wasting asset methodology follows from the logic that such built-in gain assets could have generated increased limitation if the assets had been subject to a § 338 election as the seller could have utilized the loss corporation's net operating losses without limitation prior to the ownership change and the buyer would have received a stepped-up basis, and so from a policy perspective it seemed inappropriate to have a different § 382 limitation for the buyer based solely on whether or not an actual § 338 election had been made.

Shortly after passage of the Tax Cuts and Jobs Act of 2017, the government issued Notice 2018–30, 2018–21 I.R.B. 610 to make it clear that the calculation under the § 338 wasting asset methodology should utilize a hypothetical cost recovery without regard to § 168(k) bonus depreciation. The effect of this Notice was to ensure that the bonus depreciation deduction allowed by reason of § 168(k) was ignored for purposes of calculating the hypothetical deductions that would have been allowed had an asset been the subject of a § 338 election and then had been depreciated in accordance with § 168 (while ignoring § 168(k)) over the five-year recognition period.

On September 10, 2019, the IRS issued Proposed Regulations 1.382-7 that signaled a more expansive reformulation of the government's efforts to circumscribe the § 338 wasting asset methodology as evidenced by the following statement:

> After study, and based on taxpayer input, the Treasury Department and the IRS have decided not to incorporate the 338 approach into these proposed regulations. … [T]he Treasury Department and the IRS have concluded that the 338 approach lacks sufficient grounding in the statutory text of section 382(h). Further, the Treasury Department and the IRS have determined that the mechanics underlying the 338 approach (i) are inherently more complex than the accrual-based 1374 approach, (ii) can result in overstatements of RBIG and RBIL, and (iii) as a result of the TCJA, would require substantial modifications to eliminate increased uncertainty and ensure appropriate results. By eliminating the 338 approach, the Treasury Department and the IRS have determined that these proposed regulations would significantly reduce current and future complexity of section 382(h) computations for taxpayers and the IRS alike. The Treasury Department and the IRS welcome public comment on this proposed elimination of the 338 approach for determining RBIG and RBIL.

REG-125710-18, 84 Fed. Reg. 47,455, 47,457 (Sept. 20, 2019). One of the reasons given in the Proposed Regulations for withdrawing the § 338 wasting asset methodology is that the statutory basis for promulgating Notice 2003–65 was lacking. Another factor that may have played into the retrenchment is the revelation that some of the changes that were made in the 2017 Act, namely the full-expensing approach of § 168(k) and the expanded earnings-stripping limits under § 163(j), exposed some of the difficulties of making the required computation under the § 338 wasting asset methodology. Also, the modification of § 172(a) so that a net operating loss can only offset 80% of the current year taxable income made the hypothetical § 338 wasting asset methodology more favorable than would arise if there had been an actual § 338 election in many instances. Nevertheless, these Proposed Regulations are only to be applied prospectively, and so taxpayers can continue to rely on Notice 2003–65 until the Proposed Regulations are finalized. Given the significant business disruption that has continued into 2021 caused by the COVID-19 pandemic, the ability to rely on Notice 2003–65 remains a critically important tax planning tool in this period of uncertainty.

3.3.1 *Post-ownership Change Cancellation of Debt Income*

Another fundamental question raised from the very beginning of the adoption of § 382(h) involves how to handle post-ownership change cancellation of indebtedness income. For loss corporations, net operating losses and cancellation of indebtedness income are often opposite sides of the same tax coin; in many cases, corporate losses are funded with borrowed money, and the fact that the loss corporation cannot generate positive income also correlates with its inability to service the borrowing which, debt when discharged, generates cancellation of indebtedness income that has the effect of reversing the net operating losses. For this reason, among others, there was a certain symmetry in Notice 2003–65's treatment of post-ownership change cancellation of indebtedness income arising from pre-ownership change debt as creating items of RBIG.

Proposed Regulations 1.382-7(c)(3)(ii) (2019), however, take a much different approach with respect to the treatment of cancellation of indebtedness income than the one taken in Notice 2003–65, with the consequence that the amount of cancellation of indebtedness income arising in a post-change period that will be considered RBIG will be significantly less for many taxpayers for several reasons. First, the elimination of the § 338 wasting asset methodology is likely to substantially decrease the ability to categorically treat post-ownership change cancellation of indebtedness income as RBIG. In this regard, under the § 338 wasting asset methodology set forth in Notice 2003–65, cancellation of indebtedness income attributable to indebtedness that existed as of the ownership change date was automatically treated as an item of income under the RBIG rules as long as the cancellation of indebtedness income arising in the post-change period did not exceed the difference between the adjusted issue price of the debt obligation and its fair market value as of the ownership change date. The import of this approach was that the § 338 wasting asset methodology represented a favorable means to outright classify cancellation of indebtedness income arising in the post-change period as RBIG. With the elimination of the § 338 wasting asset methodology, this opportunity is eliminated.

Second, the Proposed Regulations modify the treatment of cancellation of indebtedness income in the context of the § 1374 approach in significant ways. Under the § 1374 "safe harbor" in Notice 2003–65, the amount of cancellation indebtedness income recognized in the first 12 months of the recognition period was included an RBIG, and this treatment extended to cancellation of indebtedness income that was excluded from income by reason of an exception under § 108 where the taxpayer reduced tax basis in assets under § 1017(a). In contrast, under the Proposed Regulations, the cancellation of indebtedness income recognized during the post-change period generally would not be treated as RBIG except in certain limited situations where cancellation of indebtedness income arises within the first 12 months of the five-year recognition period and either of the following is true: (i) the debt is recourse debt that creates taxable cancellation of indebtedness income or creates excluded cancellation of indebtedness income but in the latter situation only to the extent that the excluded cancellation of indebtedness income resulted in a reduction of attributes that are not attributable to pre-change losses, including reduction of basis of the loss corporation's assets only of assets that were not held at the time of the ownership change or (ii) the debt is nonrecourse debt that gives rise to taxable cancellation of indebtedness income or results in excluded cancellation of indebtedness income but in the latter situation only to the extent that the excluded cancellation of indebtedness income resulted in a reduction of attributes that are not attributable to pre-change losses, including reduction in the basis of assets only when the loss corporation did not own those assets immediately before the ownership change. See Prop.Reg. § 1.382–7(d)(2)(iii) and (iv).

Even in these limited situations, the amount of RBIG that can arise from these provisions is capped. In the context of recourse liabilities, the RBIG related to the recourse debt cannot exceed the amount of the excess recourse liabilities that existed at the time of the ownership change. Prop.Reg. § 1.382–7(c)(3)(iii)(C) (2019). Excess liabilities mean the amount discharged in a bankruptcy proceeding or the amount of the loss corporation's insolvency at the time of the ownership change. See Prop.Reg. § 1.382–7(b)(8) (2019). In the context of nonrecourse debt, the RBIG related to the nonrecourse debt cannot exceed the amount by which the adjusted issue price of the nonrecourse debt exceeds the fair market value of the property securing the debt immediately before the ownership change. Prop.Reg. § 1.382–7(d)(2)(iv)(C).

Although cancellation of indebtedness income is included as an RBIG only if it arises within the first 12 months of the recognition period, the Proposed Regulations treat bad debt deductions, to the extent attributed bad debts existing on the ownership change date create RBILs if recognized at any time during the five-year recognition period. See Prop.Reg. § 1.382–7(d)(3)(iv). It is unclear to the authors why the government does not provide a symmetrical five-year time period for determining whether cancellation of indebtedness income creates RBIG as it provides for purposes of determining whether, in the reverse situation, a bad debt deduction creates an RBIL.

Another issue in terms of applying the § 382 limitation involves the treatment of contingent liabilities. Under Notice 2003–65, the estimated value of contingent liabilities as of the ownership change date were included in the calculation of NUBIG and NUBIL but the payment of such liabilities did not give rise to an RBIL regardless of when the contingent liability accrued in the post-ownership change period. This was a decidedly pro-taxpayer approach. In contrast to the approach taken in Notice 2003–65, the Proposed Regulations treat the payment of a contingent liability during the five-year recognition period as an RBIL if the contingent liability existed as of the ownership change date, but then only to the extent of the estimated value of that contingent liability as of the ownership change date. See Prop.Reg. § 1.382–7(d)(3)(v). If the loss corporation is subject to an acquisition where purchase accounting is utilized for financial statement purposes and contingent liabilities are valued in those records, then the approach taken in the Proposed Regulations is readily administrable. However, if the loss corporation experiences an ownership change and financial statement records are not prepared as of the ownership change date to determine the contingent liabilities known at that date, then the approach taken in the Proposed Regulations with respect to the treatment of contingent liabilities creates significant administrative burdens as it will be difficult to retroactively identify and value contingent liabilities as of the date of the ownership change date.

Page 889:

After the carryover first paragraph, add the following new section:

3.5 *Disallowed Interest Expense*

In 2017, Congress added § 382(d)(3) to make clear that a taxpayer's pre-ownership change loss includes any carryover of disallowed interest expense described in § 163(j)(2). Thus, this carryover is subject to the § 382(b) limitations along with any net operating loss that arises in the pre-ownership change period. I.R.C. § 382(d)(1) and (3). The preamble to the Proposed Regulations, 84, Fed. Reg. at 47,465, notes that disallowed interest under § 163(j) could fall within the definition of an RBIL under § 382(h)(6), thereby causing such items to be counted twice for the purpose of § 382. To prevent this result, Prop.Reg. § 1.382–7(d)(3)(vi) provides that the use of § 163(j) carryovers during the recognition period does not give rise to an RBIL.

PART V

SPECIAL RULES TO PREVENT AVOIDANCE OF SHAREHOLDER LEVEL TAX

CHAPTER 14

PENALTY TAXES

SECTION 1. THE ACCUMULATED EARNINGS TAX

DETAILED ANALYSIS 2.4 PROVISION FOR CONTINGENCIES

Page 906

After the first full paragraph, add the following new paragraph:

The docketed Tax Court case of Alta Peruvian Lodge Ltd. v. Commissioner, Docket No. 022821-21 (Tax Court, filed Sept. 15, 2021; trial date set for Oct. 11, 2022) further highlights the subjective nature of the interaction of perceived business contingencies and liability for the penalty tax. In this case, the IRS assessed an accumulated earnings tax on $2.5 million of a ski lodge's retained earnings as of the tax period ending April 30, 2019. The tax, as described in § 531, is a 20% penalty imposed by the IRS when a corporation retains profits beyond what it reasonably needs for its business operations. In its petition, Alta Peruvian Lodge Ltd. claims that it needs a large retained earnings reserve to manage fluctuations in revenue caused by such things as erratic weather, pandemics, and competition from other hotels. The taxpayer further asserted that its retention of a significant amount of retained earnings was justified because reservation numbers for its rooms fluctuate and are subject to factors beyond its control. According to the taxpayer, the cyclical nature of its business is further evidenced by the fact that substantially all of the ski lodge's revenue is earned between the months of November and April from customers who reserve rooms at the lodge for skiing.

Page 914

SECTION 3. CORPORATE ALTERNATIVE MINIMUM TAX

Prior to the 2017 Tax Act, corporations were subject to the alternative minimum tax provided by § 55 through § 59 in any year in which the alternative minimum tax exceeded the regular tax. The alternative minimum tax rate for corporations was 20% and was imposed on "alternative minimum taxable income," a tax base that differed substantially form "taxable income." The corporate alternative minimum tax was repealed by the 2017 Tax Act. The Inflation Reduction Act, § 10101, amends Code § 55(b) to reinstate a corporate alternative minimum tax in the form of a 15% minimum tax on corporations (other than S corporations, regulated investment companies, and real estate investment trusts) with average "adjusted financial statement income" measured over three years of over $1 billion. Adjusted financial statement income is the net income or loss stated on the taxpayer's "applicable financial statement," with complex modifications set forth in § 56A.

An "applicable financial statement" is defined by cross-reference to § 451(b)(3), which in turn defines an applicable financial statement as (1) a financial statement that is certified as being prepared in accordance with generally accepted accounting principles and that is (a) a 10-K or annual statement to shareholders required to be filed with the Securities and Exchange Commission, (b) an audited financial statement used for credit purposes, reporting to shareholders, partners, other proprietors, or beneficiaries, or for any other substantial nontax purpose, or (c) filed with any other federal agency for purposes other than federal tax purposes; (2) certain financial statements made on the basis of international financial reporting standards and filed with certain agencies of a foreign government; or (3) a financial statement filed with any other regulatory or governmental body specified by the IRS. Section 56A(c)(2)(A) provides that if the financial results of a taxpayer are reported on applicable financial statements for a group of entities, then the applicable financial statement of the taxpayer is the financial statement filed on behalf of the group as determined under the rules of § 451(b)(5). Section 56A(c)(2)(B) provides a general rule that taxpayers which are members of a tax consolidated group must take into account items on the applicable financial statements that are properly allocable to the members of the tax consolidated group. Section 56A(c)(2)(D)(i) provides that, except as provided by the Secretary, if the taxpayer is a partner in a partnership, the taxpayer's applicable financial statement income is adjusted to take into account the taxpayer's distributive share of such partnership's applicable financial statement income.

Congress set forth multiple modifications to adjusted financial statement income in § 56A(c). For example, one modification relates to defined benefit pensions. I.R.C. § 56A(c)(11). Another modification allows depreciation deductions utilized to determine applicable financial statement income to be based on § 167 and § 168 tax depreciation rather than book depreciation. I.R.C. § 56A(c)(13). Adjusted taxable income also is modified to include any income of a disregarded entity that is owned by the taxpayer. I.R.C. § 56A(c)(6). The IRS is given authority to make further modifications through regulations. I.R.C. § 56A(c)(15); §56A(e).

In Notice 2023-7, 2023-3 I.R.B. 390, the Treasury Department indicated that forthcoming regulations would indicate that any income arising from various nonrecognition provisions, including, for example, § 351, §368, and §1032, will be excluded from applicable financial statement income. Furthermore, adjustments are also expected to be made with respect to cancellation of indebtedness income excluded under § 108.

PART 7

ELECTIVE PASSTHROUGH TAX TREATMENT

CHAPTER 16

S CORPORATIONS

SECTION 1. INTRODUCTION

C. S CORPORATION ELECTION PROCEDURES

Page 982:

After the third full paragraph add the following:

Rev. Proc. 2022-19, 2022-41 I.R.B. 282 (Oct. 11, 2022), amplifies Rev. Proc. 2013-30 by allowing "S corporations and their shareholders to resolve frequently encountered issues with certainty and without requesting a private letter ruling." The Revenue Procedure contains guidance relating to six areas. As one example, it distinguishes between "governing provisions" (e.g., bylaws and articles of incorporation) and "other agreements and arrangements" (e.g., buy-sell agreements and short-term unwritten advances), and provides that such other agreements and arrangements will not be treated as a second class of stock "so long as there was no principal purpose to use the agreement" to circumvent the requirement. The IRS further explains, "Because entering into these specific agreements will not result in termination of S corporation status, taxpayers do not need to seek relief . . . and because the existence of a principal purpose is inherently factual in nature, the IRS will not rule in these situations."

SECTION 3. EFFECT OF THE SUBCHAPTER S ELECTION BY A CORPORATIOIN WITH NO C CORPORATION HISTORY

A. PASSTHROUGH OF INCOME AND LOSS

DETAILED ANALYSIS 5. LIMITATION ON BUSINESS INTEREST

Page 1002:

Replace the last sentence immediately following the block quotation in the first full paragraph with the following insert:

Final Regulations incorporate this approach, and those Regulations, along with further Proposed Regulations issued in that same year, expand on the manner of application of § 163(j) to S corporations. Treas.Reg. § 1.163–6; Prop.Reg. § 1.163(j)–6, REG-107911-18, 85 Fed. Reg. 56,846 (Sept. 14, 2020); see also T.D. 9943, 86 Fed. Reg. 5496 (Jan. 19, 2021).

Replace the last sentence of Detailed Analysis 5 at the bottom of page 1002 and carrying over to page 1003 with the following:

The Regulations apply to S corporations the same carryover rules applicable to a C corporation that is not a member of a consolidated group. Treas.Reg. § 1.163(j)–6(*l*)(5).

PART VIII

TAXATION OF PARTNERS AND PARTNERSHIPS

CHAPTER 17

INTRODUCTION TO PARTNERSHIP TAXATION

SECTION 3. ANTI-ABUSE REGULATIONS

Page 1086:

Add to the end of the third sentence of the first complete paragraph:

In Tribune Media Company v. Commissioner, T.C. Memo. 2021-122, the court interpreted the "business purpose" language of Treas.Reg. § 1.701–2(a) as a "broad provision applying to the function of the partnership as a whole. It is not intended to apply to every agreement into which the partnership or its partners enter. That level of minutiae was not contemplated by the general anti-abuse rule." In that case, the IRS argued that a guaranty of a nonrecourse debt lacked a substantial business purpose and was instead motivated by tax considerations.

CHAPTER 18

TAXATION OF PARTNERSHIP TAXABLE INCOME TO THE PARTNERS

SECTION 1. PASS-THROUGH OF PARTNERSHIP INCOME AND LOSS

Page 1101:

Delete the final sentence of Detailed Analysis 2.3 and insert:

This new rule and recently finalized Regulations are discussed primarily in Chapters 4 and 8.

Pages 1105–1107:

Substitute the below for the material contained in Detailed Analysis 4.2.2:

Section 163(j) contains specific rules for partnerships, and Regulations finalized in 2020 and 2021 provide additional guidance. Application of the § 163(j) limitation to a partnership's business interest expense is determined at the partnership level. In some situations, this will be simpler than applying the limitation at the partner level. For example, the final Regulations clarified that if a partnership qualifies for the "small business" exemption of § 163(j)(3), then the partnership's business interest expense is not limited and is not re-tested under § 163(j) at the partner level. Treas.Reg. § 1.163(j)–6(m)(1) & (o)(11), Ex. 11.

If the partnership does not qualify as a small business (or for any other exception), the partnership applies the limitation provided in § 163(j)(1) to determine the amount of the deductible business interest expense, which will be treated as a nonseparately stated item. Treas.Reg. § 1.163(j)–6(a). It will be rare that the partnership's business interest expense precisely matches the sum of 30% of the partnership's adjusted taxable income plus its business interest income. As the preamble to the final regulations emphasized, the partnership may have either, but not both, in the same taxable year, (1) excess business interest expense or (2) excess taxable income and/or excess business interest income. T.D. 9905, 2020–40 I.R.B. 614. For example, if a partnership has $0 business interest income, $150x of adjusted taxable income, and

$30x of business interest expense, there will be $50x of "excess taxable income," because 30% of $100x adjusted taxable income will allow deduction of the $30x of business interest expense, leaving $50x adjusted taxable income as "excess taxable income," up to 30% of which could be used to permit deduction of a partner's business interest expenses from another business (e.g., a sole proprietorship). There is, however, no carryforward of excess taxable income or excess business interest income.

If a partnership lacks sufficient adjusted taxable income and business interest income, then there will be "excess business interest expense." Instead of being carried forward at the partnership level, excess business interest expense is allocated among the partners, and the allocation will reduce a partner's basis in the partnership interest, but not below zero. I.R.C. § 163(j)(4)(B)(iii). Even though an allocation of excess business interest expense reduces basis, it is not treated as paid or accrued until the partner is allocated a share of excess adjusted taxable income. At that point, the *partner* is treated as paying a portion of the carried over excess business interest expense equal to the amount of excess taxable income allocated to that partner. I.R.C. § 163(j)(4)(B)(ii). This does not necessarily mean the carried forward excess business interest expense is deductible; instead, the carryforward is treated as paid and thereby becomes subject to the § 163(j) limitation, determined at the partner level for that year. For example, if a partner has a $30x excess business interest expense from a prior year and is allocated $50x of excess taxable income in the current year, all $30x excess business interest expense is treated as *paid*, but if the partner's only source of adjusted taxable income is the $50x of excess taxable income and the partner has no business interest income, then only $15x of the $30x excess business interest expense will be deductible (30% of $50x); the remaining portion would be carried forward again. Treas.Reg. § 1.163(j)–6(o)(2), (7) & (8), Exs. 2, 7–8.

If a partner is allocated excess business interest expense but has insufficient basis, the final Regulations clarify that the allocation is treated as a § 704(d) suspended loss (discussed in Section 2 of this Chapter) and is labelled as a "negative § 163(j) expense." Treas.Reg. § 1.163–6(h). Once the negative § 163(j) amount is no longer suspended (by operation of the general rules applicable to § 704(d) suspended losses), it becomes excess business interest expense, reduces basis (again not below zero), and is treated as paid only to the extent the partner is allocated excess taxable income. Treas.Reg. § 1.163(j)–6(h)(2) & (o)(7)–(8), Exs. 7–8.

If the partner has been allocated excess business interest expense that reduced basis and then sells all or part of the partner's partnership interest before that excess business interest expense is treated as paid, the final Regulations provide that a proportionate share (by relative fair market value) of the excess business interest expense is added to the basis of the sold interest (and removed from the remaining excess business interest expense associated with the retained partnership interest). For purposes of this rule, if a partner's interest is completely terminated through liquidation, this is also treated as a disposition of the partnership interest. The basis increase is in lieu of deducting the implicated portion of excess business interest expense. Treas.Reg. § 1.163(j)–6(h)(3) & (o)(9)–(10), Exs. 9–10. Note that this basis increase at disposition is not available with respect to suspended, negative § 163(j) expense because that portion would not yet have reduced basis in the partnership interest.

If there is excess business interest income or excess taxable income, these items are allocated to the partners and are used to compute a partner's § 163(j) limitation with respect to business interest expense at the partner level (which, as previously noted, may include excess business interest expense from a prior year treated as paid by the partner because of the allocation of excess taxable income.

These rules require an allocation of the (1) excess business interest expense or (2) excess taxable income and/or excess business interest income. The final Regulations adopted a complex, 11-step process for assigning these items. This lengthy process is not required if a partnership makes use of pro rata allocations. The preamble explains such a process is necessary because "the 11-step calculation preserves the entity-level calculation required in section 163(j)(4) while also preserving the economics of the partnership, including respecting any special allocations made in accordance with section 704 and the regulations . . . . Stated otherwise, the allocations of section 163(j) excess items prescribed by the 11-step calculation attempt to reflect the aggregate nature of partnerships under subchapter K of the Code while remaining consistent with the application of section 163(j) at the partnership level." T.D. 9905. See Treas.Reg. § 1.163(j)–6(o)(17) through (o)(22), Ex. 17–22.

Because a partner may have a business separate from the partnership (e.g., a sole proprietorship), rules are also required to prevent a partner from using a partnership's taxable income twice—once when the partnership determines the limitation for its business and once when the partner determines the § 163(j) limitation as to any other businesses the partner may have. In applying § 163(j) at the individual partner level, the statute provides that a partner must initially disregard all of the partner's partnership tax items and then add back in the partner's share, if any of the partnership's excess taxable income. I.R.C. § 163(j)(4)(A). The final Regulations make clear that this is the same "excess taxable income" allocated in the 11-step process. See Treas.Reg. § 1.163(j)–6(o)(1) through (o)(8) & (o)(17) through (o)(22), Exs. 1–8 & 17–22.

The Regulations contain many additional rules. For example, a special rule applies if a partner lends to the partnership; that rule deems excess business interest income to the lending partner determined with reference to the lesser of the lending partner's interest from the loan or the partner's excess business interest expense. Treas.Reg. § 1.163(j)–6(n). The final Regulations also contain rules for how to handle interest that would be treated as investment interest by certain partners (e.g., non-materially participating partners in certain trading partnerships) and how to handle interest allocated to a "C" corporation partner, as such interest is deemed to be business interest. Treas.Reg. §§ 1.163(j)–4(b)(3), –6(c). Regulations proposed in September 2020 contain additional rules for determining how to assign interest paid by a partnership among its businesses and investments. Prop.Reg. § 1.163–14, 85 Fed. Reg. 56,846 (Sept. 14, 2020). Suffice it to say, the complexity added by the § 163(j) limitation on deductibility of business interest is high.

Page 1107:

Delete Detailed Analysis 4.2.3 [CARES Act Modifications to § 163(j) have not been extended past 2020.]

Page 1110:

Add to the end of the third full paragraph the following:

The BBA continues to evolve. New final regulations added in December 2022 provide rules excepting certain partnership-related items from the BBA regime. T.D. 9969, 87 Fed. Reg. 75473 (Dec. 9, 2022). The Regulations describe § 6241(11) "special enforcement matters" as to which the centralized regime does not apply and set forth alternative examination rules for such matters. The 2022 Regulations also amend prior BBA Regulations to account for changes made to the Code.

CHAPTER 19

FORMATION OF THE PARTNERSHIP

SECTION 3. CONTRIBUTION OF PROPERTY VERSUS CONTRIBUTION OF SERVICES

Page 1150:

At the end of the second full paragraph on the page, at the following:

In a recent opinion, the Tax Court rejected as "unreasonably narrow" the IRS's argument that Rev. Proc. 93-27 only applies when the recipient of a partnership interest provides the service directly to that partnership. In ES NPA Holding, LLC v. Commissioner, T.C. Memo 2023-55, a corporation, NPA Inc., created two LLCs, IDS LLC and NPA LLC. The corporation placed substantially all its business assets into NPA LLC and then contributed ownership of NPA LLC to IDS LLC, which thereby became a holding LLC. Both LLCs had three classes of membership units, and each LLC became taxed as a partnership as a result of transfers in ownership of membership units. The Tax Court addressed whether Rev. Proc. 93-27 applied to the receipt by ES NPA Holding of Class C units in IDS LLC for services ES NPA Holding provided to NPA Inc., the corporation that formed the two LLCs. The Class C units in IDS LLC tracked and were identical to the NPA LLC Class C units. The IRS argued that because ES NPA Holding did not provide the services to IDS LLC, Rev. Prov. 93-27 was inapplicable to the receipt of the IDS LLC interest. The Tax Court disagreed and stated that Rev. Proc. 93-27 should not be viewed as "a safe harbor with limited application" but rather "as administrative guidance on the treatment of the receipt of a partnership profits interest for services." The Tax Court found that the "material assets of this partnership are held in NPA LLC, and the activities performed . . were to and for the benefit of the future partnership," and that IDS LLC was a "mere conduit." Thus, Rev Proc. 93-27 applied. The Tax Court then further found that the interest had zero liquidation valuation and thus was a profits interest.

Page 1154:

Substitute the following for the last sentence of the carryover paragraph from page 1153:

Section 1061 is discussed in greater detail in Chapter 4 (for its application to distributive share allocations) and in Chapter 8 (for its application to partnership interest dispositions).

.

CHAPTER 20

DETERMINING PARTNERS' DISTRIBUTIVE SHARES

SECTION 2. THE SECTION 704(b) REGULATIONS

A. ALLOCATIONS OF ITEMS UNRELATED TO NONRECOURSE DEBT

(1) ECONOMIC EFFECT

Page 1200:

Add after the first full paragraph, the following:

In Clark Raymond & Co. PLLC v. Commissioner, T.C. Memo 2022-105, the Tax Court effectively gave determinative weight to a qualified income offset (QIO) provision in applying the facts and circumstances test. The case involved an accounting firm, Clark Raymond & Co. PLLC (CRC). Two of the partners withdrew from CRC, and multiple clients left with them. CRC reduced the capital accounts of the departing partners by the value of the departing clients' book of business, which caused negative capital accounts. CRC then allocated all of its ordinary income for the year to the departed partners pursuant to the QIO. The partners who had withdrawn contested both that there was an in-kind distribution of client intangibles and the ordinary income allocation. The IRS largely sided with withdrawing partners, which precipitated a response from CRC, ultimately resulting in the Tax Court decision. The Tax Court determined as a factual matter that CRC did own client-based intangibles and that there was a distribution of such intangibles (even though the clients were never bound to stay with CRC) and they were valuable. Further, the Tax Court found that there was substantial unrealized book gain in the client-based intangibles, which should have been revalued and the book gain allocated at the time of the distribution under Treas. Reg. § 1.704-1(v)(2)(iv)(*e*) (revaluation provision applicable to distributions and discussed on page 398). The Tax Court held that failure to revalue the distributed intangibles caused CRC to fail to maintain capital accounts, which in turn caused the allocation of ordinary income to lack economic effect. The Tax Court then turned to the partner's interest in the partnership test, but it looked primarily to the partnership agreement terms governing current income allocations, including the QIO, while giving less weight to factors such as relative contributions and liquidation rights. The Tax Court used the partnership agreement's income allocation provisions to assign the unrealized book gain in the client-based intangibles not just to the departing partners (which would have resulted in a wash to the departing partners and was the position of the IRS) but to all the CRC partners. (A curious note: the opinion only references one remaining partner in CRC but does not address how/whether CRC continued as a partnership nor does it reference § 736 (discussed in Chapter 9).) This caused the departing partners to have negative capital accounts, and the Tax Court determined that the QIO required that current income be allocated so as to bring the partners' capital accounts to zero. This had the effect of moving the allocation of current income completely away from the remaining partner in CRC.

(2) SUBSTANTIALITY

Page 1221–1222:

Replace the material in Detailed Analysis 4 with the following:

Section 1061, added in 2017, applicable to the exchange of services for a profits interest in certain investment-focused partnerships such as private equity partnerships, requires that the service partner treat as short-term capital gain the excess (if any) of the partner's net long-term capital "with respect to the interest" calculated using the general § 1222 rules over the partner's net long-term capital gain computed as though § 1222 said "3 years" instead of "1 year."

Regulations finalized in January 2021 clarify that § 1061 may affect not only the character of gain on the disposition of a partnership interest but also the character of distributive share allocations of capital gain. The Regulations apply only to long-term capital gain triggered through application of § 1222 and not, for example, to gain treated as long-term capital gain through § 1231 or any other provision. Treas.Reg. § 1.1061–4(b)(7). The relevant holding period is determined by looking at the direct owner of the asset, except that a special rule applies to prevent using distributions by a partnership to circumvent this rule. Treas.Reg. §§ 1.1061–1(a), –4(b)(8), (c)(1)(ii). Thus, for example, if a partnership is subject to § 1061, holds a capital asset for 2 years, and sells the asset at a gain, the distributive share allocation of that capital gain to a partner subject to § 1061 would be subject to the recharacterization rule of § 1061, even if the partner had held the partner's partnership interest for more than 3 years. The same result would apply if the partnership distributed the capital asset and the partner sold it at a gain shortly after the distribution. Treas.Reg. § 1.1061–4(c)(1)(i) through (ii), Exs. 1–2.

The Regulations contain rules providing that allocations made with respect to contributed capital are not subject to recharacterization if the allocation "is determined and calculated in a similar manner as the allocations with respect to capital interests held by similarly situated "Unrelated Non-Service Partners" who have made significant aggregate capital contributions." Treas.Reg. § 1.1061–3(c)(3). "Significant" contributions by such unrelated non-service partners require that they own at least 5% or more of the aggregate capital contributed to the partnership when the allocations are made. Id. "Related Person" means a person or entity treated as related through § 707(b) or § 267(b), and an "Unrelated Non-Service Partner" means partners who do not provide services to the partnership and who are not related to *any* person who provides services to the partnership or to any holder of an applicable partnership interest. Treas.Reg. § 1.1061–1(a)(ii).

The Regulations specify that the analysis includes not simply looking to allocations but also to distribution rights, and they contain a list of factors that are relevant in determining whether the "allocation and distribution rights with respect to capital contributed . . . are reasonably consistent with allocation and distribution rights" of the unrelated non-service partners. Treas.Reg. § 1.1061–3(c)(3). The Regulations allow capital contributions through reinvestment but limit the extent to which a partner will be treated as making a capital contribution when using borrowed funds. Id.

Special allocations intended to reduce the impact of § 1061 will require careful evaluation under the substantiality requirement.

B. ALLOCATIONS ATTRIBUTABLE TO NONRECOURSE DEBT

Page 1230:

Substitute the following for the text of the first sentence of the second full paragraph (keep footnote 8):

If a partnership's depreciation is funded solely through nonrecourse debt (e.g., the partnership owns one depreciable asset purchased solely with nonrecourse debt and no equity), then a special allocation of depreciation alone, with all other items of the partnership being allocated according to a different consistent fraction, will not meet the regulatory safe harbor.

CHAPTER 21

ALLOCATION OF PARTNERSHIP LIABILITIES

Page 1275:

Add to the end of the second full paragraph:

It is important to remember that general principles may be invoked to recharacterize debt as equity, thereby taking a transaction outside of § 752's purview. See Tribune Media Company v. Commissioner, T.C. Memo. 2021-122 (using 13-factor test to determine that subordinated financing was equity, not debt, and thus did not increase a partner's allocable share of recourse debt).

SECTION 2. ALLOCATION OF NONRECOURSE DEBT

Pages 1299–1300:

Delete the second full paragraph on page 1299 through the first table on page 1300 and insert:

First, pursuant to § 704(c) and Treas.Reg. § 1.704–3, D would be allocated $1,500 of the $4,500 of taxable gain (the excess of tax gain over book gain). Second, because under Treas.Reg. § 1.704–2(d)(3) partnership minimum gain is computed with reference to the excess of the nonrecourse debt over book value, the amount of the partnership's minimum gain is $3,000. That gain would be allocated between the partners in the ratio they claimed the nonrecourse depreciation deductions, which are also determined with reference to the excess of nonrecourse debt over book value—$1,000 to each of D, E, and F. (That is, each partner's allocation of $1,500 of book depreciation included $1,000 of nonrecourse deductions; the *tax* allocation required by § 704(c) of $1,500 to E and F are not relevant to the first component.) Thus, under the first component of the formula in Treas.Reg. § 1.752–3, $1,000 of the nonrecourse debt is allocated to each of D, E, and F. Under the second component of the formula, $1,500 is allocated to D (notice that this component is tied to "taxable gain" allocated under § 704(c) on a disposition of the property). And under the third component of the formula, the remaining $3,000 of the debt is allocated equally among the partners, $1,000 to each. D's total share of the indebtedness is $3,500, and the total share of each of E and F is $2,000. As a result, even though the individual components of each partner's share of the debt shifted, none of the partners experienced an overall change in debt share (that is, D's debt share remained $3,500, while E and F's share each remained $2,000). At the end of the year, the partnership balance sheet would be as follows:

	Assets		**Indebtedness and Partners' Capital Accounts**		
	Book	**Tax Basis**		**Book**	**Tax Basis**
Cash	$3,000	$3,000	Debt	$7,500	
Property	$4,500	$3,000	D	$ 0	$2,000
			E	$ 0	$2,000
			F	$ 0	$2,000
	$7,500	$6,000		$7,500	$6,000

CHAPTER 22

TRANSACTIONS BETWEEN PARTNERS AND THE PARTNERSHIP

SECTION 2. SALES OF PROPERTY

Page 1343:

After the end of the first full paragraph on page 1343 before *Detailed Analysis* 3.3.3, add:

Treas.Reg. § 1.707–5 may trigger a disguised sale not only when a partnership assumes the debt of a contributing partner but also when the partnership incurs new debt following a contribution. Treas.Reg. § 1.707–5(b) provides, however, that if the new debt is used to fund a transfer to the contributing partner within 90 days of the partnership incurring the debt, then the transfer is treated as part of a disguised sale only to the extent the amount of the transfer exceeds the contributing partner's allocable share of the new partnership debt.

In Tribune Media Company v. Commissioner, T.C. Memo. 2021-122, the Chicago Tribune and its affiliates (Tribune) attempted, with partial success, to use this "debt-financed distribution exception" to reduce tax gain on the sale of the Chicago Cubs. Tribune contributed the Cubs to a newly formed LLC in a § 721 transaction; cash contributions to the new LLC were made at the same time by the buyer, a trust controlled by the Ricketts family. On the same date, the LLC borrowed money through two different arrangements and distributed the proceeds to Tribune. One financing arrangement was through commercial banks—the "Senior Debt." Tribune guaranteed the Senior Debt and argued this guaranty made the debt recourse with respect to Tribune, thereby increasing its basis and reducing the portion of the cash transfer that would be characterized as a disguised sale. The IRS argued that the guaranty was invalid under the Regulations, including both the § 752 Regulations and the general anti-abuse partnership Regulations, as well as under general substance-over-form principles. The Tax Court held for the Tribune as to this issue. (The LLC formation took place in 2009, so recent amendments strengthening the anti-abuse rules of the § 752 Regulations were not addressed by the Tax Court, but given the Tax Court's view that Tribune had the financial wherewithal to make good on the guaranty (notwithstanding that

Tribune was in bankruptcy proceedings) and its finding that there were no other guarantees or indemnification agreements, it seems likely the outcome would have been the same under the current § 752 Regulations.)

The second "loan" arrangement was financed by entities affiliated with the Ricketts family and was subordinated to the Senior Debt. The IRS argued that this arrangement constituted equity, instead of a loan, and thus could not give rise to additional recourse debt share for the Tribune and would increase the amount of gain on the disguised sale. The IRS prevailed on this argument with the Tax Court applying a 13-factor test to determine that the arrangement constituted equity. The Tax Court emphasized that the enforcement rights were meaningless and that only through treating the arrangement as equity would the equity ownership percentages match the operating agreement percentages. The Tax Court also noted the relatedness of the Ricketts family entities as well as the failed attempts to market the subordinated debt to other parties, including through offering owner-type privileges such as box seats and priority parking.

CHAPTER 24

SALES OF PARTNERSHIP INTERESTS BY PARTNERS

SECTION 1. THE SELLER'S SIDE OF THE TRANSACTION

B. CAPITAL GAIN VERSUS ORDINARY INCOME: SECTION 751

Page 1390:

After the first sentence of the third full paragraph on the page, add the following:

But see CCA 202309015 (Mar. 2, 2023) (concluding that § 1221(a)(1) applies instead of § 741 when a taxpayer holds partnership interests primarily for sale to customers in the ordinary course of business).

Page 1407:

Substitute the following for the last two sentences of the carryover paragraph from page 1406 and the first sentence of the first full paragraph on page 1407:

Final Regulations provide that the term "corporation" for purposes of § 1061(c)(4)(A) does not include "S" corporations or any pass-through entity. Treas.Reg. § 1.1061–3(b).

The statutory language of § 1061 seems to require recognition of short-term capital gain on the direct or indirect transfer of a covered interest to certain related parties. I.R.C. § 1061(d)(1). Regulations finalized in January 2021 define "transfer" to mean "a sale or exchange in which gain is recognized by the Owner Taxpayer," thereby taking a narrow approach to the statute and not, for example, requiring acceleration of gain recognition on gratuitous transfers. Treas.Reg. § 1.1061–5(b).