Selected Highlights of the Tax Cuts and Jobs Act

- **Accounting**
  - Increased ability of C corporations to use cash method [p.3, A.1]
    - C corporations, and partnerships with C corporation partners, can use cash method if average annual gross receipts over 3 prior years do not exceed $25 million.
    - Applies even if inventory is material income-producing factor.
    - Change in accounting method treated as made with IRS consent.
  - Expanded exception to the UNICAP rules [p.5, D.1]
    - Available to taxpayers who meet the $25 million gross receipts test (above).
    - Available to those who produce and those who acquire for resale
  - Revenue recognition by accrual method taxpayers [p. 5, D.2]
    - No later than recognized in “applicable financial statement”
    - Codification of deferral method for advance payments
Costs of Entertainment
2017 TCJA § 13304
Outline: item D.3, page 9

TCJA § 13304 amends Code § 274(a) to disallow business deductions for:

1. Costs “[w]ith respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation.”
2. Membership dues with respect to any club organized for business, pleasure, recreation or other social purposes.

- Applies to taxable years beginning after 2017.
  - Treasury and IRS will issue proposed regulations.
  - Meals are still deductible (subject to 50% limit) if, among other requirements, taxpayer (or employee) is present and meal is provided to current or potential business customer, client, consultant, or similar business contact.

Notice 2018-76
2018-42 I.R.B. 599 (10/3/18)
Outline: item D.3.a, page 10

- Taxpayers may deduct 50 percent of an otherwise allowable business meal expense if:
  1. The expense is an ordinary and necessary expense under § 162(a) paid or incurred during the taxable year in carrying on any trade or business;
  2. The expense is not lavish or extravagant under the circumstances;
  3. The taxpayer, or an employee of the taxpayer, is present at the furnishing of the food or beverages;
  4. The food and beverages are provided to a current or potential business customer, client, consultant, or similar business contact; and
  5. In the case of food and beverages provided during or at an entertainment activity, the food and beverages are purchased separately from the entertainment, or the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The entertainment disallowance rule may not be circumvented through inflating the amount charged for food and beverages.
Example 1.
1. Taxpayer A invites B, a business contact, to a baseball game. A purchases tickets for A and B to attend the game. While at the game, A buys hot dogs and drinks for A and B.
2. The baseball game is entertainment as defined in § 1.274-2(b)(1)(i) and, thus, the cost of the game tickets is an entertainment expense and is not deductible by A. The cost of the hot dogs and drinks, which are purchased separately from the game tickets, is not an entertainment expense and is not subject to the § 274(a)(1) disallowance. Therefore, A may deduct 50 percent of the expenses associated with the hot dogs and drinks purchased at the game.

Example 2.
1. Taxpayer C invites D, a business contact, to a basketball game. C purchases tickets for C and D to attend the game in a suite, where they have access to food and beverages. The cost of the basketball game tickets, as stated on the invoice, includes the food and beverages.
2. The basketball game is entertainment as defined in § 1.274-2(b)(1)(i) and, thus, the cost of the game tickets is an entertainment expense and is not deductible by C. The cost of the food and beverages, which are not purchased separately from the game tickets, is not stated separately on the invoice. Thus, the cost of the food and beverages also is an entertainment expense that is subject to the § 274(a)(1) disallowance. Therefore, C may not deduct any of the expenses associated with the basketball game.
Example 3.

1. Assume the same facts as in Example 2, except that the invoice for the basketball game tickets separately states the cost of the food and beverages.

2. As in Example 2, the basketball game is entertainment as defined in § 1.274-2(b)(1)(i) and, thus, the cost of the game tickets, other than the cost of the food and beverages, is an entertainment expense and is not deductible by C. However, the cost of the food and beverages, which is stated separately on the invoice for the game tickets, is not an entertainment expense and is not subject to the § 274(a)(1) disallowance. Therefore, C may deduct 50 percent of the expenses associated with the food and beverages provided at the game.

Qualified Transportation Fringes Disallowed

2017 TCJA § 13304

Outline: item D.4, page 11

- No deduction for qualified transportation fringes (employee parking, transit passes, transportation in commuter highway vehicle)
- Applies to amounts paid or incurred after 2017
- Ability of employees to exclude transportation fringes not affected
- Exception: qualified bicycle commuting reimbursements before 2026 are:
  - Deductible by employer
  - Included in income of the employee
- Note: UBTI of tax-exempt organizations is increased if they provide nondeductible qualified transportation fringes. [Outline page 88, item A.3.b].
Notice 2018-99
2018-52 I.R.B. 1067 (12/10/18)
Outline: item D.4.a, page 11

- Treasury and IRS will issue proposed regulations under § 274 that will include guidance on:
  - Determining nondeductible expenses for qualified transportation fringes
  - Calculation of increased unrelated business taxable income (UBTI) of tax-exempt organizations that provide qualified transportation fringes.

- Provides:
  - Section 274(a) does not disallow amounts an employer pays to third parties for employee parking in excess of the § 132(f)(2) monthly limitation on exclusion ($260 for 2018 and $265 for 2019), and employer must treat excess amount as compensation and wages to the employee.
  - If a taxpayer owns or leases parking facilities where employees park:
    - Nondeductible portion of the cost of providing parking can be calculated using any reasonable method.
    - The notice provides a four-step methodology that is deemed to be a reasonable method.

---

20% Deduction for Qualified Business Income
2017 TCJA § 11011
Outline: item D.5, page 12

- TCJA § 11011 adds Code § 199A, which generally allows a 20% deduction for “qualified business income.”
  - Available to individuals, estates, and trusts for taxable years beginning after 2017 and before 2026
- Final regulations: issued January 18, 2019
- Proposed regulations: issued January 18, 2019
  - Provide guidance on treatment of previously suspended losses that constitute qualified business income.
- Notice 2019-7 (1/18/2019)
  - Safe harbor under which rental real estate enterprises are treated as a trade or business for purposes of § 199A
Limit on Deducting Business Interest
2017 TCJA § 13301

Outline: item D.6, page 17

- Amendments to Code § 163(j) limit the deduction of business interest expense – a/k/a “thin cap rules.”
- Limit is business interest income plus 30% of “adjusted taxable income” plus floor plan financing
  - ATI generally is earnings before interest, tax, depreciation and amortization (EBITDA) for 2018-2022, then earnings before interest and taxes (EBIT).
- Businesses with average annual gross receipts of $25 million or less (over 3 years) are exempted
- Real estate businesses can elect out, but become subject to alternative depreciation system.

Increased Limits Under § 179
2017 TCJA § 13101

Outline: item E.1.a, page 20

- Basic limit: $1 million (increased from $520,000)
- Phase-out threshold: $2.5 million
- Limit for SUVs remains at $25,000
- Applies to property placed in service in TY beginning after 2017
- Definition of qualified real property (QRP) revised
  - Formerly 3 categories: qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property
  - Combined into 1 category: qualified improvement property.
  - Roofs, HVAC/fire protection/security systems now are QRP.
Bonus Depreciation Under § 168(k)  
2017 TCJA § 13201  
*Outline: item E.1.b, page 21*

- 100% for property *acquired and placed in service* after September 27, 2017
  - Percentage declines beginning in 2023
  - Property acquired *on or before* September 27, 2017, is eligible for only 50% if placed in service in 2017, 40% in 2018, 30% in 2019
  - Drafting glitch: qualified improvement property is not eligible
- *Used* property is now eligible for bonus depreciation if *acquired and placed in service* after September 27, 2017
- *Also note*: TCJA shortened recovery period for machinery and equipment used in a farming business from 7 to 5 years and eliminated required use of 150% declining balance method.

NOL Changes  
2017 TCJA § 11012  
*Outline: item H.1, page 26*

- Net operating loss changes
  - “Excess business losses” of noncorporate taxpayers disallowed and carried forward (2018-2025)
    - Amount by which aggregate trade or business deductions exceed aggregate gross income from those trades or businesses, plus $250,000 ($500,000 for joint filers).
  - NOLS not carried back (only forward) (permanent)
  - NOLs can offset only 80% of taxable income (permanent)
  - NOLs do not expire (permanent)
Sugar Land Ranch Dev., LLC v. Commissioner,
T.C. Memo. 2018-21 (2/22/18)
Outline: item A.3, page 29

- The taxpayer, an LLC treated as a TEFRA partnership, acquired tracts of land in 1998 just outside Houston.
  - Planned to develop the land into single-family residential building lots and commercial tracts.
  - Performed environmental cleanup, but never subdivided or developed it.
  - When subprime mortgage crisis hit, decided in 2009 not to develop and adopted unanimous resolution stating this.
- In 2011, received unsolicited offer; sold property to developer.
- **Issue:** Is the taxpayers’ gain (or loss) ordinary or capital?
- **Held:** A capital gain. Taxpayers had ceased to hold the property for sale in the ordinary course of business.

Simonsen v. Commissioner,
150 T.C. No. 8 (3/14/18)
Outline: item A.4, page 30

- Due to “Great Recession,” the taxpayers had converted their underwater principal residence to rental property, but after a year of renting they sold it in a short sale at a big loss compared to their original purchase price.
  - They reported short sale as producing (1) a § 165 loss and (2) excludible COD income under § 108(a)(1)(E).
  - IRS argued no loss, but instead gain due to special rule in Reg. § 1.165-9(b)(2) adjusting basis downward to FMV at time of conversion to rental property.
- **Issue:** Who’s right? Taxpayers or the IRS?
- **Held:** Neither. Due to unique California law treating home mortgage debt as nonrecourse, and rare no gain/no loss rule of Reg. § 1.165-9(b)(2), the taxpayers and IRS both got it wrong.
**Miscellaneous Itemized Deductions**  
2017 TCJA § 11045

*Outline: item C.1, page 32*

- For taxable years beginning after 2017 and before 2026, miscellaneous itemized deductions are not deductible.
- Includes:
  - Investment-related expenses
  - Unreimbursed employee business expenses
  - Tax preparation fees
- Will put more pressure on lawyers, CPAs, and other advisers to allocate fees toward trade or business, not personal tax advice
- Notice 2018-61 (7/13/18): proposed regs. will clarify that estates and non-grantor trusts are not affected.

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**Like-Kind Exchanges**  
2017 TCJA § 11045

*Outline: item E.1, page 32*

- Like-Kind Exchanges (Section 1031)
  - Limited to real property for taxable years beginning after 2017
  - Transition rules allow deals struck in 2017 to qualify even if not real estate and exchange not completed until 2018
  - Reverse exchange could take awhile? See, *e.g.*, *Estate of Bartell* (replacement property acquired through intermediary 17 months prior to exchange of relinquished property with intermediary)
  - Cost segregation studies could come back to haunt taxpayers
  - For exchanges of personal property, impact is lessened by availability of bonus depreciation.
### Moving Expenses

**2017 TCJA § 11048 and 11049**

*Outline: item A.4, page 34*

- Moving expenses in connection with work not deductible (Code § 217)
- Reimbursements (qualified moving expense reimbursements) not excludable by employees (Code § 132(g))
- Applies to taxable years beginning after 2017 and before 2026
- Exception: members of armed forces on active duty who move pursuant to military orders
- Note: Some churches require ministers to move every few years – may make pastor moves more expensive for churches going forward

### Notice 2018-75

**2018-41 I.R.B. 556 (9/21/18)**

*Outline: item A.4.a, page 35*

- **Notice 2018-75:**
  - The suspension of the exclusion for moving expenses does not apply to individuals who receive reimbursements from employers in 2018 for expenses incurred in connection with moves that occurred before 2018.
  - Applies whether employer pays moving expense directly or reimburses individual.
  - Employers who have included such amounts in an individual’s wages or compensation for purposes of federal employment taxes (and withheld and paid federal employment taxes on these amounts) can use the normal adjustment or refund processes to correct the overpayment of federal employment taxes.
Unwinding Roth IRA Conversions
2017 TCJA § 11048 and 11049

Outline: item D.1, page 40

  - No more unwinding Roth IRA conversions by extended due date of an individual’s return
  - Applies to taxable years beginning after 2017
- A Roth IRA conversion made in 2017 may be recharacterized as a contribution to a traditional IRA if the recharacterization was made by October 15, 2018.

2018 Individual Tax Rates

Outline: items A.1-2, pages 40-42

<table>
<thead>
<tr>
<th></th>
<th>Before TCJA</th>
<th>After TCJA</th>
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<tbody>
<tr>
<td>Individual rate brackets</td>
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<td>7</td>
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<tr>
<td>Lowest individual rate (ordinary income)</td>
<td>10%</td>
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<tr>
<td>Highest individual rate (ordinary income)</td>
<td>39.6%</td>
<td>37%</td>
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<tr>
<td>Rates on long-term capital gain</td>
<td>0%, 15%, 20%</td>
<td>0%, 15%, 20%</td>
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<tr>
<td>Tax on net investment income</td>
<td>3.8%</td>
<td>3.8%</td>
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</table>
**Kiddie Tax**

2017 TCJA § 11001(a)

*Outline: item A.3, page 42*

- New Code § 1(j):
  - Modifies the “kiddie tax” for tax years beginning after 2017 and before 2026.
  - Unearned income of minor children is taxed under the rate schedule that applies to trusts and estates (not by adding it to the parent’s income and calculating the increase).
  - Thus, child’s tax on unearned income is unaffected by the parents’ situation.

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**Sun v. Commissioner,**

880 F.3d 173 (5th Cir. 1/18/18)

*Outline: item B.4, page 44*

- The taxpayer served as CEO of a corporation and also devoted a significant amount of time to investment activities.
- The taxpayer and his business acquaintance and friend, a resident of Hong Kong, orally agreed the taxpayer would invest his friend’s funds.
  - Over a period of two years, the friend sent $19 million to be invested.
- The taxpayer:
  - Used several million of the funds for personal purposes, including the purchase of a Mercedes Benz automobile and for gambling.
  - The taxpayer informed his friend that he had lost approximately $2 million of the friend’s funds through gambling.
- Issue: did either the corporation or the taxpayer have gross income?
- Held:
  2. No as to the corporation, which was a mere conduit.
Standard Deduction
Outline: item D.3, page 49, and D.14 page 55

<table>
<thead>
<tr>
<th></th>
<th>Before TCJA</th>
<th>2018</th>
<th>2019</th>
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<tbody>
<tr>
<td>Single</td>
<td>$6,500</td>
<td>$12,000</td>
<td>$12,200</td>
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<tr>
<td>Married filing separately</td>
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<td>$12,200</td>
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<tr>
<td>Head of household</td>
<td>$9,550</td>
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<td>$18,350</td>
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<tr>
<td>Married filing jointly</td>
<td>$13,000</td>
<td>$24,000</td>
<td>$24,400</td>
</tr>
</tbody>
</table>

Personal Exemption Deduction
Outline: item D.4, page 50

- Before TCJA: $4,050 per person (taxpayer and each dependent)
- TCJA:
  - Eliminated the personal exemption deduction for 2018-2025
  - Still need to determine who is a dependent
    - Filing status, earned income credit etc.
  - Employees need to check amount of tax withheld from paychecks
    - Use online withholding calculator on IRS website (or consult tax adviser)
    - Submit new W-4 Form to employer if necessary
Notice 2018-70
2018-38 I.R.B. 441 (8/28/18)
Outline: item D.4.a, page 50

The 2017 Tax Cuts and Jobs Act added § 151(d)(5), which reduces the exemption amount to zero for TY beginning after 2017 and before 2026.

- Eliminates the deduction for personal exemptions authorized by § 151(a).

However, it is still necessary to determine for various purposes whether an individual is a “dependent” within the meaning of § 152.

- Qualifying child
- Qualifying relative:
  - To be a qualifying relative, § 152(d)(1)(B) requires the individual’s gross income for the calendar year be less than the exemption amount as defined in § 151(d).
  - Notice 2018-70: “because it would be highly unusual for an individual to have gross income less than zero, virtually no individuals would be eligible as qualifying relatives.”

Notice 2018-70:
- Proposed regulations will be issued.
- In determining eligibility in 2018 for head-of-household filing status and for the new $500 credit (§ 24(h)(4)) for dependents other than a qualifying child, an individual must have gross income not exceeding $4,150 (to be adjusted for inflation).

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Deduction of State and Local Taxes
Outline: item D.5, page 51

TCJA: An individual’s itemized deductions on Schedule A for state taxes cannot exceed $10,000.

- Applies to aggregate of property taxes, and sales or income taxes.
- Limit applies both to single individuals and married individuals filing jointly
- Applies 2018 through 2025

Some states have adopted workarounds, e.g., New Jersey gives a credit against property taxes for contributions to certain charitable funds designated by the state.

Notice 2018-54 (5/23/18): proposed regulations will “make clear that the requirements of the Internal Revenue Code, informed by substance-over-form principles, govern the federal income tax treatment of such transfers.”
Deduction of State and Local Taxes
Outline: item D.5.b, page 51

  - Apply to contributions after 8/27/18.
- The proposed regulations:
  - Generally require taxpayers to reduce the amount of any federal income tax charitable contribution deduction by the amount of any corresponding state or local tax credit.
  - Provide an exception: a taxpayer’s federal charitable contribution deduction is not reduced if the corresponding state or local credit does not exceed 15 percent of the taxpayer’s federal deduction.
  - Example: T contributes $1,000 to state charity and gets 10% state tax credit.
  - Provide that a state or local tax deduction normally will not reduce a taxpayer’s federal deduction (provided the state and local deduction does not exceed the taxpayer’s federal deduction).

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Deduction of State and Local Taxes
IRS News Release IR-2018-178 (9/5/18)
Outline: item D.5.c, page 52

- This News Release provides:
  - If a payment to a government agency or charity qualifies as an ordinary and necessary business expense under § 162(a), it is not subject to disallowance in the manner in which deductions under § 170 are subject to disallowance.
  - This is true regardless of whether the taxpayer is doing business as a sole proprietor, partnership or corporation.
- FAQ on the IRS website:
  - “[A] business taxpayer making a payment to a charitable or government entity described in § 170(c) is generally permitted to deduct the entire payment as an ordinary and necessary business expense under § 162 if the payment is made with a business purpose.”
Mortgage Interest Deduction
2017 TCJA § 11043
Outline: item D.6, page 52

- Prior to TCJA, taxpayers could deduct interest paid on:
  - Up to $1 million of “acquisition indebtedness”
    - Debt used to acquire, construct, or substantially improve principal residence or 1 other residence & secured by residence
  - Up to $100,000 of “home equity indebtedness”
    - Debt secured by residence not used to acquire, construct, or substantially improve the residence
  - Limit on acquisition indebtedness reduced from $1 million to $750,000 (effective TYB after 2017 and before 2026).
  - Interest on home equity indebtedness no longer deductible (effective TYB after 2017 and before 2026)
    - Potential trap: the cash-out refinance
      - Will result in home equity indebtedness if cash proceeds not invested in the home.

Medical Expenses
2017 TCJA § 11027
Outline: item D.7, page 53

- Prior to TCJA, medical expenses generally were deductible only to the extent they exceeded 10% of a taxpayer’s AGI
  - For taxable years beginning after 2012 and ending before 2017, this threshold was reduced to 7.5% if the taxpayer or the taxpayer’s spouse had attained age 65 by the close of the year.
- TCJA:
  - Amended § 213(f) to provide that the 7.5% threshold applies to all taxpayers.
  - This rule applies for taxable years beginning after 2016 and ending before 2019 (i.e., calendar years 2017 and 2018).
  - The 7.5% threshold applies for purposes of both the regular tax and the AMT.
Personal Casualty Losses  
2017 TCJA § 11044  
Outline: item D.8, page 53

- Under amended § 165(h), personal casualty losses are not deductible.
- Applies to taxable years beginning after 2017 and before 2026.
- Exception: personal casualty losses in federally declared disaster areas are still deductible.

Section 68 Overall Limitation on Itemized Deductions  
2017 TCJA § 11046  
Outline: item D.9, page 53

- Congress has “suspended” the § 68 overall limit on itemized deductions for taxable years beginning after 2017 and before 2026.
Child Tax Credit
2017 TCJA § 11022
Outline: item D.10, page 53

- Increased from $1,000 to $2,000 per child
- Refundable portion of credit increased from $1,000 to $1,400 per child
- Phase-out of the credit begins at:
  - MFJ: AGI of $400,000 (increased from $110,000)
  - All others: $200,000 (increased from $75,000 for single filers)
- New $500 nonrefundable credit for dependents other than a qualifying child.
- All provisions apply for tax years beginning after 2017 and before 2026.

Alimony
2017 TCJA § 11051
Outline: item E.1, page 55

- Prior to TCJA:
  - Alimony is deductible (above-the-line) by the payor
  - Alimony is included in the gross income of the recipient
  - Example: payor earns $100,000 and pays to ex-spouse $50,000 of alimony—each individual is taxed on $50,000
- TCJA: For divorce or separation instruments executed after 2018—
  - Alimony is not deductible by the payor
  - Alimony is not included in the gross income of the recipient
529 Accounts
2017 TCJA § 11032
Outline: item F.1, page 55

- New Code § 529(c)(7) permits tax-free distributions from § 529 accounts to pay “expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school.”
- Applies to distributions occurring after 2017
- Limit is $10,000 per year per distributee-child even if child covered by multiple § 529 accounts
- Home school expenses next? Omitted from final TCJA bill

Individual AMT
2017 TCJA § 12002
Outline: item G.1, page 56

<table>
<thead>
<tr>
<th>AMT Exemption Amounts for 2018</th>
<th>AMT Phase-Out Thresholds for 2018</th>
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<tr>
<td><strong>Filing Status</strong></td>
<td><strong>Before TCJA</strong></td>
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<tr>
<td>Married Filing Separately</td>
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<td>Single and HOH</td>
<td>$55,400</td>
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<td>Married Filing Jointly and Surviving Spouses</td>
<td>$86,200</td>
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<tr>
<td>Estates and Trusts</td>
<td>$24,600</td>
</tr>
</tbody>
</table>
Summary for Individuals

- Lower tax rates
  - More take-home pay for employees because of reduced withholding
  - Need to check withholding
- Fewer available deductions and larger standard deduction means more likely to take standard deduction rather than itemize deductions
- No personal exemption deduction
- More likely to benefit from child tax credit

Example

- Married couple filing jointly
- Two small children
- Both parents work and earn a total of $140,000
- Itemized deductions of $15,000 (mortgage interest, property taxes, charitable contributions)
Example

<table>
<thead>
<tr>
<th></th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Income</td>
<td>$140,000</td>
<td>$140,000</td>
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<tr>
<td>Standard Deduction</td>
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<tr>
<td>Itemized Deductions</td>
<td>$(15,000)</td>
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<tr>
<td>Personal Exemptions</td>
<td>$(16,200)</td>
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<tr>
<td>Taxable Income</td>
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<td>$116,000</td>
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<tr>
<td>Tax</td>
<td>$18,678</td>
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<tr>
<td>Child Tax Credit</td>
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<td>$(4,000)</td>
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<tr>
<td>Tax Due to IRS</td>
<td>$18,678</td>
<td>$13,399</td>
</tr>
</tbody>
</table>

Beneficiaries of Electing Small Business Trusts

*Outline: item D.2, page 57*

- Subchapter S corporations are permitted to have only certain categories of shareholders.
  - A nonresident alien is not a permissible shareholder
- One of the permissible shareholders of a subchapter S corporation is an “electing small business trust”
- Prior to the 2017 TCJA, if an ESBT had a nonresident alien as a beneficiary, the subchapter S election would terminate.
- The 2017 TCJA changed this: an ESBT now can have a nonresident alien as a shareholder.
Summa Holdings, Inc. v. Commissioner, 848 F.3d 779 (6th Cir. 2/16/17)

Outline: item H.1, page 58

- Members of the Benenson family owned C corporation stock.
  - Two family members established Roth IRAs, which (through a holding company) held the shares of a domestic international sales corporation (DISC).
  - The C corporation paid $5.2 million in deductible commissions to the DISC, which excluded them from income. The DISC paid dividends to the Roth IRAs, triggering UBIT.
  - IRS asserted that the structure impermissibly avoided the contribution limits for Roth IRAs, and that the substance-over-form doctrine required recharacterization of the corporation’s commission payments as nondeductible dividends.
  - Held: IRS cannot use the substance-over-form doctrine to recharacterize the C corporation’s commission payments.

Mazzei v. Commissioner, 150 T.C. No. 7 (3/5/18)

Outline: item H.1.b, page 60

- Members of the Mazzei family owned S corporation stock.
  - Two family members established Roth IRAs, which bought shares in a newly-formed foreign sales corporation (FSC) for $500. [FSCs since repealed.]
  - The S corporation paid over $500k in deductible commissions to the FSC during years 1998 to 2002. Roth IRAs grew and paid no tax on dividends from FSC.
  - IRS asserted that the structure impermissibly avoided the contribution limits for Roth IRAs.
  - Held: Roth IRAs not true owners of FSC stock, so IRS position sustained.
  - Dissent: Should have followed 6th Circuit in Summa Holdings.
Shareholders in the *Summa Holdings* case appealed the Tax Court’s decision to the First and Second Circuits.
- The Sixth Circuit ruled on the tax consequences to the C corporation that operated the family business.
- These shareholders resided in the First and Second Circuits.
- The First and Second Circuits followed the Sixth Circuit in rejecting application of the substance over form doctrine.
- **Held**: the shareholders are not treated as receiving a deemed distribution and as making an excess Roth IRA contribution.

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**Selected Highlights of the Tax Cuts and Jobs Act**

- **Corporations**
  - 21% flat corporate tax rate (TYB after 2017) [p.62, H.2]
    - Repeal of corporate AMT (TYB after 2017) [p.62, H.2.a]
  - Reduced corporate dividends-received deduction [p.63, H.3]
    - 100% deduction unchanged
    - 80% deduction reduced to 65%
    - 70% deduction reduced to 50%
2017 Tax Cuts and Jobs Act § 13312
Outline: item H.4, page 64

- Section 13312 of the 2017 TCJA amended Code § 118.
- New § 118(b)(2) provides:
  - Non-shareholder contributions to the capital of a corporation made after 12/22/17 by any governmental entity or civic group are not excluded from the corporation’s gross income.
- The legislative history of this amendment states:
  - “The conferees intend that section 118, as modified, continue to apply only to corporations.”

Ginsburg v. United States,
136 Fed. Cl. 1 (1/31/18)
Outline: item G.2.a, page 78

- The taxpayer held 90% of the membership interests in an LLC classified as a partnership for federal tax purposes.
- The LLC participated in New York State’s Brownfield Development Tax Credit program.
  - In return for acquiring an abandoned shoe factory and restoring it as residential property, the LLC received state tax credits.
  - Any credit in excess of state tax liability is paid in cash.
  - The LLC received $1.8 million from New York State as an “excess” credit payment.
- Issue: is $1.8 million payment included in the LLC’s (and therefore its partners’) gross income?
- Held: Yes. The payment was an accession to wealth (Glenshaw Glass (U.S. 1955). The court rejected arguments that the payment was a nontaxable (1) contribution to capital, (2) recovery of investment, or (3) general welfare grant.

**Outline: item G.2.b, page 79**

- **Held:** An $11 million grant from New York State received by an LLC classified as a partnership for federal tax purposes was included in the LLC’s (and therefore the partners’) gross income.
  - The grant was for restoration of a building in Buffalo.
  - The court rejected the argument that the grant was a nontaxable contribution to capital because § 118 applies only to corporations.
- **Planning idea:**
  - The LLC had two members, each of which was a disregarded LLC held by a subchapter S corporation.
  - Had the grant been paid to the S corporations and then contributed to the LLC, the S corporations could have excluded the grant from gross income (at least under the pre-TCJA version of § 118).

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**Selected Highlights of the Tax Cuts and Jobs Act**

- **Partnerships**
  - Legislative reversal of Tax Court’s 2017 *Grecian Magnesite Mining* decision, which held that a foreign partner was not subject to U.S. tax on the sale of a U.S. partnership interest [p. 71, D.1. and p. 72, D.1.a]
  - No more technical terminations of partnerships [p. 73, D.2]
  - Automatic § 754 election in certain circumstances [p. 73, E.1]
Selected Highlights of the Tax Cuts and Jobs Act

- Changes Affecting Exempt Organizations
  - Excise tax of 21% (highest corporate rate) for “applicable tax-exempt organizations” paying more than $1 million annually to “covered employees.” [p. 83, A.1]
    - Notice 2019-9 (12/31/18) [p. 84, A.1.c]
  - Excise tax of 1.4% on net investment income of private colleges and universities with endowments of $500,000 or more per full-time student [p. 85, A.2]
  - Changes to UBIT rules. [p. 85, A.3]

2018-31 I.R.B. 280 (7/16/18)
Outline: item A.9, page 91

- Substantial contributors’ names no longer required to be disclosed on Form 990.
## Selected Highlights of the Tax Cuts and Jobs Act

- **Changes Affecting Charitable Giving**
  - Increased limit (60% instead of 50% of contribution base) for *cash* contributions made by an individual to *public charities* and certain other organizations. [p. 92, B.3.a]
  - Repeal of § 170(f)(8)(D) for taxable years beginning after 2016. [p. 92, B.3.b]
    - This provision permitted, *as provided in regulations*, a charitable contribution deduction, despite the absence of a contemporaneous written acknowledgment (CWA), if the donee filed a return (such as Form 990) with the requisite CWA information. *See 15 West 17th Street LLC v. Commissioner*, 147 T.C. No. 19 (12/22/16).
  - Amendment of § 170(l) to preclude a charitable contribution deduction of amounts paid to a college or university for preferred seating at athletic events. [p. 93, B.3.c]
  - Effective for amounts paid in taxable years beginning after 2017

## Affordable Care Act

2017 TCJA § 11081

*Outline: item A.4, page 101*

- **TCJA:**
  - Repealed the *individual* Affordable Care Act penalty (individual mandate) for months beginning after 2018
  - Left in place the *employer* mandate for applicable large employers.
    - Employers with 50 or more FTE employees still must offer to full-time employees health insurance that meets ACA standards.
    - Shared responsibility penalty applies if employer fails to offer qualifying health insurance and an employee purchases health insurance through an exchange and receives a premium subsidy.
**Weiss v. Commissioner,**
121 A.F.T.R.2d 2018-783 (D.C. Cir. 5/22/18)

Outline: item F.1.a, page 108

- **Held:** when the date of a Final Notice of Intent to Levy is earlier than the date of mailing, the 30-day period for the taxpayer to request a collection due process hearing runs from the date of mailing.

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**Buzz Killers for the Marijuana Industry**

Outline: item H.10, page 123

- Section 280E disallows any deduction or credit otherwise allowable if such amount is paid or incurred in connection with a trade or business consisting of trafficking in controlled substances.
  - The IRS has conceded in more than one case that § 280E does not bar taking into account cost of goods sold.
  - *The Green Solution Retail, Inc. v. United States,* 855 F.3d 1111 (10th Cir. 5/2/17).
  - The Anti-Injunction Act ("AIA") and the Declaratory Judgment Act ("DJA") bar a marijuana dispensary's suit to enjoin the IRS from auditing its business records.
  - *Alpenglow Botanicals, LLC v. United States,* 894 F.3d 1187 (10th Cir. 7/3/18).
  - Rejected taxpayer’s arguments that (1) the IRS lacked authority to investigate and deny tax deductions under § 280E without a criminal conviction having been established, and (2) even if IRS had such authority, it lacked sufficient evidence of “trafficking” to apply § 280E.
    - S corporation’s deduction for wages paid to shareholder-employees disallowed under § 280E.
    - Effect: income of S corporation subject to double taxation.
    - Unaddressed issue: effect on shareholders’ qualified business income- § 199A.
FBAR Penalties
Outline: item H.11, page 123

- Under 31 U.S.C. § 5321(a)(5)(A), the Secretary of the Treasury “may impose” a penalty for FBAR violations.
  - Pursuant to administrative orders, the authority to impose FBAR penalties has been delegated by the Secretary to the IRS.
- Maximum penalties:
  - Before the American Jobs Creation Act of 2004 (“AJCA”), 31 U.S.C. § 5321(a)(5) provided that the penalty for willful FBAR violations was the greater of $25,000 or the balance of the unreported account up to $100,000.
  - After the AJCA of 2004, the normal penalty for an FBAR violation is $10,000 per offending account, but the penalty for a willful FBAR violation “shall be increased to the greater of” $100,000 or 50 percent of the balance in the offending account at the time of the violation.
- The relevant regulation, 31 C.F.R. § 1010.820(g), reflects pre-ACJA law and caps the penalty for willful FBAR violations to $100,000 per account.
- Issue: can the government impose the higher, current statutory penalty?