CURRENT DEVELOPMENTS
American Bar Association
Section of Taxation
Tax Accounting Committee

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I. Case Law

A. Plano Holding LLC v. Commissioner, T.C. Memo. 2019-140

In Plano Holding LLC v. Commissioner, the Tax Court held that the target in an acquisition could not deduct a finder's fee that it paid to a service provider that was engaged by an institutional investor affiliated with the acquirer. The institutional investor agreed to pay a $1.5 million finder's fee to its financial advisor, who recommended a potential acquisition of target. The engagement agreement provided that the services were rendered solely for the benefit of institutional investor and the parties' obligations could not be assigned without the service provider's prior written consent. The target ultimately paid the fee and claimed 70% of the fee as a deduction under the success-based fee safe harbor. The Tax Court disallowed the deduction, assessing more than $100,000 in deficiencies and penalties, holding that the target failed to establish a "direct link" between the benefits it derived from the transaction and the payment.

Facts

In 2010, Plano Molding Co. (Plano), an Illinois plastics manufacturer, retained Robert W. Baird & Co., Inc. (Baird) as its financial advisor to assist with a potential sale of the company. No sale took place at that time.
In 2012, Baird suggested Plano as a potential acquisition candidate to the Ontario Teachers’ Pension Plan Board (OTPP), a Canadian corporation and large institutional investor. Baird attempted to set up a lunch meeting between OTPP and Plano’s shareholder, Tincum. While the lunch never transpired, OTPP and Tincum later discussed the potential acquisition by phone. Baird had no further involvement in the acquisition that followed.

On July 26, 2012, Plano retained Harris Williams LLC (Harris Williams) as its exclusive investment banker and financial advisor.

On November 20, 2012, Plano and New Plano Molding, LLC entered into a merger agreement with Plano Holding LLC (Holding) and Plano Acquisition LLC, newly formed wholly owned subsidiaries of OTPP.

On November 28, 2012, OTPP agreed to pay Baird $1.5 million for his services as its exclusive financial advisor upon the successful acquisition of Plano. The agreement provided that Baird’s services were rendered solely for the benefit of OTPP and the parties’ obligations could not be assigned by OTPP without Baird’s prior written consent. This agreement stemmed from OTPP’s determination that Baird should be compensated for suggesting Plano as a potential acquisition candidate and attempting to arrange an introductory meeting.

On December 21, 2012, the transaction closed. Under the terms of the merger agreement, Holding acquired Plano for approximately $240 million. As a result of the acquisition, Plano became a wholly owned subsidiary of Holding.

Upon consummation of the transaction, Plano paid fees of $2.89 million to Harris Williams and $1.5 million to Baird. While the fee paid to Harris Williams was treated as a transaction expense that reduced the purchase price of Plano, the Baird fee was not.

Holding filed a consolidated federal income tax return for 2012, in which 70% of the Baird fee paid by Plano was deducted (with the balance capitalized) under the safe harbor election under Revenue Procedure 2011-29. The IRS denied the deduction because it noted that Baird did not provide services to Plano or Holding. As a result, the IRS issued a notice of deficiency of $90,385 and an accuracy-related penalty of $18,077.

**Analysis**

IRC Section 162(a) allows a deduction for ordinary and necessary business expenses paid or in carrying on a trade or business incurred during the tax year. The Tax Court, however, observed that taxpayers generally may not “deduct the payment of another person’s expenses.” An exception to that rule was set out in *Lohrke v. Commissioner*, 48 T.C. 679, 684 (1967). The Court in *Lohrke* held that a taxpayer may deduct the payment of another person’s expenses if “(1) the taxpayer’s primary motive for paying the other’s obligation is to protect or promote the taxpayer’s own business and (2) the expenditure is an ordinary and necessary expense of the taxpayer's business.” The Tax Court held that Plano failed both prongs of this test.

Citing *Bone v. Commissioner*, T.C. Memo. 2001-43, 81 T.C.M. (CCH) 1199, 1202 (2001), aff’d, 324 F.3d 1289 (11th Cir. 2003), the court pointed out that taxpayers must show that a direct nexus exists between the payment’s purpose and their business or income-producing activities to establish that they made the payment to benefit their business. Holding argued that, as a result of Baird’s matchmaking role, Holding acquired Plano, which allowed Plano to expand. Rejecting this argument, the court found that Holding did not prove that a direct link existed between Plano’s acquisition and the payment to Baird. Specifically, the court noted, Plano and OTPP had already agreed to the merger more than a week before OTPP contracted to pay Baird; therefore, the merger was not contingent on Plano’s payment of the Baird fee. Additionally, Holding failed to show that there would be “direct and proximate adverse consequences to Plano’s business of manufacturing plastic goods had it not covered OTPP.” While Plano expanded its market presence after the acquisition, the court reasoned, there is no evidence that “OTPP would have scaled back its plans or financial backing had Plano not paid the fee.” Finally, while recognizing the significant role that Baird played in the early days of the potential acquisition, the Court could not discern any benefit to Plano from the Baird payment. Instead, the court concluded that OTPP primarily benefitted from the payment to Baird. Therefore, the court held, Holding failed to meet the first prong of the *Lohrke* test.
The court also held that Holding failed to meet the second prong because the payment was not an ordinary and necessary expense of Plano’s business of manufacturing plastic goods. First, the court noted, neither party suggests that Plano’s payment of the Baird fee was for Baird’s attempts to find a purchaser for Plano in 2010; rather, the court noted, the parties "agreed that the Baird payment came about because OTPP felt obligated to Baird for its legwork (in 2012) in identifying a potential acquisition for OTPP." Thus, the court observed, "[t]he Baird payment is in the nature of a finder’s fee that OTPP decided to bestow months after the fact. Were we looking at the business of an institutional investor, like OTPP, we very well might conclude that a fee of this sort (if it were not a capital expenditure to acquire Plano) would be an ordinary and necessary expense that could be deducted. But we are not.”

In its analysis of the second prong of the Lohrke test, the court rejected Holding's reliance on Square D v. Commissioner, 121 T.C. 168, 200 (2003). Holding argued that, similar to the facts in Square D, "Plano could not enter a fee agreement with Baird directly because of (1) Plano's retention of Harris Williams as financial advisor and (2) financial repercussions for its shareholders if the Baird payment were treated as a transaction expense." The court found that "OTPP acted on its own behalf, not on behalf of Plano, in agreeing to the Baird payment, thus distinguishing this case from Square D, where the recipient of the benefit was the taxpayer who made the payments and claimed the deduction." Further, the court noted that PLR 200953014 addressed a factual situation similar to Square D, concluding that a company could deduct transaction costs arranged on its behalf, but Holding failed to establish that any services for the Baird fee were rendered on Plano’s behalf.

Accordingly, the Tax Court sustained the IRS’s deficiency and accuracy-related penalty determinations.

B. Lowell G. Den Besten v. Commissioner, T.C. Memo 2019-154

In Lowell G. Den Besten v. Commissioner, the Tax Court concluded that the taxpayer engaged in cutting horse activities for profit under Section 183 and thus allowed the taxpayer to deduct his expenses under Section 162.

The main issues of the case included: (i) whether the taxpayer’s horse cutting activity was an activity not engaged in for profit, (ii) whether the taxpayer substantiated expenses and net operating losses; and (iii) whether the taxpayer was liable to pay the accuracy related penalties under Section 6662(a).

Facts

The taxpayer started a seed business with his father in 1964. In 2002, the taxpayer sold the business to his son to pursue greater involvement with cutting horses activities, which he has been involved in since 1986. In 2005, the taxpayer decided to scale back the horse business after one of his prized horses died to help his son revive the failing seed business. Over the years and through the years at issue, the taxpayer expanded his horse cutting business into breeding, raising, boarding, training, and selling registered cutting horses and used the expertise of trainers, managers, and employees to maintain the facilities. He additionally improved his property to include a foaling barn, breeding operation, and a riding arena to host roping and cutting competitions as well as use as a training facility. The taxpayer achieved national success as a cutting horse competitor, evidenced by his established reputation in the industry.

The taxpayer maintained records relating to the horse cutting activity as well as breeding and training records in the manner in which his father taught him. The taxpayer claimed it is common for trainers and hay farmers to conduct business by handshake and therefore, no receipts or invoices are provided. The taxpayer paid an expense by check (from a co-mingled personal/horse activity account) when the item/services were performed and kept breeding records, which are required for sales and national registration.

For the years at issues, the taxpayer reported his cutting horse activity on Schedule F, Profit or Loss from Farming, and his seed business on Schedule C, Profit and Loss from Business. He also claimed an NOL carryover partially attributable to his seed business that affected each year at issue. The taxpayer’s tax
returns only provided general statements about the net operating losses of his seed business rather than actual substantiation.

Analysis

In determining whether the taxpayer carried on the horse cutting activity for profit the court analyzed the following factors outlined in Treas. Reg. §1.183-2(b):

- The manner in which the taxpayer carried on the activity;
- The expertise of the taxpayer or his advisors;
- The taxpayer’s time and effort expended in carrying on the activity;
- The expectation that assets used in the activity may appreciate in value;
- The taxpayer’s success in carrying on other similar or dissimilar activities;
- The taxpayer’s history of income or losses with respect to the activity;
- The amount of occasional profits;
- The financial status of the taxpayer; and
- The presence of personal pleasure or recreation.

Based on the evaluation of these factors, the court found that six favored the petitioner’s profit motive, one factor remained neutral, and two favored the position of the IRS. The court determined the taxpayer’s actions, coupled with sincere and credible testimony for his business goals supported his claim that he had a bona fide profit motive. Therefore, the court held that the taxpayer engaged in the horse cutting activity for a profit motive.

After hearing testimony from the taxpayer and reviewing other evidence to substantiate expenses reported by the taxpayer related to his cutting horse activity, the court determined the amounts and categories of expenses substantiated. The taxpayer provided testimony relating to the method in which he kept records, using cancelled checks and his bank statements to track income and expenses to compile a year-end list to provide to his accountant. The taxpayer maintained a combined checking account for his horse activity and his personal affairs for the years at issue. The court noted that all of the expenses the court determined as substantiated by the taxpayer had cleared the bank and the checks were written to named vendors. The court also indicated that expenses claimed by the taxpayer having both personal and business characteristics and a few expenses that did not clear the taxpayer’s bank account were not sufficiently substantiated to maintain deductions related to them.

Additionally, the court concluded that the taxpayer did not meet his burden of establishing the existence of NOL carryforwards as the taxpayer had no documentation other than the tax return with general statements explaining activity losses to substantiate the claims. The court, however, held that the taxpayer was not liable for the 20 percent accuracy related penalty under Section 6662. The court cited the fact that the taxpayer reasonably relied on the professional advice of his long term accountant and provided the accountant with his records.

C. Joyner Family Limited Partnership et al. v. Commissioner, T.C. Memo. 2019-159

In Joyner Family Limited Partnership et al. v. Commissioner, the Tax Court determined that a cash basis dealer of mobile homes could not use the Section 453 installment method, and that notes from debtors with no means to pay were not cash equivalents that need be reported at the time of receipt.

Joyner Family Limited Partnership (the Taxpayer) sold land and mobile homes under seller-financed deferred payment plans to buyers who could not obtain traditional financing. The Taxpayer used the overall cash method and reported land and mobile home sales on the installment method under Section 453. The IRS argued that the Taxpayer must report income from the sales upon receipt of promissory notes.

For each sale the Taxpayer and the buyer executed a purchase agreement and a note. The Taxpayer retained legal title until the buyer paid the full sale price. The purchase agreement gave the Taxpayer the right to
either declare the entire unpaid balance due and payable, or rescind the sale and convert the sale into a rental, keeping all prior payments as rent.

In the case of land-only sales, the Tax Court held that the Taxpayer was permitted to use Section 453, as the Taxpayer did not make improvements to the land and thus was not a prohibited “dealer.” In the case of mobile home sales, however, the Taxpayer was clearly a dealer and relied on industry standards to justify the use of the installment method.

The Taxpayer argued that its accounting method for reporting mobile home sales represented a permissible hybrid method that reports Section 453 interest on the principal portion of each payment to compensate for the benefit of the deferred income reporting, in order to adhere to Section 453(l)(3), as well as reporting gain on repossession of properties that the Taxpayer had previously allocated to nontaxable basis recovery in order to report all payments received as income.

The Tax Court noted that Section 446 considers accepted practices within a particular trade or business in determining whether a method of accounting clearly reflects income; however, the court noted that the installment method for dealer dispositions is prohibited under statute, and cited Thor Power Tool Co. v. Comm’r, 439 U.S. 522, 532-535 (1979), stating “an industry standard cannot condone the use of a method of accounting that is expressly prohibited by the Code.” Accordingly, the Taxpayer could not use the Section 453 method as part of a hybrid method, and had to report income from mobile home sales under the cash method of accounting.

The Tax Court further found that the income from mobile home sales must be recognized in the year of sale pursuant to Section 1001. The Taxpayer had gain equal to the excess of the amount realized on the sale over its adjusted basis in the mobile home sold. The promissory note represented property (other than money) for purposes of determining the amount realized. For a cash basis taxpayer, notes are only included in income if the notes are cash equivalents. Under the cash equivalency doctrine, a note is a cash equivalent if the holder of the note can sell it for an immediate cash value even if less than the note’s face value. A note is not a cash equivalent if the debtor is insolvent or the note would be deeply discounted.

The Tax Court found that most of the Taxpayer’s buyers were low income, had poor credit and unstable job histories, and could not obtain traditional loans. While not strictly insolvent, the notes were generally worthless or would trade at such a deep discount as to not represent cash equivalents. Although the Taxpayer may be required to report income in the amount of the fair market values of the notes, the Taxpayer adequately demonstrated that the notes had no ascertainable value.


In Meredith Corporation v. U.S., a court denied summary judgment to a taxpayer whose claim to the deduction for income from domestic production activities under Section 199, repealed by the Act for tax years beginning after 2017.

The taxpayer in Meredith Corporation is a book and magazine publisher that contracted with third parties to print its publications. The IRS denied the taxpayer’s Section 199 deduction because, it claimed, the taxpayer did not bear the benefits and burdens of production of the QPP (the publications) during the printing process and, therefore, the taxpayer did not produce the QPP.

The court applied a facts and circumstances test to determine, for purposes of the summary judgment motion, if a question of material fact existed as to whether the taxpayer bore the benefits and burdens of ownership of the QPP during the printing process. The court considered both the terms of the contracts between the taxpayer and the printers and other evidence, such as expert testimony.

The court identified nine factors it considered in evaluating the benefits and burdens of ownership:
(1) Who had legal title;
(2) How did the parties treat the transaction;
(3) If an equity interest was acquired;
(4) Did the contract require a seller to execute a deed and a purchaser to make payments;
(5) Whether the purchaser has right of possession and control of the property;
(6) Who pays property taxes;
(7) Who bears risk of loss or damage;
(8) Who receives profits from operation and sale of the property; and
(9) Does the taxpayer actively participate in ownership and management of the activity.

The court concluded that the evidence regarding legal title and how the parties treated the transaction presented triable issues of fact. The taxpayer provided the paper for the printing, and asserted that title to the paper never passed to the printer and the printer was providing only a service. The IRS argued that some contracts provided that the printers owned work in process and transferred title to the property to the taxpayer after printing completion. At least one agreement referred to the printer’s work as both production and services. The court concluded that extrinsic evidence is required to interpret these contract terms.

The IRS claimed that the printers acquired an equity interest in the publications by manufacturing them using their machines and materials. The taxpayer argued that it owned the paper and publications and the printers acquired no equity interest.

The taxpayer paid personal property taxes, but the IRS asserted that other parties also may have paid property taxes.

The IRS and taxpayer offered competing evidence on the amount of control the taxpayer maintained over the printing process, for example whether the taxpayer or the printers exercised greater quality control.

The IRS and taxpayer agreed on certain matters involving risk of loss—that the taxpayer bore the risk of cost increases in the price of paper and loss of customers and advertising, and the printers were required to carry insurance on the property. The parties disagreed, however, on whether pricing terms in the contracts indicated they were fixed price or cost-plus arrangements. In a fixed price contract, the printer would bear the risk that costs would increase, and this factor would weigh in favor of the printer having the benefits and burdens of ownership. A cost-plus contract would require the taxpayer to pay the printer’s costs plus an additional amount, and the taxpayer would bear the risk of cost increases and be more likely to have the benefits and burdens of ownership.

Accordingly, as a result of concluding that these factual issues exist, the court denied the taxpayer’s summary judgment motion.

II. Treasury Regulations

A. Proposed regulations under Section 162(m) (REG-122180-18; 84 F.R. 70356, December 20, 2019)

The IRS and Treasury issued proposed regulations under Section 162(m) (Prop. Treas. Reg. §1.162-33), which limits the deductibility of certain employee compensation in excess of $1 million for US federal income tax purposes. Written or electronic comments are requested by February 18, 2020.

The Tax Cuts and Jobs Act of 2017 generally extended the reach of Section 162(m) by (i) expanding the definition of publicly traded company taxpayers that are subject to the provision, (ii) increasing the group of employees whose compensation is subject to the provision, and (iii) making new types of compensation subject to the provision.
The proposed regulations also contain detailed grandfather rules that generally exempt from the application of the revised Section 162(m) compensation that is paid pursuant to a written binding contract that was in effect on November 2, 2017, and that was not modified in any material respect on or after such date. In addition, the proposed regulations provide coordination rules with Section 409A. The proposed regulations also address various scenarios in which certain compensation is deferred.

In general, the rules contained in the proposed regulations would apply to taxable years beginning on or after date when the regulations are finalized. However, pursuant to certain special effective date rules, certain provisions have earlier effective dates.

B. Final and proposed regulations under Section 59A (TD 9985, Dec. 6, 2019; REG-112607-19; 84 F.R. 67046, December 6, 2019)

Treasury and the IRS on December 2 released final regulations (the Final Regulations) and new proposed regulations (the 2019 Proposed Regulations) for the Base Erosion and Anti-Abuse Tax (BEAT) under Section 59A as enacted by the 2017 tax reform legislation (the Act). The BEAT rules require certain corporations to pay a minimum tax on taxable income as computed without certain deductions for certain payments to foreign related parties.

The Final Regulations generally are applicable for tax years ending on or after December 17, 2018. However, taxpayers may rely on the Final Regulations in their entirety for tax years ending before December 17, 2018, but must do so consistently and cannot selectively choose which particular provisions to apply.

The 2019 Proposed Regulations generally are applicable to tax years beginning on or after the date the regulations are filed as Final Regulations in the Federal Register. Taxpayers may rely on the 2019 Proposed Regulations in their entirety for tax years beginning after December 31, 2017 and before the Final Regulations are finalized but must do so consistently and cannot selectively choose which particular provisions to apply.

The Final Regulations and 2019 Proposed Regulations include the following items, relevant to Tax Accounting:

Pass-through payments

Despite commenters’ requests, the Final Regulations do not provide specific rules or safe harbors regarding the determination of whether payments made by a US entity as an agent or conduit, or under a cost-reimbursement or revenue; share arrangement (pass-through payments), to a foreign related party are excludable from the BEAT. The Final Regulations instead reiterate the 2018 Proposed Regulations by providing that a taxpayer determines the proper treatment of a payment as a deductible or pass-through payment under general US income tax law.

Section 15

Section 59A(b)(1)(A) provides that the BEAT generally is equal to 10% of a taxpayer’s modified taxable income over its regular tax liability. However, for tax years beginning in 2018, Section 59A(b)(1)(A) provides for a reduced BEAT rate of 5%. The 2018 Proposed Regulations provided that Section 15, requiring a blended tax rate for tax years that include a rate change, applies to fiscal tax years that include January 1, 2019. Following this proposed rule, an applicable taxpayer with a tax year beginning July 1, 2018 and ending June 30, 2019 would be required to apply a blended rate between 5 and 10 percent in determining its BEAT liability for FY 2019.

The Final Regulations modify the Proposed Regulations by providing that that Section 15 does not apply to any tax year that includes January 1, 2019. However, the Final Regulations continue to provide that the Section 15 blended rate applies to the change in the BEAT rate from 10% to 12.5% that is effective for tax years beginning after December 31, 2025.
Cost of Goods Sold

The Conference Report to the Act provides that base erosion payments generally do not include amounts that constitute reductions in gross receipts, including payments for cost of goods sold. However, neither the statute nor the 2018 Proposed Regulations expressly provide that payments constituting reductions in gross income are excluded from the definition of base erosion payments. In order to provide more certainty to taxpayers, the Final Regulations provide that an amount that reduces gross income under Section 61, including an amount properly treated as cost of goods sold under the Code generally is not a base erosion payment.

Waiver of deductions (the 2019 Proposed Regulations)

The 2019 Proposed Regulations provide an election for taxpayers to waive allowed deductions in order to reduce their BEAT liability. A taxpayer that makes this election will not treat the waived deduction as a base erosion tax benefit and will not include the waived deduction in its base erosion percentage calculation.

A taxpayer may make the election to waive any portion of a deduction associated with a particular cost or expense. The election may be made on an originally filed or amended federal income tax return. A taxpayer also may make the election during the course of an examination of the taxpayer’s tax return by following procedures provided by the Commissioner. A taxpayer may also increase the amount of any waived deductions on an amended return (or during the course of an examination of the taxpayer’s tax return); however, a taxpayer may not later revoke or decrease the amount of previously waived deductions.

The Proposed Regulations provide special rules to ensure that taxpayers do not later benefit from any waived deductions. For example, if a taxpayer waives a deduction with respect to an item and later requests a change in method of accounting with respect to that item, the previously waived portion is not taken into account in determining the amount of the taxpayer’s Section 481(a) adjustment. Additionally, the taxpayer disregards the election for purposes of determining its earnings and profits as well as for purposes of determining basis adjustments to property as required under Section 1016 (e.g., for allowed or allowable depreciation).

III. Revenue rulings


Revenue Ruling 2019-24 addresses whether a taxpayer has income under Section 61 as the result of a cryptocurrency ‘hard fork’ if the taxpayer does not receive units of a new cryptocurrency and as the result of an ‘air drop’ if the taxpayer receives units of a new cryptocurrency.

The revenue ruling explains that (1) cryptocurrency is a type of virtual currency that utilizes cryptography to secure transactions that are digitally recorded on a distributed ledger, (2) a hard fork occurs when a cryptocurrency on a distributed ledger undergoes a protocol change resulting in a permanent diversion from the existing distributed ledger and may result in the creation of a new cryptocurrency on a new distributed ledger, and (3) an air drop is a means of distributing units of a cryptocurrency to the distributed ledger addresses of taxpayers. A hard fork followed by an airdrop results in the distribution of units of the new cryptocurrency to addresses containing the legacy cryptocurrency, but an air drop does not always occur following a hard fork.

Revenue Ruling 2019-24 holds that a taxpayer (1) does not have gross income under Section 61 as a result of a hard fork of a cryptocurrency if the taxpayer does not receive units of a new cryptocurrency, and (2)
has ordinary gross income as a result of an air drop following a hard fork if the taxpayer receives units of new cryptocurrency.

IV. Revenue Procedures


Revenue Procedure 2019-43 provides an update of the omnibus revenue procedure that describes the accounting method changes and related terms and conditions under the automatic procedures. Revenue Procedure 2019-43 primarily consolidates automatic method changes added by other revenue procedures, for example Rev. Proc. 2019-37 on method changes to comply with regulations under Sections 451(b) and 451(c), since the last update. However, Rev. Proc. 2019-43 also adds new automatic method changes and revises some terms and conditions.

Leasing. Historically, for a change in method of accounting regarding a sale, lease, and financing transaction, taxpayers have been required to file a non-automatic method change with various details about other parties to the transaction in order to receive audit protection and a Section 481(a) adjustment. Revenue Procedure 2019-43 now allows taxpayers to make these method changes on an automatic basis with a Section 481(a) adjustment and receive audit protection (except as to the proper classification of the transaction, e.g. sale or lease), and requires taxpayers to provide only the name of the other party. Rev. Proc. 2019-43 also provides an automatic method change for tenant construction allowances for existing leases with audit protection.

Section 451. Revenue Procedure 2019-43 adds automatic changes to the procedures in Rev. Proc. 2019-37 to allow taxpayers without an applicable financial statement complying with the Section 451(c) proposed regulations to (1) use the streamlined procedures when there is a zero Section 481(a) adjustment, and (2) determine when income is earned using a straight-line ratable basis.

UNICAP. Revenue Procedure 2019-43 provides audit protection for taxpayers under examination (unless the issue is under examination) for certain changes to UNICAP methods of accounting. These changes relate to final regulations published in 2018 and apply for a taxpayer’s first, second, or third tax year ending on or after November 20, 2018.


The IRS recently released Rev. Proc. 2019-38, which provides a safe harbor under which a rental real estate enterprise may be treated as a trade or business for purposes of the Section 199A deduction. The IRS initially issued a proposed version of this revenue procedure in January with Notice 2019-07. Rev. Proc. 2019-38 generally applies to tax years ending after December 31, 2017.

While the final revenue procedure generally maintains the framework laid out in Notice 2019-07, it also incorporates changes in response to taxpayer concerns. Triple net leases remain excluded from application of the safe harbor in the revenue procedure. In addition, Treasury and the IRS continue to make a distinction in the revenue procedure between commercial and residential property so that those activities cannot be combined for purposes of satisfying the safe harbor.

V. PLRs

A. PLRs 201941024, 201946010, and 201951002 (various dates)

In recently issued PLRs, the IRS granted taxpayers an extension of time to file Form 3115, Application for Change in Accounting Method. Section 6.03(1)(a)(i) of Rev. Proc. 2015-13 provides that a taxpayer
changing an accounting method under the automatic change procedures must complete and file a Form 3115 in duplicate. The original Form 3115 must be attached to the taxpayer’s timely filed original federal income tax return for the year of change (including any extension), and a signed copy of the Form 3115 must be filed with the appropriate office of the IRS no earlier than when the original is filed with the return.

The taxpayers in the rulings either inadvertently omitted the original Form 3115 from their timely filed federal income tax returns that had been prepared consistent with the results of the proposed accounting method changes or failed to file the duplicate copies with the appropriate office of the IRS due to an unintentional error. In granting relief, the IRS concluded that the taxpayers acted reasonably and in good faith and that the grant of relief would not prejudice the interest of the Government.

B. PLRs 201947008, 201947009 and 201948004 (various dates)

In various, recently issued PLRs, the IRS granted taxpayers an extension of time to make a safe harbor election under Rev. Proc. 2011-29. Section 4.01 of the revenue procedure provides that a taxpayer that pays or incurs a success-based fee with respect to a covered transaction may make the election by: (1) treating 70 percent of the fee as not facilitating the transaction; (2) treating the remaining 30 percent as facilitating the transaction; and (3) attaching a statement to the taxpayer’s original federal income tax return for the year in which the success-based fee was paid or incurred.

The taxpayers in the rulings inadvertently omitted the required election statement from their timely filed tax returns that had been prepared consistent with the allocation of the success-based fees. In granting relief, the IRS concluded that the taxpayers acted reasonably and in good faith and that the grant of relief would not prejudice the interest of the Government.

C. PLR 201943004 (October 28, 2019)

In PLR 201943004, the IRS concluded that the taxpayer did not elect out of the installment method and allowed the taxpayer to amend its tax returns to properly report the gain from the installment sale.

The taxpayer, an S corporation wholly owned by an individual, entered into an Asset Purchase Agreement (the “Agreement”) to sell all of its assets to an unrelated third party. Per the terms of the Agreement, the taxpayer was set to receive a portion of the selling price at closing and the remaining balance in quarterly payments over four years. The taxpayer received the agreed upon amount at closing; however, the purchaser later defaulted on the agreement and made no further payments.

The taxpayer engaged a return preparer to prepare its final S corporation return. The return preparer was unavailable to file the individual’s return, which led individual to engage an accounting firm. In completing the individual’s return, the accounting firm identified several errors on the S corporation’s final return. Specifically, the accounting firm identified that the taxpayer’s Form 1120S did not properly report the installment sale on Form 6252, Installment Sale Income. The return preparer did not report the full amount realized of the first payment the taxpayer received, nor did the preparer report the full amount of the installment obligation, but the return included an amount related to the sale.

The accounting firm filed the individual’s Form 1040 and attached Form 8275 to disclose the reporting and computation errors filed on the taxpayer’s final S corporation return and the individual’s use of the installment method on Form 1040. Individual represented that she intended to report the gain from the sale using the installment method under Section 453. Return preparer represented that there was no intention to election of out the installment method and that only the proceeds received in the year of sale were reported on the Form 1120S. Taxpayer requested a ruling that taxpayer did not intend to elect out of the installment method under Section 453.

Based on the facts and representations presented, the IRS concluded that the taxpayer did not elect out of the installment method with respect to its sale of assets. The IRS stated that the taxpayer and possibly the individual must file amended tax returns for all relevant years to report using the installment sale.
VI. Other Guidance

A. IRS FAQ on Virtual Currency Transactions (Released Oct. 9, 2019; Last Update Dec. 31, 2019)

The IRS addressed a total of 45 frequently asked questions relating to the federal income taxation of virtual currency and related transactions. Among other items, the IRS addressed (i) income tax consequences of transactions in cryptocurrency, including making payments in cryptocurrency and receiving cryptocurrency for services, as well as how to determine taxpayer’s holding period and tax basis in cryptocurrency, (ii) several issues relating to cryptocurrency that goes through a fork, including the definition of a hard fork and a soft fork, and when the taxpayer recognizes income as a result of a fork, (iii) taxation of cryptocurrency exchanges, (iv) valuation issues, (v) several issues relating to charitable contributions of cryptocurrency, and (vi) record-keeping requirements.


1. At OIRA
   i. Final regulations under Section 468A involving the decommissioning costs of a nuclear power plant.
   ii. Final regulations under Section 163(j)

2. On PGP
   i. Regulations under amended Section 162(f) and Section 6050X.
   ii. Regulations under Section 172 for computing the net operating loss deduction to reflect changes made by TCJA.
   iii. Regulations and other guidance under Sections 263A, 448, 460, and 471 to reflect TCJA changes affecting small businesses.
   iv. Regulations and other guidance under Section 451(b) and (c).
   v. Guidance under Section 170(e)(3) regarding charitable contributions of inventory.
   vi. Revenue procedure under Section 263(a) concerning the capitalization of natural gas transmission and distribution property.
   vii. Regulations under Section 472 concerning dollar-value last-in, first-out (LIFO) inventories, including rules for combining pools as a result of a change in method of accounting, certain corporate acquisitions, and certain nonrecognition transactions.
   viii. Final regulations amending Treas. Reg. §1.472-8 concerning the inventory price index computation (IPIC) method.