

# 2023 Federal Tax Update Business Issues

---

Bruce A. McGovern

Professor of Law and Director, Tax Clinic

South Texas College of Law Houston

Houston, Texas

---

TXCPA Houston Tax Expo

January 2024

1

## Schedule for Today

### Business Issues

- 10:00 a.m.-11:50 a.m.

2

2

## **Organization of Materials**

- Indexed Items for 2023 ..... page A-1
  - Rev. Proc. 2022-38 ..... page A-1
- Selected Provisions That Expired/Changed for 2023 .... page B-1
- Legislative Developments ..... page C-1
- Recent Developments in Federal Income Taxation ..... page D-1
- Clean Vehicle Tax Credits ..... page E-1

3

3

## **A. INDEXED ITEMS FOR 2023**

### **REV. PROC. 2022-38**

4

4

## Election to Expense Assets Under § 179 - 2023

### *Outline: page A-16*

- Basic limit: \$ 1,160,000
- Phase-out threshold: \$2,890,000
- Limit for SUVs (vehicles over 6,000 lbs): \$28,900
  - Note: such vehicles are eligible for 80% bonus depreciation in 2023
- Example:
  - Taxpayer places in service in 2023 depreciable equipment that cost \$3,890,000 with a recovery period of 20 years or less
  - Taxpayer could deduct 80% of the cost as bonus depreciation
  - If taxpayer elects to take the § 179 deduction:
    - Cost of equipment exceeds the \$2,890,000 threshold by \$1 million
    - Taxpayer's § 179 deduction is limited to \$160,000 (\$1,160,000-\$1 million)

5

5

## Energy Efficient Comm'l Building Deduction - § 179D

### *Outline: page A-16*

- § 179D provides a limited deduction for the cost of energy-efficient commercial building property.
  - Generally: improvements that reduce energy and power costs with respect to interior lighting, HVAC and hot water systems, and the building envelope by at least 25%.
- Limits for 2023:
  - Basic limit: \$0.54 per square foot, increased by \$0.02 for each percentage point above 25% by which the energy improvements reduce energy and power costs, with a maximum amount of \$1.07 per square foot.
  - Limit if prevailing wage and apprenticeship requirements are met: \$2.68 per square foot, increased by \$0.11 for each percentage point above 25% by which the energy improvements reduce energy and power costs, with a maximum amount of \$5.36 per square foot.

6

6

## **Limit on Use of Cash Method of Accounting - 2023**

### ***Outline: page A-18***

- C corporations, and partnerships with C corporation partners, can use the cash method of accounting if average annual gross receipts over 3 prior years do not exceed a specified threshold.
- For 2023, the threshold is \$29 million

7

7

## **Threshold for Excess Business Loss - 2023**

### ***Outline: page A-19***

- “Excess business losses” of noncorporate taxpayers are disallowed by § 461(l)
  - “Excess business loss” is amount by which taxpayer’s aggregate trade or business deductions exceed aggregate gross income from those trades or businesses, plus \$250,000 (\$500,000 for joint filers), adjusted for inflation after 2018
- For 2023, these figures are \$290,000 (\$578,000 for joint filers)

8

8

## B. SELECTED PROVISIONS THAT EXPIRED OR CHANGED FOR 2023

9

9

### Provisions That Expired or Changed for 2023 *Outline: page B-1*

Code Section	Topic	Change for 2023
163(j)	Limit on deducting business interest	The deduction of business interest is limited by § 163(j). One component of the limit is 30% of “adjusted taxable income.” For tax years beginning before 2022, ATI was similar to EBITDA. For tax years beginning after 2021, depreciation, amortization and depletion are no longer added back to taxable income to determine ATI. Therefore, ATI is now similar to EBIT.
168(k)	Bonus first-year depreciation	The applicable percentage for first-year bonus depreciation of qualifying property was 100% in 2022. For 2023, it is 80%. In 2024, it will be 60%.

10

10

## Provisions That Expired or Changed for 2023

### *Outline: page B-1*

Code Section	Topic	Change for 2023
174	Deduction of research or experimental expenditures	Such expenditures formerly could be deducted. For tax years beginning after 2021, such expenditures must be capitalized and amortized over 5 years (15 years for foreign research).

11

11

## Notice 2023-74 (11/21/23)

### Form 1099-K Delay

*[Not in outline]*

- Background:
  - In 2008, Congress added § 6050W to the Code.
  - Section 6050W became effective for the 2011 tax year.
  - Requires payment card companies and online marketplaces (aka third-party settlement organizations) to report on Form 1099-K payments processed for goods and services.
    - Payment cards include credit, debit, and stored value cards
    - Third-party settlement organizations include eBay, gig-worker platforms like Uber and Lyft, and payment apps such as Venmo and Cash App (but not Zelle).

12

12

**Notice 2023-74 (11/21/23)**  
**Form 1099-K Delay**  
***[Not in outline]***

- De minimis exceptions:
  - Payment cards. There has never been a de minimis exception for payment card transactions, i.e., a payment card company must report all transactions processed for a participating payee
  - Third-party settlement organizations. As enacted, third-party settlement organizations were required to issue Forms 1099-K only when gross payments to a participating payee for goods and services during the calendar year exceeded \$20,000 and there were more than 200 transactions
    - The American Rescue Plan (March 2021) lowered the de minimis exception for third-party settlement organizations to \$600 with no minimum number of transactions, effective in 2022
    - In Notice 2023-10, the IRS announced that 2022 would be a transition period for implementation of the reduced reporting threshold, i.e., the reduced threshold did not apply for 2022

13

13

**Notice 2023-74 (11/21/23)**  
**Form 1099-K Delay**  
***[Not in outline]***

- IRS announced in Notice 2023-74 that the reduced reporting thresholds for Form 1099-K enacted by the American Rescue Plan (March 2021) will not apply for 2023.
- The former 1099-K reporting thresholds remain in place for 2023
- For calendar year 2023:
  - Payment card companies still must report all transactions processed for a participating payee, regardless of amount or number of transactions
  - A third-party settlement organization is not required to report payments in settlement of third-party network transactions with respect to a participating payee unless:
    1. the gross amount of aggregate payments to be reported exceeds \$20,000, and
    2. the number of such transactions with that participating payee exceeds 200.

14

14

**Notice 2023-74 (11/21/23)**  
**Form 1099-K Delay**  
***[Not in outline]***

- Common problems with 1099-K:
  - Incorrect 1099-K received (e.g., reporting wrong amounts)
    - Solution: obtain a corrected 1099-K if possible
  - Form 1099-K received for payments that are not taxable:
    - Example 1: you took a trip with a friend and you paid for the airline tickets. Your friend reimburses you \$2,500 for their airline tickets and you received a Form 1099-K reporting the \$2,500 as gross proceeds
      - Solution:
        - Report as other income on Form 1040, Schedule 1 (Additional Income and Adjustments to Income), line 8z (e.g., "Form 1099-K Received in Error .... \$2,500")
        - Report as a negative adjustment on Form 1040, Schedule 1, line 24z, e.g., "Form 1099-K Received in Error.... \$2,500")

15

15

**Notice 2023-74 (11/21/23)**  
**Form 1099-K Delay**  
***[Not in outline]***

- Common problems with 1099-K (cont'd):
  - Form 1099-K received for payments that are not taxable:
    - Example 2: you sell your couch on eBay for \$800. You purchased the couch years ago for \$2,000 (nondeductible personal loss of \$1,200). You received a Form 1099-K reporting the \$800 as gross proceeds.
      - Solution:
        - Report as other income on Form 1040, Schedule 1 (Additional Income and Adjustments to Income), line 8z (e.g., "Form 1099-K Personal Item Sold at a Loss.... \$800")
        - Report as a negative adjustment on Form 1040, Schedule 1, line 24z, (e.g., "Form 1099-K Personal Item Sold at a Loss.... \$800")

16

16



## **Digital Assets Treated as Cash for Form 8300 Reporting** ***[Not in outline]***

- Code § 6050I requires any person engaged in a trade or business who receives more than \$10,000 in cash in 1 transaction (or 2 or more related transactions) to file a return reporting the transaction.
- Reporting: Form 8300 (Report of Cash Payments Over \$10,000 in a Trade or Business)
  - Must be filed within 15 days of the transaction
  - Filed electronically with Financial Crimes Enforcement Network (FinCen) or on paper with IRS
  - Effective January 1, 2024, Form 8300 must be e-filed if taxpayer is required to e-file other information returns (such as Forms 1099 series and Forms W-2).
  - This means taxpayer must e-file Forms 8300 if taxpayer is required to file at least 10 information returns other than Form 8300.

17

17

## **Digital Assets Treated as Cash for Form 8300 Reporting** ***[Not in outline]***

- The Infrastructure Investment and Jobs Act (Nov. 2021) amended Code § 6050I to provide that the term “cash” includes any “digital asset”
  - A digital asset is “any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary [of the Treasury].” See Code § 6045(g)(3)(D).
  - This definition is broad enough to include most virtual currencies, such as Bitcoin and Ethereum, and some non-fungible tokens (NFTs)
- Effective date:
  - This change applies to Forms 8300 required to be filed after December 31, 2023
  - Because the form is due within 15 days of the transaction, digital asset transactions in December 2023 might have to be reported

18

18

## **Digital Assets Treated as Cash for Form 8300 Reporting** ***[Not in outline]***

- IRS has not issued any guidance on the new reporting requirement
  - Instructions for Form 8300 (revised December 2023) do not even mention digital assets
  - IRS and Treasury attorneys have been assigned to write proposed regulations, but none have yet been issued.
- Areas of uncertainty include:
  - Will IRS develop a new form for digital assets in excess of \$10,000 or instead continue to use Form 8300?
  - How will the recipient complete and file Form 8300 (or a new form) if they do not know the sender and are unable to obtain the information required, such as name, address, taxpayer identification number, and identifying document and number (such as driver's license or passport)?
- Steep penalties apply for failure to file or furnish Form 8300

19

19

## **C. LEGISLATIVE DEVELOPMENTS**

20

20

**Legislative Developments**  
**SECURE 2.0 Act of 2022**  
***Outline page C-1***

- Consolidated Appropriations Act, 2023, Pub. L. No. 117-328
  - Signed by the President on December 29, 2022.
  - Division T of the legislation contains the SECURE 2.0 Act of 2022.
    - Makes significant changes that affect retirement plans.
- What's not in SECURE 2.0
  - No elimination of or restriction on back-door Roth IRAs
  - No restrictions on Roth conversions for high-income taxpayers
  - No increase in required minimum distributions (RMDs) for high-income taxpayers with large retirement account balances
  - No change to the age at which qualified charitable distributions from an IRA can be made (age 70-1/2)
  - No clarification of how the 10-year rule applies to a person who inherits a retirement account and is not an eligible designated beneficiary.

21

21

**No RMDs for Roth Accounts in Employer Plans**  
***Outline: page C-1; item B.5, page D-19***

- SECURE 2.0 Act § 325:
  - No RMDs for Roth accounts in employer retirement plans. Effective in 2024, Roth accounts in employer retirement plans will be exempt from RMD requirements.
  - Effect:
    - Those already taking RMDs from Roth accounts in employer sponsored plans, and those who turn age 73 in 2023, must take an RMD for 2023 (no later than April 1, 2024).
    - For 2024 and later years, no RMDs are required from Roth accounts in employer sponsored plans.

22

22

## Changes to Employer Plan Catch-Up Contributions

***Outline: page C-2; item B.8, page D-20***

- SECURE 2.0 § 603:
  - Changes to employer plan catch-up contributions. Individuals age 50 and older can contribute an additional \$7,500 (2023 and 2024) to an employer-sponsored retirement plan. SECURE 2.0:
    - Catch-up contributions must be invested in Roth accounts for those with wages over \$145,000. Provides that, beginning in 2024, if a participant has wages over \$145,000 during the previous year, all catch-up contributions must be deposited into a Roth account. The \$145,000 wage threshold will be adjusted annually for inflation.

23

23

## Changes to Employer Plan Catch-Up Contributions

***Outline: item B.8.a, page D-20***

- Notice 2023-62, 2023-37 I.R.B. 817 (8/25/23):
  - IRS has announced a two-year “administrative transition period.”
  - Specifically, until taxable years beginning after December 31, 2025:
    1. catch-up contributions will be treated as satisfying the requirements of section 414(v)(7)(A), even if the contributions are not designated as Roth contributions, and
    2. a plan that does not provide for designated Roth contributions will be treated as satisfying the requirements of section 414(v)(7)(B).
  - Notice 2023-62 also provides that future guidance will:
    - Provide that those who do not have wages are not subject to the Roth-only rule
    - Plan administrators and employers can treat employees who are subject to the Roth-only rule as having elected to make Roth contributions
    - Provide guidance on employer plans maintained by more than one employer

24

24

## **Automatic Enrollment of Employees in New Plans** ***Outline: page C-2; item B.9, page D-21***

- SECURE 2.0 Act § 101:
  - Automatic enrollment of employees in newly-created 401(k) and 403(b) plans. SECURE 2.0 provides that beginning in 2025, 401(k) and 403(b) plans established after December 29, 2022, must automatically enroll eligible participants.
  - Beginning in 2025, plans subject to this requirement must provide that:
    1. The percentage of compensation contributed by participants is at least 3% and not more than 10% in the first year of participation,
    2. Whatever the initial percentage of compensation contributed, the percentage is increased by 1 percentage point per year until the percentage contributed is at least 10% and not more than 15% of compensation.
  - Employees can opt out of participation or can elect to contribute a different amount.

25

25

## **Automatic Enrollment of Employees in New Plans** ***Outline: page C-2; item B.9, page D-21***

- SECURE 2.0 Act § 101:
  - Automatic enrollment of employees in newly-created 401(k) and 403(b) plans. SECURE 2.0 provides that beginning in 2025, 401(k) and 403(b) plans established after December 29, 2022, must automatically enroll eligible participants. Participants can opt out of participation.
  - Exceptions:
    1. § 401(k) and § 403(b) plans established before December 29, 2022,
    2. Plans maintained by employers that have been in existence fewer than 3 years,
    3. Plans maintained by employers that normally employ 10 or fewer employees, and
    4. Governmental plans (within the meaning of § 414(d)) and church plans (within the meaning of § 414(e)).

26

26

## D. RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

27

27

### **Prevailing Wage and Apprenticeship Requirements Proposed Regulations (8/30/23)**

#### ***Outline: item D.2.b, page D-10***

- Inflation Reduction Act (Aug. 2022)
  - Amended several Code provisions and enacted others that authorize tax credits (or deductions)
  - Examples:
    - Deduction (§ 179D) for making commercial buildings energy efficient
    - Credit (§ 45L) for contractors building and selling energy-efficient homes
  - Generally, the credit or deduction is 5 times the normal amount if prevailing wage and apprenticeship requirements are satisfied
- Notice 2022-61 (11/30/22): provides initial guidance on PWA requirements
- Proposed regulations: 88 F.R. 60018 (8/30/23):
  - State that, generally, taxpayer satisfies prevailing wage requirement by ensuring laborers and mechanics employed are paid at rates not less than those set forth by Department of Labor
  - Permit taxpayers to cure failure to satisfy PWA with a penalty
  - Provide guidance on types of records needed to demonstrate compliance with PWA requirements

28

28

## Inflation Reduction Act (August 2022) Deduction for Making Comm'l Buildings Energy Efficient *Outline: item D.3, page D-12*

- § 179D: limited deduction for the cost of energy-efficient commercial building property.
  - Generally: improvements that reduce energy and power costs with respect to interior lighting, HVAC and hot water systems, and the building envelope
  - In 2022, lifetime limit on deductions was \$1.88 per square foot
- Complete Form 7205 and report on appropriate line of tax return
  - Example: on corporate tax return (Form 1120), report deduction on line 26 (other deductions)

**7205 Energy Efficient Commercial Buildings Deduction**  
 Form 7205 (December 2022)  
 Department of the Treasury  
 Internal Revenue Service

OMB No. 1545-2004

Go to [www.irs.gov/Form7205](http://www.irs.gov/Form7205) for instructions and the latest information.

Identifying number

Check the appropriate box:  
 Building owner  Designer of energy efficient commercial building property (EECBP)

**Part I Building and EECBP Information** (see instructions)

1	A Address of building	B Date placed in service	C EECBP system and computed energy savings percentage				D Check if energy lighting, HVAC, and hot water systems are included	E Potential energy and power cost savings from EECBP systems and equipment (see instructions)	F Building energy ratings	G Potential Section 179D deduction amount (see instructions and column 12)
			A	E	H	L				
A			%	%	%	%				
B			%	%	%	%				
C			%	%	%	%				
D			%	%	%	%				

**Part II Computation of Energy Efficient Commercial Buildings Deduction Amount** (see instructions)

2	A Total cost (column 10) in prior years	B Building system that was first placed in service (see instructions)	C Check if the amount in column 2B is greater than or equal to column 10B	D If column 2C is checked, enter the amount in column 10B and column 2B and go to column 20B (instructions, enter 20)	E Check if the amount in column 2D is greater than or equal to column 10A	F If column 2E is checked, the amount in column 2D is entered here	G If column 2E is checked, multiply column 2B by column 10A
A							
B							
C							
D							

29

29

## Inflation Reduction Act (August 2022) Deduction for Making Comm'l Buildings Energy Efficient *Outline: item D.3, page D-12*

- § 179D: Inflation Reduction Act (Aug. 2022):
  - Modifies the deduction for tax years beginning after December 31, 2022:
    - Improvements must reduce energy and power costs by 25 percent in comparison to certain standards (rather than by 50 percent).
    - For 2023, deduction is limited to \$0.54 per square foot, increased by \$0.02 for each percentage point above 25 percent by which the energy improvements reduce energy and power costs. Maximum is \$1.07 per sq. ft.
      - For projects meeting certain prevailing wage and apprenticeship requirements, figure is \$2.68 per sq. ft., increased by \$0.11 for each percentage point above 25 percent. Maximum is \$5.36 per sq. ft.
    - Maximum deduction is total deduction available less deductions claimed with respect to the building in the preceding 3 years.
      - Note: this is a significant change that means there is no longer a lifetime limit on the deduction.

30

30

**Inflation Reduction Act (August 2022)**  
**Deduction for Making Comm'l Buildings Energy Efficient**  
***Outline: item D.3, page D-12***

- § 179D: Inflation Reduction Act (Aug. 2022) (cont'd)
  - Allows tax-exempt entities to allocate the deduction to the person primarily responsible for designing the property.
  - Eligible tax-exempt entities that can allocate the deduction are:
    - Governmental entities
    - Tax-exempt organizations
    - Indian tribal governments and Alaska native corporations
  - Effect: such entities with a substantial amount of real estate (governmental entities, universities etc.) can reduce the cost of construction by allocating the deduction to the architecture or engineering firm designing the building.
  - Procedure: there is no prescribed IRS form or template for allocation of the § 179D deduction.
    - The tax-exempt entity should prepare an allocation letter with the 8 information items the IRS requires. See Notice 2008-40, § 3.04.

31

31

**Inflation Reduction Act (August 2022)**  
**Deduction for Making Comm'l Buildings Energy Efficient**  
***Outline: item D.3, page D-12***

- Example 1:
  - A commercial building owner replaces the existing HVAC and hot water system at a total cost of \$50,000
    - The new equipment reduces energy and power costs by 30%
    - Square footage of building is 15,000 SF
    - Prevailing wage and apprenticeship requirements were not met
  - Calculation of § 179D deduction:
    - Cost of improvements: \$50,000
    - Limit:
      - \$0.54 per square foot
      - Increased by \$0.02 for each percentage point above 25 percent by which the energy improvements reduce energy and power costs.
        - $30\% - 25\% = 5$  percentage points \*  $\$0.02 = \$0.10$
        - $\$0.54 + \$0.10 = \$0.64$
        - $\$0.64 * 15,000 \text{ SF} = \$9,600$  § 179D deduction

32

32



**Inflation Reduction Act (August 2022)**  
**Deduction for Making Comm'l Buildings Energy Efficient**  
**Outline: item D.3, page D-12**

- Example 2:
  - A commercial building owner replaces the existing HVAC and hot water system at a total cost of \$50,000
    - The new equipment reduces energy and power costs by 30%
    - Square footage of building is 15,000 SF
    - Prevailing wage and apprenticeship requirements were met
  - Calculation of § 179D deduction:
    - Cost of improvements: \$50,000
    - Limit:
      - \$2.68 per square foot
      - Increased by \$0.11 for each percentage point above 25 percent by which the energy improvements reduce energy and power costs.
        - $30\% - 25\% = 5$  percentage points \*  $\$0.11 = \$0.55$
        - $\$2.68 + \$0.55 = \$3.23$
        - $\$3.23 * 15,000 \text{ SF} = \$48,450$  § 179D deduction

33

33

**Inflation Reduction Act (August 2022)**  
**Credit for Construction & Sale of Energy Efficient Homes**  
**Outline: item F.1, page D-13**

- § 45L: credit an eligible contractor can claim for each qualified new energy efficient home constructed and sold or leased
- Inflation Reduction Act (Aug. 2022):
  - Extended credit through 2032
  - Modifies the credit for homes acquired after December 31, 2022:
    - Credit is \$2,500 for homes that meet certain Energy Star efficiency standards
      - \$500 per unit for multifamily dwelling units (2,500 per unit if prevailing wage requirements met)
    - Credit is \$5,000 for new homes certified as zero-energy ready
      - \$1,000 per unit for multifamily dwelling units (\$5,000 per unit if prevailing wage requirements met)

34

34

**Inflation Reduction Act (August 2022)  
Credit for Construction & Sale of Energy Efficient Homes  
Outline: item F.1, page D-13**

Home Type	Qualification	Prevailing Wage Requirement?	2022 Credit	2023 Credit
Single Family	Energy Star	No	\$2,000	\$2,500
Single Family	ZERH	No	NA	\$5,000
Multi-Family Unit	Energy Star	No	\$2,000	\$500
Multi-Family Unit	ZERH	No	NA	\$1,000
Multi-Family Unit	Energy Star	Yes	NA	\$2,500
Multi-Family Unit	ZERH	Yes	NA	\$5,000

35

35

**Inflation Reduction Act (August 2022)  
Credit for Construction & Sale of Energy Efficient Homes  
Outline: item F.1, page D-13**

- § 45L: credit an eligible contractor can claim for each qualified new energy efficient home constructed and sold or leased
- Reporting:
  - Complete Form 8908
  - Partnerships and S corporations report the credit on Schedule K
  - All other taxpayers report the credit on Form 3800 (General Business Credit), part III, line 1p

**8908** Energy Efficient Home Credit

OMB No. 1545-0058

Form 8908 (Rev. December 2022)

Department of the Treasury Internal Revenue Service

OMB No. 1545-0058

Attachment Sequence No. 153

Identifying number

**Note:** A contractor must own and have a basis in the qualified new energy efficient home during its construction to qualify as an eligible contractor with respect to the home and claim the credit. See instructions.

**1a** Enter the total number of qualified new energy efficient homes eligible to participate in the Energy Star Residential New Construction Program or the Energy Star Manufactured New Homes Program meeting the single-family home requirements but not certified as a zero energy ready home that were sold or leased to another person for use as a residence during the tax year. See instructions.

**1b** Multiply line 1a by \$2,500

**2a** Enter the total number of qualified new energy efficient homes eligible to participate in the Energy Star Residential New Construction Program or the Energy Star Manufactured New Homes Program and certified as a zero energy ready home that were sold or leased to another person for use as a residence during the tax year. See instructions.

**2b** Multiply line 2a by \$5,000

**3800** General Business Credit

OMB No. 1545-0058

Form 3800 (Rev. December 2022)

Department of the Treasury Internal Revenue Service

OMB No. 1545-0058

Attachment Sequence No. 22

Identifying number

**A** Corporate Alternative Minimum Tax (CAMT) and Base Erosion Anti-Abuse Tax (BEAT). Are you both (a) an "applicable corporation" within the meaning of section 1564(b) for the CAMT, and (b) an "applicable taxpayer" within the meaning of section 56(a) for the BEAT? See instructions. Yes  No

**Part I Current Year Credit for Credits Not Allowed Against Tentative Minimum Tax (TMT)**  
Go to Part III before Parts I and II. See instructions.

**1** Non-passive credits from Part III, line 2, combine column (a) with non-passive amounts from column (g). See instructions. **1**

**2** Passive credits from Part III, line 2, combine column (f) with passive amounts in column (g). See instructions. **2**

**3** Enter the applicable passive activity credits allowed for 2023. See instructions. **3**

**4** Carryforward of general business credit to 2023. See instructions for statement of amounts. **4**

**5** Carryback of general business credit from 2024. See instructions. **5**

**6** Add lines 1, 3, 4, and 5. **6**

**Part II Allowable Credit**

36

**Hoops, LP v. Commissioner,  
77 F.4th 557 (7<sup>th</sup> Cir. 8/9/23)  
*Outline: item C.1.a, page D-25***

- In 2012, an accrual method partnership, Hoops, LP, which owned the NBA's Memphis Grizzlies, sold substantially all the assets to a buyer.
  - The buyer assumed substantially all the liabilities of Hoops, including the obligation to pay approximately \$10.7 million in nonqualified deferred compensation to two players (Zach Randolph and Michael Conley).
- Hoops included the assumed liabilities in its amount realized from the sale.
- Hoops filed an amended partnership return for 2012 claiming a deduction for the deferred compensation.
- Issues:
  1. Could the partnership deduct the deferred compensation in 2012?
  2. [Did Hoops have to include the assumed liabilities in its amount realized?]
- Held:
  1. No. Section 404(a)(5) defers Hoops' deduction until the year in which the players include the compensation in gross income.
  2. [Yes, under the definition of amount realized in § 1001(b) and Reg. § 1.1001-2(a)(1).—argument not raised in 7<sup>th</sup> Circuit]

37

37

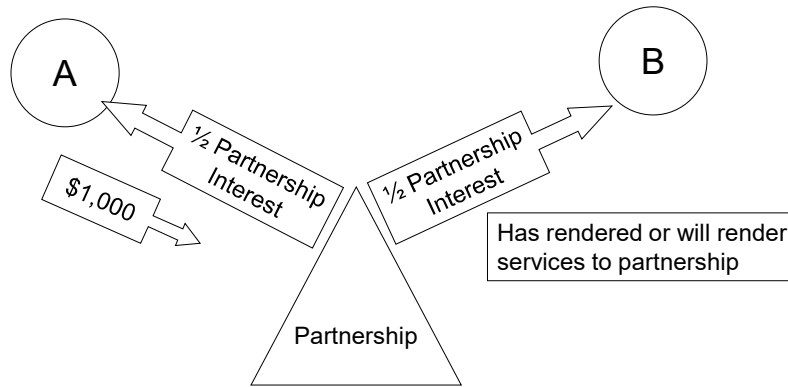
**ES NPA Holding, LLC v. Commissioner,  
T.C. Memo. 2023-55 (5/3/23)  
*Outline: item G.1, page 45***

- Background:
  - A person providing services to a partnership might receive either:
    - Capital Interest, or
    - Profits Interest
  - Under Rev. Proc. 93-27:
    - "if a person receives a profits interest for the provision of services to or for the benefit of a partnership in a partner capacity or in anticipation of being a partner, then the IRS will not treat the receipt of such an interest as a taxable event for the partner or the partnership."
    - Profits Interest: "[A] partnership interest other than a capital interest." Rev. Proc. 93-27, § 2.01.
    - Capital Interest: "[A]n interest that would give the holder a share of the proceeds if the partnership assets were sold at fair market value and then the proceeds were distributed in a complete liquidation of the partnership." Rev. Proc. 93-27, § 2.01.

38

38

**ES NPA Holding, LLC v. Commissioner,  
T.C. Memo. 2023-55 (5/3/23)  
Outline: item G.1, page D-45**

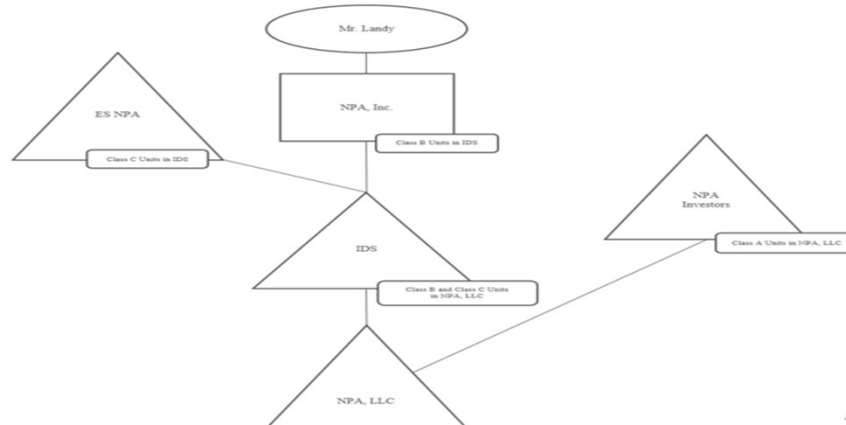


39

39

**ES NPA Holding, LLC v. Commissioner,  
T.C. Memo. 2023-55 (5/3/23)  
Outline: item G.1, page D-45**

- In a tiered partnership structure, ES NPA, LLC (“ES NPA”) received a partnership interest in IDS (which was an indirect partnership interest in NPA, LLC) in exchange for services provided to NPA, Inc.



40

40

**ES NPA Holding, LLC v. Commissioner,  
T.C. Memo. 2023-55 (5/3/23)  
Outline: item G.1, page D-45**

■ Issues:

1. Did Rev. Proc. 93-27 apply to ES NPA's receipt of a partnership interest in IDS (which was indirectly a partnership interest in NPA, LLC) in exchange for services that ES NPA had provided to NPA, Inc.?
2. If Rev. Proc. 93-27 applies, was the partnership interest that ES NPA received a profits interest or a capital interest?

■ Held:

1. Yes, Rev. Proc. 93-27 applies.
  - Court rejects IRS's argument that Rev. Proc. 93-27 did not apply because ES NPA had not provided services to IDS, the partnership in which it received an interest.
2. Yes, the partnership interest that ES NPA received was a profits interest.
  - Court rejects IRS's argument that assets of the underlying partnership had been undervalued and that the interest was really a capital interest.

41

41

**Farhy v. Commissioner,  
160 T.C. No. 6 (4/3/23)  
Outline: item A.3, page D-58**

- Section 6038(a) requires every United States person to provide information with respect to any foreign business entity the person controls
  - Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations.
- Section 6038(b)(1) imposes a penalty of \$10,000 for each annual accounting period for which a person fails to provide the required information.
  - In addition, § 6038(b)(2) imposes a continuation penalty of \$10,000 for each 30-day period that the failure continues up to a maximum continuation penalty of \$50,000 per annual accounting period.
- Issue: can the IRS levy to collect the penalties imposed by § 6038(b)?
- Held: No. There is no statutory authority for the IRS to assess these penalties. Because they cannot be assessed, the IRS cannot exercise its administrative collection powers to collect them.

42

42

**Soroban Capital Partners v. Commissioner,  
161 T.C. No. 12 (11/28/23)  
Outline: item B.1, page D-85**

- **Facts**
  - The petitioner, Soroban Capital Partners LP (Soroban), is a limited partnership subject to the former TEFRA unified audit and litigation procedures.
  - Soroban had one general partner (a limited liability company) and three individual limited partners.
  - On its partnership tax returns for 2016 and 2017, Soroban included in net earnings from self-employment the guaranteed payments received by the three limited partners and the general partner's distributive share of the partnership's ordinary business income.
  - Soroban excluded from net earnings from self-employment the limited partners' distributive shares of the partnership's ordinary business income.
- **Issue:** were the limited partners' shares of the partnership's ordinary business income automatically excluded from net earnings from self-employment?
- **Held:** No. Although § 1402(a)(13) excludes from net earnings from self-employment "the distributive share of any item of income or loss of a limited partner, as such ...," an analysis of the limited partners' functions and roles is required.

43

43

**Connelly v. United States  
70 F.4<sup>th</sup> 412 (8<sup>th</sup> Cir. 6/2/23)  
Outline: item A.1, page D-86**

- Two brothers owned all the shares of stock of a corporation.
- Under a stock purchase agreement, upon the death of either brother:
  - The surviving brother had the right to purchase the deceased brother's shares and,
  - If the surviving brother declined to purchase the shares, the corporation was obligated to redeem the shares.
- Value of stock was established either by brothers' agreement or by appraisal.
- The corporation owned life insurance with a death benefit of \$3.5 million on each brother's life to allow the corporation to redeem shares.
- One brother passed away and the corporation redeemed the shares for \$3 million. Value established by agreement of surviving brother and decedent's son.
- **Issue:** in determining the value of the deceased brother's shares for estate tax purposes, is the value increased by the \$3.5 million of life insurance proceeds?
- **Held:** Yes. The corporation's obligation to redeem the shares is not a liability that offsets this \$3.5 million. Estate of Blount (11<sup>th</sup> Cir. 2005) rejected.
- U.S. Supreme Court has granted certiorari.

44

44

## **E. CLEAN VEHICLE CREDITS- QUALIFIED COMMERCIAL CLEAN VEHICLE CREDIT**

45

45

### **Qualified Commercial Clean Vehicle Credit**

#### ***Outline: section E***

- The Inflation Reduction Act (August 2022) enacted new Code §45W, which authorizes a “qualified commercial clean vehicle credit”
- Businesses and tax-exempt organizations qualify for the credit
- There is no limit on the number of credits a business can claim
- The credit is nonrefundable, but any excess credit can be carried over as a general business credit

46

46

## Qualified Commercial Clean Vehicle Credit

### *Outline: section E*

- Amount of the credit:
  - The lesser of:
    - 15% of basis in the vehicle (30% if the vehicle is not powered by a gasoline or diesel internal combustion engine), or
    - The incremental cost of the vehicle
      - Incremental cost is the excess of the purchase price of a qualified commercial clean vehicle over the price of a comparable vehicle.
      - A comparable vehicle is one powered solely by a gasoline or diesel internal combustion engine that is comparable in size and use to the qualified commercial clean vehicle.
      - For 2023, IRS published a safe harbor to determine incremental cost. See Notice 2023-9.
  - Maximum credit is:
    - \$7,500 for qualified vehicles with gross vehicle weight ratings (GVWRs) of under 14,000 pounds, and
    - \$40,000 for all other vehicles

47

47

## Qualified Commercial Clean Vehicle Credit

### *Outline: section E*

- Amount of the credit:
  - Incremental cost:
    - Notice 2023-9 provides a safe harbor for determining incremental cost.
    - The safe harbor relies on an analysis performed by the US Department of Energy (DOE) for different vehicle classes
    - For 2023, the IRS will accept the following incremental costs:

Vehicle	Incremental Cost for 2023
Compact plug-in hybrid electric vehicles (PHEVs)	\$7,000
Vehicles (other than compact PHEVs) with gross vehicle weight under 14,000 lbs	\$7,500
Vehicles with gross vehicle weight $\geq$ 14,000 lbs	DOE figure

48

48



## **Qualified Commercial Clean Vehicle Credit**

### ***Outline: section E***

- **Qualifying vehicles:**
  - To qualify for the credit, the vehicle must be depreciable and must meet all of the following requirements:
    - Be made by a qualified manufacturer (check IRS index)
    - Be for use in taxpayer's business, not for resale
    - Be for use primarily in the United States
    - Not have been allowed a credit under sections 30D (clean vehicle credit) or 45W (commercial clean vehicle credit)
    - Be either:
      - A plug-in electric vehicle that draws significant propulsion from an electric motor with a battery capacity of at least 7 kilowatt hours (if GVWR is under 14,000 pounds) or 15 kilowatt hours (if GVWR is 14,000 pounds or more), or
      - A fuel cell motor vehicle that satisfies certain requirements

49

49

## **Qualified Commercial Clean Vehicle Credit**

### ***Outline: section E***

- **Reporting:**
  - To claim the credit:
    - Complete Form 8936-A and, for each vehicle, Schedule 1 of Form 8936-A
    - Report the credit as follows:
      - Partnerships and S Corporations report on Schedule K
      - All others, report on Form 3800 (General Business Credit), Part III, line 1zz

50

50

## **Qualified Commercial Clean Vehicle Credit**

### ***Outline: section E***

- Example:
  - Taxpayer purchases for business use a new 2023 Ford F-150 Lightning Pro that is a plug-in vehicle without a gas/diesel internal combustion engine
  - Gross vehicle weight is under 14,000 pounds
  - Price: \$50,000
  - Calculation of credit:
    - Lesser of 30% of basis (\$15,000) or incremental cost (\$7,500 safe harbor) = \$7,500
    - Maximum credit is \$7,500 (not an issue)
    - Credit is \$7,500
  - Note: taxpayer must reduce the basis of the vehicle by the amount of the credit.

51