2022 Federal Law Tax Update

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Overview:

2022 has not seen significant federal tax legislation.

The **Inflation Reduction Act of 2022** was signed into law by President Biden on August 16,2022.

The legislation includes a new corporate minimum tax, a stock repurchase excise tax, numerous green energy credits, other tax provisions, and significantly increased enforcement resources.

The Act covers, among other things:

- A 15% corporate alternative minimum tax on large corporations
- A 1% excise tax on stock buybacks
- Credits for new and used clean (EV) vehicles
- Credits for the production of clean hydrogen
- Credits for the production of zero-emission nuclear power

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Corporate Alternative Minimum Tax.** Imposes a corporate alternative minimum tax (AMT) equal to the excess of 15% of a corporation's **adjusted financial statement income** (AFSI) over its corporate AMT foreign tax credit.

- Applies to C corporations which, for a three taxable year period, have average annual AFSI greater than **$1 billion** (and at least $100 million for members of foreign-parented international financial reporting groups).

- AFSI is the net income or loss set forth on an applicable financial statement, with certain adjustments. Provides rules for calculating AFSI for certain entities and income (e.g., consolidated groups, foreign-parented groups, effectively connected income). AFSI is reduced by accelerated depreciation deductions.

- Applies to taxable years beginning after 2022. **IRC §55, §59(k), New IRC §56A**

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Excise Tax on Repurchase of Corporate Stock.** Imposes a 1% tax on the fair market value of stock repurchased by a **publicly traded U.S. corporation** during the taxable year.

- Reduced for stock issuances during the taxable year.

- Applies to **IRC §317(b)** redemptions and economically similar transactions, as well as stock acquired by a corporation's specified affiliate from another person. Also applies to certain acquisitions and repurchases of publicly traded foreign corporation stock.

- **Exceptions for IRC §368 tax-free reorganizations**, total repurchased stock of **$1 million** or less for the taxable year, repurchases treated as dividends, and certain other transactions.

- Applies to repurchases of stock after 2022. New **IRC §450**.

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Extension of Limitation on Excess Business Losses of Noncorporate Taxpayers.** Extends limitation on excess business losses of noncorporate taxpayers by two years. Losses disallowed for taxable years beginning in 2021 through 2028.

- The term "**excess business loss**" means the excess (if any) of the aggregate deductions of the taxpayer for the taxable year which are attributable to trades or businesses of such taxpayer (determined without regard to whether or not such deductions are disallowed for such taxable year under **§461(1)(1)** and without regard to any deduction allowable under **§172** or **§199A**), over the sum of:

  - 1. the aggregate gross income or gain of such taxpayer for the taxable year which is attributable to such trades or businesses, plus
  - 2. $250,000 (200% of such amount in the case of a joint return).

- **IRC §461(l)**.

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Extension and Modification of the Renewable Electricity Production Tax Credit (PTC).**

- Extends the beginning-of-construction deadline for certain renewable electricity production facilities through the end of 2024.

- Extends to the end of 2024 the election to treat certain facilities that otherwise qualify for the IRC §45 PTC ("**qualified investment credit facilities**") as energy property qualified for the IRC §48 ITC instead.

- Reduces the base amount of the credit. Facilities that pay prevailing wages during construction and for the first decade of operation, and fulfill apprenticeship requirements, can qualify for up to **five times** the base amount of the credit.

- Generally applies to facilities placed in service after 2021. Increased credit amounts for domestic content, energy communities, and hydropower apply to facilities placed in service after 2022. IRC §45.

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Extension and Modification of the Energy Investment Tax Credit (ITC).**

- Extends for one year, through the end of 2024, the beginning-of-construction deadline for some types of energy property (e.g., qualified fuel cell property) to qualify for the energy credit.

- Extends the beginning-of-construction deadline for geothermal equipment through the end of 2034.

- Reduces the base energy credit rate unless wage and apprenticeship requirements are met. Allows the credit for new types of energy property, including energy storage technology, qualified biogas, and microgrid controller property.

- **Quintuples** the credit amount in some circumstances; for example, if wage and apprenticeship requirements are met. Adds a 10% bonus credit if a domestic content requirement is met.

- The credit for new types of energy property applies to property placed in service after 2022. The extension of the beginning-of-construction deadline applies to property placed in service after 2021. **IRC §48**

Legislative Developments

- Inflation Reduction Act of 2022

  - **Increase in Energy Credit for Solar and Wind Facilities Placed in Service in Connection with Low-Income Communities.**
  - Expands the **IRC §48** energy investment tax credit to include certain qualified solar and wind facilities for which the Treasury Department allocates environmental justice solar and wind capacity limitation.
  - To qualify, a facility must have a maximum net output of less than 5 megawatts and must be in a low-income community, or on American Indian land, or part of a low-income residential building project or a low-income economic benefit project.
  - Effective beginning in 2023.
  - **IRC §48**

Legislative Developments

- Inflation Reduction Act of 2022

  - **Extension and Modification of Carbon Oxide Sequestration Credit.**
  - Extends, with modifications, and enhances the carbon oxide sequestration credit for qualified industrial facilities and direct air capture facilities if construction begins before 2033, subject to conditions.
  - Lowers the minimum carbon capture requirement.
  - Increases credit amount if wage and apprenticeship requirements are met.
  - Generally applies to facilities or equipment placed in service after 2022.
  - The modified carbon capture requirements apply to facilities or equipment the construction of which begins after the date of enactment.
  - The amendments to the special rules for carbon capture equipment placed in service before February 9, 2018, take effect on the date of enactment. **IRC §45Q**.

Legislative Developments

❖ Inflation Reduction Act of 2022

➢ More Credits.

- ➢ Zero-Emission Nuclear Power Production Credit.
- ➢ Extension of Tax Credits for Biodiesel, Renewable Diesel, and Alternative Fuels.
- ➢ Extension of Second Generation Biofuel Credit.
- ➢ Sustainable Aviation Fuel Credit.
- ➢ Credit for Production of Clean Hydrogen.
- ➢ Extension and Modification of Nonbusiness Energy Property Credit.
- ➢ Extension and Modification of Residential Energy Efficient Property Credit (Residential Clean Energy Credit).
- ➢ Extension, Increase, and Modification of New Energy Efficient Home Credit.
- ➢ Extension and Modification of Alternative Fuel Vehicle Refueling Property Credit.
- ➢ Extension of the Advanced Energy Project Credit.
- ➢ Advanced Manufacturing Production Credit.
- ➢ Clean Electricity Production Credit.
- ➢ Clean Electricity Investment Credit.
- ➢ Clean Fuel Production Credit.

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Modification and Termination of New Qualified Plug-In Electric Drive Motor Vehicle Credit (Clean Vehicle Credit).**

- Increases the dollar limit on the new qualified plug-in electric drive motor vehicles credit (renamed the "clean vehicle credit") if *critical minerals* and *battery components* requirements are met.

- Adds requirements that would render electric vehicles made with any battery components manufactured by "*foreign entities of concern*" ineligible to receive the credit after 2023.

- Beginning in 2025, prohibits use of any critical mineral in a battery that is extracted or processed by those countries.

- Adds a requirement that final assembly of the vehicle occur in **North America** **(can check whether a particular vehicle meets this requirement by entering its vehicle identification number (VIN) into the VIN decoder).**

- Eliminates the limit on the number of credit-eligible vehicles, but allows only one credit per vehicle.

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Modification and Termination of New Qualified Plug-In Electric Drive Motor Vehicle Credit (Clean Vehicle Credit).**

- *Imposes a new credit limit based on the taxpayer's income*. Allows a taxpayer to transfer the credit to a registered dealer in exchange for payment from that dealer.

- Generally applies to vehicles placed in service after 2022.

- The final assembly requirement applies to vehicles sold after the date of enactment.

- The per-vehicle dollar limit applies to vehicles placed in service after the proposed guidance described in **IRC §30D(e)(3)(B)** is issued.

- The transfer-of-credit provision applies to vehicles placed in service after 2023.

- The elimination of the limit on the number of credit-eligible vehicles applies to vehicles sold after 2022. **IRC §30D**.

- Terminates the credit after 2032.

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Modification and Termination of New Qualified Plug-In Electric Drive Motor Vehicle Credit (Clean Vehicle Credit).**

- Under the new rules, the amount of the credit will be based on two separate requirements, each one based on where the vehicle's battery is sourced:

  - Taxpayers get a **$3,750** credit for meeting the critical minerals requirement (which requires that a minimum percentage of the minerals contained in the battery be sourced in the United States or a country with which the United States has a free trade agreement in effect).

  - Taxpayers also can get a **$3,750** credit for satisfying the battery component requirement (which requires that a minimum percentage of the value of the components of the battery be manufactured or assembled in North America.

- Taxpayers can satisfy either or both requirements, for either a $3,750 credit (if only one requirement is satisfied) or a **$7,500** credit (if both requirements are satisfied).

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Modification and Termination of New Qualified Plug-In Electric Drive Motor Vehicle Credit (Clean Vehicle Credit).**

- **Modified adjusted gross income limitation.** Starting on January 1, 2023, the ability to take the electric vehicle credit will be limited based on modified adjusted gross income. The threshold amount is:

    - For married taxpayers filing a joint return or a surviving spouse, $300,000.
    - For taxpayers filing as head of household, $225,000.
    - For all other taxpayers (single, married filing separately), $150,000.

- These amounts are not adjusted for inflation.

- **MSRP limitation.** Also starting on January 1, 2023, vehicles will not be eligible for the credit if they exceed an MSRP limit: $80,000 for vans, pickup trucks, and sport utility vehicles; $55,000 for other vehicles.

- This means that if you are looking at a higher-end electric vehicle, you need to act by the end of December.

Legislative Developments

❖ Inflation Reduction Act of 2022

➢ **Qualifying Vehicle**

Imaged by Heritage Auctions, HA.com

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Credit for Previously- Owned Clean Vehicles.**

- Provides a new nonrefundable personal credit for qualifying previously owned clean vehicles to individual purchasers whose modified adjusted gross income does not exceed a specified limit.

- A taxpayer may elect to transfer the credit to a registered dealer in exchange for payment from that dealer.

- Credit terminates after 2032.

- Generally applies to vehicles acquired after 2022. Transfer-of-credit provision applies to vehicles acquired after 2023.

- New **IRC §25E**.

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Legislative Developments

❖ Inflation Reduction Act of 2022

- **Credit for Qualified Commercial Clean Vehicles.**

- Provides a new business credit for qualified commercial clean vehicles, in an amount equal to the lesser of:

  - 15% (or 30% for a vehicle not powered by a gas or diesel internal combustion engine) of basis, or

  - the incremental cost of the vehicle (excess of purchase price of such vehicle over purchase price of a comparable vehicle, up to $7,500 (or $40,000 for a vehicle with a gross vehicle weight rating of at least 14,000 pounds).

- Credit terminates after 2032.

- Applies to vehicles acquired after 2022.

- New **IRC §45W**

Legislative Developments

❖ Inflation Reduction Act of 2022

- **Transfer of Eligible Credits.** Permits a taxpayer to elect to transfer all or a portion of an eligible credit to an unrelated eligible taxpayer, but the recipient taxpayer may not transfer any portion of the transferred credit. Eligible credits include:
  - the business credit portion of the alternative fuel vehicle refueling property credit;
  - the renewable electricity production credit;
  - the carbon oxide sequestration credit;
  - the zero-emission nuclear power production credit;
  - the clean hydrogen production credit;
  - the advanced manufacturing production credit;
  - the clean electricity production credit;
  - the clean fuel production credit;
  - the energy investment credit;
  - the qualifying advanced energy project investment credit; and
  - the clean electricity investment credit.

- Eligible credits cannot be transferred to a tax-exempt entity, state or local government, political subdivision, the Tennessee Valley Authority, tribal government, Alaska Native Corporation, or cooperative that furnishes electricity to rural areas. Applies to taxable years beginning after 2022. **New IRC §6418**.

Legislative Developments

❖ Inflation Reduction Act of 2022

- **IRS Enforcement.**
- Appropriates about $80 billion to the IRS to add auditors, improve customer service, and modernize technology.
- **87,000 new IRS Agents.**
- Provides $15 million to the IRS with funding for a report to Congress on the potential creation and maintenance of an IRS-run e-file system.

Legislative Developments

❖ Inflation Reduction Act of 2022

- ➢ **WVU Capacity circa 60,000 - 45% more than shown in this photo.**

Legislative Developments

❖ Inflation Reduction Act of 2022

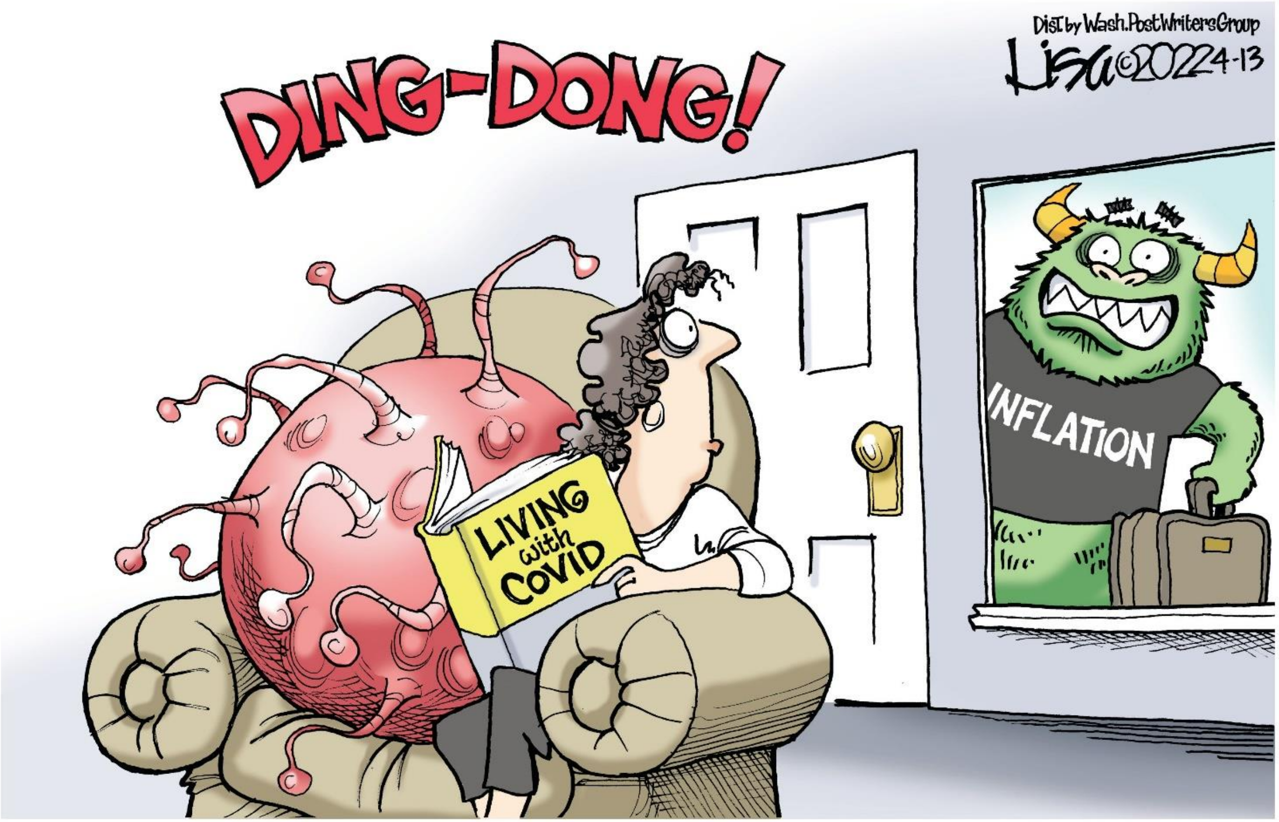
- Over the 12 months ended June 2022, the Consumer Price Index for All Urban Consumers increased **9.1 percent**.

- The 9.1-percent increase in the all items index was the largest 12-month increase since the 12-month period ending **November 1981**.

- Annual inflation rate in the US slowed for the third month running to 8.2% in September of 2022, the lowest in seven months, compared to 8.3% in August but above market forecasts of 8.1%.

Legislative Developments

❖ Inflation Reduction Act of 2022



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Legislative Developments

❖ Inflation Reduction Act of 2022

2022 Fed Rate Hikes: Taming Inflation

FOMC Meeting Date	Rate Change (bps)	Federal Funds Rate
Sept 21, 2022	+75	3.00% to 3.25%
July 27, 2022	+75	2.25% to 2.5%
June 16, 2022	+75	1.5% to 1.75%
May 5, 2022	+50	0.75% to 1.00%
March 17, 2022	+25	0.25% to 0.50%

- Expected +75 in November
- Expected +75 in December
- January 2023? Fed target is 5%.
- Fed target inflation is 2%. This is going to be a bumpy ride…

Legislative Developments

- **PPP and Bank Fraud Enforcement Harmonization Act of 2022.**

  - On August 5, 2022, President Biden signed the PPP and Bank Fraud Enforcement Harmonization Act of 2022 (HR7352)

  - Establishes a **10-year statute** of limitations for criminal charges and civil enforcement against a borrower who engages in fraud with respect to a Paycheck Protection Program loan.

  - PPP fraud. During the course of the program, over **8.5 million employers** received PPP loans to cover payroll costs and nonpayroll costs during the COVID-19 pandemic.

Legislative Developments

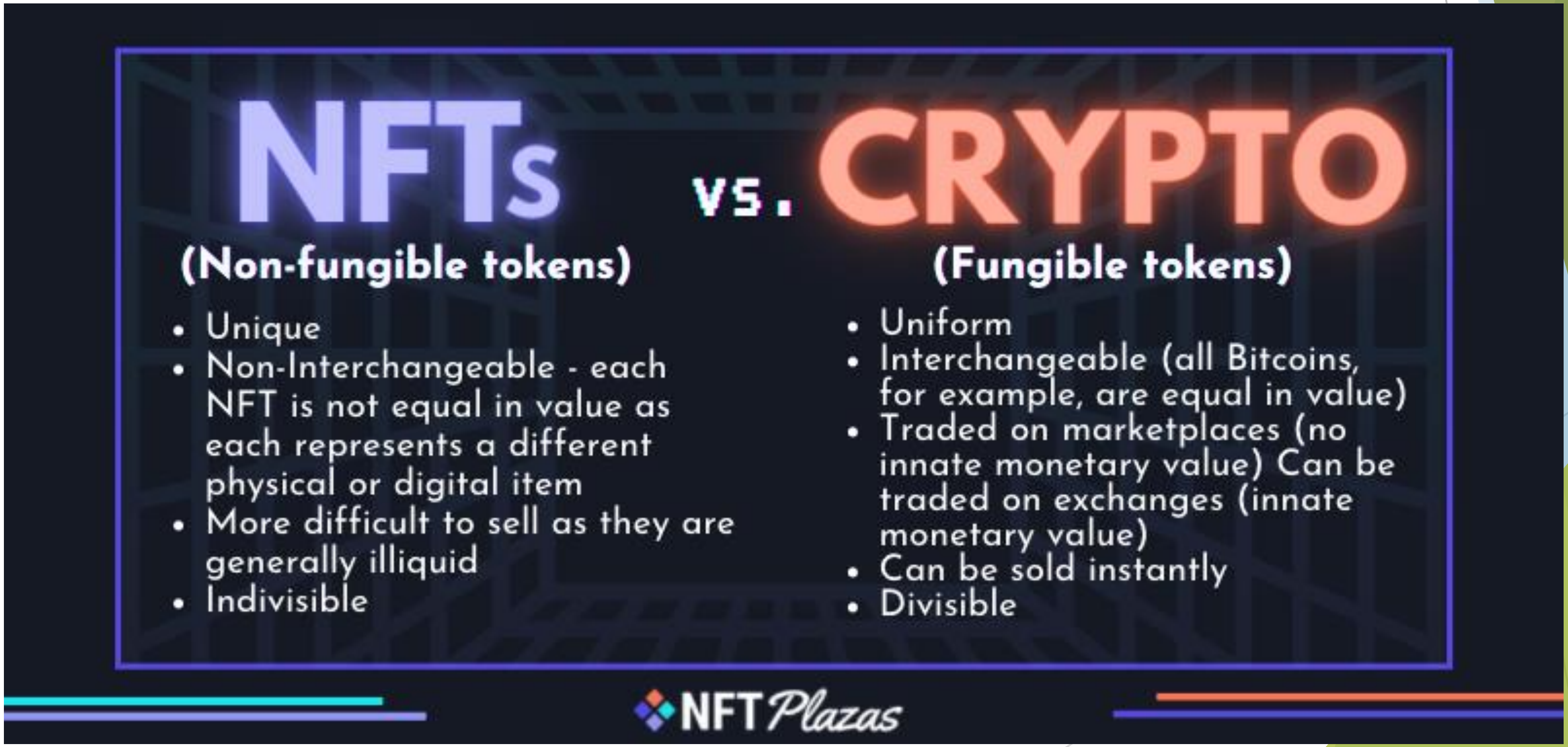
- **PPP and Bank Fraud Enforcement Harmonization Act of 2022.**

  - The Office of the Inspector General (OIG) issued a report in May that identified more than **70,000 loans** totaling over **$4.6 billion** in *potentially fraudulent PPP loans*.
  - OIG found that the SBA lacked the organizational structure to combat PPP fraud throughout the implementation of the program.
  - OIG found that the SBA did not provide sufficient guidance to lenders on how to identify, track, address, and resolve potentially fraudulent PPP loans.
  - During the OIG's review, the SBA established the Fraud Risk Management Board tasked to coordinate fraud risk prevention, detection, and response activities.
  - Quin Ngoc Rudin sentenced to 10 years **- $43,000,000**

Legislative Developments

❖ 2023 IRS cryptocurrency reporting requirements

- Code §6045(g)(3)(D) defines a digital asset as "any digital representation of value that is recorded on a cryptographically secured distributed ledger or any similar technology."
- Notice 2014-21, IRS explained that virtual currency is treated as property for federal income tax purposes.



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Legislative Developments

❖ 2023 IRS cryptocurrency reporting requirements

- New reporting for digital assets (most cryptocurrencies, and potentially some **non-fungible tokens** (NFTs)).
- 2021 legislation expanded the definition of "brokers" who must furnish **Forms 1099-B** to include businesses that are responsible for regularly providing any service accomplishing transfers of digital assets on behalf of another person (for example, cryptocurrency exchanges).
- Any platform on which you can buy and sell cryptocurrency will have to report digital asset transactions to the IRS and to you at the end of each year.
- The cryptocurrency exchanges/platforms will have to gather information from customers, so that they can properly issue Forms 1099-B at the end of each tax year.

Legislative Developments

❖ 2023 IRS cryptocurrency reporting requirements

- Cryptocurrency exchanges will have to get the customer's name, address, and phone number, the gross proceeds from the sale of digital assets, and capital gains or losses and whether these were short-term (held for one year or less) or long-term (held for more than one year).

- Note that it's not yet known whether exchanges/platforms will have to file Form 1099-B itself (modified to include digital assets) or some other, new IRS form.

- Cash transaction reporting on **Form 8300** will apply to cryptocurrency. Under a set of rules separate from the broker reporting rules, when a business receives **$10,000** or more in cash in a transaction, that business must report the transaction, including the identity of the person from whom the cash was received, to the IRS on Form 8300. For this cash reporting requirement, businesses will have to treat digital assets like cash.

- IRS's Form 8300 requires the reporting of the identifying information of the individual from whom the cash was received-including address, occupation, and taxpayer identification number-as well as other information. The current-law rules that apply to cash usually apply to in-person payments in actual cash.

Legislative Developments

❖ **Judge Clears IRS to Seek Bank's Crypto Customer Records.**

- The IRS was handed a win September 21 when the U.S. District Court for the Southern District of New York granted the agency's *ex parte* petition for leave to serve a so-called John Doe summons to M.Y. Safra Bank following an investigation into the crypto trading platform SFOX.

- Judge Paul Gardephe agreed there was a "reasonable basis for believing" at least 10 individuals may have failed to disclose and pay tax on crypto transactions conducted by the taxpayers via SFOX, which uses M.Y. Safra's banking services.

- These currently unidentified taxpayers, and potentially others, may have failed to report to the IRS profits from crypto sales and pay tax on applicable gains, which the agency can determine by obtaining bank records from M.Y. Safra. The IRS, and the federal government overall, have become hawkish on tax evasion schemes that take advantage of **Web 3.0** (the newest iteration of the World Wide Web, often denoted by decentralized platforms and blockchains) crypto technologies.

- In a September 22 statement, the Justice Department described SFOX as "a cryptocurrency prime dealer and trading platform that connects digital currency exchanges, over-the-counter virtual currency brokers, and liquidity providers globally." The platform has more than **175,000** users and has facilitated over **$12 billion** since it was founded in 2014.

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Legislative Developments

❖ Nonfungible Tokens (NFTs).

- Cryptocurrency and nonfungible tokens (NFTs) are far from interchangeable from a tax perspective, and a lack of IRS guidance has left tax experts to speculate on the nuances of how various digital assets may be treated.

- NFTs are unique, identifiable digital assets that are accompanied by a digital certificate of authenticity.

- Unlike cryptocurrencies, NFTs haven't been formally defined by the IRS. There "isn't really any guidance on what they are," Edward Froelich of Morrison & Foerster said March 23 on a conference panel hosted by the Tax Executives Institute.

- §6045(g)(3)(D) defines a digital asset as "any digital representation of value that is recorded on a cryptographically secured distributed ledger or any similar technology." This encompasses cryptocurrencies, which the IRS clarified in FAQs are a form of virtual currency, or such a digital representation of value that "functions as a unit of account, a store of value, and a medium of exchange." Some cryptocurrencies, like Bitcoin, are considered convertible if there is an equivalence to a real currency's value. In Notice 2014-21, the IRS explained that virtual currency is treated as property for federal income tax purposes.

Legislative Developments

❖ Nonfungible Tokens (NFTs).

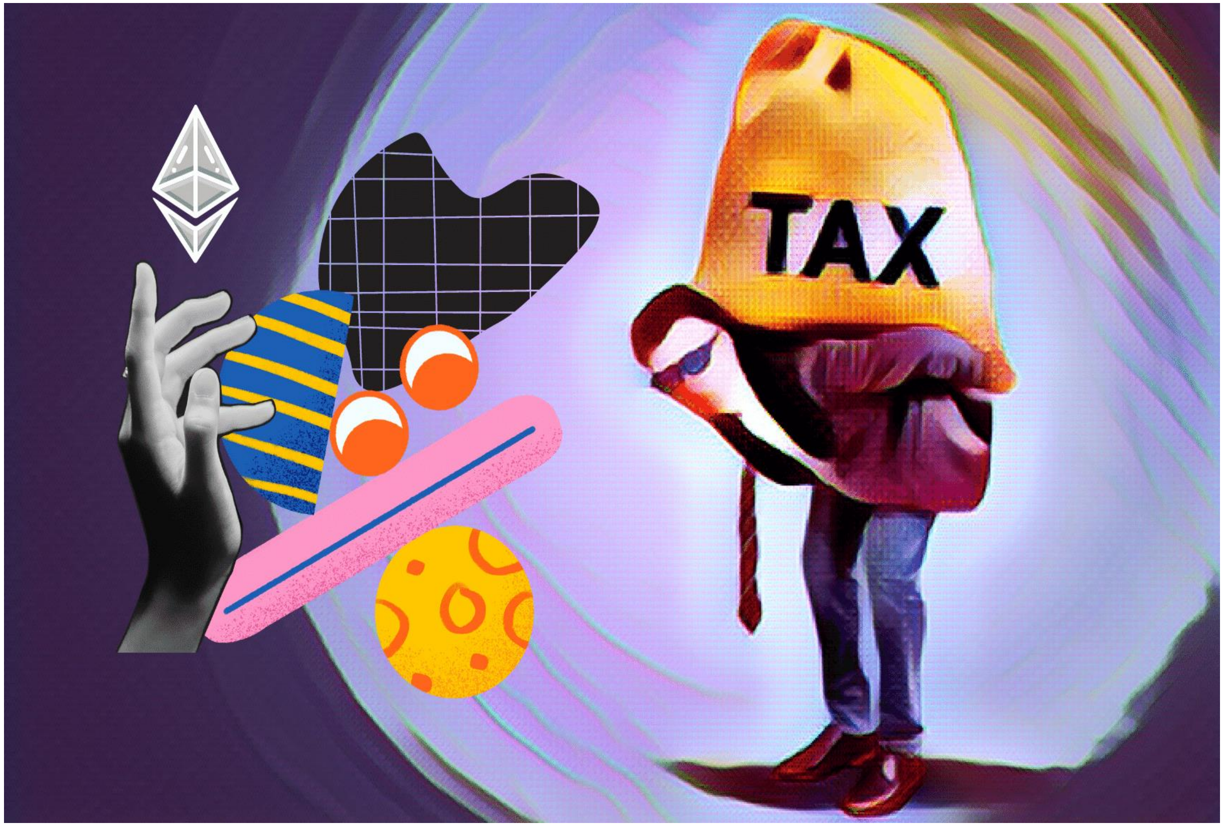
- NFTs are also property but aren't mediums of exchange. Instead, they're individual instances of digital assets. Thus far, this has included artwork, collectibles, and in-game items. Rebecca Lee of PricewaterhouseCoopers explained on the TEI panel that "no two NFTs are the same" because each is assigned its own serial number and has identifiable features.

- Because NFTs are often purchased with cryptocurrency, existing guidance may apply, as would new reporting obligations of digital asset brokers. Under amended **§6045**, a broker is "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."

- NFTs represent underlying pieces of digital code (which may, in turn, represent a physical asset). *Each "token" is actually a smart contract that operates on a blockchain and is programmed to define and ensure that a given piece of digital content is unique and owned by a single person or entity at a specific point in time*. Because everyone can look at the blockchain, the ownership of the NFT can be easily confirmed. However, if they so choose, the person or company who owns the token can remain anonymous.

Legislative Developments

❖ **Nonfungible Tokens (NFTs).**



Other Federal Tax Developments

1. Transfer Tax Issues

2. Individual Income Tax Issues

3. Business Tax Issues

4. Case and PLR Developments

Transfer Tax
Increased Exemption Amount

- Adjusted for inflation the exemption amount is $12,060,000 for 2022, or $24,120,000 per couple. **2023 - $12,920,000 $25,840,000 per couple - Rev Proc 2022-38.**

- For gifts made and estates of decedents dying in 2022, the exclusion amount will be $12,060,000.

- Generation-skipping transfer (GST) tax exemption. The exemption from GST tax will be $12,060,000 for transfers in 2022.

- Gift tax annual exclusion. For gifts made in 2022, the gift tax annual exclusion will be $16,000. **2023 - $17,000 - Rev Proc 2022-38.**

- Annual exclusion for gifts to noncitizen spouses. For gifts made in 2022, the annual exclusion for gifts to noncitizen spouses will be $164,000 (up from $159,000 for 2021).

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Transfer Tax

IRS Provides Simplified Method for Extending Portability Election

- **Rev Proc 2022-32, 2022-30 IRB**
- The IRS has released a procedure that provides a new, simplified method for obtaining an extension of time to make a "**portability**" election.
- A portability election allows a surviving spouse to apply a deceased spouse's unused exclusion (DSUE) amount to their own transfers during life or at death.
- **New simplified method.** The new procedure provides a new simplified method for certain estates to use to obtain an extension of time to elect portability of a DSUE amount.
- The procedure applies to estates that are not normally required to file an estate tax return because the value of the gross estate and adjusted taxable gifts is under the filing threshold and the decedent has a surviving spouse.

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Transfer Tax

IRS Provides Simplified Method for Extending Portability Election

- **Rev Proc 2022-32, 2022-30 IRB**
- Under the new procedure, an extension request must be made on or before the **fifth (5) anniversary** of the decedent's death.
- This simplified method, which doesn't require a user fee, should be used in lieu of the letter ruling process.
- The Executor filing the Form 706 must state at the top of the form that the return is:
  - **FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A).**

Transfer Tax

IRS Proposes Exception to Special Rule Regarding Basic Exclusion Amount

- **Preamble to Prop Reg REG-118913-21**

- The IRS has proposed an exception to the special rule protecting gifts made before 2026 from the declining basic exclusion amount. **Prop Reg § 20.2010-1(c)(3)** would provide an exception to the special rule for transfers that are includible, or are treated as includible, in a grantor's gross estate.

- Increased basic exclusion amount. In 2017, **§ 2010(c)(3)** was amended to increase the basic exclusion amount (BEA) to $10MM adjusted for inflation (increased BEA). The increased BEA applies to decedents dying and gifts made after December 31, 2017, and before January 1, 2026. On January 1, 2026, the BEA will revert to $5 million adjusted for inflation.

- In 2019, the IRS issued final regs that included a "special rule" to ensure that a donor's estate is not taxed on completed gifts that, due to the increased BEA, were free of gift tax when made. See, Final regs under **§2010** protect gifts made before 2026.

- The special rule in the final regs didn't distinguish between two types of transactions that the Code treats differently:

  - completed gifts that are treated as "adjusted taxable gifts" but are not includible in the grantor's gross estate for estate tax purposes (not-includible gifts); and

  - completed gifts that are treated as testamentary transfers includible in the grantor's gross estate for estate tax purposes (includible gifts).

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Transfer Tax

RS Proposes Exception to Special Rule Regarding Basic Exclusion Amount

- **Preamble to Prop Reg REG-118913-21**
- Proposed **§2010 regs**. In keeping with the statutory distinction between includible and not-includible gifts, **Prop Reg §20.2010-1(c)(3)** would provide an exception to the special rule for transfers that are includible, or are treated as includible, in a grantor's gross estate.
- This exception would also apply to certain transfers that effectively allow the donor to retain enjoyment of the gifted property for life.
- However, the special rule would continue to apply to transfers includible in the gross estate when the taxable amount of the gift is 5% or less than the total amount of the transfer, as valued on the date of the transfer.
- These proposed rules would apply, after being published as final, to the estates of decedents dying on or after April 27, 2022. While the special rule will not be needed until the BEA decreases by statute, if a BEA decrease is enacted on or after April 27, 2022, but before final regs are issued, the proposed exception to the special rule would apply to the estates of decedents dying on or after April 27, 2022.

Transfer Tax

RS Proposes Exception to Special Rule Regarding Basic Exclusion Amount

- **Preamble to Prop Reg REG-118913-21**
- Example. The proposed regs contain the following example to illustrate the new exception:
  - Assume that when the BEA was $11.4 million ($10 million adjusted for inflation), a donor gifted an enforceable $9 million promissory note to their child. This transfer constituted a completed gift of $9 million.
  - On the donor's death, the assets that are to be used to satisfy the note are part of the donor's gross estate, with the result that the note is treated as includible in the gross estate for purposes of **§2001(b)**. Thus, the $9 million gift is excluded from adjusted taxable gifts in computing the tentative estate tax under Code **§2001(b)(1)**.
  - Nonetheless, if the donor dies on or after January 1, 2026, the credit to be applied in computing the donor's estate tax is the credit based upon the BEA allowable as of the donor's date of death ($6.8 million). (Preamble to Prop Reg REG-118913-21)

Transfer Tax
Clawback IRC §2010

- The 2021-2022 IRS Priority Guidance Plan includes the following item in the "Gifts and Estates and Trusts" section:
  - 3. Regulations under **§2010** addressing whether gifts that are includible in the gross estate should be excepted from the special rule of **§20.2010-1(c)**.

Transfer Tax

Section 7520 Applicable Federal Rates

2021 Tax Year

Month	Source	Rate
Jan.	Rev. Rul. 2021-1	0.6%
Feb.	Rev. Rul. 2021-4	0.6%
Mar.	Rev. Rul. 2021-5	0.8%
Apr.	Rev. Rul. 2021-7	1.0%
May	Rev. Rul. 2021-8	1.2%
June	Rev. Rul. 2021-9	1.2%
July	Rev. Rul. 2021-12	1.2%
August	Rev. Rul. 2021-14	1.2%
September	Rev. Rul. 2021-16	1.0%
October	Rev. Rul. 2021-18	1.0%
November	Rev. Rul. 2021-21	1.4%
December	Rev. Rul. 2021-23	1.6%

Transfer Tax

Section 7520 Applicable Federal Rates

2022 Tax Year

Month	Source	Rate
Jan.	Rev. Rul. 2022-1	1.6%
Feb.	Rev. Rul. 2022-3	1.6%
Mar.	Rev. Rul. 2022-4	2.0%
Apr.	Rev. Rul. 2022-8	2.2%
May	Rev. Rul. 2022-9	3.0%
June	Rev. Rul. 2022-10	3.6%
July	Rev. Rul. 2022-12	3.6%
August	Rev. Rul. 2022-14	3.8%
September	Rev. Rul. 2022-17	3.6%
October	Rev. Rul. 2022-18	4.0%

Individual Income Tax Rates

Individual Income Tax Inflation Adjustments

- The income tax brackets, standard deduction amounts, and many other tax items are adjusted annually for cost-of-living increases.
- Although the tax rates didn't change, the income tax brackets for 2022 are slightly wider than for 2021.
- The difference is due to inflation during the 12-month period from September 2020 to August 2021, which is used to figure the adjustments.

Individual Income Tax Rates

2022 Tax Rate Schedules
(Source: Rev. Proc. 2021-45)

Section 1(a) — MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES

If Taxable Income Is:	The Tax Is:
Not Over $20,550	10% of taxable income.
Over $20,550 but not over $83,550	$2,055 plus 12% of the excess over $20,550.
Over $83,550 but not over $178,150	$9,615 plus 22% of the excess over $83,550.
Over $178,150 but not over $340,100	$30,427 plus 24% of the excess over $178,150.
Over $340,100 but not over $431,900	$69,295 plus 32% of the excess over $340,100.
Over $431,900 but not over $647,850	$98,671 plus 35% of the excess over $431,900.
Over $647,850	$174,253.50 plus 37% of the excess over $647,850.

Individual Income Tax Rates

2022 Tax Rate Schedules
(Source: Rev. Proc. 2021-45)

Section 1(b) — HEADS OF HOUSEHOLDS

If Taxable Income Is:	The Tax Is:
Not Over $14,650	10% of taxable income.
Over $14,650 but not over $55,900	$1,465 plus 12% of the excess over $14,650.
Over $55,900 but not over $89,050	$6,415 plus 22% of the excess over $55,900.
Over $89,050 but not over $170,050	$13,708 plus 24% of the excess over $89,050.
Over $170,050 but not over $215,950	$33,148 plus 32% of the excess over $170,050.
Over $215,950 but not over $539,900	$47,836 plus 35% of the excess over $215,950.
Over $539,000	$161,218.50 plus 37% of the excess over $539,900

Individual Income Tax Rates

2022 Tax Rate Schedules
(Source: Rev. Proc. 2021-45)

Section 1(c) — UNMARRIED INDIVIDUALS (OTHER THAN SURVIVING SPOUSES AND HEADS OF HOUSEHOLDS)

If Taxable Income Is:	The Tax Is:
Not Over $10,275	10% of taxable income
Over $10,275 but not over $41,775	$1,027.50 plus 12% of the excess over $10,275
Over $41,775 but not over $89,075	$4,807.50 plus 22% of the excess over $41,775
Over $89,075 but not over $170,050	$15,213.50 plus 24% of the excess over $89,075
Over $170,050 but not over $215,950	$34,647.50 plus 32% of the excess over $170,050
Over $215,950 but not over $539,900	$49,335.50 plus 35% of the excess over $215,950
Over $539,900	$162,718 plus 37% of the excess over $539,900

Individual Income Tax Rates

2022 Tax Rate Schedules
(Source: Rev. Proc. 2021-45)

Section 1(d) — MARRIED INDIVIDUALS FILING SEPARATE RETURNS

If Taxable Income Is:	The Tax Is:
Not Over $10,275	10% of taxable income
Over $10,275 but not over $41,775	$1,027.50 plus 12% of the excess over $10,275
Over $41,775 but not over $89,075	$4,807.50 plus 22% of the excess over $41,775
Over $89,075 but not over $170,050	$15,213.50 plus 24% of the excess over $89,075
Over $170,050 but not over $215,950	$34,647.50 plus 32% of the excess over $170,050
Over $215,950 but not over $323,925	$49,335.50 plus 35% of the excess over $215,950
Over $323,925	$87,126.75 plus 37% of the excess over $323,925

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Individual Income Tax Rates

2022 Tax Rate Schedules
(Source: **Rev. Proc. 2021-45)**

Section 1(e) — ESTATES AND TRUSTS

If Taxable Income Is:	The Tax Is:
Not Over $2,750	10% of taxable income.
Over $2,750 but not over $9,850	$275 plus 24% of the excess over $2,750.
Over $9,850 but not over $13,450	$1,979 plus 35% of the excess over $9,850.
Over $13,450	$3,239 plus 37% of the excess over $13,450.

Individual Income Tax Rates

2022 Long-Term Capital Gains Tax Rate Thresholds

Tax rates on long-term capital gains (i.e., gains from the sale of capital assets held for at least one year) and qualified dividends did not change for 2022. However, the income thresholds to qualify for the various rates were adjusted for inflation.

Long-Term Capital Gains Tax Rate 2022	Single	Married Filing Jointly	Head of Household	Married Filing Separately	Estate or Trust
0%	Less than $41,675	Less than $83,350	Less than $55,800	Less than $41,675	Less than $2,800
15%	$41,675-$459,749	$83,350-$517,199	$54,100-$488,499	$41,675-$258,599	$2,800-$13,699
20%	$459,750+	$517,200+	$488,500+	$258,600+	$13,700+

2022 Net Investment Income Tax

The **3.8% surtax** on net investment income stays the same for 2022. It kicks in for single people with modified AGI over $200,000 and for joint filers with modified AGI over $250,000.

Individual Income Tax Rates

2022 Standard Deductions

- The standard deduction amounts were increased for 2022 to account for inflation.

- Married couples get $25,900 ($25,100 for 2021), plus $1,400 for each spouse age 65 or older ($1,350 for 2021). **2023 - $27,700 Rev Proc 2022-38.**

- Singles can claim a $12,950 standard deduction ($12,550 for 2021) — $14,700 if they're at least 65 years old ($14,250 for 2021). **2023 - $13,850 Rev Proc 2022-38.**

- Head-of-household filers get $19,400 for their standard deduction ($18,800 for 2021), plus an additional $1,750 once they reach age 65 ($1,700 for 2021). **2023 - $20,800 Rev Proc 2022-38**

- Blind people can tack on an extra $1,400 to their standard deduction ($1,350 for 2021). That jumps to $1,750 if they're unmarried and not a surviving spouse ($1,700 for 2021).

Individual Income Tax Rates

2022 Third Party Payment Settlement Networks 1099-K

- Banks and online payment networks—payment settlement entities (PSEs) or third-party settlement organizations (TPSOs)—must report payments in a trade or business to the IRS and payees on **Form 1099-K**, Payment Card and Third-Party Network Transactions. These entities include **Venmo** and CashApp, as well as gig economy facilitators such as Uber and TaskRabbit.

- What is "gig" work? Generally, it's on-demand labor that doesn't follow a fixed schedule. Such jobs are often found through an app or website. Examples include driving a car for booked rides (Uber, Lyft), selling goods online (Etsy, eBay), renting out property (Airbnb, Vrbo), and providing services such as web design, house sitting, or dog walking.

- Starting with the 2022 tax year, third-party payment settlement networks will a Form 1099-K if payment is exceeds $600 during the year for goods or services, regardless of the number of transactions.

- Previously the form was only sent if the amount received exceeded **$20,000** in gross payments and there were more than **200 transactions**.

- The gross amount of a payment does not include any adjustments for credits, cash equivalents, discount amounts, fees, refunded amounts, or any other amounts.

- This change to the reporting threshold means more people receive a 1099-K form next year. However, 1099-K reporting is only for money received for goods and services. It doesn't apply to payments from family and friends.

Individual Income Tax Rates

2022 Above The Line Charitable Deductions

- ❖ The "above-the-line" deduction for up to $300 of charitable cash contributions ($600 for married couple filing a joint return) expired at the end of 2021.

- ❖ The 2020 and 2021 suspension of the 60%-of-AGI limit on deductions for cash donations by people who itemize also expired, so the limit is back in place starting with the 2022 tax year.

Individual Income Tax Rates

2022 Retirement Updates

- ❖ The IRS updated the table used to calculate required minimum distributions (RMDs) to account for longer life expectancies beginning in 2022. The RMDs should be a less starting in 2022 than they were before.

- ❖ **Dollar limits on retirement plans and IRAs are higher in 2022.**
  - ❖ The maximum contribution limits for 401(k), 403(b) and 457 jumps from $19,500 to $20,500 for 2022, while people born before 1973 can once again put in $6,500 more as a "catch-up" contribution.

  - ❖ The 2022 cap on contributions to SIMPLE IRAs is $14,000 ($13,500 in 2021), plus an extra $3,000 for people age 50 and up.

  - ❖ The 2022 contribution limit for traditional IRAs and Roth IRAs stays at $6,000, plus $1,000 as an additional catch-up contribution for individuals age 50 and up.

- ❖ The income ceilings on Roth IRA contributions went up. Contributions phase out in 2022 at adjusted gross incomes (AGIs) of $204,000 to $214,000 for couples and $129,000 to $144,000 for singles (up from $198,000 to $208,000 and $125,000 to $140,000, respectively, for 2021).

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Individual Income Tax Rates

2022 Retirement Updates

- **Savers Credit**
  - Lower-income people may be able to claim the "saver's credit" in 2022, too. This tax break can be worth up to $1,000 ($2,000 for joint filers), but there must be a contribution to a retirement account and the adjusted gross income (AGI) must be below a certain threshold to qualify.
  - For 2022, the income thresholds are $34,000 of adjusted gross income (AGI) for single filers and married people filing a separate return ($33,000 for 2021), $68,000 for married couples filing jointly ($66,000 for 2021), and $51,000 for head-of-household filers ($49,500 for 2021).

Individual Income Tax Rates

2022 Teacher COVID Above The Line Deduction

- For the 2022 tax year, teachers and other educators who buy books, supplies, COVID-19 protective items, and other materials used in the classroom can deduct up to $300 of these out-of-pocket expenses ($250 for 2021).

- The maximum deduction for 2022 increases to $600 for a married couple filing a joint return if both spouses are eligible educators – but not more than $300 each.

- An "eligible educator" is anyone who is a kindergarten through 12th grade teacher, instructor, counselor, principal, or aide in a school for at least 900 hours during a school year.

- Homeschooling parents can't take the deduction.

Planning Considerations Arising From 2026 Sunset. Provisions that sunset 12/31/2025:

- The individual income tax rates and brackets (sec 1(j))
- Increase in standard deduction of individuals (sec. 63(c)(7))
- Suspension of limitation on itemized deductions (sec. 68(f))
- Suspension of deduction for personal exemptions (sec. 151(d)(5))
- The $10,000 cap on SALT deductions (sec. 164(b)(6))
- The limits on home mortgage interest deductions (sec. 2010(c)(3)(C))
- The 199A pass-through deduction (sec. 199A(i))
- The increase in the estate tax exclusion amount (sec. 2010(c)(3)(C))

Provisions that do not :

- The change to the inflation index
- The corporate flat 21% rate

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Business Income Tax

- Flat 21%.
  - Before the TCJA, rates were graduated, starting at 15% for taxable income up to $50,000, with rates at 25% for income between 50,001 and $75,000, 34% for income between $75,001 and $10 million, and 35% for income above $10 million.

Business Income Tax

- **Rev Proc 2022-13, 2022-6 IRB**
  - The IRS has issued guidance on when and how it will issue a **Notice of Employment Tax Determination** and how taxpayers can petition the Tax Court for review of that notice.
  - Tax Court review of employment tax determinations. Generally, the Tax Court may review two types of IRS employment tax determinations: (1) worker reclassification determinations, and (2) section 530 relief determinations. (Code **§7436**)
  - According to the IRS's interpretation of Code **§7436**, the Tax Court may only review an IRS employment tax determination if the IRS has issued a Notice of Employment Tax Determination (**§7436** Notice).
  - The IRS will only issue a **§7436** Notice when, after an audit, it has determined that (a) one or more individuals performing services for the taxpayer are employees, and (b) the taxpayer isn't entitled to Section 530 relief. (Notice 2002-5, 2005-3 IRB 320)

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Business Income Tax

- **Rev Proc 2022-13, 2022-6 IRB**
  - However, in two opinions, the Tax Court clarified that its review of worker classification determinations didn't depend on the IRS issuing a §7436 Notice because the notice wasn't a jurisdictional requirement. The determination itself gives rise to Tax Court jurisdiction.
  - Accordingly, even when the IRS doesn't issue a **§7436** Notice, a taxpayer may petition the Tax Court for review of a worker reclassification or section 530 relief determination.
  - New procedures for issuing a **§7436** Notice. Under **Rev Proc 2022-13**, the IRS has provided detailed guidance on how and when it will issue a **§7436** Notice and what a taxpayer needs to do to request Tax Court review of an IRS employment tax determination with or without such a notice, including:
    - (1) What must happen before the Tax Court has jurisdiction to review an IRS employment tax determination. (Rev Proc 2022-13, Sec. 3)
    - (2) Details when the IRS will issue a **§7436** Notice. (Rev Proc 2022-13, Sec. 4)

Business Income Tax

- **Labor Department Issues Proposed Worker Classification Rules**
- The U.S. Department of Labor (DOL) has published a proposed rule to revise the Department's guidance on how to determine who is an employee or independent contractor under the Fair Labor Standards Act (FLSA) (Federal Register 2022-21454, published on 10/13/2022).
- Accordingly, even when the IRS doesn't issue a **§7436** Notice, a taxpayer may petition the Tax Court for review of a worker reclassification or section 530 relief determination.
- The DOL said its proposed rule is not using "core factors" but instead aims to return to a **totality-of-the circumstances** analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.

Business Income Tax

- **Labor Department Issues Proposed Worker Classification Rules**
- Proposed **29 CFR § 795.110** provides multiple economic realities factors to be considered when determining worker status. The DOL notes that the list is not exhaustive and no single factor is dispositive. These factors are:
  - Whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work.
  - Whether any investments by a worker are capital or entrepreneurial in nature.
  - Degree of permanence of the work relationship and weigh whether the work relationship is indefinite in duration or continuous (in favor of employee) or nonexclusive, project-based, or sporadic (in favor of independent contractor).
  - Nature and degree of control, including reserved control, over the performance of the work and the economic aspects of the working relationship.
  - Whether the work performed is an integral part of the employer's business.
  - Whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.
  - Any additional relevant factors may be considered.

Business Income Tax

- **Chief Counsel Advice 202204007 (01/28/2022)**
- In a Chief Counsel Advice, the IRS has determined that a taxpayer was not entitled to exclude from income gain from the sale of business stock. The business, which facilitates property leasing, provides a brokerage service so it's shares aren't qualified small business stock under **§1202**.
- **Qualified small business stock**. Under **§1202**, noncorporate taxpayers can exclude a certain percentage of gain from the sale or exchange of **qualified small-business (QSB)** stock held for more than **five** years. QSB stock is stock in a C corporation that was originally issued after August 10, 1993, and
  - (1) on the date of the stock's issuance the corporation is a QSB, and
  - (2) the taxpayer acquired the stock at its original issue in exchange for money or other property or as compensation for services.
- To be a QSB, the issuing corporation must satisfy the active trade or business requirement. §1202(e)(3)(A) specifically provides that a trade or business involving the performance of services in various fields, including brokerage services, is not an active trade or business.

Business Income Tax

- **Chief Counsel Advice 202204007 (01/28/2022)**
- The issuing corporation (IC) provided a searchable website that allowed lessors to list properties for rent and lessees to see what properties were available to rent. As a condition of being listed on IC's website, lessors agreed to pay a recurring periodic fee ("listing fee"). Once a lessee leased a property through IC's website, the lessor also agreed to pay a fee based on a percentage of the rent paid by the lessee. IC required lessees to pay a leased facility' rent through IC's website.
- Chief Counsel determined that IC was performing brokerage services and, therefore, was not a QSB. According to Black's Law Dictionary, a broker is "[O]ne who is engaged by another, usually on a commission, to negotiate contracts to property in which he or she has no custodial or proprietary interest, or an agent who acts as an intermediary or negotiator, especially between prospective buyers and sellers."

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Business Income Tax

- **Chief Counsel Advice 202204007 (01/28/2022)**
- According to the IRS Chief Counsel, the services performed by IC met this definition because IC brought together a potential lessor with a potential lessee. The determining factor in its determination, Chief Counsel said, was how IC was being paid. While IC charged a minimum flat fee to list property for lease on its website; IC was also compensated on a commission basis once a property was leased by a lessee using its website.
- The fact that IC's services were provided by software rather than directly by people didn't change the functional nature of the services it provided. Because IC provided brokerage services within the meaning of **§1202(e)(3)(A)**, it was not a QSB and taxpayer was not entitled to exclude any of the gain from the sale of IC stock under **§1202**.

Business Income Tax

- **TD 9963, 8/4/2022 754 Election**
- An election pursuant to §754 permits a partnership to adjust the basis of its assets in the case of (a) a distribution of property to a partner and (b) upon the transfer of a partnership interest.
- **§734(b) Distribution of Property to a Partner**: When a partner withdraws assets from a partnership, the gain or loss potentially inherent in those assets is either reported by the partner at the time of the distribution or remains with the assets. To prevent the remaining partners from reporting a gain or loss that has already been passed on to the distributee partner, the optional basis adjustment election either increases or decreases the partnership's basis in its remaining assets.
- **§743(b) Transfer of Partnership Interest by Sale or Exchange or Upon Death of a Partner**: To give a purchasing partner (or a partner acquiring a partnership interest by bequest) a share of the partnership's basis in its assets (inside basis) equal to the purchasing partner's basis in the partnership interest (outside basis), the partnership can elect to adjust the basis of partnership assets upon the sale of a partnership interest. The purpose of the special basis adjustment is to place the purchasing partner in the same position as that partner would have been in had the partner directly purchased an allocable share of the partnership's existing assets. extensions) and one of the partners must sign the election statement.

Business Income Tax

- **TD 9963, 8/4/2022 754 Election**
- The IRS has issued final rules on how to make a valid election to adjust the basis of partnership property after the partnership makes a property distribution or a partnership interest is transferred.
- These final rules are effective **August 5, 2022.**
- Under **§754**, after a partnership makes a distribution of partnership property, or an interest in the partnership is transferred, the partnership may make an election to adjust the basis of the remaining partnership property.
- Once a partnership makes a basis adjustment election, it applies to all a partnership's distributions of partnership property and all transfers of interests in the partnership, with certain limitations.
- Generally, a partnership makes a basis adjustment election in a written statement (**§754** election statement) that's filed with the partnership's return for the tax year of the distribution or transfer. For a **§754** election to be valid, the return must be timely filed (including extensions) and one of the partners must sign the election statement.

Business Income Tax

- **TD 9963, 8/4/2022 754 Election**
- Proposed regs. In 2017, the IRS proposed regulations (Preamble to Prop Reg REG-116256-17) that would remove the **§754** election statement signature requirement. The IRS didn't receive any substantive comments or a request for a public hearing in response to the proposed regs.
- Final regs. The final regs adopt the proposed regs without change.
- Applicability date. Generally, these final regs apply to tax years ending on or after August 5, 2022. However, taxpayers may apply the final regs to tax years ending before August 5, 2022.

2022 Developments

2022 Developments

2022 Developments

2022 Developments

- **William R. Huff, et al. v. Commissioner, (2021) TC Memo 2021-140**
- Investment management firm owner/husband and firm's attorney/wife showed for **§183** purposes that their miniature donkey breeding activity, as conducted through LLC and with intent of turning activity over to adult daughter to help supplement her income, was activity engaged in for profit for tax purposes.
- Notably, taxpayers had business plan for activity, kept separate records for same, and otherwise conducted activity in businesslike manner.
- Other key factors included that taxpayers enlisted help of professional who advised them about industry; that what little available time they had outside their jobs was spent on activity; and that they also engaged experts to assist with same.
- Fact that activity had losses in years at issue wasn't determinative where those losses were so far below taxpayers' job income that this wasn't situation of using activity losses to shelter their other income. IRS's arguments challenging same, or that there wasn't real business plan and taxpayers were using activity for other purposes than stated, were rejected.

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2022 Developments

- **Walraven v. U.S., DC TX, 129 AFTR 2d ¶2022-405**
- Taxpayer/attorney's loss-based refund complaint, relating to liquidation of S corp./FLP partner and resulting discounts in value of FLP interests, failed on summary judgment.
- Although transaction complied with Code Sec. 336 in form, it violated **economic substance doctrine** as it essentially involved circular flow of funds back to taxpayer.
- Transaction also failed under **substance vs. form doctrine** when considering overall circumstances, including that taxpayer stood on all sides of transaction.

2022 Developments

- **Walraven v. U.S., DC TX, 129 AFTR 2d ¶2022-405**
- Fifth Circuit Two Prong Economic Substance Test:

  1. Transactions lack objective economic reality if they do not vary, control, or change the flow of economic benefits.. This is an objective inquiry into whether the transaction either caused real dollars to meaningfully change hands or created a realistic possibility that they would do so.
  2. A subjective inquiry into whether the taxpayer was motivated by profit to participate in the transaction. Tax-avoidance considerations are not wholly prohibited; taxpayers who act with mixed motives, seeking both tax benefits and profits for their businesses, can satisfy the business-purpose test. [T]he absence of a nontax business purpose is fatal to the argument that the Commissioner should respect an entity for federal tax purposes

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2022 Developments

- **Walraven v. U.S., DC TX, 129 AFTR 2d ¶2022-405**
- Substance Over Form Doctrine.
- A fundamental principle of our income tax structure is the basic rubric that economic substance prevails over form
- The substance over form doctrine permits a court to determine a transaction's characterization according to its underlying substance of the transaction rather than its legal form
- Even if a transaction falls within the literal requirements of the tax statute, the transaction will be disregarded...if it has no business purpose or economic effect other than the creation of tax deductions, or if its only purpose is tax avoidance."
- To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress

2022 Developments

- Christian Sezonov, et ux. v. Commissioner, (2022) TC Memo 2022-40
- Married taxpayers/HVAC business owner's and spouse's claims that either or both of them qualified for PAL deduction purposes as **§469(c)(7)** real estate professionals were rejected.
- Although taxpayers provided time logs of hours they spent on real estate activities, those records weren't contemporaneous or clear as to who worked which hours.
- Or in any event, hours estimated therein fell well short of 750-hour test for real estate professional. liabilities, would seriously impair the effective administration of the tax policies of Congress

2022 Developments

- <u>Donald Furrer, et al. v. Commissioner, (2022) TC Memo 2022-100, 2022</u>
- Married taxpayers/farmers who formed charitable remainder annuity trusts (CRATs) were denied charitable contribution deductions for in-kind agricultural crop transfers to CRATs.
- Taxpayers failed to substantiate same insofar as they didn't secure appraisal, attach completed Forms 8283 to their returns, or maintain written records required by **Reg. § 1.170A-13(b)(2)(ii)(D)**.
- Or even if taxpayers had complied with these substantiation requirements, crops were considered similar to inventory and thus ordinary income property limited to cost or basis deduction under **§170(e)(1)(A)**; and because their basis in crops was zero, available deduction for transfers of same to CRATs was reduced to zero under that section.

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2022 Developments

- **Najle -Rahim v. Comm., CA 9, 130 AFTR 2d ¶2022-5046**
- Tax Court properly upheld fraud penalties against physician/wife and spouse based on evidence they significantly understated income and overstated expenses, failed to maintain records, failed to cooperate with IRS, and concealed information from their return preparer.
- Also, as educated and sophisticated professionals who had "demonstrated their ability to pay careful attention to detail," taxpayers lacked credibility when they attempted to shift responsibility to preparer.
- Tax Court properly denied physician/wife's and spouse's claims for various business deductions that they didn't substantiate.
- Tax Court properly upheld IRS's deficiency determination against physician/wife and spouse for stated years: IRS's determination was supported by substantial evidence and taxpayers didn't rebut same.

2022 Developments

- Heinrich C. Schweizer v. Commissioner, (2022) TC Memo 2022-102, 2022
- In charitable deduction case involving taxpayer/art dealer/auction director who was already found to have not met §170(f)(11)'s and **Reg §1.170A-13(c)(3)**'s substantiation/qualified appraisal requirements regarding his sculpture donation to art institute, IRS was granted partial summary judgment that taxpayer also didn't qualify for §170(f)(11)'s reasonable cause exception, and thus, deduction was denied.
- While taxpayer claimed that he received, and reasonably relied on, return preparer advice that it was unnecessary to include either qualified appraisal or fully completed Form 8283 with his return, there was no evidence preparer actually gave such advice; or even if preparer did, taxpayer couldn't have reasonably and in good faith relied on same when considering that it was his duty to review return and that he was educated taxpayer who knew of **Form 8283** and qualified appraisal requirements from past donations which he made in years immediately before and otherwise close in time to year at issue.

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2022 Developments

- Clary Hood, Inc., v. Commissioner, (2022) TC Memo 2022-15, 2022 RIA TC Memo
- Tax Court redetermined deductible amount of compensation which closely held construction co./taxpayer paid to CEO/founder, finding under multifactor test that taxpayer failed to adequately establish how amount it claimed for each year was both reasonable and paid solely as compensation for founder's services during stated time.
- Taxpayer was still entitled to deduct up to stated amounts, which were less than taxpayer claimed but more than IRS determined.
- Court noted that in this case, factors addressing comparable pay by comparable concerns, taxpayer's shareholder distribution history, how founder's compensation was set in years at issue, and his involvement in taxpayer's business were most relevant and persuasive factors in reaching its conclusion.
- Court also looked to expert who included compensation for *surety bond guaranties* in his analysis and provided well-reasoned salary comparison against industry standards. Also, taxpayer's arguments regarding using independent investor vs. multifactor test were rejected.

2022 Developments

- Aspro, Inc. v. Comm., CA 8, 129 AFTR 2d ¶2022-604
- Tax Court properly determined that taxpayer/asphalt paving co. wasn't entitled to deductions for purported management fee payments to its shareholders, who were 1 individual and 2 corps., because fees weren't paid as compensation for services, but instead were disguised distributions of corp. earnings.
- Taxpayer's argument that Court wrongly excluded its experts/contractor's and CPA's testimonies failed in face of facts that contractor didn't offer opinion as to value of various services at issue or apply scientific principles and methods and that CPA merely summarized facts and advocated for taxpayer's position rather than providing expert analysis.

2022 Developments

- Aspro, Inc. v. Comm., CA 8, 129 AFTR 2d ¶2022-604
- Taxpayer's alternate argument that at least part of fees were reasonable compensation also failed when considering that it didn't offer evidence of what “like enterprises under like circumstances” would ordinarily pay for like management services, quantify value of management services provided, or show that similar cos. would pay stated amount for similar services.
- Taxpayer had not made dividend distributions for decades, yet paid management fees to shareholders in amounts roughly proportional to their interests; did so in lump sum at end of year; and had relatively little taxable income after deducting same. Also, there was no credible explanation of what individual shareholder did to earn purported fees in stated amounts.

2022 Developments

- **Notice 2022-36, 2022-36 IRB**
- The IRS is providing penalty relief to certain taxpayers who filed their 2019 and/or 2020 tax returns late. The penalty relief also extends to certain domestic and international information return filers.
- For income tax filers to qualify for this penalty relief, any "eligible income tax return" must be filed on or before September 30, 2022.
- The notice provides details on penalty relief for filers of various international information returns, such as those reporting transactions with foreign trusts, receipt of foreign gifts, and ownership interests in foreign corporations.
- To qualify for this relief, any eligible tax return must be filed on or before September 30, 2022.

2022 Developments

- **IRS Criminal Investigation unveils top 10 cases of 2021**

IRS Criminal Investigation (IRS-CI), which is responsible for conducting financial crime probes, has released its top 10 cases for 2021.

The investigative work of 2021 has all the makings of a made for TV movie—embezzlement of funds from a nonprofit, a family fraud ring that stole millions in COVID-relief funds, and a $1 billion Ponzi scheme used to buy sports teams and luxury vehicles," said IRS-CI Chief Jim Lee.

The following is a brief description of each of the top 10:

- #1. A married couple who are currently fugitives submitted 150 fraudulent applications for COVID-relief funds based on phony payroll tax records and tax documents to the Small Business Administration.
- #2. The owner of a California company created a Ponzi-scheme involving the sale of thousands of manufactured solar generator units that did not exist.
- #3. A man sold false information or fictitious debts to payday loan businesses.
- #4. The ex-pastor of a church defrauded investors of $33 million by orchestrating a church-based investment scam.

2022 Developments

- **IRS Criminal Investigation unveils top 10 cases of 2021**
- #5. A foreign national participated in a scheme where popular online auction and sales websites falsely advertised high-cost goods that did not actually exist.
- #6. A man operated an unlicensed business that exchanged at least $13 million in Bitcoin and cash, often for drug traffickers.
- #7. A man renounced his U.S. citizenship in an effort to conceal large stock gains that were reportable to IRS.
- #8. Two sisters operated a Florida tax preparation business that filed more than 16,000 false tax returns for clients over a five-year period.
- #9. A man conspired with others to obtain money through an investment fraud Ponzi scheme.
- #10. A New Mexico couple stole funds from a nonprofit organization that provided guardianship, conservatorship, and financial management services to people with special needs.

2022 Developments

- **West Virginia Ambulance Services Business Owner Indicted for Tax Crimes**
- A federal grand jury in Charleston, West Virginia returned an indictment today charging a Pineville man with willful failure to pay over employment taxes and obstructing the IRS's collection efforts.
- According to the indictment, Christopher J. Smyth operated Wyoming County's Best Ambulance Service Inc., Stat Ambulance Service Inc., and Stat EMS LLC, all of which provided ambulance services in Wyoming County, West Virginia.
- Just Don't Do It! After the IRS imposed penalties against Smyth for not paying over these funds, he allegedly stopped operating Stat Ambulance Service and created Stat EMS in the name of a nominee owner.

2022 Developments

- **PLR 202205022 Discharge of indebtedness income; income exclusions; qualified real property indebtedness; elections; extensions.**
- Taxpayers were denied extension to make §108(c)(3)(C) election to exclude from income discharge of qualified real property business indebtedness for stated tax year.
- Taxpayers didn't act reasonably and in good faith because request was based on hindsight, and granting relief would prejudice govt.'s interests because limitations period was closed for stated year and subsequent years affected by late election.
- Requested 6-year extension also wasn't reasonable because taxpayers should have discovered missed election before limitations period expired and/or state tax authority disallowed **§1231** loss.

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2022 Developments

- **IRS announces creation of its Taxpayer Experience Office.**
- IRS has announced it has "officially established" the first-ever **Taxpayer Experience Office** and steps are currently underway to expand the effort. (IR 2022-50, 3/4/22)
- As described in the agency's announcement, the office will focus on all aspects of taxpayer transactions with the IRS across the service, compliance and other program areas, working in conjunction with all IRS business units and coordinating closely with the Taxpayer Advocate Service.
- In January 2021, IRS created a new Chief Taxpayer Experience Officer position to help unify and expand efforts agency-wide to serve taxpayers. This was the first senior leadership role created within IRS under the Taxpayer First Act.
- Ken Corbin, who currently serves as the commissioner of the Wage and Investment Division, also wears the hat of chief taxpayer experience officer. "Improving service delivery and customer experience are fundamental priorities for us," Corbin said, adding that "we're committed to designing and delivering services that better connect with our diverse taxpayer base."

2022 Developments

- **John D. Lord, v. Commissioner, (2022) TC Memo 2022-14280E - Medical marijuana—cost of goods sold—inventory costs—capitalization and inclusion.**
- Case involving married couple's passthrough income from medical marijuana businesses/LLC and S corp., which were subject to **§280E**.
- Taxpayer was mot required to keep books and records for non-tax purposes in accordance with GAAP, and which computed depreciation included in COGS using accelerated cost recovery method and also claimed bonus depreciation under **§168**.
- Tax Court determined that stated tax depreciation methods for inventory production assets couldn't be used under either section.
- **§263A** or **§471**. As to **§263A**, Court found that such couldn't be relied on to calculate inventory costs given **§280E's** interposition and **§263A's** plain language.

2022 Developments

- John D. Lord, v. Commissioner, (2022) TC Memo 2022-14 280E - Medical marijuana—cost of goods sold—inventory costs—capitalization and inclusion.
- Taxpayers' arguments, that §263A's costs prohibition meant only personal vs. business costs, or that it would be unconstitutional not to be able to calculate business inventories pursuant to §263A, and/or that §280E itself was unconstitutional, were rejected accordingly.
- §471, Court found that statute's "best accounting practice" conformity requirement couldn't be met since that term was interpreted to mean GAAP-conforming methods, and businesses' methods didn't so conform.
- Although businesses' depreciation method was provided for by §168, since §168 provided methods for §167 deductions and since §167 deductions in turn weren't available to §280E-affected businesses, §168 method was also not allowable here; and thus, IRS was entitled to change businesses' method as not clearly reflecting income.

2022 Developments

- In Re: Creative Hairdressers Inc., (Bktcy Ct MD 3/3/2022) 129 AFTR ¶2d 2022-453.
- Employer shared responsibility payment deemed excise tax entitled to priority in bankruptcy.
- A U.S. bankruptcy court determined that the employer shared responsibility payment was an excise tax entitled to priority and that the transaction triggering the required payment arose when an uninsured employee enrolled in a qualified health plan through the federal healthcare exchange.
- The debtor, Creative Hairdressers Inc., filed for bankruptcy due to COVID-19 pandemic lockdowns ordered in March 2020. While it was operating, the debtor offered only minimum essential health insurance coverage to 95% of its employees.
- The IRS certified certain of the company's employees as having received "*health care assistance*" (via premium tax credits and cost-sharing reductions) and assessed an "employer shared responsibility payment" against it.

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2022 Developments

- In Re: Creative Hairdressers Inc., (Bktcy Ct MD 3/3/2022) 129 AFTR ¶2d 2022-453.

- Employer shared responsibility payment. §4980H, an "applicable large employer" is required to make an employer shared responsibility payment ("ESRP") to the IRS if the agency certifies any of the employer's full-time employees as having received "health care assistance" and the employer either:

  - did not offer health care coverage for all its full-time employees, or
  - offered coverage that was: (a) not "affordable for the employee," or (b) did not provide "minimum value."

- Disputed issues in the bankruptcy proceedings. After the debtor filed for bankruptcy, the IRS filed a priority claim for the ESRP.

2022 Developments

- **In Re: Creative Hairdressers Inc., (Bktcy Ct MD 3/3/2022) 129 AFTR ¶2d 2022-453.**
- Debtors objected to this claim arguing that the ESRP wasn't an excise tax entitled to priority treatment but, rather, was a nonpriority penalty.
- The IRS and the Debtors also disputed which ESRP's were entitled to priority under the limitations rules in 11 USC 507(a)(8)(E).
- The bankruptcy court rejected the debtor's argument that the ESRP isn't an excise tax. Citing Liberty University, (CA4 2013) 112 AFTR 2d 2013-5089, the court concluded that the ESRP is an excise tax because:
  - the ESRP doesn't punish unlawful behavior like a penalty.
  - the amount of the ESRP is proportionate rather than punitive, and
  - the ESRP raises revenue for the government (the essential feature of any tax).limitations rules in 11 USC 507(a)(8)(E).

2022 Developments

- In Re: Creative Hairdressers Inc., (Bktcy Ct MD 3/3/2022) 129 AFTR ¶2d 2022-453.
- When "transaction occurred" for §507 purposes. Under the bankruptcy code, unsecured government claims are entitled to priority to the extent such claims are for an excise tax on a "transaction occurring" during the three years immediately preceding the petition date. (11 USC 507(a)(8)(E))
- The IRS argued that the "transaction occurred" when the IRS sent the debtor a letter certifying that some of its employees had received tax credits or cost-sharing reductions.
- The bankruptcy court rejected this argument because using the date of the certification letter, which the IRS sent 18 to 24 months after the tax year ended, would allow the IRS claim priority status for taxes outside the limitations period.
- The court found that the transaction giving rise to the ESRP liability occurred when the debtor's employees enrolled in a qualified health plan on a healthcare exchange. The court reasoned that while the amount of the ESRP isn't finally determined or imposed until a later date, for purposes of the limitations period in 11 USC 507(a)(8)(E), the "transaction occurred" when an eligible employee, who was not offered qualifying employer health insurance, enrolled in a qualified individual health plan using a healthcare exchange and received tax credits or cost-sharing reductions.

2022 Developments

- **Fact Sheet 2022-25, 4/11/2022 - The IRS has provided information about how taxpayers should handle non-tax and tax-related identity theft.**
- Tax-related identity theft occurs when someone uses a taxpayer's lost or stolen SSN or individual tax identification number (ITIN) to file a tax return claiming a fraudulent refund. In most tax-related identity theft cases, the IRS will identify a suspicious tax return and pull it for review.
- Depending on the situation, a taxpayer will receive one of three letters asking them to verify their identity:
  - Letter 5071C, which asks a taxpayer to verify their identity using an online tool and confirm that they did (or didn't) file the return in question.
  - Letter 4883C, which asks the taxpayer to call the IRS to verify their identity and confirm whether they did or didn't file the pulled return.
  - Letter 5747C, which asks the taxpayer to verify their identity in person at a Taxpayer Assistance Center (usually, this letter is used for taxpayers who have been a victim of a data breach).

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2022 Developments

- **Fact Sheet 2022-25, 4/11/2022 - The IRS has provided information about how taxpayers should handle non-tax and tax-related identity theft.**
- A taxpayer who thinks they have a tax-related identity theft problem (but hasn't received a letter from the IRS) should complete and submit Form 14039, Identity Theft Affidavit.
- If a taxpayer receives any of the above letters, they don't need to file a Form 14039. Instead, they should follow the instructions in the letter to verify their identity with the IRS.
- Signs of tax-related identity theft include:
  - A taxpayer can't e-file their tax return because a tax return was already filed using their SSN.
  - A taxpayer can't e-file their return because a dependent's SSN or ITIN was already used on another return without the taxpayer's knowledge or permission.

2022 Developments

- **Fact Sheet 2022-25, 4/11/2022 - The IRS has provided information about how taxpayers should handle non-tax and tax-related identity theft.**
- Signs of tax-related identity theft include:
  - A taxpayer receives a tax transcript in the mail they did not request.
  - A taxpayer receives a notice from a tax preparation software company confirming an online account was created in their name, and they did not create one.
  - A taxpayer receives a notice from their tax preparation software company that their existing online account was accessed or disabled when they took no action.
  - A taxpayer receives an IRS notice informing them that they owe additional tax, or their refund was offset to a balance due, or that they have had collection actions taken against them for a year they did not earn any income or file a tax return.
  - The IRS sends a taxpayer a notice indicating that the taxpayer received wages or other income from someone they didn't work for.
  - The taxpayer was assigned an Employer Identification Number (EIN), but they did not request or apply for an EIN.

2022 Developments

- **Fact Sheet 2022-25, 4/11/2022 - The IRS has provided information about how taxpayers should handle non-tax and tax-related identity theft.**
- After the IRS receives Form 14039 from a taxpayer, the IRS will work to verify the taxpayer's identity and confirm that the taxpayer is the victim of tax-related identity theft.
- Once the IRS confirms the taxpayer is the victim of tax-related identity theft, the IRS will clear any fraudulent return from the taxpayer's account and place a special code on the taxpayer's account. This code will prompt the IRS to send the taxpayer an identity protection personal identification number (IP PIN) to the taxpayer each year.

2022 Developments

- **Notice 2022-52.**
- Modifies and amplifies provisions of Notice 2022–05, 2022–5 I.R.B. 457, by providing additional temporary relief from certain requirements under **§42** of the IRC for qualified low-income housing projects.
- For purposes of **§42(h)(1)(E)(i)** the new deadline is December 31,2022.
- This additional temporary relief is provided due to unavoidable labor and supply-chain disruptions delaying the construction, rehabilitation, and restoration of properties throughout the United States.
- Notice 2022-52 will be in IRB: 2022-43, dated October 24, 2022.

2022 Developments

- Adams & Boyle, P.C., et al. v. Slatery III, et al., DC TN
- The parties sought guidance from the Court regarding the proper procedure for disbursing $249,000 in attorney fees, which the Court awarded to plaintiffs.
- The core issue before the Court is whether the award of attorney fees constitutes taxable income when counsel was retained on a pro bono basis.

2022 Developments

- <u>**Adams & Boyle, P.C., et al. v. Slatery III, et al., DC TN**</u>
- The Internal Revenue Code defines "gross income" as "all income from whatever source derived." **26 U.S.C. §61(a).**
- The Supreme Court has long held that gross income includes "[t]he discharge of an obligation by a third person"–here, the obligation to pay attorney fees–stating that such a "payment constitute[s] income to the [obligor]." <u>Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 729</u> [7 AFTR 8875] (1929). See also Comm'r v. Banks, 543 U.S. 426, 433-35 [95 AFTR 2d 2005-659] (2005) (*stating that, under the anticipatory assignment of income doctrine, legal fees disbursed pursuant to a contingency fee arrangement similarly constitute taxable income to the litigant*).
- However, no Supreme Court precedent addresses whether an award of attorney fees constitutes taxable income to the litigant where, as here, counsel was retained on a pro bono basis and, therefore, the litigant has no obligation to pay fees or costs for their representation.

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2022 Developments

- Adams & Boyle, P.C., et al. v. Slatery III, et al., DC TN
- The Court concluded that because counsel was representing plaintiffs pro bono, **plaintiffs have no financial obligations that will be discharged by the Court's award of attorney fees**.
- Counsel alone bore the costs of litigation. Therefore, the payment of attorney fees in this case does not constitute gross income taxable to plaintiffs and defendants do not need plaintiffs' W-9 forms prior to disbursement. Accordingly,.

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2022 Developments

- Martha L. Albrecht v. Commissioner, (2022) TC Memo 2022-53
- Taxpayer's charitable deduction claims for donation of Native American jewelry and artifacts to museum were denied due to her failure to comply with CWA requirement under **§170(f)(8).**
- Although taxpayer received gift deed from museum before filing return, deed didn't specify whether museum provided any goods or services in return for donation or state that it represented entire agreement between museum and taxpayer.

2022 Developments

- Martha L. Albrecht v. Commissioner, (2022) TC Memo 2022-53
- Deed's terms were subject to separate/gift agreement, which wasn't provided to taxpayer before return was filed.
- Arguments that gift agreement was irrelevant to issue of whether museum provided goods or services in exchange for donation because its sole purpose was to describe donor's rights in donation, and/or that museum's failure to provide taxpayer with such agreement created presumption that all of her rights in donated property were included in donation, were unsupported.
- CWA requirement couldn't be satisfied via substantial compliance.

2022 Developments

- <u>Martha L. Albrecht v. Commissioner, (2022) TC Memo 2022-53</u>
- For any contribution of $250 or more, **§170(f)(8)(A)** requires that the taxpayer obtain from the donee organization, and maintain in his files, a "contemporaneous written acknowledgement" (CWA).
- The CWA must include:
  - (i) the amount of cash and a description (but not value) of any property other than cash contributed;
  - (ii) whether the donee organization provided any goods or services in consideration, in whole or in part, for any such property; and
  - (iii) a description and good faith estimate of the value of any such goods or services. **§170(f)(8)(B).**
- Furthermore, the taxpayer must receive the CWA from the donee organization on or before the earlier of the date the taxpayer files his or her return or the due date for filing such return. §170(f)(8)(C).

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2022 Developments

- **McAuliffe, (Bktcy Ct WV, 05/26/2022) 129 AFTR 2d. Debtor Awarded Damages for IRS Violation of Discharge Order**
- A U.S. Bankruptcy Court in West Virginia awarded damages to a debtor because the IRS violated the discharge order when it attempted to collect tax debts that had been discharged in bankruptcy. The court rejected the IRS's defense that it didn't willfully violate the discharge order when its automated system sent collection notices to the debtor.
- The court said a violation of the discharge order occurs when the creditor knows of the pending petition and intentionally attempts to collect despite it. According to the court, the IRS's characterization of its actions as "inadvertent" was invalid because:
  - The IRS filed a claim for the tax debt in the debtor's bankruptcy;
  - It failed for nearly 12 months to enter the discharge order into its systems; and
  - The debtor mailed discharge notices to the IRS multiple times.

2022 Developments

- **McAuliffe, (Bktcy Ct WV, 05/26/2022) 129 AFTR 2d. Debtor Awarded Damages for IRS Violation of Discharge Order**
- The court determined that while one notice could be "inadvertent," the IRS should have abated the discharged taxes after the debtor contacted it multiple times regarding the discharge order (which it should have known about anyway since it had filed a claim in the debtor's bankruptcy case).
- the IRS disregarded the debtor's discharge notices and continued direct attempts to collect the discharged tax debts. In fact, the IRS took no action on the discharge order until the debtor reopened the bankruptcy case and filed a complaint against the IRS. The IRS didn't abate the discharged taxes until nearly a year after the debt was discharged.
- This situation led to the debtor being unable to enter into an installment agreement for post-petition taxes she owed because the IRS's records showed the discharged taxes were still due and owing.

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2022 Developments

- **Legal Advice Issued by Field Attorneys 20223301F**
- In a Field Attorney Advice, the IRS Chief Counsel's Office determined that a penalty should be assessed against a tax preparer who advised their client that a reserve for estimated liabilities could be excluded from income.
- Generally, federal tax rules prohibit a taxpayer from using reserves to offset gross revenue. Instead, those rules require that liabilities be "fixed" before becoming deductible under the "all events test" in **§461**.
- During the tax year at issue, reserves were treated differently for financial statement purposes.
- Faulty tax advice. The parent of a consolidated group that had undergone a "technical termination" during a reorganization was advised by the firm preparing its tax return that it could employ the reserve method of accounting for tax purposes and include income items net of its reserves (e.g., the estimated cost of its anticipated discounts and disputed claims).

2022 Developments

- **Legal Advice Issued by Field Attorneys 20223301F**
- Preparer penalty should be assessed. According to the Chief Counsel's Office, the return position the preparer advised the taxpayer to take ran contrary to settled law applicable to the facts and circumstances. The IRS should therefore assess the preparer penalty for willful or reckless conduct under **§6694(b).**
- The Chief Counsel's Office determined that the penalty under **§6694(b)** was proper because all of the tax professionals involved in giving the taxpayer advice had to have been aware of Code **§461** and its corresponding regulations when providing the advice. They knew the taxpayer couldn't use book accounting to exclude or deduct estimated liabilities for tax reporting, so their written advice that the taxpayer should do just that intentionally disregarded the rules and regulations.

2022 Developments

- **Biden Announces Student Loan Relief for Borrowers Earning $125,000 or Less**
- President Joe Biden on August 24 announced a three-part plan to address student loan debt, including forgiveness of up to $20,000 for some borrowers and extension of the repayment freeze a final time, until the end of this year.
- The first part of the plan would allow $20,000 in debt forgiveness if a taxpayer went to college on a Pell Grant, or $10,000 without the assistance.
- Debt forgiveness applies only to those earning less than $125,000 a year ($250,000 for married couples).
- Student loan forgiveness is excluded pursuant to **IRC §108(f)(5).**

2022 Developments

- **IR 2022-162, 9/21/2022; Chief Counsel Advice 202237010**
- The IRS Chief Counsel's Office issued an Advice Memorandum confirming that improperly forgiven paycheck protection loans are taxable income.
- PPP loans were established to help small U.S. businesses adversely affected by the COVID-19 pandemic cover certain expenses. Under the program, lenders can forgive the loan if the borrower meets three conditions:
- 1. The loan recipient was eligible to receive the PPP loan. An eligible loan recipient is a small business concern, independent contractor, eligible self-employed individual, sole proprietor, business concern, or a certain type of tax-exempt entity;
  - was in business on or before February 15, 2020; and
  - had employees or independent contractors who were paid for their services, or was a self-employed individual, sole proprietor or independent contractor.

2022 Developments

- IR 2022-162, 9/21/2022; Chief Counsel Advice 202237010
- 2. The borrower used the loan proceeds to pay eligible expenses, such as payroll costs, rent, interest on the business' mortgage, and utilities.
- 3. The borrower applied for loan forgiveness and attested on the application that they were eligible for a PPP loan, they used the loan proceeds for eligible expenses, certain financial information was correct, and they met other legal qualifications.
- When all three requirements are met, the loan (or a portion of it) is forgiven. However, unlike other forgiven debts, the borrower doesn't need to include the forgiven portion of the loan in income.

2022 Developments

- **United States v. Bittner, 19 F.4th 734, 2021 WL 5570729, 128 A.F.T.R. 2d 2021-6760 (5th Cir. Nov. 30, 2021), cert. granted, (S.Ct. June 21, 2022)**
- In United States v. Bittner, the U.S. Supreme Court granted certiorari in a case regarding whether the $10,000 penalty for non-willful non-filing of FBAR is calculated based on the number of foreign financial accounts that were not reported or the number of annual FBARs that were not filed.
- The Fifth Circuit in Bittner held that the calculation is based on the number of foreign **accounts that were not reported**.
- The Ninth Circuit in United States v. Boyd, 991 F.3d 1077, 2021 WL 1113531 (9th Cir. 2021), rev'g and rem'g 2019 WL 1976472 (C.D. Cal. 2019), held that the calculation is based on how **many FBARs were not filed.**
- As a matter of perspective, the difference in Bittner was between a $50,000 penalty and a $2.4 million penalty.

2022 Developments

- **Are FBAR penalties subject to the Excessive Fines Clause?**
- On 8/26/2022, Monica Toth filed a petition for certiorari asking the U.S. Supreme Court to determine if the penalties for willful failure to file an FBAR are limited by the **Eighth Amendment's Excessive Fines Clause**. (Petition for certiorari in Toth, U.S. Supreme Court Docket No. 22-177) Toth sought review of a First Circuit Court of Appeals decision that affirmed a $2.17 million civil penalty imposed by the IRS for willfully failing to file FBARs. (Toth, 129 AFTR2d 2022-1646 (CA-1, 2022))
- The Bank Secrecy Act requires U.S. citizens with certain foreign accounts to file a Report of Foreign Bank and Financial Accounts, or FBAR. This filing requirement applies when a U.S. person has a financial interest in, or other authority over, one or more foreign bank accounts with an aggregate balance that exceeded $10,000 during the previous calendar year.
- The filing requirement is enforced through civil and criminal penalties. For individuals whose failure to file an FBAR is willful, the maximum civil penalty is the greater of $100,000 or half the balance in the unreported account.
- In the instant case, the IRS determined that Toth's failure to file an FBAR for 2007 had been "willful" and assessed a penalty of $2,173,703.
- The First Circuit Court of Appeals affirmed a district court's decision, which established that Toth had acted willfully when she failed to file FBARs. The Court of Appeals held, among other things, that the civil FBAR penalty was not a fine to which the Excessive Fines Clause applied.
- The petition for certiorari states that the question being presented to the Supreme Court is whether the civil penalties imposed under the Bank Secrecy Act that are "**avowedly deterrent and noncompensatory"** are subject to the Eighth Amendment's Excessive Fines Clause.

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2022 Developments

- Pond v. U.S., DC NC, 129 AFTR 2d ¶2022-582
- Taxpayer/partnership investor's complaint for partnership item-related refund, for year for which IRS had no record of receiving his administrative claim/Form 1040X until after expiration of applicable claim period under former §6230, was dismissed.
- Although taxpayer argued that he was entitled to use *common law mailbox rule* to establish he timely filed subject year's Form 1040X, theorizing that his accountant originally sent same by regular/1st class mail in same envelope with another year's form and that because IRS said only other year's form was missing, he reasonably believed IRS did timely receive subject year's form, was unavailing.
- §7502 supplanted common law mailbox rule such that taxpayer would only be allowed to prove timely mailing either by meeting §7502's certified/registered mail exception or by proving actual physical delivery, neither of which he was able to do.

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2022 Developments

- Pond v. U.S., DC NC, 129 AFTR 2d ¶2022-582
- The IRS issued regulations (proposed in 2004, finalized in 2011) to make clear that the common law mailbox rule is no longer available.
- Under the regulations, a document must be postmarked by the U.S. Postal Service on or before the last date prescribed for filing, and the document must actually be delivered to the IRS (**Regs. §301.7502-1**).
- The regulations provide an exception to the actual-delivery requirement, which applies when the taxpayer sends the document by registered or certified mail.
- In this case, proof that the document was properly registered or certified and that the envelope was properly addressed constitutes prima facie evidence that the document was delivered (**Regs. §301.7502-1(e)(2)**).

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2022 Developments

- **Pond v. U.S., DC NC, 129 AFTR 2d ¶2022-582**
- Under this subsection, direct proof of actual delivery, proof of proper use of registered or certified mail, or proof of proper use of a duly designated private delivery service are the exclusive means to establish prima facie evidence of delivery of a document to the IRS.
- The regulation states that "[n]o other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered," thus abolishing the common law mailbox rule.
- **All mail should be sent to the IRS by certified or registered mail, and the receipt should be kept.** This will establish that the documents were timely mailed if they get lost in the mail or if delivery is delayed.

2022 Developments

- **Social Security Wage Base Increases to $160,200 in 2023**
- The Social Security Administration (SSA) has announced that the maximum earnings subject to Social Security (OASDI) tax will increase from $147,000 to $160,200 in 2023 (an increase of $13,200). The maximum Social Security employer contribution will increase $818.40 in 2023. The $160,200 wage base for 2023 is significantly greater than the wage base forecasted by the SSA's Office of the Chief Actuary back in June.
- For 2023, the FICA tax rate for both employers and employees is 7.65% (6.2% for OASDI and 1.45% for Medicare).
- For 2023, an employer must withhold:
  - 6.2% Social Security tax on the first $160,200 of employee wages (maximum tax is $9,932.40; i.e., 6.20% × $160,200), plus;
  - 1.45% Medicare tax on the first $200,000 of employee wages, plus;
- 2.35% Medicare tax (regular 1.45% Medicare tax + 0.9% additional Medicare tax) on all employee wages in excess of $200,000.

Section 199A

W-2 Wages Limit

- The W-2 and qualified property-based limitations do not apply when the taxpayer claiming the deduction has taxable income for the year of less than $340,100 (if married filing jointly; $170,050 for all other taxpayers).

Year	Joint Return	Married Filing Separate Return	Single / Head of Household Return	Source
2022	$340,100	$170,050	$170,050	Rev. Proc. 2021-45, §3.27
2021	$329,800	$164,925	$164,900	Rev. Proc. 2020-45, §3.27
2020	$326,600	$163,300	$163,300	Rev. Proc. 2019-44, §3.27
2019	$321,400	$160,725	$160,700	Rev. Proc. 2018-57, §3.27

The End

Thank you!