

**IRS/Delaware Tax Institute:  
What's Old, What's New, What May be  
Happening**

*Presented for:*  
State of Delaware: IRS and Div. of Rev. Annual Fed/State Tax Institute  
December 10 – Rehoboth  
December 11 – Dover  
December 13 - Newark

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**2019 Federal Individuals**

- **What's Old**
  - Year-End Tax Planning
- **What's New**
  - General Updates
  - Recent Court Cases and Rulings
  - Taxpayer First Act of 2019
- **What May Be Happening**
  - SECURE Act
  - Executive Order 13847
  - December 31, 2025



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**Tax Planning: Controlling AGI**

AGI Impacts:

- Income Tax Brackets – marginal & effective tax rates
- Capital Gains Tax Rate
- Medical Deduction
- QBI Deduction
- Special Allowance for Rental Real Estate for Active Participation
- Medicare Surtax / Net Investment Income Tax
- Medicare Part B and D Premiums
- Taxability of Social Security Benefits

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### Year-End Tax Planning: Controlling AGI – Con't

How to Control:

- Accelerating / Decelerating income
- Sell Appreciated Assets or Harvest Losses
- Tax-Exempt Investments
- Qualified Charitable Deduction (QCD)
- Maximize Retirement Contributions
- ROTH Conversions
- Maximize Other Pre-Tax Benefits

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### Year-End Tax Planning: Other Pre-Tax Benefits

- Health Savings Account
- Flexible Spending Account
- Commuter Benefits
- Dependent Care



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### Year-End Tax Planning: Bunching Deductions

- Medical
- Charitable
  - Funding Donor-advised funds
  - Funding CRUTS/CRATS
  - Contributing highly appreciated assets

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### Year-End Tax Planning: Gifting

- \$15,000 annual exclusion per person in 2019 and 2020
- Lifetime exclusion increases from 11.4 million (2019) to 11.58 million (2020)



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### General Update: Schedule E New Checkbox as of 2018

- **IRS website:** "As stated in Part II of the Schedule E (Form 1040), a taxpayer who owns an interest in an S corporation and reports a loss, receives a distribution, disposes of stock, or receives a loan repayment from the S corporation must check a corresponding box under line 28, column (e), and attach a computation detailing their S corporation basis."
- Requirement to attach basis schedule for losses is not new

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### General Updates: 2019 Tax Brackets

Rate	Individuals, Taxable Income Over	MFJ, Taxable Income Over	HOH, Taxable Income Over
10%	\$0	\$0	\$0
12%	\$9,700	\$19,400	\$13,850
22%	\$39,475	\$78,950	\$52,850
24%	\$84,200	\$168,400	\$84,200
32%	\$160,725	\$321,450	\$160,700
35%	\$204,100	\$408,200	\$204,100
37%	\$510,300	\$612,350	\$510,300

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### General Updates: 2019 Capital Gains Rates

Rate	Individuals, Taxable Capital Gains Over	MFJ, Taxable Capital Gains Over	HOH, Taxable Capital Gains Over
0%	\$0	\$0	\$0
15%	\$39,375	\$78,750	\$52,750
20%	\$434,550	\$488,850	\$461,700

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### General Updates: Standard Deduction

Filing Status	Deduction Amount
Single	\$12,200
Married Filing Jointly	\$24,400
Head of Household	\$18,350

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### General Updates: Retirement Contribution Limits

Type	2020 Amounts	2019 Amounts
401(k), 403(b)	\$19,500	\$19,000
Catch up Contributions to Employer Plan	\$6,500	\$6,000
SEP IRA	\$57,000	\$56,000
SIMPLE	\$13,500	\$13,000
SIMPLE Catch up	\$3,000	\$3,000
Defined Benefit Plan	\$230,000	\$225,000
IRA	\$6,000	\$6,000
Catch up Contributions to IRA	\$1,000	\$1,000

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**General Updates: Virtual Currency Transactions – Con’t.**

- Mining = Ordinary Income & possibly S/E Income
- Selling = Capital Gain
- Hard Fork = Ordinary Income
- Notice 2014-21
- Revenue Procedure 2019-24
- FAQs



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**General Updates: Health Insurance**

- Shared Responsibility payment no longer calculated; don't need exemptions; no penalty at Federal level
- MA (predates), NJ, and DC have state level mandates in 2019. VT will have one in 2020. CA & RI are looking into proposed legislation to implement in their respective states.
- If receiving the benefit of advance credit payments, or if you plan to claim the premium tax credit, must file a federal income tax return and attach Form 8962 to claim and reconcile

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**General Updates: Safe Harbor for Rental Real Estate to be Treated as T&B for 199A**

- Revenue Procedure 2019-38
- Rental real estate enterprise – “Solely for purposes of this safe harbor”; “an interest in real property held for the production of rents and may consist of an interest in a single property or interests in multiple properties. The taxpayer or RPE relying on this revenue procedure must hold each interest directly or through an entity disregarded as an entity separate from its owner under any provision of the Code.”
  1. Separate books and records are maintained
  2. Hour requirement
  3. Maintain contemporaneous records
  4. Attach statement to tax return

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**Chapman & Smith v. Commissioner of Internal Revenue T.C. Memo. 2019-110**

- Duane Chapman & recently deceased wife, Alice Smith (of Dog the Bounty Hunter on A&E)
- Taxpayers 2006 and 2007 returns were under examination
- Taxpayers used a CPA address on their most recently filed tax return
- Did not receive notice of deadline for Tax Court petition because it was mailed to CPA address

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**Gregory v. Commissioner T.C. Memo. 2018-192 – Notice to IRS on Change of Address**

- Taxpayer files 2014 tax return in October of 2015 and subsequently moves
- In October of 2016, Commissioner sends notice of deficiency to old address. Taxpayer has not filed 2015 return at the time of the notice of deficiency.
- Taxpayer becomes aware of and responds to notice of deficiency in January 2017, more than 90 days after notice.
- Taxpayer extended the 2015 tax return and sent in power of attorney during this time span, both containing the new address.
- Taxpayers lose as instructions for both forms state they are not adequate to update the taxpayers address

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**PLR 201934006 – IRA to Surviving Spouse**

- IRA had listed children as beneficiary, but the state court later ruled that the surviving spouse was the sole beneficiary
- IRS permitted surviving spouse to roll her deceased husband's IRA to an IRA in her own name despite not being directly named as a beneficiary; IRS did not question state ruling

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**PLR 201902023 – Subtrust as a Conduit**

- IRA funds payable to a trust, which were then payable to subtrust
- Trusts as beneficiaries of retirement plans pose problems because of the potential of non-individual beneficiaries or the possibility of distributions being based on the oldest beneficiary
- Conduit trusts are safe harbor mechanisms which help avoid these problems
  - Trustee is required to distribute the minimum RMD from the retirement plan over the life expectancy of the individual trust beneficiary or the oldest member of the beneficiaries
  - The trustee does not have the power to accumulate income
  - All beneficiaries of trust must be individuals
- Trust and subtrust in PLR satisfies the conduit rules
- Beneficiary of subtrust life expectancy could be used for the payout
- Why use trusts in retirement planning - Can control what comes out of the trust and control the ultimate disposition of funds

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**Barbara v. Commissioner T.C. Memo. 2019-50 – Material Participation vs Passive Activity**

- Material participation tests – Pub 925 (2018)
- Taxpayer had lending business with an office in Chicago
- Taxpayer was responsible for all executive functions
- Taxpayer spent 40% of time in Chicago and 60% of time in FL during 2009 to 2012 and worked at least 700 hours per year
- Tax Court ruled in favor of taxpayer’s material participation

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**Hairston v. Commissioner T.C. Memo. 2019-104 – Real Estate Professional**

- Taxpayers failed to meet the tests for real estate professionals
- Two tests under IRC §469(c)(7)(B):
  - a) More than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and
  - b) performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates
- Married couples cannot combine hours; must separately track and satisfy these requirements

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**Bea v. Commissioner T.C. Memo. 2019-115 – Relief for Irrevocable Election Fails**

- Married couple could not obtain relief from making irrevocable NOL carryback election because they were not aware of it
- Errors on returns filed from 2011-2014
- Net operating loss in 2014 but tax preparer waived carryback to previous tax years
- IRS audits 2011 and 2012 return and asserts deficiencies
- Taxpayers fail in their attempt to carry back 2014 loss to 2012. Argued they did not understand the initial election to carry back the loss.

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**Doyle v. Commissioner T.C. Memo. 2019-8 – Reasonable Cause**

- Taxpayer tried to argue his settlement proceeds were not taxable under 104(a)(2)
- Court noted emotional distress is not excludable under 104(a)(2)
- IRS argues 20% underpayment penalty under 6662 should apply
- Tax Court cited Neonatology Assocs., PA v. Commissioner questions
  - Was advisor competent with sufficient expertise to justify reliance?
    - Yes. Ivy League CPA with forty years of experience
  - Did taxpayer provide necessary and accurate information to the advisor?
    - Yes. All logs and records were presented to the CPA
  - Did the taxpayer rely on advisor in good faith?
    - Yes
    - CPA showed all the income on the return and backed out the part he deemed to be nontaxable
    - This area of tax preparation requires "specialized knowledge" Stadnyk v. Commissioner

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**Kurdziel v. Commissioner T.C. Memo. 2019-20 – Hobby Losses**

- Kurdziel purchases a WWII aircraft that is not in working condition, the only man who has a Fairey Firefly capable of being flown
- Taxpayer spends \$1.6 million and it takes 45,000-man hours to restore it and obtains a license to fly claiming large deductions on returns 2007 through 2010
- Initially wanted to sell rides on the plane but FAA regulations made that impossible
- Taxpayer was able to take to air shows
- Taxpayer described it as a leasing activity on his return but never leased it out
- Taxpayer said he planned to sell the plane but showed no evidence to do so

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**Kurziel v. Commissioner T.C. Memo. 2019-20 – Hobby Losses – Con’t**

- IRC183(a) - *In the case of an activity engaged in by an individual or an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section.*
- Reg. 1.183-2(a) - Standards to analyze profit motive
  - The manner in which the taxpayer carries on the activity;
  - The expertise of the taxpayer or his advisors;
  - The time and effort expended by the taxpayer in carrying on the activity;
  - The expectation that assets used in the activity may appreciate in value;
  - The success of the taxpayer in carrying on other similar or dissimilar activities;
  - The taxpayer's history of income or losses with respect to the activity;
  - The amount of profits earned, if any;
  - The financial status of the taxpayer; and
  - Any elements of personal pleasure or recreation.
- **Result:** Hobby Loss - No clear business plan, overall actions weren't consistent with a taxpayer looking to make money off the plane

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**IRS Sec. 183(d) – Safe Harbor to Avoid Hobby Loss Treatment**

- If the safe harbor is not met, the taxpayer must establish a profit motive using the subjective factors mentioned in the regulations.
- To meet the safe harbor, an activity must generate a profit in at least three of the five years (two of seven years for activities involving horse racing, breeding, training, or showing) ending with the tax year in question.
- If the safe harbor is met, the burden of proof for lack of profit motive is shifted to the IRS

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**Taxpayer First Act of 2019**

- Requires the IRS to develop a strategy for customer service and present to Congress by July 1, 2020
- New way for low-income taxpayers to waive the application fee for Offer-in-Compromise
- Prohibits IRS to use private collection agencies to recover delinquent taxes from certain individuals
- IRS must wait 45 days from notice before contacting anyone other than taxpayer to determine or collect taxes
- New electronic filing threshold requirements

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### What *May* be Happening: SECURE Act

- Passed House in May 2019 with broad backing from both Republicans & Democrats
- Currently stuck in Senate
- Would be biggest changes to US retirement system since 2006



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### What *May* be Happening: SECURE Act – Con't

- Repeal maximum age of 70 ½ to make contributions to IRA
- Raise age for RMDs from 70 ½ to 72
- Expand early withdraw penalty exemptions
- Allow part-time employees to participate in 401(k)
- Allow multi-employer 401(k) plans
- Require most nonspouse beneficiaries to withdraw from inherited retirement accounts within 10 years of the original owner's death instead of spreading out withdraws across their lifetime

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### What *May* be Happening: Executive Order 13847

- Directed Secretary of the Treasury to examine the life expectancy and distribution period tables in the regulations on RMD from retirement plans and determine whether they should be updated
- IRS recently issued proposed regulations in response - *the effect of these changes is to reduce required minimum distributions, which will allow participants to retain larger amounts in their retirement plans to account for the possibility they may live longer. (citation: REG-132210-18, p. 9-10)*
- The life expectancy tables and Uniform Lifetime Table under these proposed regulations would apply for distribution calendar years beginning on or after January 1, 2021

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**What *May* be Happening: December 31, 2025**

- 23 provisions from TCJA impacting individual income taxes will expire including:
  - Reduced individual income tax rates
  - Increased AMT exemption and phaseout threshold
  - Increased standard deduction
  - Increased child tax credit
  - Cap on state and local income taxes
  - Zero personal exemptions
  - Zero miscellaneous deductions subject to 2%

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**IRS/Delaware Tax Institute:  
Business Update**

*Presented for:*  
 State of Delaware: IRS and Div. of Rev. Annual  
 Fed/State Tax Institute  
 December 10 – Rehoboth  
 December 11 – Dover  
 December 13 - Newark

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**2019 Business Update**

- **What's Old**
  - Revisiting the provisions of TCJA
  - Foreign tax provisions and disclosures
  - 1099's – a lingering issue
- **What's New**
  - Focus on state nexus
  - "Basis" issues are back
  - Cryptocurrencies
  - New and updated IRS forms and disclosures
- **What May Be Happening**
  - Will we get any corrections to some of the open TCJA items?
  - How knows amid impeachment and a looming election?

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**SALT and Wayfair Issues**

- Supreme Court Case in 2018 Wayfair – why this is meaningful
- Economic Nexus
- Sales tax versus Income Tax Nexus Issues



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**Opportunity Zone Funds**

- Encourage long-term private investment in economically distressed communities
- Incentive to reinvest capital gains and defer the taxes for a period of time
- Potential reduction of ultimate capital gain on sale of reinvestment
- 8,700 certified zones within the 50 states, DC and US Territories
- For individual and corporate investors
- Benefits – tax deferral to potentially 2026, shield 15% of gain on original investment and 100% of gain on Fund appreciation

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**1099s**

- Due dates – January 31st (non-employee compensation), February 28th (other paper filed 1099's), March 31st (other electronically filed 1099's)
- Big Penalties
  - \$50 per information return if file within 30 days – max \$194,500/\$556,500
  - \$110 per information return if file after 30 days but before August 1st – max \$556,500/\$1,669,500
  - \$270 per information return if file after August 1st or do not file – max \$1,113,000/\$3,339,000
  - Several types of ways to be penalized – fail to file timely, fail to include all information, include incorrect information, paper filed when you should have e-filed, incorrect or missing TIN, fail to file paper forms that are readable

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### 1099s – Con't

- Enforcement – have we seen notices on this?
- Form 1099-NEC – is coming back for 2020 – due date will be 2/1/21
- QBI position as a trade or business – should file 1099's to support this

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### Cryptocurrencies

- IRS Notice 2014-21, Revenue Ruling 2019-24 & 2019 IRS FAQ's
  - Virtual currency treated as property – general tax principles apply
  - Investors – gains/losses on holding virtual currency
  - Income from Mining – taxable income – could be subject to self-employment taxes or treated as wages
  - Forks guidance
  - No like-kind exchanges effective 1/1/2018
  - Subject to foreign reporting if held in overseas exchanges (FBAR and FATCA)
  - IRS Enforcement Measures

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### Foreign Disclosures – *don't forget about these*

- FBAR's – foreign bank account disclosure
- 8938 – foreign financial asset disclosure
- 5471/5472/8865/8858 – foreign activity disclosures
- 926/1042's – foreign payments/transfers
- Big Penalties



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### International Related Provisions

- 2017 – IRC 965 repatriation tax – taxation of deferred foreign income
- 2018 – IRC 951A GILTI – tax on current foreign earnings
- 2018 – IRC 250 FDII – additional deduction available
- FTC credits still available to offset taxes, with some special rules



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### New Partnership Audit Process

- Partnership audit adjustments assessed at the partnership level and is payable in the year the IRS makes the adjustment
- Negative adjustments are taken into consideration in the year following
- Partners can file amended returns
- Certain partnerships can opt out – fewer than 100 K-1's, some entity type owners not eligible
- Adjustments can be “pushed-out” and included with a 2% interest rate penalty
- The role of the partnership “representative”
- Procedure and rules are complex

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### Tax Basis Capital Accounts Required

- 2018 partnership instructions require additional reporting if “tax basis” capital accounts are not presented
- Required to report on Line 20, using code AH the amount of the partner’s tax basis capital both at the beginning of the year and at the end of the year if either amount is negative
- Additional time and penalty relief provided by the IRS – Notice 2019-20
- New box on Schedule E reporting – “basis computation is required”

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### Partnerships Barred from Using Disregarded Entities to Treat Partners as Employees

- Proposed regulations finalized
- Final regulations make clear that using a disregarded entity will not allow partners to be treated as employees and avail themselves of various tax benefits of being an employee

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### Self-Employed Health Insurance

- Family Members of S-Corporation Shareholders
  - Chief Counsel Advice 201912001
  - IRS held that family members, not directly owning shares, are deemed to be 2% shareholders under the rules related to allowing a deduction for self-employed health insurance (IRC 318 and 162(l))
  - Attribution to the shareholder – includes member of family – spouse, children, grandchildren and parents
  - Must be reported as wages



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### Depreciation Rules for 2019

- What options are currently available?
  - Immediately expense more – Section 179
  - Temporary 100% expensing for certain assets – first year bonus depreciation
  - Enhanced auto deductions
  - Recovery periods for real property
  - Qualified Improvement Property
- Cost segregation studies



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### Revenue Recognition Rules

- Proposed regulations issued in September
- Including procedures for making related accounting method changes
- Accrual basis taxpayers with applicable financial statements
- One-year deferral method for advance payments

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### Health Reimbursement Arrangement (HRA)

- New rules provided employers with additional flexibility to offer employee health coverage
- No longer required to be integrated with an employer-sponsored group health plan
- Two new types of HRA's:
  - Individual coverage HRA
  - Expected benefit HRA

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### Draft 2019 Forms Updates

- Tax basis capital accounts
- Additional 704(c) disclosure
- Split of Guaranteed Payments between those for capital and those for services
- Additional information on the existence of activities for at-risk and passive activity purposes
- Descriptive text for 199A disclosures

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### Employer Credit for Paid Family and Medical Leave

- General business credit
- Percentage of wages paid to qualifying employee while on family and medical leave for up to 12 weeks per taxable year
- Effective for wages paid in taxable years beginning after 12/31/17 and before 1/1/2020

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### Rehabilitation Tax Credit

- Repeals the 10% credit for building placed in service before 1936
- Keep the 20% credit for expenses to rehabilitate certain historic structures
- Required to prorate the 20% credit over five years instead of the year placed in service
- Effective for qualified expenditures incurred after 12/31/17



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### Qualified Business Income (QBI)

- New form and disclosures
- Aggregation
- Rental Real Estate – can qualify, but still uncertainty
- IRS will cover in detail in the afternoon session



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### Accounting Method Changes

- Related to small businesses – cash method of accounting, inventories, cost capitalization and long-term contracts
- Average annual gross receipts of \$25 million or less
- Effective after 12/31/17
- Change of accounting method required – Form 3115
- Is now the time to consider this further?

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### Net Operating Loss Changes

- Starting for losses in 2018
- No carryback
- Limited to 80% of taxable income



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### Excess Business Losses

- \$250,000/\$500,000
- Treated as net operating loss carryforwards in subsequent years
- Can they offset unrelated wages?

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### Limitations on Business Interest

- IRC 163(j) Rules
  - 30% Limitation
  - Aggregation
  - Using Carryforwards
  - Exemptions
  - Passthrough Differences
- What will year two calculations look like?

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### Meals & Entertainment - Parking & Transportation

- Eliminated deduction for entertainment, amusement, or recreation
- Meals still at 50% mostly
- Qualified transportation fringe benefits disallowed – Parking issue
- Moving expenses – included in taxpayers wages



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### Sale of Partnership Interest and Withholding (TCJA)

- IRC 1446(f) Foreign Partners Withholding Rules
  - 10% Transferee withholding
  - Effectively connected with a US trade or business
  - Exceptions



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### Other TCJA Items

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- Software Issues
- Still a lot of temporary guidance
- Ongoing state issues – how are states dealing with these items?
- Corporate conversions/choice of entity considerations?

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### Kaestner Decision (Trusts – NC Case)

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- Can states tax trusts based on trust beneficiaries in-state residency?
- NC law says – “tax is computed on the amount of the taxable income of the estate or trust **that is for the benefit of a resident of this state**”
- Supreme court ultimately sided with the NC courts – presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it
- Good result, but fact pattern is still very narrow
- Ongoing issue – what is sufficient contact?

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### 2019 Tax Cases

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- Ginsburg – NY State Tax Credit Paid is Income
- Eger – Resort properties are not rentals and cannot be grouped
- Seaview Trading – faxed return is not considered a filed return
- Kress – valuation of S-Corporation stock

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