Federal Tax Alert

Provided by the National Tax Office

IRS releases high-level guidance on UBI siloing provisions

Special report on Notice 2018-67

IRS ISSUES NOTICE 2018-67 ON UNRELATED BUSINESS INCOME

Notice 2018-67 (released Aug. 21, 2018) provides interim guidance with respect to the new Internal Revenue Code Sec. 512(a)(6), which isolates unrelated business activities into separate trade or business units. Under this new code section, if the activity generates positive unrelated business income (UBI), tax is owed. If the activity generates a loss, the loss carries forward until the discrete activity suffering a loss has offsetting income. Siloing (alternatively called “basketing” or “bracketing”) replaces the traditional tax treatment of the income and loss from multiple activities netting to one bottom-line number. Notice 2018-67 provides interim guidance and requests comments on issues related to defining a separate trade or business in this context.

The notice suggests identifying separate trades or businesses under Sec. 512(a)(6) by use of the North American Industry Classification [NAICS] code. NAICS codes are a government-developed, business-type identification system frequently used to compile statistical information about the U.S. economy. A preliminary review of NAICS codes identifies separate codes for activities such as laboratory testing-medical, pharmacy and drug stores, office administrative services, and computer facilities management. The service also explained that existing code sections such as Sec. 183 (Hobby Loss) and Sec. 469 (Passive Activity Loss) were not appropriate to identify separate trades or

businesses under Sec. 512(a)(6). The IRS also promised to further clarify the vexing question of allocating shared expenses among multiple trades or businesses, while directing taxpayers to use the existing admittedly inadequate regime under Reg. Sec. 1.512(a)-1. This clarification has been promised for several years in successive priority guidance plans.

The notice next turns to the treatment of investments. The interim guidance provides that all "qualifying partnership interests" can be aggregated into one trade or business. This treatment can apply to both (a) discrete activities carried on within one partnership, and (b) separate partnership interests. A qualifying partnership interest is defined as one which meets one of two tests — "De minimis" or "Control."

The aptly named de minimis test is met if an organization owns no more than 2 percent of the profits and loss or capital of a partnership interest. Certain common holdings among related parties and disqualified persons must be aggregated for purposes of the 2 percent test.

The control test is met if an organization owns no more than 20 percent of the profits and loss or capital of a partnership interest, and the organization does not exert control or influence over the partnership. Control or influence is defined as the ability of the organization to appoint management of members of governance; ability of the organization to influence management or governance of the organization; or control over an act that significantly affects the partnership.

The guidance also took pains to clarify that multiple different potential trades or businesses in one partnership including debt-financed income would typically be treated as one trade or business at most.

Under a transition rule, partnership interests purchased prior to Aug. 21, 2018, may be treated as at most one trade or business even if it fails to meet either the de minimis or control test.

Finally, on a couple of separate issues, the service made clear that it does not consider the new Sec. 512(a)(7) qualified transportation benefit addition to unrelated business taxable income to be a trade or business for purposes of Sec. 512(a)(6). In addition, the service indicated that global intangible low-tax income under new Sec. 965 earned by a tax-exempt organization would not be unrelated business taxable income.

If you have any questions, please contact:

Lynne Huismann
248-375-7327
lynne.huismann@plantemoran.com

David Lowenthal
312-980-2954
david.lowenthal@plantemoran.com

Stephen Eckert
877-622-2257, Ext. 23653
stephen.eckert@plantemoran.com

Amy Ciminello
614-222-9044
amy.ciminello@plantemoran.com

Copyright 2018, American Health Lawyers Association, Washington, DC. Reprint permission granted.

The information provided in this alert is only a general summary and is being distributed with the understanding that Plante & Moran, PLLC, is not rendering legal, tax, accounting, or other professional advice, position, or opinions on specific facts or matters and, accordingly, assumes no liability whatsoever in connection with its use.