Top Tax Developments of 2022

(Parker Tax Publishing December 2022)

In August, President Biden signed the Inflation Reduction Act of 2022 (2022 IRA), a scaled-back version of the Build Back Better Act which had stalled out in the Senate in 2021. After failing to reach a bipartisan deal on a fully refundable child tax credit and other tax measures this fall, Congress is poised to pass a year-end omnibus spending bill that includes the SECURE 2.0 Act of 2022 (aimed at expanding enrollment in retirement plans and increasing retirement savings), as well as changes to the rules for charitable conservation easement contribution deductions. On the administrative front, the IRS finalized regulations fixing the "family glitch" in the premium tax credit, began issuing guidance under the 2022 IRA, and issued proposed regulations in other areas. In addition, several important court decisions were handed down in 2022, in cases dealing with the Tax Court's jurisdiction, micro-captive insurance arrangements, and the IRS's process for identifying listed transactions.

The following are some of the top tax developments of 2022.

Inflation Reduction Act of 2022 Signed Into Law

On August 16, President Biden signed into law the Inflation Reduction Act of 2022 (2022 IRA) (Pub. L. 117-169). The 2022 IRA contains numerous energy-related incentives aimed at cutting pollution and creating jobs. It also includes several revenue-raising provisions such as a corporate alternative minimum tax, an excise tax on stock buybacks, the narrowing of the carried interest loophole, and a two-year extension of the limitation on losses of noncorporate taxpayers.

The 2022 IRA contains several important energy incentives for individuals and businesses. For individual taxpayers, these incentives include the expanded nonbusiness energy property credit under Code Sec. 25C and the residential clean energy credit under Code Sec. 25D. The 2022 IRA also greatly modified and expanded the clean vehicle credit under Code Sec. 30D and introduced a new credit under Code Sec. 25E for the purchase of a previously owned clean vehicle. For businesses, the 2022 IRA provided an updated and expanded energy efficient commercial buildings deduction under Code Sec. 179D, extended and expanded the new energy efficient home credit under Code Sec. 45L, and created a new credit for qualified commercial clean vehicles under Code Sec. 45W. Most of these expanded provisions take effect beginning in 2023.

In October, the IRS issued several notices requesting comments from practitioners regarding the clean energy credits, which the IRS said it will use in formulating guidance relating to these provisions. The IRS also issued Notice 2022-61 to provide guidance relating to the prevailing wage and apprenticeship requirements under the 2022 IRA. In Rev. Proc. 2022-42, the IRS provided procedures for qualified manufacturers of clean vehicles to report certain information regarding such vehicles, such vehicle identification numbers, to the Treasury Secretary, as well as procedures for sellers of clean vehicles to report the information required to be reported to the IRS in order for a vehicle to be eligible for the clean vehicle credits.

For a full discussion:
In-Depth Report: Key Tax Provisions of the Inflation Reduction Act. (Client Letters Included)

Year-End Spending Bill Includes Retirement Plan, Conservation Easement Changes

On December 19, the text of a year-end omnibus spending bill (H.R. 2617) was released. H.R. 2617 includes the SECURE 2.0 Act of 2022, which is aimed at expanding enrollment in retirement plans and increasing retirement savings. The bill also includes changes to charitable conservation easement contribution deductions made by pass-through entities. The change generally limits the amount of a partnership's deduction to 2.5 times the sum of each partner's basis in the partnership.

For a full discussion:
[Year-End Spending Bill Includes Retirement Plan, Conservation Easement Changes.]

Final Regulations Fix "Family Glitch" in Premium Tax Credit

In October, the IRS issued final regulations (T.D. 9968) that fixed the so-called "family glitch" in the premium tax credit (PTC) under Code Sec. 36B. The PTC is a refundable tax credit for eligible individuals and families who buy health insurance through an insurance Exchange.

An individual is generally not eligible for the PTC if the individual or a member of his or her family qualifies for minimum essential coverage (MEC). One type of MEC is employer-provided coverage, but only if the coverage is "affordable." The "family glitch" refers to a rule in the regulations under Code Sec. 36B issued in 2013 providing that affordability of an employer-sponsored plan was determined based on the cost for the employee, and did not take into account the cost to add family members.

The final regulations eliminated the family glitch by providing that, for purposes of determining eligibility for the PTC, affordability of employer coverage for individuals eligible to enroll in the coverage because of their relationship to an employee of the employer (related individuals) is determined based on the employee's share of the cost of covering the employee and the related individuals. The IRS stated that the affordability rule for related individuals in the final regulations represents the better reading of the relevant statutes, and is consistent with Congress's purpose in the ACA to expand access to affordable health care coverage.

For a full discussion:
IRS Expands Cafeteria Plan Change-in-Status Rules in Connection with Family Glitch Fix.

Proposed Regs Address TCJA Increase to Basic Exclusion Amount for Estate and Gift Tax

The Tax Cuts and Jobs Act (Pub. L. 115-97) (TCJA) amended Code Sec. 2010(c)(3) to increase the basic exclusion amount (BEA) for federal estate and gift taxes by $5 million to $10 million, as adjusted for inflation, for years 2018-2025. Unless the increased BEA is extended, on January 1, 2026, it will revert to $5 million as adjusted for inflation.

In 2019, the IRS published final regulations (T.D. 9884) which included a special rule in Reg. Sec. 20.2010-1(c) for cases where the credit against the estate tax that is attributable to the BEA is less at the date of death than the sum of the credits attributable to the BEA allowable in computing the gift tax payable on a decedent's lifetime gifts. In such cases, the special rule provides that the portion of the credit against the net tentative estate tax that is attributable to the BEA is based on the sum of the credits attributable to the BEA allowable in computing gift tax payable regarding the decedent's lifetime gifts. This rule ensures that the estate of a donor isn't taxed on completed gifts that, as a result of the increased BEA, were free of gift tax when made. In the preamble to the final regulations, the IRS noted that further consideration would be given to the issue of whether transfers made during the increased BEA period that are not true inter vivos transfers, but rather are includible in the gross estate (e.g., transfers subject to a retained life estate or other retained powers or interests), should be excepted from the special rule.

In April, the IRS published proposed regulations (REG-118913-21) relating to the BEA that generally deny the benefit of the special rule in Reg. Sec. 20.2010-1(c) to gifts that are includible in an estate. Specifically, the proposed regulations added an exception to the special rule for transfers that are includible in the gross estate or are treated as includible in the gross estate. Such transfers include, for example, gifts subject to a retained life estate or subject to other power or interests under Code Sec. 2035 through Code Sec. 2038 and Code Sec. 2042, regardless of whether the transfer was deductible under Code Sec. 2522 or Code Sec. 2523.

For a full discussion:
Proposed Regs Address TCJA Increase to Basic Exclusion Amount for Estate and Gift Tax.

IRS Punts Final Regs on Required Minimum Distributions from Qualified Plans to 2023

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) changed the rules in Code Sec. 401(a)(9) for required minimum distributions (RMDs) from qualified plans by enacting new Code Sec. 401(a)(9)(H). Generally, under Code Sec. 401(a)(9)(B), if an employee dies before RMDs have begun, the employee's interest must either be: (1) distributed within five years after the death of the employee (i.e., the five-year rule), or (2) distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions beginning no later than one year after the date of the employee's death (unless the designated beneficiary is the employee's surviving spouse).

Under Code Sec. 401(a)(9)(H)(i), the five-year rule is extended to 10 years (10-year rule), and this new 10-year rule applies regardless of whether the employee dies before the required beginning date. In addition, pursuant to Code Sec. 401(a)(9)(H)(ii), the exception to the 10-year rule under which the 10-year rule is treated as satisfied if distributions are paid over the designated beneficiary's lifetime or life expectancy, applies only if the designated beneficiary is an eligible designated beneficiary, as that term is defined in Code Sec. 401(a)(9)(E)(ii).

In February, the IRS issued proposed regulations regarding RMDs under Code Sec. 401(a)(9) and related provisions (REG-105954-20). Those regulations provided that, when finalized, they would apply beginning with the 2022 distribution calendar year. The proposed regulations addressed issues relating to the new 10-year rule in Code Sec. 401(a)(9)(H). Prop. Reg. Sec. 1.401(a)(9)-5(d)(1)(i) requires that, in the case of an employee who dies on or after the employee's required beginning date, distributions to the employee's beneficiaries for calendar years after the calendar year of the employee's death must satisfy Code Sec. 401(a)(9)(B)(i). In addition, distributions to the employee's beneficiaries must also satisfy Code Sec. 401(a)(9)(B)(ii) (or if applicable, Code Sec. 401(a)(9)(B)(iii), taking into account Code Secs. 401(a)(9)(E)(iii), (H)(ii), and (H)(iii)).

However, in Notice 2022-53, the IRS noted that it received comments indicating that some individuals thought the new 10-year rule would apply differently from what was proposed in the proposed regulations. Specifically, commenters believed that, regardless of when an employee died, the 10-year rule would operate like the 5-year rule, under which there would not be any RMD due for a calendar year until the last year of the 5- or 10-year period following the specified event (the death of the employee, the death of the eligible designated beneficiary, or the attainment of the age of majority for the employee's child who is an eligible designated beneficiary). Commenters in those situations who are heirs or beneficiaries of individuals who died in 2020 explained that they did not take an RMD in 2021 and were unsure of whether they would be required to take an RMD in 2022.

The IRS responded by announcing its intention to issue final RMD regulations that will apply no earlier than the 2023 distribution calendar year. Further, because of confusion surrounding the application of the proposed regulations, the IRS stated that a defined contribution plan that failed to make a specified RMD in 2021 or 2022 (1) will not be treated as having failed to satisfy Code Sec. 401(a)(9) merely because it did not make that distribution, and (2) to the extent a taxpayer did not take a specified RMD (as defined in the guidance), the IRS will not assert that an excise tax is due under Code Sec. 4974.

For a full discussion:
IRS Issues Proposed Regs on Required Minimum Distributions from Retirement Plans.

IRS Increases Optional Mileage Rates for Last 6 Months of 2022 Due to High Fuel Prices

In Notice 2022-3, the IRS issued the optional standard mileage rates for computing the deductible costs of using an automobile for business, medical, or moving expense purposes and for determining the reimbursed amount of these expenses that is deemed substantiated. In June, the IRS took the unusual step of increasing the optional standard mileage rates for the last six months of 2022. In Announcement 2022-13, the IRS increased the standard mileage for business purposes to 62.5 cents per mile, up from 58.5 cents per mile, and for medical and moving purposes to 22 cents per mile, up from 18 cents per mile. The revised rates apply from July 1, 2022, to December 31, 2022. The IRS explained that this special adjustment was made in recognition of gas price increases and noted that midyear increases in the optional rates are rare; the last time the IRS made such an increase was in 2011.

For a full discussion:
IRS Increases Optional Mileage Rates for Last 6 Months of 2022 Due to Higher Fuel Prices.

House Ways and Means Committee Gains Access to Former President Trump's Tax Returns

In 2019, Representative Richard Neal (D, MA), the Chairman of the House Ways and Means Committee (Committee), made a request under Code Sec. 6103(f)(1) for the federal income tax returns of then-President Donald Trump, as well as the returns of various entities in which Trump had an interest. Chairman Neal's request stated that the Committee was "considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." However, the Treasury Department responded that it did not intend to comply with the request because it was not supported by a legitimate legislative purpose. The Committee sued the Treasury Department and the IRS, and Trump intervened.

After Joe Biden became president, the Treasury Department determined that it was required under Code Sec. 6103(f)(1) to comply with the Committee's request and voluntarily dismissed its lawsuit. However, Trump filed claims alleging that the Committee's request was unlawful and therefore the Treasury Department should not comply. The district court dismissed Trump's claims, and Trump appealed to the D.C. Circuit.

In House Committee on Ways and Means v. Department of the Treasury, 2022 PTC 234 (D.C. Cir. 2022), the D.C. Circuit affirmed the district court and allowed the disclosure of the former President's returns. The court found that the Committee's request had a valid legislative purpose concerning the application of the tax laws to a sitting President. The court also found no violation of separation of powers or any other Constitutional rule. Trump appealed to the Supreme Court, which declined to intervene. In November, the Treasury Department complied with the request and provided the Committee with the tax returns. On December 20, the Committee voted to publicly release them.

For a full discussion:
D.C. Circuit Allows Disclosure of Former President Trump's Tax Returns to Ways and Means Committee.

Supreme Court, Tax Court Decide Whether Filing Deadlines Are Jurisdictional

Under Code Sec. 6330(d)(1), a taxpayer has 30 days to appeal a decision by the IRS Independent Office of Appeals in a collections due process (CDP) case in the Tax Court. To file a petition for review of a notice of deficiency, Code Sec. 6213(a) generally provides that the petition must be filed within 90 days of the mailing of the notice. This, year, the Supreme Court and the Tax Court were asked to decide whether these rules affect the Tax Court's jurisdiction.

In Boechler, P.C. v. Comm'r., 2022 PTC 112 (S. Ct. 2022), the Supreme Court reversed the Eighth Circuit and unanimously held that the 30-day time limit in Code Sec. 6330(d)(1) is a nonjurisdictional rule. The Court found that under Arbaugh v. Y & H Corp., 648 U.S. 500 (2006), a procedural requirement is treated as jurisdictional only if Congress "clearly stated" that it is. In the Court's view, Code Sec. 6330(d)(1) does not clearly state that the 30-day deadline is jurisdictional, and therefore concluded that it is subject to equitable tolling.

In Hallmark Research Collective v. Comm'r, 159 T.C. No. 6 (2022), the Tax Court reached the opposite conclusion with regards to Code Sec. 6213(a) and held that the deadline for a notice of deficiency is jurisdictional. In that case, a taxpayer whose late petition was dismissed for lack of jurisdiction argued that the Supreme Court's decision in Boechler undercut the theory and reasoning underlying the Tax Court's precedents holding that Code Sec. 6213(a) is jurisdictional. The Tax Court disagreed with the taxpayer and found that Boechler does not apply to the 90-day deadline of Code Sec. 6213(a). Rather, the court found that Code Sec. 6213(a) clearly states that its deadline is jurisdictional and that this interpretation is confirmed by the context and historical treatment of the statute.

For a full discussion:
Tax Court Holds That 90-Day Deadline is Jurisdictional, Not Subject to Equitable Tolling.

Sixth Circuit, Tax Court Say IRS Can't Identify Listed Transactions by Issuing Notices

Under Reg. Sec. 1.6011-4(a), every taxpayer that has participated in a reportable transaction must attach a Form 8886, Reportable Transaction Disclosure Statement, to the taxpayer's return to report the taxpayer's participation in the transaction. Reporting and recordkeeping requirements also apply to material advisors in such transactions. Since 2000, the IRS has identified over 30 listed transactions by publishing a notice or other subregulatory guidance.

Two cases decided in 2022 cast doubt on the IRS's ability to identify listed transactions using notices. In Mann Construction, Inc. v. U.S. 2022 PTC 63 (6th Cir. 2022), the Sixth Circuit held that Notice 2007-83, which treats certain transactions involving trust arrangements utilizing cash value life insurance policies as listed transactions, violated the Administrative Procedure Act (APA) because it was issued without following the notice-and-comment procedures required by Section 553 of the APA. Using a similar analysis, the Tax Court held in Green Valley Investors, LLC, et al, v. Comm'r, 159 T.C. No. 5 (2022), that the IRS ran afoul of the APA's notice and comment requirements when it issued Notice 2017-10, which identifies certain syndicated conservation easements as listed transactions.

In Announcement 2022-28, the IRS said that it disagreed with the Mann Construction and Green Valley decisions and will continue to defend Notice 2017-10 and similar notices except in the Sixth Circuit. The IRS also issued proposed regulations (REG-106134-22) identifying certain syndicated conservation easement transactions as listed transactions. The IRS noted that it intends to finalize these regulations, after consideration of public comments, in 2023 and will issue proposed regulations identifying additional listed transactions in the near future.

For a full discussion:
Sixth Circuit Reverses Lower Court; IRS Violated Administrative Procedure Act in Issuing Notice 2007-83.

Tax Court Invalidates Notice Identifying Conservation Easements as Listed Transactions.

Tenth Circuit Deals Significant Blow to Microcaptive Insurance Arrangements

The Tenth Circuit upended the world of microcaptive insurance arrangements when it held in Reserve Mechanical Corp. v. Comm'r, 2022 PTC 137 (10th Cir. 2022), that a company could not exclude purported insurance premiums it received in a captive insurance arrangement from income because the company was not a tax-exempt insurance company.

The company, Reserve Mechanical Corp. (Reserve), issued insurance policies to Peak Mechanical Corp. (Peak), a manufacturer of underground mining equipment, in a captive insurance arrangement set up by Capstone Associated Services, Ltd, a captive insurance management company. Capstone set up the arrangement so that 30 percent of Reserve's premiums would come from unaffiliated companies. Capstone arrived at the 30 percent number by relying on a Tax Court case which held that a captive insurer had a sufficient pool of insureds to provide risk distribution when approximately 30 percent of the captive's business came from insuring unrelated parties.

The IRS determined that Reserve was not a tax-exempt small insurance company under Code Sec. 501(c)(15) because its insurance transactions lacked economic substance. In T.C. Memo. 2018-86, the Tax Court agreed, and held that Reserve was not an insurance company and that its purported premiums were properly characterized as U.S.-source fixed or determinable annual or periodical income. The Tenth Circuit affirmed the Tax Court's decision. The Tenth Circuit found that Reserve's premiums were unreasonable, not negotiated at arm's length, and were not calculated based on the risk covered by the policies. The court also derisively noted the "singular carelessness" of the purported insurance policies, which contained numerous errors. Practitioners responded to the decision by observing that many microcaptive insurance arrangements are structured similarly and could be challenged by the IRS.

For a full discussion:
Tenth Circuit Upholds Tax Court; Deals Significant Blow to Microcaptives.

Circuits Split on Validity of Conservation Easement Proceeds Regulation

A split emerged in 2022 among the Circuit Courts concerning the validity of Reg. Sec. 1.170A-14(g)(6)(ii), which deals with the proceeds a charitable donee must receive upon the extinguishment of a conservation easement in order for the donation to qualify for a charitable contribution deduction. Reg. Sec. 1.170A-14(g)(6)(ii) provides that, upon the extinguishment of a conservation easement, the donee organization must receive as proceeds a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole at that time. This regulation is referred to as the "proceeds regulation."

In Hewitt v. Comm'r, 2021 PTC 410 (11th Cir. 2021), the Eleventh Circuit struck down the proceeds regulation after finding that it violated the procedural requirements of the APA. The Eleventh Circuit focused on comments received by the Treasury Department in response to the proposed regulations - specifically regarding whether or not post-donation improvements should be excludible from the calculation of extinguishment proceeds. In the court's view, the lack of a response from the Treasury Department to these comments, as well as the Treasury Department's failure to articulate a clear purpose for the regulation, violated of the APA and rendered the regulation invalid.

However, in Oakbrook Land Holdings, LLC v. Comm'r, 2022 PTC 70 (6th Cir. 2022), the Sixth Circuit upheld the validity of Reg. Sec. 1.170A-14(g)(6). The Sixth Circuit reasoned that perpetuity is vital to the statutory scheme of allowing deductions for qualified conservation contributions and that the regulation permissibly carries out this purpose. The Sixth Circuit also noted that the Treasury Department received many comments on the proposed regulation and held a public hearing before finalizing the rules. The court concluded that, juxtaposing the final version of reg. Sec. 1.170A-14(g)(6)(ii) with the notice of proposed rulemaking, the basis and purpose of the final regulation was apparent.

For a full discussion:
Court Rejects IRS Motion for Summary Judgment in Conservation Easement Case.

Circuits Split on Validity of Conservation Easement "Proceeds" Regulation.

2022 Year-End Tax Planning for INDIVIDUALS and BUSINESSES. Client Letters Included.

Always popular, Don't miss Parker's yearly tax planning guides for businesses and individuals. The first installment of Parker's annual two-part series on year-end tax planning recaps 2022's major changes affecting individual taxpayers and provides strategies clients can use to minimize their 2022 tax bill. The second installment of Parker's annual two-part series on year-end tax planning recaps 2022's major changes affecting businesses as well as some strategies clients can utilize to minimize their business's 2022 tax bill.

For a full discussion:
2022 Year-End Tax Planning for Individuals. Client Letter Included.

2022 Year-End Tax Planning for Businesses. Client Letter Included.