

OTHER ITEMS OF NOTE

Allocation of Expenses – Pending the publication of further guidance in a separate notice of proposed rulemaking, the final regulations continue to provide that an exempt organization with more than one unrelated trade or business must allocate deductions between separate unrelated trades or businesses using the reasonable basis standard described in Treas. Reg. Section 1.512(a)-1(c).

Net Operating Losses (NOLs) – Under Section 512(a)(6), NOLs arising in a tax year beginning before Jan. 1, 2018 (“pre-2018 NOLs”) may be taken against aggregate or total UBTI, while NOLs arising in a tax year beginning after Dec. 31, 2017 (“post-2017 NOLs”) may only be taken against UBTI from the same trade or business from which the post-2017 NOL arose. The final regulations require an organization with both pre-2018 NOLs and post-2017 NOLs to first deduct its pre-2018 NOLs from its total UBTI before deducting any post-2017 NOLs from the UBTI of the separate trade or business that gave rise to the NOL. The final regulations further provide that if a trade or business is terminated, sold, exchanged or disposed of, any NOLs remaining after offsetting any gain on the sale or disposition are suspended. Suspended NOLs may only be used if the previous business is later resumed or if a new business using the same NAICS 2-digit code is commenced or acquired. For this purpose, a business is considered “terminated” if the appropriate identification of the business changes from one NAICS code to a different NAICS code.

Charitable Contributions – Under Section 512(b)(10), tax-exempt corporations can take charitable contribution deductions under Section 170 up to 10% of UBTI (tax-exempt trusts look to Section 512(b)(11) for its percentage limitations). The final regulations provide that in applying these percentage limitations, exempt organizations would use total UBTI computed pursuant to Section 512(a)(6) and would not allocate the charitable contribution deduction among silos.

Public Support Tests – The final regulations address the fact that the calculation of public support on Form 990, Schedule A could be negatively impacted by the treatment of UBTI under the new silo rules. To address this issue, the final regulations allow exempt organizations to calculate public support tests using either UBTI as computed under Section 512(a)(6) or UBI calculated in the aggregate, whichever is least administratively burdensome or provides the highest ratio for the organization.

Subpart F and Global Intangible Low-Taxed Income – Similar to the proposed regulations, the final regulations clarify that inclusions of Subpart F income under Section 951(a)(1)(A) and global intangible low-taxed income (GILTI) under Section 951A(a) are treated in the same manner as dividends for purposes of Section 512(b)(1).

The final regulations are applicable to tax years beginning on or after Dec. 2, 2020 (date of publication in the Federal Register). For virtually all exempt organizations this means their 2021 tax years. Organizations should consult with their tax advisors to ensure the identification of any and all of their separate unrelated trades or businesses, especially those organizations with significant investment activities.