2022

# Tax Planning Opportunities

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## Foreword

The Tax Cut and Jobs Act (TCJA) signed into law in late 2017 made some of the most significant tax regulation changes in decades and created many new planning opportunities for contractors. Changing entity types, accounting methods, new deductions for qualified businesses, new depreciation alternatives and new tax incentives for qualified investments are just some of the provisions in the TCJA that will require careful analysis and proactive planning for CPAs and their contractor clients.

On March 27, 2020, The Coronavirus, Aid, Relief and Economic Security Act (CARES Act) was passed. The CARES Act includes many tax provisions that are intended to put cash flow in the hands of individuals and businesses. On December 27, 2020, the Consolidated Appropriations Act, 2021 was passed impacting specific tax regulations.

On August 16, 2022, the Inflation Reduction Act of 2022 (IRA) was passed. The IRA will have wide ranging impact on the construction industry, primarily around the energy and climate provisions of the legislation. These provisions were enacted to further promote, expand, and incentivize actions around the design, development, and construction of energy efficient property.

The CICPAC Tax Thought Leadership Committee has compiled an updated summary of those changes potentially impacting our construction clients. In the interest of timing, this document overviews considerations for planning in 2022 and beyond. As a reminder more in-depth historical guidance and practical application materials can be found in the CICPAC issued whitepaper regarding ***Tax Planning Opportunities – CORONAVIRUS LEGISLATION, released November 2021.***

Thanks to the members of the Tax Thought Leadership Committee and their collective efforts resulting in this document. We are also grateful to Kathleen Baldwin and Michelle Class for bringing it all together.

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## Construction Accounting Methods

One of the most comprehensive changes included in the TCJA is the changes in tax accounting methods available for contractors. Methods previously only available to smaller contractors are now available for contractors with average annual gross receipts (measured on an income tax basis) of up to an inflation-adjusted ceiling of $27 million for tax year 2022 ($29 million for 2023). In addition, IRS revenue procedures issued in 2018 and later provide that most of the allowable changes will be considered automatic.

Although automatic changes will still require a submission of Form 3115 to the IRS, the amount of detail and documentation is significantly reduced, user fees of up to $11,500 are not applicable and prior approval by the IRS before adoption is not required so the form can be submitted with the tax return for the year. This provides additional time to analyze the impact of a potential change as well having available the actual year end numbers that will be affected while performing the analysis.

Since accounting methods only impact the timing of when income or deductions are reported it is considered revenue neutral. The timing changes, however, can result in deferral of tax liabilities. Some amount of deferral or increasing deferrals can result in permanent or at least long-term tax savings to companies: theoretically a win-win for the government and the taxpayers.

## Large Contractors

As noted above, under pre-TCJA regulations large contractors were considered to be those with average annual gross receipts of $10 million and above. That limit is now raised to $27 million (as adjusted for inflation) and above. Contractors meeting those revenue limits are still required to use the percentage of completion method (with some variations) to account for all long-term contract revenues. However, the IRS issued revenue procedures issued in 2018 that now include the ASC 606 Revenue Recognition Standards as an acceptable percentage of completion method. Contractors will need to analyze the impact of the standards on the timing of their revenues. If the implementation of the new standards for financial statement purposes generally results in reporting revenues later rather than sooner, a switch to this method for taxes also will result in deferred / reduced tax liabilities. An ancillary benefit would also be to minimizes book / tax reconciliation differences.

Revisions to IRC Section 451(b) regarding timing of income recognition and new 451(c) related to advance payments should also be considered.

The charts on the following pages provide an overview of these new provisions as well the other accounting methods that have not been changed and are allowable for large contractors.

## Accounting Method Changes for Large Contractors

| Description of Change | What Contractors May Benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Adoption of New Revenue Recognition Standards (ASC 606)** | Application of revenue recognition standards for GAAP, may slow or accelerate revenue for reporting purposes, depending on when taxpayer recognizes revenue under new performance obligation model set forth in new standards. | Goes into effect for calendar year 2019, but important to identify during 2018 process, potential impact areas for GAAP reporting and its impact for tax. | Any automatic change can be made in the taxpayer's first, second or third taxable year ending on or before May 10, 2021. | Outside of the current three-year window noted under 'timing', advance consent with the IRS would be required pending further guidance. |
| **Impact of Section 451(b) on Book-Tax Conformity** | New rule under TCJA, mandates certain accrual method taxpayers shall recognize gross income for tax purposes no later than taken into account in a taxpayer's applicable financial statement. | This binds closely with new ASC 606 standards above, as its important to understand potential GAAP differences and/or upcoming changes to GAAP revenue reporting. Even if do not elect to follow ASC 606 for tax purposes, 451(b) may require following similar concepts for consistency with financial statement reporting. | No need to file a Form 3115 if any required change (under new tax) is made immediately in the first taxable year after December 31, 2017. | Applies only if accrual method and have a required applicable financial statement (AFS). For closely held contractor clients this would normally mean an audited financial statement. The new rules do not apply to any specific items of gross income where a special method of accounting is used (i.e. - Sec. 460 Long-term contract method). Additional attention should be paid to the accrual less retainage method of accounting. |

| Description of Change | What Contractors May Benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Impact of Section 451(c) on Advance Payments** | New rule under TCJA, mandates accrual method taxpayer must include advance payments in income when received, unless elected to defer for tax purposes to the first year only following receipt. | Identify if taxpayer receives advance payments and determine if any current inconsistencies between GAAP and tax reporting, and if the deferral on those payments exceeds 12 months. | No need to file a Form 3115 if any required change (under new tax law) is made immediately in the first taxable year after December 31, 2017. | This section largely tracks existing Revenue Procedure 2004-34, which allowed the deferral of advance payments in a similar manner pretax reform. Service contracts should be reviewed to determine whether any deferral opportunity exists. |

## Accounting Methods Available to Large Contractors, Over $27 Million (As Adjusted For Inflation) In Average Annual Gross Receipts, Has Not Changed:

| Description of Change | What Contractors May Benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Percentage of Completion (PCM)** | In general, taxable income from a long-term contract is determined under PCM. | If contractor moves from a defined small contractor to a large contractor due to revenue growth no formal election or method change needed. Apply PCM to the contracts started in the first year of application. | Incorporate into an entity tax return, including extensions. | Large contractors will typically be required to apply PCM to long-term contract. As noted under action steps if contractor moves between large and small under the definition of the $27M (as adjusted for inflation), further considerations should be given. |

| Description of Change | What Contractors May Benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Percentage of Completion (PCM) - 10% Method** | Defer recognition of revenue under PCM until 10% of estimated total contract costs are incurred and allocated | Election attached to tax return in the year adopting. | File with entity tax return, including extensions. | Unavailable if the taxpayer elected to utilize the simplified cost-to-cost method for PCM, versus standard "cost-to-cost" method. |
| **Percentage of Completion - Capitalized Cost Method (PCCM)** | Ability for those contractors with residential construction contractors to report 70% of the contract under PCM, and the remaining 30% under exempt method (e.g. - completed contract). | Requires advance consent of the IRS by filing Form 3115. | Filed by the last day of applicable tax year. | Definition of residential contract in this regard means building with 4 or more units versus home construction contract which is 4 of fewer. Further definitions are key to review under IRC Section 460(e). |
| **Accrual Excluding Retainages** | Defer inclusion in income of retainages withheld by customer until final acceptance by customer occurred as specified in the contract. Contract must be exempt from IRC Section 460 (short-term). | Requires automatic consent of the IRS by filing Form 3115. | File with entity tax return, including extensions. | Must also exclude retainage payable related to same short-term contracts. |
| **Accrual Excluding Retainage Payable** | Retainage payable related to long-term contracts are not included in contracts costs until the retainage is payable to the subcontractor as defined in the contract. This slows the percent complete and reduces income recognition. | Requires advance consent of the IRS by filing Form 3115. | Filed by the last day of applicable tax year | Contract language is key to applicability. |

## Small Contractors

The small contractor exception requiring the use of the percentage completion method has been expanded from contractors with average annual gross receipts of less than $10 million to $27 million (as indexed for inflation) for 2022 ($29 million for 2023). Contractors not exceeding the $27 million (as adjusted for inflation) limitation and previously using the percentage completion method to account for revenues from long-term contracts now have broad range of choices for tax accounting methods.

In addition, IRC Section 448 has also been expanded to allow the cash method of accounting for companies with receipts of less than $27 million (as adjusted for inflation). Revisions to IRC Section 471 eases accounting for inventories also allowing the cash basis for smaller companies.

Previously, changes in accounting for long-term contracts would require advance notification and approval by the IRS. Changes for contractors no longer meeting the requirements for percentage completion or accrual basis of accounting requirements are now considered automatic. Form 3115 is still required but is submitted with the tax return for the year of change, no user fees apply, and the information required is significantly reduced. Changes from the percent complete method are made on the cut-off method so revenues from contracts in progress prior to the year of change will still be accounted for under the old method. Changes in overall methods, i.e., from accrual to cash, are made through a 481(a) adjustment. The effect of the change in the accounting method is determined at the beginning of the year of change and taken into income over four years if a positive adjustment and deducted in the year of change if negative.

The chart on the following pages provides an overview of these provisions.

## Accounting Method Changes for Small Contractors

| Description of Change | What contractors may benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Accounting for Long Term Contracts**<br>TCJA increased the exemption for requirements to use the percentage completion method of accounting for long term contracts for taxpayers with less than $10 million in average annual gross receipts to less than $27 million (as adjusted for inflation) in average annual gross receipts | Contractors with revenues less than $27 million (as adjusted for inflation) currently using the % completion method | Completion and submission of Form 3115 under automatic change provisions | By due date of the return including extensions | Conversion applied on the cut-off method for contracts entered into after December 31, 2017 |
| **Other Methods Available:** | | | | Application may be made concurrent with other changes available under TCJA provisions |
| **Completed Contract**<br>Revenues and costs for each contract is deferred until the job is at least 95% complete | | | | For non-C corporation entities - beware of AMT issues on taxable income difference between method and percent complete income |
| **Cash**<br>Revenue is recognized when cash is received and are deductible when paid. | | | | |

| Description of Change | What contractors may benefit | Action Steps | Timing | Other Considerations |
|---|---|---|---|---|
| **Accrual**<br>Revenues recorded as available to be billed, Costs recorded based on economic performance occurs | | | | |
| **Overall Method Change from Accrual to Cash Method**<br>TCJA increased the gross receipts threshold for the requirement to use the accrual method of accounting from $5 million to $27 million (as adjusted for inflation) | Contractors with revenues less than $27 million (as adjusted for inflation) currently on the accrual method | Completion and submission of Form 3115 under automatic change provisions | By due date of the return including extensions | Conversion made through 481(a) adjustment determined at beginning of the year of change with negative adjustment applied in the year of change and positive adjustment taken into account ratably over 4 years |
| **Accounting for Inventories**<br>TCJA no longer requires accrual method of accounting if company revenues are less than $27 million (as adjusted for inflation); inventory is non-incidental material and supplies, or accounting treatment is consistent with applicable financial statement | | | | |

## What is Section 199A and Who Benefits?

Section 199A provides a 20% deduction on the amount of Qualified Business Income (referred to as QBI and defined later) from a domestic business operated as a partnership, S-Corporation, sole proprietorship, trust, or estate. This deduction is in response to the approximate 20% tax rate cut for C-Corporations and replaces the Domestic Productions Activity Deduction (DPAD).

Section 199A applies to all US (including Puerto Rico) non-C-Corporation taxpayers and is calculated at the individual taxpayer level. It is limited by each individual taxpayer's taxable income range and the industry in which they conduct their trade or business. Specified Service Trade or Businesses (referred to as SSTB and defined later) can reduce or eliminate the amount of deduction received. There are several other limitations which are discussed later in detail.

Section 199A puts all taxpayers into one of three categories (as indexed for inflation):

1. Those below the taxable income threshold ($170,050 single / $340,100 married filing joint)
2. Those above the taxable income threshold and within the phase-in range ($170,050 - $220,050 single / $340,100 - $440,100 married filing joint)
3. Those above the taxable income threshold and above the phase-in range

Depending on the category an individual taxpayer falls within certain limitations may apply.

## How is "Qualified Business Income" Defined?

Per IRC Sec. 199A(c), qualified business income (QBI) means the net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer. QBI does not include any qualified REIT dividends or qualified publicly traded partnership income. Qualified items of income, gain, deduction, and loss mean items of income, gain, deduction and loss to the extent such items are effectively connected with the conduct of a trade or business within the United States and included or allowed in determining taxable income for the taxable year (Sec. 199A(c)(3)(A)).

Simply put, Box 1 or Box 2 from K-1s, Schedule C income, Schedule E rental income (pending further guidance from the IRS), and Schedule F farm income are all included in QBI. Also included are Sec. 751 gain or loss giving rise to ordinary income and Sec. 481 adjustments (if the adjustment arises in taxable years ending after 12/31/17). Previously disallowed losses under Secs. 465, 469, 704(d), and 1366(d) allowed in the taxable year are taken into account for purposes of computing QBI if the losses were disallowed after 12/31/17.

Items of income and deduction that are excluded from QBI include: short-term and long-term capital gains and losses, dividend income, interest income (other than interest income which is properly allocable to a trade or business), wages to shareholders, partner guaranteed payments, and Sec. 1231 gains (unless taxed at ordinary rates).

## How is A "Specified Service Trade or Business" Defined?

A Specified Services Trade of Business (SSTB) includes any trade or business involving the performance of services in the fields of:

- Health, law, accounting, actuarial sciences, performing arts, consulting, athletics, financial services, brokerage services,
- Any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners, or
- Which involves the performance of services that consist of investing and investment management trading, or dealing in securities, partnership interests, or commodities.

Based on the definitions in the final regulations issued by the IRS, certain professions that appear to be SSTBs are not. In general, construction activities are not SSTBs and should qualify for the 199A deduction.

## When Do the Limitations Apply?

The income category of the taxpayer will determine the limitations on the 199A deduction. The three categories of income thresholds are listed above, and the deduction can be limited by two major factors:

1. W-2 wages and qualified property
2. Whether the trade or business is an SSTB

***W-2 Wages and Qualified Property Limitation***

The deduction is limited to the lesser of 20% of the qualified business income OR the greater of 1) 50% of the W-2 wages relating to the qualified trade or business and 2) the sum of 25% of the W-2 wages and 2.5% of the unadjusted basis of qualified property.

If the taxpayer falls in the first category (under the income threshold of $170,050 single / $340,100 married filing joint), the wage and qualified property limitation do not apply. The limitation is phased in over the income above the threshold for the taxpayers who are in the second category ($170,050 - $220,050 single / $340,100 - $440,100 married filing joint). Taxpayers in the third category (above the thresholds) apply the wage and qualified property limitation in full.

***Specified Service Trade or Business Exception***

As stated above, a SSTB taxpayer may not be able to claim any or the full 199A deduction otherwise allowed based on the income category that applies to the taxpayer. The same categories apply to the SSTB exception in a similar way to the wage and qualified property limitation.

The SSTB exception does not apply to taxpayers in the first category. Therefore, even a SSTB taxpayer below the income threshold can claim the 199A deduction. The deduction amount of an SSTB taxpayer is phased out over the income range for SSTB taxpayers in the second category. For a SSTB taxpayer in the third category, the 199A deduction is prohibited on the corresponding SSTB income.

Because most construction companies will not fall under the SSTB designation, the wages and qualified property limitation will be the most significant consideration in determining the 199A deduction. However, you would need to evaluate the de minimus rules to confirm whether any issues exist.

The following examples illustrate the application of the 199A deduction in various scenarios.

## How Do We Apply the 199A?

**Income Above Threshold Amounts – Wage-Intensive Business**

| | Business Other than Specified Service Business | Specified Service Business |
|---|---|---|
| Partner's Share of Qualified Business Income | $ 1,000,000 | $ 1,000,000 |
| Partner's Share of W-2 Wages | $ 200,000 | $ 200,000 |
| Partner's Share of Unadjusted Basis of Qualified Property | $ 10,000 | $ 10,000 |
| 20% of Partner's Share of Qualified Business Income | $ 200,000 | $ 200,000 |
| Deduction (Apply 50% of W-2 wage limit) | $ 100,000 | $ 0 |

**Income Above Threshold Amounts – Capital-Intensive Business**

| | Business Other than Specified Service Business | Specified Service Business |
|---|---|---|
| Partner's Share of Qualified Business Income | $ 1,000,000 | $ 1,000,000 |
| Partner's Share of W-2 Wages | $ 50,000 | $ 50,000 |
| Partner's Share of Unadjusted Basis of Qualified Property | $ 1,000,000 | $ 1,000,000 |
| 20% of Partner's Share of Qualified Business Income | $ 200,000 | $ 200,000 |
| Deduction<br>(Apply 25% of W-2 / 2.5% unadjusted basis limit) | $ 37,500 | $ 0 |

## Wage Limitation

Wages play a major role in the calculation of the 199A deduction. Below are three scenarios:

| | A | B | C |
|---|---|---|---|
| Wages (including owners) | $ 400,000 | $ 200,000 | $ 300,000 |
| Taxable income | $ 600,000 | $ 800,000 | $ 700,000 |
| 20% of QBI | $ 120,000 | $ 160,000 | $ 140,000 |
| 50% of wages | $ 200,000 | $ 100,000 | $ 150,000 |
| 199A Deduction | $ 120,000 | $ 100,000 | $ 140,000 |

**In Scenario A** (most construction companies) – the deduction is limited to 20% of QBI. Therefore, reducing owner's wages and increasing QBI will increase the deduction. Consider paying quarterly estimates instead of a bonus to pay safe harbor amounts. If the owner reduces his wages by $100,000, and takes a distribution instead, the deduction is increased by $20,000. Please remember to watch reasonable compensation.

**In Scenario B** (possible for construction management and A&E firms) – the deduction is limited to 50% of the wages. Therefore, increasing owner's wages will increase the deduction. As with any planning technique, consider the cost of increasing payroll expenses versus the benefit of increasing the 199A deduction.

**In Scenario C** – this is close to the optimum wage to QBI percentage, 50% of wages approximates 20% of the QBI.

Another area relating to wages are leased employees, if you have a developer who maintains a separate partnership for all projects but uses one entity for payroll, the payroll can be allocated to the end users of the payroll, thus increase the 199A deductions.

Subcontracting is very common in the construction industry and subcontractor fees do not qualify as wages. If your company heavily relies on subcontracting you may want to consider who you can include on payroll to maximize your 199A deduction.

## Property Limitations

Another limit of the deduction is 2.5% of unadjusted basis on qualifying property plus 25% of wages. Property no longer qualifies after 10 years from the original placed in service date or the last day of last full year in the applicable recovery period determined under section 168. If this factors into the 199A deduction, it should factor into property replacement decisions.

## Aggregation Rules

A taxpayer can potentially choose to aggregate businesses for the deduction if the taxpayer operates multiple businesses in coordination with each other, shares resources, and are commonly controlled. How a taxpayer groups or doesn't group businesses for purposes of applying the passive activity loss rules doesn't affect how the taxpayer can aggregate or not aggregate businesses for purposes of applying the QBI deduction rules. After a taxpayer chooses to aggregate two or more businesses for QBI deduction purposes, he or she must continue to aggregate the businesses in all subsequent tax years.

## Other Considerations

If the business income does not qualify for the 199A deduction consider additional wages to reduce the income to an amount under the threshold and look at other deductions such as bonus depreciation, Section 179 depreciation, and retirement or SEP contributions. Conversely some taxpayers may need to reduce the amount of deductions to optimize their 199A deduction.

In summary, Section 199A can provide a tax benefit but how to best derive that benefit can be vastly different taxpayer by taxpayer. It is highly recommended you consult the CICPAC group and your tax advisor to discuss any planning needs.

## Other Opportunities / Considerations Under TCJA

### Excess Business Losses

The TCJA brought in some unfavorable rules around the deductibility of excess business losses. The maximum annual business loss is now $500,000 for joint filers and $250,000 for singles. As indexed for inflation, the threshold amount is $540,000 / $270,000 (2022). These rules apply at the taxpayer level for pass-through business income (or schedule C business income) and do not apply to C corporations. Excess losses are carried forward to future years as Net Operating Losses, so they are not subject to the 2022 $540,000 / $270,000 maximum limitation but are limited in the same way NOLs are limited. (See discussion below regarding CARES Act reprieve from 2018 to 2020).

For non-corporate taxpayers who under TCJA were limited to using net business losses to the extent of $250,000 ($500,000 for married filing joint), taxable incomes for 2018, 2019 and 2020 can be computed without this limitation. **However, for 2022 the limitation is now in effect and should be incorporated into annual tax planning moving forward (through 2025).**

### Capitalization of Research Expenses (R&E)

The Tax Cuts and Jobs Act of 2017 (TCJA) contained a provision with a deferred effective date which eliminates the current deduction for research and experimentation costs (R&D costs), as defined under IRC section 174, for tax years beginning in 2022. Instead, taxpayers are required to capitalize them and to amortize them over a five-year period (15 years for research and experimentation costs which are conducted outside of the United States). This new rule also impacts the write-off of capitalized R&D costs on the disposition or abandonment of the R&D in the future. Contractors that are investing in research and development expenditures will be significantly impacted by these new requirements. These new requirements apply whether or not a credit for R&D is claimed under Internal Revenue Code (IRC) section 41.

There was a provision in the Build Back Better Act (BBBA) that would have deferred the effective date of this rule until after 2025. This was consistent with the Green Book discussion of the Biden tax proposals which were intended to provide encouragement to US research and experimentation activities. However, the BBBA legislation has stalled in Congress so the TCJA rule is currently effective.

**While many businesses as well as tax professionals are hopeful that this TCJA change will be repealed, or at least deferred, the Contractor must deal with the realization that it is current the law**.

The new provisions will require a review and discussion with key personnel of the Contractor so that R&D costs can identified as well as segregated in their accounting records. Additionally, these provisions will impose an obligation on the tax return preparer to consider R&D costs when preparing Construction Company tax returns for 2022 and later.

Historically under IRC section 174 provided taxpayers options as to the treatment of research and development expenses. They could be expensed currently under IRC section 174(a); treated as deferred expenses which are capitalized and amortized over a period of not less than 60 months beginning with the month that the taxpayer first realized a benefit from these costs under IRC section 174(b); or capitalized and amortized over a 10-year period under IRC section 59(e).

If research and experimentation costs were capitalized, prior law allowed these costs to be deducted in the year that the research was disposed of, sold, or abandoned.

The definition of research and experimentation expenses under old IRC section 174 is much broader than those costs which are used in calculating a research and development credit under IRC section 41. They can include a portion of utilities, property maintenance costs, depreciation, legal fees (to obtain a patent), payroll not qualifying for the credit and the list goes on. Consequently, the Contractor cannot merely consider costs used for the R&D credit as being subject to this rule. Contractors will need to analyze their business operations to determine the affected R&D costs.

**Careful planning must be taken for 2022 purposes to evaluate the impact this new rule may have on a Contractors' taxable income, cash flow, financials, and estimated tax payments.**

## Choosing Between S CORP Versus C CORP

The TCJA brought about a myriad of changes to C Corp and S Corp tax rules. Over the past 40 years, tax practitioners have seen the effective corporate tax rates increase relative to personal income tax rates. The TCJA brought a significant reduction of the federal corporate tax rate and not quite the same reductions in personal tax rates. It is easy to see why a corporate tax structure is a much easier tax pill to swallow and may be the most tax efficient entity type if a large portion of earnings are not being distributed to owners but are being retained in the company for growth and / or debt repayment.

- Highest effective tax rates of S-Corp net income – 37% (29.6% with full section 199A deduction)
- Highest effective tax rates of C-Corp net income – 21% (plus 15% or 23.8% on dividend distributions)

## Considerations to Keep in Mind for Converting from an S-CORP to a C-CORP:

- Is the entity/Are the owners eligible for QBI deduction?
- If change from S to C, how are historical earnings taxed leaving a C-Corp?
- Per 1371(e)(1) during the post-termination transition period (PTTP) the corporation is allowed distributions tax free to the extent of AAA. These distributions decrease the owner's basis in the stock. Note – lack of clarity what happens to unused AAA if re-elect S status down the road.
- After PTTP closes, distributions are treated as pro-rata coming from AAA and E&P for an eligible S-Corp (same ownership proportions as S-Corp when C-Corp).
- PTTP generally ends on later of one year after S-election revocation or due date for filing the final S-Corp return including extensions.
- Plan for future cash distributions to owners (beware, second layer of tax).
- Future plan to exit the business (beware, second layer of tax).
- Must remain C-Corp for five tax years.
- Must consider built-in-gains tax consequences for 5 years post re-electing S-Corp status.

Below is a chart comparing the pre and post TCJA impact of an S- and C-Corporation:

| | | S-Corporation | | C-Corporation | |
|---|---|---|---|---|---|
| | | **Pre-Tax Law** | **Post-Tax Law** | **Pre-Tax Law** | **Post-Tax Law** |
| **Qualified Business Income** | | $1,500,000 | $1,500,000 | $1,500,000 | $1,500,000 |
| **DPAD** | **9.0%** | (135,000) | | (135,000) | |
| **199A Deduction** | **20.0%** | | (300,000) | | |
| **Net Taxable Income** | | $1,365,000 | $1,200,000 | $1,365,000 | $1,500,000 |
| **Tax Rates** | | 39.6% | 37.0% | 34.0% | 21.0% |
| **Tax Expense** | | $540,540 | $444,000 | $464,100 | $315,000 |
| **Tax on Distribution of Income/Dividend** | | | | $207,180 | $237,000 |
| **Total Tax** | | $540,540 | $444,000 | $671,280 | $522,000 |
| **Effective Tax Rate** | | 36.0% | 29.6% | 44.8% | 36.8% |

# Tax Planning Tips Around Net Operating Losses, Bonus Depreciation, and Section 179

## NOL Changes

The Tax Cuts and Jobs Act significantly changed the way NOLs generated in 2018 and beyond are treated. NOLs generated in 2018 are only able to be carried forward indefinitely. Also, NOLs can only offset 80% of taxable income.

The CARES Act passed in 2020, updated the Net Operating Loss rules, by allowing a 5-year carryback and removing the 80% of Taxable Income Rule. This applies to NOLs only from 2018, 2019 or 2020.

After 2020 and moving forward, the treatment of net operating losses reverts to the rules provided by TCJA for which NOLs can only be carried forward and carry backs are not allowed. Additionally, an NOL can only offset 80% of taxable income for losses carried over from post 2017 tax years. This includes remaining losses generated in 2018-2020. This means that you cannot shelter 100% of your regular taxable income.

## Bonus Depreciation Changes

The TCJA brought some major changes to the treatment of bonus depreciation. First, the bonus depreciation amount increased from 50% to 100% acquired after September 27, 2017, through 2022 and will phase down to zero over a 5-year period after that. Secondly, the TCJA removed the requirement that the original use of qualified property must commence with the taxpayer. In other words, new AND used assets are eligible for bonus depreciation. Bonus depreciation is 80% for 2022 and drops to 60% for 2023.

On September 21, 2020, the IRS issued final regulations for bonus depreciation under Sec. 168(k). The final regulations provide guidance for partnerships, consolidated groups, and taxpayers that undertake a series of related transactions.

## Section 179 Changes

Section 179 is still allowed on both new and used property. The maximum deduction increased from $500,000 to $1,000,000 (indexed for inflation). Plus, the phase-out threshold increased from $2,000,000 to $2,500,000 (indexed for inflation). **The maximum deduction is $1,080,000 and the deduction begins to phase out at $2,700,000** and is fully phased out at $3,780,000 for 2022.

## Tax Planning Tips – NOL/Depreciation

Since Congress heavily expanded the use of bonus depreciation, we foresee many taxpayers having a very high tax depreciation expense in 2018 and beyond. In many circumstances, the use of bonus depreciation will likely cause a taxable loss, therefore generating a net operating loss. Since NOLs can no longer be carried-back and can only offset 80% of future taxable income, we recommend using Section 179 as a tool to limit the NOL generation and generate a section 179 expense carry forward. Section 179 expense carry forward will offset future taxable income dollar for dollar, while the NOL may only offset 80% of taxable income.

## Pass-Through Entity (PTE) Tax Elections

IRS provides certainty regarding the deductibility of payments by partnerships and S Corporations for State and local income tax.

- On November 9, 2020, the Internal Revenue Service issued regulations will clarify that State and local income taxes imposed on and paid by a partnership or S Corporation on its income are allowed as a deduction by the partnership or S Corporation in computing its non-separately stated taxable income or loss for the taxable year of payment, and therefore are not subject to the State and local tax deduction limitation for partners and shareholders who itemize deductions.
- The notice applies to these types of income taxes starting November 9, 2020 and allows taxpayers to apply these rules to specified income tax payments made in a taxable year of a partnership or an S Corporation ending after December 31, 2017, and before the date the regulations published on November 9, 2020.
- This notice assures an entity level deduction for Contractors that pay entity level state and local taxes imposed in lieu of individual income taxes or offset by credits on the individual partner or shareholders returns. IRS Notice 2020-75 effectively sanctioned the workaround, for appropriately designed pass-through entity (PTE) taxes. However, the applicability varies in each state following their specific statutes and provisions.
- To date, over a dozen states have enacted some type of entity level tax where application of this IRS notice may apply. Contractors should review with their tax advisor, the current state requirements, and be on the look-out for additional states to pass their own legislation to allow an entity level tax deduction.
- Most states that have enacted a PTE tax require estimated tax payments to be made.

## Inflation Reduction Act of 2022

In late July, a deal to revive a scaled back reconciliation bill was reached resurrecting some concepts previously brought forth from the prior year during the Build Back Better proposals. The Inflation Reduction Act of 2022 provides investment in clean energy, promotes reductions in carbon emissions and extends popular Affordable Care Act premium reductions. The bill is being paid for through the implementation of a 15% corporate minimum tax, budget increases to bolster the IRS to close the 'tax gap', excise tax on stock buybacks, and changes to Medicare rules. No new business taxes were proposed on pass-through entities or families making less than $400,000.

A few additional proposed details of interest to Contractors are that the corporate minimum tax would go into effect for tax years beginning after 2022 and would equal 15% of the corporation's 'adjusted financial statement income' for the tax year. The tax would only apply to covered corporations with average annual adjusted financial statement income in excess of $1 billion for the three prior tax years. A covered corporation is a corporation whose stock is traded on an established securities market. This would not apply to S-Corporations.

The Contractor should continue to monitor opportunities arising from clean energy, climate change and tax credit space of the bill. Specifically impacting the Contractor, the Act expands two key Federal energy efficient tax incentives currently in existence, the **179D Energy-Efficient Commercial Building Deduction** and **45L Energy-Efficient Home and Multifamily Tax Credit,** with expanded credits and applicability starting in 2023. It is vital for the Contractor to review the applicability on these incentives with the work performed. Congress has provided further signals that opportunities in the construction industry from the Inflation Reduction Act will directly evolve around the energy and climate provisions of the legislation, to further promote, expand, and incentivize actions around the design, development and construction of energy efficient property.

## Mobile Workforce Considerations

With the increasing mobility of the Contractor's workforce, a few changes, and reminders for consideration for 2022:

- Starting on July 1 through December 31 the IRS increased the standard business mileage rate to 62.5 cents per mile. Up from a rate of 58.5 effective from January 1st through June 30th.
- Contractors should continue to monitor and follow the U.S. General Services Administration per diem rates which are reset each fiscal year starting October 1st.
- Business meal expense provided by a restaurant, continues to be 100% deductible in 2022 (same as 2021).

For a more detailed reminder on current mobile workforce considerations and best practices, please see the following chart and access the CICPAC issued whitepaper found at **www.cicpac.com**.

## Comparison of M&E Expense Under the Old Law Versus the New Law

| Event | 2017 Expenses (Old Rules) | 2018 Expenses (New Rules) * | Under 2021 CAA Expenses (New Rules 1/1/21 – 12/31/22) ** |
|---|---|---|---|
| Office Holiday Party or Summer Picnic | 100% deductible | 100% deductible | 100% deductible |
| Client Business Meals | 50% deductible if taxpayer is present, and not lavish or extravagant. | 50% deductible if business is conducted, taxpayer is present, and not lavish or extravagant. | 100% deductible if business is conducted, taxpayer is present, and not lavish or extravagant and purchased from a qualifying restaurant (see below) |
| Entertainment-related Meals | 50% deductible | No deduction (e.g., meals incurred when no business is conducted, potentially at night clubs, cocktail lounges, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, vacation, and similar trips). | No deduction (e.g., meals incurred when no business is conducted, potentially at night clubs, cocktail lounges, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, vacation, and similar trips). |
| Transportation to/from Restaurant for Client Business Meal | 100% deductible | 100% deductible | 100% deductible |

| Event | 2017 Expenses (Old Rules) | 2018 Expenses (New Rules)* | Under 2021 CAA Expenses (New Rules 1/1/21 – 12/31/22) ** |
|---|---|---|---|
| Sporting Event Tickets | 50% deductible for face value of ticket. | No deduction | No deduction |
| | 50% deductible for skybox expenses to the extent of non-luxury seat ticket face value in such box. | No deduction | No deduction |
| | 100% deductible for charitable sporting events. | No deduction | No deduction |
| | Contributions for the right to purchase tickets to an educational institution's athletic events 80% deductible. | No deduction | No deduction |
| | 50% for transportation to/from and parking at the sporting events. | No deduction | No deduction |
| Club Memberships | No deduction for club dues; however, 50% deduction for expenses incurred at a club organized for business, pleasure, recreation, or other social purposes if related to an active trade or business. | No deduction | No deduction |
| Meals Provided for the Convenience of Employer | 100% deductible provided they are excludable from employee's gross income as de minimis fringe benefits; otherwise, 50% deductible. | 50% deductible (non-deductible after 2025). | 50% deductible (non-deductible after 2025). |

| Event | 2017 Expenses (Old Rules) | 2018 Expenses (New Rules)* | Under 2021 CAA Expenses (New Rules 1/1/21 – 12/31/22) ** |
|---|---|---|---|
| Meals Provided to Employees Occasionally and Overtime Employee Meals | 100% deductible provided they are excludable from employees' gross income as de minimis fringe benefits; otherwise, 50% deductible. | 50% deductible | 50% deductible |
| Water, Coffee, and Snacks at the Office | 100% deductible provided they are excludible from employees' gross income as de minimis fringe benefits; otherwise, 50% deductible. | 50% deductible (non-deductible after 2025) | 50% deductible (non-deductible after 2025) |
| Meals in the Office During Meetings of Employees, Stockholders, Agents, or Directors | 50% deductible | 50% deductible | 50% deductible |
| Meals during Business Travel | 50% deductible | 50% deductible | 100% deductible if business is conducted, taxpayer is present, and not lavish or extravagant and purchased from a qualifying restaurant (see below). Includes meal portion of per diem allowance. |

| Event | 2017 Expenses (Old Rules) | 2018 Expenses (New Rules)* | Under 2021 CAA Expenses (New Rules 1/1/21 – 12/31/22) ** |
|---|---|---|---|
| Meals at a Seminar or Conference, or at a Business League Event | 50% deductible | 50% deductible | 100% deductible if business is conducted, taxpayer is present, and not lavish or extravagant and purchased from a qualifying restaurant (see below) |
| Meals included in Charitable Sports Package | 100% deductible | 50% deductible | 50% deductible |
| Meals Included as Taxable Compensation to Employee or Independent Contractor | 100% deductible | 100% deductible | 100% deductible |
| Meals Expenses Sold to a Client or Customer (or Reimbursed) | 100% deductible | 100% deductible | 100% deductible |
| Food Offered to the Public for Free | 100% deductible | 100% deductible | 100% deductible |

*On September 30, 2020, the IRS issued final regulations on the business expense deduction for meals and entertainment under Sec. 274. The final regulations address the disallowance of the deduction for expenditures related to entertainment, amusement, or recreation activities. The final regulations also provide guidance to determine whether an activity is considered entertainment as well as the limitation on the deduction of food and beverage expenses. The final regulations are effective for tax years beginning on or after October 9, 2020, so taxpayers can continue to rely on the proposed regulations for tax years beginning prior to October 9, 2020.

**Consolidated Appropriations Act, 2021 (CAA Act) - On December 27, 2020, the CAA Act was passed which authorized a 100% deduction for certain business meal expenses for the next two years. Companies may now deduct 100% of business meals if they meals are provided by restaurants and paid or incurred prior to January 1, 2023. A restaurant does not include businesses that primarily sell pre-packaged food or beverages not for immediate consumption. It is highly recommended you consult the CICPAC group and your tax advisor to discuss any details in these regulation changes and overall impact on your business.

## Opportunity Zones

The Opportunity Zone Program is an effort by the Federal Government to spur new or increased investments in low-income communities. It is based on 25% of the census tracts identified as 'Low Income Communities' by the Community Development Financial Institutions Fund (CDFI Fund), a division of the US Department of the Treasury.

The program offers a tax incentive for investors by allowing them to contribute their capital gains within 180 days of the sale into Opportunity Funds. Under the program, if a capital gain is invested in a Qualified Opportunity Fund within 180 days of realizing the gain, then the gain is not included in income until the investment is sold, or December 31, 2026, whichever is sooner. There are three potential separate tax benefits – (1) temporary deferral, (2) permanent exclusion of either 10% or 15%, or (3) permanent exclusion of post-acquisition appreciation.

The investor can contribute their capital gain in a Qualified Opportunity Fund within 180 days of the sale, then the tax due on the gain can be deferred for as long as eight years, decreasing the gain by up to 15% and escaping tax on future appreciation if held at least 10 years. There are roughly 8,700 opportunity zones throughout the United States.

Requirements:

- Must be certified by the US Treasury Department.
- Must be organized as a corporation or partnership for the purpose of investing in Qualified Opportunity Zone Property.
- Must hold at least 90% of their assets in Qualified Opportunity Zone Property.
- Qualified Opportunity Zone property includes newly issued stock, partnership interests, or business property in a Qualified Opportunity Zone business.
- Opportunity Fund investments are limited to equity investments in businesses, real estate, and business assets that are located in a Qualified Opportunity Zone.
- Loans are not eligible for tax incentives.
- Opportunity Fund investments are subject to a substantial rehabilitation requirement.

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