ALAN GASSMAN INTERVIEWS DAVID KIRK ON 199A AND ASSOCIATED NEW TAX LAW ISSUES

EXECUTIVE SUMMARY:

David Kirk is uniquely qualified to lead the field on explanation and analysis of section 199a and other individual and business taxpayer provisions of the new Tax Act.

Known by many as one of the brightest and best qualified experts on these topics, David was an attorney for the Office of the Chief Counsel at the IRS and a chief draftsman of the Regulations under IRC Section 1411 (the Net Investment Income Tax). Readers will not want to miss what David has to say, or his very entertaining tone and sharp wit that gives us guidance and also the motivation and resilience needed to make sense of these new rules and apply them as best possible. If you are a professional in a tax-related field and have never heard of David Kirk, then hold onto your desk because you are in for a real treat and a lot of new knowledge.

Thanks to LISI commentators Alan Gassman and Brandon Ketron for their work on this LISI exclusive interview.

Bios:

David Kirk:

David Kirk was a former attorney for the Office of the Chief Counsel at the IRS and now a National Tax Partner for Ernst & Young LLP. David received his law degree from the University of Pittsburgh and a LL.M from Georgetown before joining the IRS.[1] He is credited with providing much needed clarity and guidance as the primary author of the Regulations under Section 1411, the provision of the Affordable Care Act that imposes a 3.8% surtax on net investment income.[2] Since 2014, Kirk has been a National Tax Partner at Ernst & Young LLP, where he primarily focuses on the taxation of individuals, trusts, and their pass-through entities.[3] Kirk continues to contribute his knowledge of the net investment income tax through his authoring of the Bloomberg-BNA Tax Management Portfolio on Section 1411[4] and tireless writing and speaking at many major tax conferences.

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[1] https://www.forbes.com/sites/anthonynitti/2017/12/27/understanding-the-new-tax-law-a-qa-with-david-kirk-former-irs-attorney-turned-ey-tax-partner/#2ad0eed1611d

[2] Id.

[3] Id.

[4] Id.

Alan Gassman, JD, LL.M and Brandon Ketron, CPA, JD, LL.M are lawyers practicing with the law firm of Gassman, Crotty & Denicolo, P.A. in Clearwater, Florida. Their LISI commentary, Income Tax Planning Newsletter #125 on Section 199A, can be viewed by **CLICKING HERE**, and information on their upcoming Webinar on February 1st on Creative Planning With Flow Through Entities, Including 199(A), New Ideas can be viewed by **[CLICKING HERE]**. Alan is speaking for the following Heckerling Exhibitors at the following booths next week, and welcomes all questions on 199A. Monday, January 22 from 12:35PM-1:00PM with Professor Jerry Hesch at the Veralytic booth where they will be demonstrating their EstateView 11.2 software, Tuesday, January 23 from 10:40AM-11:10AM at the Interactive Legal booth where he will be illustrating estate tax savings using EstateView, Wednesday, January 24th from 10:40AM-10:55AM at the Premier Trust booth where he will be discussing prominent differences between Florida and Nevada trust law, and Thursday, January 25 from 12:30PM-12:45PM at the Veralytic booth where he will be discussing 10 questions every planner should ask before purchasing life insurance.

HERE IS THE INTERVIEW.

Alan: David, thanks for dusting off your cape and flying to our rescue. As a well-respected tax expert who lives and breathes 'what the Internal Revenue Code does for successful taxpayers and businesses', how does it feel to go through yet another large tax change that will impact 10's of thousands of taxpayers and businesses in so many surprising and impactful ways?

David: You know Alan, I keep thinking about the opening line of the Twilight Zone - '**You are traveling through another dimension, a dimension not only of sight and sound but of mind. A journey into a wondrous land of imagination**.' But mine ends with 'Next stop, tax reform.'

Alan: That is certainly a telling observation. What are you telling your fellow tax professionals at Ernst and Young and elsewhere?

David: I am trying to be clear with clients and colleagues - that everybody just needs to be patient and learn and just be able to be comfortable with not knowing.

We can all take comfort that during the next potentially tumultuous 18 months, we are all in good company in riding the storm on this page-turning 2017 Christmas present given by our legislature.

Alan: Well said. I feel better already. I view this new law as a great opportunity to help our clients to avoid tax while also improving their estate, creditor protection and family planning. Clients want to know how the law impacts them right, now, but we need to try to educate them to the fact that it can take some time to get our arms around this.

What are your thoughts on the scope and impact of new Section 199A, which gives many "flow through entity" owners a tax deduction of up to 20% of qualifying income?

David: This is actually proceeding a lot like the original [section] 199, which was enacted October of 2004 to be effective for years, beginning after December 31, 2004. So, when people are looking for guidance on how things are all going to play out, I think looking at the original 199 may provide some clues.

I think you are going to see Notices coming out this spring. The reason for this is that the IRS does not like creating law in forms and instructions. So they are going to have to push out a Notice that will be a "reliance notice", which is the type of sub-regulatory guidance that can be issued quickly, and taxpayers can rely on without concern for penalties. They will also request comments. But what it will do is provide the basis for the changes to the forms and instructions that we will probably see in the fall.

Alan: Why in the fall?

David: We need them in the fall because the software vendors of the world need that much lead time to start programming all of the inner guts of their systems to handle the changes to interest expense, the changes to 199A, the loss limitation rule, and all these other fun things that have popped up at the last minute. They are going to have to do all of their programming for that because we need to be able to go live this time next year.

Alan: How detailed do you think the Notices in August will be?

David: I think they are probably going to hit straight down the fairway, but they are not going to tackle anything that is remotely complicated.

I mean, if you look back to some of the other major tax events; there has not been anything major like this since the Affordable Care Act, and arguably, Affordable Care Act is not really a tax event, but it was in that you had a billion dollars more in budget to the IRS, you had tens of thousands more employees, and you had a long runway. You do not have any of that right now. And so the idea of being able to push out guidance of this sort has to run through the Treasury Office of Tax Policy, which has been basically, to some extent, a speed bump because it is the narrowest point where everything has to go, along with going to Chief Council's office, and going through the commissioner's office, [both of which] are really relatively narrow paths. So if there are no pressing projects, for example the international repatriation tax, then this might fall back. Or, if they are going to be occupied on depreciation or occupied on interest, [something] thing is going to fall behind. I know that the IRS folks working on this corner of our world will try their best to push out items in a timely manner, but even though these items are of exceptional importance to our community, our project is probably is not going to be the voice that barks the loudest.

Just think about it. Corporate tax reform drove this whole thing, but it makes up a smaller population of returns filed and taxes paid. So, it wouldn't be surprising that our corner of the world is not going to be the most pressing guidance that the IRS has to deliver. Our community, the family tax community for lack of a better term, usually takes a back seat to corporate and international items.

Alan: How long did it take from start to finish to have Proposed Regulations under 1411, and then to go from proposed to final, and how long do you think this may take for 199A?

David: The first proposed regulations took two years, two weeks and two days to see the light of day. Final Regs took fifty weeks. But I don't think 1411 is the place to look. Look at the old section 199 – that will be more telling. The old 199 was enacted in October 2004, and effective January 1, 2005. It was just repealed for years after December 31, 2017. So it had a life of twelve years. Notice 2005-14, which was released within three months of the enactment of §199, provided interim guidance. Proposed Regulations were published in November 2005. The initial Regs were finalized in May 2006, and amended five times after that, with the final amendment being in August 2015. I expect that a similar timeline would be expected here.

And just for comparison, if we exclude proposed Regs, the current 199 Regs come in around 100 pages and the NIIT regs are just 40.

Alan: Are you finding many errors and issues in the new law that were not foreseen by the drafters?

David: It seems like we are finding an error, a quirk, or whatever you want to call it, almost every day. In many instances, we will need to correct the statutory language. But here's the rub - you cannot do technical corrections with fifty votes. You need sixty, which means the Democrats have to play along, and for some, that may be politically difficult.

Some of the items would not even necessarily be technical corrections by definition. Technical corrections would be something like correcting a mis-numbered Code Section. But other things that will have an actual economic impact or have a budget impact are not technically "technical corrections", but are going to be essential, or at least sorely missed.

Alan: I see. What specifically comes to mind as far as big technical corrections that are needed under this new law?

David: Here's an example; under 199A, you are allowed a 20% deduction for REIT dividends. These are non-qualified dividends coming out of a REIT. Okay, that's great, except what they forgot to do is amend the RIC rules and common trust fund rules to account for this new dividend 'character.' So, the way I read it, you will not get the 20% deduction if you own a REIT mutual fund or ETF. But if you owned all of the individual REITs themselves, you would get the deduction.

Quote stand out:

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But if you look what they did in the Bush tax cuts when they created qualified dividends, they had to go through the entire Code and make amendments to [section] 584 for common trust funds, and they had to do it in 854, for the mutual funds or ETFs, so that they could pass that qualified dividend character through. In this Bill, they didn't do that. So, is that a technical correction? I mean, that is a big revenue mark. So little things like that, we're finding them every day. And that is the difficult part.

The other thing, which is really going to be a major challenge, is the definitional rules. In the interest area, they allow you to be exempt from the 30% interest limitation if you are a real property trade or business, by cross-reference to the [section] 469(c)(7)(C). That has only been on the books since 1993, and they have not been able to define any of those eleven terms in the last 25 years. Is it time to start?

I was on a reg[ulation] project when I was in the IRS Counsel's office to define a "trade or business" under this provision, and it just collapsed under its own weight. Because it was too complicated and there was too much of arbitrary line drawing. But that was just for individuals. We were just trying to provide clarity to folks about what these eleven terms meant to help figure out whether the guy that installs windows in your house is a real estate professional or whether he needs to be a contractor to be able to put an addition on your house to be a real estate professional because windows-only were not enough. But now we are starting to get questions from publically traded corporations [asking] are they real estate businesses? Can they be exempt?

And so, it has taken a relatively obscure definition and now made it so that you have entities that have financial statement impacts on whether they can deduct things on the line. That is a big thing. And even under 199A they cross-referenced 1202 for the service businesses. Well, conveniently 1202 also came in in 1993 and, unfortunately, nothing has been defined in that aspect in 25 years. It is almost like they just went into Title 26, did a "find" for a definition somewhere, and just let the chips fall where they may without appreciating how tortured the existence of that provision has been over 25 years. Maybe that is not the best way to define something.

Alan: Let's cover something very interesting that we were talking about before this interview. How does the definition of athletics, or a trade or business whose principal asset is the skill of one or more of its employees, affect a sports team? Is there a common analysis here that can apply to other businesses?

David: Right, let's start off with sports teams. I was having a discussion the other day with someone about professional sports teams and whether they produce qualified business income or not. The definition of one of these service businesses is the "performance of services in the field of athletics", or any business with a reputation of skill of one or more of its owners or employees. So ask yourself, using my beloved Pittsburgh Steelers as an example, is Ben Roethlisberger providing services, and if so, to who? Or is it the skill or reputation of the employees? The employees being the entire team and coaching staff? Well, I mean, maybe the skill or reputation of the employees of the Steelers are better than the skill of the Cleveland Browns, but apparently not as good as Jacksonville last Saturday, although I am not really sure that is what they were getting at. Sorry Cleveland, it was just too easy. But you know, there are millions of dollars at issue.

Alan: It seems that sports teams may want to get into the business seminar and workshop business to allow business owners and professionals to attend programs and events for the primary purpose of enhancing skills and office team synergy at the ballpark or stadium where tickets to the events and food, drink and facilities are deductible at least in large part as non-entertainment expenses, and team income is based on business platform programs like this, and not just regular sports activities that will be taxed without benefit of the 199 deduction. Would that make sense?

David: You make a good point. The way I read 199A, it is a business by business test. So if you have a business of renting out the stadium for events – whether it be for concerts or corporate gatherings - I would think that would be tantamount to a rental activity. That would be different than athletics. But the key is whether you have a separate trade or business and, if so, what are your W-2 wages and any qualified property associated with it? Maybe you outsource the concessions and the stadium security – so maybe the only limit would be the undepreciated basis? I don't know. Additionally, I am not sure how many teams actually own their stadiums. I know some do, and I know that some are owned by the local government.

Alan: So there will probably be a lot of changes in business entities and functions this year, but things may need to go back when we get more defined rules.

David: Interestingly, I think [Congress] expected that because there is a provision in there that says that if you claim the 199A deduction, your threshold for substantial understatement of tax gets cut in half. So they went in and amended Section 6662. Traditionally, one of the ways to be assessed a substantial understatement of tax penalty is when the tax on your return is understated by greater than 10%. They cut it to 5%. And so imagine an individual, an executive in a company that has whatever stuff going on, big W-2s, big houses, boats, planes, and whatever it is. [He] has $10,000 of

REIT dividends because he owns it in his brokerage account and he claims a deduction for $2,000 on his return. His entire return has now been tainted and now the [section] 6662 would penalty kick in with a 5% difference in tax.

Alan: That can have a significant impact!

David: Absolutely. I am concerned, for example, about the guy that is doing his own return at his kitchen table with off-the-shelf consumer software. He is going to get a 1099 from his brokerage account with a REIT dividend on it. He is going to plug it in from the 1099-DIV into the box on a computer screen. The software will give him a 20% deduction and off he goes. Do you think he has any idea that he is changing his threshold for penalty based on the claiming of that thing, or is the software just going to do it? That is kind of wacky.

Alan: So are you seeing people already changing their business models and restructuring to try to take advantage of these exemptions?

David: People are asking questions. They are contemplating changing business models. They are trying to figure out how to de-leverage because of the interest expense limitation. They are trying to figure out whether they could restructure in order to maximize the 199A. Could they divide up businesses? Let's go back to the sports team scenario. What happens if I split the team up so that all the souvenirs and the merchandising are in a separate entity that is not a service business in the field of athletics?

Even look at traditional family businesses where a family company might be an S-Corp and that entity has all of the employees. Imagine that there are different partnerships set up in each state that the family does business in, but all of the employees are housed in the S-Corp, and so none of those operating businesses in all those states are going to have W-2 wages even though there might be cost-sharing.

But at the end of the day, most of these provisions are temporary. Converting to a corporation for near-term tax savings is a pretty dramatic move. If the landscape changes again, people need to consider NOW how to move into a structure that can be unwound later without problem. This is where partnership entities may be used more flexibly than S corporations. It is time to brush up on your subchapter K skills in your spare time, if you haven't already.

Alan: Right, speaking of partnership tax, when you are a partner in a partnership that needs to pay out wages to enable a higher earning (taxable income over $315,000 married or $157,500 single) partner to take the full 20% deduction, the deduction can be limited based upon the amount of wages paid by the entity and a partnership can't pay wages to the partners because of the guarantee payment rules, right? There is a lot of confusion and lack of knowledge on this.

David: Correct. According to the IRS, and that has been the case for - give or take - 40 years. So there has been a lot of discussion about why you are carving out W-2s, why you are carving out guaranteed payments, but you cannot W-2 yourself? Well, what the law says and what people do are two different things. So there are probably partnerships that do W-2 their partners. There are Schedule Cs that probably W-2 their owners. If something crazy can happen, it does happen.

So going back to the accuracy related penalty, does that mean that their math may be off? Yes. Does that mean your substantial understatement goes to 5%? Yes.

Cut out:

This is going to be a tumultuous 18 months. And when I use 18 months, I mean between now and when the rubber really meets the road in summer of '19; when the numbers actually have to be populated on tax returns.

Alan: In regards to employee leasing, will you look through employee leasing to consider what you pay though the employee leasing company a wage, or is that going to be the death of employee leasing companies?

David: Well, it will be leasing, right? One question is whether employee leasing is a specified service business? The law seems pretty darn clear when it says "W-2", it means the W-2 reported to the Social Security Administration. There is some thinking about whether a common law employer concept could move the W-2s around to various businesses in a group, but that thought is far from fully baked.

I do not see any hook to apply any aggregation rule where one entity has the trade or business and another pays the wage. Would the IRS adopt 469 groupings in order to solve these, arguably, common problems? If I operate a business in several states, and I have a separate legal entity for each state, but my employees are in the parent entity, how is that going to work? Do I need to move all of my employees in Pennsylvania to the Pennsylvania entity? Or my Georgia employees to my Georgia partnership? Or can I just keep everyone where they are? Do I have to do all of my employee benefit plans all over again? This is going to be brutal. And it is for a provision that has a 2025 expiration date.

Alan: Going back to definitions and listed categories of businesses, what do you think a "health" trade or business is, or more important what isn't "health"?

David: You know, if you go back, there are a couple of PLRs out there on health that have to do with laboratory testing under the Section 1202 rules which are referred to under 199A. What they were probably trying to do back in '93 is to prevent doctors, lawyers, and accountants from being able to retire from their practice or sell their practice to their partners, get paid out and get a 50% exclusion. That makes sense. But due to the breadth, there are a lot of activities that could be health-related. But these PLRs found that if you employ physicians, but the physicians do laboratory tests, help get FDA approval, or are contract researchers, then probably you are not health business, but just a business. Then you get into is it the skill or reputation of one or more of your employees? But if that is the case, then every business would be a service business. Even the ones that were carved out, which were architecture and engineering. You have some pretty good architects -- does that mean they are employees so therefore it is a skill or reputation? Does that mean you got caught by the catch all? It would be intuitive to look to Canons of statutory interpretation which may bring to a conclusion like *Congress intentionally did something and they always know what they meant to do so there would have been no need for them to carve that out if they knew they were going to be pulled back in. So, it must have meant that they were not intended to be pulled back in*. But is that the type of advice that you need to be giving your clients in hopes that you will deal with an IRS agent that understands the canons of statutory interpretation?

This is for the guy that is trying to do their return on software at their kitchen table. This is not just for the wealthy, this is everybody. How many questions are we going to have to ask to parse through these definitions? If you are a commercial tax software developer, what is your Q&A decision tree going to look like?

Alan: Amazing. Do you think these companies will break off their billing, break off their accounts receivable collection, and pay a reasonable management fee? You are going to have a bunch of small businesses trying to do that and the statute does not say you cannot do it.

David: But what is the end game (cue Taylor Swift)?

Alan: The end game is that 10% of your net profits ends up in a separate company that could maybe take a 20% deduction.

David: Well, sure, so it is basically [earnings] stripping.

Alan: Yes.

David: Just like self-charged rent and self-charged interest you have stripped out in order to reduce self-employment tax. We gave that away in the NIIT regulations, so it is not subject to net investment income nor self-employment, so it is a good stripper. So you are doing [the same thing] over here, and I am not sure that there is ability in the statute for the IRS to really combat a lot of this.

There is specific guidance, which one might say, would lend itself to what someone may call "legislative regulation writing" that gives the IRS the ability to carry out the purposes of this section for restricting allocation of items and wages [and] stop the splitting off of management fees and the application of this section in tiered entities. So maybe there is something there that they could stop but it requires regulations. There is nothing wrong with it until Regulations are issued that says that it is bad.

So query, how long will it take for Regulations to be issued and when will they be effective? That gets you into Section 7805. Section 7805(b) talks about retroactivity of Regulations. If they can issue Regulations within 18 months of the effective date of a law then they can be retroactive to January 1. Query whether that can actually happen? So like I said, it is going to be a tumultuous year.

Alan: Let's talk more about restructuring to allow more partners or S corporation owners to spread the income to have more of it fall below the $315,000, $157,500 thresholds to allow the 20% deduction to apply to listed businesses or trades and businesses where there are not enough wages or qualified property present to otherwise allow the deduction.

For example, is there anything to prevent a C corporation from funding an irrevocable trust for one or more shareholders by consent and direction of the shareholders, and for that complex trust to own and operate a trade or business or invest in a partnership entity that owns and operates a trade or business in order to have the full 20% deduction on the first $157,500 of net income, or on more income if the wage or wage plus qualified property at 2.5% tests are met and it is not a "listed" activity?

David: Well, I not sure that anything prevents it per se, but I am not terribly sure in what situation this would make sense. If a corporation creates as trust for shareholders, it would likely be considered a deemed dividend of property to the shareholder – so there's a 23.8% dividend tax potential and there would be a 311(b) gain at the entity level. The trust might end up a grantor trust to the shareholders by reason of 1.671-2(e)(4).

But let me take that concept a step further. Imagine that you and I are partners in a specified service business – a law firm for example. Assuming that state law allows, is there anything to prevent me from taking my 50% and putting part of my interest into a complex trust to make the threshold of $157,500 available to the trust? How about going even further. I fund one complex trust for my son and one for my daughter. Now I have two $157,500 limits to work with. But could I do better?

What about this – I take my 50% in the law firm, create an S corporation, and put 25% of the firm in it. I then create a complex trust for my son and another for my daughter. I put 50% of the S stock in the trust for each child, and the put 12.5% of the firm in each trust. The complex trusts make ESBT (Electing Small Business Trust) elections. Now, do I have four $157,500 limits to work with on the theory that each side of an ESBT is a separate trust? Even if this does work, I have many collateral issues to deal with like (1) can trusts be an owner of a law firm under state law, (2) would the tax rates in the trusts be higher than for me, (3) we have the NIIT (Medicare tax) issue, if the trust does not materially participate in the practice, (4) do I have a taxable gift if the client is concerned with estate and gift taxes, and (5) will the entire arrangement be respected under Sections 704(e) if a partnership, or 1366(e) if an S corporation? That's an awful lot of brain damage to go through to get a 20% deduction when the provision is only on the books between 2018 and 2025, and at most, you may be saving just a little more than 20% of 37% of $157,000 per trust, which is $11,655 per year.

Alan: Agreed, but if this is to complex trusts that retain $157,500 of income and distribute the rest out to taxpayers who are also under the $157,500 of income then the savings can be multiple times that, and if this reduces the parent's or grandparent's income to below the $315,000/ $157,000 taxable level there is much more family income tax savings, not to mention other planning objectives that can be met thought these types of structures.

David: Yes, but so are some of the expenses and formalities for the family to go through. But if there are other good reasons for the arrangement, it may make good sense. This is a good opportunity to look at all client needs to see what makes sense globally in each situation.

Alan: Any other big surprises that come to mind or big realizations that you came to this week?

David: Based on my experience over the last few weeks, the people that are most upset are the ones who have the business losses that are limited, mostly real estate professionals, startups, and oil and gas people. Real estate professionals that are chronic NOL taxpayers, or start up people, or people that have certain businesses that always run at a loss. Think about hedge funds, where a lot of the people run the management company at a loss because they W-2 bonus their traders. But then they make it up in interest, dividends or gains from their carried interest. Well, this $500,000 or $250,000 loss limit may limit the loss coming out of the management company to $250,000 or $500,000. Whereas, in the past, they have been allowed to kind of offset their interest dividends and just call it a day. Real estate folk are facing the same situation. So if you are used to having a good amount of interest, dividends and wages, but you are also a real estate professional and you have a giant Schedule E loss every year because of bonus depreciation, you have not been too accustomed to paying tax. But when you combine this $500,000 loss limit with the 80% NOL limit, now all of a sudden you are guaranteeing that just about everyone is going to be a tax payer. When I say a tax payer, I mean tax paying person.

So we have seen people that the $500,000 limit may change their liability by $15,000,000-$25,000,000. It is that big of a deal. And it came out of nowhere. If you had a $700,000 loss, $500,000 would be allowed, $200,000 would transform into an NOL to be used next year, subject to the 80% taxable income limitation. So maybe it is only a one year thing, but it looks like a budget gimmick.

Alan: Any other issues with trusts or estates that you've seen or heard about?

David: I worry about how all of this is going to work for trusts. Everyone is talking about the 20% deduction and the W-2 limit, but there is also another limit. The overall deduction is also limited to 20% of ordinary income. It actually says 20% of the taxable income over net capital gain. Will each side of an ESBT do separate taxable income calcs?

Or think of a CRT. Imagine that you have a CRT with $10,000 of ordinary REIT dividends. You'd think that we have a $2,000 deduction. But the problem is that CRTs do not calculate taxable income. See for yourself, look at the Form 5227 and try to find taxable income. It doesn't exist. How are you going to literally apply this provision?

We were just kicking around the loss limitation rule, how is this going to work for trusts? Does each side of an ESBT get $250,000? What about a CRT? In theory, a CRT can own business assets such as real estate that produce losses but don't create a UBIT problem. But CRTs can't have NOLs because a net loss in the ordinary income category just rolls forward – so do CRTs just ignore this provision? The real head scratchers always seems to involve CRTs.

Alan: So what areas are you going to specialize in? Are you going to start writing on 199A or where are you going to be?

David: As an individual tax guy, we need to know everything. There will be time for specialization next year.

For the time being, I am just strapping on a helmet and preparing to get smacked around for the next year or so.

Alan: I am sure that most of our readers can identify with this completely.

David: For me, I started getting people up to speed on the 469 trades or businesses, the 1202 definitions, looking at other areas of the Code and the international provisions. It is possible that people are going to need to know that, especially, look at you guys down in South Florida, you have a lot of Latin American people that might have CFCs that have never had a problem because they are operating companies back in their home countries. They are going to have this massive inflow of deemed income due to the repatriation tax. Did you realize that the massive in flow happens on December 31, 2017, which means that their fourth quarter estimates are due on the 16th and that they might be underpaid? You see, even if you have a deemed income inclusion on December 31, 2017, individuals have the ability to defer the tax over eight years. If the repat income is through an S corporation, you can defer almost indefinitely. However, folks need to appreciate that the deferral does not defer the NIIT.

Alan: As you know, we have a lot of estate planners in LISI that read these letters. Does anything in particular come to mind as a "gotcha" or planning opportunity in this area?

David: For one thing, there is a provision for S corporations that makes death an acceleration event of the deferred tax under new Section 965(i). . If it does accelerate, it is on the decedent's final 1040 or on the estate's form 1041? I think it should be a liability for 706 purposes. But there is a mechanism that can defer the acceleration if the successor agrees to assume the liability. How is that going to work? Does the estate need to accept it, what if it is in a rev trust that simply turns non-grantor at death? Does that change it if a 645 election is made or is not? Does my will/trust need to require the fiduciary to make the election to accept the deferred tax to protect them from liability? Does a transfer include a testamentary trust that makes an ESBT election? In theory, the trust splits and the new S portion is created as a new trust. That same issue with QSSTs, except the beneficiary becomes to the owner. Are these transfers that cause acceleration? But if the QSST beneficiary signs the consent, has her or she accepted a liability that was of the trust? Is that some kind of taxable sale for the trust? And while we're in this morass, is the assumption of the liability to pay the deferred tax a deemed contribution to the trust by the QSST beneficiary and will that impact my GST inclusion ratio? Good gosh man, this is going to give me a stroke.

That is just a quick example of a situation where the learning curve is more akin to a brick wall. As people and the IRS are unpacking it. I think everybody just needs to be patient and learn and just be able to be comfortable with not knowing.

Alan: Yeah, wow that is a great quote.

David: So, I guess I should probably just stop at that then because I don't know how much longer I can go without swearing. And my head hurts.

Alan: David, thanks so much for making yourself available for this interview. And final words?

David: There are going to be a lot of issues! I often joke with people, I think this is going to end up being like a land war in Asia, it will take 10 years and no one is going to know how it ends. I'll be there doing my best to help taxpayers and advisors to navigate the unpredictable deltas and pathways the best we can. At least we will not run out of situations to analyze and improve given the nature of the tax code, people and businesses.

You know, if you look up the word reform in the dictionary, it says something like *to change to a better state* or *improve by alteration.* I'm just not convinced that we actually have tax reform by that definition. I see this as a marketing gimmick. But I can't really come up with anything more fitting that doesn't involve a four letter word, so I guess I just need to accept it and move on. Thanks for hearing me out, maybe I can skip therapy this week.

Alan. Thanks to you, David, both from me and from the readers of LISI. You are amazing.

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