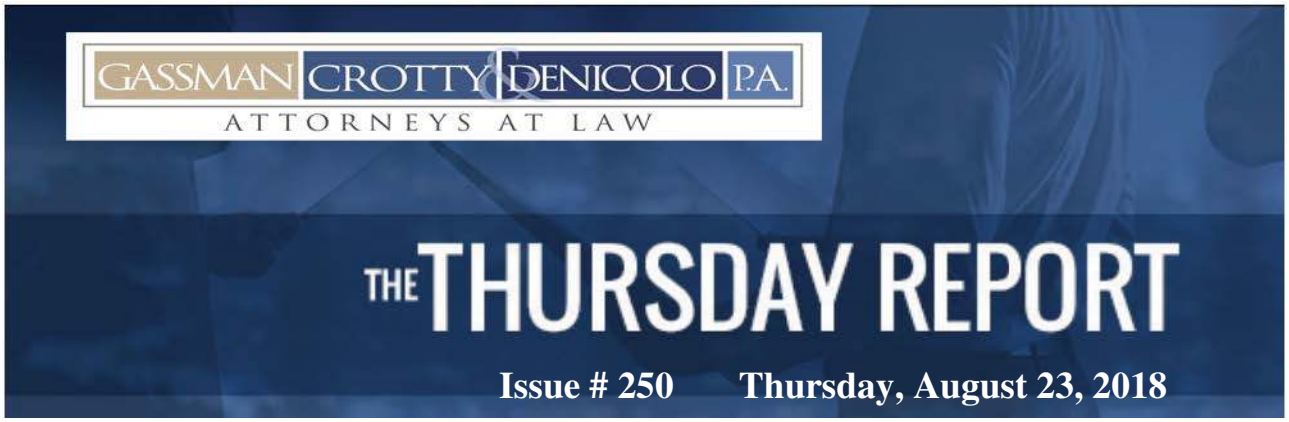

Re: The Bring on Autumn-Day Report

In This Issue:

Quote of the week

We know that in September, we will wander through the warm winds of summer's wreckage. We will welcome summer's ghost.

-Henry Rollins

New Outrageous Partnership Tax Laws – Current Partners Can be Liable for Former Partners' Taxes

by Chris Denicolo

Partnerships and LLCs that are classified as partnerships for federal income tax purposes. Such partnerships or LLCs are referred to in this article as "partnerships". Partnerships are very desirable because they allow for flexibility in allocating income and ownership, without being subject to the double taxation of a C corporation or the strict ownership requirements of an S corporation. Partnerships also allow for the appointment a representative that was known as a "tax matters partner" who could represent the partnership with respect to any federal income tax audits.

Effective January 1, 2018, the rules relating to tax matters partners and partnership audit procedures by the IRS have drastically changed and can provide a significant trap for the unwary and those who have not updated their partnership arrangements to effectively opt out of the new rules.

Specifically, the Bipartisan Budget Act of 2015 became effective on January 1, 2018, and replaced the "tax matters partner" with the concept of a "partnership representative." The partnership representative is a similar position, although such representative need not be a partner in the partnership and is only required to have a substantial presence in the United States. Therefore, partnerships can appoint an entity is not a partner to act as the partnership representative. Additionally, the new rules provide that the partnership representative has the sole authority to act on behalf of the partnership in audits or other proceedings, and the partnership representative has no legal obligation to keep the partners updated on the status of an audit or to obtain the partners' consent before taking any action.

In order to avoid unintended results under the new law, the partnership agreement or operating agreement should be updated to require that the partnership representative keep all partners reasonably informed with respect to any federal income tax audits or similar proceedings, and/or be required to obtain consent from the partners prior to making any elections or otherwise acting to bind the partnership. For example, a provision could be added to provide that a vote of a majority in interest of the partners is required in order for the partnership representative to take any action that binds the partnership.

More importantly, the new rules allow the IRS to pursue the partnership for any imputed underpayment with respect to tax due as a result of an audit of the partnership. This essentially means that the partners of a partnership at the time of the audit are responsible for the payment of tax assessed by the IRS, regardless of whether there were different partners for the tax year that is the subject of the audit. This can cause a substantial disparity if the ownership of the partnership has changed.

For example, suppose A and B are partners in a partnership in 2010, with each of them owning a 50% interest. In 2011, A sells his entire partnership interest to C. In 2012, the IRS reviews the partnership's 2010 tax return and finds that the partnership understated its income by $100,000. Any tax resulting from the IRS audit is allocable to B and C based upon their respective ownership interests and tax rates, notwithstanding that C was not a partner in 2010 when the issue giving rise to the audit occurred.

Fortunately, the partnership agreement (or operating agreement, if the partnership is an LLC) can address this issue by providing that former partners are required to indemnify and reimburse all other current and former partners with respect to any increased tax obligations associated with an IRS assessment. Nevertheless, absent such a provision being added to the partnership agreement or operating agreement, the current partners will effectively be responsible for any tax burden resulting from the IRS audit, which can lead to unfair and unintended consequences.

A limited exception (the "opt-out" election) applies to partnerships that make an election but is only available if a partnership has 100 or fewer partners, and all partnership interests are owned by individuals, C corporations, S corporations or estates. Thus, this election is not available for any partnerships that are owned by other partnerships or non-grantor trusts.

A second election (called the "push-out election") is available for partnerships that make an election within 45 days of the date of the notice of final partnership tax adjustment from the IRS. This exception causes the responsibility of any imputed underpayment to be shifted to the partners of the partnership for the year that is the subject of the audit. However, this election is to be made in the discretion of the partnership representative and is not required to be made unless the partnership agreement or operating agreement provides otherwise.

Accordingly, the partnership agreement or operating agreement should be updated to add provisions whereby the partnership representative is required to make an opt-out election or a push-out election where applicable, and to require all partners to cooperate with respect thereto, even after they are no longer partners in the partnership.

The above changes have not been given much attention, and many partnerships and partners thereof will be surprised at the new procedures if and when a situation implicating them arises. Nevertheless, it is prudent to review partnership agreements and consider amendments thereto in order to avoid any unintended consequences or surprises down the road.

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Does Rental Real Estate Qualify For The Section 199A Deduction? – It All Depends!

by Alan S. Gassman and Martin S. Shenkman

Section 199A was added to the Internal Revenue Code under the Tax Act of 2017 to provide a 20% deduction from income pass-through attributable to trades or businesses that qualify.

One immediate question under the new law was what the definition of a "trade or business" is, and whether a landlord who is in the business of collecting rent and performing only incidental duties under a Lease Agreement can be considered to be in the "trade or business" of leasing.

This will make a big difference for landlords who have a net profit where rental income exceeds depreciation and interest deductions.

New Proposed Regulations were issued on August 8th which provide some degree of guidance, but also confusion.

The new Proposed Regulations indicate that if a taxpayer has an active business, like a factory or an engineering firm, and directly or indirectly leases property to the firm, then the net income from the leasing arrangement will be considered to be an active trade or business for Section 199A purposes.

On the other hand, where the tenant under an arrangement is not an active business that is affiliated by at least 50% ownership with the landlord, then by the terms of the Proposed Regulations a definition of trade or business which comes from Internal Revenue Code Section 162 will be used. Section 162 dates back to 1926, and controls when a taxpayer can take deductions for expenses incurred in an active "trade or business."

The court cases interpreting Section 162 have not always been kind to landlords. In particular, there needs to be something more than a long-term triple net lease where a landlord just collects rent and does very little else in order to qualify as being a trade or business.

A landlord that provides active management relating to a particular building, or at least administers common area expenses, should probably be able to take the Section 199A deduction, but someone who simply bought a building that is triple net leased to a large company where the large company does everything and simply sends a check to the property owner will probably not qualify, although this is not clear.

One example in the Proposed Regulations provides that an individual who manages and leases vacant property to an airport is considered as an "trade or business".

There are other aspects of the example that are explained therein, so the primary focus was not whether this landowner was in a "trade or business," but it seems like the only reason the IRS would have had to mention that the landlord manages the airport property would be to show that it must be an active trade or business.

A second example in the Proposed Regulations provides the same language for a parking garage rental.

Based upon the above, it appears that taxpayers who have passive triple net leases and who are not in an active trade or business that might at least involve doing continuous due diligence, negotiating, and buying and selling properties that are triple net leased may not be considered to be in a trade or business that would qualify for the Section 199A deduction.

Proposed Regulations constitute the thinking of the IRS, and these particular Proposed Regulations are only binding on taxpayers to the extent that taxpayers would choose to rely upon them. In other words, they cannot be used by the IRS against the taxpayer.

Hopefully, the real estate lobby will be able to convince the IRS and the Treasury Department that final Regulations should be more tolerant.

In the meantime, individuals and entities taxed as disregarded, as S - corporations or partnerships that have triple net lease situations should consider making the arrangement more active by providing management to the tenant, or engaging in activities that would make the business of being a triple net lease landlord more active than what might otherwise be the case.

This article does not constitute a full and complete discussion of everything that someone would need to know about Section 199A and real estate leasing. The Section 199A rules have a number of requirements that may need to be met.

For example, high earner taxpayers who wish to take a 199A deduction attributable to rental income will need to satisfy a wage and/or qualified property test that may require that they pay a minimum amount of wages and/or have a minimum amount of property based upon the original cost of depreciable components.

These requirements are beyond the scope of this article, but the authors have written on them in depth and can provide copies of these broader articles upon request.

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Client Relationships: Don't Forget the Five Commandments

Part 3 of 5 by Alan Gassman and Kateline Tobergte

The following is part three from an article being published in the ALI ABA Tax Lawyer Magazine, which was co-written with Stetson University law student Kateline Tobergte. Any and all brilliance that might be found in this article came from Kateline.

3. CLEARLY COMMUNICATE WITH YOUR CLIENT

Once you build a basic rapport and trust with your client it is important to keep it. This means being open and clear with your client about their situation and your roll in their situation. Explain the Attorney-Client relationship to your client, and very clearly let them know if you are not representing them. A client will likely assume that you are their lawyer for everything once they talk to you. You may also be their therapist at times and their friend at others. It is important to set clear boundaries, so the client knows what you are and are not responsible for and capable of. Also make it clear who you are not representing if dealing with more than one person or a business. You do not want a non-client saying they were your client and thought you were protecting their interests. Explain the scope of the representation and the costs associated with their situation. When the status and scope of the relationship, or lack of relationship, is not undeniably clear the client's belief is almost always right when they sue you or file a bar complaint. If it is not in writing, it did not happen, unless there were multiple witnesses on your side.

If you decide to not take a person as a client confirm that you have not advised them about statute of limitation issues and that you do not specialize in the area of law involving their situation, unless you really do.

Manage the client's expectations. Many clients will want results that are not likely, or even possible. It is important to let the client know that you can try your very bet and get help from the best specialist available, but none of us can control the universe, let alone a jury or any legal situation. The very best lawyers work hard to limit expectations and to discuss how the client can survive a bad result so that the result is not as important. Many clients are pre-occupied with a situation that is not as bad as they think it is, or have not developed a "Plan B" to facilitate making the best of a bad result. They will appreciate when you bring this up.

Many clients make bad decisions, and then look to blame these on the lawyer who let them act thereon. Ignorance is not always bliss, and clients can do some serious damage to their situation if they release confidential information or lose their cool and anger the other side. Even if the client's actions were the reason something went wrong, the lawyer will be the one blamed. This is because human tendency is to blame others when something goes wrong. You are the one in a position of authority and are supposed to have all of the answers, so if something happens the client will turn to you. It is important to explain to your client what they should and should not

do in order to keep confidentiality and make the situation go well for everyone. Of course, this does not mean to coerce or impermissible coach your client, but talk to them about what can go wrong.

Some clients will ask you to do things that are ethically questionable or flat out illegal. Immediately tell the client that you will never risk your legal license or reputation on questionable conduct, and that they are welcome to go to another lawyer and that you will hand the file off politely and without problem if they choose to do so. You can also jokingly tell them that they probably won't look good in stripes and you won't either and they will usually get the point.
If the client is unaware that what they are requesting is illegal or wrong, explain why it is wrong or what law it is breaking, and the consequences associated with their proposed conduct. If a lawyer does assist a client with fraudulent activities there can be serious consequences. For instance, in 2002 a lawyer was indicted for assisting a businessman fraudulently conceal assets from creditors. His indictment lead to him committing suicide. He lost everything, including his life. The Model Rules of Professional Responsibility prohibit assisting a client in fraudulent or illegal activity, but allow educating a client about the consequences of a proposed course of action. If the client refuses to move on and insists on the illegal conduct, you must withdraw from representation. Keep in mind that under the Crime Fraud Exception to the Attorney Client privilege law enforcement officials can reach your files even if the client objects to this if you and the client have conspired to commit even a small and technical violation of the law. Don't go there!

It is also okay to not have all the answers and let the client know that. Being honest about what you do and do not know will help keep your client's trust and make you appear humble. There is nothing wrong with saying "to the best of my knowledge and memory ABC=XYZ, but if you would like I can check on this by doing a little research or calling an expert." Then let the client know if they want you to determine what the answer is, or if it is unimportant, and point this out in your follow up correspondence.

Always follow up with a letter or email shortly after a meeting to state what was discussed, what you will be doing, and what you need for the client to do. If possible sit down right after you meet with the client with a legal assistant or other person in the firm and talk through what was said, and what needs to be done. They can even listen to you dictate a letter to the client that explains to them what help you need and what issues have arisen. Nine times out of ten that staff member will point out two or more things that should be considered, and you might even send the client an extra quick email to point out something you forgot to discuss, or information that you might need before you get started.

Determine whether your client prefers to communicate by email, regular mail, or even texting, and use this mode of communication if and as needed. You may find that there is a particular time of day or a particular day of the week when the client can be attentive to you. If the client is not able to communicate back or is too scattered, disrespectful, or untrustworthy to respond to your inquiries, consider termination of the relationship or have a candid discussion about your concern. How do you know they will pay your bill if they will not even answer your emails or phone calls?

Parts 4 and 5 of this article will be covered in subsequent editions.

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Forbes Corner with Alan Gassman

678 Ways To Qualify For The 199A 20% Deduction

My recent blog post on the discriminatory nature of Section 199A makes mention of having high-income taxpayers falling under the SSTB (Specified Service Trade or Business) category consider the use of management, billing, marketing, and intellectual property entities held at arm's- length to reduce taxes, and discusses that if the proposed regulations that were issued on August 8, 2018 become final, then such entities will be aggregated with the affiliated SSTB and thus ineligible for the Section 199A deduction if the owner's taxable income exceeds the $207,500/$415,000 levels, or phased out ratable for income exceeding $157,500 for single filers and $315,000 for married filers.

To view the full article, click HERE

Beautiful Losers: The Discriminatory Nature Of The 199A Proposed Regulations

The lyrics of Bob Seger's hit "Beautiful Loser" ring true when reading the Proposed Regulations under Section 199A, which are riddled with disparities that push the envelope of the IRS's regulatory authority.

To view the full article, click HERE

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Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from *Wealth Management* says:

One of the most common questions we get from clients is ***whether they should transfer their house to their children****.*

The ***answer*** *to this question is* ***almost always absolutely not!***

To view the full article, click HERE

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Humor

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Upcoming Seminars and Webinars

FREE!

HOT topics for a HOT summer

A presentation offered by
Johns Hopkins All Children's Foundation

Wednesday, August 29th, 2018

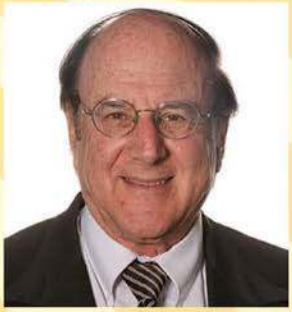
12:00 P.M.—1:30 P.M. EST

Featured speakers:

Jonathan Blattmachr

Martin Shenkman

Moderated by:



Jerome Hesch

Get information on a variety of hot topics and recent developments in:

- Estate and Gift Tax Law
- Creditor Protection Law
- Planning with Irrevocable Trusts
- Planning Under New Section 199A
- Florida Law Developments
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Alan S. Gassman is a practicing lawyer and author based in Clearwater, Florida. Mr. Gassman is the founder of the firm Gassman Law Associates, PA., which focuses on the representation of physicians, high net worth individuals, and business owners in estate planning, taxation, and business and personal asset structuring.

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To Register, Please Click HERE

Calendar of Events

Newly announced events in RED

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
Roadhouse Blues Party and Benefit	Friday, August 24, 2018, 4:00 PM - Midnight	The Parkview Room – 105 Central Park Dr N., Largo, FL 33771	See invite above for full details	Contact: Jason@gassmanpa.com	
Trusts & Estates Magazine Webinar	Friday, August 24, 2018 3:00 PM	TBD	199A Planning Under the Proposed Regulations with Jonathan Blattmachr and Martin Shenkman	Contact: Agassman@gassmanpa.com	
All Children's Webinar	Wednesday, August 29, 2018	Gotowebinar.com	"Hot Topics for a Hot Summer" With Jonathan Blattmachr, Martin Shekman & Jerome Hesch	Click HERE	
Professional Acceleration Workshop	Friday, September 7, 2018. 9 AM-3 PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Click HERE	See above
Florida Osteopathic Medical Association Conference	September 14-16, 2018, 7:30 am – 8:30 am	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	
University of Florida Advisers Network	September 14, 2018	University of Florida	Dynamic Planning Strategies for the Well Informed Advisor	Contact: Agassman@gassmanpa.com	
North Suncoast Chapter FICPA Seminar	Wednesday, September 19, 2018, 4:30 PM	Chili's, 9600 US Highway 19, New Port Richey	Section 199A	Contact: Agassman@gassmanpa.com	Click Here
Leimberg Webinar	Thursday, September 20, 2018, 3:00 PM – 4:30 PM	Leimbergservices.com	Bankruptcy	Contact: Agassman@gassmanpa.com	
FBA Trust & Wealth Management Conference	Thursday, September 28, 2018	Ritz Carlton, Sarasota	Creditor Protection and Planning for Addicted Individuals	Contact: Agassman@gassmanpa.com	
Notre Dame Tax Institute	October 11-12, 2018	South Bend Indiana	Planning Under Section 199A and Associated Tax and Practical Considerations	Contact: Agassman@gassmanpa.com	

Federal Tax Institute of New England Seminar	October 17-18, 2018	TBA	TBA	Contact: Agassman@gassmanpa.com	
Las Vegas Life Insurance Conference	October 25, 2018	Las Vegas, Nevada	Dynamic Planning techniques for Cautious Advisors Note-this is a private event	Contact: Agassman@gassmanpa.com	
AAA-CPA Conference	November 5, 2018	Miami, FL	Topics to be Announced	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236		Contact: Agassman@gassmanpa.com	

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