

THE THURSDAY REPORT

Issue # 255 ~~Thursday~~ Friday, November 23 2018

Re: One of Our Best EVER...

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We welcome contributions for future Thursday Report topics. If you are interested in making a contribution as a guest writer, please email Alan at agassman@gassmanpa.com

This report and other Thursday Reports can be found on our website at www.gassmanlaw.com

Thanksgiving means gratitude.

It did not take modern science or technology for the Pilgrims who came to the United States on the Mayflower to understand the importance of expressing and feeling gratitude for so many things that they had found on Plymouth Rock in 1620.

We know this from the book, *Pilgrims Progress*, which was written by John Bunyan in 1678.

Had it not been for this book, it seems likely that no one would know who the Pilgrims were, or why it is so important to celebrate a gratitude holiday at least once per year.

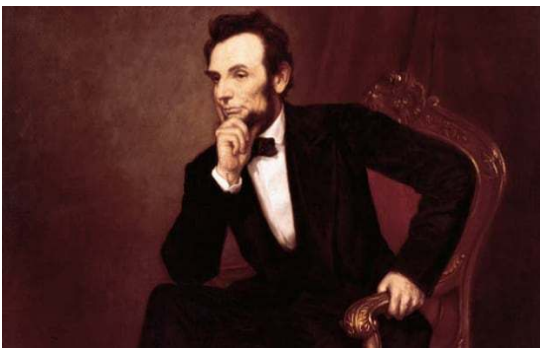
The following items were emphasized as being appreciated by the Pilgrims, notwithstanding that the standard of living that they endured at Plymouth Rock would be viewed as beyond terrible by most of us here in 2018.

What they did have included the following:

1. Solid marriages, to the extent that we can tell.
2. Close relationships with their children and other relatives who came over on the Mayflower.
3. Freedom to practice their religion in any way that they deemed appropriate.
4. Freedom to not go to debtor's prison if they borrowed money and could not pay it back.
5. Freedom to say whatever they wanted to say whenever they wanted to say it.

The writers of the Thursday report thank you, our readers, for providing the audience that we so appreciate, the feedback that we receive by e-mails and in person, when we meet Thursday report readers, and for trying out Kentucky Fried Turkey, which we hope will premiere in 2020, when our Thursday Report will be eight years old, and hopefully we will make some gravy by then.

Quote of the week



Interestingly, it was Abraham Lincoln who set the precedent for Thanksgiving Day in America. Before this Proclamation by President Lincoln, each state celebrated Thanksgiving at a different time. Abraham Lincoln unified the country on this day of thanks. His Proclamation is as follows (emphasis added):

By the President of the United States of America.

A Proclamation.

The year that is drawing towards its close, has been filled with the blessings of fruitful fields and healthful skies. To these bounties, which are so constantly enjoyed that we are prone to forget the source from which they come, others have been added, which are of so extraordinary a nature, that they cannot fail to penetrate and soften even the heart which is habitually insensible to the ever watchful providence of Almighty God. In the midst of a civil war of unequalled magnitude and severity, which has

sometimes seemed to foreign States to invite and to provoke their aggression, peace has been preserved with all nations, order has been maintained, the laws have been respected and obeyed, and harmony has prevailed everywhere except in the theatre of military conflict; while that theatre has been greatly contracted by the advancing armies and navies of the Union. Needful diversions of wealth and of strength from the fields of peaceful industry to the national defense, have not arrested the plough, the shuttle or the ship; the axe has enlarged the borders of our settlements, and the mines, as well of iron and coal as of the precious metals, have yielded even more abundantly than heretofore. Population has steadily increased, notwithstanding the waste that has been made in the camp, the siege and the battle-field; and the country, rejoicing in the consciousness of augmented strength and vigor, is permitted to expect continuance of years with large increase of freedom. No human counsel hath devised nor hath any mortal hand worked out these great things. They are the gracious gifts of the Most High God, who, while dealing with us in anger for our sins, hath nevertheless remembered mercy. It has seemed to me fit and proper that they should be solemnly, reverently and gratefully acknowledged as with one heart and one voice by the whole American People. **I do therefore invite my fellow citizens in every part of the United States, and also those who are at sea and those who are sojourning in foreign lands, to set apart and observe the last Thursday of November next, as a day of Thanksgiving and Praise to our beneficent Father who dwelleth in the Heavens.** And I recommend to them that while offering up the ascriptions justly due to Him for such singular deliverances and blessings, they do also, with humble penitence for our national perverseness and disobedience, commend to His tender care all those who have become widows, orphans, mourners or sufferers in the lamentable civil strife in which we are unavoidably engaged, and fervently implore the interposition of the Almighty Hand to heal the wounds of the nation and to restore it as soon as may be consistent with the Divine purposes to the full enjoyment of peace, harmony, tranquility and Union.

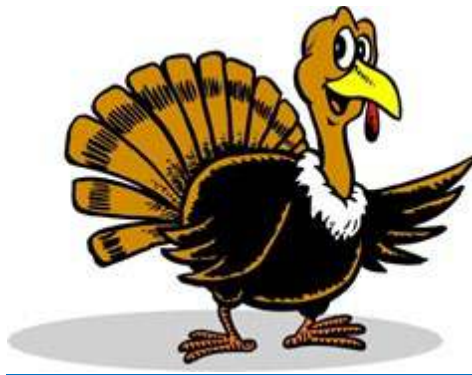
In testimony whereof, I have hereunto set my hand and caused the Seal of the United States to be affixed.

Done at the City of Washington, this Third day of October, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the Eighty-eighth.

By the President: Abraham Lincoln

Washington,
October 3, 1863

D.C.





Special Notice for New Tax Rates and Thresholds for 2019

By Alan Gassman and Brandon Ketron



New Powerpoints Summarize Tax Brackets and Other Updates from IRS Inflation Report, Including \$11, 400,000 2019 Estate and Gift Tax Exemption.

The following are our slides presented on the Leimberg LISI System. We hope that these are useful for all who open them.



NEW TAX RATES AND THRESHOLDS FOR 2019

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New Tax Rates and Thresholds for 2019

On Thursday, November 15th, the IRS announced the new thresholds and exemptions to apply for 2019 tax planning.

While the highest individual tax rate is still 37%, with a 3.8% Medicare tax, a single person will now have to earn more than \$510,300 to reach that rate, and a married couple filing jointly will have to earn over \$612,350 to reach the rate.

Trusts that are taxed as separate taxpayers can now retain up to \$12,750 of income that will not be subject to the 3.8% Medicare tax, and which will be taxed at an overall average rate of 24.11%, saving \$2,127.09 in taxes for each such trust as opposed to having the income taxed at 40.8%.

For those who wish to qualify to take the new 20% deduction on trade and business income from a "specified trade or business" ("SSTB"), the threshold for taxable income will be \$321,400 for a married couple and \$160,700 for someone single or who is married filing separately to have no phase out.

The estate tax exemption will rise from \$11,180,000 to \$11,400,000, and the \$15,000 per year annual exclusion for gifting will remain at \$15,000.

This is described in more detail by the attached charts, which were put together by Brandon Ketron, J.D., LL.M and our Empress of PowerPoints and presentations, Debbie Grey.

We welcome any and all questions, comments and suggestions on these changes.



ITEMS RELATING TO: ESTATE AND GIFT TAX ANNUAL EXCLUSIONS

	Tax Year 2019	Tax Year 2018
Unified Credit Against Estate Tax	\$11,400,000	\$11,180,000
Annual Exclusions for gifts	\$15,000	\$15,000
Gifts to Non-Citizen Spouses	\$155,000	\$152,000



ITEMS RELATING TO: INDIVIDUAL TAXPAYERS QUALIFIED BUSINESS INCOME (SECTION 199A)

Filing Status	Tax Year 2019	Tax Year 2018
Single	\$160,700	\$157,500
Married Jointly	\$321,400	\$315,000
Head of Household	\$160,700	\$157,500

NEW TAX RATES AND THRESHOLDS FOR 2019

LISI 11.16.18

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ITEMS RELATING TO: INDIVIDUAL TAXPAYERS - KIDDIE TAX AND TRUST TAX RATES

The Kiddie Tax was modified by the 2017 Tax Act and taxes a child's unearned investment income over a certain threshold. Under prior law, unearned income of the child was taxed at the parents' rates. Under the 2017 Tax Act, unearned income will be taxed using the trust tax rates, which are as follows:

Ordinary Taxable Income (2018)	Ordinary Taxable Income (2019)	Ordinary Income Tax Rate
\$0 – \$2,550	\$0 – \$2,600	10%
\$2,551 – \$9,150	\$2,601 – \$9,300	24%
\$9,151 – \$12,500	\$9,301 – \$12,750	35%
\$12,501 +	\$12,751 +	37%
Capital Gain Income (2018)	Capital Gain Income (2019)	Capital Gain Tax Rate
\$0 – \$2,600	\$0 – \$2,650	0%
\$2,661 – \$12,700	\$2,651 – \$12,950	15%
\$12,701 +	\$12,951 +	20%

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Tax Brackets - Single

Changes to the tax brackets for Single Filers are listed below:

TAX YEAR 2019		TAX YEAR 2018	
Tax Rate	Taxable Income	Tax Rate	Taxable Income
10%	\$0 to \$9,700	10%	\$0 to \$9,525
12%	\$9,701 to \$39,475	12%	\$9,526 to \$38,700
22%	\$39,476 to \$84,200	22%	\$38,701 to \$82,500
24%	\$84,201 to \$160,725	24%	\$82,501 to \$157,500
32%	\$160,726 to \$204,100	32%	\$157,501 to \$200,000
35%	\$204,101 to \$510,300	35%	\$200,001 to \$500,000
37%	Over \$510,300	37%	Over \$500,000

The brackets will continue to be adjusted for inflation, except that the inflation adjustments will be based upon the "Chained CPI."

These changes sunset for tax years beginning in 2026.

NEW TAX RATES AND THRESHOLDS FOR 2019

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Tax Brackets – Married Filing Jointly

Changes to the tax brackets for those who are Married Filing Jointly are listed below:

TAX YEAR 2019		TAX YEAR 2018	
Tax Rate	Taxable Income	Tax Rate	Taxable Income
10%	\$0 to \$19,400	10%	\$0 to \$19,050
12%	\$19,401 to \$78,950	12%	\$19,051 to \$77,400
22%	\$78,951 to \$168,400	22%	\$77,401 - \$165,000
24%	\$168,401 to \$321,450	24%	\$165,001 - \$315,000
32%	\$321,451 to \$408,200	32%	\$315,001 - \$400,000
35%	\$408,201 to \$612,350	35%	\$400,001 - \$600,000
37%	Over \$612,350 +	37%	Over \$600,000 +

The brackets will continue to be adjusted for inflation, except that the inflation adjustments will be based upon the "Chained CPI."

These changes sunset for tax years beginning in 2026.

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Tax Brackets – Head of Household

Changes to the tax brackets for those filing as a Head of Household are listed below:

TAX YEAR 2019		TAX YEAR 2018	
Tax Rate	Taxable Income	Tax Rate	Taxable Income
10%	\$0 to \$13,850	10%	\$0 to \$13,600
12%	\$13,851 to \$52,850	12%	\$13,601 to \$51,800
22%	\$52,851 to \$84,200	22%	\$51,801 to \$82,500
24%	\$84,201 to \$160,700	24%	\$82,501 to \$157,500
32%	\$160,701 to \$204,100	32%	\$157,501 to \$200,000
35%	\$204,101 to \$510,300	35%	\$200,001 to \$500,000
37%	Over \$510,300	37%	Over \$500,000

The brackets will continue to be adjusted for inflation, except that the inflation adjustments will be based upon the “Chained CPI.”

These changes sunset for tax years beginning in 2026.

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ITEMS RELATING TO: INDIVIDUAL TAXPAYERS CAPITAL GAINS TAX RATES

Long Term Capital Gains Tax Rates:

Tax Rate	Long Term Capital Gain/ Qualified Dividend Income			
	2019		2018	
	Married Filing Jointly	Single	Married Filing Jointly	Single
0%	\$0 - \$78,750	\$0 - \$39,375	\$0 - \$77,200	\$0 - \$38,600
15%	\$78,751 - \$488,850	\$39,376 - \$434,550	\$77,201 - \$479,000	\$38,601 - \$425,800
20%	\$488,851 +	\$434,551 +	\$479,001 +	\$425,801 +

Short term capital gains will continue to be taxed at ordinary income rates.

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ITEMS RELATING TO: INDIVIDUAL TAXPAYERS ALTERNATIVE MINIMUM TAX (AMT)

Filing Status	Alternative Minimum Tax (AMT) Exemption Amounts			
	2018		2019	
	Exemption	Phase out	Exemption	Phase out
Single	\$70,300	\$500,000	\$71,700	\$510,300
Married Filing Joint	\$109,400	\$1,000,000	\$111,700	\$1,020,600
Married Filing Separately	\$54,700	\$500,000	\$55,850	\$510,300

The exemption is reduced by \$0.25 for every dollar of income that exceeds the phase out threshold

NEW TAX RATES AND THRESHOLDS FOR 2019

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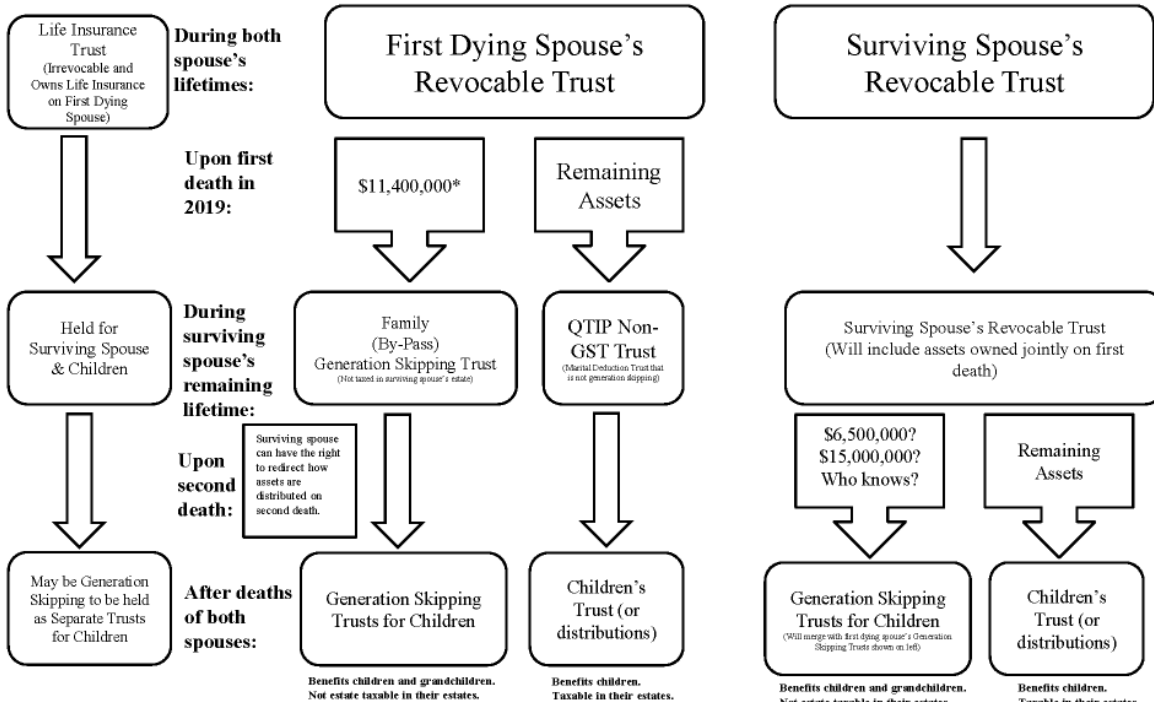
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PROTECTIVE TRUST LOGISTICAL CHART



*Assumes first spouse dies in 2019 when the exemption is \$11,400,000, and that the surviving spouse dies in a later year when the estate tax exemption has changed. The estate tax exemption is \$11,400,000, less any prior reportable gifts, for those that die in 2019, and increases with the "Chained CPI."

If the first spouse does not use the entire exemption amount, what remains may be added to the surviving spouse's allowance under the "portability rules" but will not grow with inflation, and will be lost if the surviving spouse remarries and the new spouse dies first, leaving no exemption.

NEW TAX RATES AND THRESHOLDS FOR 2019

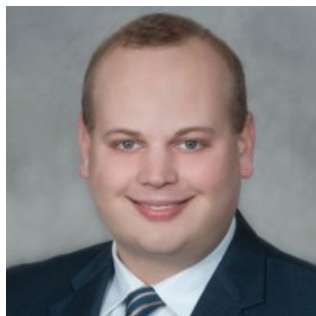
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You Can Now Donate 100% of a Company to Your Family Foundation Thanks to Paul Newman

By John Beck

On February 9, 2018, the Philanthropic Enterprise Act of 2017 as part of the Bipartisan Budget Act of 2018 was signed into law. This new law provides the ability for certain private foundations to own 100% of a for-profit business, as long as certain conditions are met. The law was championed by Newman's Own Foundation in its desire to continue to hold 100% interest in its LLC, No Limit, LLC, which is a for-profit company that produces and sells food products under the Newman's Own brand name.

Prior to the passing of this law, the excess business holding rule generally prohibited a private foundation from owning more than 20% of a for-profit company. Now a private foundation can hold 100% of a for-profit company based upon the provisions of Internal Revenue Code Section 4943(g). Although there are a number of limitations on who this new law applies to, this change should prove to be a useful planning tool for clients who own businesses and want to include a private foundation as part of their estate plan.

Requirements to Qualify for Section 4943(g):

For a non-profit organization to hold more than 20% of a for-profit organization without triggering excess business holdings penalties, the private foundation must meet the following requirements:

1. The foundation must own 100% of the shares of the for-profit business;
 2. The shares must have been donated to the foundation or acquired in a manner other than by way of a purchase by the foundation;
 3. All net operating income must be donated to the foundation within 120 days of the end of the tax year;
 4. No substantial contributor or family member of the contributor to the foundation can be a director, officer, trustee, manager, employee, or contractor of the business enterprise;
 5. At least a majority of the foundation's board members must be persons that are not directors or officers of the business or family members of a substantial contributor;
 6. The company must not make loans to substantial donors of the foundation.
- These restrictions can impose a significant barrier to estate planning clients who wish to utilize a private foundation to take ownership of one of their businesses upon their passing but can be beneficial in certain circumstances.

In conclusion, the new law provides estate planning attorneys a new tool in advising clients on how to meet their charitable goals while continuing to maintain a profitable business on a going forward basis. This new tool will likely only be applicable to very specific clients due to concerns regarding common control of the business and the foundation, and the requirement that all net operating income must be distributed. Thus, for certain clients who have a profitable business that does not require the retention of net operating income, who do not want to keep control over the foundation and the company within the client's family, and who are comfortable with donating all of the future profits of their business to charity, this new law provides a great estate planning opportunity.



IRS Associate Chief Counsel Provides Advice on 199A De Minimis Threshold: What happens when multiple businesses are conducted under a single entity?

By Brandon Ketron and Alan Gassman



On Nov. 14, an Internal Revenue Service Associate Chief Counsel provided some clarification that could be helpful for practitioners with clients who are eligible for the 20 percent tax deduction on income from qualifying pass-through entities under Internal Revenue Code Section 199A. Her comments underscored the importance of keeping separate books and records when multiple trades or businesses are operated under a single entity.

Taxpayers with income from medical, law and account practices, consulting activities, financial services and other industries referred to under the statute as Specified Service Trades or Businesses (SSTBs) may not take the deduction if the taxpayer's taxable income exceeds \$207,500 for single filers or \$415,000 for married filers.

Many taxpayers were concerned that a small amount of income from one of the above mentioned SSTBs would taint a business that was engaged primarily in non-SSTB activities. For example, many contractors provide consulting services as part of the construction process and questioned whether the income attributable to the consulting services they provide as part of the overall construction process would convert the income of the construction business into a SSTB, or whether the business would have to keep separate books and records to separately track income attributable to the consulting services.

Proposed Regs

Fortunately, the proposed regulations (proposed regs) issued in August 2018 provide for a de minimis exception. The proposed regs state that if the income from a SSTB activity is less than 10 percent (5 percent if annual receipts are greater than \$25 million) of the combined gross receipts of the SSTB and non-SSTB activities, then the business won't be treated as a SSTB, and all of the income will qualify for the 20 percent deduction.

For example, a consultant could join an engineering firm with less than \$25 million in annual receipts, and the income attributable to the consulting activity would qualify for the deduction if the consulting revenue is less than 10 percent of total revenue of the firm.

What Threshold Applies?

A separate question after the proposed regs were released was at what level this de minimis threshold applies. Does the threshold apply at the entity level, meaning that all receipts must be aggregated and all SSTB activities must be combined to see if the 10 percent threshold is satisfied, or does the de minimis threshold apply separately for each trade or business when an entity has multiple trades or businesses?

Keep Separate Books and Records

At the American Institute of CPAs (AICPA) Fall Tax Division Meeting, IRS Associate Chief Counsel of Passthroughs and Special Industries, Holly Porter, stated that this de minimis threshold could apply multiple times under the same entity if separate books and records were kept for each separate trade or business.¹ Practitioners attending the meeting requested that the IRS provide examples for apply the de minimis threshold across multiple trade or businesses under a single entity, but it's unclear what the final regulations may bring.

It may therefore be important to decide whether your clients should keep separate books and records beginning as early as next year when multiple trades or businesses are operated under a single entity and the entity provides ancillary services that could be considered SSTB income.

By strategically separating multiple trades and businesses and maintaining separate books and records, taxpayers can maximize their deduction by allocating what would otherwise be considered SSTB income across multiple de minimis thresholds and potentially qualify for the deduction when they otherwise might not have.

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Section 199A: Triple Net Leases Considered a Trade or Business? Part I

By Alan Gassman and Kelsey Weiss

From Steve Leimberg's Income Tax Planning Email Newsletter Archive Message #161, November 8, 2018:

**Steve Leimberg's Income Tax Planning
Email Newsletter Archive Message #161**

Date:08-Nov-18

Subject: Alan Gassman & Kelsey Weiss - Is it Possible for a Triple Net Lease to be Considered a "Trade or Business" for Section 199A Purposes

"The 2017 Tax Cuts and Jobs Act introduced the new, and problematic, Section 199A to the Internal Revenue Code. Section 199A was designed to provide taxpayers with a 20% deduction for qualified business income earned through qualifying trades or business. This deduction for business owners was added, most likely, in response to the significant tax cut the Act created for large corporations. Unfortunately, the Internal Revenue Code has yet to specifically define 'trades or businesses,' leaving some taxpayers in limbo as to whether they qualify for this deduction.

Instead of supplying taxpayers with a definition, the Proposed Regulations state that a qualifying 'trade or business' must meet the requirements of the Internal Revenue Code Section 162. However, Section 162 does not provide a clear definition either. Section 162 states that expenses can be deducted when they are incurred for a legitimate and active trade or business. Section 199A of the Act simply defines 'trades and businesses' by exclusion. The term excludes 'the trade or business of performing services as an employee and 'specified service' trades or businesses: those involving the performance of services in law, accounting, financial services, and several other enumerated fields, or where the business's principal asset is the reputation or skill of one or more owners or employees.' This definition begs the question: who actually qualifies for the 199A deduction, and where do real estate investors fall into this?

This newsletter will focus on using previous court decisions to define the term 'trade or business' for purposes of determining whether a real estate investor with a triple net lease can qualify for the 199A deduction under the Proposed Regulations."

We close the week with important commentary by **Alan Gassman** and **Kelsey Weiss** that examines whether a triple net lease can be considered a “trade or business” for Section 199A purposes.

Alan Gassman, JD, LL.M is the founding partner of the law firm of **Gassman, Crotty & Denicolo, P.A.** in Clearwater, Florida. Alan is a frequent contributor to [LISI](#) and has authored several books and many articles on Estate and Estate Tax Planning, Trust Planning, Creditor Protection Planning, and associated topics. Most recently, Alan is the co-author of [The Section 199A \(and 1202\) Handbook: The Advisor's Guide to Saving Taxes on Business and Investment](#), with **Brandon Ketron**, **Martin Shenkman**, **Jonathan Blattmachr**, and **Robert Schenck**.

Kelsey Weiss is a law clerk for **Gassman, Crotty & Denicolo, P.A.** and is a student at Stetson College of Law.

Here is their commentary:

EXECUTIVE SUMMARY:

The 2017 Tax Cuts and Jobs Act introduced the new, and problematic, Section 199A to the Internal Revenue Code. Section 199A was designed to provide taxpayers with a 20% deduction for qualified business income earned through qualifying trades or business. This deduction for business owners was added, most likely, in response to the significant tax cut the Act created for large corporations.¹ Unfortunately, the Internal Revenue Code has yet to specifically define “trades or businesses,” leaving some taxpayers in limbo as to whether they qualify for this deduction.

Instead of supplying taxpayers with a definition, the Proposed Regulations state that a qualifying “trade or business” must meet the requirements of the Internal Revenue Code Section 162. However, Section 162 does not provide a clear definition either. Section 162 states that expenses can be deducted when they are incurred for a legitimate and active trade or business. Section 199A of the Act simply defines “trades and businesses” by exclusion. The term excludes “the trade or business of performing services as an employee and ‘specified service’ trades or businesses: those involving the performance of services in law, accounting, financial services, and several other enumerated fields, or where the business's

principal asset is the reputation or skill of one or more owners or employees.” This definition begs the question: who actually qualifies for the 199A deduction? And where do real estate investors fall into this?

This newsletter will focus primarily on using previous court decisions to define the term “trade or business” for purposes of determining whether a real estate investor with a triple net lease can qualify for the 199A deduction under the Proposed Regulations.

FACTS:

The Supreme Court has been faced with the task of defining a “trade or business” in the tax context multiple times over the last century. Going back to 1911, the Court in *Flint v. Stone Tracey* used the Bouvier Dictionary to broadly define a business as, “that which occupies the time, attention and labor of men for the purpose of a livelihood or profit.”ⁱ Then, in 1935 the Supreme Court provided a limitation to the definition by distinguishing between an active trader and an investor.ⁱⁱⁱ In *Snyder v. Commissioner*, the Court determined that an investor seeking to merely increase his personal holdings was not engaged in a trade or business.^{iv} However, Justice Brandeis also stated that a taxpayer who made his livelihood from buying and selling on the stock exchange would be a trade or business.^v This was the first of many instances where the activity level of the taxpayer is a deciding factor in whether the definition of a “trade or business” applies.

Not long after *Snyder*, the Court was faced with two “trade or business” cases in one year centered on estate preservation. In the 1941 *Higgins v. Commissioner* case, the Court determined that a taxpayer managing and preserving his own estate did not qualify as carrying on a business.^{vi} Next, in *City Bank Farmers Trust v. Helvering*, the Court decided that asset conservation and maintenance by way of estate or trust efforts is not a trade or business.^{vii}

These cases highlight the struggle of the Supreme Court in deciding whether a certain activity qualifies as a trade or business without a succinct definition from Congress or its agencies. In its 1987 sentinel case *Commissioner v. Groetzinger*, the Court laid out a definition for what qualifies as a trade or business that is still good law.^{viii} In *Groetzinger*, the Court determined that a full-time gambler who wagered for himself alone

was engaged in a “trade or business” within the meaning of the applicable Internal Revenue Code.^{ix} The Court rejected the previously used ‘goods and services’ test reasoning that almost every activity could potentially satisfy the test leading to litigation over the meaning.^x

The Court held that to be an engaged in a trade or business: (1) the taxpayer’s involvement must be continuous and regular; and (2) the primary purpose of the activity must be for income or profit.^{xi} The Court then cautioned future courts to examine the facts of each case as this is not a test for all situations and highlighted that it is the responsibility of Congress to make changes or revisions to this Court’s interpretation of the definition.^{xii} While it is true that Congress has the ultimate responsibility to define “trade or business” as used in its rules and proposed regulations, they have not done so. Therefore, the best definition available still comes from the Supreme Court in *Groetzinger*.

The Supreme Court, however, only hears a select number of cases, and the majority of disputes related to tax matters are heard by the Tax Court. The Tax Court has held that, beyond the definition provided in *Groetzinger*, the threshold test for deduction of income expenses under Section 162 is whether the primary purpose and intention of the taxpayer was to make a profit.^{xiii} In other words, if a taxpayer loses money by participating in a hobby, the taxpayer cannot receive benefits of income tax deductions by calling the hobby a trade or business.

For example, in *Seebold v. Commissioner*, a married couple decided to breed horses to add to their retirement income.^{xiv} In this case, the court explicitly placed greater weight on the objective factors showing the couple’s intent to profit rather than simply their statement of intent.^{xv} For example, they worked hard to learn the subject area, sought advice from experts in the field, used a veterinarian for the purpose of breeding, and consulted an accountant.^{xvi} Additionally, Mrs. Seebold eventually quit her job to work on the breeding farm full time.^{xvii}

The Tax Court determined that this level of activity met the threshold showing that the primary purpose and intention of the Seebolds was to incur a profit, regardless of the loss they sustained when they first started and the Seebold’s horse breeding qualified as a trade or business.^{xviii} Therefore, in addition to the *Groetzinger* test, taxpayers must also be able to show that the primary purpose and intent of the activity is to incur a

profit. According to the court in *Seebold*, the petitioner bears the burden of proving they meet the threshold. Therefore, a taxpayer must prove that they meet this burden before benefitting from the 199A deduction.

Application to Real Estate

The issue of whether a taxpayer is engaging in a trade or business is an issue of fact that involves analyzing the scope of activities the taxpayer is engaged in, either personally or through an agent. Passive ownership of a rental property will not be enough to qualify as a trade or business, however, active management of such a property historically has been viewed as a trade or business. Because qualifying as a trade or business is based on a question of fact, the line distinguishing passive ownership and active ownership can become blurry.

A typical court, when considering whether a real estate venture qualifies as a trade or business, will evaluate four factors.^{xxix} First, the court will consider the type of property owned and/or managed by the taxpayer (i.e. commercial, residential, condominium, or personal).^{xx} Second, the court will consider the number of properties rented out by the taxpayer.^{xxi} Third, and what seems to be most importantly, the court will consider the day to day involvement of the owner or agent.^{xxii} And finally, the court will consider the type of rental (i.e. triple net lease, traditional lease, short term lease, or long-term lease).^{xxiii}

The Tax Court, in the 1946 case *Hazard v. Commissioner*, ruled that even one single family rental was a trade or business.^{xxiv} The Internal Revenue Service has since adopted the same reasoning and the rule still stands in most jurisdictions.^{xxv} Therefore, it would be reasonable for the IRS to continue to follow the *Hazard* standard with regard to 199A deductions and allow single family, or single property, rentals to qualify as a trade or business. However, much case law has shown that simply renting the property alone is not enough.

In *Neill v. Commissioner*, the 1942 Tax Court ruled that the mere collection of rent without any other activity was not enough to constitute a trade or business.^{xxvi} Additionally, in *Hendrickson v. Commissioner*, the Tax Court ruled that a passive investment in an oil gas well where the owner simply purchased the lease and collected income from it did not qualify as a trade or business.^{xxvii} Therefore, while it is possible for a rental business to

constitute a “trade or business” for the purpose of deductions under Section 162, simply owning the business and collecting money is not enough.

Based on the relevant case law, in order to qualify as engaging in a trade or business, the taxpayer must have some active role in running the rental. For example, in *Schwarcz v. Commissioner*, the Tax Court determined that a landlord owning, managing, and operating apartment buildings was engaging in a trade or business.^{xxviii} Interestingly, the owner could do so through an agent and would still qualify.^{xxix}

In some tax cases not related to the 199A deduction, taxpayers may want to avoid being labeled as a tax or business in order to avoid paying additional taxes as a trade or business. In *Bennett v. Commissioner*, two partners leased equipment to site organizations allowing people to play a form of lottery called Keno under the company name of Lucky Keno.^{xxx} The partners both reported their business income from Lucky but did not report self-employment tax.^{xxxi} The partners argued that they did not have to pay the self-employment tax because Lucky was a passive owner of the equipment and not actively engaged in trade or business.^{xxxii} However, the Tax Court disagreed stating that the partners oversimplified their role.^{xxxiii} Lucky’s name was on all of the Keno advertisements and Lucky controlled the funds and distributed them to the winners, municipalities, the state, and the site organizations.^{xxxiv} Therefore, Lucky was not a passive owner and the partners were required to pay the self-employment tax because they owned a trade or business.^{xxxv}

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Reports of the Death of the Installment Sale (For Many Clients) Are Greatly Exaggerated – The Installment Sale to the OBIT Provides Exceptional Tax Benefits

By Chris Denicolo

A special thanks to Ed Morrow for his writings on this subject.

The Tax Cuts and Jobs Act of 2017 has temporarily increased the estate tax exclusion amount for individuals dying in 2018 to approximately \$11,180,000. Such elevated estate tax exemption amount is scheduled to remain in place until January 1, 2026. The effect of this significant increase in the estate tax exclusion amount is that many clients who had estate tax concerns and who could have benefitted from engaging

in estate tax planning techniques has been reduced dramatically as a result. Nevertheless, clients under the \$11,180,000 threshold (which would be \$22,360,000 for married couples) can reap considerable income tax planning benefits from a widely used estate planning technique – the installment sale to a defective grantor trust.

The conventional installment sale to defective grantor trust involves an individual selling assets to a trust that is considered as owned by the individual under the income tax rules in exchange for a promissory note bearing interest at least the IRS minimum stated applicable federal rate. Because the trust is considered as owned by the individual for federal income tax purposes, no income tax will result from such sale.

The premise of this strategy is to allow the grantor to essentially freeze the value of the assets being sold and to have all future appreciation and income associated with the transferred assets to be held under the trust, outside of the estate tax system.

However, many clients do not have estate tax planning objectives, and might even be put in a worse position if they enter into a conventional installment sale because upon the grantor's death, it is not clear whether the assets in the trust get a step-up in income tax basis under Internal Revenue Code §1014. This "step-up" in income tax basis generally applies where an individual dies owning assets that are included in his or her gross estate for federal estate tax purposes. Any such assets would receive a new income tax basis equivalent to their fair market value upon the grantor's death, which could provide significant income tax benefits if highly appreciated assets are owned by a decedent.

Although some commentators have argued that assets held under a grantor trust upon the grantor's death will also be afforded the step-up in income tax basis under Internal Revenue Code §1014, the IRS has not accepted this position, and there is no definitive authority to support or reject this position. Nevertheless, it is well settled that assets owned by a grantor individually, or otherwise included in his or her estate for federal estate tax purposes will receive a step-up in income tax basis. This includes assets that are subject to a general power of appointment held by the individual. A general power of appointment is the power to appoint assets to the power holder, the power holder's estate, creditors of the power holder, and the creditors of the power holder's estate. The reasoning is that because the power holder has the ability to benefit herself and her estate, she will be considered to be the owner of such assets for federal estate tax purposes, which will cause any assets subject to the power to be entitled to a step-up in basis.

General powers of appointment have become more commonplace in revocable trusts and testamentary estate planning documents with the advent of the \$5,000,000 plus inflation estate tax exclusion amount in 2011. For example, many revocable trust documents now provide the surviving spouse with a general power of appointment over assets held under an "estate tax exempt" bypass trust (a/k/a credit shelter trust) in order to allow the assets under such trust to get a step-up in income tax basis upon the surviving spouse's death where estate tax savings is no longer needed due to the increased exemption levels.

Edwin Morrow has written extensively on the concept of using general powers of appointment under revocable trusts, irrevocable trusts and otherwise integrating such powers of appointment into trust drafting and planning to obtain income tax benefits. A concept developed by Mr. Morrow is the "Optimal Basis Increase Trust" where an older relative or friend of the grantor is made a beneficiary of an irrevocable trust, and is given a testamentary general power of appointment in order to cause a step-up in basis on assets upon the death of the older individual. Such general powers of appointment can be drafted where they are expressly provided to the older individual under the terms of the trust document, they can be bestowed as an independent committee (such as trust protectors) determines in their discretion, or they can be drafted as a formula general power of appointment clause that only applies only to appreciated assets. Therefore, an individual who is under the estate tax exemption levels can sell appreciated assets to a defective grantor trust in exchange for an installment note, where the trust provides an older relative or friend with a general power of appointment upon the individual's death. Upon the older beneficiary's death, the assets in the trust will receive a new, increased basis that can provide income tax savings upon ultimate liquidation of the asset, or an increased depreciation allowance, if the property is depreciable.

The trust document can provide that the beneficiary holding the general power of appointment can assign the assets to or for the benefit of the creditors of his or her estate, and also include the grantor's family (or even

the grantor in certain situations) as potential appointees of the trust assets. The trust can further provide that, if such power of appointment is not exercised by the power holder, then the assets in the trust will be held for the grantor's family.

If the power holder exercises the power of appointment, the power holder will likely be considered the grantor of the trust containing assets subject to the power of appointment, which would trigger income tax on any outstanding amounts payable under the promissory note owed back to the grantor, which are in excess of the greater of \$5,000 or 5% of the value of the trust assets.

With the increased exemption amount, using the traditional installment sale with the new twist of giving an older individual a testamentary general power of appointment in order to cause a step-up in basis can provide significant income tax benefits, and should be considered for clients that have highly appreciated assets.

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[Alan's Forbes Blog](#)

Hazards of Direct or Indirect Real Estate Ownership Under an IRA.



The tax benefits of owning real estate in an IRA plan certainly seem appealing at first glance.

Under a self-directed IRA, you can control your investments, and the tax benefits of owning real estate in an IRA plan certainly seem appealing. In a Roth IRA, contributions are made with after-tax dollars, and the

earnings on your investments grow tax-free, and can later be withdrawn tax-free. Under a traditional IRA, contributions are tax deductible up to \$5,600 each year, and the investments there-under grow tax-free and are not taxed until they are withdrawn years down the road.

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 *Leimberg 60 -Second Planner* below reports:

In PLR 201843007, the IRS ruled on the tax consequences of a judicial modification of an irrevocable trust. Bob Keebler reports. The text of the IRS ruling can be found at

<https://www.irs.gov/pub/irs-wd/201843007.pdf>.
[Click here to hear the podcast](#)

This PLR addressed a judicial modification of a trust to fix the Crummey withdrawal power.

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Humor

Happy Thanksgiving from Gassman, Crotty & Denicolo, P.A.

by Alan Gassman
(without the assistance of Tina Arvin, Carl Jenne, and Colonel Sanders)

Every Thanksgiving
We focus on gratitude,
Gathering with family,
Enjoying a holiday interlude.

We must first thank our readers,
Then our writers and our staff,
And for those who are still working,
Collecting time and a half.

Looking forward to the future,
Of Thursday Reports to print,
The next improved edition,
After our readers comment (and relent).

And thanks to the turkeys,
Who put their necks on the line,
To allow us to promote the Thursday Report,
By this holiday poem and line.

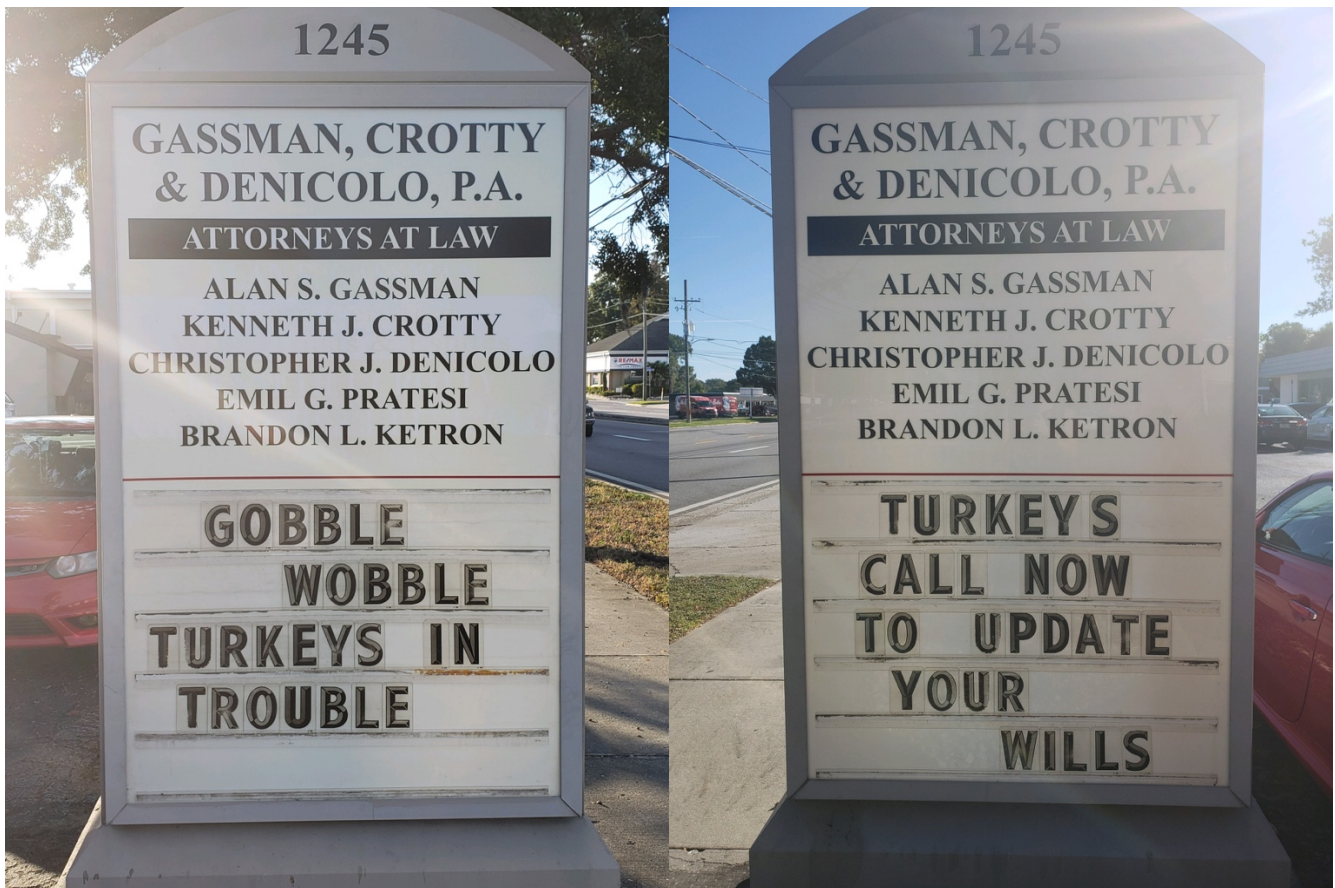
Let us not forget to thank Col. Sanders
As we carve the turkey with cheer,
For the chicken we enjoy
The rest of the year.

Let's welcome the holiday season
With joy and with mirth,
Whatever that is,
And for all that its worth.

May you have a great meal,
With those you hold close,
May your holiday season
Include many a warm toast.

And remember that no gift
Is complete without love,
Unless it has value
Of \$50 or above.

We thank all our staff,
With great warmth and affection,
Better that they are off on Friday,
Than having a staff infection.





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Upcoming Events



Alan Gassman and The Pinellas County Medical Association Present Two Outstanding Continuing Education and Legal, Tax and Financial Knowledge Enhancement Programs

What You Need to Know About... Webinar Series:

We will explore a variety of estate planning and tax related issues including asset protection, estate planning, life insurance issues and more!

December:

- Definitions and Fundamentals of Tax and Accounting for Physicians with **Troy Kimbrough** - December 4, 2018
- What are the Most Important Things a Physician Needs to Know in Regards to Personal and Practice Financial Planning?: Fully Fund Your Retirement Plans with **Mike Jensen** - December 11, 2018
- A Personal Insurance Coverage Checklist with **Chuck Wasson** - December 18, 2018

January:

- Business and Personal Law 101 for Physicians and Their Advisors with **Alan Gassman** - January 8, 2019
- Increasing Your Practice's Income by Applying 3 Billing and Coding Principals with **Renee Kelly** - January 15, 2019
- What are the Most Important Things a Physician Needs to Know in Regards to Personal and Practice Financial Planning?: Protecting Your Assets From Malpractice Predators and Financial Creditors with **Mike Jensen** and **Troy Kimbrough** - January 22, 2019
- The Medical Practice Insurance and Risk Exposure Checklist with **Chuck Wasson** - January 29, 2019

February:

- What a Good Billing and Coding Consultant Can Do For Your Practice with **Renee Kelly** - February 5, 2019
- Limiting Liability by Using Medical Practice Companies and Other Entities with **Alan Gassman** - February 12, 2019
- Employee Practices, Exposures, and Insurances with **Chuck Wasson** and **Alan Gassman** - February 19, 2019
- What are the Most Important Things a Physician Needs to Know in Regards to Personal and Practice Financial Planning?: Have a Full Financial Analysis Done by a Team of Professionals with **Mike Jensen** - February 26, 2019

March:

- Year End Tax Planning, If It Isn't Too Late with **Troy Kimbrough** - March 5, 2019
- Anti Kickback and Related Laws, Don't Be Stark Naked with **Alan Gassman** and **Renee Kelly** - March 12, 2019
- What are the Most Important Things a Physician Needs to Know in Regards to Personal and Practice Financial Planning?: How to Invest in Stocks, Bonds, Mutual Funds and Institutional Money Managers with **Mike Jensen** - March 19, 2019
- What are the Most Important Things a Physician Needs to Know in Regards to Personal and Practice Financial Planning?: Action Plan to Achieve Financial and Retirement Goals with **Mike Jensen** - March 26, 2019

April:

- How Practice Financial Statements Work, and What they can tell you with **Troy Kimbrough** - April 2, 2019
- Cornflakes and Estate Planning Mistakes with **Alan Gassman** and **Mike Jensen** - April 9, 2019
- Coding Mistakes Often Seen in Primary Care Offices with **Renee Kelly** - April 16, 2019
- How malpractice insurance works and options you may not know about with **Chuck Wasson** - April 23, 2019

Webinar series free for PCMA members. Non-members can make a donation of \$295 to the PCMA Fund for unlimited access to these webinars, PowerPoint presentations and other useful materials.

Pinellas County Medical Association's 9th Annual Continuing Medical Education Cruise 4 Night Western Caribbean Cruise Conference - March 14 - 18, 2019

10 AMA PRA Category 1 Credits TM

PROGRAM TOPICS:

- The Biggest Mistakes Physicians Make As Owners and Non-Owners in Medical Practices - **Alan Gassman, JD, LLM**
- Update on Marijuana Recommendations - **Dr. Lora Brown**
- Current Management of Sepsis - **Dr. Tim Carlson**
- Top 10 reasons why your practice loses Money/and Payor Denials - **Renee Kelly, Medical / Practice Consultant**
- Planning in the Age of Tax Reform - **Troy Kimbrough, CPA, Gregory Sharer & Stuart**
- Medical Errors - **Dr. Paula O. Pell** (2hr)
- 'Not tonight dear' Undiagnosed Chronic Pelvic Pain - **Dr. Meena Jain**
- Latest update on the use of Stem Cell - **Dr. Tracie Leonhardt**
- Cyber Security, are you and your practice and mobile devices protected?

COURSE FEE:

\$350 Members
\$450 Non-Members



TARGET AUDIENCE:

Physicians, Physician Assistants,
Office Administrators & Ancillary Medical Staff

Spouses are welcome to attend tax and legal sessions on cruise.

PCMA webinars can be shared with spouses, office managers and professional advisors.

EVENT	DATE/TIME	LOCATION	DESC.	REGISTRATION
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236	Estate, Medical Practice, Retirement, Tax, Insurance and Buy/Sell Planning – The Earlier You Start, the Sooner You Will Be Secure	Contact: Agassman@gassmanpa.com
Pinellas County Medical Association Webinar Series	January 8, 2019, 12:00 PM	Gotowebinar	Business and Personal Law 101 for Physicians and Their Advisors.	Please Click HERE
53rd Annual Heckerling Institute on Estate Planning	January 14-18, 2019 At Orlando World Center Marriott Resort & Convention Center	Monday, January 14-Alan's Meet and Greet at Bloomberg Tax Booth--See Alan and get a free copy of <i>Gassman and Markham on Florida Creditor Protection</i> , which is newly added to the Bloomberg Tax family of books. Tuesday, January 15, See Alan and Jerry Hesch at the Veralitics booth to discuss life insurance planning.		Please Click HERE
Maui Mastermind Scale and Grow Rich	January 25-27, 2019	Hilton Irvine-Orange County Airport	Preparing Your Company for Sale and Why	Please Click HERE .
Johns Hopkins All Children's Foundation 2019 Estate, Tax, Legal and Financial Planning Seminar	February 7, 2019	TBD	Alan will be serving as moderator and speaking	Contact: Agassman@gassmanpa.com
Pinellas County Medical Association Webinar Series	February 12, 2019, 12:00 PM	Gotowebinar	Limiting Liability by Using Medical Practice Companies and Other Entities	Please Click HERE

Pinellas County Medical Association Webinar Series	February 19, 2019, 12:00 PM	Gotowebinar	Employee Practices, Exposures and Insurances with Chuk Wasson.	Please Click HERE
New Jersey Bar Association Conferences	March 11, 2019, 9:00am and 1:00PM 	5 hours for 2 separate conferences: A.M. Conference: What New Jersey (and other) Lawyers Need to Know About Florida Law and Trust and Estate Planning for Their Florida Based Clients <i>and Business Law You Need to Know for Your Florida Client</i> P.M. Conference: What to do for Estate Planning Clients that No Longer Have to Worry About Estate Tax with Martin Shenkman		Contact: Agassman@gassmanpa.com
Pinellas County Medical Association Webinar Series	March 12, 2019, 12:00 PM	Gotowebinar	Anti-Kickback and Related Laws with Renee Kelly	Please Click HERE
9th Annual Pinellas County Medical Association Continuing Medical Education Cruise	March 14-18, 2019 	Biggest Mistakes Physicians Make in Medical Practice ...also small workshops as well as free 20 minute curb consultations.		FOR INFORMATION AND RESERVATIONS CONTACT JEN BOLL 727-526-1571 / 1-800-422-0711 Or Anessa Raiford at araiford@pinellascma.org Please contact Alan Gassman at agassman@gassmanpa.com for webinar series information.
Pinellas County Medical Association Webinar Series	April 9, 2019, 12:00 PM	Gotowebinar	Cornflakes and Estate Planning Mistakes with Mike Jensen	Please Click HERE
Florida Bar Association -Nuts and Bolts of Florida Creditor Protection	April 18, 2019, 10:00 am – 2:00 PM at Stetson Tampa Law Center	<i>Primary Florida and Federal Creditor Protection Laws, A Closer Look at Florida and Federal Creditor Exemption Laws and Planning And Putting it All Together with Leslie Share</i>		Contact: Agassman@gassmanpa.com

	 Leslie Share	Attendees will receive a complimentary copy of <i>Gassman & Markham on Florida and Federal Asset Protection Law</i>		
Maui Mastermind Financial Pillar Super Course	June 22-23, 2019 at Hilton-Atlanta Airport	Crucial Legal and Tax Principles for Accumulating Wealth		Please Click HERE
45th Annual Notre Dame Tax Institute	October 26-27, 2019	South Bend, Indiana	TBD	Contact: Agassman@gassmanpa.com
Maui Mastermind Wealth Summit	November 3-8, 2019	Wailea Beach Resort, Maui	Essential Aspects and Decisions for Your Remarkable Financial and business Future	Please Click HERE

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Or check out our many free webinars on Youtube by searching "Youtube Gassman Webinars."

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All prices are reduced 25%-30% but as always, LISI members get a special discount. [Click this link](#) to learn more: **LSI's Black Friday spectacular**

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