Section 199A IRS Final Regulations: Deductions, Limitations, Complexities and Opportunities for Pass-Through Entities
Determining Qualified Business Income, Loss Carryover, Reformation Considerations and More

THURSDAY, OCTOBER 10, 2019
1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:

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Requirements of Section 199A, Defining “Qualified Business Income,” and Calculating the Deduction

Dina A. Wiesen, Deloitte Tax LLP
dwiesen@deloitte.com
October 10, 2019
Agenda

Overview of section 199A, final regulations, and other new guidance

Safe harbor for rental real estate enterprise as a trade or business

Determination of W-2 wages

Determination of unadjusted basis immediately after acquisition of qualified property (UBIA)

Specified service trades or businesses (SSTBs)

Aggregation rules (including entity-level aggregation)

Definition of qualified business income (QBI)
Overview of section 199A, final regulations, and other new guidance
Overview of Section 199A
Background

- Section 199A generally provides a deduction of up to 20 percent of qualified business income from a domestic business operated as a sole proprietorship or through a partnership, S corporation, trust, or estate, subject to certain significant limitations (the “section 199A deduction”). This provision applies to taxable years beginning after 2017 and before 2026.

- NOTE: For purposes of section 199A, “individual” includes reference to a trust (other than a grantor trust) or an estate.

- Congress enacted section 199A on December 22, 2017 as part of the 2017 Tax Act (Pub. L. 115-97), and later was amended by the Consolidated Appropriations Act (CAA), 2018-(H.R. 1625) enacted on March 23, 2018.

- On August 8, 2018, the Treasury Department (“Treasury”) and the Internal Revenue Service (IRS) released proposed regulations under section 199A (the “2018 proposed regulations”).

- On January 18, 2019, Treasury and the IRS released final section 199A regulations, new proposed regulations under section 199A, and other guidance.

- On February 8, 2019, the government published new proposed regulations and a corrected version of the final section 199A regulations in the Federal Register.
New Section 199A Guidance

Overview of Section 199A

• On January 18, 2019, Treasury and the IRS released:

  − **Final section 199A regulations**, including a number of clarifying changes and new aggregation rules for relevant passthrough entities (RPEs);

    ◦ Generally applicable to taxable years ending after the date the final regulations are published in the Federal Register. Note retroactive effective date for certain anti-abuse rules.

    ◦ However, **for taxable years ending in calendar year 2018**, final regulations provide that taxpayers may rely on either the final regulations, in their entirety, or the 2018 proposed regulations, in their entirety.

    ◦ **Note**: The final regulations as published in the Federal Register include corrections to:
      − Comments in the Preamble addressing the definition of a trade or business
      − The definition of a disregarded entity (DRE)
      − Various unadjusted basis immediately after acquisition of qualified property (“UBIA”) provisions

  − **New proposed regulations** covering:

    ◦ The treatment of previously suspended losses that constitute qualified business income (QBI), and

    ◦ The determination of the section 199A deduction for taxpayers that hold interests in regulated investment companies, charitable remainder and other split-interest trusts;

  − **Rev. Proc. 2019-38**, which announces a safe harbor to treat certain rental real estate enterprises as a trade or business; and

Overview of Section 199A
Combined Qualified Business Income (QBI)

• Under section 199A, an individual, estate or trust taxpayer generally may deduct the sum of -
  – An amount for each trade or business, equal to the lesser of –
    ◦ 20 percent of the taxpayer’s QBI with respect to the trade or business, or
    ◦ The greater of the following limitations –
      – 50 percent of the W–2 wages with respect to the trade or business, or
      – the sum of 25 percent of the W–2 wages with respect to the qualified trade or business, plus 2.5 percent of the UBIA.
  – 20 percent of aggregate qualified REIT dividends and qualified publicly traded partnership income.

• However, the section 199A deduction is limited to 20% of the amount by which taxable income exceeds net capital gain (the “overall limitation”)
  – The final regulations clarify that the definition of “net capital gain” for this purpose means the excess of net long-term capital gain for the taxable year over the net short-term capital loss for such year plus any qualified dividend income.
QT B and SST B threshold application

**QT B**

Deduction available subject to overall limit

Phase-in wage and basis limit, and overall limit also applies

Deduction available subject to wage and basis limit and overall limit

\[ \text{Taxable income as determined without regard to the deduction} \rightarrow \text{end of phase-in} \]

End of phase-in

- $207,500 (single/other filers) or
- $415,000 (MFJ)

**SST B**

Deduction available subject to overall limit

Phase-in SST B limit, wage and basis limit, and overall limit also applies

Deduction NOT available

Threshold amount*

- $157,500 (single/other filers) or
- $315,000 (MFJ)

End of phase-in

- $207,500 (single/other filers) or
- $415,000 (MFJ)

* For taxable years beginning after 2018, the threshold amount will be adjusted for inflation (using a section 1(f)(3) cost-of-living adjustment).
Determination of W-2 wages
Determination of W-2 Wages

Overview

• Under Treas. Reg. § 1.199A-2(b), there is a three-step process for determining the W-2 wages paid with respect to a trade or business that are properly allocable to QBI –
  − Each individual or RPE must determine its total W-2 wages paid for the taxable year.
  − Each individual or RPE must allocate its W-2 wages between or among one or more trades or business.
  − Each individual or RPE must determine the amount of such wages with respect to each trade or business, which are allocable to the QBI of the trade or business (or aggregated trade or business).

• Amounts treated as W-2 wages for a taxable year cannot be treated as W-2 wages for any other taxable year or by more than one trade or business (or aggregated trade or business). See Treas. Reg. § 1.199A-2(b)(5).

• Section 199A(f)(1)(A) provides that a partner’s or shareholder’s allocable share of W-2 wages from a partnership or S corporation must be determined in the same manner as the partner’s or shareholder’s allocable share of wage expenses.
Determination of W-2 Wages
Example: Section 3504 Agent

• LLC is the common law employer of Employees, and LLC designates Payroll Agent to be the payor and reporter of Form W-2 for its Employees

• For purposes of section 199A, LLC may take into account W-2 wages reported by Payroll Agent
Determination of W-2 Wages
Example: Certified Professional Employer Organization (CPEO)

• X Inc. leases employees from a CPEO
• The CPEO pays wages and issues Form W-2 to employees of X Inc.
• Where X Inc. is the common law employer, for purposes of section 199A, X Inc. may take into account W-2 wages reported by CPEO
Determination of W-2 Wages
Why is the W-2 Wages Determination Complex?

Issues clients face:
• Complex business operating models
• Sharing of employees and costs
• Desire to ease administrative burdens
• Federal and state employment tax requirements

Key considerations for W-2 wage determination:
• Who is the common law employer?
• What types of third-payor arrangements are in place?
• Are there cost sharing arrangements in place?
• Are there arrangements to share the services of employees?
• Who controls the payment of wages?
• Is the reporting structure compliant from an employment tax perspective?
Determination of unadjusted basis immediately after acquisition qualified property (UBIA)
UBIA

Generally

• Unadjusted basis immediately after acquisition (UBIA) generally is the basis on the placed in service date as determined under section 1012 without regard to certain adjustments

• Special rules for property acquired in nonrecognition transactions and for like-kind exchanges and involuntary conversions

• Special rules for partnership basis adjustments under section 743(b)

• Pass-through allocations of UBIA and other provisions
Safe harbor for rental real estate enterprise as a trade or business


Rev. Proc. 2019-38 provides a safe harbor under which certain rental real estate enterprises will be treated as trades or businesses solely for section 199A and, therefore, the rental income will be QBI. The safe harbor was proposed in Notice 2019-07.

What is a “rental real estate enterprise”?

- An interest in real property held for the production of rents.
  - May include multiple properties
- A taxpayer must treat each property held for the production of rents as a separate enterprise or treat all similar properties held for the production of rents as a single enterprise.
- Commercial and residential real estate may not be part of the same enterprise. Mixed use property may be bifurcated.
- The individual or relevant pass-through entity (RPE) relying on the safe harbor must hold the interest directly or through a disregarded entity.

What real estate is excluded from the safe harbor?

- Real estate used as a personal residence by the taxpayer (including the owner or beneficiary of a RPE or trust relying on the safe harbor)
- Triple-net leased real estate

NOTE: Failure to satisfy the requirements of the safe harbor does not preclude a taxpayer from otherwise establishing that a rental real estate enterprise is a trade or business for section 199A.
Rental real estate enterprise safe harbor
Rev. Proc. 2019-38 requirements

**During the taxable year:**

- Maintain separate books and records for each rental real estate enterprise.
- For rental real estate enterprises in existence for *less than* four years,
  - Perform 250 or more hours of “rental services” per year with respect to the rental enterprise.
- For rental real estate enterprises in existence for *at least* four years,
  - Perform 250 or more hours of “rental services” with respect to the rental real estate enterprise during any three of the five consecutive taxable years that end with the taxable year.
- Taxpayer must also maintain contemporaneous records showing safe harbor compliance.
  - Effective for taxable years ending after 12/31/2017.

**“Rental Services”**

- May be conducted by owners or by employees, agents, and/or independent contractors of the owners.
- Includes:
  - Advertising to rent or lease the real estate.
  - Negotiating and executing leases.
  - Verifying information contained in prospective tenant applications.
  - Collection of rent.
  - Daily operation, maintenance, and repair of the property, including the purchase of materials and supplies.
  - Management of the real estate.
  - Supervision of employees and independent agents.
- Does not include:
  - Financial and investment management activities (e.g., procuring property, studying and reviewing financial statements, etc.)
Rental real estate enterprise safe harbor (cont.)

Procedural requirements for application of safe harbor:

• A taxpayer or RPE must include a **statement attached to the return** on which it claims the section 199A deduction or passes through section 199A information. The statement must describe all rental real estate properties included in each rental real estate enterprise and describing rental real estate properties acquired and disposed during the taxable year and include a representation that all requirements of Rev. Proc. 2019-38 have been satisfied.

• The statement must be **signed by the taxpayer**, or an authorized representative of an eligible taxpayer or RPE, which states:

> “Under **penalties of perjury**, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete.”

• The individual or individuals who sign must have **personal knowledge** of the facts and circumstances related to the statement.
Special rule for renting to a related person
Final regulations under section 199A

• Solely for purposes of section 199A, the rental or licensing of tangible or intangible property to a related trade or business is treated as a trade or business if the rental or licensing activity and the other trade or business are commonly controlled.

The final regulations clarify that this exception only applies to situations in which the related party, as determined under sections 267(b) or 707(b), is an individual or an RPE which is commonly controlled under Treas. Reg. § 1.199A-4(b)(1)(i).
Specified service trades or businesses (SSTBs)
Specified service trade or business
General definitions

• Unless a taxpayer’s income is below the threshold amount, a qualified trade or business does not include a specified service trade or business (SSTB). The final regulations provide additional guidance on definitions for SSTBs.

• An **SSTB** means any trade or business involving the performance of services in one of more of the SSTB fields provided by the final regulations.

• If a trade or business conducted by a RPE is an SSTB, this limitation applies to any direct or indirect individual owners of the business, regardless of whether the owner is passive or participated in any specified service activity.

• **NOTE**: Performing services as an employee is not a qualified trade or business for purposes of section 199A.
In response to comments, the final regulations provide additional guidance for the definition of specific SSTB fields [1], including businesses that could potentially be considered to involve the fields of health, consulting, athletics, financial services, and dealing.

Any trade or business where the principal asset is the “reputation or skill” of employees or owners [2]

[1] The rules for determining whether a business is an SSTB within the meaning of section 199A(d)(2) apply solely for purposes of section 199A and therefore, may not be taken into account for purposes of applying any other provision of law, except to the extent that another provision expressly refers to section 199A(d).

[2] The final regulations leave unchanged the 2018 proposed rule limiting the meaning of the “reputation or skill” clause to fact patterns in which an individual or RPE is engaged in the trade or business of receiving income from endorsements, the licensing of an individual’s likeness or features, and appearance fees.
Specified service trade or business
Examples of specific guidance provided by the final regulations

<table>
<thead>
<tr>
<th>QTB</th>
<th>SSTB</th>
</tr>
</thead>
<tbody>
<tr>
<td>architecture or engineering services</td>
<td>veterinary services</td>
</tr>
<tr>
<td>broadcasting or disseminating video or audio of professional sports or performing arts</td>
<td>stock brokerage</td>
</tr>
<tr>
<td>retail banking, including taking deposits or making loans</td>
<td>medical services, including those not directly provided to patients</td>
</tr>
<tr>
<td>insurance brokerage</td>
<td>financial services, including arranging lending transactions</td>
</tr>
<tr>
<td>payment processing &amp; billing services</td>
<td>consulting services</td>
</tr>
<tr>
<td>real property management</td>
<td>investment management</td>
</tr>
<tr>
<td></td>
<td>sports teams</td>
</tr>
<tr>
<td>pharmaceuticals or medical devices</td>
<td>veterinarian services</td>
</tr>
<tr>
<td>operators of emergency care centers, urgent care, surgical centers</td>
<td>dealing in securities, commodities, or partnership interests</td>
</tr>
<tr>
<td>lab services with no proximity to patients</td>
<td>financial services, including arranging lending transactions</td>
</tr>
<tr>
<td>health clubs &amp; spas</td>
<td>investment banking</td>
</tr>
<tr>
<td>consulting that is embedded or ancillary to the sale of goods</td>
<td>stock brokerage</td>
</tr>
</tbody>
</table>
The “de minimis rule”

A trade or business (determined before the application of the aggregation rules) is NOT an SSTB if:

• Its gross receipts in a taxable year are $25M or less and less than 10% of its gross receipts is attributable to the performance of services in an SSTB, or

• Its gross receipts in a taxable year are more than $25M and less than 5% of its gross receipts is attributable to the performance of services in an SSTB.

Clarifications in the final regulations:

• There is a “cliff effect” when gross receipts from services in an SSTB field exceed the threshold.

• If an individual (or RPE) has more than one trade or business, the presence of specified service activity in one of those trades or business will not cause the individual’s (or RPE’s) other trades or businesses to be considered SSTBs (except to the extent that the rules in regarding services or property provided to an SSTB apply).
Multiple trades or businesses

While Treasury and the IRS declined to provide specific guidance as to the definition of a trade or business under section 162, the Preamble acknowledges that an individual or an entity can conduct more than one trade or business. It further states that whether a single entity has multiple trades or businesses is a factual determination, but that Treasury and the IRS believe that multiple trades or businesses generally will not exist within an entity unless different methods of accounting could be used for each trade or business under Treas. Reg. § 1.446-1(d).

Treas. Reg. § 1.446-1(d)(2) provides that no trade or business will be considered separate and distinct unless a complete separable set of books and records is kept for such trade or business.

The commentary in the Preamble is not addressed in the final regulations.
Specified service trade or business

Anti-abuse rule

• The final regulations removed what was known as the “80 percent rule” under the proposed regulations.

• The final regulations provide that if a trade or business provides property or services to an SSTB and there is a 50 percent or more common ownership of the trade or business, the portion of the trade or business providing property services to the 50 percent or more commonly-owned SSTB will be treated as a separate SSTB with respect to related parties.

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[1] PropCo owns an office building and leases 30% of the office space to other unrelated companies.

[2] AdminCo only provides administrative services to the law firm.
Specified service trade or business
Anti-abuse rule – Former employee presumption

There is a rebuttable presumption that a former employee providing substantially the same services in a different capacity is still an employee for section 199A purposes.[1]

[1] In response to the comments, the final regulations provided a three-year lookback rule with respect the rebuttable presumption.

[2] Because they were never employees of Law Firm, the new associates are not presumed to be in the trade or business of providing services as an employee. However, there would only be a section 199A benefit for individuals under the SSTB phase-in range.
Individual and Entity Aggregation rules
How to determine which trades or businesses MAY be aggregated
RPEs, individuals, estates and trusts can aggregate trades or businesses

Ownership

Does the same person or group of persons, directly or by attribution, own 50% or more of each trade or business to be aggregated?

Clarifications:
• Sections 267(b) and 707(b) attribution rules apply to the ownership test
• A C corporation may constitute a part of the ownership group

Taxable year

Does such ownership exist for the majority of the applicable taxable year, including the last day of the taxable year?

Are all items attributable to each trade or business to be aggregated reported on returns with the same taxable year?

SSTB

Are any of the trades or businesses to be aggregated an SSTB?

Necessary factors

Do the trades or businesses exhibit at least 2 of the following 3 factors?

1. Products, property, or services provided are the same or customarily provided together

2. Shared facilities or shared significant centralized business elements

3. Operated in coordination with, or reliance on, one or more of the businesses in the aggregated group
Entity-Level Aggregation

• The final regulations permit an individual, trust, estate and an RPE to aggregate. An RPE may aggregate trades or businesses it operates directly or through lower-tier RPEs.

• An individual, trust, estate or upper-tier RPE may not separate the aggregated trade or business of a lower-tier RPE, but instead must maintain the lower-tier RPE’s aggregation; but,

• An individual, trust, estate or upper-tier RPE may aggregate additional trades or businesses with the lower-tier RPE’s aggregation if all of the aggregation requirements are met including the ownership test.

• Treas. Reg. § 1.199A-4(c)(4)(i) requires that, for each taxable year, RPEs (including each RPE in a tiered structure) attach a statement to each owner’s Schedule K-1 identifying each aggregated trade or business. The statement must contain:
  − A description of each trade or business; the name and EIN of each entity in which a trade or business is operated; information identifying any trade or business that was formed, ceased operations, was acquired, or was disposed of during the taxable year; information identifying any aggregated trade or business of an RPE in which the RPE holds an ownership interest; and such other information as the Commissioner may require in forms, instructions, or other published guidance.
  − IRS Publication 535 provides Schedule B, which expands upon this requirement.
Entity-Level Aggregation – Example

• **A owns:**
  – 75% of a residential apartment building
  – 80% of RPE, LLC

• **RPE, LLC owns:**
  – 80% of the interests in a residential condominium building
  – 80% of the interests in a residential apartment building

• **Additional facts:**
  – RPE, LLC’s residential condominium building and residential apartment building operations share centralized back office functions and management
  – A’s residential apartment building and RPE, LLC’s residential condominium and apartment building operate in coordination with each other in renting apartments to tenants
Analysis

- RPE, LLC may aggregate its residential condominium and apartment building operations
  - Ownership test: Met as RPE, LLC owns more than 50% of each trade or business
  - Necessary factors test: Met because the businesses are of the same type of property and share centralized back office functions and management
- Note that, if RPE, LLC aggregates its residential condominium and apartment building operations, A may not disaggregate those operations
- However, A may also add its residential apartment building operations to RPE, LLC’s aggregated residential condominium and apartment building operations
  - Ownership test: Met as A owns more than 50% of each trade or business
  - Necessary factors test: Met as the businesses operate in coordination with each other

coordinate renting apartments to tenants

centralized back office functions & management
Aggregation reporting requirements

- The final regulations:
  - Provide that a taxpayer’s failure to aggregate trades or businesses will not be considered to be an aggregation under this rule; that is, later aggregation is permitted.
  - Do not generally allow for an initial aggregation to be made on an amended return as this would allow aggregation decisions to be made with the benefit of hindsight.
    - However, final regulations allow taxpayers to amend initial aggregation on amended returns for only the 2018 taxable year.
Definition of qualified business income (QBI)
## Domestic Trade or Business Items – What’s Included in QBI?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ordinary gains and losses</strong></td>
<td><strong>Capital gains or losses</strong></td>
</tr>
<tr>
<td>Losses previously disallowed, suspended, or limited in taxable years ending <strong>after 12/31/2017</strong>, but currently allowed [1]</td>
<td>Current year losses that are disallowed, suspended, limited, or carried over and losses disallowed, suspended, or limited in years ending <strong>before 1/1/2018</strong> [1]</td>
</tr>
<tr>
<td>Wages <strong>paid</strong> by an S corporation to a shareholder as reasonable compensation; will reduce QBI of the payer.</td>
<td>Wages <strong>received</strong> by an S corporation shareholder as reasonable compensation are not QBI to the recipient.</td>
</tr>
<tr>
<td><strong>Deductions</strong> for guaranteed payments and other service payments to partner under section 707(a); will reduce QBI of the payer.</td>
<td>Income from guaranteed payments and other service payments to partners under section 707(a) are not QBI to the recipient.</td>
</tr>
<tr>
<td>Guaranteed payments for the use of capital (“GPUC”) reduce QBI of the payer, but are QBI to the recipient only to extent properly allocable to a trade or business of the recipient (narrow exception).</td>
<td>GPUC income that is not properly allocable to a trade or business of the recipient.</td>
</tr>
<tr>
<td>Section 481 adjustments arising in taxable years ending after <strong>12/31/2017</strong></td>
<td><strong>Dividends or dividend equivalents</strong></td>
</tr>
<tr>
<td>Deductible portion of tax on self-employment income under section 164(f), self-employed health insurance deduction under section 162(l), and the deduction for contributions to qualified retirement plans under section 404</td>
<td>Non-business interest income</td>
</tr>
<tr>
<td>[1] Such losses will be utilized on a first-in, first-out (FIFO) basis.</td>
<td>Effectively connected income that is not attributable to a trade or business</td>
</tr>
<tr>
<td></td>
<td>Section 954 transactions, including commodities, foreign exchange and notional principal contracts</td>
</tr>
</tbody>
</table>
IRC Section 199A
Planning Techniques and Opportunities Under Final Administrative Guidance

Presented as a portion of:

Section 199A IRS Final Regulations: Deductions, Limitations, Complexities and Opportunities for Pass-Through Entities
A Strafford Publications, Inc. Webinar
October 10, 2019 1:00-2:50p.m. EDT
These slides were prepared and presented in conjunction with “Requirements of Section 199A, Defining ‘Qualified Business Income,’ and Calculating the Deduction” by Dina A. Wiesen, Deloitte Tax LLP, dwiesen@deloitte.com (“Wiesen Slides”). The reader is advised to refer to Ms. Wiesen’s presentation for additional background and details, many of which will be assumed in the discussion and examples that follow.

Thanks to Cindy L. Grossman, Giordani, Swanger, and Ripp LLP, cgrossman@gsrlawfirm.com for the use of some of her prior materials.
• “Deduction” can be utilized only by an “individual taxpayer” (including non-grantor trusts and estates)

• Deduction only allowed for trade or business (“ToB”) income (must be domestic ToB)

• Deduction applies to only certain types of qualified ToB income
  ➢ GOOD - “Qualified Business Income” (“QBI”)
  ➢ BAD – “Specified Service Trade or Business” (“SSTB”) income (at least after certain income thresholds are reached)

➢ An employee is not in a ToB with respect to their employment

• QBI can be earned:
  ➢ By a sole proprietors (no entity), or
  ➢ Via allocations from a relevant passthrough entity (“RPE”) (partnership, S-corporation)
Deduction is limited by a variety of other restrictions ("guardrails")

- Cannot exceed 50% of wages paid in the ToB
- Alternate guardrail: Cannot exceed portion of wages PLUS portion of basis of qualified tangible property ("QTP") used in the ToB
  - 25% of wages in the TOB and
  - 2.5% “Unadjusted Basis Immediately after Acquisition” ("UBIA") of QTP
- Overall limitation - 20% of taxable income less net capital gain
- Anti-abuse rules

Guardrails may not apply:

- Do not apply at all up to certain income thresholds
- Are phased-in up to certain income ceilings
- Same as with SSTB

Exception: Overall limitation always applies
With the basics in mind – change them where you can

Ensure that there is a ToB
- Particularly important in real estate rental industry
- Consider change in owner business model (e.g. change from employee to independent contractor)
- Some things will never be a ToB (ordinary passive investments, employee services)
- “Passive” activity rules IRC Sec. 469 are not relevant

If an SSTB:
- Manipulate annual income levels (defer income; accelerate deductions)
- Separate non-SSTB trade or businesses (crack and pack)
Maximizing the Deduction – In General (cont.)

• Maximize the guardrails:
  ➢ Maximize wages of the ToB
    o Create wages payable to ToB owners (choice of entity concerns)
    o Consider change in business model for ToB workers – convert independent contractors to employees
  ➢ Maximize QTP used in ToB (purchase instead of lease)

• Avoid “orphaned” guardrails
  ➢ Particularly where multiple ToBs are operated
  ➢ Ensure wages are matched and allocated to QBI
  ➢ Ensure QTP matched and allocated to QBI
  ➢ Consider aggregation of TOBs where possible
  ➢ Plan to avoid anti-abuse rules
• Issue: Sec. 199A is set to expire in 2025
  ➢ As is the case with many TCJA individual provisions
  ➢ Political winds do not bode well for continued costly tax expenditures

• Deduction planning may:
  ➢ Become useless
  ➢ Become detrimental
  ➢ Be irreversible or at least costly to reverse (e.g. S Corp election)

• Planning costs will be “sunk”

• Silver lining: As a tax advisor “get it while the gettin’s good”
Some More Caveats: Forget Everything You Knew – Question Everything You Think You Know

- Sec. 199A Deduction is complex
- Old ideas of choice-of-entity must be re-examined
- Choice-of-entity is an combined legal and tax issue
- Deep and holistic understanding of self-employment tax issues is required
- Deduction planning ideas & structures
  - Must be “business” tested
  - Must be quantified
    - Excel is your friend
    - If you can’t run the numbers, get somebody who can
• Issue: SSTB income is not QBI under certain income levels
  o Single filer “Threshold” - $157,500 (phase out up to $207,500 “Ceiling”)
  o Joint “Threshold” - $315,000 (phase out up to $415,000 “Ceiling”)

• Plan: Reduce income to increase or allow Deduction
  o Increase retirement plan contributions
  o Fully-fund Health Savings Accounts (“HSA”)
  o Capture all legitimate business expenses
  o Consider other loss creating investments (but be aware of passive loss limitations)

• Typical income planning
  o Accelerate deductions, Defer income
  o Bunch income, bunch deductions
• CPA Jill
  - Married, filing jointly, stay-at-home spouse
  - Earns taxable income of $450,000 from practice.
  - Apparently no Deduction because practice is SSTB and income exceeds Ceiling of $415,000
  - Has family health plan

• How to (sensibly) reduce taxable income to $315,000?
  - Implement SEP and fund with $56,000
  - Fund HSA with $7,000 (2019 maximum)
  - Purchase new IT and office equipment for $15,000 and utilizes TCJA 100% bonus depreciation
  - Invest in oil & gas working interest in amount of $77,000
    - Assume 75% of amount is intangible drilling cost which is 100% deductible immediately ($58,000 in year incurred)
    - Working interest is non-passive under IRC Sec. 469 rules

• Result:
  - Jill now has Sec. 199A deduction of $63,000
  - Tax savings of $20,160 (assumed 32% marginal income tax rate)
Old maxim: Maximizing retirement plan contributions is always sound planning

Deduction may change analysis

- Most plan contributions reduce QBI and thus Deduction
- Maximizing plan contributions now may not be wise in order to maximize overall economic result

New maxim:

- The value of incremental plan contributions may be less than value of foregoing contribution, thus allowing utilization of Deduction against QBI
- Another take: Maximizing contribution may cause “lost” Deduction, which is overall negative result
• Jack and Jill, married couple, need to evaluate retirement plan contribution
  ➢ They have $200,000 total income
  ➢ $100,000 of income is QBI from their ToB
  ➢ Retirement plan options:
    o $12,000 in traditional IRA contributions, or
    o Maximize SEP contribution of $18,587
  ➢ Assume marginal income tax rate of 24%

• Calculation of retirement plan alternatives:
  ➢ IRA contribution of $12,000, saves $2,880 in tax
    o IRS contribution does not reduce QBI
    o Deduction of $20,000 results and tax savings of $4,800
    o Total tax savings = $7,680
  ➢ SEP contribution of $18,587, saves $4,526 in tax
    o SEP contribution reduces QBI, so Deduction of $16,229, and tax savings of $3,895
    o Total tax savings = $8,421 ($741 greater than under IRA scenario)
Jack and Jill’s takeaways:

➢ Is $741 increased tax savings from SEP contribution worth it?

➢ Marginal tax savings rate on the $6,587 additional SEP contribution is only approximately 10%

➢ BUT, the tax rate on SEP contributions, when distributed at retirement will likely be much higher than 10%

➢ Jack and Jill might be better served to:
  o Forego the SEP; contribute to the IRA
  o Invest $6,587 in taxable account which produces capital gain
  o Could reinvest that amount in their own business which might someday create capital gain upon exit

➢ Note: This phenomenon generally only applies at lower income levels
• Issue: Jack, single individual, is an employee
  ➢ Earns wages of $450,000
  ➢ No Deduction since wages received as an employee are not QBI
  ➢ If wages could be converted to QBI from IC services:
    o Possible tax savings of $30,000+ (assuming non-SSTB)
    o BUT, additional employment taxes to Jack

• Can Jack convert to IC status?
  ➢ Will service recipient allow change? Service recipient may have their own guardrail concerns
  ➢ Are services of a type likely to be non-SSTB?
  ➢ Will worker classification issues permit conversion?
    o 20 factor common law test will apply
    o Also, regulatory anti-abuse rule: If an employee converts to an IC but provides substantially the same services as when they were an employee, there is a *presumption* that the worker is an employee.

• Classification can be changed in certain circumstances:
  ➢ Presumption can be overcome
  ➢ Significant restructuring of worker/service recipient relationship is required
• Issue:
  o A ToB with little or no wage expense (or QTP) will have limited Deduction (beyond Thresholds)
  o Amounts paid to ICs do not increase wage guardrail

• Can taxpayer convert ICs to employees?
  o Worker classification principles - Very few if any restrictions on doing so
  o No anti-abuse rules under the Sec. 199A regulations
  o BUT, change in business model to employee workforce:
    o Raises host of other issues
      ✓ Increased costs (and liability) associated with employees could outstrip tax savings
      ✓ Increased liability associated with employees
      ✓ Costs could outstrip tax savings - “Tax tail wagging dog” issue
      ✓ Can “never” go back (at least not without complexity)
Effect of Choice of Entity
- QBI can include pass-through ToB income from partnership or S corporation
  - Above the Thresholds however,
    ✓ ToB must have guardrails (wages, QTP) of some significant amount
    ✓ Otherwise, lack of guardrails could reduce or eliminate Deduction
  - Wages cannot be paid by a partnership to partners (partner not an employee)
  - “Guaranteed payments” to partners are not wages (even though intended to serve same economic purpose)
- S corporation shareholders can pay themselves wages

Takeaways:
- Partnership may not be best choice of entity
- Particularly so where ToB otherwise has limited wage base or QTP base (few employees; assets)
- Professional service businesses (almost always) tend to favor S corporation
Jack and Jill own an architecture firm, JJ
- Organized as a tax partnership
- JJ has QBI of $800,000
- QBI considers wage expense of $200,000.
- Deduction is limited to $100,000:
  - QBI calculation - $800,000 x 20% = $160,000
  - Wages guardrail calculation - $200,000 x 50% = $100,000
  - “Orphaned” Deduction of $60,000

Planning to increase Deduction:
- JJ makes S-election
- J and J each pay themselves wage salaries of $75,000 each
- Result:
  - Deduction is now $130,000
    - QBI calculation $650,000 x 20% = $130,000
    - Wage guardrail calculation $350,000 x 50% = $175,000
  - Additional self-employment tax benefit
    - Self-employment taxes apply to all of the former partnership’s pass-through income
    - Self-employment taxes do not apply to S-corporation non-wage allocations / distributions
    - But, S corporations are subject to “reasonable compensation” requirement for shareholder-employee salaries.
    - Assume reasonable compensation is $125,000 each? Deduction now only $110,000.
• Issues:

➢ QBI may produce lower Deduction than guardrails would otherwise permit (see prior example - $65,000 “lost” Deduction)

➢ Manage the QBI limitation by increasing QBI

• Opportunities

➢ “Bunch” income or expenses into particular years
  ○ Particularly useful for SSTBs

➢ Change recurring expenditures into one-time expenditures
  ○ Purchase equipment that was previously leased for ToB
  ○ Purchase real estate in which ToB operates

➢ Reduce leverage
Consider JJ architecture firm example above:
- $65,000 “lost” deduction
- Wage guardrail allowed greater Deduction than actual QBI

Solution:
- Assume JJ was leasing equipment for $100,000 total each year.
- Assume they change business capital model as follows:
  - Purchase equipment in Year 1
  - Possibly write-off entire cost in Year 1 (TCJA 100% depreciation rules)
- In year 2 and succeeding years equipment still utilized
  - QBI will increased by $100,000 per year
  - Deduction increased by $20,000 (total deduction of $150,000) per year
• Pre-regulations “Crack and Pack” strategy (do not try at home):
  ➢ Separate SSTB from non-SSTB business (duh!)
  ➢ Non-SSTB business would presumably create QBI thus qualify for Deduction
  ➢ SSTB business would be ineligible for Deduction (at least to the extent Threshold and Ceilings exceeded)

• Pre-regulations example:
  ➢ Dermatologist Janet, single, earns more than $415,000 from her practice (an SSTB)
  ➢ Janet also has a retail component of that business which sells skincare products and cosmetics
  ➢ Janet separates the retail business component from the medical practice
  ➢ QBI from retail is $200,000, and it pays total wages of $100,000
    o Deduction is 40,000 (lesser $200,000 x 20% = $40,000 & $100,000 x 50%)
    o Janet could presumably take $40,000 Deduction for her retail business
  ➢ Hint: Even though Jan’s medical practice earns only $215,000 her total taxable income meets or exceeds the Ceiling
• If a non-SSTB business provides services or property to an SSTB, it may be recast as an SSTB, at least in part

• Rules:
  ➢ An SSTB will include a portion of any “tested” business that
    o Has 50% or more common ownership with an SSTB
    o AND, which provides any services or property to the SSTB
  ➢ Ownership is determined by applying the attribution rules of IRC Sec. 267(b) or 707(b)
    o Includes attribution from and to partnerships
    o Includes attribution among trusts and their grantors and beneficiaries,
    o Includes family attribution among siblings, spouses, ancestors, and descendants
  ➢ The 50% common ownership rules tests the combined ownership of each person who owns an interest in the SSTB and the tested entity
  ➢ Only a portion of the tested business’s income will be treated as SSTB
    o The portion is proportionate to the amount of the tested businesses’ services or property provided to the SSTB
    o Under the proposed regulations an additional 80% test applied; the tested business would be entirely treated as an SSTB if at least 80% of its services and property were provide to the SSTB
  ➢ De minimis rules under final regulations:
    o Certain de minimis SSTB activity in an otherwise qualified ToB can be ignored
Change Business Model – Cracking and Packing (after the regulations) - Examples

• Example 1:
  ➢ Doctors A, B, C, and D own:
    o 25% each of Medical Practice ABCD in which they all practice
    o 25% each of Management Company B
    o Management Company B provides services exclusively to ABCD
  ➢ Result: B is an SSTB in its entirety with respect to all doctors

• Example 2:
  ➢ Doctors A, B, C, and D own:
    o 100% each of their own medical practices, AMP, BMP, CMP, and DMP
    o 25% each of Management Company B
    o Management Company B provides services exclusively to all four of the practices
  ➢ Result: B is wholly a non-SSTB with respect to all doctors

• Example 3:
  ➢ Ownership:
    o Doctors A and B own medical practice ABP
    o Doctors C and D each of their own medical practices, CMP and DMP
    o All of the doctors own 25% each of Management Company B
  ➢ Result:
    o B is an SSTB with respect to A and B to the extent of B’s provision of services and property to ABP
    o B is not an SSTB with respect to C and D

• Post-proposed regulations planning: avoid 50% common ownership
Whether real estate rental is a ToB is frequently debated / litigated under tax law. Sec. 199A further implicates this issue.


➢ Provides a safe-harbor allowing taxpayer to treat rental real estate as ToB

➢ Aggregation:
  o Allows aggregation of individual real estate interests held directly or through disregarded entities into rental real estate enterprises ("RREE’s")
  o Cannot aggregate commercial with residential property
  o Aggregation facilitates qualifying for safe harbor

➢ Safe harbor:
  o Requires expending 250 hours on certain qualifying services per year for each RREE during a look-back period
  o Qualifying services pertain to rental, management, and maintenance of RREE; purely financial analysis, etc. is not qualified
  o Services can be performed by independent contractors
  o Test must be met each of 4 years for RREE’s existing less than 4 years;
  o Test must be met 3 out of 5 year years for other RREE’s
• Takeaways

➢ Personal residence and triple-net lease do not qualify for safe-harbor testing

➢ Only a safe-harbor – taxpayer can otherwise establish ToB status of rental real estate activity under general jurisprudence

➢ Compare analysis of treatment under IRC Sec. 469
  o Almost always treated as a passive activity
  o Usually not an active ToB (exception for real estate professionals)

➢ Compare safe-harbor aggregation and aggregation of ToBs for other Deduction purposes (see Wiesen Slides 32-33)
• Facts:
  ➢ Jim owns interests in five real estate activities as follows:
  ➢ Properties A and B
    o Single family residences owned outright by Jim and held for rental.
    o Jim spends 150 hours per property, per year, performing real estate services with respect to A and B.
  ➢ Property C
    o A convenience store owned by a Partnership C of which Jim owns 50%.
    o C lease terms are other than triple-net.
    o Jim is a passive investor in Partnership C and performs no services with respect to this property.
  ➢ Property D
    o Mixed-use 70% residential/30% commercial building held in Partnership D of which he owns 33%.
    o All of the residences are listed with AirBnb and are typically rented on a short-term basis.
    o Jim handles all of the residential tenant rentals via AirBnB on behalf of Partnership D and spends 100 hours a year doing so.
  ➢ Property E is a commercial office building held by Partnership E
    o Jim owns 5% of this partnership.
    o Property E is rented on a triple-net basis by the partnership.
• RREE aggregation options for Jim under the safe-harbor
  ➢ Jim can treat each of the five property interests as separate RREEs.
    o Unfortunately, the safe harbor would not be available to him with respect to any of the properties owned outright (A and B)
    o He does not perform 250 hours of service with respect to any property
    o The safe-harbor is not available Jim in any event with respect properties C, D, and E (not owned outright or through disregard)
  ➢ Since Jim owns properties A and B directly, he can aggregate them
    o Further, they are both residential properties
    o In which case he would qualify for the safe-harbor (combined 300 hours of service)
  ➢ Property C is a commercial property, but Jim does not own the property outright or through a disregarded entity, so the safe-harbor is irrelevant as to him.
    o If Partnership C performs the requisite number of hours of service directly or through independent contracts, however, the partnership itself might qualify for the safe-harbor.
    o In that case, Jim’s allocation of income from the partnership would be QBI.
    o Jim himself could be the person that performs the requisite services.
    o Even if the partnership itself does not meet the safe-harbor, Jim still might be able to argue that it is a ToB
• RREE aggregation options for Jim under the safe-harbor (cont.)
  ➢ As to property D, the safe-harbor is irrelevant to Jim
    o Does not own the property outright or through a disregarded entity.
    o Partnership D, however, can determine whether it qualifies under the safe-harbor, and, in doing so, can consider the services performed by Jim.
    o Further, under the safe-harbor, the partnership can either treat the mixed-use property as a single RREE or can treat the mixed-use property as two separate RREE’s (one commercial, one residential).
    o If and to the extent Partnership D qualifies for the safe-harbor, Jim can treat his allocation of income from the partnership as QBI.
    o Query: Is the residential portion of the property more like a hotel? Is a hotel residential property or commercial property?
  ➢ Property E is a triple-net lease property
    o Thus, cannot qualify for the safe-harbor at the partnership level.
    o Partnership E might still argue that the rental activity is a ToB under general relevant jurisprudence.
Martha is a renowned and award-winning celebrity chef

She enjoys several different sources of income based on her skills and celebrity status

Owns interests directly and through partnerships in several restaurants around the U.S. and some abroad ($600,000 income)*

➢ Some of bear her name in some fashion ($300,000 income)
➢ With regard to all of them, she provides menu and presentation plans and ideas.

Appears at various for-profit and charitable events, and receives appearance fee ($200,000 income)

Appears on syndicated television shows and receives appearance fees

➢ Sometimes cooking related shows ($50,000 income)
➢ Other times, personal background oriented shows ($50,000 income)
➢ In one instance, appeared on a game show as a celebrity contestant ($50,000 income)

Martha actually prepares meals from time to time for which she is paid separate fee

➢ Sometimes at the various restaurants in which she has an ownership interest ($200,000 income)
➢ Other times at high-profile events where she caters the food ($100,000 income)

She endorses various products for which she is paid endorsement fees ($200,000 income)

Martha’s business structure:

➢ She has a single LLC, disregarded entity, through which she owns all of her various restaurant interests.
➢ She has 1 employee whom she pays $200,000 in wages
➢ She utilizes 2 independent contractors routinely and pays them $200,000 each
➢ She utilizes large numbers of independent contractors on a one-off basis at her various appearances, including particularly where she caters large events; total payments $500,000 annually

*all amounts are annual and net of expenses except employees and independent contractors.
### The Celebrity Chef – Separation of SSTB from non-SSTB

#### Income Statement

<table>
<thead>
<tr>
<th>Source</th>
<th>Amount</th>
<th>Subtotals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Income</strong></td>
<td></td>
<td><strong>1,550,000</strong></td>
</tr>
<tr>
<td>Named Restaurants – Owned</td>
<td>500,000</td>
<td></td>
</tr>
<tr>
<td>Unnamed Restaurants – Owned</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td>Appearance Fees (non-restaurant)</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td>Cooking TV show</td>
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<td></td>
</tr>
<tr>
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<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Game TV show</td>
<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Working chef appearances – owned</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td>Working chef appearances – catering</td>
<td>100,000</td>
<td></td>
</tr>
<tr>
<td>Endorsements</td>
<td>200,000</td>
<td><strong>1,550,000</strong></td>
</tr>
<tr>
<td><strong>Total Expenses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wages</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td>“Captured” ICs</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td>Miscellaneous ICs</td>
<td>300,000</td>
<td><strong>700,000</strong></td>
</tr>
<tr>
<td><strong>Net Income</strong></td>
<td><strong>850,000</strong></td>
<td></td>
</tr>
</tbody>
</table>
## The Celebrity Chef – Separation of SSTB from non-SSTB – Deduction Analysis

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<tr>
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</tr>
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### Issue

<table>
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<tr>
<th>Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is Deduction if all non-SSTB income?</td>
</tr>
</tbody>
</table>

(Assume income tax rate of 40%)

Lesser of:

- \(850,000 \times 20\% = 170,000\)
- \(200,000 \times 50\% = 100,000\)

Problem: “Orphaned” 70,000 deduction

### How to Increase Deduction?

Convert Captured ICs to employees: Result: Guardrail increased by 100,000 but maximum Deduction increase allowed is 70,000

Question: Does increased Deduction value of 28,000, offset cost and liability of converting ICs?

Convert Martha’s LLC to S corporation and pay Martha wages (don’t convert other ICs).

Result: Probably works, given range of income types (but be aware of reasonable compensation)

**BUT – the “real” Problem?**

See next slide.
## The Celebrity Chef – Separation of SSTB from non-SSTB – Deduction Analysis (SSTB Issue)

<table>
<thead>
<tr>
<th>Source</th>
<th>Amount</th>
<th>SSTB</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Named Restaurants – Owned</td>
<td>500,000</td>
<td>Probably not, although it is possible that some portion of the income is attributable to Martha’s celebrity status</td>
</tr>
<tr>
<td>Unnamed Restaurants – Owned</td>
<td>200,000</td>
<td>Probably not SSTB</td>
</tr>
<tr>
<td>Appearance Fees (non-restaurant)</td>
<td>200,000</td>
<td>Yes, SSTB</td>
</tr>
<tr>
<td>Cooking TV show</td>
<td>50,000</td>
<td>Probably SSTB, but does it matter if she’s touting her restaurants?</td>
</tr>
<tr>
<td>Background TV show</td>
<td>50,000</td>
<td>Almost certainly SSTB</td>
</tr>
<tr>
<td>Game TV show</td>
<td>50,000</td>
<td>Almost certainly SSTB</td>
</tr>
<tr>
<td>Working chef appearances – owned restaurants</td>
<td>200,000</td>
<td>Close call. Perhaps unnamed restaurant appearances are SSTB because he otherwise is not being compensated</td>
</tr>
<tr>
<td>Working chef appearances – catering</td>
<td>100,000</td>
<td>In these cases, she is being compensated for the product she produces. Does it matter that some attendees probably came strictly because she was there!</td>
</tr>
<tr>
<td>Endorsements</td>
<td>200,000</td>
<td>Yes, SSTB, no question</td>
</tr>
</tbody>
</table>

### Analysis

#### Issue

<table>
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</tr>
</thead>
<tbody>
<tr>
<td>Is some income SSTB income?</td>
</tr>
<tr>
<td>Most certainly. SSTB includes business where the principal asset is the reputation or skill of one or more of its employees or owners</td>
</tr>
<tr>
<td>Which categories of Martha’s income are SSTB income?</td>
</tr>
<tr>
<td>See analysis at left.</td>
</tr>
<tr>
<td>Does it matter that Martha has SSTB and non-SSTB income in same entity (or in no entity)?</td>
</tr>
<tr>
<td>This implicates the issue of maintaining at least “separable” books for the different businesses</td>
</tr>
<tr>
<td>Does it matter that Martha has clearly SSTB businesses into a separate entity</td>
</tr>
<tr>
<td>Perhaps Martha should separate her clearly SSTB businesses into a separate entity</td>
</tr>
<tr>
<td>Does it matter that Martha has clearly separate a portion of her interest as being SSTB</td>
</tr>
<tr>
<td>Perhaps with named restaurants in which she owns an interest, she should clearly separate a portion of her interest as being SSTB</td>
</tr>
<tr>
<td>Further planning: Create entity that holds her celebrity reputation. That entity receives pure SSTB income (endorsements, TV appearances, etc.). That entity could license her likeness to the owned, restaurants particularly the named ones, to clarify separation between SSTBs and non-SSTBs</td>
</tr>
</tbody>
</table>
• Self-Employment Income Taxes
  ➢ The Deduction does not decrease employment or self-employment tax base
  ➢ Such taxes are probably payable on all QBI from pass-through business structures, except:
    o Real estate rental income
    o S corporation non-wage allocations and distributions
  ➢ Also, the portion of self-employment taxes that are deductible will reduce QBI
• Substantial understatement penalty enhanced for taxpayer who uses Deduction
  ➢ Normal penalty: Substantial understatement of tax normally occurs where the understatement exceeds greater of
    o (1) 10% of the tax required to be shown, or
    o (2) $5,000.
  ➢ New penalty: Threshold (1) is lowered to 5% of the tax shown if any Deduction is taken (no matter how small)

• Planning issues:
  ➢ Take due care when determining and calculating the Deduction
  ➢ In some cases, take steps to avoid the Deduction where the tax savings are less than possible penalty.
  ➢ Query: Is the Deduction mandatory if the taxpayer qualifies for it?
IRC Sec. 280E denies tax deductions for non-cost of goods sold expenses paid or incurred pursuant to trafficking in controlled substances

➢ Cannabis is still a controlled substances (Sched I and II Controlled Substances Act)
➢ The Deduction is neither “paid” nor “incurred” by a taxpayer

Can cannabis business claim the Deduction?

➢ Cannabis businesses (such as dispensaries and growers) are not specifically listed as an ineligible trade or business under the final regulations
➢ Sec. 199A was intended, in part, to foster fairness between C corporations and pass-through entities
  o C corporations - 21% marginal rate
  o Pass-through entity owners up to 37% marginal rate (but 29.6% after the Deduction)
➢ If a cannabis business operating as a C corporation is taxed at the 21% rate - why shouldn’t an owner of a pass-through entity be taxed at a lower rate as well?

The Deduction is not claimed at the entity level but on the owner’s personal tax return.

➢ Not clear if IRC Sec. 280E applies only at the business level, or whether it should be applied again at the pass-through owner’s level
➢ Be aware of more stringent substantial underpayment penalty
• Issue: For Deduction purposes
  ➢ Each entity is generally analyzed separately for QBI, wages, QTP
  ➢ Taxpayer with multiple entities may have mismatch of QBI with wage and QTP guardrails
  ➢ One business has significant QBI, but not enough wages or QTP, other business has excess wages or QTP

• Regulations provide an aggregation rule to ameliorate this
  ➢ Businesses meeting certain requirements can be tested for Deduction collectively
  ➢ Aggregation may result in favorable combination of QBI, wages, and QTP

• Aggregation is made at the election of the taxpayer
  ➢ Owners of a business do not need to make the same aggregation decision
  ➢ Aggregation election cannot generally be reversed - care must be taken to make sure appropriate businesses are aggregated
Businesses may only be aggregated if

- The same person or persons, directly or indirectly, own 50% or more of each business (attribution rules apply) for majority of the taxable year
- All items attributable to each business are reported on tax returns having the same taxable year
- None of the businesses is an SSTB, and:
- Businesses must meet 2 out of 3 of
  - Must provide products and services that are the same or are customarily offered together
  - Must share facilities or significant centralized business elements (such as personnel, accounting, legal, manufacturing, purchasing, human resources, or IT resources)
  - Must be “operated in coordination with, or reliance upon, one or more businesses in the aggregated group” (such as supply chain relationships)