

# Recent Developments in Federal Income Taxation

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## **Mylan, Inc. v. Commissioner,**

**156 T.C. No. 10 (4/27/21)**

***Outline: item B.1, page 7***

- The taxpayer was a manufacturer of brand-name and generic drugs.
- The taxpayer sought FDA approval of generic drugs by submitting Abbreviated New Drug Applications (ANDAs).
- As required by the ANDA process, the taxpayer:
  - Certified to the FDA that existing patents on the drugs were invalid or would not be infringed by the sale or use of the generic version of the drug, and
  - Sent notice letters to the holders of the patents informing them of the certification.
- Issues: (1) were legal expenses incurred to prepare the notice letters capital expenditures? (2) were legal expenses incurred to defend patent infringement suits brought in response to the notice letters capital expenditures?
- Held: (1) Yes. The legal expenses facilitated acquisition of an intangible (an FDA-approved ANDA); (2) No. The legal expenses are a cost incurred to protect business profits, not to defend or perfect title.

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**Deduction of Costs Paid with PPP Loan Proceeds**  
**2020-21 I.R.B. 837 (5/1/20)**  
***Outline: item D.2, page 12***

- Federally-backed loans made to businesses under the Paycheck Protection Program (PPP) must be used to fund payroll and certain other expenses.
- Businesses that use the loans in this manner can apply to have the loans forgiven.
- CARES Act § 1106(i) provides that any income arising from having PPP loans forgiven is excluded from gross income.
- Issue: can a business that has a PPP loan forgiven deduct expenses funded with the loan proceeds?
- Notice 2020-32: No. Section 265 precludes a deduction.
  - Section 265(a)(1): disallows a deduction for “any amount otherwise allowable as a deduction which is allocable to one or more classes of income other than interest wholly exempt from the taxes imposed by this subtitle.”

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**Deduction of Costs Paid with PPP Loan Proceeds**  
**2020-21 I.R.B. 837 (5/1/20)**  
***Outline: item D.2.c, page 14***

- Taxpayer Certainty and Disaster Tax Relief Act (12/27/20):
  - Legislatively changes the result in Notice 2020-32
    - “no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income [of the forgiveness of a PPP loan]”
  - In the case of partnerships and subchapter S corporations:
    - Any amount forgiven is treated as tax-exempt income
    - This has the effect of providing a basis increase to the partners or shareholders.
  - Applies retroactively as if included in the CARES Act.
- Weird aspect? See Rev. Proc. 2021-20, item d, page 14 (can deduct 2020 expenses on 2021 return).

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**100% Deduction of Restaurant Business Meals**  
***Outline: item D.3, page 15***

- Taxpayer Certainty and Disaster Tax Relief Act of 2020.
  - Part of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260, enacted on December 27, 2020.
- Amends § 274(n)(2)
  - Provides exceptions to normal 50 percent limitation on deducting business meals
  - Legislation adds a new exception:
    - Can deduct 100% of the cost of food or beverages provided by a restaurant paid or incurred before January 1, 2023
    - Applies to amounts paid or incurred after December 31, 2020.
- Notice 2021-25, 2021-17 I.R.B. 1118 (4/8/21).
  - A restaurant is “a business that prepares and sells food or beverages to retail customers for immediate consumption, regardless of whether the food or beverages are consumed on the business’s premises.”
  - Your favorite food truck and street vendors are “restaurants,” but Whole Foods is not. Caterers that don’t operate restaurants? Who knows? <sup>5</sup>

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**Notice 2021-49, 2021-34 I.R.B. 316 (8/4/21)**  
**Employee Retention Credit**  
***Outline: item F.4, page 21***

- This notice provides guidance on the employee retention credit first enacted in the CARES Act (2020), modified by the Taxpayer Certainty and Disaster Tax Relief Act (2020), and extended by the American Rescue Plan (2021).
- The notice provides guidance on several important issues, including:
  - The definition of a “full-time employee” for purposes of the employee retention credit.
  - Whether cash tips can be treated as qualified wages.
  - Whether wages paid to an employee who owns more than 50 percent (majority owner) or to the spouse of a majority owner may be treated as qualified wages.
- Note: infrastructure bill eliminated the credit for last 3 months of 2021 (Oct.-Dec.). <sup>6</sup>

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