The BEAT Proposed Regulations: Use of Common Law Doctrines

*By William Skinner**

With its new reach, the Base Erosion and Anti-Abuse Tax ("BEAT") under Section 59A has now come into sharp focus for many large corporate taxpayers, particularly in light of the phase in of the 10% BEAT rate for taxable years beginning in 2019. While labeled an "inbound provision," the BEAT may apply most harshly to U.S. based multinational corporations. This is because of the adverse treatment under the BEAT rules of U.S. tax attributes, such as net operating loss ("NOL") carryovers and foreign tax credits ("FTCs") for foreign taxes imposed on foreign source income. Many corporate taxpayers who previously sheltered regular tax liability with NOLs or FTCs may find themselves facing a BEAT liability. Taxpayers engaged in services or other industries with primarily "below-the-line" deductions also are likely to be hit hard by the BEAT.

In December 2018, the IRS and Treasury issued proposed regulations on the BEAT. Although the proposed regulations contain a few unfavorable surprises, they also are helpful in providing clear guidance on several BEAT interpretive questions. As with most of the Tax Reform-related regulatory projects, the proposed regulations are intended to be effective as of the first year of BEAT's applicability, which is for taxable years beginning after January 1, 2018. In light of the relatively clear guidance provided by the BEAT Proposed Regulations, taxpayers can now begin planning in earnest to mitigate potential BEAT exposure. Several areas of key issues that face taxpayers and require interpretation are set out below.

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Use of Common Law Doctrines

One area left open for consideration by the Proposed Regulations is the treatment of various shared expenses or pooled revenue of the U.S. corporation and foreign affiliates. For example, assume that a foreign affiliate pays third-party expenses and then embeds the reimbursement for this expense to the U.S. subsidiary in an intercompany fee. For example, in the pharmaceuticals sector, a foreign entity in the group may pay third-party clinical testing expenses directly for the benefit of a U.S. affiliate. As another example, a foreign parent or affiliate might pay for informational technology, supplies and other third-party costs that benefit the group and seek reimbursement for part of that expense from a

WILLIAM SKINNER is a tax partner in Fenwick & West LLP's Silicon Valley office, focusing on international tax planning and corporate taxation.

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U.S. affiliate. From a regular tax perspective, the taxpayer may not have cared whether the payment by the U.S. subsidiary to its foreign affiliate was characterized as a direct reimbursement of the third-party expense or a separate intercompany charge deductible to the U.S. subsidiary and includible in income by the foreign affiliate. For BEAT purposes, however, such a distinction makes a major difference in whether or not such expenses are included in the U.S. subsidiary's base erosion payments. Analogous questions also arise on the revenue side in determining, for example, whether a global services agreement executed by the U.S. company and its foreign affiliates establishes a prime contractor–subcontractor relationship or rather an agreement to directly share revenue from the third-party customer.

The BEAT Proposed Regulations do not directly address such questions, deferring instead to the common law doctrines such as assignment of income, the reimbursement doctrine, and conduit case law. As noted in the Preamble, the characterization of such arrangements has other tax effects, so that Treasury and IRS concluded that it was inappropriate to provide a special characterization for BEAT purposes only. The character of a transaction as a separate payment or conduit for third-party revenue or expense—a critical distinction for BEAT purposes—will turn on general common law principles.

As others have noted in the context of qualified cost-sharing arrangements, Reg. §1.482-7(j)(3) seems to provide favorable treatment of cost-sharing transaction payments by deeming each payor to have incurred the expenses at the location where the work was performed. CST payments received by the payor of intangible development costs (IDCs) are deemed to be a reduction of its deductible payments. As the IRS advised in connection with the 1995 cost-sharing regulations, "R&E cost-sharing payments are not income to the recipient, but reduce the amount of deductible R&E expense of the recipient subject to allocation. … [A] CFC in a cost-sharing arrangement *directly incurs and deducts* a portion of the section 174 R&E expenses."[1]

Outside the specialized regulations for qualified R&D cost-sharing, taxpayers seeking to reduce their base erosion payments will need to dust off a mass of old and sometimes varied case law.

One area outside BEAT where the reimbursement doctrine has previously been an area of focus is where one party reimburses another party for an expense that is non-deductible for U.S. federal income tax purposes, such as employee meal and entertainment subject to Code Sec. 274 (hereafter, "M&E expense").

In two cases, the Tax Court and Eighth Circuit addressed the proper assignment of the tax detriment of M&E expense in the context of employee leasing arrangements. In the cases, one company, the leasing company, hired truck drivers and was responsible for their payroll, including reimbursement of employee *per diems* and other M&E expense. The leasing company then contracted with a trucking company to provide the drivers to it on a full-time basis in return for a fee that provided the leasing company a profit on its costs. At issue was whether the trucking company or leasing company was subject to the Code Sec. 274(n) limitation on deduction of M&E expense. In *Beech Trucking Co., Inc.*,[2] the Tax Court held that application of the Code Sec. 274(n) depended on which party was the common law employer of the drivers who incurred the M&E expenses. The Tax Court concluded in *Beech Trucking* that the trucking company was the common law employer, which accordingly bore the tax detriment of the M&E expense, while the leasing company was effectively treated as a conduit for payment of the M&E expense.

In a subsequent case, *Transport Labor Contract/Leasing, Inc.*,[3] the Tax Court again held that the Code Sec. 274(n) limitation applied to the common law employer, but in this case found that the leasing company filled that role. As a result, the leasing company was whipsawed by including the portion of the service fee that related to M&E in gross income, while being limited in its deduction of the reimbursed expense. On appeal, however, the Eighth Circuit reversed. The Eighth Circuit held that the leasing company's contract with the trucking company was a *bona fide* reimbursement arrangement that shifted the incidence of the Code Sec. 274(n) limitation to the trucking company, stressing "there is a difference between compensating a vendor for its services, and reimbursing the vendor for a specific expense incurred in providing those services." Facts the Eighth Circuit cited in this determination were that the trucking company set the drivers' wages and *per-diem* rates for M&E before services were rendered and that the leasing company's invoice segregated amounts for driver compensation and *per-diem* reimbursements. The court noted that expense reimbursement arrangements allow for some flexibility as to how the arrangement is documented.

Finally, in Rev. Rul. 2008-23, the IRS revised its position on M&E reimbursements in addressing three employee leasing situations. The revised positions give significant credence to the form of an expense reimbursement arrangement. In situation No. 1, the client pays the leasing company a lump sum periodically, with no itemized statement of wages as compared to M&E

reimbursements. In this case, the leasing company bears the M&E expense, and the client is viewed as paying a service fee. In situations 2 and 3, the client was viewed as reimbursing the expenses of the leasing company where the underlying reimbursed expenses are itemized to the client either directly by the driver or by the leasing company. In situation No. 2, this result obtains even though the client makes a lump sum payment to the leasing company, and receives a statement of the M&E expenses after payment. In all situations, the leasing company charges the client a fee that includes a profit element on the salary, driver M&E expenses and other expenses of the leasing company.

Similar weight was given to the form of the transaction between related parties in TAM 9237003. There, the Service addressed service charges between a U.S. Corporation and its Foreign Parent for employee travel and related M&E expenses under Code Sec. 274. Where employees of the U.S. subsidiary traveled to Foreign Parent, the U.S. subsidiary charged Foreign Parent a service fee that included a separate statement and accounting for employee travel and M&E expense. Conversely, where Foreign Parent employees traveled to the United States, the Foreign Parent invoiced the U.S. subsidiary for a single undivided fee with no itemized statement of M&E expense. The IRS National Office respected this differential invoicing pattern, so that Foreign Parent was treated as reimbursing the U.S. subsidiary's employees' M&E, while U.S. subsidiary was treated as paying a service fee to Foreign Parent that did not include any reimbursement of expense.

There are clearly lessons to be learned from the above case law and rulings insofar as identifying a reimbursement arrangement for BEAT purposes. As noted by the Court in *Transport Leasing*, there is important but perhaps form-driven distinction between the vendor being paid for its services and passing through an expense incurred in performing those services. Separate itemization of the reimbursed expenses and ability of the reimbursing party to control the amount and timing of such expenses would be desirable in seeking to establish a reimbursement arrangement.

The reimbursement doctrine has also been applied in a variety of other settings outside of Code Sec. 274. Some of these other authorities, in a manner more consistent with the Tax Court's focus on identifying the common law employer in *Beech Trucking*, have tried to discern the true incidence of the expense, in addition to analyzing the form of the arrangement. Very recently, in LTR 201904004,[4] the IRS found an expense reimbursement where the foreign affiliate reimbursed its U.S. subsidiary for a branded prescription drug (BPD) fee imposed under the Affordable Care Act (ACA). Under the ACA, all affiliates in the group were jointly and severally liable for the BPD Fee. The U.S. subsidiary directly paid the BPD fee, but under the group's transfer pricing served as a limited risk distributor. Importantly, the intercompany distribution agreement provided that the foreign affiliate that manufactured the drugs and earned residual profits from the drug sale was responsible for the BPD and similar fees. The IRS ruled privately that the U.S. subsidiary had no accession to wealth when it received the reimbursement payment from the Foreign affiliate under a legal obligation to pay it over to the government. It seemed important, however, that the foreign affiliate reimbursing the expense economically bore the expense as the entrepreneurial entity in the structure.

In the private ruling, the IRS relied on *Seven-Up Co.*,[5] where Seven-Up Company managed a pool for advertising funds for its distributors. Although Seven-Up held the pooled funds in a general account commingled with its other funds, the Tax Court found them to be held in a constructive trust in which Seven-Up was obliged to use them to pay for the distributors' advertising campaign. A written agreement provided for the use of the funds for common advertising expenses. Importantly, the distributors also economically benefited from the advertising expenses paid by Seven-Up out of the shared pools.

Two other interesting authorities concern reimbursement for overhead or general and administrative expenses. Rev. Rul. 84-138 concerned a parent mutual fund company that charged its subsidiary for a broad share of overhead expenses, including personnel costs. For purposes of determining parent's status as a Regulated Investment Company ("RIC"), the IRS ruled that the payments received from the subsidiary were reimbursements excluded from gross income rather than additional gross income that might imperil the parent's RIC qualification. In support of the ruling, the IRS noted that the Parent "was not engaged in the business of receiving compensation for services of the type that were reimbursed." On the other hand, in *Andrew Jergens Co.*,[6] the Board of Tax Appeals found payments received by a parent from a subsidiary for use of its manufacturing plant and related services were included in gross income. The parent owned the plant, depreciated the equipment and earned the income from the facilities. Therefore, the Board found the subsidiary's payment to the parent, although calculated as an allocation of the Parent's expenses, was a service fee, not reimbursement expenses. Considering the Parent's ownership of the relevant facilities that were leased, the Board found it more appropriate

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to characterize the reimbursement of expenses as gross income from the parent's conduct of business.

In applying these authorities in the BEAT context, the form of the arrangement is important, but it may also be necessary to make a deeper analysis of the economic relationships between the parties. However, as noted by the Eighth Circuit in *Transport Leasing* the concept of a "reimbursement arrangement" is by its nature somewhat flexible, leaving room for appropriate planning.

Cost of Goods Sold

Another significant area of planning under the BEAT concerns payments characterized as cost of goods sold ("COGS"). In the original House draft of the Tax Reform, Congress would have included an excise tax on foreign related party payments not reflected in the payee's effectively connected income.[7] The excise tax generally would have applied to payments for purchase of tangible property and other inputs that are reflected in COGS.

BEAT, as introduced in the Senate Bill and reflected in the final legislation, by contrast is limited to adding back "base erosion tax benefits" attributable to "base erosion payments." Base erosion payments and base erosion tax benefits in turn are defined as certain foreign related party payments with respect to which a "deduction" is both "allowable" and "allowed" for regular income tax purposes.[8] Other than certain payments made to inverted corporations as provided in Code Sec. 59A(d)(4), the statute does not treat payments that reduce gross receipts as base erosion payments. The legislative history to BEAT makes clear that payments reflected in COGS are not intended to be captured by BEAT.[9]

The Proposed BEAT Regulations do not explicitly address the treatment of COGS. Nonetheless, it is well-established in the Code and case law that COGS is taken into account in computing gross income and thus does not constitute a "deduction." For example, in *Max Sobel Wholesale Liquors*,[10] the Tax Court permitted a liquor wholesale dealer to reduce its gross receipts by the amount it paid as illegal kickbacks to its customers. Although Code Sec. 162(c)(2) disallows a deduction for such bribes and other illegal payments, the Tax Court and Ninth Circuit both held that Code Sec. 162(c)(2) did not apply to disallow expenses taken into account through COGS. As stated by the Ninth Circuit:

> For good or ill, tax law distinguishes between exclusions from gross income ("above the line" items) and deductions from gross income ("below the line" items). "Gross income," I. R. C. §61, is determined by subtracting all "above the line" items from gross receipts. See Reg. §1.61-3(a). The very definition of "gross income" has been thought to mandate the exclusion of certain amounts (e.g., the cost of goods sold) from that figure, even in the absence of specific statutory authority for such exclusion.

Recently, the treatment of nondeductible expenses as COGS has been addressed by the Tax Court in a series of cases involving cannabis businesses subject to Code Sec. 280E, hereafter, (the "marijuana cases"). Code Sec. 280E provides that no deduction or credit is allowed for any expenses of a trade or business that is involved in trafficking controlled substances. However, on several occasions, the Tax Court has held that Code Sec. 280E does not disallow the cost of purchases of controlled substances.[11] As stated in the *Alterman* case, COGS is a reduction in arriving at gross income, and "is not a deduction" that may be "allowed" or "disallowed" by statute.[12]

In *Patients Mutual*, the Tax Court reiterated its holding that Code Sec. 280E does not disallow drug traffickers an adjustment for COGS. At the same time, however, the Tax Court distinguished between the direct costs of acquiring goods for resale – which were costs of goods sold of a purchaser of inventory for reseller under the Code Sec. 471 regulations in place at the enactment of Code Sec. 280E – and the broader set of "indirect costs" required to be capitalized only with the subsequent enactment of Code Sec. 263A in 1986. In the latter case, the Court noted that the flush language of Code Sec. 263A(a)(2) and the Reg. §1.263A-1(c)(2) provides that "costs" capitalized under Code Sec. 263A only apply to expenses that would otherwise be taken into account in computing taxable income but for Code Sec. 263A. Accordingly, the *Patients Mutual* holding limited the COGS deduction for the reseller at issue in the case to the direct acquisition cost of the cannabis, while it held that indirect costs that would not be capitalized but for Code Sec. 263A remained nondeductible despite being recovered through the inventory account.

The distinction in *Patients Mutual* between Code Sec. 263A and Code Sec. 471 COGS would seem to not to be relevant for BEAT, given that Code Sec. 263A was long operative at the time BEAT was enacted. Further, unlike Code Sec. 280E, which disallows a deduction for certain expenses, and thus according to *Patients Mutual*, precludes the expense from being taken into account under Code Sec. 263A, BEAT does not disallow deductions for regular tax purposes. Rather, BEAT recomputes the taxpayer's modified taxable income by removing certain

deductions allowed to the taxpayer that are attributable to base erosion payments. Since COGS is not characterized as a deduction for regular tax purposes, it seemingly should fall outside of the BEAT whether the expense is capitalized under Code Sec. 471 or Code Sec. 263A.

Whether expenses of a producer or reseller of tangible personal property are properly capitalized under Code Sec. 471 or Code Sec. 263A, as well as how these costs are ultimately recovered are methods of accounting questions. Capitalization into COGS primarily determines the timing of recognition of expense; for purposes of BEAT, however, it also determines the deductible or non-deductible nature of the expense.[13] Expenses paid to a related party (or imputed under Code Sec. 482) are generally required to be capitalized under Code Sec. 263A to the extent properly allocable to the property produced or acquired for resale.[14]

As noted above, the BEAT Proposed Regulations provide no BEAT-specific guidance on COGS, instead deferring to general tax accounting principles. The Preamble explicitly notes that no guidance is provided on whether sales-based royalties, such as were considered in the *Robinson Knife* case, are includible in COGS under Code Sec. 263A. In *Robinson Knife Manufacturing Co., Inc. and Subsidiary*,[15] the Second Circuit reversed the Tax Court and held that "sales-based royalties" (*i.e.,* royalties only due on the sale of the manufactured product) were not production expenses capitalized under Code Sec. 263A and thus were currently deductible. Following the Second Circuit decision, the IRS amended the Code Sec. 263A regulations to require sales-based royalties to be capitalized, but also to allow taxpayers to allocate all such expenses to current COGS.[16] Taxpayers applying these regulations to sales-based royalties, as opposed to manufacturing royalties, may find that obtaining favorable BEAT treatment does not result in a deferral of expense.

Since the application of Code Sec. 263A involves the timing of expense, its application on the facts of a taxpayer's situation would normally involve a "method of accounting." The taxpayer's methods of accounting are subject to the general standard that the method adopted clearly reflection income, *see* Code Sec. 446(b), and moreover, to the requirement that the IRS provide consent to a change in method of accounting under Code Sec. 446(e).[17] Taxpayers seeking to change their application of Code Sec. 263A likely would need to formally request approval of the IRS for a change in method. Where the change may not be made through automatic consent, it remains to be seen the extent to which the IRS will consider BEAT implications of the method change in processing taxpayer requests.

In addition to the potential discretion in adopting a method of accounting under Code Sec. 263A, the Code Sec. 263A regulations (Reg. §1.263A-1(j)(2)) and Code Sec. 266 allow the taxpayer to elect to voluntarily capitalize certain expenses. Such permissive capitalization is not allowed, however, where it would result in a material distortion of income, such as in the change of the taxpayer's Code Sec. 904 limitation. If the taxpayer, for example, has related party interest associated with production that it elects to capitalize under Code Sec. 263A to reduce its BEAT liability, will this be viewed as resulting in a material distortion of income? The answer to this question also remains to be seen.

Treatment of Tax Attributes and Forsaking Tainted Deductions

One of the harsher features of the BEAT is its adverse treatment of regular tax attributes, such as NOL carryovers and FTCs, in computing the taxpayer's modified taxable income and modified tax liability. Such tax attributes, by reducing regular tax liability, but not modified tax liability, may result in a greater BEAT liability than if the regular tax credit or deduction did not exist. As shown in the following examples, BEAT creates an unusual incentive in that taxpayers that are "over-sheltered" by regular tax attributes may prefer to eliminate base erosion deductions at the cost of increasing their regular taxable income.

For example, Proposed Reg. §1.59A-4(c), Example 1, illustrates a case where a taxpayer has gross income of $100, non-BEAT deductions of $80 and a deduction attributable to a BEAT payment of $50. The taxpayer also has NOL carryovers from prior years of $400. All $400 of the NOLs arose in 2016 and thus have a "base erosion percentage" of zero.

Under the BEAT, the taxpayer's modified taxable income is $20, the result of reversing out $50 of base erosion deductions from the taxpayer's current year loss of <$30>. Accordingly, the taxpayer pays BEAT of $2 (at the 10% rate applicable to 2019 and later years) on the difference between its modified tax liability of $2 and regular tax liability of $0.

But wait a minute, the taxpayer might ask, I have $400 of pre-2018 NOLs that would have wiped out my regular tax liability regardless of the base erosion deductions. Why should I be worse off than a taxpayer that did not have any base erosion payments but fully used its pre-2018 NOL carryover? However, the Proposed Regulations provide clear guidance on this point. Since

none of the $400 NOL carryover is deductible for regular tax purposes, it does not factor into the modified taxable income calculation. The Proposed Regulations specifically rejected comments calling for a "re-computation" approach like that used under the pre-2018 corporate AMT.

Equally harsh results can also apply in the case of a U.S. taxpayer with base erosion payments combined with GILTI sheltered by FTCs, which are allowable for regular but not BEAT purposes. Even a taxpayer with R&D credit carryovers may find the R&D credit to be of limited utility for BEAT purposes if the taxpayer also has FTCs or NOLs. Even though R&E credits under Code Sec. 41 are available for BEAT purposes,[18] the amount of such credits taken into account in computing the taxpayer's modified tax liability is limited to its portion of the credits allowed under Code Sec. 38 that are attributable to Code Sec. 41. A taxpayer that owes no regular tax liability due to deductions or FTCs would not be allowed any Code Sec. 38 credits for regular tax purposes and not be permitted to take such credits into account.

Barring a wholesale revision of the approach in the BEAT final regulations, taxpayers with significant tax attributes will need to exercise self-help to mitigate their BEAT liability. For example, a taxpayer in the above examples might find it to their advantage to eliminate the transaction giving rise to tainted deductions, such as by capitalizing intercompany debt. Alternatively, subject to foreign transfer pricing issues, the taxpayer might seek to reduce an intercompany royalty rate or service fee. In such a context, can the IRS use Code Sec. 482 to deem a deduction in the United States solely for BEAT purposes? At the least, it would seem counterintuitive to the IRS to invoke Code Sec. 482 to create a regular tax deduction in the United States, but it is not wholly unprecedented. For example, in FSA 200006003, the IRS attempted to impute a constructive payment of interest from an insolvent U.S. subsidiary to its foreign parent on conversion of accrued but unpaid interest to capital. The constructive payment of interest in stock allowed the taxpayer a tax deduction, which added to its NOLs, but also was asserted to be a payment subject to FDAP withholding under Code Sec. 1442.

Even more fundamentally, can a taxpayer facing a BEAT but not a regular tax liability simply forego the deduction for the base erosion payment? For example, although Code Sec. 162 provides that trade or business deductions "shall be allowed" to the taxpayer, the Code repeatedly refers to deductions "allowed" and "allowable," which implies that deductions allowed to the taxpayer are a subset of allowable deductions. Even Code Sec. 59A(c)(2) itself, in defining "base erosion tax benefits" refers to the deductions "allowed" from "base erosion payments," which are certain payments for which a deduction is "allowable" to the taxpayer. This would also seem to imply that not all base erosion payments produce base erosion tax benefits in the form of deductions allowed to the taxpayer. While the limited authorities on this question are mixed, some have argued persuasively that taking allowable deductions is not mandatory.[19] In light of the maxim that "deductions are a matter of legislative grace," *New Colonial Ice v. Helvering*[20] it can certainly be argued that a taxpayer may spurn the grace of regular tax deductions that end up costing the taxpayer in the form of additional BEAT liability.

Conclusion

With the Proposed Regulations on BEAT released and expected to be finalized in the near term, affected taxpayers are wrestling the BEAT and its harsh and arbitrary distinctions. Given the limitations on use of tax attributes, many more corporations will be affected by the BEAT than previously paid regular tax. What are discussed above just three of the many sets of interpretive issues that will arise under the BEAT. More so than other international tax issues, the BEAT may often turn on a holistic consideration of tax accounting rules and general Federal income tax principles not purely confined to international taxation.

ENDNOTES

* The author has significant experience in a wide range of international and corporate tax planning and tax controversies, including tax litigation. His area of expertise includes the full panoply of international rules adopted or changed by the Tax Cuts and Jobs Act (TCJA). He may be contacted at 650-335-7669 or *wrskinner@fenwick.com*.

1. CCA 200243020 (July 16, 2002) (emphasis added).
2. *Beech Trucking Co., Inc.*, 118 TC 428, Dec. 54,753 (2002).
3. *Transport Labor Contract/Leasing, Inc.*, 123 TC 154, Dec. 55,714 (2004), *rev'd by* CA-8, 461 F3d 1030 (2006).
4. LTR 201904004 (Oct. 29, 2018).
5. *Seven-Up Co.*, 14 TC 965, Dec. 17,656 (1950).
6. 40 BTA 868 119.
7. House Bill at Section 4303.
8. *See* Code Secs. 59A(c)(2), 59A(d).
9. Conference Report at 653; Bluebook at 400.
10. *Max Sobel Wholesale Liquors*, 69 TC 477, Dec. 34,789 (1977), *aff'd*, CA-9, 80-2 USTC ¶9690, 630 F2d 670.

[11] *See Patients Mutual Assistance Collective Corp. (dba Harborside)*, 151 TC No. 11, Dec. 61,317 (Nov. 29, 2018); *L. Alterman & W. Gibson*, 115 TCM 1452, Dec. 61,193(M), TC Memo. 2018-83; and *M. Olive*, 139 TC 19, 32, Dec. 59,146 (2012), *aff'd*, CA-9, 2015-2 USTC ¶50,377, 792 F3d 1146.

[12] *See id.*, at 30.

[13] While treatment of expenses as COGS is favorable for BEAT purposes, the opposite may be true for purposes of Code Sec. 163(j). Under the Proposed Regulations, the add-back to Adjusted Taxable Income for depreciation and amortization (prior to 2022) has been interpreted not to apply to depreciation or amortization taken into account as COGS. *See* Proposed Reg. §1.163(j)-1(b)(1)(iii).

[14] *See* Reg. §1.263A-1(j).

[15] *Robinson Knife Manufacturing Co., Inc. and Subsidiary*, CA-2, 2010-1 USTC ¶50,300, 600 F3d 121, *rev'g*, 97 TCM 1037, Dec. 57,710(M), TC Memo. 2009-9.

[16] Reg. §1.263A-1(e)(3)(ii)(U)(2), adopted by T.D. 9652, IRB 2014-12, 655.

[17] In certain circumstances, where the taxpayer was using an improper method of accounting, and the IRS denied a request for change, the IRS's denial has been held an abuse of discretion that could be overturned by litigation. *See, e.g.*, *National Bank of Fort Benning*, DC-GA, 79-2 USTC ¶9627.

[18] *See* Code Sec. 59A(b)(1)(B)(ii)(I).

[19] The authorities addressing this issue are discussed at length in the seminal paper by James Maule, *No Thanks Uncle Sam, You Can Keep Your Tax Break*, 31 SETON HALL LEGIS. J. 53 (2007).

[20] *New Colonial Ice v. Helvering*, SCt, 4 USTC ¶1292, 292 US 435, 54 SCt 788 (1934).

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