September 9, 2020

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RE: Comments on Proposed Regulations (REG-106864-18) Regarding Unrelated Business Taxable Income Separately Computed for Each Trade or Business Pursuant to Section 512(a)(6)

Dear Ms. Cook, Ms. Robbins and Mr. Carter:

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) to address the need for guidance related to new section 512(a)(6)[1] as enacted under Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (the TCJA or the "Act").[2]

On April 24, 2020, Treasury and the IRS published REG-106864-18 ("proposed regulations") to address new section 512(a)(6) requirements under the TCJA that provide guidance on how an exempt organization subject to the unrelated business income tax determines if it has more than one unrelated trade or business; and, if so, how the exempt organization calculates unrelated business taxable income. Previously, on August 21, 2018, Treasury and the IRS had issued Notice 2018-67 ("the Notice"), which provided interim guidance. The AICPA appreciates the efforts of Treasury and the IRS in providing administrable guidance within the intent of section 512(a)(6). This letter is our response to the request for comment on the rules described in the proposed regulations related to section 512(a)(6). It does not address: the questions raised by the application

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[1] Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.
[2] Public Law 115-97, 131 Stat. 2054.

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of section 163(j) to an exempt organization where section 512(a)(6) applies; whether the interest expense limitation contained in section 163(j) should be computed separately for each trade or business or, rather, should be computed on the aggregate level for the organization; or, if the latter, how the business interest expense limitation should apply in computing unrelated business taxable income (UBTI) for each separate trade or business. The AICPA plans to comment on section 163(j) and section 512(a)(6) issues in a separate comment letter.

Similarly, the specific provisions that apply to charitable trusts as noncorporate taxpayers, such as passive activity losses, the alternative minimum tax, and excess business losses, are not addressed in this letter. Questions arise on whether the noncorporate tax provisions should be calculated within each separate trade or business or at the aggregate entity level. Currently, there are no proposed regulations or guidance on this matter. The AICPA also plans to comment on these provisions once guidance is issued.

Specifically, the AICPA provides recommendations on the following issues:

I. Definition of Trades or Businesses for Organizations with *De Minimis* Amounts of Unrelated Business Income

II. Separate Trades or Businesses
   1. 2-Digit NAICS Codes
   2. Social Clubs

III. Activities in the Nature of Investments
   1. Qualifying Partnership Interests
      a) Control Test
      b) Look-through Rule for Control Test
      c) Guidance under Section 6031(d)
      d) Reliance on Schedule K-1
      e) Determination of a Partner’s Percentage Interest
   2. Investment Expenditures Related to Investment Activities for Trusts

IV. Transition Rule and Net Operating Losses

V. Net Operating Losses and Unrelated Business Taxable Income
   1. Ordering of Net Operating Losses
   2. Allocating UBTI after Applying pre-2018 Net Operating Losses
   3. Computation of Modified Taxable Income for Use of Net Operating Loss Carryforwards and the Corresponding Reduction for Charitable Contribution Carryforwards to Extent Contributions Reduce Modified Taxable Income

VI. Charitable Contributions Taken Against Unrelated Business Taxable Income

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We appreciate your consideration of our comments. If you have any questions, please contact Jennifer Becker Harris, Chair, AICPA Exempt Organizations Taxation Technical Resource Panel, at (425) 454-4919, jharris@clarknuber.com; Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9247, or elizabeth.young@aicpa-cima.com; or me at (612) 397-3071, or chris.hesse@CLAconnect.com.

Sincerely,

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Asst. Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service
Ms. Amber Saloto, Attorney Advisor, Department of Treasury
Ms. Tamera Ripperda, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service
Mr. Edward Killen, Deputy Commissioner, Tax Exempt and Government Entities, Internal Revenue Service
Ms. Margaret Von Lienen, Director, Tax Exempt and Government Entities, Internal Revenue Service
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AMERICAN INSTITUTE OF CPAs

Comments on Proposed Regulations (REG-106864-18) Regarding Unrelated Business Taxable Income Separately Computed for Each Trade or Business Pursuant to Section 512(a)(6)

September 9, 2020

BACKGROUND

In general, organizations described in sections 401(a) and 501(c) are exempt from federal income tax. However, a tax on UBTI of organizations described in section 511(a)(2) and trusts described in section 511(b)(2) is imposed by section 511(a)(1). These organizations are referred to as tax-exempt organizations or exempt organizations in this letter.

Prior to the enactment of the TCJA, tax-exempt organizations could aggregate the income and losses from all unrelated, regularly carried on, active trades or businesses to calculate UBTI. Such organizations could reduce the overall net taxable income by netting a loss generated from one unrelated activity against the net taxable income of another dissimilar activity.

The TCJA created new section 512(a)(6), which requires the separate computation of UBTI for each trade or business of a tax-exempt organization subject to the unrelated business income tax (UBIT). Tax-exempt organizations with more than one unrelated trade or business must calculate the UBTI of each trade or business separately without netting the losses from one unrelated activity against the income of another activity. The provision is effective for tax years beginning after December 31, 2017.

On August 21, 2018, Treasury and the IRS issued the Notice, which provided interim guidance. The Notice described issues arising under new section 512(a)(6) and provided transition rules. The Notice addressed areas such as the following: (1) general concepts for identifying separate trades or businesses and providing interim reliance on a reasonable, good-faith interpretation standard; (2) general principles surrounding income from partnerships; (3) the aggregation of income from partnerships and debt-financed income from partnerships; (4) net operating losses (NOLs); and (5) the inclusion of Global Intangible Low-Taxed Income (GILTI) as a dividend, among other areas. The AICPA previously commented and submitted recommendations on the Notice in November 2019.

SPECIFIC COMMENTS

I. Definition of Trades or Businesses for Organizations with *De Minimis* Amounts of Unrelated Business Income

Overview

The new computation requirement of section 512(a)(6) represents a significant departure from previous law and necessitates the costly tracking of separate unrelated business income (UBI) activities by tax-exempt organizations, particularly those with small amounts of UBI.

Additionally, tax-exempt organizations with more than one unrelated trade or business will also need to track carryover losses by activity.

Recommendation

We recommend that Treasury and the IRS adopt a definition of trade or business that permits organizations with de minimis UBI—less than $10,000 of UBI gross revenue for all activities—to categorize all their activities as a single unrelated trade or business. Similarly, for exempt organizations reporting gross revenue from all unrelated trades or businesses of $10,000 or greater, for each separate trade or business activity with less than $1,000 of UBI, we recommend an option of aggregating those activities together as one trade or business.

We propose determination and application of the $10,000 or $1,000 thresholds on an annual basis, with aggregation permitted only in those tax years when the organization or activity's UBI (as applicable) falls below the $10,000 or $1,000 threshold, respectively. If an NOL is generated for a separate trade or business during a tax year for which aggregation is not permitted due to exceeding the relevant UBI thresholds, apply that NOL against UBI derived from the same separate trade or business in future tax years only when aggregation is not permitted; siloing of that trade or business is required. Any NOLs generated during a tax year for which aggregation is permitted under the $10,000 threshold (or from a trade or business consisting of activities meeting the $1,000 threshold) are used only against UBI derived in a future tax year for which aggregation is permitted (and in the case of the $1,000 threshold, only against UBI derived from the trade or business consisting of activities meeting the $1,000 threshold).

Analysis

Organizations with less than $10,000 of gross UBTI are likely to lack the internal staff, the ability to engage outside accounting professionals, and the resources to properly implement software, accounting, and other changes necessary to comply with section 512(a)(6). For example, tax-exempt organizations would require upgraded general ledger software to track each trade or business to maintain the appropriate records for tax preparation at the end of the tax year.

While many smaller entities are not as likely to have more than one unrelated trade or business, for those that do, the burden of tracking and maintaining records is significant relative to the amount of tax potentially due. In addition, monitoring or examining organizations with such low UBTI would be administratively burdensome to the IRS. A trade or business category for *de minimis* UBI is beneficial to both taxpayers and the IRS as it would help to alleviate the administrative burden imposed on both parties.

A review of IRS statistical data relating to tax returns with positive UBTI is helpful in defining a practical and fair de minimis exception. According to IRS statistics for the 2013 tax year (the most recent year that data is publicly available), less than 1% ($44,717 / $5,653,471) of total UBIT was paid by organizations that reported gross UBI of under $10,000, on average.[3] This would reduce the number of organizations subject to the provision and reduce the administrative burden on the IRS to monitor compliance while applying the rules to the majority of total UBTI.

According to the General Explanation of Public Law 115-97 released by the Joint Committee on Taxation, Congress intended that Treasury and the IRS would "issue guidance concerning when an activity will be treated as a separate unrelated trade or business for purposes of the provision."[4] In addition, sections 511 to 514 do not place any constraints on Treasury and the IRS to define a separate unrelated trade or business for purposes of section 512(a)(6). In issuing these proposed regulations, Treasury and the IRS have already exercised their authority to define a separate trade or business by permitting organizations to combine otherwise separate trades or businesses. For example, qualifying partnership interests are combined and treated as a single trade or business in recognition of the administrative burden of separately tracking those activities. Similarly, Treasury and the IRS should exercise this authority in defining a trade or business for organizations with de minimis levels of unrelated business income.

II. Separate Trades or Businesses

1. 2-Digit NAICS Codes

Overview

The Notice indicated that Treasury and the IRS were considering the use of the North American Industry Classification System (NAICS) 6-digit codes to help organizations determine separate trades or businesses. The NAICS codes are a standard used by federal agencies to classify businesses for statistical purposes and may help exempt organizations group UBI activities to determine separate activities for section 512(a)(6) purposes. NAICS uses a hierarchical structure of 2- to 6-digit codes.

The proposed regulations generally require exempt organization taxpayers to select a 2-digit NAICS code that best describes each unrelated trade or business if they are engaged in more than one unrelated trade or business. Treasury and the IRS concluded that adopting 2-digit NAICS codes will minimize limitations that exist in using the 6-digit NAICS codes as a method of identifying an exempt organization's separate unrelated trades or businesses. Treasury and the IRS also stated that 2-digit NAICS codes are less likely to change over time than NAICS codes with more digits. Each NAICS code is only used once by an organization regardless of where the activity is conducted by geographic location or if each location maintains separate books and records. The activities using the same NAICS codes may be combined for netting unrelated business taxable income and losses.

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[3] https://www.irs.gov/statistics/soi-tax-stats-exempt-organizations-unrelated-business-income-ubi-tax-statistics#2 Table 4. Unrelated Business Income Tax Returns: Returns with Positive Unrelated Business Taxable Income: Number of Returns, Gross Unrelated Business Income (UBI), Total Deductions, Unrelated Business Taxable Income, and Total Tax, by Type of Entity and Size of Gross UBI, Tax Year 2013).

[4] Joint Committee on Taxation, *General Explanation of Public Law No. 115-97* (JCS-1-18), December 2018.

Recommendation

The AICPA supports allowing taxpayers to use a specific listing of 2-digit NAICS codes and appreciates that Treasury and the IRS considered our initial suggestion of allowing taxpayers to use the highest level of aggregation. Using NAICS codes appears to be a logical safe harbor method for separating and classifying unrelated trades or businesses.

The AICPA recommends that the IRS clarify the primary business activity approach outlined in the preamble in terms of what occurs if the primary business activity changes. The AICPA recommends that facts and circumstances are allowed if the primary underlying business activity changes and that there is not an underlying method change associated with a primary business activity shift.

The AICPA also requests clarity as to how to report those categories of UBI that do not correspond with unrelated trade or businesses: investments, income from controlled subs and S corporations. If a NAICS code is mandatory, the IRS should specific which NAICS code to use. Another possibility is no numerical code, but report each additional siloed UBI source on a separate schedule M.

Analysis

In its response to the Notice, the AICPA recommended that Treasury and the IRS issue proposed regulations allowing taxpayers to utilize NAICS codes as a safe harbor to separate and classify unrelated trades or businesses. For taxpayers using NAICS codes, the AICPA recommended that Treasury and the IRS allow taxpayers to use the highest level of aggregation (i.e., the use of fewer than six digits) that reasonably defines a given trade or business for section 512(a)(6) purposes.

As outlined above, a taxpayer may use NAICS codes as a safe harbor to separate and classify unrelated trades or businesses. When an unrelated business involves interconnected activities falling into more than one NAICS code (other than NAICS Sector 81, for Other Services), the primary business activity approach used in the NAICS system is reasonable.[5]

Additional guidance is needed to ensure that separate unrelated trades or businesses, which cross over multiple 2-digit NAICS codes, may be properly grouped together within the confines of the regulations. It seems reasonable that the NAICS code, which represents the primary business activity, is selected for purposes of preparing the Form 990-T. The NAICS code system contemplates this very issue as the NAICS FAQs[6] provide guidance on determining the primary business activity based on the activity that generates the most revenue. If the primary business activity changes over time, this is an instance that would result in a need to change the 2-digit NAICS code. Therefore, a facts and circumstance analysis should be allowed when there is an underlying primary business activity change.

[5] North America Industry Classification System Frequently Acted Questions (FAQ) #1 and #4, https://www.census.gov/eos/www/naics/faqs/faqs.html#q1.

[6] North American Industry Classification System, Frequently Asked Questions (FAQs) https://www.census.gov/eos/www/naics/faqs/faqs.html.

It is also possible, albeit unlikely, that there will be changes to the 2-digit NAICS codes in the future. Should this happen, it is important to consider the effect on UBI reporting should new codes be added, or certain codes deleted.

We understand once a classification has been made, the organization will need to assign a NAICS code to the activity in order to complete a Form 990-T filing. Should the IRS and Treasury require identification of all separate unrelated business activities and reporting using a 2-digit numerical code, there is a need for guidance on how classification occurs outside the realm of the NAICS codes. For example, non-NAICS codes within the Form 990-T instructions could supplement the existing list of 2-digit NAICS codes. These new 2-digit codes would include the types of unrelated trades or businesses that NAICS codes do not currently describe. For example, Treasury and the IRS could add code 00 to this list for investment activities. Adding more entries to the list of allowable codes, which taxpayers will be required to use to identify and report their separate unrelated trades or businesses, will help them comply with section 512(a)(6) while increasing the likelihood of uniform reporting across the sector.

2. Social Clubs

Overview

Section 512(a)(3) defines UBTI differently for organizations exempt under section 501(c)(7) ("social clubs") as gross income other than exempt function income, less the allowable deductions directly connected with the production of such income. Exempt function income generally includes income from members of the organization for providing such members, their dependents, and their guests, goods, facilities, or services in furtherance of the organization's exempt purposes. Income from activities not connected to a social club's exempt purposes (e.g. takeout food and drink) or received from non-members, including investment income, is considered to be UBTI.

The exemption for social clubs is based on a different premise than other exempt organizations. The exemption was not designed to provide social clubs a tax advantage, but rather tax neutrality so that its members are not disadvantaged as compared to individuals that pursue recreation on an individual basis rather than through an organization. Social clubs typically generate revenue from membership dues and fees from the pursuit of some type of recreational activity, such as golf, tennis, yachting, fishing, hunting, gaming, etc. as well as the provision of food and drink in connection with such activities. UBTI often stems from the provision of these same activities to non-members, the use of facilities on an irregular basis by the public for other types of events such as tournaments or weddings, and income from investments such as interest-bearing accounts or securities. To a lesser degree, UBTI also includes income from non-traditional activities conducted with members such as take-out food and drink.

The proposed regulations specifically prohibit clubs from using the 2-digit NAICS code 71 to classify all their UBTI from non-members, stating that food service is contained in NAICS code 72 and should be considered a separate trade or business activity. The proposed regulations also prohibit clubs from using the special rules applicable to qualifying partnership interests ("QPI(s)") for purposes of calculating UBTI from investment activities.

Recommendation

The AICPA encourages Treasury and the IRS to issue final regulations providing the following guidance for section 501(c)(7) organizations with respect to defining their separate trade or business activities for the purpose of applying section 512(a)(6) to their UBTI:

- Report UBTI from activities that lack a profit motive as a single trade or business for Form 990-T. This reporting will make it easier to apply the requirement to limit losses from such activities to the extent of income and still address the intention of section 512(a)(6) to prevent the use of losses from one trade or business activity offsetting income from another trade or business activity.

- Report UBTI from profit-motivated activities that are conducted in connection with a club's exempt activities, but are considered to be UBTI because they are conducted with non-members or fail the social interaction requirement, as a single trade or business for Form 990-T. This approach is true to the concepts applicable to defining a trade or business rather than segmenting an activity into the parts that are described in different 2-digit NAICS codes.

- Permit clubs to use the rules provided for QPIs in determining UBTI from their investment activities. If Treasury and the IRS do not believe that all the QPI exceptions are applicable to clubs, we recommend applying the de minimis rule.

- Allow aggregation of rental income from real property that would otherwise be excluded under section 512(b)(3)(A)(i) with a club's investment activities, rather than being reported as a separate trade or business.

Analysis

The requirement for conducting the activity with a profit motive to be considered UBTI is not applicable to social clubs. Revenue Ruling 81-69 addressed the situation where a social club had sales of food and beverages to non-members, which were not profit-motivated. Since such sales are reportable as UBTI, the ruling clarified that expenses related to the activity must be limited to the income from that activity so that losses would not offset investment income also taxable as UBTI. To the extent that an activity that generates UBTI is not profit motivated, all such activities should be aggregated. Since such activities typically result in losses, and Revenue Ruling 81-69 already serves to limit such losses, there is little tax advantage to clubs in allowing this aggregation. Further, allowing such aggregation would reduce the administrative burden on such organizations.

Clubs typically generate UBTI from activities tangentially related to their central purpose of operating the club rather than the carrying on of unrelated trade or business activities. It is unlikely that a club would operate multiple trade or business activities directly. The club may have different revenue streams (e.g., fees for participating in recreational activities, sales of food and drink, sales of inventory items used in club activities, and payments for the use of club facilities for the same purposes as its members). They all stem from the club's central purpose of social recreation. The commentary included with the proposed regulations states that a "social club must use the NAICS code that most accurately describes its unrelated trade or business activities." Since UBTI is defined differently for social clubs than other exempt organizations and with a different rationale, it is reasonable to apply section 512(a)(6) differently for social clubs and not require clubs to define all of their separate trade or business activities using the 2-digit NAICS codes that describe each activity. Instead, Treasury and the IRS should permit a social club to aggregate all income from its profit-motivated activities that are connected to its central purposes (e.g., NAICS code 713910), but taxed as UBTI because they are conducted with non-members. For example, income from the use of the club's facilities in special activities (such as tournaments and weddings) or activities that fail the social interaction requirement (such as sales of take-out food and drink to non-members) should be grouped into one silo. The fact that a good or service is provided to a different group of people or at a different location should not fundamentally change the classification of an activity as one type of trade or business versus another. If the requirement to use 2-digit NAICS codes is retained in the final regulations, require clubs to use such codes with respect to trade or business activities that do not relate in any way to their social and recreational purposes.

Under the proposed regulations, all investment income (e.g., interest, dividends, capital gain/loss from the sale of securities, etc.) would be treated as a separate trade or business activity for purposes of the aggregation rules. The proposed regulations do not permit use of the special rules provided for the treatment of UBTI from QPIs because social clubs should not be invested in partnerships that would generally conduct non-traditional, unrelated trades or businesses that generate more than a de minimis amount of UBTI. UBTI for a club includes investment income such as interest and dividends; it would be possible for a club to invest in a partnership that only generates investment income vs. income from a trade or business. Additionally, a club is already subject to limitations on the amount of investment income and income from non-traditional business activities it may receive in order to maintain exempt status. There is no statutory reason to exclude clubs from the provisions provided to other exempt organizations under the administrative convenience exception. The ability to combine UBTI from QPIs not only reduces the administrative burden for exempt organizations, but also reduces the burden for partnerships that would be required to provide a breakdown of UBTI by classification as debt-financed income or income from a trade or business activity along with a description of such activity in order for exempt organizations to be able to comply with section 512(a)(6). For partnerships that have multiple tiers of investments in other partnerships, this information is extremely difficult to come by. While it may be reasonable to expect a partnership to invest time and effort in tracking this information for partners with significant ownership percentages (if such information is available), it seems excessive to impose the requirement for partners (such as clubs) that own a very minor percentage. Additionally, if partnerships limit their reporting on Schedules K-1 provided to exempt organization partners who meet the de minimis threshold, a club partner may not receive the information needed to comply. (The Schedule K-1 partner type only identifies exempt organizations as a category; clubs are not specifically identified. Moreover, it is likely that a Schedule K-1 preparer is not aware of this distinction.) It is reasonable to provide clubs with the de minimis rule for QPIs.

The proposed regulations provide that rental income from real property normally excluded from UBTI except for the application of section 512(b)(4) with respect to debt-financed property is grouped with an organization's investment income. Since the exclusion from UBTI under section 512(b)(3)(A)(i) for rents from real property is not applicable to clubs, it is reasonable for clubs to include UBTI from the rental of real property with investment income rather than report it as a separate trade or business activity using a 2-digit NAICS code. As an example, if a club rented out a parcel of land and provided no services or personal property in connection with the rental of such property, the club should be entitled to combine that rental income with interest income earned on a savings account as its UBTI from investment activities. This activity is distinguished from income earned from renting out the entire club facility to a non-member for purposes of an event that would include the use of furniture and equipment as well as the provision of services by club staff. In that case, the income is not treated as rental income from real property, but instead income from a business activity that either is profit-motivated and included with other profit-motivated activities or as non-member income lacking a profit motive included with similar such income.

III. Activities in the Nature of Investments

1. Qualifying Partnership Interests

<u>Overview</u>

The proposed regulations allow for qualified partnership interests, qualified S corporation interests (QSI), and unrelated debt-financed income under section 512(b)(4) to be considered investment activities to the exempt organization. One benefit of UBTI generated from investment activities is the ability to aggregate into one trade or business activity for purposes of section 512(a)(6). An important element to investment activities is QPIs, as many organizations hold investments in alternative structures (such as limited partnerships (LPs) or limited liability companies (LLCs)) taxed as partnerships.

In general, QPIs include LP interests that meet either a de minimis test or do not control the partnership under a control test. The de minimis test deems a partnership interest as a QPI if the exempt organizations holds no more than a 2% capital and profits interest. If the partnership investment does not meet the de minimis test, it still may qualify as QPI if the exempt organization does not control the partnership based on facts or circumstances and holds no more than 20% capital interest, aggregated with related interests.

a. Control Test

<u>Overview</u>

The proposed regulations provide that LP interests are considered qualifying partnership interests under the control test if the organization holds no more than 20% of the capital interest and does not control the partnership.[7] In response to the Notice, the AICPA recommended aligning the control test with existing provisions of the code such as section 4943, which applies to the excess business holding rules for private foundations. The preamble to the proposed regulations discusses how the 20% capital interest threshold is aligned with an existing partnership (Treas. Reg. § 1.731-2(e)).

[7] Prop. Reg. §1.512(a)-6(c)(4).

Recommendation

We recommend a rebuttable presumption of non-control in connection with a partnership interest of a limited partner who is not otherwise reportable by the respective partnership on Schedule B-1 of its Form 1065 for the taxable year ending within the taxable year of the limited partner. An organization is deemed to control a partnership regardless of ownership percentage if any of the provisions of Prop. Treas. Reg. § 1.512(a)-6(c)(4)(iii) apply, but an ownership percentage of 50% or more, as reportable on Form 1065, Schedule B-1, would become the administrative proxy beyond which a partnership interest is deemed to have control. We recommend an ownership percentage of 50% or more as this is in alignment with other measures of control, such as Form 1065 Schedule B-1 and general accepted accounting principles (GAAP).

Analysis

We acknowledge some relevance in aligning the control test with the percentage threshold under Treas. Reg. § 1.731-2(e)(4), and we recognize the purpose of establishing an administrable bright line for evaluating whether a partnership interest may be investment activity. We understand the need to have this bright line test aligned with a standard of control found in the Code, but the Treas. Reg. § 1.731-2(e)(4) standard is too narrow in this case as compared to other standards such as Form 1065 and GAAP. The 20% threshold is overly restrictive in defining control for exempt organizations and creates new administrative difficulties for partnerships and their tax-exempt partners.

i. Pre-legislative history of section 512(a)(6)

The IRS Exempt Organizations Colleges and Universities Compliance Project Final Report[8] was posted on April 25, 2013 and provides much of the data upon which the EO provisions of the TCJA were formed. The report summarizes results from 34 examinations of colleges and universities, with about half public and half private. Underreporting of UBTI is listed as the first examination highlight, and the number one reason for UBTI adjustments was for the misclassification of trades or businesses due to lack of a profit motive. The following activities are listed as those in which most of the examination adjustments for UBTI were made: fitness and recreation centers, sports camps, advertising, facility rentals, arenas, and golf courses.

UBTI from partnership investments is not addressed as an area of interest or where significant income adjustments were made. The focus of the UBTI portion of this project was to call attention to the directly-conducted activities of these organizations, many of which lacked profit motives and were creating losses to offset the profit-motivated UBTI activities. In light of the basic data underlying the origin of section 512(a)(6), the limitation of 20% ownership being the administrative proxy beyond which a partnership interest cannot be treated as investment activities is overly restrictive.

[8] IRS Exempt Organizations Colleges and Universities Compliance Project Report (Apr. 25, 2013): *BNA Tax Management Portfolio 482 2nd*

ii. Non-tax considerations for less than 50% partnership interests as investment activities

The Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) is the source of authoritative principles and standards recognized by the FASB to be applied by nongovernmental entities, including not-for-profit entities (NFP), in the preparation of financial statements in conformity with GAAP.[9] A significant number of exempt organizations prepare their annual financial statements in conformity with GAAP. GAAP provides guidance in two areas that focus on whether an organization has control as an investor in a partnership: accounting for the investment on the equity method and presenting the investment as a consolidated subsidiary.

Accounting under the Equity Method

Financial accounting standards, pursuant to FASB 323-10-15-6 through 15-11, provide guidance on accounting for equity ownership in partnerships. These standards specifically address whether an investor in a partnership has the ability to exercise significant influence over operating and financial policies. If the investor is determined to have a significant influence under the standards, the investor must account for the investment under the equity method of accounting, whereby the investor recognizes increases or decreases in the economic resources underlying the investment.

Comparison between the facts and circumstances considerations for control under the proposed regulations and the accounting standards described above for determining significant influence reveals many common factors. It is reasonable to assert that if a tax-exempt organization's partnership interest properly follows GAAP under the equity method of accounting, that same partnership interest is deemed to have control under the proposed regulations.[10] In other words, GAAP does not require an investor to account for its investment in a partnership under the equity method of accounting in situations where the investor's ownership is greater than 20%. Facts and circumstances may reveal that the investor does not have the ability to exercise significant influence. If the control test percentage under the proposed regulations were increased to 50%, and aligned with Form 1065 Schedule B-1 reporting, before control is presumed, a GAAP basis exempt organization would still know that any partnership investment presented under the equity method would not meet the definition of a qualifying partnership interest.

Consolidation of Investment as a Subsidiary

Considerations for control under the proposed regulations and the accounting standards for consolidation of an investment as a subsidiary also reveal many common factors. It is reasonable to assert that if a tax-exempt organization's partnership interest is properly presented following GAAP as a consolidated subsidiary, that same partnership interest is deemed to have control under the proposed regulations.[11]

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[9] ASC 105-10-10-1.
[10] Prop. Reg. § 1.512(a)(6)-(c)(4)(iii).
[11] Prop. Reg. § 1.512(a)(6)-(c)(4)(iii).

The Consolidations Topic of ASC 810 provides guidance on accounting for, among other things, investments by NFPs in limited partnerships. The accounting turns on the question of whether the NFP has a controlling interest in the LP. ASC 810 specifically outlines factors to consider in determining whether an NFP controls an LP. The guidance states that "[t]he usual condition for a controlling financial interest in an LP is ownership of a majority of the limited LP's kick-out rights through voting interests…"[12] Kick-out rights allow the limited partners to remove the general partner(s) without cause[13] and are analogous to voting rights of stockholders in a corporation. Assuming nothing to the contrary in the LP agreement, voting rights in an LP are the same as kick-out rights. In other words, an NFP holding over 50% of the voting rights would control the LP. If less than 50% of these rights were held by an NFP, it is not considered to have control of the LP.

GAAP guidance on control as it relates to the equity method of accounting for an investment and to the consolidation of the investment as a subsidiary are both reasonable methods for determining whether an NFP has control in an investment. If so, it is not a QPI.

iii. Legislative history of section 731(c) and relevance to tax-exempt organizations

The statute and regulations under section 731(c) address partnership distributions of marketable securities and limitation of gain deferral for partners receiving marketable security distributions. Prior to section 731(c), a partner receiving a distribution in the form of marketable securities could defer any gain on the appreciation of its partnership interest. In contrast, receipt of an equivalent amount in a cash distribution would result in a taxable gain. The legislative history of section 731 further explains that the exception for gain recognition on distributions of marketable securities to partners of investment partnerships, as described in Treas. Reg. § 1.731-2(e), was an acknowledgment that investment partnerships deal in transactions involving securities more than other types of partnerships.

Treasury Reg. § 1.731-2(e)(4) establishes a 20% capital/profits interest as a criterion for whether a partner is engaged in the trade or business activity of a lower-tier partnership. These section 731 regulations also apply the same 20% threshold for the anti-stuffing rule under Treas. Reg. § 1.731-2(d)(2) as well as a 20% threshold for the "less than substantially all" definition under Treas. Reg. § 1.731-2(e)(3)(ii). Unlike the definition of control under section 512(b)(13)(D), the Treas. Reg § 1.731-2 thresholds were not designed to measure control of a partnership by a tax-exempt owner with respect to UBTI.

iv. Convergence of section 512(b)(13) control with existing partnership reporting requirements

Section 512(b)(13)(D)(i)(II) provides that control exists where there is "in the case of a partnership, ownership of more than 50 percent of the profits interests or capital interests in such partnership." Coincidentally, all partnerships have an existing requirement to report on Form 1065 Schedule B-1 the name, employer identification number, type of entity (e.g., exempt organization), country of

[12] ASC 810-10-25-1A

[13] ASC Master Glossary

organization and maximum percentage owned in profit, loss or capital for any foreign or domestic entity, individual, trust or estate owning 50% or more in the profit, loss or capital of the partnership.

In the case of a general partnership interest or other interest where a partner has rights similar to those enumerated in the Prop. Treas. Reg. § 1.512(a)-6(c)(4)(iii), we agree that a tax-exempt partner should not treat such an interest as a QPI. For LP interests, without these rights of control, alignment of the control test percentage with that of the percentages linked to both section 512(b)(13) and Form 1065 Schedule B-1 would seem reasonable and provide the intended bright-line administrative proxy as described in the preamble.

This alignment would leverage an existing requirement of partnerships—that of Schedule B-1 of Form 1065—to provide a baseline for determining presumptive control of a partnership with respect to reporting UBTI of tax-exempt partners. Partnerships already have detailed guidance, in the Instructions to Form 1065 and Instructions for Schedule B-1, for determining which partnership interests are reportable on Form 1065 Schedule B-1, including constructive ownership rules. Use of Schedule B-1 for this purpose would also enable the IRS to cross-reference Schedule B-1 reporting from a partnership with the UBTI reporting of a tax-exempt partner to evaluate compliance with section 512(a)(6).

b. Look-through Rule for Control Test

Overview

Currently, the proposed regulations only allow an exempt organization to apply the de minimis test and not the control test with respect to indirectly-held partnership interests. Further, a tax-exempt partner is only permitted to do so if it does not control the directly held partnership.

Recommendation

Whether a partnership interest is held directly or indirectly, we recommend that the application of both tests, de minimis and control, apply in determining whether a partnership interest is a QPI (i.e., the tests should apply to the UBTI generating partnerships, not to the holdings partnerships that do not generate UBTI themselves but merely pass on information from an underlying partnership). The exempt organization should be able to apply both the de minimis and control test to partnerships indirectly held, and it should have the ability to do so even if it controls the directly held partnership under Prop. Regs. § 1.512(a)-6(c)(4)(iii).

Analysis

A look-through rule for the de minimis test as applied to indirectly-held partnership interests is appropriate. However, the proposed regulations limit the evaluation of indirectly-held partnership interests to only the de minimis test, and the look-through rule only applies when the exempt organization does not control the directly-held partnership.

The control test has two prongs: (1) the exempt organization holds no more than 20% of the capital interest; and (2) the exempt organization does not control the partnership (within the meaning of

Prop. Regs. § 1.512(a)-6(c)(4)(iii)). Pursuant to the proposed regulations (Prop. Regs. § 1.512(a)-6(c)(2)(ii)), when the exempt organization's ownership meets the second prong but fails the first prong, the indirectly-held partnership interest will be a QPI if it meets the de minimis test on a look-through basis.

The look-through control test should apply with regard to indirectly held partnerships, similar to the look-through de minimis test. When the organization does not control or own more than 20% of the indirectly-held partnership, the indirectly-held partnership should be a QPI. Any abuse that the IRS is trying to curtail can only be achieved through control of the UBTI generating partnership, not through control of the top holding partnership. It should not matter that an exempt organization is deemed to control the partnership in which it invests unless the exempt organization controls the UBTI generating partnership. The IRS can achieve its desired result and still extend the look-through test to indirectly held partnerships that meet the control test.

As part of their investment activities, exempt organizations will regularly invest in directly-held partnerships in which they may own more than 20% of the capital interest. Third-party investment professionals often manage the directly-held partnerships that will invest in a series of lower-tier investment partnerships. Each investment partnership may own numerous trades or businesses; this ownership may be multiple tiers below the investment partnership. It is common for an exempt organization to invest in a fund of funds which could own hundreds of private equity funds. Each private equity fund could, in turn, own multiple passthrough portfolio companies that generate UBTI. Special purpose vehicles or other holdings partnerships in between each of these levels may create more levels between the reporting organization and the UBTI-generating partnership.

If there is no look-through control test rule, the lower-tier partnerships will need to provide all the trade or business information to their partners to comply with the lower-tier partnerships' requirements under section 6031(d). This administrative burden will exist even if there is no direct exempt organization partner in the lowest tier partnership because there could be an indirect exempt organization partner that controls or owns more than a 20% capital interest in an upper-tier entity. Without knowledge of the ownership at the highest tier, partnerships will report unnecessary and voluminous information at every tier. By applying the control test to indirect partnerships, the partnership closest to the UBTI-generating partnership could make a determination as to whether any of its exempt organization partners or partnership partners could potentially have a controlling interest and only provide the information to the extent required. For example, if a lower-tier partnership determines that it does not control any UBTI-generating partnership, it can safely determine that no exempt organization up the chain would control such UBTI-generating partnership. It would not need to pass on all of the requisite detail (e.g., NAICS code, partnership name, EIN, etc.). The lower-tier partnership could then look at its capital interest in the UBTI-generating partnership and the capital interests of its partners to determine whether the UBTI-generating partnership would qualify as a QPI for any upper-tier tax-exempt partner. Without this look-through rule, the partnership would need to report this information in case there is an exempt organization up the chain that controls or owns more than 20% of a top tier partnership. If the indirectly-held partnership waits to report the trade or business information until it receives a request from the exempt organization, there will be an undue delay in the reporting. The increased burden would add unnecessarily to the cost the exempt organization would bear to invest in a partnership.

Permitting an exempt organization to aggregate any indirectly-held partnership interests that meet the requirements of the de minimis test with all other QPIs will not reduce the administrative burden on exempt organizations. They will need to identify each trade or business conducted by indirectly-held partnerships in circumstances where the directly-held partnership is controlled by an exempt organization unless a look-through control test is enacted.

In applying the control test indirectly, the exempt organization can rely on representations from an underlying partnership that it does not control any UBTI generating partnership. It is burdensome to require the organization to separately state each indirect partnership for which the exempt organization is treating as a QPI. Reporting unnecessary detail defeats the purpose of applying the test to indirect partnerships. For example, if an exempt organization invests in a fund of funds, there could potentially be thousands of indirect UBTI generating partnerships flowing into that one partnership. The rules should allow the exempt organization to list only the top partnership treated as a QPI and indicate it is relying on representations indirectly from such QPI that the QPI itself does not control any of the UBTI generating partnerships.

c. Guidance under section 6031(d)

Overview

Section 6031(d) provides that, in the case of any partnership regularly carrying on a trade or business, the partnership's Schedules K-1 must "include such information as is necessary to enable each partner to compute its distributive share of partnership income or loss from such trade or business in accordance with section 512(a)(1)" – e.g., its UBTI.

Recommendation

Treasury and the IRS should provide guidance under section 6031(d) clarifying that if a partnership determines that its tax-exempt partners (or any possible tax-exempt partner in an upper-tier partnership) are able to treat their interests as QPI, the partnership can provide information on the Schedule K-1 based on the assumption that all such tax-exempt partners will treat their interests as QPIs and need not provide NAICS codes.

Analysis

Treasury and the IRS should provide guidance on how this provision is applied when the rules of section 512(a)(6) permit a tax-exempt partner to compute its UBTI in more than one way. A tax-exempt partner that may compute UBTI from a partnership with respect to NAICS codes or, alternatively, may treat that partnership interest as a QPI. Such guidance is necessary to avoid the administrative burden that the existence of QPIs was designed to alleviate.

d. Reliance on Schedule K-1

Overview

The proposed regulations provide guidance for how organizations may rely upon the capital and profits percentage interest reported on their Schedules K-1 to determine if their interest meets the de minimis and control tests.[14]

Recommendation

We generally agree with the guidance for relying upon and determination of percentages of profits and capital interest reported on Schedule K-1. For administrative ease, we recommend adding guidance in this section of the regulations that would encourage timely reporting of underlying UBTI from partnerships to their tax-exempt partners to facilitate compliance with section 512(a)(6).

Analysis

If a look-through rule for the control test is adopted in the final regulations, as recommended in the section above, we would expect a reduction of the burden related to accessing underlying UBTI for many tax-exempt investors. Notwithstanding, in instances where a directly-held UBTI generating partnership has a tax-exempt partner or a partnership partner whose capital interest ownership percentage is 20% or more, as determined by the proposed regulations, the partnership should report the details of the UBTI in the Schedule K-1. This enables a tax-exempt partner to properly identify and calculate the UBTI for separate trades or businesses where the partner does not otherwise meet the de minimis or control tests.

Partnerships are required to report UBI to their tax-exempt partners under section 6031(d). Enactment of section 512(a)(6) potentially creates additional UBTI reporting requirements where a tax-exempt partner cannot treat its interest as a QPI and cannot aggregate its UBTI from the partnership with UBTI from other QPI. The partnership, not the tax-exempt partner, is the party with access to underlying UBTI information needed for section 512(a)(6) purposes. Control of a partnership, due to certain rights described in Prop. Treas. Reg. § 1.512(a)-6(c)(4)(iii)(A) through (D), may exist at percentages less than 20%. Similarly, these rights of control may not be present in a partnership interest higher than 20%. Regardless, if a partnership knows that reporting a 20% or more capital interest on the Schedule K-1 of a tax-exempt partner or a partnership partner may also require underlying UBTI information on that partner's Schedule K-1, the reporting of this information will be accelerated. If the tax-exempt partner is required to seek out the underlying UBTI necessary for compliance with section 512(a)(6), compliance becomes more difficult, primarily due to lack of time in the reporting year. If a tax-exempt partner with a calendar year-end receives its Schedule K-1 in late summer or early fall, it must evaluate the Schedule K-1 to determine whether its ownership meets the QPI control test. If so, it must subsequently request more detailed underlying UBTI information from the partnership in order to comply with section 512(a)(6).

[14] Prop. Reg. § 1.512(a)-6(c)(5).

e. Determination of a Partner's Percentage Interest

<u>Overview</u>

The preamble to the proposed regulations under Treas. Reg. § 1.512(a)-6 states in section 2(d)(iii)(B)(vi) "…Treasury and the IRS recognize that an exempt organization may not be aware of changes in its partnership interest until it receives a Schedule K-1 from the partnership at the end of the partnership's taxable year. In such a circumstance, it may be appropriate to permit a higher percentage interest in taxable years in which the increase in an exempt organization's percentage interest during a taxable year is the result of the actions of other partners."

<u>Recommendation</u>

We recommend alignment with Treas. Reg. § 1.6046-1, return requirement for US persons who acquire of or dispose of an interest in a foreign partnership, or whose proportional interest in a foreign partnership changes substantially. If aligned, the actions of other partners during a tax year will not cause a tax-exempt partner to cross either the 2% de minimis threshold or 20% control test, causing that partnership interest to lose QPI status.

<u>Analysis</u>

Treasury Reg. § 1.6046-1 addresses filing requirements for Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations. Treasury Reg. § 1.6046-1(c) connects a person's ownership percentage threshold for filing Form 5471, which is 10% in this case, directly to such person's acquisition of stock in the foreign corporation. This connection between a person's actions and a resulting filing obligation eliminates a filing obligation arising as a result of the actions of other owners. Setting aside that Treas. Reg. § 1.6046-1 applies to the acquisition of stock in a corporation, as opposed to the acquisition of partnership interests, we recommend consistent application to the regulations under section 512(a)(6).

Many exempt organizations subject to section 512(a)(6) are already familiar with the Form 5471 filing requirement threshold under Treas. Reg. § 1.6046-1. The same tax-exempt investment portfolios which contain investments in partnerships often also contain investments in offshore funds treated as corporations for U.S. tax purposes. The reference to Treas. Reg. § 1.6046-1 or reapplication of those rules to the ownership thresholds under section 512(a)(6) would likely make sense to these tax-exempt organizations.

2. Investment Expenditures Related to Investment Activities for Trusts

<u>Overview</u>

The proposed regulations provide that investment activities are an unrelated trade or business. This treatment applies regardless of whether the exempt organization engaging in the activities is a corporation or trust. Some commenters argued against this treatment, pointing to the Supreme Court's conclusion in *Higgins v. Commissioner*, 312 U.S. 212 (1941) that an individual's investment activities do not constitute the carrying on of a trade or business. In the preamble to the proposed regulations, Treasury and the IRS rejected this argument by claiming that Higgins applies to individuals, not corporations or trusts. Treasury and the IRS also assert that section 212, which Congress enacted in response to Higgins to allow individuals to deduct ordinary and necessary expenses incurred in the production or collection of income, "applies only to individuals." By contrast, corporations or trusts, according to Treasury and the IRS, may deduct only "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" under section 162.

The assertion that section 212 is unavailable to tax-exempt trusts comes as news to the thousands of tax-exempt trusts that assumed they should be deducting expenses incurred in conducting their investment activities under section 212 (to the extent they exceed 2% of AGI) rather than section 162.

As part of the TCJA, Congress enacted section 67(g), which suspended miscellaneous itemized deductions, including deductions under section 212. As a result, many tax-exempt trusts had concluded that they could not currently deduct most expenses (including investment advisory fees) incurred in conducting their investment activities as part of determining UBTI. This conclusion was incorrect if the investment activities of tax-exempt trusts are actually trade or business activities for which deductions under section 162 are available.

Recommendation

Treasury and the IRS should confirm that tax-exempt trusts may deduct the ordinary and necessary expenses paid or incurred in conducting their investment activities under section 162 and that the deductibility of such expenses are unaffected by section 67(g).

Analysis

If the investment activities of a tax-exempt trust are, indeed, a trade or business, ordinary and necessary expenses incurred in carrying out this activity are deductible under section 162. Conversely, if such expenses are not deductible under section 162, it is because the investment activities of a tax-exempt trust are not a trade or business activity and are not an unrelated trade or business for purposes of section 512(a)(6).

IV. Transition Rule and Net Operating Losses

Overview

The proposed regulations currently provide for a sunset of the transition rule applied to partnership interests acquired prior to August 21, 2018, and not classified as a QPI. Since these partnership interests were allowed to be treated as a single trade or business beginning in 2018, the sunset of this rule introduced in the Notice raises questions related to the carryover of the aggregate NOL generated from UBTI from lower-tier partnerships that were engaged in multiple trades or businesses and generated net operating losses prior to issuance of the final regulations.

Recommendation

We recommend the transition rule become a permanent grandfather rule for partnership interests acquired before August 21, 2018.

Analysis

Notice 2018-67, section 6 introduced an interim and transition rule for the classification of partnership investments as a trade or business activity for purposes of section 512(a)(6). Section 6.04 of the Notice introduced a transition rule, under which an EO could choose to treat a partnership interest as a single trade or business if it was acquired prior to August 21, 2018.

Beginning with the 2018 tax year, exempt organizations that applied the transition rule to certain partnership investments established NOL carryover amounts if there were aggregate net UBTI losses generated by underlying trade or business activities from within the partnership's investment portfolio. In these instances (and prior to guidance introduced for section 172(b)(1)(D)), the exempt organization applied section 172(b)(1)(A)(ii)(II) in tracking the NOL carryover and expected to offset future aggregate UBTI reported by this partnership investment with the NOL carryover pursuant to section 172(a)(2)(B).

Sunset of the transition rule pursuant to the proposed regulations will require further guidance to affected organizations to understand how NOL carryovers derived in a trade or business defined pursuant to the transition rule can offset future UBTI pursuant to section 172(a)(2)(B). In essence, the silo that was created by a partnership investment will no longer exist once the transition rule sunsets with the final regulations. This would present an administrative burden that would require organizations to retroactively bifurcate the underlying trade or business activities to track the NOL carryover properly. This exercise would appear to be against the initial policy intent of the transition rule introduced in the Notice.

V. Net Operating Losses and Unrelated Business Taxable Income

1. Ordering of Net Operating Losses

Overview

In the AICPA's previously submitted comments to the Notice, we recommended allowing exempt organizations to elect to utilize NOLs for the current and future tax years either on a last-in, first-out (LIFO), or first-in, first-out (FIFO) basis. However, the proposed regulations require that all NOLs be utilized on a FIFO basis only. In doing so, the proposed regulations disregard the ordering rule contained in section 512(a)(6). As was expressly recognized in the Notice (and implicitly on the Form 990-T), section 512(a)(6) "changed the order in which an organization would ordinarily take losses." Section 512(a)(6)(A) requires an organization with more than one unrelated trade or business to calculate UBTI separately, including for purposes of determining any NOL deduction, with respect to each such trade or business before calculating total UBTI under section 512(a)(6)(B). UBTI cannot be determined separately for a trade or business without applying post-2017 NOLs arising from that trade or business. Moreover, section 13702(b)(2) of the TCJA provides that pre-2018 NOLs are taken against total UBTI calculated under section 512(a)(6)(B). Combining these provisions, section 512(a)(6) provides that post-2017 NOLs are to be taken before pre-2018 NOLs. However, the general ordering rule under section 172 is FIFO – older NOLs are taken before more recent NOLs – suggesting a contrary ordering rule: that pre-2018 NOLs should be taken before post-2017 NOLs.

Whether it is beneficial to use pre-2018 or post-2017 NOLs first will depend upon the circumstances. Opportunities to use post-2017 NOLs will arise less frequently than using pre-2018 NOLs. Exempt organizations may wish to use the ordering rule of section 512(a)(6) to take advantage of these opportunities when they arise. However, pre-2018 NOLs may only be carried forward 20 years, and taxpayers may wish to apply the general ordering rule of section 172 when a pre-2018 NOL is close to expiring.

<u>Recommendation</u>

In any given tax year, exempt organizations should have the option to choose between deducting pre-2018 NOLs first or post-2017 NOLs first (with NOLs within each category being deducted on a FIFO basis). Examples of how these calculations could differ are attached. In example A1, the exempt organization chose to apply post-2017 NOLs first. In examples A2 and A3, the exempt organization chose to apply pre-2018 NOLs first (with the results differing depending on how the remaining UBTI is allocated, as discussed in the next section).

The AICPA also agrees with the comments submitted by the American Bar Association (ABA) that an NOL in a silo should remain available if an organization ceases and later resumes the activity in the silo[15] and comments submitted by the TEGE Exempt Organizations Council (TEGE) that in the event of a sale, exchange, liquidation or dissolution of a trade or business, any remaining losses are applied first to any gain realized on the disposition of the trade or business and any remaining accumulated losses are made available as an offset to UBTI from other trades or businesses of the organization.[16]

<u>Analysis</u>

The conflict between the ordering rules of section 512(a)(6) and section 172 does not provide Treasury and the IRS the statutory authority to disregard the section 512(a)(6) ordering rule. Rather, an attempt must be made to balance and give due respect to the ordering rules of both section 512(a)(6) and section 172. The most obvious and optimal way to give meaning to the ordering rule of both provisions is to simply let taxpayers choose which ordering rule to apply in each taxable year, depending on which option will permit the taxpayer to best utilize its NOLs and/or minimize any administrative burden with respect to calculating the permitted deduction. Giving taxpayers the option of using post-2017 NOLs first will be easier for organizations to administer in situations where they would still have UBTI remaining had they applied the pre-2018 NOLs first. This avoids a cumbersome multi-step process that necessitates allocating the remaining UBTI "back into the silos" to apply post-2017 NOLs (as discussed in the next section of this comment letter). See example A1 for an illustration of how this approach would work.

[15] ABA Comments on Proposed Regulations under Section 512(a)(6) (June 23, 2020, page 33)
[16] TEGE Comments in Responses to REG-106864-18 (June 23, 2020, page 33)

Note that even when taxpayers choose to use the ordering rule of section 512(a)(6) and apply post-2017 NOLs first, the ordering rule of section 172 is still given due respect, as both post-2017 NOLs and pre-2018 NOLs are, within each category of NOL, applied on a FIFO basis.

Treasury and the IRS should also keep in mind that a rule that gives taxpayers the option of deducting pre-2018 or post-2017 NOLs first would be an inherently temporary transition rule, as all pre-2018 NOLs will eventually expire.

In addition, the AICPA is not separately commenting on mergers, acquisitions, sales, or exchanges, or what happens when a business activity ceases; however, as mentioned previously the AICPA agrees with the viewpoints expressed by the ABA and TEGE in this area.

2. Allocating UBTI after Applying Pre-2018 Net Operating Losses

Overview

When pre-2018 NOLs are applied before post-2017 NOLs (and especially if such an ordering rule is mandated), additional guidance is needed for circumstances in which an organization with more than one trade or business and post-2017 NOLs has UBTI remaining after the application of pre-2018 NOLs. Depending on how the organization allocates the remaining UBTI between each separate trade or business activity, the amount of post-2017 NOL deduction by trade or business activity – and hence the amount of taxable income – is affected.

Recommendation

Exempt organizations with more than one trade or business that have UBTI remaining after the application of pre-2018 NOLs should be permitted to allocate, or rather assign, the remaining UBTI between each separate trade or business in a manner that maximizes utilization of post-2017 NOLs. See example A2 for an illustration of this approach.

Analysis

As discussed at length in section V.1 of this comment letter (and as the IRS has previously recognized), section 512(a)(6) provides for post-2017 NOLs to be deducted before pre-2018 NOLs, thereby maximizing the utilization of post-2017 NOLs. Accordingly, a rule that permits organizations to allocate UBTI remaining after the utilization of pre-2018 NOLs between each separate trade or business in a manner that maximizes utilization of post-2017 NOLs is consistent with section 512(a)(6). – and certainly more so than a rule requiring utilizing pre-2018 NOLs first with remaining UBTI allocated in a manner that guards against the utilization of post-2017 NOLs. See examples A2 and A3 for an illustration of how the use of post-2017 NOLs is affected by the allocation of UBTI remaining after pre-2018 NOLs are deducted. In example A2, the taxpayer allocates remaining UBTI in a manner that maximizes utilization of post-2017 NOLs and the result is no UBTI. In example A3, by contrast, the taxpayer allocates remaining UBTI to each silo in proportion to the amount of UBTI from each silo before the application of NOLs; under that allocation methodology, a small amount of UBTI results. The result in example A3 unreasonably restricts the utilization of post-2017 NOLs in a manner not contemplated by the ordering rule of section 512(a)(6).

3. Computation of Modified Taxable Income for Use of Net Operating Loss Carryforwards and the Corresponding Reduction for Charitable Contribution Carryforwards to Extent Contributions Reduce Modified Taxable Income

Overview

Beginning with the Revenue Act of 1918 and during most of the Code's continued existence, taxpayers have been allowed a deduction for NOLs from prior (carryforward) or later (carryback) tax years. In computing taxable income, a taxpayer merely treats its combined NOL carryovers as a deduction to reduce taxable income to zero. However, when determining the actual amount of the combined NOLs used as a deduction, section 172(d) requires a taxpayer to determine modified taxable income (MTI). Section 170 limitations for contributions apply after deducting NOLs in computing taxable income. Section 172(d)(1) requires a taxpayer to computing the section 170 limitation prior to using any NOLs so that MTI is reduced to zero. While Section 172(d) also has modifications for personal exemptions and nonbusiness itemized deductions, there is no reference that requires a modification for the $1,000 deduction allowed in computing UBTI in section 512(b)(12).

Since sections 170(d)(1)(A) and 170(d)(2)(A) allow charitable trusts and nonprofit corporations, respectively, to carry over charitable contributions in excess of the contribution base for up to five years, a taxpayer may be able to claim a charitable deduction for MTI that it could not claim for computing taxable income. As such, a reduction rule is included in the carryover provisions that applies when a charitable contribution reduces MTI and the taxpayer has excess charitable contributions to be carried forward under the limitation computation for taxable income. This reduction rule is often referred to as the NOL conversion rule as it mechanically reduces charitable contribution carryovers to the extent the charitable contributions increased NOL carryovers due to the lowering of MTI. See section 170(d)(1)(B) and (2)(B). The reduction rule, which is more accurately termed a charitable contribution carryover adjustment, relies on computing MTI under section 172(b)(2), and the proposed regulations request comments on the ordering for this adjustment.

In CCA 201928014, the IRS concluded that to determine the charitable contribution carryover adjustment and the amount of an NOL carryover absorbed, the taxpayer must compute MTI under section 172(b)(2) separately for each tax year's NOL carryover. The taxpayer must take into account charitable contribution deductions and deductions for NOLs carried from years before the taxable year of the NOL to be absorbed -- a method the IRS called a "year-by-year NOL absorption computation." Since many taxpayers have in the past filed returns not using the year-by-year NOL absorption method and a CCA may not be cited as precedent, we are only using this method in examples as a method and are not adopting it as the correct method to be used.

Recommendation

We recommend the following:

- Charitable contributions should be applied after section 512(a)(6) has been applied.

- If Treasury and the IRS believe the year-by-year NOL absorption computation described in CCA 201928014 is correct, we recommend confirmation of this and provide examples of this computation in the context of section 512(a)(6). Conversely, if the aggregate NOL absorption method rejected in CCA 201928014 is correct, this should be clarified in a similar fashion.

- Compute MTI consistent with methods adopted for section 512(a)(6) (e.g., at the silo or entity level).

- After a taxpayer determines its current MTI, utilize NOLs in an order consistent with the order they were used to determine a silo's current taxable year income under section 512(a)(6).

- Provide examples in the final regulations or Form 990-T instructions to guide taxpayers on applying charitable contribution deductions, including the provisions under section 170(d)(1)(B) and 170(d)(2)(B). The examples should clarify that the $1,000 specific deduction can reduce MTI under section 172(b)(2) since it is not listed as an adjustment in section 172(d). As such, the $1,000 reduces MTI for purposes of computing the charitable deduction limitation and to determine the amount of NOL used in the current tax year.

- As noted in the preamble to the final regulations for the Deduction for Foreign-Derived Intangible Income (FDII) and GILTI pre-released on July 9, 2020 [TD 9901], create a separate guidance project to address the interaction of sections 163(j), 172, 250, and other Code sections that refer to taxable income. This includes, but is not limited to, the charitable contribution rules under sections 170(b)(2), 170(d)(1)(B), 170(d)(2)(B) and how to apply the rules under the section 512(a)(6) regime for exempt organizations.

Analysis

The NOL conversion rule is complicated, confusing, and easily overlooked by organizations and practitioners. Having consistent treatment of the special rule under section 170(d)(1)(B) and 170(d)(2)(B) with Prop. Reg. § 1.512(b)-1(g)(4) will ease administrability and likelihood of correct application of the rule.

Even though section 512(a)(6) provides that NOL deductions are determined separately for each trade or business in post-2017 tax years, it does not specify determining MTI described in section 172(b)(2) separately for each trade or business. Accordingly, computing MTI on an entity-level basis for items of income or deduction also determined at the entity-level under section 512(a)(6) promotes consistency between sections 512 and 172. Moreover, nothing in section 512(a)(6) suggests that Congress intended not reducing MTI by charitable contribution deductions when determining the absorption of NOLs. However, this result would occur if the regulations required determining MTI separately for each trade or business, given that Treasury and the IRS have appropriately determined deductions for charitable contributions against only entity-level UBTI.

The examples in Exhibit 1 demonstrate the recommended order of utilizing NOLs under either the assigned method (as described in Part V.1 of this letter) or the FIFO method (see section V.2).

In addition to examples A1, A2 and A3, which do not include charitable contributions, attached are four additional examples, which add $125,000 of charitable contributions available for deduction in the current tax year. As such, examples B1, C1, C2 and C3 are to illustrate the interaction of the NOL and charitable contribution rules.

Example B1 uses the same facts as A1 with the $125,000 of charitable contributions. The use of NOLs follows the same assigned method used in A1, where the organization is permitted to first apply post-2017 NOLs before pre-2018 NOLs. For purposes of the NOL conversion rules, charitable contributions are calculated using the year-over-year NOL absorption method, as described in CCA 201928014.

In example C1, the exempt organization's facts are the same as example A2 and include $125,000 of charitable contributions available for deduction in the current year. The use of NOLs follows the FIFO method as described in Prop. Reg. § 1.512(a)-6(h)(2). All other facts are similar to example B1.

In example C2, the exempt organization's facts are the same as example C1, with the exception that the exempt organization follows the aggregate NOL absorption method for determining the charitable contribution deduction for MTI as opposed to the year-of-year NOL absorption method. We understand many tax preparation software packages used by tax preparers inconsistently apply the rules of the NOL conversion, including how to apply the specific deduction for calculating charitable contributions and MTI.

Example C3 illustrates how the rules would apply if the taxpayer in example C1 is a charitable trust rather than a nonprofit corporation. Example C3 is simplified as it doesn't contemplate the other noncorporate rules that apply to trusts but not to corporations. This example assumes all the charitable contributions are cash contributions made to public charities. In 2019, the organization may deduct cash contributions up to 60% of the contribution base as permitted by the Form 990-T instructions.

The examples are meant to highlight the need for regulation examples, worksheets and added instructions to support exempt organizations and practitioners in properly and consistently preparing Form 990-T and computing the charitable contribution and NOL carryovers. Historically, practitioners have relied on corporate and trust (noncorporate) guidance to apply the rules of sections 170(d)(2)(B) and 172; however, with the advent of section 512(a)(6) there is need for additional clarity for consistent and proper reporting.

Finally, the examples are simplified for purposes of this letter. For instance, in example C3 (a charitable trust) the calculations do not include passive activity losses, excess business losses, or at-risk limitations to name a few of the noncorporate provisions that can apply to a charitable trust. This is the case if the trust holds a large investment portfolio consisting of LPs and LLCs. The examples also did not contemplate the interaction of sections 163(j), 172 and 170(b)(2) that rely on a calculation of taxable income, as there may be a need for ordering rules or simultaneous calculations. As noted in recent final regulations to FDII and GILTI, Treasury and the IRS are considering a separate guidance project to delve into the interplay between these provisions. This project is crucial for the exempt organization sector as it faces the added component of calculating UBTI for separate trades or businesses under section 512(a)(6).

VI. Charitable Contributions Taken against Unrelated Business Taxable Income

Overview

Exempt organizations can deduct charitable contributions against UBTI whether or not the deduction is directly connected to the unrelated business activity of the organization. The proposed regulations clarify that the section 170 charitable contribution is deducted against taxable income after application of section 512(a)(6) (i.e., the combined number of silos with taxable income.)

Section 512(b)(10) provides that, for a tax-exempt corporation, the section 170 charitable deduction amount used to reduce UBTI "shall not exceed 10 percent of" UBTI (computed without regard to section 512(b)(10)). The 2019 Form 990-T instructions provide that the tax-exempt organization can deduct charitable contributions up to 100% of UBTI for certain "qualified contributions," as defined in the Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94. For these purposes, a "qualified contribution" is a charitable contribution: (1) paid after December 31, 2017, and before February 19, 2020, to a qualified charitable organization (other than to a supporting organization described in section 509(a)(3) or to establish or maintain a donor advised fund (DAF)); (2) made for relief efforts in one or more qualified disaster areas; (3) for which the taxpayer has obtained a contemporaneous written acknowledgment that such contribution was used (or is to be used) for relief efforts as described above in (2); and (4) for which the taxpayer has elected the application of the increased limitation with respect to the contribution.

Section 512(b)(11) provides that, for a tax-exempt trust, the section 170 deduction against UBTI is subject to the "limitations prescribed in section 170(b)(1)(A) and (B) determined with reference to" UBTI rather than adjusted gross income (AGI). The 2019 Form 990-T instructions provide that, for tax-exempt trusts, "[a]n increased limitation may be available for cash contributions under section 170(b)(1)(G)." Section 170(b)(1)(G) permits individuals to deduct cash contributions up to 60% of AGI to charitable organizations described in section 170(b)(1)(A).

Section 2205 of the Coronavirus Aid, Relief, and Economic Security Act[17] (CARES Act) increased the limitation on deductions for 2020 cash contributions by corporations to charitable organizations described in section 170(b)(1)(A) (other than supporting organizations or DAFs) from 10% of taxable income to 25% of taxable income, provided the corporation makes an election.

[17] P.L. 116-116.

The CARES Act increased the limitation on deductions for cash contributions by individuals to charitable organizations described in section 170(b)(1)(A) (other than supporting organizations or DAFs) made in 2020 from 60% of AGI to up to 100% of AGI, provided the donor makes an election.

Recommendations

We recommend the following:

- Clarify in the final regulations that the limit for tax-exempt trusts deducting charitable cash contributions to qualified charitable organizations is 60% of UBTI, pursuant to section 170(b)(1)(G).
- Provide guidance confirming that the limit for electing tax-exempt corporations deducting section 170 charitable qualifying contributions under the CARES Act is 25% of UBTI.
- Provide guidance confirming that the limit for electing tax-exempt trusts deducting section 170 charitable qualifying contributions under the CARES Act is 100% of UBTI.

Analysis

While the instructions to the 2019 Form 990-T suggest that the limitations discussed in the recommendations section should apply, the cross-references in the various statutory provisions are not entirely clear. Accordingly, we recommend that Treasury and the IRS confirm the applicability of these limitations in published guidance so that tax-exempt organizations can make charitable contributions in 2020 with confidence as to the extent of their deductibility.

Net Operating Loss Example A1
Illustration of utilization of post-2017 NOLs before pre-2018 NOLs

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Post-2017 Silo NOLs (limited to Silo's income for tax year 2019 and 2020) or to 80% for subsequent years. (line 30)	(100,000)		(50,000)	
Unrelated business taxable income in each silo (line 31)	5,000	(5,000)	15,000	
Aggregate UBTI before applying pre-2018 NOLs (line 32)	5,000	0	15,000	20,000
Assign Pre-2018 NOLs (line 36)				(20,000)
Unrelated business taxable income (line 39)				0

Process Steps
Step 1: Calculate UBTI per silo.
Step 2: Apply post-2017 NOLs within each silo (on a FIFO basis)
Step 3: Add together UBTI from each silo with positive UBTI after Step 2
Step 4: Deduct pre-2018 NOLs from sum in Step 3 on a FIFO basis

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(100,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	5,000	0	15,000	20,000

Line 32	Total UBTI from all unrelated trades or businesses	20,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(20,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Process Steps Cont'd
Step 5: Prepare the Form 990-T and Schedules M through line 32.
Step 6: Determine charitable deduction (if applicable)
Step 7: Apply the pre-2018 NOL deduction determined in Step 4.
Step 8: Apply the specific deduction, as applicable.

Net Operating Loss Example A1
Illustration of utilization of post-2017 NOLs before pre-2018 NOLs

NOL Carryover Schedule	Beginning NOL Carryover	CY NOL Absorbed	CY NOL Generated	Amount Converted to NOL	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)			0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)			0
pre-2018 NOL - 2014 Carryover	15,000				15,000
pre-2018 NOLs	35,000	(20,000)		0	15,000
Silo #1 NOL - 2018 Carryover	100,000	(100,000)			0
Silo #2 NOL - 2018 Carryover	2,000				2,000
Silo #2 NOL - 2019 Carryover			5,000		5,000
Silo #2 NOLs	2,000	0	5,000	0	7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)			0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	9,400	22,000

Process Steps Cont'd
Step 9: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 10: Apply NOL Conversion rule pursuant to section 170(d)(2)(B) (if applicable)

Net Operating Loss Example A2
Illustration of utilization of pre-2018 NOLs before post-2017 NOLs

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Aggregate UBTI before all NOL deductions	105,000	0	65,000	170,000
Deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)				(35,000)
Total UBTI before post-2017 NOLs				135,000
Allocation to maximize use of post-2017 NOLs	85,000		50,000	135,000
Post-2017 NOLs for silos with income	(100,000)		(50,000)	
Allowed 2018 NOL	(85,000)		(50,000)	(135,000)
Unrelated business taxable income	0		0	0

Process Steps
Step 1: Calculate UBTI per silo before NOLs
Step 2: Add together UBTI from each silo with positive pre-NOL UBTI under Step 1
Step 3: Deduct pre-2018 NOLs from sum in Step 2 on a FIFO basis
Step 4: If any UBTI remains, allocate remaining UBTI to each silo to maximize use of post-2017 NOLs
Step 5: Deduct post-2017 NOLs on a FIFO basis
Step 6: Add together UBTI from each silo with positive post-NOL UBTI under Step 5

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(85,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	20,000	0	15,000	35,000

Line 32	Total UBTI from all unrelated trades or businesses	35,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(35,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Process Steps Cont'd
Step 7: Prepare the Form 990-T and Schedules M through line 32.
Step 8: Determine charitable deduction (if applicable)
Step 9: Apply the post-2018 NOL deduction.
Step 10: Apply the specific deduction, as applicable.

Net Operating Loss Example A2
Illustration of utilization of pre-2018 NOLs before post-2017 NOLs

NOL Carryover Schedule	Beginning NOL Carryover	CY NOL Absorbed	CY NOL Generated	Amount Converted to NOL	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)			0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)			0
pre-2018 NOL - 2014 Carryover	15,000	(15,000)			0
pre-2018 NOLs	35,000	(35,000)		0	0
Silo #1 NOL - 2018 Carryover	100,000	(85,000)			15,000
Silo #2 NOL - 2018 Carryover	2,000				2,000
Silo #2 NOL - 2019 Carryover			5,000		5,000
Silo #2 NOLs	2,000	0	5,000	0	7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)			0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	9,400	22,000

Process Steps Cont'd
Step 11: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 12: Apply NOL Conversion rule pursuant to section 170(d)(2)(B) (if applicable)

Net Operating Loss Example A3
Illustration of utilization of pre-2018 NOLs before post-2017 NOLs

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Aggregate UBTI before all NOL deductions	105,000	0	65,000	170,000
Deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)				(35,000)
Total UBTI before post-2017 NOLs				135,000
Apportion based on relative UBTI before NOL	83,382		51,618	135,000
Post-2017 NOLs for silos with income	(100,000)		(50,000)	
Allowed 2018 NOL	(83,382)		(50,000)	(133,382)
Unrelated business taxable income	0		1,618	1,618

Process Steps
Step 1: Calculate UBTI per silo before NOLs
Step 2: Add together UBTI from each silo with positive pre-NOL UBTI under Step 1
Step 3: Deduct pre-2018 NOLs from sum in Step 2 on a FIFO basis
Step 4: If there are post-2017 NOLs, calculate amount of remaining UBTI attributable to each silo. If any UBTI remains, allocate remaining UBTI to each silo in proportion to the amount of UBTI from each silo before the application of NOLs
Step 5: Deduct post-2017 NOLs on a FIFO basis
Step 6: Add together UBTI from each silo with positive post-NOL UBTI under Step 5

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(83,382)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	21,618	0	15,000	36,618

Line 32	Total UBTI from all unrelated trades or businesses	36,618
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(35,000)
Line 38	Less the specific deduction	(1,000)
Line 39	Unrelated business taxable income	618

Process Steps Cont'd
Step 7: Prepare the Form 990-T and Schedules M through line 32.
Step 8: Determine charitable deduction (if applicable)
Step 9: Apply the post-2018 NOL deduction.
Step 10: Apply the specific deduction, as applicable.

Net Operating Loss Example A3
Illustration of utilization of pre-2018 NOLs before post-2017 NOLs

NOL Carryover Schedule	Beginning NOL Carryover	CY NOL Absorbed	CY NOL Generated	Amount Converted to NOL	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)			0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)			0
pre-2018 NOL - 2014 Carryover	15,000	(15,000)			0
pre-2018 NOLs	35,000	(35,000)		0	0
Silo #1 NOL - 2018 Carryover	100,000	(83,382)			16,618
Silo #2 NOL - 2018 Carryover	2,000				2,000
Silo #2 NOL - 2019 Carryover			5,000		5,000
Silo #2 NOLs	2,000	0	5,000	0	7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)			0
Total of all Silos and Pre-2018 NOLs	187,000	(168,382)	5,000	9,400	23,618

Process Steps Cont'd
Step 11: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 12: Apply NOL Conversion rule pursuant to section 170(d)(2)(B) (if applicable)

Net Operating Loss Example B1
Illustration of Charitable Contribution Rules

The baseline facts build off of Example A1 and the organization is a nonprofit corporation.
The AICPA has included charitable contribution carryover information into Example B1.

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

Charitable contributions carryover and current year detail	Year	Amount
	2015	20,000
	2016	15,000
	2017	60,000
	2019	30,000
		125,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Post-2017 Silo NOLs (limited to Silo's income for tax year 2019 and 2020) or to 80% for subsequent years. (line 30)	(100,000)		(50,000)	
Unrelated business taxable income in each silo (line 31)	5,000	(5,000)	15,000	
Aggregate UBTI before applying pre-2018 NOLs (line 32)	5,000	0	15,000	20,000
Assign pre-2018 NOLs (line 36)				(20,000)
Unrelated business taxable income (line 39)				0

Process Steps
Step 1: Calculate UBTI per silo.
Step 2: Apply post-2017 NOLs within each silo (on a FIFO basis)
Step 3: Add together UBTI from each silo with positive UBTI after Step 2
Step 4: Deduct pre-2018 NOLs from sum in Step 3 on a FIFO basis
Step 5: Sum totals to determine the amount to report on Form 990-T, line 30

Net Operating Loss Example B1
Illustration of Charitable Contribution Rules

2019 Form 990-T	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(100,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	5,000	0	15,000	20,000

Line 32	Total UBTI from all unrelated trades or businesses	20,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(20,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Process Steps Cont'd
Step 6: Prepare the Form 990-T and Schedules M through line 32.
Step 7: Determine charitable deduction (if applicable)
Step 8: Apply the pre-2018 NOL deduction determined in Step 4.
Step 9: Apply the specific deduction, as applicable.

Step 7: Determine charitable contribution deduction per section 512(b)(10)	
Aggregate UBTI before applying pre-2018 NOLs (line 32)	20,000
Less pre-2018 NOLs	(20,000)
Less specific deduction	
UBTI before charitable contribution deduction	0
	10%
Max charitable contribution deduction allowed	0

NOL Carryover Schedule	Beginning NOL Carryover	NOL Absorbed	CY NOL Generated	Amount Converted to NOL (Step 11c)	Specific Deduction Allowed 172(b)(2)	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)				0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)		700	1,000	1,700
pre-2018 NOL - 2014 Carryover	15,000					15,000
pre-2018 NOLs	35,000	(20,000)		700	1,000	16,700
Silo #1 NOL - 2018 Carryover	100,000	(100,000)				0
Silo #2 NOL - 2018 Carryover	2,000					2,000
Silo #2 NOL - 2019 Carryover			5,000			5,000
Silo #2 NOLs	2,000	0	5,000	0		7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)				0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	700	1,000	23,700

Process Steps Cont'd
Step 10: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.

Net Operating Loss Example B1
Illustration of Charitable Contribution Rules

Charitable Contribution Carryover Schedule	Beginning Carryover	CY Amount	Amount Utilized	Converted Contributions (Step 11b)	Ending Carryover
2019 charitable contributions		30,000		(700)	29,300
Charitable contribution carryover -2014	0				0
Charitable contribution carryover -2015	20,000				20,000
Charitable contribution carryover -2016	15,000				15,000
Charitable contribution carryover -2017	60,000				60,000
Charitable contribution carryover -2018	0				0
Total charitable contributions	95,000	30,000	0	(700)	124,300

Process Steps Cont'd
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(2)(B).
Step 12: Update of charitable contribution carryover schedules.

Step 11: Determine the NOL Conversion per sections 170(d)(2)(B) and 172	
Modified taxable income before contributions (Amount from Step 11a)	170,000
Less 2018 NOLs fully absorbed	(150,000)
Less 2011 NOLs fully absorbed	(12,000)
Taxable income before charitable contributions	8,000
Less charitable contribution deduction	(700)
Less the specific deduction	(1,000)
Modified taxable income after contributions deduction	6,300
Less NOL deduction for the current year (for the NOLs not fully absorbed)	(8,000)
Decrease in NOL Utilized per Section 172(b)(2) modified taxable income	**(1,700)**

Process Steps Cont'd
Step 11a: Calculated modified taxable income under section 172(b)(2). Per the year-by-year NOL absorption method subtract the year-by-year NOLs that were fully absorbed by the current taxable income. (Per CCA 201928014)
Step 11b: Charitable deduction for purposes of section 172(b)(2). See
Step 11c: Determine excess available NOL over section 172(b)(2) taxable income. If positive, stop here as 170(d)(2)(B) does not apply and if negative, the amount is the NOL Conversion included to the NOL Carryover schedule.

Step 11b: Determine charitable contribution deduction for 172(b)(2) modified taxable income	
Modified taxable income before contributions (Amount from Step 11a)	8,000
Less specific deduction	(1,000)
UBTI before charitable contribution deduction	7,000
	10%
Maximum charitable contribution deduction allowed	700
Available charitable contributions	125,000
Lesser of the maximum allowed our current year contributions	**700**

Process Steps Cont'd
Step 11b: Determine the charitable contribution deduction for purposes of section 172(b)(2) modified taxable income calculation.

Step 11c: 170(b)(2) modified taxable income	
Taxable income under section 172(d)	170,000
Less charitable contribution deduction (Step 11b)	(700)
Less specific deduction under 512(b)(12)	(1,000)
Modified taxable income	168,300

Net Operating Loss Example C1
Illustration of Charitable Contribution Rules

The baseline facts build off of Example A2 and the organization is a nonprofit corporation.
The AICPA has included charitable contribution carryover information from Example B1.
For purposes of the special rule under section 170(d)(2)(B) and 172(b)(2) the year-over-year NOL absorption method has been used.

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

Charitable contributions carryover and current year detail	Year	Amount
	2015	20,000
	2016	15,000
	2017	60,000
	2019	30,000
		125,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Aggregate UBTI before all NOL deductions	105,000	0	65,000	170,000
Deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)				(35,000)
Total UBTI before post-2017 NOLs				135,000
Allocation at will	85,000		50,000	135,000
Post-2017 NOLs for silos with income	(100,000)		(50,000)	
Allowed 2018 NOL	(85,000)		(50,000)	(135,000)
Unrelated business taxable income	0		0	0

Process Steps
Step 1: Calculate UBTI per Silo.
Step 2: Apply section 512(a)(6) to determine UBTI.
Step 3: Apply the pre-2018 NOL deduction, pursuant to Prop Reg §1.512(a)-6(h)(2)
Step 4: If there are post-2017 NOLs, calculate amount of remaining UBTI attributable to each silo.
Step 5: Determine post-2017 NOLs to utilize
Step 5a: Apply post-2017 NOLs to the extent of UBTI (for tax years 2019 and 2020) or to 80% of UBTI (for subsequent tax years).
Step 5b: Sum totals to determine the amount to report on Form 990-T, line 30

Net Operating Loss Example C1
Illustration of Charitable Contribution Rules

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(85,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	20,000	0	15,000	35,000

Line 32	Total UBTI from all unrelated trades or businesses	35,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(35,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Step 7: Determine charitable contribution deduction per section 512(b)(10)	
UBTI as calculated in Step 2	170,000
Less post-2017 NOLs under 512(a)(6)(A)	(135,000)
UBTI as defined by Prop. Reg. 1.512(b)-1(g)(4)	35,000
Less pre-2018 NOLs	(35,000)
Less specific deduction	
UBTI before charitable contribution deduction	0
	10%
Max charitable contribution deduction allowed	0

Process Steps Cont'd
Step 6: Prepare the Form 990-T and Schedules M through line 32.
Step 7: Determine charitable deduction (if applicable)
Step 8: Apply the pre-2018 NOL deduction determined in Step 3.
Step 9: Apply the specific deduction, as applicable.

NOL Carryover Schedule	Beginning NOL Carryover	NOL Absorbed	CY NOL Generated	Amount Converted to NOL (Step 11c)	Specific Deduction Allowed 172(b)(2)	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)				0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)				0
pre-2018 NOL - 2014 Carryover	15,000	(15,000)				0
pre-2018 NOLs	35,000	(35,000)		0		0
Silo #1 NOL - 2018 Carryover	100,000	(85,000)		13,400	1,000	29,400
Silo #2 NOL - 2018 Carryover	2,000					2,000
Silo #2 NOL - 2019 Carryover			5,000			5,000
Silo #2 NOLs	2,000	0	5,000	0		7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)				0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	13,400	1,000	36,400

Process Steps Cont'd
Step 10: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(2)(B) and 172. The taxpayer assigned the amount to Silo #1 similar to Step 5 above.

Net Operating Loss Example C1
Illustration of Charitable Contribution Rules

Charitable Contribution Carryover Schedule	**Beginning Carryover**	**CY Amount**	**Amount Utilized**	**Converted Contributions (Step 11b)**	**Ending Carryover**
2019 charitable contributions		30,000		(13,400)	16,600
Charitable contribution carryover -2014	0				0
Charitable contribution carryover -2015	20,000				20,000
Charitable contribution carryover -2016	15,000				15,000
Charitable contribution carryover -2017	60,000				60,000
Charitable contribution carryover -2018	0				0
Total charitable contributions	95,000	30,000	0	(13,400)	111,600

Process Steps Cont'd
Step 12: Update of charitable contribution carryover schedules.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(2)(B).

Step 11: Determine the NOL Conversion per sections 170(d)(2)(B) and 172	
Taxable income before NOL and charitable contributions	170,000
Less 2011 NOL carryover fully absorbed	(12,000)
Less 2012 NOL carryover fully absorbed	(8,000)
Less 2013 NOL carryover fully absorbed	(15,000)
Taxable income before charitable contributions	135,000
Less charitable contribution deduction	(13,400)
Less the specific deduction	(1,000)
Modified taxable income after contributions deduction	120,600
Less NOL deduction for the current year (for the NOLs not fully absorbed)	(135,000)
Decrease in NOL Utilized per Section 172(b)(2) modified taxable income	**(14,400)**

Process Steps Cont'd
Step 11a: Calculated modified taxable income under section 172(b)(2). Per the year-by-year NOL absorption method subtract the year-by-year NOLs that were fully absorbed by the current taxable income. (Per CCA 201928014)
Step 11b: Charitable deduction for purposes of section 172(b)(2). See calc. below.
Step 11c: Determine excess available NOL over section 172(b)(2) taxable income. If positive, stop here as 170(d)(2)(B) does not apply and if negative, the amount is the NOL Conversion included to the NOL Carryover schedule.

Step 11b: Determine charitable contribution deduction for 172(b)(2) modified taxable income	
Modified taxable income before contributions (Amount from Step 11a)	135,000
Less specific deduction	(1,000)
UBTI before charitable contribution deduction	134,000
	10%
Maximum charitable contribution deduction allowed	13,400
Available charitable contributions	125,000
Lesser of the maximum allowed our current year contributions	**13,400**

Process Steps Cont'd
Step 11b: Determine the charitable contribution deduction for purposes of section 172(b)(2) modified taxable income calculation and amount to use for reduction of contribution carryover under section 170(d)(2)(B).

Step 11c: 170(b)(2) modified taxable income	
Taxable income under section 172(d)	170,000
Less charitable contribution deduction (Step 11b)	(13,400)
Less specific deduction under 512(b)(12)	(1,000)
Modified taxable income	155,600

Net Operating Loss Example C2
Illustation of Charitable Contribution Rules

Same example as C1 except, for purposes of the special rule under section 170(d)(2)(B) and 172(b)(2) the aggregate NOL absorption method has been used.

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Amount
	2011	12,000
	2012	8,000
	2014	15,000
		35,000

Charitable contributions carryover and current year detail	Year	Amount
	2015	20,000
	2016	15,000
	2017	60,000
	2019	30,000
		125,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Unrelated business taxable income	105,000	0	65,000	170,000
Deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)				(35,000)
Total UBTI before post-2017 NOLs				135,000
Allocation at will	85,000		50,000	135,000
Post-2017 NOLs for silos with income	(100,000)		(50,000)	
Allowed 2018 NOL	(85,000)		(50,000)	(135,000)
Unrelated business taxable income	0		0	0

Process Steps
Step 1: Calculate UBTI per Silo.
Step 2: Apply section 512(a)(6) to determine UBTI.
Step 3: Apply the pre-2018 NOL deduction, pursuant to Prop Reg §1.512(a)-6(h)(2)
Step 4: If there are post-2017 NOLs, calculate amount of remaining UBTI attributable to each silo.
Step 5: Determine post-2017 NOLs to utilize
Step 5a: Apply post-2017 NOLs to the extent of UBTI (for tax years 2019 and 2020) or to 80% of UBTI (for subsequent tax years).
Step 5b: Sum totals to determine the amount to report on Form 990-T, line 30

Net Operating Loss Example C2
Illustation of Charitable Contribution Rules

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(85,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	20,000	0	15,000	35,000

Line 32	Total UBTI from all unrelated trades or businesses	35,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(35,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Step 7: Determine charitable contribution deduction per section 512(b)(10)	
UBTI as calculated in Step 2	170,000
Less post-2017 NOLs under 512(a)(6)(A)	(135,000)
UBTI as defined by Prop. Reg. 1.512(b)-1(g)(4)	35,000
Less pre-2018 NOLs	(35,000)
Less specific deduction	
UBTI before charitable contribution deduction	35,000
	10%
Max charitable contribution deduction allowed	3,500

Process Steps Cont'd
Step 6: Prepare the Form 990-T and Schedules M through line 32.
Step 7: Determine charitable deduction (if applicable)
Step 8: Apply the pre-2018 NOL deduction determined in Step 3.
Step 9: Apply the specific deduction, as applicable.

NOL Carryover Schedule	Beginning NOL Carryover	NOL Absorbed	CY NOL Generated	Amount Converted to NOL (Step 11c)	Specific Deduction Allowed 172(b)(2)	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)				0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)				0
pre-2018 NOL - 2014 Carryover	15,000	(15,000)				0
pre-2018 NOLs	35,000	(35,000)		0		0
Silo #1 NOL - 2018 Carryover	100,000	(85,000)		16,900	1,000	32,900
Silo #2 NOL - 2018 Carryover	2,000					2,000
Silo #2 NOL - 2019 Carryover			5,000			5,000
Silo #2 NOLs	2,000	0	5,000	0		7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)				0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	16,900	1,000	39,900

Process Steps Cont'd
Step 10: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(2)(B) and 172. The taxpayer assigned the amount to Silo #1 similar to Step 5 above.

Net Operating Loss Example C2
Illustation of Charitable Contribution Rules

Charitable Contribution Carryover Schedule	Beginning Carryover	CY Amount	Amount Utilized	Converted Contributions (Step 11b)	Ending Carryover
2019 charitable contributions		30,000		(16,900)	13,100
Charitable contribution carryover -2014	0				0
Charitable contribution carryover -2015	20,000				20,000
Charitable contribution carryover -2016	15,000				15,000
Charitable contribution carryover -2017	60,000				60,000
Charitable contribution carryover -2018	0				0
Total charitable contributions	95,000	30,000	0	(16,900)	108,100

Process Steps Cont'd
Step 12: Update of charitable contribution carryover schedules.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(2)(B).

Step 11: Determine the NOL Conversion per 170(d)(2)(B) adjustment	
Taxable income before NOL and charitable contributions	170,000
Less charitable contribution deduction	(16,900)
Less the specific deduction	(1,000)
Modified taxable income	152,100
Less NOL deduction absorbed during the year	(170,000)
Decrease in NOL Utilized per Section 172(b)(2) modified taxable income	**(17,900)**

Process Steps Cont'd
Step 11a: Determine the modified taxable income per the second sentence of section 172(b)(2) for purposes of section 170(d)(2). Aggregate method is used for the NOL absorption.
Step 11b: Charitable contribution for purposes of section 172(b)(2). See calc. below.
Step 11c: Determine excess available NOL over section 172(b)(2) taxable income. If positive, stop here as 170(d)(2)(B) does not apply and if negative, the amount is the NOL Conversion included to the NOL Carryover schedule.

Step 11b: Determine charitable contribution deduction for 172(b)(2) modified taxable income	
Modified taxable income before contributions (Amount from Step 11a)	170,000
Less specific deduction	(1,000)
UBTI before charitable contribution deduction	169,000
	10%
Maximum charitable contribution deduction allowed	16,900
Available charitable contributions	125,000
Lesser of the maximum allowed our current year contributions	**16,900**

Process Steps Cont'd
Step 11b: Determine the charitable contribution deduction for purposes of section 172(b)(2) modified taxable income calculation and amount to use for reduction of contribution carryover under section 170(d)(2)(B).

Step 11c: 170(b)(2) modified taxable income	
Taxable income under section 172(d)	170,000
Less charitable contribution deduction (Step 11b)	(16,900)
Less specific deduction under 512(b)(12)	(1,000)
Modified taxable income	152,100

Net Operating Loss Example C3
Illustration of Charitable Contribution Rules

Same facts as C1 except the exempt organization is a charitable trust rather than a nonprofit corporation.

UBTI and Carryovers per Silo	Silo #1	Silo #2	Silo #3
2019 unrelated taxable income and losses (UBTI)	105,000	(5,000)	65,000
2018 NOL Carryover	100,000	2,000	50,000

Pre-2018 NOLs including years generated	Year	Regular Tax Amount	AMT Amount
	2011	12,000	12,000
	2012	8,000	8,000
	2014	15,000	15,000
		35,000	35,000

Charitable contributions carryover and current year detail	Year	Regular Tax Amount	AMT Amount
	2015	20,000	20,000
	2016	15,000	15,000
	2017	60,000	60,000
	2019	30,000	30,000
		125,000	125,000

2019 Form 990-T Calculations

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Aggregate UBTI before all NOL deductions	105,000	0	65,000	170,000
Deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)				(35,000)
Total UBTI before post-2017 NOLs				135,000
Allocation at will	85,000		50,000	135,000
Post-2017 NOLs for silos with income	(100,000)		(50,000)	
Allowed 2018 NOL	(85,000)		(50,000)	(135,000)
Unrelated business taxable income	0		0	0

Process Steps
Step 1: Calculate UBTI per Silo.
Step 2: Apply section 512(a)(6) to determine UBTI.
Step 3: Apply the pre-2018 NOL deduction, pursuant to Prop Reg §1.512(a)-6(h)(2)
Step 4: If there are post-2017 NOLs, calculate amount of remaining UBTI attributable to each silo.
Step 5: Determine post-2017 NOLs to utilize
Step 5a: Apply post-2017 NOLs to the extent of UBTI (for tax years 2019 and 2020) or to 80% of UBTI (for subsequent tax years).
Step 5b: Sum totals to determine the amount to report on Form 990-T, line 30

Net Operating Loss Example C3
Illustration of Charitable Contribution Rules

2019 Form 990-T

	Silo #1	Silo #2	Silo #3	Total
UBTI before NOL deduction (line 29)	105,000	(5,000)	65,000	
Deduction for NOL arising post 1/1/2018 (post-2017 NOLs) (line 30)	(85,000)		(50,000)	
Unrelated business taxable income (line 30) with application of section 512(a)(6)	20,000	0	15,000	35,000

Line 32	Total UBTI from all unrelated trades or businesses	35,000
Line 34	Less charitable contributions	0
Line 36	Less the deduction for NOL arising before 1/1/2018 (pre-2018 NOLs)	(35,000)
Line 38	Less the specific deduction	
Line 39	Unrelated business taxable income	0

Step 7: Determine charitable contribution deduction per section 512(b)(10)	
UBTI as calculated in Step 2	170,000
NOL deductions (pre-2018 and post-2017)	(170,000)
Less specific deduction	
UBTI before charitable contribution deduction	0
	60%
Max charitable contribution deduction allowed	0

NOL Carryover Schedule	Beginning NOL Carryover	NOL Absorbed	CY NOL Generated	Amount Converted to NOL (Step 11c)	Specific Deduction Allowed 172(b)(2)	Ending NOL Carryover
pre-2018 NOL - 2011 Carryover	12,000	(12,000)				0
pre-2018 NOL - 2012 Carryover	8,000	(8,000)				0
pre-2018 NOL - 2014 Carryover	15,000	(15,000)				0
pre-2018 NOLs	35,000	(35,000)				0
Silo #1 NOL - 2018 Carryover	100,000	(85,000)		80,400	1,000	96,400
Silo #2 NOL - 2018 Carryover	2,000					2,000
Silo #2 NOL - 2019 Carryover			5,000			5,000
Silo #2 NOLs	2,000	0	5,000			7,000
Silo #3 NOL - 2018 Carryover	50,000	(50,000)				0
Total of all Silos and Pre-2018 NOLs	187,000	(170,000)	5,000	80,400	1,000	103,400

Process Steps Cont'd
Step 6: Prepare the Form 990-T and Schedules M through line 32.
Step 7: Determine charitable deduction (if applicable)
Step 8: Apply the pre-2018 NOL deduction determined in Step 3.
Step 9: Apply the specific deduction, as applicable.

Process Steps Cont'd
Step 10: Adjust the NOL carryforward schedules for NOL deductions generated or utilized in the tax year.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(1)(B) and 172. The taxpayer assigned the amount to Silo #1 similar to Step 5 above.

Net Operating Loss Example C3
Illustration of Charitable Contribution Rules

Charitable Contribution Carryover Schedule	Beginning Carryover	CY Amount	Amount Utilized	Converted Contributions (Step 11b)	Ending Carryover
2019 charitable contributions		30,000		(30,000)	0
Charitable contribution carryover -2014	0				0
Charitable contribution carryover -2015	20,000				20,000
Charitable contribution carryover -2016	15,000				15,000
Charitable contribution carryover -2017	60,000			(50,400)	9,600
Charitable contribution carryover -2018	0				0
Total charitable contributions	95,000	30,000		(80,400)	44,600

Process Steps Cont'd
Step 12: Update of charitable contribution carryover schedules.
Step 11: Apply NOL Conversion rule pursuant to section 170(d)(1)(B).

Step 11: Determine the NOL Conversion per sections 170(d)(1)(B) and 172	
Taxable income before NOL and charitable contributions	170,000
Less 2011 NOL carryover fully absorbed	(12,000)
Less 2012 NOL carryover fully absorbed	(8,000)
Less 2013 NOL carryover fully absorbed	(15,000)
Taxable income before charitable contributions	135,000
Less charitable contribution deduction	(80,400)
Less the specific deduction	(1,000)
Modified taxable income after contributions deduction	53,600
Less NOL deduction for the current year (for the NOLs not fully absorbed)	(135,000)
Decrease in NOL Utilized per Section 172(b)(2) modified taxable income	**(81,400)**

Process Steps Cont'd
Step 11a: Calculated modified taxable income under sections 170(d)(2) and 172(b)(2). Per the year-by-year NOL absorption method subtract the year-by-year NOLs that were fully absorbed by the current taxable income. (Per CCA 201928014)
Step 11b: Charitable deduction for purposes of section 172(b)(2). See calc. below.
Step 11c: Determine excess available NOL over section 172(b)(2) taxable income. If positive, stop here as 170(d)(1)(B) does not apply and if negative, the amount is the NOL Conversion included to the NOL Carryover schedule.

Step 11b: Determine charitable contribution deduction for 172(b)(2) modified taxable income	
Modified taxable income before contributions (Amount from Step 11a)	135,000
Less specific deduction	(1,000)
UBTI before charitable contribution deduction	134,000
	60%
Maximum charitable contribution deduction allowed	80,400
Available charitable contributions	125,000
Decrease in NOL Utilized per Section 172(b)(2) modified taxable income	**80,400**

Process Steps Cont'd
Step 11b: Determine the charitable contribution deduction for purposes of section 172(b)(2) modified taxable income calculation.

Step 11c: 170(b)(2) modified taxable income	
Taxable income under section 172(d)	170,000
Less charitable contribution deduction (Step 11b)	(80,400)
Less specific deduction under 512(b)(12)	(1,000)
Modified taxable income	88,600

AMT Calculations

	Silo #1	Silo #2	Silo #3	Pre-2018		Total
Adjusted total income or (loss)	0	0	0			
NOL deduction	85,000	0	50,000	35,000		135,000
AMT NOL						(121,500)
Adjusted AMTI						13,500
Exemption						25,000

Process Steps Cont'd
Step 12: Consider if AMT applies
The exception amount is higher than AMTI, stop here.