KPMG report: Separately computed UBTI, analysis of final regulations

December 2, 2020

Introduction

Final regulations (T.D. 9933) published today in the Federal Register provide guidance on section 512(a)(6), which was added to the Code by the 2017 tax law (Pub. L. No. 115-97) or the law that is often referred to as the "Tax Cuts and Jobs Act."

Section 512(a)(6) requires tax-exempt organizations with more than one unrelated trade or business to calculate unrelated business taxable income (UBTI) separately with respect to each trade or business. The final regulations provide guidance on how to identify separate trades or businesses, as well as how to calculate UBTI when an organization has more than one trade or business.

The final regulations generally follow the approach taken in the proposed regulations (April 2020), although a few modifications were made in response to comments. Like the proposed regulations, the final regulations generally allow organizations to treat much investment activity as a single trade or business, while most other unrelated business activities must be classified by using the first two digits of the North American Industry Classification System (NAICS) code that most accurately describes the trade or business.

The final regulations are applicable to tax years beginning on or after December 2, 2020. For calendar year taxpayers, therefore, there is little time to analyze unrelated activities, identify separate trades and businesses, adopt new allocation methodologies, or implement changes to reporting systems before the final regulations go into effect on January 1, 2021.[1]

For tax years prior to the applicability of the final regulations, tax-exempt organizations may rely on the final regulations, the proposed regulations, Notice 2018-67 (which provided initial guidance prior to the proposed regulations), or a reasonable, good faith interpretation of section 512(a)(6).

Read the **final regulations** [PDF 385 KB] (33 pages)

Contents

[1] Treas. Reg. § 1.512(a)-6(i).

Identification of separate trades/businesses

Required classification by NAICS codes

Like the proposed regulations, under the final regulations, most business activities must be classified pursuant to 2-digit NAICS codes, which identify trades or businesses in 20 economic sectors. The final regulations instruct organizations to use the 2-digit NAICS code that "most accurately describes the unrelated trade or business based on the more specific NAICS code, such as at the 6-digit level, that described the activity it conducts" and states that the "descriptions in the current NAICS manual" [PDF 7.3 MB] are relevant to this determination.[2] As the preamble notes, the breadth of the 2-digit NAICS codes may result in the aggregation of certain business activities that have little operational connection. For example, a hotel and a completely unrelated restaurant would presumably both fall under NAICS code 72, which includes all "accommodation and food services."

Conversely, activities that are delivered and sold (and managed) in the aggregate as one business might fall into multiple NAICS codes. One commenter gave an example of a museum that sells a package for special events involving catering services, valet parking, and personal property rentals. The commenter noted that this special events business could theoretically be broken into three different trades or businesses using three different NAICS 2-digit codes—one for catering (72), one for parking (81), and one for rentals (53). The final regulations do not provide any definitive answer for addressing these situations. Rather, the preamble states only that "if an exempt organization determines that, based on the facts and circumstances, its trade or business activities must be separated into two or more unrelated trades or businesses under NAICS 2-digit codes" or "if trade or business activities would be best described by different NAICS 2-digit codes, those activities should be identified using different NAICS 2-digit codes and treated as separate unrelated trades or businesses." The caveats regarding "if an exempt organization determines" that a trade or business is "best described" under more than one NAICS 2-digit codes imply that there is some discretion that exempt organizations may exercise in these situations. Moreover, the NAICS manual (which the final regulations instruct organizations to rely on) instructs users to classify establishments engaged in multiple activities by the NAICS code of the "primary activity" of that establishment, although it is not clear whether this "primary activity" approach should apply to classifying unrelated trades or businesses for purposes of section 512(a)(6).

Notwithstanding the general ambiguity surrounding situations in which a trade or business consists of multiple activities that could fall into more than one NAICS code, the final regulations do provide specific relief for one such situation. Namely, even though the sale of certain goods could fall into different NAICS codes depending on whether they are sold in stores (44) or online (45), the final regulations adopt a rule (apparently used in NAICS for identifying certain industries) that a separate unrelated trade or

[2] Treas. Reg. § 1.512(a)-6(b)(1).

business is identified by the goods sold in stores if the same goods generally are sold both online and in stores.[3]

Finally, the final regulations also remove the prohibition on changing NAICS 2-digit codes that was in the proposed regulations. Instead, the final regulations require an exempt organization that changes the identification of a separate unrelated trade or business to report the change in the tax year of the change in accordance with forms and instructions. To report a change in identification, the final regulations require the organization to provide the identification of the separate unrelated trade or business in the previous tax year, the identification of the separate unrelated trade or business in the current tax year, and the reason for the change.[4] As discussed below, if the organization changes the identification of a separate unrelated trade or business, any NOL associated with the business must stay with the formerly identified trade or business, with the result that NOLs may become suspended and unavailable for use after the change of identification is made.

Certain activities deemed separate businesses

As under the proposed regulations, certain activities and income are treated as separate trades or businesses under the final regulations. These include:

- **Certain aggregated investment activities**. As described in more detail in part II, below, certain investments in partnerships and S corporations may be aggregated and treated as a single unrelated trade or business. Income from debt-financed property (described in section 514) may also be included as part of this separate investment activity business.[5]

- **Specified payments from controlled entities**. All "specified payments" (that is, interest, rents, royalties, and annuity payments described in section 512(b)(13)(C)) received by a controlling tax-exempt organization from an entity that it controls (within the meaning of section 512(b)(13)(D)) is treated as gross income from a separate unrelated trade or business. If a controlling organization receives specified payments from two different controlled entities, the payments from each controlled entity would be treated as a separate unrelated trade or business.[6]

- **Certain amounts derived from controlled foreign corporations (CFCs)**. All amounts included in UBTI under section 512(b)(17) are treated as income derived from a single separate unrelated trade or business.[7]

- **S corporation interests**. Each S corporation interest, other than a qualified S corporation interest included in an investment activity business noted above, must be treated as an interest in a separate unrelated trade or business. Qualified S corporation interests are discussed more fully below.[8]

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[3] *Id.*
[4] Treas. Reg. § 1.512(a)(6)-1(a)(3).
[5] *See generally* Treas. Reg. § 1.512(a)(6)-1(c).
[6] Treas. Reg. § 1.512(a)(6)-1(d)(1).
[7] Treas. Reg. § 1.512(a)(6)-1(d)(2).
[8] Treas. Reg. § 1.512(a)(6)-1(e)(1).

Disappearing transition rule

Under the proposed regulations (and in Notice 2018-67 before that), a partnership interest acquired prior to August 21, 2018, which did not meet the requirements for being included in the investment activity business, could be treated as a single trade or business. Although this "transition rule" was not as favorable as qualifying to be included in the investment activity business, it reduced the administrative burden on organizations, freeing them from the need to dig into the partnership's holdings to separate the income and expenses (and any NOLs) into separate NAICS codes. However, the final regulations provide that organizations may rely on this provision only until the final regulations go into effect. Organizations have been relying on this transition rule since 2018 and have been treating these partnership interests as separate businesses and tracking NOL carryforwards separately. Going forward, however, these partnerships may no longer qualify as one separate trade or business.

Once the final regulations are effective, the organization will need to identify the business activities of the partnership by 2-digit NAICS codes and, if more than one such NAICS code is identified, may no longer have a separate trade or business consisting solely of the partnership interest. To use NOL carryforwards from such a partnership going forward, it appears that the organization or partnership would need to look back and recalculate the income and expense by separate 2-digit NAICS codes in order to identify which unrelated trade or business, if any, has NOL carryforwards that may be used. However, it may be quite difficult to obtain the information from the partnership necessary to do this.

Investment activities as a separate unrelated business

The final regulations provide that tax-exempt organizations may treat certain investment activities collectively as a single unrelated trade or business, rather than looking through the investment interests to the underlying trade or business activities in order to classify them by NAICS codes. In particular, for most organizations,[9] all income, deductible expenses, and losses derived from the following investments may be aggregated in computing UBTI:

- Qualifying partnership interests (QPIs);
- Qualifying S corporation interests; and
- Debt-financed property or properties (within the meaning of section 514).

Qualifying partnership interests (QPIs)

The de minimis and participation tests

Similar to the proposed regulations, QPIs are generally defined as partnership interests that meet one of two tests:

[9] The rules in the proposed regulations for social clubs described in section 501(c)(7), voluntary employees' beneficiary associations described in section 501(c)(9), and supplemental unemployment benefits trusts described in section 501(c)(17), all of which are subject to the special UBIT rules of section 512(a)(3), are somewhat different and not summarized in this report. See Treas. Reg. § 1.501(a)(6)-1(c)(7)-(8) for these rules.

- **A de minimis test**, which the exempt organization satisfies if it holds directly or indirectly no more than 2% of the profits interest and no more than 2% of the capital interest of the partnership;[10] or

- **A participation test** (formerly known as the "control test," under the proposed regulations), which the exempt organization satisfies if it holds directly or indirectly no more than 20% of the capital interest and does not "significantly participate in" (formerly "control") the partnership.[11]

Although these tests in the final regulations are similar to those in the proposed regulations in most respects, there were a few notable changes. For one, the final regulations change the name of the proposed regulations' "control test" to the "participation test," and also change the test in a few other respects. Most significantly, the definition of "significant participation" in the final regulations omits the general facts and circumstances determination that was in the proposed regulations and relies only on four factors that are sufficient for a per se determination of significant participation. The four factors in the final regulations are identical to those contained in the proposed regulations, with the exception of a new parenthetical in the first factor (italicized below), which makes clear that the ability to prevent an action of the partnership due to an unanimous vote requirement or through minority consent rights will not be sufficient to result in significant participation. In particular, the final regulations provide that an organization significantly participates in a partnership if:

- The organization, by itself, may require the partnership to perform, or may prevent the partnership from performing (*other than through a unanimous voting requirement or through minority consent rights*), any act that significantly affects the operations of the partnership;

- Any of the organization's officers, directors, trustees, or employees have rights to participate in the management of the partnership at any time;

- Any of the organization's officers, directors, trustees, or employees have rights to conduct the partnership's business at any time; or

- The organization, by itself, has the power to appoint or remove any of the partnership's officers or employees or a majority of directors.[12]

Of these factors, the second may prove to be the most problematic for exempt organizations. If an organization happens to have an investment manager on its board of directors (which is not uncommon) and invests in a fund managed by that investment manager, then, based on this factor, the organization's interest in the fund would not qualify as a QPI if the organization owns more than a 2% profits or capital interest in the fund.

The final regulations, like the proposed regulations, require the interests of certain supporting organizations and controlled entities to be combined with those of the organization itself in determining whether the organization's interest in a partnership crosses the 20% threshold under the participation test. However, while the proposed regulations required the interests of *all* types of supporting organizations to be taken into account for purposes of the 20% threshold, the final regulations do not require an organization to combine the interests of a Type III supporting organization unless that supporting organization is the organization's parent.[13]

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[10] Treas. Reg. § 1.512(a)(6)-1(c)(3).
[11] Treas. Reg. § 1.512(a)(6)-1(c)(4).
[12] Treas. Reg. § 1.512(a)(6)-1(c)(4)(iii).
[13] Treas. Reg. § 1.512(a)(6)-1(c)(4)(ii).

Like the proposed regulations, the final regulations provide that any partnership in which an organization is a general partner is not a QPI, regardless of the organization's percentage interest. For purposes of this rule, the final regulations look to whether the organization is a general partner under applicable state law. The final regulations also extend this rule to situations in which an organization's interest is combined with those of a supporting organization or a controlled entity for purposes of the participation test. In such situations, if either the organization or the supporting organization/controlled entity is a general partner of a partnership, neither organization's partnership interests can qualify as a QPI.[14]

In addition, like the proposed regulations, the final regulations provide that for purposes of the de minimis test and the participation test, an organization determines its percentage interest by taking an average of the organization's percentage interest at the beginning and the end of the partnership's tax year (or, if different, the beginning and end of the period of ownership within the partnership's tax year).[15] Also like the proposed regulations, the final regulations provide that exempt organizations may rely on the Schedule K-1 provided by a partnership (or S corporation) for purposes of the de minimis and the participation tests to the extent that the Schedule lists the organization's percentage profits and/or capital interest (as applicable) at the beginning and end of the partnership's tax year.[16]

Notwithstanding the continuing use of the *partnership*'s tax year to measure an organization's profits and capital interests under the above rules, the final regulations' provisions that generally describe the de minimis and participation tests have newly added language referring to the percentage of profits and capital interests held "during the *organization's* taxable year with which or in which the partnership's taxable year ends."[17] The preamble does not contain any explanation of this change and its meaning is unclear. However, read together with the provision indicating that the organization's percentage interest is determined based on the organization's percentage interests at the beginning and ending of the partnership's tax year (as reported on the Schedule K-1), query whether this addition is intended to clarify *which* partnership year the organization looks to when the organization's tax year does not end on the same date as the partnership's tax year (namely, the partnership's tax year ending within the organization's tax year).

In addition, the final regulations include a new provision (again, with little explanation)[18] that states that, "[f]or purposes of the de minimis test…an organization's profits interest in a partnership is determined in the same manner as its distributive share of partnership taxable income. See section 704(b) (relating to the determination of the distributive share by the income or loss ratio) and §§1.704-1 through 1.704-4."[19] Although the preamble to the final regulations states that the information needed to determine an organization's percentage interest for purposes of the de minimis test is "[g]enerally . . . found in Part II, Line J (partner's share of profit, loss, and capital), of Schedule K-1 (Form 1065),"[20] it has been observed that Line J is not necessarily reported in a manner consistent with this new provision, and the intent and impact of this provision are unclear.

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[14] Treas. Reg. § 1.512(a)(6)-1(c)(8)(ii).
[15] Treas. Reg. § 1.512(a)(6)-1(c)(5)(iii).
[16] Treas. Reg. § 1.512(a)(6)-1(c)(5)(iv).
[17] Treas. Reg. § 1.512(a)(6)-1(c)(3) and (4) (emphasis added).
[18] The preamble states only that, "These clarifying rules for determining an exempt organization's partnership interest are consistent with longstanding rules in §53.4943-3(c)(2) for purposes of a private foundation's determination of whether it has excess business holdings."
[19] Treas. Reg. § 1.512(a)(6)-1(c)(5)(i).
[20] *See* preamble, Summary of Comments and Explanation of Revisions, section 2.b.vii.

Finally, the final regulations indicate that in the absence of a provision in the partnership agreement,[21] an exempt organization's "capital interest" in a partnership is determined on the basis of its interest in the assets of the partnership which would be distributable to such organization upon its withdrawal from the partnership, or upon liquidation of the partnership, whichever is the greater.[22]

Meeting the de minimis and participation tests "indirectly"

Although the proposed regulations permitted an organization to treat an indirectly held partnership interest (that is, one held through one or more tiers of partnerships, as in a "fund of funds" context) as a QPI only by satisfying the de minimis test, the final regulations allow an organization to treat an indirectly held partnership interest as a QPI by satisfying *either* the de minimis or the participation test. Moreover, the proposed regulations prevented an organization from satisfying even the de minimis test indirectly if the organization controlled (now, "significantly participated in") the top-tier partnership in which it held a direct interest. By contrast, under the final regulations, significant participation is irrelevant altogether for purposes of satisfying the de minimis test indirectly and is relevant for purposes of satisfying the participation test indirectly only by reference to the partnership that directly holds the lower-tier partnership interest being tested for QPI status (as described further below).[23]

An organization satisfies the de minimis and participation tests "indirectly" in different ways. An indirectly-held (or lower-tier) partnership interest satisfies the de minimis test if the organization's indirect interest in that lower-tier partnership interest is no more than 2%. An example provided in the final regulations states that, if an organization directly holds 50% of the capital interest of a partnership[24] and the directly-held partnership holds 4% of the capital and profits interest of lower-tier partnership A, the organization's interest in A is a QPI because it meets the de minimis test indirectly (as 50% of 4% is 2%). Interestingly, although the example is applying the criteria of the de minimis test to the indirectly-held lower-tier partnership interest, the example appears to look only to the capital interest of the organization in the directly-held interest.[25]

On the other hand, a lower-tier partnership interest satisfies the participation test indirectly only if the *partnership that directly holds* the lower-tier partnership interest owns no more than 20% of the capital interest of the lower-tier partnership and does not significantly participate in the lower-tier partnership.[26] The fact that the organization's indirect share of the lower-tier partnership may be less than 20% or that the organization does not significantly participate in the directly-held (upper-tier) partnership is not relevant. For example, if an organization directly holds 50% of the capital interest of a partnership and the directly-held partnership holds 30% of the capital interest of a lower-tier partnership B, the organization's interest in B is *not* a QPI because the directly held partnership holds more than 20% of B. The fact that

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[21] Some, but not all, partnership agreements may provide for a fixed percentage or a formulaic approach to determining a partner's capital interest.
[22] Treas. Reg. § 1.512(a)(6)-1(c)(5)(ii). As previously noted, the final regulations' approach to defining "profits" and "capital" can be found in Treas. Reg. §53.4943-3(c)(2), dealing with taxes on excess business holdings of a private foundation in a partnership. Note that the definition of capital interest under the final section 512(a)(6) regulations may be different than tax basis capital required to be reported on Item L of the Schedule K-1 for tax years 2020 and on.
[23] Treas. Reg. § 1.501(a)(6)-1(c)(2)(ii)(B) and (C).
[24] It is unclear why this example in the final regulations (which is the same as that in the proposed regulations), in applying the criteria of the de minimis test to the indirectly-held lower-tier partnership interest, refers only to the organization's capital interest (and not also the organization's profits interest) in the directly-held partnership interest.
[25] Treas. Reg. § 1.501(a)(6)-1(c)(2)(ii)(B).
[26] Treas. Reg. § 1.501(a)(6)-1(c)(2)(ii)(C).

the organization's proportionate capital interest in B is less than 20% (as 50% of 30% is 15%) is not relevant.[27]

For purposes of determining whether an upper-tier partnership "significantly participates in" a lower-tier partnership, the final regulations provide that the upper-tier partnership's officers, directors, trustees, or employees should be understood to include the upper-tier partnership's general partner.[28]

Finally, the final regulations provide that if an organization chooses to treat an indirectly-held partnership interest as a QPI, it may not also treat the directly-held partnership interest as a QPI under the transition rule.[29]

Grace period for changes in percentage interests

Another helpful new provision in the final regulations provides that a partnership interest that met either the de minimis or the participation test in a prior tax year, but that fails to meet either test in the current tax year, may nonetheless qualify as a QPI in the current tax year under certain circumstances. This so-called "grace period" allows organizations to either reduce their percentage interest prior to the end of the current tax year to continue to meet the requirements of the de minimis or participation test or to prepare for treating the partnership interest as other than a QPI in the succeeding tax year. To qualify for the grace period, the following circumstances must apply:

- The partnership interest must have met the requirements of the de minimis test or participation test in the organization's prior tax year without application of the grace period;
- The increase in the organization's percentage interest in the current tax year must have been due to the actions of one or more partners *other than* the organization; and
- In the case of a partnership interest that met the requirements of the participation test in the prior tax year, the interest of the partner or partners that caused the increase in percentage interest described in (2) must not have been those of a supporting organization or controlled entity that had to be combined with the organization for the prior tax year or must be combined with the organization for the current tax year.[30]

If an organization qualifying for the grace period in the current tax year does not reduce its percentage interest prior to the end of the year to meet the requirements of the de minimis or participation test, the partnership interest will not be a QPI in the next year. This would mean that the organization would be required to identify the partnership's trades or businesses using 2-digit NAICS codes in the next year.

Finally, as in the proposed regulations, once an organization designates a partnership interest as a QPI, it cannot subsequently look through the partnership interest and identify trades or businesses of the partnership using the 2-digit NAICS codes, unless and until the partnership fails to qualify as a QPI (and after application of the grace period).[31]

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[27] Treas. Reg. § 1.501(a)(6)-1(c)(2)(ii)(D).
[28] Treas. Reg. § 1.501(a)(6)-1(c)(2)(ii)(C).
[29] Treas. Reg. § 1.501(a)(6)-1(c)(9)(ii).
[30] Treas. Reg. § 1.501(a)(6)-1(c)(6).
[31] Treas. Reg. § 1.501(a)(6)-1(c)(2)(iii).

Qualifying S corporation interests and debt-financed properties

A qualifying S corporation interest is basically an S corporation interest that meets either the de minimis or participation test for QPIs (but looking to ownership of S corporation stock rather than profits or capital interests).[32]

The final regulations do not elaborate on the provision that allows an organization to include debt financed property (within the meaning of section 514) as an investment activity that may be aggregated as part of its investment activity business. Although not expressly stated, it seems reasonable to assume that the UBTI income, expenses, and losses derived from a partnership solely because of debt-financing (that is, unrelated debt-financed income or "UDFI") may be treated as income from an investment activity regardless of whether the partnership is a QPI. In other words, even if a partnership is not a QPI, UDFI derived from the partnership may be aggregated with QPIs, qualifying S corporation interests, and other UDFI as part of the organization's investment activity business.

Calculation of unrelated business income

Net operating losses (NOLs)

Under section 512(a)(6), NOLs arising in a tax year beginning before January 1, 2018 ("pre-2018 NOLs") may be taken against aggregate or total UBTI, while NOLs arising in a tax year beginning after December 31, 2017 ("post-2017 NOLs") may only be taken against UBTI from the same trade or business from which the post-2017 NOL arose. The final regulations require an organization with both pre-2018 NOLs and post-2017 NOLs to first deduct its pre-2018 NOLs from its total UBTI before deducting any post-2017 NOLs from the UBTI of the separate trade or business that gave rise to the NOL. The final regulations further provide that pre-2018 NOLs should be taken against total UBTI in the manner that allows for "maximum utilization" of any post-2017 NOLs in that tax year.[33]

For example, consider an organization with $400 in pre-2018 NOLS that has two trades or businesses, Business1, which generates $200 in UBTI before applying any NOLs and has $100 in post-2017 NOL carryforwards, and Business 2, which generates $300 in UBTI before applying any NOLs and has no post-2017 NOL carryforwards. The organization would maximize utilization of its post-2017 NOLs by allocating $300 of the pre-2018 NOLs to Business 2 and $100 of the pre-2018 NOLs to Business 1, leaving $100 in Business 1 UBTI remaining after applying the pre-2018 NOLs, from which the $100 Business 1 post-2017 NOL could be deducted. (The organization would *not* have to allocate the $400 in pre-2018 NOLs ratably between the two businesses based on each business's pre-NOL UBTI, which would have resulted in utilization of only $40 in post-2017 NOLs.)

If a trade or business is terminated, sold, exchanged, or disposed of, the final regulations provide that any NOLs remaining after offsetting any gain on the sale or disposition are suspended. Suspended NOLs may only be used if the previous business is later resumed or if a new business accurately identified using the same NAICS 2-digit code is commenced or acquired.[34] A business is considered "terminated"

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[32] Treas. Reg. § 1.501(a)(6)-1(e)(2).
[33] Treas. Reg. § 1.501(a)(6)-1(h)(2).
[34] Treas. Reg. § 1.501(a)(6)-1(h)(3)

for these purposes if the appropriate identification of the business changes from one NAICS code to a different NAICS code. When this occurs, none of the NOLs from the previously identified separate business (i.e., identified by the old NAICS code) will be carried over to the newly identified business. If the change in identification applies to the originally identified separate business only in part, the originally identified business that is not changing retains all of the NOLs and the newly identified business may not utilize those NOLs. In accordance with this general principle, the final regulations provide that if a QPI that is part of an organization's investment activity business later becomes a non-QPI (for example, because the organization's profits or capital interest exceeds the specified thresholds), then any NOLs attributable to that QPI are retained with the organization's investment activity business. A change in identification is effective the first day of the tax year in which the change is made. An exception provides that if a business was accidentally misidentified, then the NOLs may be carried over to the business as correctly identified.[35]

Charitable contributions

Section 512(b)(10) permits tax-exempt corporations to take charitable contribution deductions under section 170 up to 10% of UBTI, while section 512(b)(11) limits the deduction of tax-exempt trusts to the percentage limitations applied to individuals under section 170(b)(1)(A) and (B) determined with reference to UBTI. The final regulations provide that in applying these percentage limitations, exempt organizations would use total UBTI computed pursuant to section 512(a)(6).

More generally, the final regulations make clear that charitable contributions are deducted against total UBTI.[36]

Allocation of expenses

The preamble to the final regulations states that Treasury and the IRS plan to issue rules regarding methods of allocating expenses, depreciation, and similar items between unrelated business activities and exempt activities, or between separate unrelated business activities, in separate proposed regulations. However, the final regulations provide that using one method in particular is not reasonable. Specifically, the regulations provide that a revenue-based method of allocation between exempt and unrelated activities with substantially similar costs that does not account for price differences when the prices charged for the unrelated activity are higher than those charged for the exempt activity will not be considered reasonable.

The preamble to the final regulations expressly states that the "IRS will continue to refrain from litigating the reasonableness of other allocation methods pending the publication of further guidance."

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[35] *See generally* Treas. Reg. § 1.501(a)(6)-1(h)(4).
[36] Treas. Reg. § 1.501(b)-1(g)(4).

Miscellaneous provisions

Public support tests

The final regulations revise the "public support tests" that section 501(c)(3) organizations use to qualify as public charities (as opposed to private foundations) by permitting an organization to aggregate net income and net losses from all of its unrelated business activities for purposes of determining whether the organization is publicly supported. This responds to comments expressing concern that the change in the computation of UBTI might cause organizations to fail to qualify as publicly supported charities. Alternatively, to reduce the burden on organizations who may be able to meet the public support test using any measure of UBTI, the final regulations also permit organizations to use UBTI as computed under section 512(a)(6) for purposes of the public support tests if desired.[37]

Subpart F and global intangible low-taxed income

Like the proposed regulations and Notice 2018-67, the final regulations clarify that inclusions of subpart F income under section 951(a)(1)(A) and global intangible low-taxed income (GILTI) under section 951A(a) are treated in the same manner as dividends for purposes of section 512(b)(1), which are generally excluded from UBTI as long as the stock in the relevant corporation is not debt-financed.[38]

[37] Treas. Reg. §§ 1.170A-9(f)(7)(v), 1.509(a)-3(a)(3)(i) and (4).
[38] Treas. Reg. § 1.512(b)-1(a)(3).

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