

THE DISAPPOINTING IRS PROPOSED RULE: WHAT WE ARE GOING TO DO ABOUT IT

Last Wednesday, the IRS published a proposed rule that, if left unchanged, would restrict the ability of SNF owners and some assisted living owners to take full advantage of this year's federal tax cuts. This memo will explain the issue, what the proposed rule says, what we are doing about it, and how you can help in those efforts.

THE ISSUE IS WHETHER WE ARE A "SPECIFIED SERVICE TRADE OR BUSINESS"

This issue may seem complicated. It's not. The new tax law allows passthrough entities like limited liability corporations, partnerships, S corporations, and sole proprietors to deduct 20% of their "qualified business income." That's great because we have many members who are structured in this way. One would think those facilities should be able to deduct 20% of their income and therefore pay taxes on a much lower total number.

The question then becomes what is "qualified business income." Congress defined qualified business income as income from a "qualified trade or business," which, in turn, does NOT include a "specified service trade or business." The bottom line: We DON'T want to be a specified service trade or business.

What is a specified service trade or business? Unfortunately, that is where we start running into problems. For these purposes, the Internal Revenue Code defines it as:

"Any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners."

A non-lawyer reading that may say that SNFs are involved in providing services in the field of health and therefore are a specified service trade or business. That reading would keep us from getting the deduction.

WHY WE BELIEVE WE ARE NOT A SPECIFIED SERVICE TRADE OR BUSINESS

We argued to the Department of Treasury prior to the release of this proposed rule that we are not a specified service trade or business for several reasons. First, the primary intent of Congress was to keep practicing physicians and other similar professionals from reorganizing their business structures to be able to take advantage of the 20% deduction. The legislation is intended to help real businesses with significant numbers of employees and capital needs. In other words, it was intended to provide tax relief to people like us so that we could have additional funds to help employees and/or put additional dollars to work in the economy. Unfortunately, legislative staff essentially borrowed from preexisting and unartfully drafted language that has created confusion, but the Congressional intent was to help people like us.

The second argument we made to Treasury was that we are more than health care providers. We provide board, meals, security, socialization, etc. Many of our members also have long used business structures that separate operations from real estate. We suggested that if the IRS was determined to exclude the health care portions of our business, that our members should be able to segregate out portions of their income not directly related to providing health care services. You can read our white

paper [here](#) that makes a very persuasive case for this.

THE PROPOSED RULE

The proposed rule did not give us the clear relief for which we asked. Instead it took a very strict view of the statutory language by borrowing from pre-existing IRS regulations interpreting similar statutory language in a different context, seemed to ignore legislative intent, and could preclude segments of our sector (especially SNFs) from taking the deduction.

The proposed rule would essentially adopt the pre-existing regulatory definition of "services in the field of health" by including in that category services provided by nurses and physical therapists, among others. The proposed rule also provides that a "specified service trade or business" would include any trade or business with 50% or more common ownership (direct or indirect) that provides 80% or more of its property or services to a "specified service trade or business."

At the same time, however, the proposed rule rejects the notion that providing any amount of "services in the field of health"-no matter how small-automatically renders a taxpayer a "specified service trade or business" ineligible for the 20% deduction. The proposed rule contains what it characterizes as a "de minimus rule," the application of which varies depending on the amount of gross receipts a business or trade receives in a taxable year. If a trade or business has gross receipts of \$25 million or less in a taxable year and less than 10% of those gross receipts are attributable to the performance of services in a "specified service trade or business," the business or trade is not a "specified service trade or business." The allowable percentage drops to 5% if a trade or business has gross receipts greater than \$25 million.

Therefore, although the proposed rule does not address assisted living expressly, our initial view is that many assisted living communities would avoid being characterized as a "specified service trade or business" either by virtue of the fact that they do not provide "services in the field of health" as defined by the IRS or they provide so relatively little that it triggers the de minimus rule. (Individual circumstances will vary, of course.)

WHAT WE ARE DOING

We are disappointed. We used some very high-level political allies to lobby the IRS and, so far, have not been successful. Here is what we are doing now.

1. We will file comments on the proposed rule. Comments are due on October 1, 2018, and we encourage you to file comments as well. You can file comments using the instructions at the end of this memo. If an online link becomes available, we will send information to members with the link. The arguments to make in your comment letter could include the following:
 - a. Jobs: My skilled nursing facility helps create jobs in my community. The benefits of the new tax law can help me reinvest in creating more jobs in my community.
 - b. Intent: Congress intended for businesses like skilled nursing facilities to be able to take full advantage of the benefits of the new tax law.
 - c. Services: Skilled nursing facilities provide more than health care services, including meals, room and board and entertainment/activities.
2. If we are not successful in getting the final rule changed, we will work to get this fixed in a tax bill that is likely to run in the lame duck. Republican leadership has assured us that it will include our clean up language in that package. The problem is that they may need Democratic help to get a cleanup bill passed. So, it is not clear this can happen.
3. If they can't get the cleanup bill passed in the lame duck, they will try again in the spring of 2019. That is the most likely time for a fix, but the election results will impact whether the cleanup bill can pass then.

CONCLUSION

I am disappointed we couldn't get this done. I'm shocked that the IRS would do this when the administration's position was to advocate for the broadest tax cut possible. You should be able to take advantage of something that Republican leadership wanted you to have and that you deserve to have.

We will continue to fight this. Thanks for your help on this and so many other issues.

Sincerely,



Mark Parkinson
President & CEO

Instructions to submit comments:

Send submissions to CC:PA:LPD :PR (REG-107892-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C., 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-107892-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C., 20224, or via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-107892-18). The public hearing will be held in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC.

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