TAX STRATEGIST
2022 WEBINAR SERIES

TAX STRATEGIST FOR REAL ESTATE

FOURTH QUARTER CONSIDERATIONS

December 15, 2022

With You Today

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Legislative Update

Legislative Update

- House of Representatives
  - Speaker of the House
  - Majority Whip
  - Minority Leader
  - Chair, Ways and Means Committee
- Senate
  - Majority Leader
  - Minority Leader
  - Chair, Senate Finance Committee

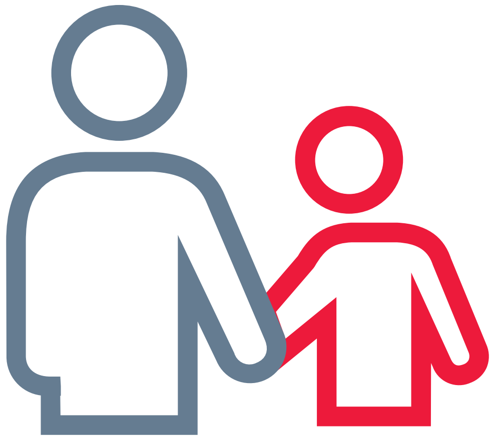
Possible Topics for Proposed Legislation

LAME DUCK SESSION AND BEYOND

Retirement

Research & Development

Child Care Credit



Possible Topics for Proposed Legislation

LAME DUCK SESSION AND BEYOND

Real Estate

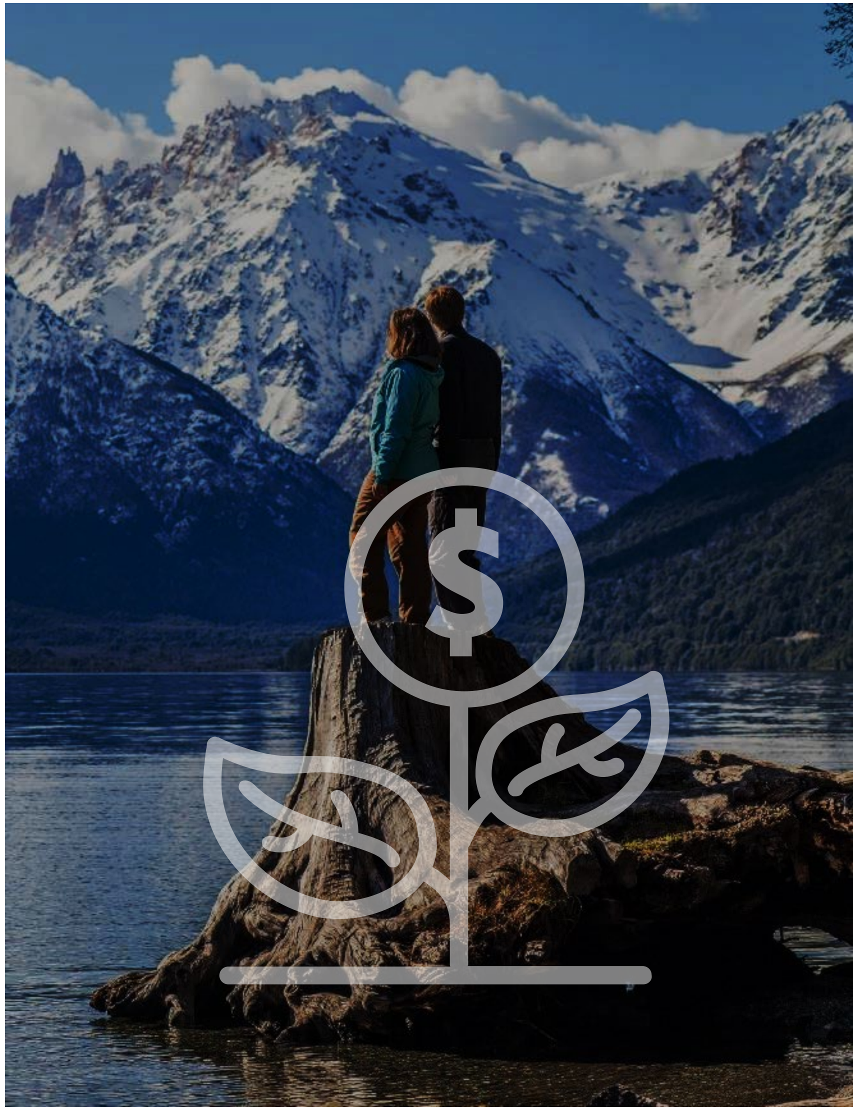
- Retail Revitalization Act of 2021
  - Increase from 10% to 30% permissible REIT ownership of tenant
  - Increase to 50% for distressed tenants
  - H.R. 840, introduced February 4, 2021 by Rep. Schneider, LaHood, Sewell, Suozzi, Buchanan, Sanchez, Walorski & Beyer
- Revitalizing Downtowns Act
  - Incentivize developers and building owners to transition outdated buildings in city centers from empty office or retail space to housing or mixed-use properties
  - S. 2511, introduced July 28, 2021 by Senators Stabenow & Peters (MI)

Inflation Reduction Act: Tax Incentives For Real Estate & Construction

Inflation Reduction Act

TAX CREDIT OVERVIEW

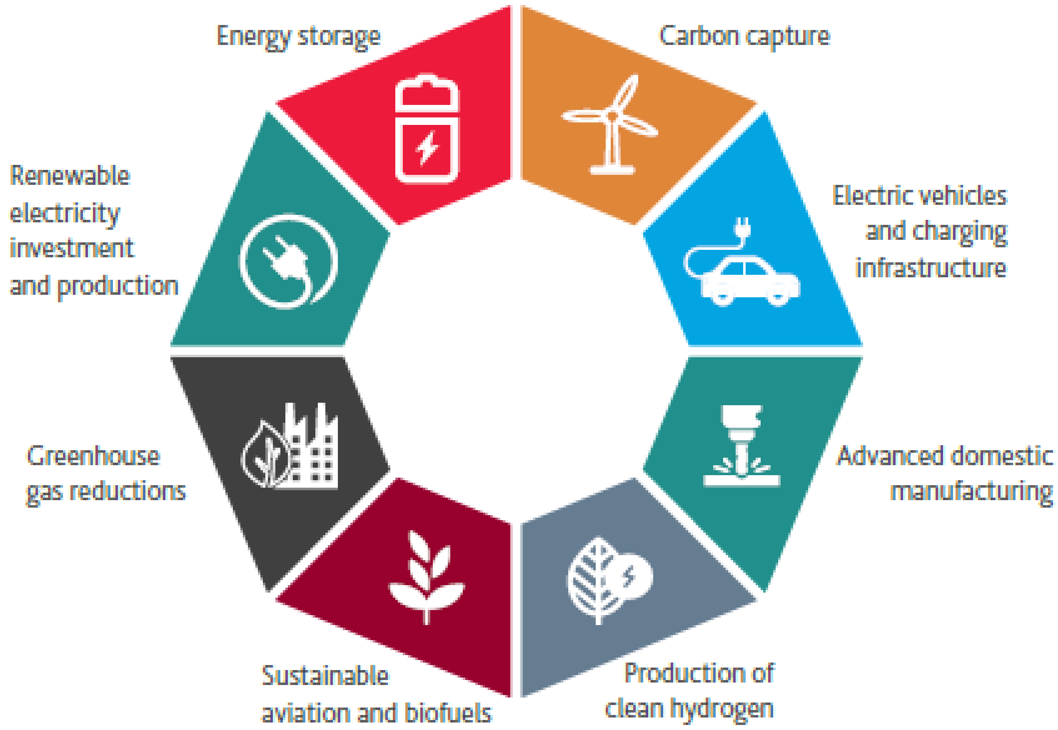
The Inflation Reduction Act (IRA) is the largest-ever U.S. investment committed to combat climate change, allocating $369 billion to energy security and clean energy programs over the next 10 years with a goal of reducing greenhouse gas emissions and incentivizing green energy investment.



The IRA:

- Introduces new credits and structures
- Adds additional monetization options
- Provides tax-exempt entities the ability to claim credits
- Extends and enhances many of the current energy-related tax credits
- Provides credits for domestic manufacturing

Navigating Available Incentives

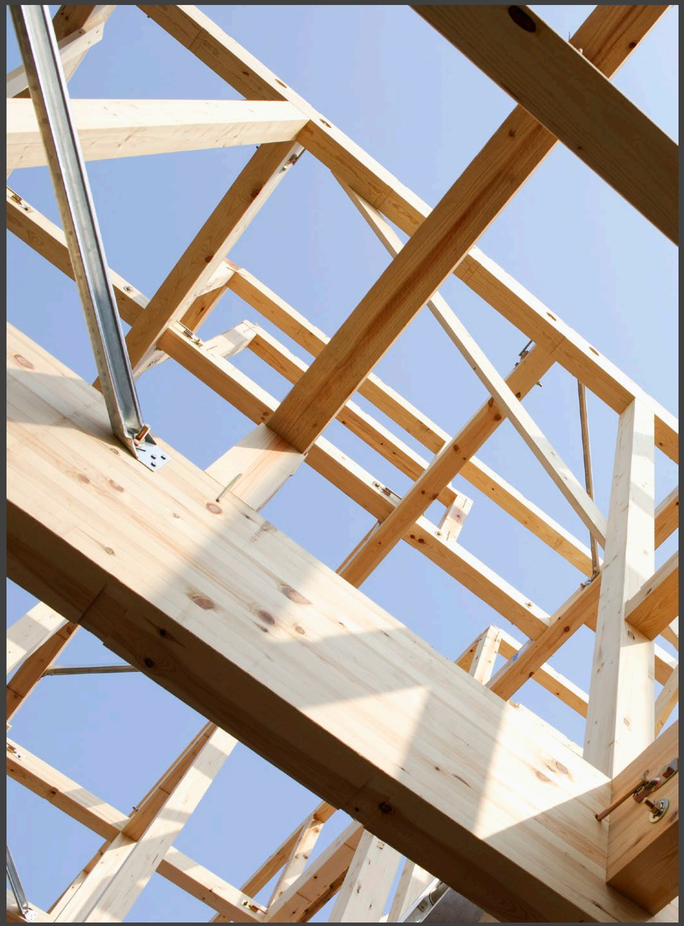


Inflation Reduction Act – Navigating Available Incentives

Category	Credit	Description	Transferability [1]	Direct-Pay Tax Exempts [2]	Direct-Pay Available to Taxpayers	Special Carryback or Carryforward [3]	Recapture Potential
Energy Efficiency	Section 25C	Nonbusiness Energy Property Credit	No	No	No	No	No
Energy Efficiency	Section 25D	Residential Clean Energy Credit	No	No	No	No	No
Transportation	Section 25E	Previously Owned Clean Vehicle Credit	No	No	No	No	No
Transportation	Section 30C	Alternative Fuel Refueling Property Credit	Yes	Yes	No	Yes	Yes
Transportation	Section 30D	Clean Vehicle Credit	No	No	No	No	Yes
Transportation	Section 40B	Sustainable Aviation Fuel Credit	No	No	No	No	No
Clean Energy	Section 45	Renewable Electricity Production Credit (PTC)	Yes	Yes	No	Yes	No
Clean Energy	Section 45J	Advanced Nuclear Power Facility Production Credit	No	No	No	No	No
Energy Efficiency	Section 45L	New Energy Efficient Home Credit	No	No	No	No	No
Carbon	Section 45Q	Carbon Oxide Sequestration Credit	Yes	Yes	Yes - 5 year period	Yes	Yes
Clean Energy	Section 45U	Zero Emission Nuclear Power Production Credit	Yes	Yes	No	Yes	No
Clean Energy	Section 45V	Clean Hydrogen Credit	Yes	Yes	Yes - 5 year period	Yes	No
Transportation	Section 45W	Qualified Commercial Clean Vehicle Credit	No	Yes	No	Yes	No
Manufacturing	Section 45X	Advanced Manufacturing Production Credit	Yes	Yes	Yes - 5 year period	Yes	No
Clean Energy	Section 45Y	Clean Electricity Production Credit	Yes	Yes	No	Yes	No
Transportation	Section 45Z	Clean Fuel Production Credit	Yes	Yes	No	Yes	No
Clean Energy	Section 48	Renewable Energy Investment Credit (ITC)	Yes	Yes	No	Yes	Yes
Manufacturing	Section 48C	Advanced Energy Project	Yes	Yes	No	Yes	No
Clean Energy	Section 48E	Clean Electricity Investment Credit	Yes	Yes	No	Yes	Yes

Inflation Reduction Act:
Tax Incentives For Real Estate & Construction

New Energy Efficient Home Credit (IRC Sec. 45L)	Allows a $2,000 credit per single family residential housing unit and multifamily developers, investors, and construction that build energy efficient properties sold or leased through December 31, 2022. The credit increases to $2,500 per unit under Energy Star and $5,000 per unit under the Zero Energy Ready Homes program from January 1, 2023 through December 31, 2032.
Energy Efficient Commercial Buildings Deduction (IRC Sec. 179D)	Enables building owners to claim a tax deduction for installing qualifying energy systems in buildings. The deduction can be up to $1.88 per sq. ft. through December 31, 2022 and increases up to $5.00 per sq. ft. beginning in 2023 as long as the project meets prevailing wage, and apprenticeship requirements.
Business Energy Investment Tax Credit (IRC Sec. 48)	Provides an energy tax credit for investments in various renewable energy properties including solar and geothermal. The credit rate for solar projects is 30% through the end of 2022. Beginning in 2023, there is a base and bonus structure that could increase the credit to 50% as long as the project meets prevailing wage/apprentice requirements, domestic content requirements, and is located in an energy community.. The credit was also expanded to include solar and wind energy investments in low-income communities, tribal land and other projects benefiting the underprivileged.
Alternative Fuel Refueling Property Tax Credit (IRC 30C)	Businesses that install EV chargers and equipment at their property can qualify for a tax credit of up to 30% of the cost. The maximum amount allowed was increased to $100,000 for projects completed after December 31, 2022.



REIT Private Letter Rulings

REIT PLRs

The IRS has issued fewer private letter rulings than usual this year, but several are quite significant.

- PLR 202237004
  - Floating docks
  - Cabins
  - Dry dock storage income
  - Business interruption insurance proceeds
  - Related services
- PLR 202205001, revoking PLR 201337007 in part
  - Rents based on formula similar to earnings before income tax, depreciation, amortization and rental expense ("EBITDAR") violates prohibition on rents based on net income and, thus, taints all income received by the REIT under the lease

LLC Member Self-Employment Tax

Self-Employment Taxes

Overview

- Section 1402(a)(13) provides that a distributive share of partnership income allocable to a “limited partner” is not subject to self-employment tax (“SECA”), other than guaranteed payments to that partner for services rendered
- Neither the tax code nor regulations define the term “limited partner”
- Under the plain language of the statute, a limited partnership interest in a state law limited partnership could arguably be considered a limited partner for purposes of the exception, regardless of the taxpayer’s level of activity in the partnership’s trade or business

1997 Proposed Regulations

- Created rules to define “limited partner” related to the variety of limited liability entities other than state law limited partnerships – principally, LLCs.
- Generally, the 1997 Proposed Regulations define a limited partner as someone who does not:
  - Have personal liability for the debts of or claims against the partnership by reason of being a partner,
  - Have authority to contract on behalf of the partnership, or
  - Participate in the partnership’s trade or business for more than 500 hours during the partnership’s taxable year
- While the 1997 Proposed Regulations have never been finalized, they continue to provide useful guidance that may be relied upon for members of entities taxed as a partnership to determine whether a partner is a limited partner within the meaning of Section 1402(a)(13)

Self-Employment Taxes

- IRS SECA Tax Compliance Campaign – The Large Business and International ("LB&I") group of the IRS notes that individual partners are making inappropriate claims of qualifying as limited partners that are not subject to self-employment tax
- Recent court decisions that have considered this issues all found in favor of the government
- Pending Court Cases
  - The IRS is beginning to tee up court cases to challenge limited partners in state law limited partnerships
    - Sirius Solutions, L.L.L.P., Docket No. 30118-21
    - Wrigley, Docket No. 11699-21
    - Soroban Capital Partners LP, Docket No. 16217-22

To date, the IRS wins in the self-employment tax area have, with the exception of the Joseph case, been with entities other than state law limited partnerships.

- *Renkemeyer, Campbell, & Weaver LLP v. Commissioner*, 136 T.C. 137 (2011)
- *Riether v. United States*, 919 F.Supp.2d 1140 (D. N.M. 2012)
- *Vincent J. Castigliola, et ux., et al. v. Commissioner*, TC Memo 2017-62
- *George E. Joseph*, T.C. Memo. 2020-65

Like-Kind Exchanges under Section 1031

Like-Kind Exchanges under Section 1031

An option to acquire real property now qualifies as real property for like-kind exchange purposes

- Reg. Section 1.1031(a)-3(a)(5)(i)
- A typical purchase and sale agreement ("PSA") is tantamount to an option because, upon a failure to close, the buyer's liability is limited to the contract deposit
- Other potential issues under Section 1031
  - *"Held for investment or use in a trade or business"* requirement
    - Not "held for sale in the ordinary course of a trade or business," *i.e.*, dealer property
  - Like-kind – to another option? to fee title?

Partnership Tax Reporting - Current Developments

IRS Campaigns

- IRS announced two new Large Business and International (“LB&I”) compliance campaigns
  - Partnership Losses in Excess Partner’s Basis Campaign
  - Distribution in Excess of Partner’s Basis Campaign
- Importance of a partner’s tax basis
  - A partner cannot deduct losses in the excess of its tax basis in its partnership interest and any tax losses allocated to a partner in excess of its tax basis is suspended and carried over indefinitely
  - If a partner receives a distribution of money (generally including marketable securities) in excess of its tax basis in a partnership, the partner recognizes gain outside the partnership for the excess

Focus of the New IRS Campaigns

- The IRS believes that there is significant noncompliance in both these areas and is focused on these areas in order to close the "tax gap" of unreported taxable income
- In recent years, the IRS has increased partnership tax compliance reporting requirements which will help capture information that the IRS will need in order to determine:
  - If losses are being deducted inappropriately due to lack of tax basis or gains are not being reported when partners receive distributions of money in excess of basis
- Partners in partnerships should pay particular attention to following the partnership tax basis rules in order to avoid being subject to IRS scrutiny under one of these campaigns

Partnership Audits - Final Regulations

Partnership Audits – Final Regulations

- The IRS released final regulations (TD 9969) on December 8, 2022
  - The regulations generally adopt proposed regulations
  - Comments submitted to the IRS focused primarily on non-income items
  - These comments were rejected and the final regulations adopt the proposed non-income item rules
  - Preamble:
    - "The imputed underpayment under the centralized partnership audit regime is not designed to be the exact amount of the tax liability that would have been paid by the partners, nor is it a substitute for partner tax liability."
    - "Rather, it is an entity-level liability of the partnership alone computed by reference to any adjustments made to partnership-related items, regardless of whether those adjustments would have actually resulted in a tax liability to any particular partner."

Partnership Tax Allocations

Partnership Tax Allocations

***Clark Raymond & Co. PLLC, et al v. Commissioner*, T.C. Memo 2022-105**

- Accounting firm partnership distributed “clients” to departing partners
- Departing partners’ capital accounts were reduced by the value of the “client” distribution
- However, the partnership did not book up capital accounts to reflect the unrealized gain in the distributed assets
- Accordingly, the capital accounts of the departing partners were reduced below zero
- Thus, the partnership allocated ordinary income to the departing partners under the qualified income offset provision to bring their capital accounts up to zero

Partnership Tax Allocations

***Clark Raymond & Co. PLLC, et al v. Commissioner*, T.C. Memo 2022-105**

- The Tax Court ruled that capital accounts were not properly maintained
- Thus, current year allocations did not have substantial economic effect
- Accordingly, the Tax Court reallocated partnership income and loss under the partners' interests in the partnership ("PIP") standard so that, after the distribution to the departing partners, their capital accounts (as properly adjusted) were zero

Thank You!

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