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Maximizing the Domestic Production Deduction: Asset Sales of Trades or Businesses

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The transfer of a trade or business through an asset sale usually encompasses a wide range of property—tangible personal property, inventory on-hand, software, buildings, and a broad collection of other real and personal property. This article explains why diligent review of the catalog of assets being conveyed in an asset sale (or a deemed asset sale) might reveal tax benefits in the form of the domestic production deduction.

The domestic production deduction of section 199[1] provides a permanent tax benefit measured in part by the gross receipts derived from a taxpayer's disposition of certain self-produced property. The section 199 regulations make clear that the disposition may occur at any point during the qualifying property's economic life, and regardless of the manner in which the property is used, or by whom, prior to that disposition. So long as the taxpayer produced the property and otherwise meets the requirements of section 199, gross receipts derived from any disposition of that item are included in the calculation of the section 199 deduction.

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[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

A taxpayer's sale of the assets of a trade or business frequently includes property—including unsold inventory, self-produced production equipment or tooling, software, and potentially other items—whose sale falls within the scope of section 199. As such, taxpayers engaged in an asset sale of a trade or business should carefully review the assets being conveyed to the purchaser, and when appropriate, include a portion of the gross receipts from the sale of that business in the taxpayer's section 199 computation for the year.

Section 199 Generally

Section 199 was added to the Code in 2004[2] to provide a permanent tax benefit to taxpayers engaged in qualifying production activities in the United States. The complex set of definitions, special rules, exceptions, and limitations employed by section 199 and the Treasury regulations that attempt to clarify its application have been widely discussed elsewhere, and need not be repeated in depth here.[3] In the broadest terms, however, section 199 provides a tax deduction equal to nine percent of either the taxpayer's taxable income for the year, or its "qualified production activities income" or "QPAI," whichever is less. The taxpayer's QPAI, in turn, equals the taxpayer's gross receipts derived from qualifying production activities in the United States ("domestic production gross receipts," or "DPGR"), reduced by the direct and indirect costs of generating those gross receipts. The deduction cannot exceed one-half of the production-related W-2 wages paid by the taxpayer during that year.[4]

As designed by Congress, the scope of potentially qualifying production includes a wide range of activities involving the manufacture, production, growth, or extraction ("MPGE") in the United States of tangible personal property, software, films, sound recordings, electricity, natural gas, and a range of other products.[5] The domestic production deduction likewise is available for limited categories of services (e.g., construction and engineering).[6]

Equally expansive is the scope of gross receipts "derived from" the disposition of property that the taxpayer MPGEs. The regulations under section 199 make clear that so long as the taxpayer originally produced the qualifying property, DPGR includes *any* gross receipts derived from *any* disposition of that

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[2] Section 102, Pub. L. 108-357, 118 Stat. 1418 (2004), as amended by section 403(a) of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109-135, 119 Stat. 25 (2005)), section 514 of the Tax Increase Prevention and Reconciliation Act of 2005 (Pub. L. 109-222, 120 Stat. 345 (2005)), section 401 of the Tax Relief and Health Care Act of 2006 (Pub. L. 109-432, 120 Stat. 2922 (2006)), section 401(a), Division B of the Energy Improvement and Extension Act of 2008 (Pub. L. 110-343, 122 Stat. 3765 (2008)), sections 312(a) and 502(c), Division C of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Pub. L. 110-343, 122 Stat. 3765 (2008)), section 746(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub. L. 111-312, 124 Stat. 3296 (2010)), section 318 of the American Taxpayer Relief Act of 2012 (Pub. L. 112-240, 126 Stat. 2313 (2013)), and sections 130 and 219(b) of the Tax Increase Prevention Act of 2014 (Pub. L. 113-295, 128 Stat. 4010 (2014)).

[3] *See* Beth M. Benko, 510-2d T.M., Section 199: Deduction Relating to Income Attributable to Domestic Production Activities. *See also* Benko, "Section 199, The Domestic Production Deduction: A Case for Reform," 57 Tax Mgmt. Memo 327 (Aug. 8, 2016).

[4] Sections 199(b), 1.199-2.

[5] *See generally* section 1.199-3(a).

[6] Section 1.199-3(m) and (n).

property by the taxpayer throughout the property's entire economic life, including sales, exchanges, leases, rentals, or other dispositions.[7] After the taxpayer establishes that it has produced the property within the stringent criteria of section 199, the scope of gross receipts "derived from" the taxpayer's disposition of that property is expansive.

For example, the regulations posit an example in which a taxpayer (1) originally produces the qualifying property, (2) sells that item to an unrelated party who in turn leases it to another party unrelated to either the taxpayer or the initial buyer, (3) reacquires the property subject to the lease (and begins collecting the lease payments), and (4) sells the property to the lessee at the expiration of the lease. The regulations conclude that each of these three revenue streams—the proceeds of the initial sale, the lease payments, and the proceeds of the second sale to the lessee—qualify as DPGR because they each produce gross receipts "derived from" the taxpayer's disposition of qualifying property originally produced by the taxpayer.[8]

Application to Sales of Trades or Businesses

In most situations, the sale of a trade or business through an asset sale[9] encompasses a wide range of both tangible and intangible property. When evaluating the possibility of treating as DPGR a portion of the gross receipts received in exchange for the trade or business, the threshold task is identifying those assets that (1) are within the scope of eligible property for purposes of section 199, and (2) have been MPGEd by the taxpayer. If the taxpayer did not MPGE the entire asset, then the so-called "shrink back" rule may apply to qualify a portion of the sales proceeds allocable to that asset if the taxpayer MPGEd a component part.

Eligible Assets

Section 199 applies to a wide range of real property, to "qualifying production property," and to certain other types of property, such as electricity and natural gas. Understanding the scope of qualifying production property ("QPP") is especially important when identifying each of the many types of assets being conveyed as part of the trade or business that may generate DPGR.

QPP includes three categories: tangible personal property, computer software, and sound recordings. The first two categories in particular are commonly included in the sales of trades or businesses, and these assets may generate DPGR.

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[7] *See generally* section 1.199-3(i)(1)(i).

[8] Section 1.199-3(i)(2) Ex. 2.

[9] This discussion is limited to situations in which the trade or business is sold through a taxable asset sale, or through a transaction treated as a taxable asset sale for purposes of the Code. See discussion, below. Proceeds of an asset transfer received in a tax-free transaction (*e.g.*, acquiring stock received in exchange for target assets in a section 361(a) exchange pursuant to a section 368 reorganization or transferee stock received in exchange for assets in a section 351 exchange) are not gross receipts for this purpose except to the extent that the transferor recognizes gain in the exchange (*e.g.*, boot received in a section 351 exchange). *See* section 1.199-3(c).

Tangible personal property

Reviewing the catalog of tangible personal property being sold as part of a trade or business may yield a number of overlooked items of DPGR. For this purpose, tangible personal property is any tangible property other than land, real property, or specific types of property for which the regulations provide special rules (software, sound recordings, qualified film, electricity, natural gas, and potable water).[10]

Otherwise, practically any type of tangible property being conveyed to the purchaser falls within the scope of QPP. Underscoring this scope, the regulations specifically identify the following examples of QPP:

- any gas (other than natural gas), chemical, and similar property (*e.g.*, steam, oxygen, hydrogen, and nitrogen)
- machinery
- printing presses
- transportation and office equipment
- refrigerators
- grocery counters
- testing equipment
- display racks and shelves
- neon and other signs that are contained in or attached to a building[11]

As the above discussion of the scope of gross receipts derived from the disposition of these assets shows, the current or prior usage of tangible property does not affect the potential application of section 199, nor does any interim break in the taxpayer's ownership. Thus, for example, so long as the taxpayer MPGEd the item under the section 199 standards (discussed below), section 199 will be equally applicable to inventory on-hand that is conveyed to the buyer; manufacturing equipment or tooling used in the taxpayer's own production operations; software developed by the company for use in running its business (back-office, shipping/logistics, sales portals, etc.); or materials, supplies, or standard furniture and fixtures.

For example, the regulations posit an example in which the taxpayer produces tangible property in the United States and uses that property in its own trade or business. After several years, the taxpayer sells the self-produced property to a third party. The regulations conclude that the gross receipts derived

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10 Section 1.199-3(j).

11 Section 1.199-3(j)(2)(i).

from the sale of the self-produced equipment after many years of use in the taxpayer's own business are DPGR eligible for the section 199 benefit.[12]

In addition to identifying tangible property that has been MPGEd entirely by the taxpayer, the taxpayer also should determine whether it MPGEd components of other assets being conveyed with the trade or business. Under the so-called "shrink back" rule, if the taxpayer does not satisfy the section 199 criteria with respect to the entire item, the taxpayer determines whether under those standards it has MPGEd any component of that larger property. If so, the taxpayer determines the portion of the overall sales price allocable to that smaller component, and treats that portion of the gross receipts as DPGR. [13]

Coupling the shrink back rule with the application of section 199 to multiple dispositions of the same item, the company should consider whether it previously MPGEd and disposed of an item, reacquired it as part of the purchase of a larger item for use in the taxpayer's trade or business, and is now disposing of that item once again through the sale of that larger, purchased item in conjunction with selling the trade or business.

The regulations posit as an example a steel manufacturer that produces and sells steel to an automobile manufacturer. The steel company purchases a fleet of vehicles for use in its own trade or business. When the steel company eventually disposes of those vehicles, it is permitted to determine the content of the vehicles comprised of steel previously produced by the company and sold to the automaker. If doing so is not unduly burdensome, the steel manufacturer may treat an allocable portion of the gross receipts received upon the disposition of those purchased vehicles as DPGR.[14]

Software

Internally developed software is another potential source of DPGR upon the sale of a trade or business. Companies not otherwise engaged in the production and sale of software in particular should consider whether they are disposing of internally developed software as part of the trade or business. The many examples of potentially overlooked software include:

- "back office" software used in accounting, human relations, marketing, recordkeeping, or other general and administrative functions
- software to manage warehouse and shipping operations, including interactions with third-party shippers or customers
- software to facilitate interactions with the taxpayer's franchisees, dealerships, branches, or independent sales agents
- software to manage a "just in time" inventory system with vendors

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[12] Section 1.199-3(i)(2) Ex. 1.

[13] *See, e.g.*, section 1.199-3(d)(1)(ii).

[14] Section 1.199-3(d)(4) Ex. 8.

- software used in connection with the taxpayer's provision of a service to its customers, such as on-line shopping portals
- software used to perform financial services

Because the taxpayer is disposing of the self-developed software (presumably including the source code) as a component of the overall sale of the trade or business, the IRS's restrictive interpretations as to when taxpayers derive gross receipts from software will be inapplicable.[15] Those concerns principally arise in the context of providing customers with access to online or cloud-based applications, as opposed to assignment of the software code itself to the purchaser of the trade or business.

Whether the taxpayer has produced the software will be driven by standards applicable outside section 199, principally those set forth in Revenue Procedure 2000-50, and discussed extensively elsewhere.[16] As a general rule, the taxpayer will be treated as having developed the software under those standards if its own employees perform the coding activities, as well as if it engages a third-party consultant under a time-expense, open-end job order, with the taxpayer retaining all risk of loss in the event the project is unsuccessful.[17]

For example, Company A purchases an off-the-shelf suite of ERP software, and using its own employees as well as outside contractors (with the risk of loss remaining with Company A), substantially customizes the software to its specific business needs. Company A is treated as having developed the software under the standards described in Revenue Procedure 2000-50, and accordingly currently deducts its development cost for federal tax purposes.

Several years after developing the software, Company A is sold through a taxable asset sale to Company B, an unrelated third-party. Company B pays $1000 for all the assets of Company A. Because as part of the sale, Company A sells to Company B software that it previously MPGEd in the United States, Company A may determine the allocable portion of the $1000 sales proceeds derived from the sale of the software, and include that amount in DPGR in computing its domestic production deduction for the year of the sale.

Other Categories of Personal Property

In addition to tangible personal property and software, the section 199 benefit also is available for the taxpayer's disposition of a range of other categories of personal property, provided the taxpayer

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[15] *See* AM 2014-008 (banking apps).

[16] 2000-2 C.B. 601. *See* section 1.199-3(g)(3)(iii).

[17] *See* CCA 201549024 (discussing ERP software costs); PLR 200236028 (same). Pursuant to section 6110(k)(3), written determinations such as private letter rulings represent the IRS's analysis of the law as applied to a taxpayer's specific facts, and they are not intended to be relied upon by third parties and may not be cited as precedent. They do, however, provide an indication of the IRS's position on the issues addressed.

satisfies each of the various requirements of section 199. For example, section 199 also applies to dispositions of sound recordings;[18] qualified film;[19] and electricity, natural gas, and potable water.[20]

For most companies, these items are likely to produce DPGR upon the sale of a trade or business only if they are being held for sale to customers, and the buyer acquires the business's existing inventories. If so, then the portion of the gross receipts allocable to any of those items generally would be included in DPGR.

Other potential scenarios (such as internally produced training or safety films conveyed as part of the business) generally are not likely to produce material amounts of DPGR.

Real Property

Section 199 also applies to gross receipts derived from certain dispositions of real property. The section 199 standards applicable to real property, however, differ significantly from those applicable to personal property. In particular, the taxpayer generally may include in DPGR gross receipts derived from construction activities only if it is engaged in the trade or business of construction on a regular and ongoing basis. Taxpayers not otherwise engaged in the construction business on a regular and ongoing basis nonetheless may be able to use a safe harbor permitting the inclusion of the gross receipts in DPGR so long as the real property is sold to an unrelated party within 60 months of the completion of construction.[21]

Taxpayers selling a construction trade or business should review the assets being conveyed to the buyer to identify any buildings constructed during the course of that business, even if the building was constructed several years in the past. Taxpayers not engaged in a construction business on a regular and ongoing basis nonetheless should review the assets being conveyed to identify buildings constructed within the past 60 months, and assess whether the taxpayer's activities are sufficient to constitute construction for purposes of section 199. As a general rule, undertaking the activities of a general contractor would cause section 199 to apply, but merely monitoring and paying invoices would not.[22]

As with most of the section 199 provisions, the standards applicable to determining whether the taxpayer MPGEd the real property, and the gross receipts allocable to that property, are complex and replete with exceptions and special rules. Nonetheless, if the taxpayer determines that it is conveying a self-constructed building as a component of the trade or business's assets, a closer examination of the surrounding facts may be warranted.

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18 Section 1.199-3(j)(4).

19 Section 1.199-3(k).

20 Section 1.199-3(l).

21 *See generally* section 1.199-3(m).

22 Section 1.199-3(m)(2).

Sales of Stock Treated as Asset Sales

There are a variety of means by which a sale or purchase of stock can be treated as a sale of assets for federal income tax purposes.[23] As such, gross receipts resulting from these deemed asset sales would be includible in DPGR to the same extent as in a traditional asset sale.

For example, section 338(g) permits a corporation to elect to treat certain taxable purchases of stock constituting 80 percent or more of the vote and value of the target corporation as an asset purchase. If the purchaser makes an election, the potential section 199 benefit inures to the target, and appears on the target's one-day return resulting from the purchaser's election.[24]

Section 338(h)(10) permits certain selling shareholders and a purchasing corporation jointly to elect to treat certain taxable purchases of stock constituting 80 percent or more of the vote and value of a target corporation as an asset purchase. In this situation, the benefits of section 199 would inure to the target while it is owned by the selling shareholders, flowing through to the shareholders if the target is an S corporation or, if a selling corporation and the target file a consolidated return, being reflected on the selling corporation's consolidated return.[25]

Similarly, section 336(e) permits certain shareholders of a target corporation to elect to treat certain taxable sales or distributions of stock constituting 80 percent or more of the vote and value of the target as an asset sale, with the benefits flowing through to either the shareholders or the target, in the same manner as with a section 338(h)(10) election.[26]

A corporation that owns 80 percent or more of the vote and value of a target corporation also can use the check-the-box regime to engineer a transaction that is a transfer of ownership interests for legal

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[23] *See, e.g.,* John Geracimos and Rebecca Holtje, Treating a Stock Sale as an Asset Sale for Tax Purposes: Old and New Tools, 41 J. Corp. Tax'n 03 (March/April 2014).

[24] Under a section 338(g) election, the selling shareholders are treated as selling target stock, while target is treated as selling all of its assets to a new target in a taxable transaction. As a result of this characterization, there are two levels of tax: to the selling target shareholders and to the target itself. The gain from the deemed asset sale is reflected on a one-day return disassociated from the seller and the purchaser. Therefore, the benefits of section 199 would be reflected on the one-day target return and would not inure to the purchasing corporation (except to the extent it affects the value of its target corporation stock) or to the selling shareholders.

[25] The section 338(h)(10) election is available if the target is an S corporation or if the selling shareholder is a corporation that owns 80 percent or more of the vote and value of the target. As a joint election, the sale of stock by the selling shareholders is ignored and the target is treated as selling its assets while it is owned by the selling shareholders and liquidating following the sale, resulting in a single level of tax.

[26] The section 336(e) election is available if the target is an S corporation or if the selling or distributing shareholder is a corporation that owns 80 percent or more of the vote and value of the target corporation and if the disposition otherwise would not qualify under section 338. For example, a section 336(e) election would be available if a corporate shareholder distributed target stock consisting of 80 percent or more of the stock of the target corporation to its shareholders in a transaction to which section 311(b) applied or if a corporate shareholder sold such shares to a noncorporate purchaser (e.g., an individual, the public, a partnership). As in the case of a section 338(h)(10) election, the sale or distribution of target stock by the selling shareholders is ignored and the target is treated as selling its assets while it is owned by the selling shareholders and liquidating following the sale, resulting in a single level of tax at the corporate disposition level.

purposes but a taxable sale of target assets for federal income tax purposes. If so, this likewise could potentially produce section 199 benefits for the seller.[27]

Taxpayers making any of these elections should carefully review the potential application of section 199 to the property being conveyed through these deemed asset sales.

MPGE

Gross receipts potentially qualify as DPGR if the taxpayer manufactured, produced, grew, or extracted the property under consideration.[28] The rules applicable in determining whether the taxpayer MPGEd the real or personal property being conveyed to the buyer of the trade or business must be evaluated carefully. A detailed review of those rules is beyond the intended scope of this discussion.

To qualify, the taxpayer must have MPGEd the property in whole or significant part in the United States.[29] The taxpayer can satisfy this standard by showing that its domestic production was "substantial in nature," based on all of the facts and circumstances, including such factors as the nature of the taxpayer's production activities, the nature of the item being produced, as well as the value-added and relative cost of the taxpayer's production activities in the United States. If the taxpayer contracts the production to a third party (while retaining the benefits and burdens of ownership during the production period), the third party's production activities in the United States likewise must satisfy this standard.[30]

Alternatively, the taxpayer can show that it MPGEd the assets being conveyed "in whole or significant part" in the United States by showing that its direct labor and overhead to MPGE the item in the United States accounts for at least 20 percent of the taxpayer's cost of goods sold of the item (or the item's unadjusted depreciable basis in a transaction without cost of goods sold).[31]

Qualifying section 199 activities do not include "packaging, repackaging, labeling, or minor assembly."[32] The IRS has interpreted this exclusion broadly to include activities that appear to be more than "minor assembly" or "packaging." For example, the regulations conclude that installing a sunroof in a car is "minor assembly," thereby disqualifying the gross receipts from that activity from the section 199

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[27] For example, the selling corporation could (1) create a new subsidiary ("Newco"), (2) transfer the stock of target to Newco, (3) cause target to convert to a limited liability corporation taxed as a disregarded entity, and (4) cause Newco to sell the interests of target in a taxable transaction. These steps may be treated for federal tax purposes as a conversion of the target into Newco in a section 368(a)(1)(F) reorganization followed by a taxable sale by Newco/target of all of its assets. As such, the benefits of section 199 would inure to Newco while it is a subsidiary of the parent corporation and, if the parent corporation and Newco file a consolidated return, be reflected on the seller's consolidated return.

[28] Section 1.199-3(e).

[29] Section 1.199-3(g)

[30] Section 1.199-3(g)(2).

[31] Section 1.199-3(g)(3).

[32] Section 1.199-3(e)(2).

benefit.[33] To date, however, the IRS has been unsuccessful in enforcing its narrow interpretation of qualifying production activities, and has lost each time that issue has been considered by a court.[34]

Accordingly, although the criteria are complex, the sale of a trade or business may include a number of assets that, upon careful inspection, the taxpayer has MPGEd in whole or part for purposes of section 199. A careful review of the catalog of assets being conveyed to the buyer may identify potentially eligible properties yielding a permanent tax benefit.

Allocation of Sales Proceeds

Section 199 computes DPGR on an item-by-item basis, requiring the taxpayer to determine the portion of the overall gross receipts allocable to each qualifying item of real or personal property that is being sold as part of the trade or business.[35] Because the sale of the trade of business generally includes the sale of both qualifying and non-qualifying property (i.e., property that the taxpayer did not MPGE), the taxpayer must allocate the gross receipts received upon the sale of the business between DPGR and non-DPGR.

The section 199 regulations do not impose a specific methodology for making this allocation. Instead, in doing so the taxpayer may use “any reasonable method” that is acceptable to the IRS, based on all of the facts and circumstances, and that accurately identifies the gross receipts that constitute DPGR and non-DPGR.[36]

The regulations provide a number of factors to consider in determining whether an allocation methodology is reasonable. These factors include whether the taxpayer uses the most accurate information available; the relationship between the gross receipts and the method used; the accuracy of the method chosen as compared with other possible methods; whether the taxpayer applies the same method consistently from year to year; and others.

The regulations also provide, however, that if the taxpayer has the information readily available and can, without undue burden or expense, specifically identify whether the gross receipts derived from an item are DPGR, then the taxpayer is required to use a specific identification method in doing so. If the information is not readily available, or if using a specific identification method would entail undue burden or expense, then the taxpayer may use another method to allocate the gross receipts between DPGR and non-DPGR.[37]

In the context of the sale of a trade or business, schedules used for tax or other purposes that allocate the overall sales price among each of the acquired assets likely will require the same allocations for

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[33] Section 1.199-3(e)(5) Ex. 6.

[34] Precision Dose, Inc. v. United States, 116 AFTR 2d (RIA) 6231 (N.D. Ill. 2015); United States v. Dean, 945 F.Supp.2d 1110 (C.D. Cal. 2013); Gibson & Assoc., Inc. v. Commissioner, 136 T.C. 195 (2011).

[35] Section 1.199-3(d)(1).

[36] Section 1.199-1(d)(1).

[37] Section 1.199-1(d)(2).

purposes of section 199.[38] For example, if the parties agree that of the total sales price of a trade or business, $100 is allocable to the purchase of production machinery that the taxpayer had designed and built, that $100 generally would be includible in DPGR.

Other Computational Requirements

Identifying potentially qualifying self-produced property is only one step in computing the taxpayer's section 199 deduction upon the sale of the assets of a trade or business. In computing QPAI (and from there the actual section 199 deduction to which the taxpayer is entitled), the taxpayer must reduce DPGR by cost of goods sold and by the related other expenses, losses, and deductions allocable to the production of that DPGR, as determined under section 1.199-4. The remaining tax basis of non-inventory property generally is included in cost of goods sold for this purpose.[39]

Recently in CCA 201642033, the IRS considered the application of this cost-allocation requirement in the context of a taxpayer's sale of manufacturing equipment used in its production of qualifying property. Because the taxpayer had not produced that equipment, however, its sale did not generate DPGR, and the taxpayer was not required to reduce its DPGR by that equipment's remaining tax basis.

Planning Considerations

Section 199 permits taxpayers to claim the domestic production deduction in connection with the disposition of any property that the taxpayer MPGEd in the United States. As a general rule, this benefit is available regardless of when the taxpayer produced the property; how the property was used by the taxpayer or by any other person prior to the sale; or by the number of times that the taxpayer has disposed of and reacquired the property.

Given the broad scope of qualifying assets potentially eligible, taxpayers considering or engaged in the sale of a trade or business through an asset sale should carefully review the catalog of assets being conveyed to the buyer. In many cases, the collection of assets being sold will include a variety of assets that the taxpayer itself MPGEd within the meaning of section 199, and whose sale will generate an additional tax benefit for the seller.

In addition to obvious items such as inventory on-hand as of the sale date, potentially overlooked sources of DPGR include production machinery, equipment, or tooling that the taxpayer self-produced (either directly or through a contract manufacturing arrangement in which the taxpayer retained the benefits and burdens of ownership); self-produced software (as determined under the standards of Revenue Procedure 2000-50), regardless of the nature or functionality of that software; miscellaneous items of fixtures, furniture, and equipment that the taxpayer may have produced in whole or part, and either retained for its own use or purchased from third-parties and used in its own business; and

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[38] The taxpayer may need to perform a further break-out of tangible property within specific asset classes for purposes of section 199, because the asset class may include both eligible and ineligible property, without making a distinction.

[39] Section 1.199-4(b)(1).

buildings that may qualify based on the nature of the taxpayer’s trade or business or upon how recently the building was constructed.

In each situation, identifying the real or personal property potentially yielding DPGR is just the starting point of the analysis. The rules of section 199 are many and complex, and a number of areas must be considered before determining whether sales proceeds may be included in DPGR. Nonetheless, in light of the permanent tax benefit potentially available—effectively increasing the seller’s economic benefit from the sale of the business—taking the first step of identifying potentially eligible assets MPGE by the seller is an important element in the overall tax planning for selling the assets of a trade or business.

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