What Service Businesses Qualify for IRC §§ 199A's or 1202's Benefits?

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The 2017 Tax Cuts and Jobs Act (the "2017 Tax Act") ushered in several benefits for C corporations, including reducing the top corporate rate from 35% to a flat 21% rate and eliminating the corporate alternative minimum tax (AMT). In a recent article, we discussed the benefits associated with selling C corporation qualified small business stock (QSBS) under IRC § 1202. IRC § 1202's benefits became much more attractive in 2015 when the percentage of non-taxable QSBS gain was increased to 100%, and the gain was no longer included as an AMT preference item. While we doubt that these factors will tilt most choice of entity decisions in favor of C corporations over S corporations or partnerships (LLCs), we do expect that operating as a C corporation and qualifying for QSBS' benefits will be given a fresh look.

This article is one of a series of posts addressing planning issues relating to qualified small business stock (QSBS) and the workings of Sections 1202 and 1045 of the Code.

Congress didn't want to limit the benefits ushered in with the 2017 Tax Act to C corporations. Another significant tax benefit is IRC § 199A's new deduction equal to 20% of a non-C corporation's combined qualified business income, subject to certain adjustments and limitations. We discussed IRC § 199A's benefits and its complicated rules in a separate recent article.

IRC §§ 199A and 1202 limit or exclude certain professional and service businesses from their tax benefits. Falling within the scope of IRC § 199A's disfavored service business category means that no deduction is available against the service income for taxpayers whose joint taxable income exceeds $415,000. Falling within the scope of IRC § 1202's disfavored service business category means that a corporation's stock won't qualify for IRC § 1202's benefits. While law and accounting firms clearly engage in disfavored businesses for both IRC §§ 199A and 1202 purposes, there are numerous other service businesses that defy easy categorization. A key takeaway should be that with limited exceptions, the issue of

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qualification should be carefully explored for any service business. This article's goal is to help business owners identify those service businesses that should not fall into the disfavored categories under IRC §§ 199A and 1202.

Satisfying IRC § 1202's active business requirement

For stock to qualify as QSBS, the issuer must be a C corporation and satisfy an "active business requirement." There are several critical elements of this requirement discussed below that should also be kept in mind.

An 80% value test must be satisfied substantially all of the time. IRC § 1202(e)(1)(A) provides that the issuer will generally satisfy the active business requirement if at least 80% (by value) of the issuer's assets are used in the **active conduct of one or more qualified trades or businesses**. IRC § 1202(c)(2)(A) provides that stock in a corporation will not be QSBS unless the corporation meets the active business requirements (including engaging in a qualified trade or business) during substantially all of the taxpayer's holding period for such stock. There isn't specific guidance on what "substantially all" means, but for those taxpayers seeking QSBS treatment, the safest approach is for their corporation to continually satisfy the active business requirement. Obviously, identifying whether a business is a qualified trade or business is a critical aspect of achieving QSBS status, and is the main focus of this article. This issue will be addressed in detail below after noting several other elements of the active business requirement.

Holding too much cash, investment assets or real estate can kill the potential for QSBS status. A corporation will fail the 80% value test if its aggregate investment assets (assets such as stock investments and cash, less cash qualifying for the working capital exception), **plus** non-trade or business real estate assets, **plus** disqualified trade or business assets add up to more than 20% of the value of the corporation's assets.

IRC § 1202(e)(5)(B) provides that a corporation will fail the active business requirement if more than 10% of its net assets consists of

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stock or securities in corporations that are not subsidiaries, exclusive of stocks and securities held as working capital.

IRC § 1202(e)(6)(A)(A) provides that assets (cash or investment assets) can be treated as being used in a qualified trade or business if they are (i) held for the reasonably required working capital needs of a qualified trade or business or (ii) held for investment if it is reasonably expected to be used within two years to finance research and experimentation in a qualified trade or business, or increases in working capital needs of a qualified trade or business. But for periods after the corporation has been in existence for at least two years, in no event may more than 50% of the assets of the corporation qualify as used in the active conduct of a qualified trade or business as a result of this provision.

IRC § 1202(e)(7) provides that a corporation is not engaged in an active conduct of a trade or business if more than 10% of the total value of its assets consists of real property which is not used in the active conduct of a qualified trade or business. The ownership of, dealing in, or renting of real property is not treated as the active conduct of a trade or business.

How will ownership of the stock of subsidiaries be treated for QSBS purposes? IRC § 1202(e)(5)(A) provides for a look-through if a corporation is engaging in a business through a subsidiary. IRC § 1202(e)(5)(C) defines "subsidiary" to mean a corporation where the parent owns more than 50% of the combined voting power of all classes of stock entitled to vote, or more than 50% in value of all outstanding stock. If the corporation owns a subsidiary meeting the definition, then the assets and business of that subsidiary must be factored into the determination of whether the corporation is satisfying the active business requirements.

What about interests in LLCs/joint ventures? IRC § 1202 doesn't specifically address a corporation's ownership of partnerships. Presumably, if a corporation owns a 20% interest in a partnership engaged in a qualified trade or business, the value of the partnership interest would count towards satisfying the corporation's 80% asset requirement. But if the partnership engages in business activities or holds assets that don't meet the active business or qualified trade or business requirements, then

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the corporation's pro rata share of the value of the disqualified real estate holdings, investment assets, and business activities that aren't a qualified trade or business are likely to count for IRC § 1202 purposes. While this result seems logical, there doesn't appear to be any guidance confirming how partnership items pass through for IRC § 1202 purposes.

What about holding assets in disregarded entities? Although it isn't addressed specifically in IRC §§ 199A or 1202, its seems reasonable to conclude that the existence of disregarded entities held by a C corporation or pass-through entity will be ignored for all purposes of determining qualification under those Internal Revenue Code sections.

Favorable treatment for start-up companies. IRC § 1202(e)(2) provides special dispensation for a corporation engaged in start-up activities and research and development activities associated with the future undertaking of a qualified trade or business. QSBS can be issued during this start-up period before the corporation actually starts engaging in an active trade or business, regardless of whether any income has been generated from the activity at the time of issuance.

Favorable treatment for software licensing companies. IRC § 1202(e)(8) provides that computer software is treated as an asset of a qualified trade or business if the corporation is actively engaged in developing software, receives at least 50% of its ordinary gross income as software royalties, and has deductions for software development costs equal to 25% or more of its ordinary gross income.

IRC § 1202 has additional rules and qualification requirements not addressed in this article. Make sure that all of IRC § 1202's rules and qualification requirements are satisfied. Some of the rules aren't addressed in this article.

Engaging in a qualified trade or business for purposes of IRC § 1202

As mentioned above, engaging in qualified trades and businesses is critical for satisfying the 80% by value active business requirement.

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IRC § 1202(e)(3) provides that the term "qualified trade or business" means any trade or business other than:

> (A) any trade or business involving the performance of services in the fields of health, law, engineering, architecture, 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,
>
> (B) any banking, insurance, financing, leasing, investing, or similar business,
>
> (C) any farming business (including the business of raising or harvesting trees),
>
> (D) any business involving the production or extraction of products of a character with respect to which a deduction is allowable under section 613 or 613A, and
>
> (E) any business of operating a hotel, motel, restaurant, or similar business.

In most cases, it won't be difficult to identify businesses that fall outside of the scope of a qualified trade or business. Prudent planning for taxpayers seeking the benefits of QSBS would be to separate out into a "brother-sister" corporation any activities that fall within the scope of expressly excluded activities under IRC § 1202(e)(3). There is no published guidance regarding what businesses might be "similar" to those identified in clauses (B) and (E) above.

There are two significant areas of concern attributable to the way IRC § 1202 approaches identifying the categories of businesses that aren't engaged in qualified trades or business.

Dealing with businesses that could fall within a named category. There is a problem of deciding how broad the reach should be for those categories of business activities named in IRC § 1202(e)(3). The "field of health" obviously includes the professional services of physicians and nurses, but what about other health care related business activities? For example, does the field of health include a

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physical therapy facility qualifying for Medicare and Medicaid funds? Probably? Then what about an in-home personal care business that doesn't provide any skilled nursing services? Maybe not so clear. Moving further away from core health care businesses, doesn't a climbing gym contribute to the health of its members? Yes, but its seems reasonable to argue that a gym is not a business operating in the "field of health" as Congress intended for IRC § 1202 purposes. There is a line is somewhere between a physician practice and a gym, but drawing that line may be difficult in the absence of meaningful guidance or authorities. For IRC § 199A purposes, the reference to the IRC § 448 regulations is helpful, but there is no confirmation that those regulations can be applied to IRC § 1202. However, it seems reasonable to apply the logic of the regulations as discussed below.

Dealing with the "skilled employee" service business general catch-all category. How do you identify a business where a principal asset is "the reputation or skill of one or more employees?" What if a celebrity clothing designer organizes a corporation to engage in designing and selling wedding dresses to Hollywood stars? Is the principal asset of that corporation the designer's reputation or skills? Maybe. What happens to the analysis if you add to that business the sale of wedding dresses designed by other non-celebrity employees? Here the reputation and skill arguments seems significantly weakened. Where are you in the analysis if the corporation's business includes the sale of off-the-rack wedding dresses and accessories? The activities of this retail business should fit within the qualified trade or business category.

Any business that provides services or products relies to a greater or lesser extent on the skill of its employees. Until industry moves more towards the exclusive use of robots and artificial intelligence, the skill of employees will continue to be a key asset of most every business, whether we are talking about at the retail end of the business, on the production line or in the design phase. In spite of this, it is possible to draw some lines for IRC § 1202 purposes. Based on a review of the tax authorities discussed below, there appears to be a distinction drawn between a highly trained professional's services and those provided by an employee relying heavily on proprietary software programs, equipment or machinery, or the

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company's methods, rules or processes. This analysis is couched in terms of identifying the most valuable asset of business – does the value lie in the employee's personal skills and reputation or does the value lie in assets utilized by employees to provide their services, such as the company's equipment, proprietary software, or its customized methods and processes?

The limited authorities available on this issue focus on whether the employee's skills are personal and transferable within the marketplace (i.e., suggesting that the employees' skills or professional certifications are the driver of value and service), or whether the employees simply operate within a system or method for doing business developed by their employer (i.e., suggesting that the system or method is the driver of value and service).

Finally, a key focus of the tax authorities interpreting IRC § 1202 appears to be whether the customers view themselves as acquiring a product or the skilled personal service of an identified employee. A business is unlikely to be labelled as a disqualified service business if the customer is purchasing a product, even a product where human skill and expertise is a critical part of the fabricating process. As mentioned above, the development or fabrication of a product might involve the services of skilled employees, but from the customer's standpoint, are they buying the product or the personal services of skilled employees? Perhaps some products are so customized that the skill of a particular craftsman is the most critical ingredient to the customer. But in general, if a customer views itself as purchasing a product, even if it is coupled with generic direct services, the business shouldn't fail the qualified trade or business requirement.

Where the business involves employees directly providing services to customers, a key question should be whether the customer's focus is the personal services of a particular skilled employee. Obviously, there are businesses where the core asset consists of the employee's skills and reputation. The services provided by these businesses could range from the highly skilled services of physicians and attorneys, to those of electricians or plumbers. But there will be service businesses where the critical asset won't be the personal services of the employees, but instead the value will

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rest with the company's proprietary software, the training the company provides its employees, or the processes or methods that the company requires its employees to follow on the job.

The inclusion of hotels and restaurants in the list of disqualified businesses suggests that Congress felt that it was necessary to specifically call out those businesses as falling in the disfavored category. Presumably, Congress views these businesses as heavily service based and for that reason should not qualify for IRC § 1202's benefits. Congress included a reference to "similar" business in calling out hotels and restaurants. This does raise the specter that hospitality- related businesses, even where the product rather than the service is the key asset, may fall into the disqualified category. Presumably, there should be a distinction between a food market and a restaurant, based on the degree of human skill involved in the successful preparation of food in a restaurant versus the lesser importance of employees in a food market, where the food products and perhaps the supply chain are the critical drivers of success. But in the absence of meaningful guidance, it is difficult to provide useful analytical tools for drawing the line between favored and unfavored businesses. Another way of looking at the specific references to hotels and restaurants is that Congress felt that without that reference, those businesses wouldn't typically be categorized as a disqualified trade or business. In the absence of a celebrity chef actually cooking and presenting the meal, this seems to be a reasonable conclusion, and should be applied when analyzing other businesses outside the hotel and restaurant hospitality category that have similar employee involvement in delivery of the product/service.

Tax authorities addressing the IRC § 1202 qualified trade or business issue

The IRC § 1202 regulations fail to provide any guidance for clarifying the qualified trade or business issue. In spite of the fact that IRC § 1202 has been around for years, there is only one Tax Court case and a couple of private letter rulings available as of March 2018, addressing the qualified trade or business issue.

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Owen v. Commissioner.[1] In *Owen*, the taxpayer seeking QSBS status owned stock in a corporation that sold insurance-related products, including pre-paid legal services, long-term care insurance, and whole life insurance. The IRS argued that the corporation's principal asset was the skill of its two principals. The U.S. Tax Court disagreed, stating that while the success of the business was properly attributable to two individuals, the principal asset of the corporation was the training and organizational structure. In coming to its conclusion, the Tax Court noted that it was independent contractors who sold the business products, not the employees of the business. For some reason, the IRS didn't argue that the company was engaged in a disqualified "insurance" business. Perhaps this suggests that the IRS views the scope of the "insurance" category to be limited to licensed insurance underwriters, and doesn't extend the scope to insurance agencies.

Private Letter Ruling 201717010.[2] In this PLR, the IRS considered for purposes of QSBS qualification whether a corporation that uses proprietary software and other technology to provide testing services and laboratory reports exclusively to healthcare clients was a disqualified health service business or a disqualified business where the principal asset is the reputation or skill of one or more of the employees.

The corporation was organized to develop a tool to provide more complete and timely information to healthcare providers. Specifically, the corporation used a proprietary product and other technologies for the precise detection of some unidentified item. The corporation represented that it was the only company that could legally perform its testing and that its expertise was limited to its patented testing. The testing reports did not diagnose any aliment or recommend treatment. The corporation simply provided laboratory reports to other health care providers. The employees performing the testing services, other than the laboratory director, were not required to have any specific licensing, but were well educated and received a year of training in order to perform the testing services. Additionally, the employee's prior skills were generally useless to their job functions, and the skills obtained from employment with the company were not useful to other employers. The company also maintained a research division that helped

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develop other uses for its proprietary technology.

Several facts played a key role in the IRS' determination that the business was not in a trade or business involving services in the field of health, or a trade or business where the principal asset was the reputation or skill of its employees. The IRS pointed out that the company itself did not diagnose or treat any patients, but instead only provided testing and a laboratory report. The company was not informed of any diagnosis or treatment of patients, and did not take orders or explain laboratory tests to patients. In fact, none of the company's revenues were earned in connection with any patient's medical care. Finally, employees required no prior experience, licensing, or training to qualify for the job, and the skills learned on the job were unique to the work and not useful to other employers.

Based on the IRS' analysis and comments, it can be inferred that not all services associated with the health care industry are disqualified "health" services. Instead, health services that fall under the definition of "health" for IRC § 1202(e)(3)(A) purposes may be limited to those services that diagnose or treat patients, take orders from patients, or derive revenues from patients' medical care.

Private Letter Ruling 201436001. This PLR also involved the determination of whether a company would be classified as a health service business for purposes of IRC § 1202. In this instance the company specialized in the commercialization of experimental drugs. The company provided research and clinical testing on experimental pharmaceutical products and their manufacturing processes , ultimately developing successful manufacturing process. The company utilized its own manufacturing and clinical facilities, patents and other intellectual property to help clients in the pharmaceutical industry commercialize their drugs.

This PLR's analysis of IRC § 1203(e)(3) provides a general description of the intent of the qualified trade or business definition:

Section 1202(e)(3) excludes various service industries and specified non-service industries from the term "qualified trade or business." Thus, a qualified trade or business cannot be primarily within service industries, such as restaurants or hotels or the providing of

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legal or medical services. In addition, § 1202(e)(3) excludes businesses where the principal asset of the business is the reputation or skill of one or more of its employees. This works to exclude, for example, consulting firms, law firms, and financial asset management firms. Thus, the thrust of § 1202(e)(3) is that businesses are not qualified trades or businesses if they offer value to customers primarily in the form of services, whether those services are the providing of hotel rooms, for example, or in the form of individual expertise (law firm partners).

The last sentence quoted above suggests that the IRS could take an expansive view of the category of businesses that are excluded from IRC § 1202's benefits. It appears that if services are a key part of a business, then there needs to be something else involved to keep the business outside of the disqualified category; perhaps something that keeps the business from being viewed as providing a service based on individual skills – it could be the use of the company's proprietary software in connection with undertaking the business service or the reliance or focus on the company's products, or its training, procedures or process as the mechanism for driving the company's success. Obviously, if the business engages in an activity that is within range of one of the identified services/industries, then it is more likely that the IRS will take the position that the company is engaging in a disqualified activity.

The IRS ultimately determined in PLR 201436001 that the company was not engaged in a disqualified business activity. The IRS concluded that company's activities involved the development of assets and intellectual property that assisted its customers. The IRS analogized the business to a car parts manufacturer that uses its tangible and intangible assets to develop component parts for clients. This PLR is helpful because the IRS did not seem to focus on the fact that the company was involved with the "health" industry, separate from its determination that the engine driving the business was its intellectual property assets rather than individual employee skills.

Engaging in a qualified trade or business for purposes of IRC § 199A

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In order to qualify for the 20% deduction against business income under IRC § 199A, the income must be generated by a "qualified trade or business." IRC § 199A(d) excludes from the definition of qualified trade or business all "specified service trade or business" ("Specified Services"). Specified Services are defined in IRC § 199A(d)(2) and includes any trade or business that is described in IRC § 1202(e)(3)(A), with the exception of engineering and architecture. Additionally, services that consist of investing and investment management, trading, or dealing in securities,[3] partnership interests, or commodities[4] are also included in the Specified Services definition.

The list of named excluded businesses for purposes of IRC § 199A is shorter than IRC § 1202's list of disfavored businesses, but IRC § 199A does include the skilled employee catch-all category: "any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees."[5] Engineering and architecture are specifically excluded from the named list of disfavored businesses, and our best guess would be that the IRS and courts would agree that these service businesses should not be Specified Services, even if there is a compelling argument that their principal assets consist of skilled employees.

IRC § 448 regulations. As discussed previously, the regulations under IRC § 1202 do not provide guidance on the reach of the named categories in IRC § 1202(e)(3)(A). For purposes of IRC § 199A, however, the Senate Finance Committee Report referenced IRC § 448(d)(2)(A) and associated regulations to provide further guidance on several listed services. These regulations provide more specific guidance on activities that constitute health, performing arts and consulting services and may be helpful to understand the general theme of these targeted service categories for trades and businesses not specifically listed in the statute. These regulations are particularly valuable because they confirm that even where a particular type of business activity is named, there is a reasonable line to draw between those businesses that will qualify for the IRC § 199A deduction and those that won't qualify.

The regulations suggest that services that support or are ancillary to the named professional or other services probably fall outside

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the scope of Specified Services. Since these regulations basically narrow the scope of businesses falling within the health, performing artist and consulting categories, and the cross reference in IRC § 199A didn't include all the named categories listed in IRC § 1202, it would appear that Congress intended the scope of Specified Services to be narrower than the scope of nonqualified trades and businesses under IRC § 1202.

Treasury Regulation § 1.448-1T(e)(4)(ii)[6]. This regulation limits "health" to only include services directly related to a medical field (e.g., physicians, dentists, nurses, etc.) and specifically excludes health clubs and spas or other services related to the health of clients, but not directly related to a medical field.

Treasury Regulation § 1.448-1T(e)(4)(iii)[7]. This regulation limits the meaning of services in the performance of arts to the artists themselves (e.g., actors, artists, performs, singers), and excludes any services that support the performance of arts, but do not include performing the art (e.g., agents, managers, promoters, producers, etc.).

Treasury Regulation § 1.448-1T(e)(4)(iv)[8]. This regulation limits the definition of consulting to advice and counsel and provides that a factor used in determining whether a service will be defined as consulting is the way the business is compensated, inferring that a payment contingent on consummation of a transaction would not be consulting (e.g., payment of fee or commission on a purchase or result). This regulation would indicate that a payment based purely on advice rather than being contingent on an additional factor (e.g., a successful closing of the transaction) would bring the service into the consulting category.

Application of the IRC § 448 Regulations to IRC § 1202. There is no authority dealing with whether the IRC § 448 regulations should also be considered for guidance in connection with IRC § 1202 issues. It certainly seems reasonable that the same principles that make the regulations' guidance applicable to IRC § 199A should apply for purposes of IRC § 1202.

Working through some specific examples

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Legal, medical and accounting practices. Professionals are disfavored under both IRC §§ 199A and 1202. Under IRC § 199A, no deduction will be available once a professional's taxable income hits the statutory threshold. On the other hand, if a business provides legal forms and non-customized articles about legal issues, then there is a good argument that the business is selling a product rather than services.

An interior decorating business. This is an example of a business that isn't specifically mentioned in IRC §§ 199A or 1202. Providing interior decorating services could fall within the scope of "consulting," or it might be a business where the primary asset is the skill or reputation of its employees. Based on a reading of the IRC § 448 regulations, for interior decorating to fall within the scope of "consulting" under IRC § 199A, the decorator's compensation arrangement would generally need to be a payment for the advice (e.g., an hourly consulting fee) rather than a payment tied to an event or the purchase of home furnishings. As discussed above, the same analysis could apply to IRC § 1202, but the direct tie-in to the IRC § 448 regulations doesn't exist as it does for the IRC § 199A analysis.

Even if the interior decorating business dodges the consulting classification, it still could be labelled as a service business where the principal asset of such trade or business is the reputation or skill of one or more of its employees. Based on the authorities discussed above, a key factor to consider should be whether there are assets with a greater value than the decorator's personal skills. Does the business have intangible and tangible assets that are more valuable than the skilled services of the decorator? For example, what if the business relied heavily on a proprietary software program that provided 3-D modelling of furnishing within the customer's space? Does the business have extensive floor models that allow the customer to directly select furnishing? If so, these additional assets would weigh against the conclusion that the business relies on the employees' skills. The second factor involves looking at whether the employees have certifications or expertise that is valuable within the decorating field generally, or is the training and skills specific to the business (i.e., training to operate the proprietary 3-D modelling program that isn't useful working with

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a competitor). The IRS would likely argue that if the employee's skills are valuable both to competitors and within the decorating industry generally, then this supports a conclusion that the employee's skill are a primary asset of the business. This analysis should apply for purposes of both IRC §§ 199A and 1202.

A gym or athletic training business. For purposes of IRC § 199A, this business activity would be excluded from the health service classification by the IRC § 448 regulations. For purposes of IRC § 1202, PLR 201436001 would support the argument that there must be some medical treatment or diagnosis of patients to bring the activity within the scope of health services. In rare cases, a gym or athletic training facility could run afoul of the category of service businesses where the principal asset of such trade or business is the reputation or skill of one or more of its employees. For example, what if the use of the gym is located in Hollywood and its use is limited to customers working with a famous "trainer to the stars"? While this might run afoul of the skilled employees category, in most cases the principal assets of the gym will be its exercise equipment. Even if the gym features instructors certified in a particular training approach or method, there would be a good argument that the training approach itself (including any software or videos), coupled with the equipment, keeps the gym outside of the disfavored service business category.

A catering business. A catering business is unlikely to qualify under IRC § 1202 because the business would appear to be "similar" to a restaurant, which is excluded in IRC § 1202(e)(3)(E). But perhaps there would be an argument that fewer services are provided by a catering business than a restaurant. IRC § 199A does not place restaurants in the disfavored category. Therefore, the question for IRC § 199A purposes would be whether the principal asset of such business is the reputation or skill of one or more of its employees. A catering business often has a significant amount of assets used to provide its services (e.g., equipment, place settings, food and beverages, etc.) and usually attracts customers based on the reputation of the business rather than the skills or services of particular employees. The IRS would have a better argument if a particular catering business is built around the participation of a celebrity chef, sommelier or mixologist.

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View more posts about Qualified Small Business Stock (QSBS) under IRC § 1202.

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[1] TC Memo 2012-21.

[2] Private Letter Rulings are only binding on the IRS with respect to the taxpayer who obtained the PLR. A PLR, however, can provide useful guidance as to the IRS' position on a subject and sometimes represents the best or only authority on an issue.

[3] "Securities" has the same definition as in IRC § 475(c)(2).

[4] "Commodities" has the same definition as in IRC § 475(e)(2).

[5] For purposes of the definition of "specified service trade or business" for IRC § 199A, employees include owners performing services for the business.

[6] Treas. Reg. § 1.448-1T(e)(4)(ii) provides that, "the performance of services in the field of health means the provision of medical services by physicians, nurses, dentists, and other similar healthcare professionals. The performance of services in the field of health does not include the provision of services not directly related to a medical field, even though the services may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or conditioning to their customers."

[7] Treas. Reg. § 1.448-1T(e)(4)(iii) provides that, "the performance of services in the field of the performing arts means the provision of services by actors, actresses, singers, musicians, entertainers, and similar artists in their capacity as such. The performance of services in the field of the performing arts does not include the provision of services by persons who themselves are not performing artists (e.g., persons who may manage or promote such artists, and other persons in a trade or business that relates to the performing arts). Similarly, the performance of services in the field of the performing arts does not include the provision of services by persons who broadcast or otherwise disseminate the performances of such artists to members of the public (e.g., employees of a radio station that broadcasts the performances of musicians and singers). Finally,

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the performance of services in the field of the performing arts does not include the provision of services by athletes."

[8] Treas. Reg. § 1.448-1T(e)(4)(iv) provides that, the performance of services in the field of consulting means the provision of advice and counsel. The performance of services in the field of consulting does not include the performance of services other than advice and counsel, such as sales or brokerage services, or economically similar services. For purposes of the preceding sentence, the determination of whether a person's services are sales or brokerage services, or economically similar services, shall be based on all the facts and circumstances of that person's business. Such facts and circumstances include, for example, the manner in which the taxpayer is compensated for the services provided (e.g., whether the compensation for the services is contingent upon the consummation of the transaction that the services were intended to effect).

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