Global Tax Planning for Strange Days

by Ken Brewer

Ken Brewer

Ken Brewer is a senior adviser and international tax practitioner with Alvarez & Marsal Taxand in Miami.

In this article, Brewer addresses some specific issues and tax planning strategies for losses incurred during the coronavirus pandemic and loss recoveries under U.S. tax law, and he provides some general observations about strategies that may create tax benefits in other countries.

"Strange days have found us,
Strange days have tracked us down."

— The Doors, "Strange Days"

Those lyrics, written over 50 years ago, have never seemed more fitting or ominous. For many businesses, the strangeness and uncertainty caused by the coronavirus pandemic are rampant. From a financial perspective, it starts at the revenue line and works its way all the way down to the bottom line.

One thing that is not uncertain is that many companies will experience losses like never before (both in magnitude and strangeness). In times of trouble for a business enterprise, the tax department is presented with the opportunity (welcome or not) to be a valuable — and perhaps the only — profit center. With that in mind, this article ponders strategies for maximizing the kinds of profits that might be generated by a tax department during these strange days.

I. Conceptual Overview

One of the first questions management asks in the face of an imminent loss is whether a tax benefit will be available. Unfortunately, the answer is not always yes. To obtain an income tax benefit for losses, the losses must be properly aligned with income that would otherwise be subject to tax (either currently or in applicable carryback or carryforward periods). For purely domestic businesses, alignment primarily involves timing and character. For global companies, alignment can involve an additional element: location.

Proper alignment does not take place automatically. In fact, some of the popular tax planning strategies used to minimize the worldwide effective tax rate on profits can have the side effect of minimizing any tax benefit for losses. Thus, tax planning that may have occurred during a booming economy may require some tweaking to reposition the taxpayer to achieve a tax benefit in the event of any losses not contemplated in the original plan.

In some cases, by the time a loss becomes apparent, it is too late to realign it to obtain or increase a tax benefit. Thus, as with most tax planning, it is advisable to plan as far in advance as possible. Unfortunately, none of us had advance warning of the coronavirus pandemic and the business losses it may cause. Even so, as with *causa mortis* and postmortem estate planning, tax planning for business losses sometimes involves transfers in anticipation of, and even after, a loss becomes apparent.

To begin proactively tax planning for losses, it is helpful to contemplate the various forms losses might take. For example, because losses are often bottom-line operating losses, one aspect of planning for them hinges on positioning the ownership of the potential loss unit so that its operating losses, should they occur, might offset

current taxable income of one or more profitable units.

Loss planning can also involve an item-by-item approach. The planning might focus, for example, on such items as inventory write-downs, bad debts, foreign currency losses,[1] impairments of tangible or intangible property value, severance costs, plant closing costs, research and development deductions, interest expense, and worthless or partially worthless securities. Global tax planning for those kinds of losses involves analyzing the factors that can affect their timing, character, and location.

II. Losses on Investments in Subsidiaries

Investments in subsidiaries often involve several components, typically including a class of common stock and one or more loan accounts, and sometimes at least one other class of stock. The tax treatment of the components might differ, as discussed below.

There is always the possibility, especially for a distressed subsidiary, that the IRS might take the position that at least one loan account should be recast as a class of equity (for example, preferred stock), or as a capital contribution adding to the basis of a class of stock.

A. The Debt vs. Equity Determination

Congress enacted section 385 in 1969, authorizing the IRS "to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated for purposes of [the code] as stock or indebtedness (or as in part stock and in part indebtedness)." The IRS issued related regulations in 2016 (T.D. 9790), but those regs address a fairly narrow set of circumstances regarding distributions of debt instruments and transactions having similar effects.

The vast body of U.S. tax law that governs the debt versus equity determination consists largely of case law, most of which developed before 2016. Each case addressing that determination involved different facts and circumstances. Over the years the courts have developed a fairly standard inquiry involving the consideration of up to 16 factors (only some of which are touched on in section 385 and the regulations):

- the name given to any certificate evidencing the advance;
- the presence or absence of a fixed maturity date;
- the source of the payments — that is, whether the recipient of funds can repay the advance with reasonably anticipated cash flow or liquid assets;
- whether the provider of the funds can enforce payment of principal and interest;
- whether the provider of the advance gains an increased right to participate in management;
- subordination;
- intent of the parties — that is, the intent to create either a debt or equity relationship;
- whether the recipient of the advance is adequately capitalized;
- whether there is an identity of interest between creditor and shareholder;
- source of interest payments — that is, whether the recipient of the funds pays interest from earnings;
- the corporation's ability to obtain loans from outside lending institutions;
- the extent to which the recipient used the advance to acquire capital assets;
- whether the recipient repaid the funds on the due date;
- issuance of debt to shareholders in proportion to shareholdings;
- reasonable expectation of repayment; and
- whether the interest can be converted into stock of the corporation.

The cases almost never identify any one factor as either necessary or sufficient to establish that an arrangement should be treated as either debt or equity, nor do they identify any point system or hierarchical rating for the factors. No single factor is determinative in all cases and not all factors are applicable in every case. The amount of weight given to each factor depends on the court's relatively subjective assessment of all the relevant facts and circumstances of the case.

[1] A discussion of foreign currency gains and losses is beyond the scope of this article. Suffice it to say that if a company has any financial assets or liabilities that are denominated in a foreign currency, there are often ways to trigger the recognition of the gain or loss without disposing of the underlying asset or liability.

B. Capital Loss on Sale or Exchange of Shares

One of the obvious avenues for addressing a distressed subsidiary is to sell its shares or exchange them for other property. As a general rule, a sale or exchange will yield a capital loss, which may be of limited value because of the limitation on the use of capital losses only to offset capital gains.

C. Ordinary Bad Debt Deduction

For a receivable from a subsidiary to qualify for a write-off as a bad debt, it must first pass muster as debt under the analysis discussed above. With a distressed subsidiary, there is typically a high probability that at least some loans by the shareholder to the subsidiary will be recast as equity, at least if the advances occurred while the subsidiary was distressed.

If a loan is properly characterized as debt, the lender or shareholder might qualify for an ordinary bad debt deduction under section 166 if the loan is determined to have become wholly or partially worthless during the tax year. However, section 166 does not apply to a loan that is treated as a security under section 165(g)(2)(C), which in relevant part is "a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation . . . with interest coupons or in registered form." Thus, any loans documented with a note are unlikely to qualify for a deduction under section 166, thereby limiting the possibility for an ordinary bad debt deduction for items such as trade receivables or other open advances that are not documented by a piece of paper.

D. Ordinary Worthless Stock Deduction

For investments in stock (including loans that are recast as stock) and for loan accounts that are treated as securities, the possibility of a deduction is mostly controlled by section 165. The basic requirements of section 165(g) for obtaining an ordinary loss on an investment in a security are that: (1) the security must have become worthless during the tax year; (2) the taxpayer must directly own 80 percent of the vote and value of the subsidiary when it became worthless; and (3) more than 90 percent of the subsidiary's aggregate gross receipts for all tax years must have been from sources other than royalties, rents, dividends, interest, annuities, and gains from sales or exchanges of stock and securities.

Regarding the first requirement, it is insufficient to establish that the securities were worthless at some point during the tax year; it must also be established that the securities had a positive value at some point (before the date they were found to be worthless).

E. *Granite Trust* Planning

Section 332 prevents the recognition of a loss on the liquidation of a subsidiary that is at least 80 percent owned. Any businessperson who regularly works with U.S. tax planners knows the IRS has many ways to disallow losses from transactions that are structured principally for tax avoidance.[2] But as odd as it may sound, subchapter C specialists widely believe that a rather old case — *Granite Trust Co. v. United States*, 238 F.2d 670 (1st Cir. 1956) — is still good law and can provide substantial authority for the proposition that intentional avoidance of the 80 percent ownership requirement, even if done solely for tax avoidance reasons — that is, to recognize a loss on the liquidation — through transactions staged with related taxpayers can be sufficient to avoid the application of section 332.

The consolidated return regulations prevent the avoidance of the 80 percent ownership requirement by simply transferring some of the shares of the owned subsidiary to another member of the same consolidated return group. But those regulations do not appear to prevent the avoidance of section 332 by contributing at least 20 percent of the stock of a group subsidiary to a partnership composed of consolidated group members.

F. Ordinary Abandonment Losses

A fairly recent case out of the Fifth Circuit may provide a somewhat strange opportunity to harvest an ordinary loss for an investment that is not completely worthless.[3] The taxpayer abandoned an investment in securities that had a

[2] *See, e.g.*, section 7701(o).

[3] *Pilgrim's Pride Corp. v. Commissioner*, 779 F.3d 311 (5th Cir. 2015), *rev'g* 141 T.C. 533 (2013).

tax basis of $98.6 million and a fair market value of around $20 million. The taxpayer's board of directors determined that an ordinary loss of $98.6 million would produce a tax benefit well in excess of the $20 million in cash it could receive from a sale. A sale would have yielded a capital loss of $78.6 million, with little or no tax benefit because of the absence of capital gains.

The taxpayer's theory was that an abandonment would yield an ordinary loss because capital gain or loss treatment applies only when there is a sale or exchange. An abandonment is neither of those things. The Tax Court held that section 1234A applied to cause the abandonment to yield a capital loss. The Fifth Circuit reversed, holding that section 1234A did not apply to the abandonment of the asset itself (as compared with a termination of any separate right of the asset, such as derivative or contractual rights to buy or sell a capital asset). The appellate court reasoned that if Congress had intended section 1234A to apply to the abandonment of the asset itself, it would have said that.

G. Payments to Protect the Parent's Goodwill

According to Rev. Rul. 73-226, 1973-1 C.B. 62, payments a parent makes to its subsidiary's creditors to protect its own goodwill and credit rating are ordinary and necessary business expenses deductible by the parent under section 162, rather than a capital contribution to the subsidiary.

III. Using Losses to Offset CFC Income

The amount of a controlled foreign corporation's subpart F income that must be included in its U.S. shareholders' income for a tax year is limited to the CFC's earnings and profits for that year. The amount of a CFC's tested income is based on taxable income computed under U.S. tax principles. Thus, as an alternative to having the losses of a foreign unit flow through directly to the parent's U.S. tax return, it may be possible to achieve a benefit (in some cases, an even greater benefit) by causing the losses to be deductible against a CFC's subpart F or tested income.

To achieve that objective, it is not necessary that the CFC actually incur the losses (although that will work). It is sufficient that the CFC simply be deemed to incur the losses, strictly for U.S. tax law purposes. That can be accomplished, for example, by having the foreign loss unit be owned by the CFC and making a check-the-box election to treat the loss unit as a branch of the CFC for U.S. tax purposes.

In some cases involving subpart F income, that strategy will produce only temporary U.S. tax benefits because of a recapture rule that provides that if a CFC's subpart F income is reduced by the earnings and profits limitation, any non-subpart F income earned by the CFC in subsequent years must be recharacterized as subpart F income in those years.

However, it is common for U.S.-owned groups to have at least one CFC subsidiary whose income consists entirely of subpart F income. If the foreign losses in question can be passed through to a CFC like that, the U.S. tax benefit might be permanent because the CFC would never have any non-subpart F income to recapture.

That strategy can be particularly attractive when the loss would not produce a benefit if incurred directly in the United States because it would be a capital loss. The E&P limitation on subpart F income does not distinguish between ordinary and capital losses. The same effect can occur if the loss might create an adverse foreign tax credit effect if incurred directly in the United States. By positioning it in a CFC whose only income is passive basket subpart F income, the loss reduces U.S. taxable income without harming the FTC calculation.

IV. The NOL Deduction

Two important and unfavorable changes brought in by the Tax Cuts and Jobs Act were the elimination of the net operating loss carryback and the enactment of the 80 percent limitation on deductions for post-2017 NOLs.

The recently enacted Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) reinstates the NOL carryback and lengthens the carryback period to five years for NOLs occurring in tax years beginning after 2017 and before 2021. The act also eliminates the 80 percent limitation for NOLs deducted in tax years beginning before January 1, 2021.

V. Potential NOL Rate Benefit Leakage

A. Introduction

Based on questionable positions taken by the IRS in both the global intangible low-taxed income and base erosion and antiabuse tax regulations, the tax rate benefit for NOLs carried back to 2018 and 2019 may be substantially lower than 21 percent.

B. Leakage Caused by GILTI

If an NOL is carried back to a year when the taxpayer was required to include GILTI and was entitled to a deduction equal to 50 percent of that amount under section 250, it could produce a rate benefit as low as 10.5 percent if the NOL causes a reduction in the section 250 deduction due to the taxable income limitation in section 250. That leakage could be avoided if the GILTI inclusion for the carryback year could be reduced by an NOL carryback at the CFC level for tested losses not absorbed by tested income of other CFCs.

As set forth in reg. section 1.951A-2 (and explained in the preamble to that regulations package), the IRS position is that if a CFC has a tested loss in a tax year that is not used to offset the tested income of another CFC, those losses are unavailable as an NOL carryback or carryforward to other years of the CFC. There seems to be a legitimate argument that this aspect of the regulations contradicts the statutory language of section 951A and is therefore invalid.[4]

C. Leakage Caused by BEAT

The IRS took the position in the BEAT regulations that the term "taxable income," as the starting point for computing modified taxable income for BEAT purposes, cannot be less than zero.[5] Based on that position, the carryback, or carryforward of an NOL to a year in which section 59A (BEAT) is in effect, gives rise to the possibility of a 10 percent (5 percent in 2018) rate leakage to the extent that the NOL deduction results in negative regular taxable income.

Here again, there is a legitimate argument that the IRS position is wrong (that is, contrary to the statutory language in section 59A) and that this aspect of the BEAT regulations is invalid.

VI. Timing Considerations

Perhaps the TCJA's biggest corporate benefit is its tax rate reduction (21 percent corporate rate and 20 percent deduction for passthrough businesses). The downside is that deductions in the post-TCJA era, at least as it stands today, produce less tax benefit than before. As a result of the reinstatement of the NOL carryback, a potential strategy will be to carry losses arising in post-TCJA years back to pre-TCJA years to maximize the benefit.

NOL carrybacks deducted in the last pre-TCJA year could create a problem for taxpayers that did not elect out of deducting NOLs in computing their liability for the one-time transition tax under section 965. However, the CARES Act permits taxpayers to elect not to apply NOL carrybacks to years in which the taxpayer incurred a transition tax under section 965.

For companies with substantial positive taxable income in pre-TCJA years in excess of any NOL arising in the tax year beginning in 2020, there may be a benefit to accelerating as much loss as possible from future years into the 2020 tax year for carryback to high-rate pre-TCJA years.

Another potential source of deductions in pre-TCJA years may be prior-year errors. It may be possible that a loss or deductible expense was incurred in a pre-TCJA year that went unnoticed and therefore unclaimed. That is obviously a delicate area for several reasons, not least of which is the financial statement implications of prior-year errors. Deductions based on the worthlessness of an asset (for example, a bad debt or worthless stock deduction) tend to be particularly susceptible to being missed. In fact, it is not uncommon when a taxpayer claims a deduction for the worthlessness of an asset for the IRS to assert that the asset became worthless in a prior, closed year.

The possibility of being missed in a prior year might also apply to abandonment losses. There is no rule that a taxpayer must formally announce

[4] For discussion of the argument that tested loss carryovers should be available, see Ken Brewer and Nicolaus F. McBee, "The Good, the Bad, and the GILTI: Part 3, Tested NOL Carryovers?" *Tax Notes*, July 16, 2018, p. 361.

[5] Reg. section 1.59A-4(b)(1) and (b)(2)(ii).

abandonment to qualify for a deduction. There may be circumstances in which a taxpayer can demonstrate that its actions (or inactions) for a particular asset are sufficient to establish that it abandoned the asset at some prior point in time.

As for NOLs that are carried forward, there would seem to be significant likelihood that tax rates will have to be increased to pay for the upcoming stimulus payments. So the rate benefit for NOL carryovers from 21 percent rate years may turn out to be greater than 21 percent.

A. Timing Election for Disaster Losses

Under section 165(i), any loss occurring in a disaster area and attributable to a federally declared disaster may, at the election of the taxpayer, be taken into account for the tax year immediately preceding the tax year in which the disaster occurred. The loss taken into account in the preceding tax year may not exceed the uncompensated amount determined on the basis of the facts existing at the date the taxpayer claims the loss.

By electing to claim a 2020 disaster loss in 2019, the taxpayer may get the benefit of an additional year of NOL carryback period (to 2014) if the disaster loss creates an NOL in 2019.

B. Other CARES Act Tax Benefits

In addition to the NOL provisions discussed above, the CARES Act includes several other tax benefits to businesses that should be considered, including the following:

- employers receive refundable payroll credit to encourage employee retention and are able to defer payment of 2020 employer payroll taxes to 2021 and 2022;
- rules regarding loss limitations for passthrough businesses and sole proprietors are relaxed;
- the time for corporations to claim a refundable credit for past alternative minimum taxes paid is accelerated;
- the limitation on the deductibility of business interest expense (section 163(j) for 2019 and 2020 is relaxed;
- qualified improvement property is now eligible for accelerated depreciation deductions (fixing the so-called retail glitch); and
- the 10 percent of taxable income limitation on charitable contributions is increased to 25 percent for 2020.

VII. Opportunities for Restructuring

Another way to take advantage of losses (whether recognized or built-in losses) is by using them to shelter taxable transactions from tax liability.

Corporate structures often evolve as a result of forces having little to do with tax planning. Even if tax planning has played a guiding role, changes in circumstances and tax laws can sometimes leave tax directors thinking that if they had it all to do over again, they would recommend a different corporate structure for their company. Once a global structure is in place, however, it can be costly to restructure because of the tax that would be incurred on any resulting gains.

At a time when companies find the values of their shares (and hence the implicit values of their assets) dramatically decreased, there may be a window to consider a radical change that would have been too costly during better economic times — such as inversion.

In today's economy, there are undoubtedly companies that could benefit from inversion transactions at a current tax cost that might be dwarfed by future tax savings occurring if and when the economy and the company's operations turn around. The 2004 enactment of section 7874 made it difficult to execute an inversion that produces U.S. tax benefits. However, strange times may call for the consideration of strange measures.

Radical change in a corporate structure can have nontax consequences that may outweigh any potential tax savings. U.S. companies thinking of inverting would be well advised to also consider the potentially adverse public relations consequences of becoming a non-U.S. company — especially when patriotism may be at an all-time high.

Also, inversions are not the only type of restructuring that might be worth considering in light of potential coronavirus-related losses that may be available to offset restructuring gains. For example, companies that previously opted not to engage in intellectual property migration strategies out of concern over potential taxable

gain exposure may now be in a position of reduced exposure because of reduced values or the availability of other losses to offset restructuring gains.

VIII. Obtaining Foreign Tax Benefits for Losses

The same types of losses described above may be available to produce tax benefits in foreign countries. Naturally, the foreign tax rules on the availability of loss deductions will differ from U.S. rules and should be analyzed before relying on the availability of a benefit. In some cases, the foreign rules will be more liberal. For example, in several foreign countries, stock investments in foreign subsidiaries can be written down to FMV for tax purposes even though the investment is not completely worthless. Similarly, the availability of a tax benefit for the write-down of excess or obsolete inventory may be subject to less rigorous requirements under foreign law.

A. Repositioning Potential Tax Benefits

If it becomes desirable to shift where the risk of a particular type of loss might be borne, it will almost always be preferable for the shift to occur before the decline in value occurs. Many countries have transfer pricing, tax basis, and antiabuse rules to prevent the importation of built-in losses. As the potential loss becomes more apparent, it becomes increasingly difficult to reposition. Even so, there is no harm in exploring whether any legitimate means are available. For example, it may be possible to transfer high-basis, low-value assets in a transaction in which tax basis carries over to the new owner, or to import a substantial loss by causing the owner of the loss asset to change its tax residence to a country where it may be possible to transfer loss benefits using some form of consolidated return filing or group relief.

B. Transfer Pricing Planning

Perhaps one of the most effective means of legitimately assuring a tax-efficient global positioning or repositioning of profits (including the avoidance of trapped losses) is via proactive transfer pricing planning. That includes, for example, the proper structuring of intercompany contractual relationships to position the various functions, costs, and risks consistent with the desired distribution of worldwide profits.

While much of the planning is prospective, there is sometimes potential for postmortem planning. For example, if the actual economic circumstances surrounding a particular foreign unit turn out to be dramatically different than those taken into account when the intercompany prices were set, there may be a basis to revisit the comparables used in arriving at the original prices. In some cases, different comparables may be in order; in others, adjustments may be called for in the results of the comparable or the taxpayer.

The prohibition on claiming a loss on an amended return that results from a taxpayer-initiated transfer pricing adjustment does not appear to prohibit adjustments to reflect the prices actually charged.[6] Therefore, if the initial price for a related-party transaction is determined to be incorrect and is later corrected, there may be a legitimate position for an amended return claiming the resulting income or loss (or other item).

IX. Compensating a Loss Member for Restructuring

When global companies contemplate restructuring options, some of the decisions involve consolidating similar activities previously conducted at several locations. For example, the group may manufacture the same product in two locations, both of which may be operating below capacity. Often, the less efficient unit that will be closed, with its production and customer base moved to the more efficient location.

In making those decisions, management tends to think of all the related business units as one single global business. Therefore, there might not be a natural tendency to think about arranging for the surviving unit to compensate the now-redundant unit. However, in a true arm's-length scenario, compensation would almost always accompany any form of transfer. For example, if the two manufacturing units were unrelated, neither would voluntarily stop manufacturing (in the absence of bankruptcy) and allow its backlog, work-in-process, and customer relationships to find their way to the competing unit without some form of compensation.

[6] Reg. section 1.482-1(a)(3).

Having the surviving unit compensate the less efficient, redundant unit for transfers of value may provide an effective and perfectly legitimate means to transfer otherwise expiring tax loss carryovers that the redundant unit may have as a result of its operating below capacity. A lump sum payment might not be immediately deductible by the surviving unit. However, many countries allow for the amortization of payments for goodwill and other intangible (or tangible) value.

X. Tax Treatment of Loss Recoveries

A. Background

One element of strangeness that may be associated with coronavirus-related losses has to do with the source from which businesses might receive loss compensation. In normal times, that compensation typically takes the form of insurance or contractual recoveries, and there generally is no real mystery to the tax consequences of those recoveries. They offset the amount of the deductible loss and may represent gross income if they exceed the taxpayer's basis in lost or damaged assets.

In these strange days, companies will be receiving substantial loss recoveries from a new and different source: the governments of those countries where they do business. Such is the case in the United States with many of the business provisions in the CARES Act.

B. Tax Implications of Government Loans

A major element of the stimulus included in the CARES Act includes loans by the federal government to businesses. Presumably such loans may give rise to many of the tax issues associated with loans from private lenders, such as the following:

- whether a government loan to a distressed company might be properly treated as a class of stock, for U.S. tax purposes, under the rules dealing with debt versus equity, discussed above;
- whether a government guaranteed institutional loan to a distressed company (for example, an SBA loan by a bank) might be subject to recast under *Plantation Patterns*,[7] as a loan by the lending institution to the government and a stock investment by the government in the borrower;
- whether a government loan that is respected as debt may be subject to the original issue discount rules;
- whether the forgiveness of a government loan that was respected as debt gives rise to cancellation of indebtedness income and, if so, whether it might qualify for any of the exceptions from COD income; and
- whether the forgiveness of a government loan that was properly treated as a class of stock would qualify as a tax-free shareholder contribution to capital.

The answers to some of these questions are addressed in the CARES Act. For example, section 4003(h) of the CARES Act appears to address the first two points for some (perhaps most) loans that will be made under the act, by treating them as debt for federal tax purposes.

C. General Welfare Exclusion

It is possible that the tax treatment of governmental recoveries (other than in the form of loans) may be the same as insurance or contractual recoveries. But these strange days give rise to the chance of a different treatment for at least some governmental assistance — that is, a complete exemption under the common law general welfare exclusion. The IRS has said that to qualify for that exclusion, payments must be made from a governmental fund, be for the promotion of general welfare (based on need), and not represent compensation for services.[8]

In general, payments to businesses do not qualify under the welfare exclusion because they are not based on individual or family need.[9] However, there have been exceptions.[10] There would seem to be a legitimate argument that at

[7] *Plantation Patterns Inc. v. Commissioner*, 462 F.2d 712 (5th Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972).

[8] *See* Notice 2002-76, 2002-48 IRB 1.

[9] *See* Rev. Rul. 2005-46, 2005-2 C.B. 120; Notice 2003-18, 2003-1 C.B. 699.

[10] *E.g.*, Rev. Rul. 77-77, 1977-1 C.B. 11, provided that non-reimbursable grants made under the Indian Financing Act of 1974 to expand profit-making economic enterprises owned by Native Americans on or near reservations were excludable.

least some U.S. coronavirus-related aid could qualify as "legislatively provided social benefit programs for the promotion of the general welfare."[11]

It is too early to tell whether the general welfare exclusion will be available for any coronavirus-related government assistance to businesses. However, it is something to keep in mind as the business losses and governmental assistance take shape.

XI. Conclusion

As strange as these days may seem, the coronavirus pandemic will not be the end of the world. Medical experts say the vast majority of individuals who become infected will recover. It is hoped that the same will hold true for affected companies.

One certainty is that many businesses are likely to suffer from liquidity crises. Many governments are implementing stimulus legislation, but for some companies, that may not be enough. Thoughtful planning around the harvesting of tax losses can help supplement any stimulus relief and, in some cases, may be key to a business's survival. ■

[11] Notice 2002-76.