Bloomberg Tax

bloombergbna.com

Are Governmental Entity Non-Shareholder Contributions Income After the 2017 Tax Act?

By Scott Rabinowitz, Esq.*

State and local governments historically have provided cash grants and land to incentivize businesses to relocate or expand their business to their state, but recent changes to § 118 made by the 2017 tax act may eliminate the appeal of certain incentives that have been offered.[1]

Section 118(a) generally provides that the gross income of a corporation does not include any contribution to its capital.[2] Prior to the 2017 tax act, this exclusion from gross income extended to non-shareholder contributions.[3] As such, the Internal Revenue Service has consistently held that certain subsidy payments provided to corporations to relocate or expand their facilities may be excluded from a corporation's gross income as a contribution of capital.[4] However, § 118(b)(2), as amended by the 2017 tax act, now provides that the term ''contribution to the capital of the taxpayer does not include any contribution by any governmental entity or civic group (other than a contribution made by a shareholder as such).''[5] Without further examination one might assume that a cash or land grant by a state to a corporation would now be required to be included in a corporation's gross income. However, this initial conclusion requires further investigation when one considers § 118's history.

Section 118 was enacted with the 1954 Code. The section as enacted by Congress provided that ''in the case of a corporation, gross income does not include any contribution to the capital of the taxpayer.'' The underlying legislative history of the section indicates that the section was enacted to reflect existing law as developed through administrative and Supreme Court decisions.[6] The legislative text of § 118 did not explicitly provide for the exclusion of non-shareholder contributions from gross income; rather, this was left to the regulations. Therefore, in order to gain a better understanding of the exclusion as enacted by Congress in 1954, one must turn to the judicial history of the section.

EARLY SUPREME COURT REVIEW

The judicial underpinnings of § 118 begin with the Supreme Court's decision in *Edwards v. Cuba R.R.*[7] In *Edwards*, the taxpayer agreed to build a railroad in Cuba. In return the Cuban government agreed to provide the taxpayer with certain properties (e.g., land, buildings, and railroad construction and equipment) of a defunct railroad and a cash subsidy based on the number of kilometers of track constructed by the taxpayer. At the same time, the taxpayer agreed to reduce by one-third the then-applicable tariffs for the transportation of permanent employees and troops of the Cuban government and, in the case of war or any other public disturbance, to transport troops in special trains at a reduced rate.[8] The taxpayer, in filing its tax returns, did not include these amounts in gross income. The IRS took issue with the taxpayer's position, arguing that the subsidies should be included in the taxpayer's gross in-

* Mr. Rabinowitz is an attorney at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, and has extensive experience reviewing changes in accounting method applications (Form 3115), private letter rulings, appeals protests, and representing clients before the IRS National Office of Appeals. He advises clients on a wide range of complex tax accounting issues, including timing of revenue recognition and deductions, capitalization issues, depreciation and amortization, the treatment of installment obligations, the application of the long-term contract rules and inventory methods, including the use of the LIFO inventory method and application of UNICAP (§ 263A), as well as the domestic production deduction under § 199. The author extends a special thank you to B. John Williams and David Schneider of Skadden, Arps, Meagher & Flom LLP and Affiliates for their helpful comments.

[1] Pub. L. No. 115-97. All section references are to the Internal Revenue Code of 1986, as amended (the Code), and the regulations thereunder, unless otherwise specified.

[2] For purposes of this rule, a contribution to the capital of a corporation does not include any contribution in aid of construction or any other contribution from a customer or potential customer. Section 118, as amended by the 2017 tax act, retains this exclusion.

[3] Reg. § 1.118-1.

[4] *See, e.g., May Dep't Stores Co. v. Commissioner*, 519 F.2d 1154 (8th Cir. 1975), *aff'g* T.C. Memo. 1974-253; *Federated Dep't Stores v. Commissioner*, 426 F.2d 417 (6th Cir. 1970), *aff'g* 51 T.C. 500 (1968); Rev. Rul. 68-558; PLR 200516011.

[5] § 13312, of the 2017 tax act, generally applicable to contributions made after Dec. 22, 2017 (but an exception exists for any contributions by a governmental entity pursuant to a master development plan approved prior to Dec. 22, 2017. § 13312(b)).

[6] H.R. Rep. No. 1337, 83d Cong., 2d Sess. A38 (1954).

[7] 268 U.S. 628 (1925).

[8] The company and the Cuban government agreed to certain other subsidies and price concessions. However, as these additional terms do not add to an understanding of the case, these facts have been omitted.

come as they were paid by the Cuban government for future services in the form of rate concessions.

The Supreme Court dismissed the IRS's assertion finding that "[t]here is no support for the view that the Cuban Government gave the subsidy payments, lands, buildings, railroad construction and equipment merely to obtain the specified concessions in respect of rates for government transportation." Rather, the Court found that the Cuban government's aim in providing the payments and property to the company was to complete the building of the railroad. Further, the Court held that these amounts did not "constitute income within the meaning of the Sixteenth Amendment." The Sixteenth Amendment, ratified in 1913, gives Congress the power to collect income tax without apportioning it among the states. The Court's holding was premised on its finding that "[t]he subsidy payments . . .were not made for services rendered or to be rendered . . . [and] were not profits or gains from the use or operation of the railroad."

Following its decision in *Edwards*, the Supreme Court continued to shape the contribution to capital doctrine with its decisions in *Detroit Edison Co. v. Commissioner*[9] and *Brown Shoe Co. v. Commissioner*.[10] In *Detroit Edison*, an electric company received payments from prospective customers in exchange for the extension of service to those customers. After receiving a payment from a customer, the company constructed the additional equipment that was required to provide electric service to the customers. The company did not include the payments from the customers in gross income, but included the entire cost of the construction (unreduced by the subsidy payment provided by customers) in the equipment's depreciable basis. In *Detroit Edison*, the government did not contest, and the Court did not address, the taxpayer's exclusion of the payments from the taxpayer's gross income. Rather, the government argued, and the Supreme Court held, that the company was not permitted depreciation on an investment it had not made (i.e., for purposes of computing depreciation, the basis of the equipment had to be reduced by the payments made by customers.)

In *Brown Shoe*, a manufacturing company received payments and property from community groups to induce it to locate or expand its factories in the communities. The Supreme Court held that the contributions made by non-shareholders were contributions to the company's capital and that the company was not required to reduce its depreciable basis in the property by the amount of the contributions, but rather, pursuant to then § 113(a)(8) of the 1939 Code, the company took the transferor's basis in the contributed property.[11] In so holding, the Court distinguished *Detroit Edison* on the grounds that the contributions at issue in *Brown Shoe* had not been made by customers and were not related to future services to be provided to customers.

In *Detroit Edison*, the Supreme Court concluded that the payments made by prospective customers to cover the cost of extending the utility's facilities to the customers' homes were part of the price of services and not contributions to capital. As such, the amounts received by the taxpayer could not be included in basis and recovered by the taxpayer through depreciation, the court said. In contrast, in *Brown Shoe*, the Court held that the community groups' payments to the taxpayer were not made for any specific goods or services, but instead to benefit the communities at large. As such, in *Brown Shoe* the Court held that the payments were contributions to the corporation's capital that could be included in basis under § 113(a)(8) of the 1939 Code.

Section 118 as enacted in 1954 reflects the conclusions reached by the Supreme Court in *Edwards* in that the section provided for the exclusion from gross income of contributions to the capital of a corporation. However, in 1954 Congress also enacted § 362(c) to reverse the basis rule provided by *Brown Shoe*.[12]

SUPREME COURT ADDRESSES CONTRIBUTION TO CAPITAL

In 1973, the Supreme Court in *United States v. Chicago, Burlington, & Quincy R.R. (CB&Q)*[13] was again asked to determine whether certain amounts received by a railroad company were contributions to capital for purposes of § 113(a)(8) of the 1939 Code. In that case, several governmental entities wanted the taxpayer to make safety improvements to its facilities. The taxpayer agreed to maintain the improvements provided the governmental entities paid for their installation. As the years at issue in the case preceded the enactment of § 118 and § 362(c), the taxpayer followed *Brown Shoe* and excluded the payments from gross income as non-shareholder contributions to capital and claimed depreciation on the full basis of the improvements pursuant to § 113(a)(8) of the 1939 Code.

In *CB&Q*, the government did not contend, and the Supreme Court did not opine, on whether the government payments provided to the taxpayer constituted income to the taxpayer. Rather, the sole issue before the Court was whether the amounts provided by the government to the taxpayer were a contribution to the taxpayer's capital that could be depreciated. In *CB&Q*, the government argued that the amounts received by *CB&Q* were not a contribution to capital for purposes of § 113(a)(8) and the taxpayer's basis in the property constructed with the payments was zero so that the taxpayer was not entitled to depreciation on those properties. In holding for the government, the Supreme Court laid out the following five factors that have been considered in determining whether a payment is a contribution to the capital of a corporation that may be excluded from gross income. The payment must:

- Become a permanent part of the corporation's working capital;

[9] 319 U.S. 98 (1943).

[10] 339 U.S. 583 (1950).

[11] Section 113(a)(8)(B) of the 1939 Code provided "If the property was acquired after December 31, 1920, by a corporation as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

[12] H.R. Rep. No. 1337, 83 Cong., 2d Sess. A128 (1954). Section 362(c) provides that if property other than money is acquired by a corporation as a contribution of capital from a non-shareholder, its basis in such property is zero. The section further provides that if money is received by a corporation as a contribution of capital from a non-shareholder then the basis of any property acquired with such money during a 12-month period beginning on the day of the contribution is received is reduced by the amount of the contribution.

[13] 412 U.S. 401 (1973).

- Not be compensation for specific goods or services;
- Be bargained for;
- Result in a benefit to the taxpayer commensurate with its value; and
- Be employed in or contribute to the production of income.

Although the Supreme Court in *CB&Q* did not opine on whether the payments received by the taxpayer could properly be construed as gross income for purposes of the Sixteenth Amendment or excluded from gross income under § 118, the IRS and the courts have consistently applied the factors developed in *CB&Q* in addressing the exclusion from gross income provided by § 118.[14] Moreover, using the factors developed in *CB&Q*, the IRS has repeatedly signaled that payments made by state and local governments to incentivize a corporation to relocate or expand its facilities in a certain locality are a contribution to the corporation's capital that may be excluded from the corporation's gross income pursuant to § 118.[15]

Given the Supreme Court's holding in *Edwards* that a contribution to a corporation's capital is not income under the Sixteenth Amendment, one might conclude that incentive payments that meet the *CB&Q* requirements are not income subject to tax. However, as discussed above, the Supreme Court in *CB&Q* was not asked to address and did not intimate an opinion as to whether the payments at issue in the case were income under the Sixteenth Amendment. Rather, the Court was merely asked to address and only opined on whether the amounts were contributions to capital that were included in basis under § 113(a)(8) of the 1939 Code. Moreover, given the enactment of § 118 in 1954, the courts, as well as the IRS, have not been asked to reexamine whether a contribution to a corporation's capital is income for purposes of the Sixteenth Amendment. Rather, given the exclusion provided by § 118, the courts and the IRS have focused on whether a particular payment is excluded from gross income under § 118. This distinction is particularly important when one considers the Court's evolving definition of gross income following *Edwards*.

If the Supreme Court today were faced with the facts in *Edwards*, would the Court conclude that § 118(b)(2), as added by the 2017 tax act, requires the payments to be included in gross income? Alternatively, would the Court hold that § 118(b)(2) is contrary to its holding in *Edwards* and the Sixteenth Amendment? Although this latter position has superficial appeal, a deeper analysis of the definition of gross income should be considered.

DEFINITION OF GROSS INCOME

Although the starting point for determining a taxpayer's income tax liability begins with a determination of a taxpayer's gross income, the Code does not provide a finite definition for the term "income." Rather, § 61(a) provides that "gross income means all income from whatever source derived" including certain specifically enumerated items.[16] The legislative history underlying § 61(a) indicates that this statutory phrase was taken from the Sixteenth Amendment.[17] The legislative and public debates preceding the ratification of the Sixteenth Amendment do not provide any guidance in defining the term "income."[18] One must turn to Supreme Court decisions to gain a better understanding of the evolving definition of the term. But first, an understanding of the historical background of the Sixteenth Amendment is necessary prior to diving into the case law surrounding § 61(a).

Prior to the enactment of the Sixteenth Amendment, the Supreme Court in *Pollock v. Farmers' Loan & Tr. Co.*[19] held that the 1894 income tax was a direct tax that was not properly apportioned among the states and, therefore, unconstitutional. The Court held that the tax as applied to income from property was in substance a direct tax on the source of the property. Following *Pollock*, the Sixteenth Amendment as ratified in 1913, provides that "the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

After the Sixteenth Amendment, one might conclude that Congress was empowered to impose an unapportioned income tax regardless of the source of the income. However, the Supreme Court's continuing hostility to an income tax was exhibited in a number of cases it decided after the enactment of the amendment. For example, the Court's discomfort with the income tax was displayed in *Evans v. Gore*,[20] where the court refused to interpret the Sixteenth Amendment to allow Congress to tax the salary of federal judges appointed before the enactment of the amendment. According to the Court, such tax violated the prohibition against reducing judges' stipends during their term of office. The Court also held in a later case that it was unconstitutional to tax the compensation of state officers and employees if the state employment involved the exercise of an essential government function.[21] These positions were later abandoned by the Court in subsequent cases. For example, in *Helvering v. Gerhardt*,[22] the Court held that there was no constitutional prohibition on taxing the salary of state officers or employees. Similarly, in

[14] *See, e.g., AT&T, Inc. v. United States*, 629 F.3d 505 (5th Cir. 2011)(applied *CB&Q* factors in deciding that payments made by federal and state governments to a telecommunications carrier under a universal service support program were includible in the carrier's gross income, not contributions to capital under § 118); *Deason v. Commissioner*, 590 F.2d 1377 (5th Cir. 1979), *aff'g* T.C. Memo. 1976-224 (applied *CB&Q* factors in deciding that payments received by a corporation were not excluded from gross income under § 118); Rev. Rul. 93-16 (applied *CB&Q* factors in deciding that a project grant made by the Federal Aviation Administration to a corporate owner of a public-use airport under the Airport Improvement Program is a nonshareholder contribution to the capital of the corporation under § 118(a)).

[15] *See, e.g.*, PLR 200901018; PLR 942701.

[16] *See* § 7701(c) (the terms "includes" and "including" when used in a definition contained in Title 26 shall not be deemed to exclude other things otherwise within the meaning of the term defined).

[17] S. Rep. No. 1622, 83d Cong., 2d Sess. 168–169 (1954).

[18] Boris I. Bittker, Martin J. McMahon, Lawrence Zelenak, *Federal Income Taxation of Individuals*, Chapter 3, ¶3.01 (Thomson Reuters/Tax & Accounting, 3d ed. 2002, updated May 2018).

[19] 157 U.S. 429 (1895).

[20] 253 U.S. 245 (1920).

[21] *Brush v. Commissioner*, 300 U.S. 352 (1937).

[22] 304 U.S. 405 (1938).

O'Maley v. Woodrough,[23] the Court held that there was no constitutional prohibition on taxing the salary of federal judges.

The Supreme Court's initial narrow view of the definition of income was explicitly stated in *Eisner v. Macomber*.[24] In that case, the Court held that a 1916 act that explicitly taxed stock dividends as income was unconstitutional as applied to a dividend of common stock as the stockholder had not realized any income from the dividend. In so holding, the Court stated:

> [W]e find little to add to the succinct definition. . .''Income may be defined as the gain derived from capital, from labor, or from both combined,'' provided it be understood to include profit gained through a sale or conversion of capital assets. . .
>
> . . .The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word ''gain,'' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. **''Derived-from-capital''; ''the gain-derived-from-capital,'' etc.** Here we have the essential matter: **not** a gain **accruing to** capital, not a **growth** or **increment** of value **in** the investment; but a gain, a profit, something of exchangeable value **proceeding from** the property, **severed from** the capital however invested or employed, and **coming in**, being ''**derived** '' — that is, **received** or **drawn** by the recipient (the taxpayer) for his **separate** use, benefit and disposal; — **that** is income derived from property.[25]

Following *Eisner*, it was believed that the three elements of income incorporated: (1) a gain, (2) derived or realized, and (3) from capital, or labor, or both combined.

As such, it is no surprise that in *Edwards*, which was decided after *Eisner*, the Supreme Court held that the subsidy payments received by the taxpayer were not gross income as they were not derived from capital, or labor, or both combined, as the definition provided by *Eisner* demanded for an amount to be included in gross income.

Following *Eisner*, it was assumed that gross income did not include gratuitous transfers. Said differently, it was assumed that a receipt would not constitute income to the taxpayer if the taxpayer did not provide consideration in return. This assumption was further strengthened by Congress's enactment of sections that excluded gifts from gross income and the similar exclusion of capital contributions.[26]

However, the Supreme Court through a number of decisions has retreated from the narrow definition of income that it laid out in *Eisner*. For example, as discussed above, although the Court initially held that Congress's power to tax income did not extend to salaries received by federal judges and state employees, the Court subsequently held that there was no constitutional prohibition on taxing the salary of federal judges or state employees. More importantly, the Supreme Court's holding in *Commissioner v. Glenshaw Glass Co.*[27] firmly established that consideration is not a necessary element in deciding whether an amount received must be included in gross income. In that case, the Court held that punitive damages received by the taxpayer needed to be included in ''gross income'' as the term includes ''gains or profits derived from any source whatever.'' In *Glenshaw Glass*, the Court did not attempt to reconcile its decision with the definition of income provided by it in *Eisner* (i.e., gain derived from capital, from labor, or from both combined). Rather, the Court stated the following:

> The Court [in Eisner] was there endeavoring to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder, or changed ''only the form, not the essence,'' of his capital investment. . .It was held that the taxpayer had ''received nothing out of the company's assets for his separate use and benefit.''. . .The distribution, therefore, was held not a taxable event. In that context–distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions. . .
>
> Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.[28]

In other words, the Court in *Glenshaw Glass* interpreted the term ''income'' broadly to include all gains except those exempted by statute. For example, the Supreme Court's holding in *James v. United States*[29] clearly demonstrates that a quid pro quo relationship is not a necessary element for an amount to be included in gross income. In *James*, the question before the Court was whether an embezzler was required to include embezzled funds in gross income in the year the funds are misappropriated. Prior to *James*, in *Commissions v. Wilcox*,[30] the Court had held that embezzled funds were not includible in gross income as an embezzler does not acquire misappropriated funds under a claim of right without an obligation to repay or return such funds. However, in specifically overruling its prior decision in *Wilcox*, the Court observed the following about the scope of the term ''gross income'':

> The starting point in all cases dealing with the question of the scope of what is included in ''gross income'' begins with the basic premise that the purpose of Congress was ''to use the full measure of its taxing power.'' *Helvering v. Clifford*, 309 U.S. 331 334. And the Court has given a liberal construction to the broad phraseology of the ''gross income'' definition statutes in recognition of the intention of Congress to tax all gains except those specifically exempted. *Commissioner v. Jacobson*, 336 U.S. 28, 49; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87–91. The language of § 22(a) of the 1939 Code, ''gains or profits and income derived from any source whatever,'' and the more simplified language of § 61(a) of the 1954 Code, ''all income from whatever source derived,'' have been held to encompass all ''accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'' *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431. A gain ''constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily economic value from it.'' *Rutkin v. United States*, *supra* at p. 137. Under these broad principles, we believe that petitioner's contention, that all unlawful gains are taxable except those resulting from embezzlement, should fail.[31]

[23] 307 U.S. 277 (1939).
[24] 252 U.S. 189 (1920).
[25] *Id.* at 207–208 (emphasis in original).
[26] § 102.
[27] 348 U.S. 426 (1955).
[28] *Id.* at 430–431.
[29] 366 U.S. 213 (1961).
[30] 327 U.S. 404 (1946).
[31] *James*, 366 U.S. at 218–219.

Similarly, following *Glenshaw Glass*, courts have further clarified that consideration is not a necessary element of gross income by holding that the imposition of an income tax on awards is constitutional. For example, in *Simmons v. United States*,[32] the Court of Appeals for the Fourth Circuit specifically cited to the Supreme Court's holdings in *Glenshaw Glass* and *James* in deciding that an award received by a fisherman met the broad definition of gross income as provided by the Sixteenth Amendment.[33] Following the Supreme Court's lead, the Treasury Department and the IRS have also issued published guidance consistent with a broad definition of gross income. For example, Reg. § 1.61-14 provides that income is not restricted to the enumerated listing of income items provided in § 61(a), but rather other kinds of gross income include such as items as punitive damages, exemplary damages for fraud, illegal gains, and treasure trove.[34] Likewise, the courts have supported the Treasury's and IRS's position that a taxpayer that finds and keeps treasure must include the treasure's value in gross income.[35]

Given the Supreme Court's evolving and more recent broad view of the scope of the term ''gross income'' one may question whether the narrow view of gross income as expressed by the Court in *Edwards v. Cuba Railroad, Co.* would survive further judicial scrutiny.

[32] 308 F.2d 160 (4th Cir. 1962). For a fuller discussion of the history of the term ''gross income'' see Charles L.B. Lowndes, *Current Conceptions of Taxable Income*, 25 Ohio St. L. J. 151, 173 (1964).

[33] In its decision in *Simmons*, the Fourth Circuit also held that the taxation of the gratuitous receipt of money is not a direct tax that requires apportionment under U.S. Const. art. I, § 8, cl. . Rather, the Fourth Circuit observed that the Supreme Court has repeatedly held that the federal estate tax, which taxes the gratuitous transfer of property upon death, is an indirect tax that is not subject to the apportionment requirement imposed by the constitution. *See Fernandez v. Wiener*, 326 U.S. 340 (1945); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Scholey v. Rew*, 90 U.S. 331 (1875).

[34] Prior to Reg. § 1.61-14, the Treasury's and IRS's view regarding the requirement of a taxpayer to include treasure trove in income was announced in Rev. Rul. 53-61.

[35] *See, e.g., Cesarini v. Commissioner*, 428 F.2d 812 (6th Cir. 1970), *aff'g* 296 F. Supp. 3 (N.D. Ohio 1969) (Currency found by taxpayers inside purchased piano was required to be included in gross income in the taxable year in which it was reduced to taxpayer's undisputed possession.).

ARE NON-SHAREHOLDER CONTRIBUTIONS STILL EXCLUDED?

Given the historical background of the exclusion of non-shareholder contributions to a corporation's capital from gross income one might argue that certain incentive payments made by a state or local government to a corporation should continue to be excluded from a corporation's gross income notwithstanding the enactment of § 118(b)(2). A corporate taxpayer may reasonably argue that the constitutionality of including such amounts in gross income was specifically addressed by the Supreme Court in *Edwards*. However, as discussed above, given the evolution of the definition of gross income since *Edwards* was decided, one might also justifiably argue that the Supreme Court would not come to the same conclusion as it did in *Edwards* if it were now confronted with the same facts.

In *Edwards*, the Supreme Court applied the narrow definition of gross income that it formulated in *Eisner*. The *Eisner* definition of gross income only included amounts derived from capital or labor, or both combined. In contrast, the more recent definition of gross income as expressed by the Supreme Court in *Glenshaw Glass* is more expansive and appears to include all amounts received by a taxpayer that result in an undeniable accession to wealth, that is clearly realized, and over which the taxpayer has complete dominion unless the amount is otherwise excluded from gross income by the Code.[36] Given this uncertainty, state and local governments may shy away from providing direct cash or property grants to incentivize corporations to relocate or expand facilities within the state. Companies also may push for alternative incentives that do not conflict with § 118(b)(2) and its potential federal tax cost. Instead, states and local governments may turn to nonrefundable tax credits, deductions, abatements, and exemptions from tax to provide these incentives.

[36] Notwithstanding the recent amendment to § 118 by the 2017 tax act, § 1032 continues to provide an exclusion from gross income for shareholder contributions. A shareholder's contribution to a corporation's capital is excluded from gross income under § 1032. This section provides that no gain or loss is recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation. Section 1032 has been applied to both pro rata, as well as non-pro rata contributions to a corporation. *See, e.g., Commissioner v. Fink*, 483 U.S. 89 (1987)(affirming that the contribution-to-capital rules apply to non-pro rata contributions.).