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The Tax Law and Policy of Natural Disasters

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THE TAX LAW AND POLICY OF NATURAL DISASTERS

Christine Manolakas*

Natural disasters result in untold human suffering and economic loss. In addition to possible physical injury and loss of life, the futures of the individuals involved are forever altered. Homes and neighborhoods are destroyed, families and communities are dislocated, and jobs and businesses are jeopardized. Unconscionably, Tax Cuts and Jobs Act of 2017 further diminished the already inadequate tax relief available for the damage or destruction of personal-use property caused by casualty events. Following a general discussion of the tax laws applicable to casualty losses, including changes made by the Tax Cuts and Jobs Act of 2017, this article surveys the permanent tax relief provisions available to the victims of all natural disasters and the additional permanent tax relief provisions available only to the victims of Federally declared disasters. Examined and compared is the action taken by Congress and the Treasury Department, extending even greater tax relief and incentives to the victims of selected Federally declared disasters. Although the victims of natural disasters feel the devastation equally, widespread media coverage and political considerations often result in greater levels of tax relief to victims of higher-profile natural disasters. The American public expects the federal government to provide relief to the victims of all natural disasters and is unaware the federal government, through its tax laws, treats the victims of certain natural disasters more favorably, depending often on the extent of the media coverage and the political importance of a particular casualty event.

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I. INTRODUCTION

We act as if we're immune. We build below sea level, or on barrier islands or on hillsides with brush that annually burns, or over earthquake faults—and we're shocked. . . . when disasters occur.¹

The history of the United States is beset with natural disasters, which leave behind lives shattered emotionally, physically, and financially due to the loss of lives, homes, jobs, businesses, and the sense of wellbeing. In a matter of minutes, natural disasters can overwhelm an entire community and are occurring with increased frequency and severity.² In addition to the disbelief experienced in the aftermath of casualty events, the victims may also experience disbelief upon the realization that greater tax relief and economic incentives are available to Federally declared disasters, with even greater tax relief and economic incentives available to selected Federally declared disasters or disaster years.

Part II begins with the tax treatment of losses arising from the damage or destruction of property due to casualty events. Examined are the definition, timing, and computation of casualty loss deductions. Important in the examination is the distinction between casualty losses sustained by business or investment property and personal-use property. The distinction

¹MARVIN OLASKY, *THE POLITICS OF DISASTER: KATRINA, BIG GOVERNMENT, AND A NEW STRATEGY FOR FUTURE CRISES* 1 (2006).

²See NAT'L CTRS. FOR ENVTL. INFO., *Billion-Dollar Weather and Climate Disasters: Table of Events*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (July 9, 2018, 11:00 AM), <https://www.ncdc.noaa.gov/billions/events/US/2016-2017>.

between casualty losses sustained in business or for-profit activities versus personal activities impacts the allowability and amount of the casualty loss deductions. Unconscionably, the Tax Cuts and Jobs Act of 2017 (TCJA) effectively eliminates the deduction of *net* personal casualty losses unless the loss occurs in a Federally declared disaster.³ This article also examines Revenue Procedure 2018-8, which provides safe harbor methods for determining the amount of casualty losses sustained by personal-use residential real property and personal belongings due to non-Federally declared disasters.⁴ Finally, Part II considers the inclusion of casualty losses in the computation of the net operating loss (NOL) deduction, including the changes made by the TCJA.

Part III examines the characterization of casualty gains and losses for the purposes of applying the preferential tax rate for capital gains and the timing of capital loss deductions. The characterization of casualty gains and losses as capital or ordinary determines not only the applicable rate of tax but also the amount and timing of casualty loss deductions and the treatment of casualty loss deductions in the computation of the taxable income.⁵ Part IV details the permanent provisions of the Internal Revenue Code⁶ that provide tax relief to the victims of casualty events, including a discussion of the suspension of net personal casualty loss deductions unless incurred in a Federally declared disaster. Since most disasters in the United States are small and localized, the victims of these non-Federally declared disasters receive even less financial relief through the tax laws.

In Part V, the article explores the process of declaring a federal disaster. Pursuant to the Stafford Act, the decision to grant the request of a Governor of an affected state to declare a federal disaster rests solely with the President of the United States.⁷ If granted, the Federal Emergency Management Agency (FEMA) provides and administers federal disaster assistance.⁸ The scholarship in the area suggests that political considerations and media coverage influence the President's decision to grant or deny

³Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁴Rev. Proc. 2018-8, 2018-2 I.R.B. 286.

⁵See *infra* text accompanying notes 137–69.

⁶All references to the Internal Revenue Code are to the 1986 Internal Revenue Code, 26 United States Code, as amended, or Treasury regulations promulgated thereunder.

⁷Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100–707, § 103, 102 Stat. 4689 (1988).

⁸*Id.*

disaster relief.⁹ Part V reviews additional permanent provisions of the Internal Revenue Code that become available with the declaration of a federal disaster.

Part VI discusses the tax relief and economic incentives passed by Congress after the more severe, higher-profile natural disasters. Compared are the TCJA, which singles out 2016 Federally declared disasters, and the Disaster Tax Relief and Airport and Airway Extension Act of 2017 and the Bipartisan Budget Act of 2018, which single out Hurricanes Harvey, Irma, and Maria, and the California wildfires. Also compared are the tax benefits provided by the Hurricanes Katrina, Rita, and Wilma Tax Acts of 2005, and the Gulf Opportunity Zone Act of 2005.

Finally, Part VII continues the discussion of Revenue Procedure 2018-8, which provides additional safe harbor methods to use in calculating the amount personal casualty losses due to Federally declared disasters, and Revenue Procedure 2018-9, which provides an additional safe harbor method available only to the victims of Hurricanes Harvey, Irma, and Maria.¹⁰ Part VII then examines the tax relief extended administratively to select Federally declared disasters, beginning with the administrative tax relief provided for the victims of Hurricane Sandy. The article compares the administrative tax relief, in addition to the legislative tax relief, afforded the victims of Hurricanes Harvey, Irma, and Maria and the California wildfires with the tax relief afforded other 2017 Federally declared disasters.

Part VIII questions the unequal and piecemeal tax relief and economic incentives available to victims of natural disasters. The levels of tax assistance available are on a continuum with non-Federally declared disasters receiving only minor tax consideration.¹¹ At the other end of the continuum, Federally declared disasters receiving the benefit of additional permanent provisions of the Internal Revenue Code plus, on occasion, special legislation and administrative tax relief.¹² Even among Federally declared disasters, the levels of tax assistance varies greatly, depending on the how severe and widespread the natural disaster or the year in which the natural disaster occurs. The levels of inequity and randomness are

⁹FRANCIS X MCCARTHY, CONG. RESEARCH SERV., R43784, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER 23 (2014).

¹⁰Rev. Proc. 2018-8, 2018-2 I.R.B. 286; Rev. Proc. 2018-9, 2018-2 I.R.B. 290.

¹¹See *infra* Part VIII.

¹²*Id.*

unacceptable and contrary to the American spirit of immediate aid and fair treatment of all individuals impacted by natural disasters.

II. LOSSES FROM CASUALTY EVENTS

Over the past decade, the United States has been plagued with myriad natural disasters. The National Oceanic and Atmospheric Administration reports that in 2017 alone, the country experienced 16 weather-and-climate-related disasters costing more than \$1 billion apiece and, in total, exceeding \$306 billion, which far surpassed the previous record of \$215 billion set in 2005. Many scientists are predicting more extreme weather-related events in the future.¹³

Casualty events can result in the loss of life, physical injury, emotional suffering, economic devastation, and damage or destruction of property. In addition to the financial burden of repairing lives, homes, and businesses, the victims of casualty events may have the added burden of paying taxes. The tax relief provisions of the Internal Revenue Code available to the victims of all casualty events and the additional provisions available only to the victims of Federally declared disasters must be examined to understand the inconsistent tax treatment of casualty losses.¹⁴ Moreover, the change in tax treatment contained in the TCJA must also be incorporated into the discussion.

For tax purposes, a casualty event results in the *realization* and *recognition* of gain or loss.¹⁵ Counterintuitively, a casualty event may produce a gain if the victim receives compensation for the destruction of

¹³Kristie N. Tierney, et al., *Analyzing the New Personal Casualty Loss Tax Rules*, JOURNAL OF ACCOUNTANCY, July 1, 2018, <https://www.journalofaccountancy.com/issues/2018/jul/irs-personal-casualty-loss-tax-rules.html>.

¹⁴See I.R.S. PUB. NO. 547, CASUALTIES, DISASTERS, AND THEFTS (2017) (explaining, generally, the tax treatment of casualty and theft losses); I.R.S. PUB. NO. 584, CASUALTY, DISASTER, AND THEFT LOSS WORKBOOK (2017) (providing a workbook designed to aid in the computation of personal casualty losses in the event of a casualty, disaster, or theft); I.R.S. PUB. NO. 2194, DISASTER ASSISTANCE AND EMERGENCY RELIEF, DISASTER RESOURCE GUIDE FOR INDIVIDUALS AND BUSINESSES (2018) (providing information and assistance to individuals and businesses affected by Federally declared disasters).

¹⁵I.R.C. § 1001(c) (LexisNexis 2012). Unless otherwise provided, gain or loss *realized* on the disposition of property is *recognized* for tax purposes. *Id.*

property.¹⁶ More often, a casualty event produces a loss that may be deductible.¹⁷ If a deduction is allowable, the individual must establish the amount of the loss deduction¹⁸ and the tax year in which the loss deduction can be taken.¹⁹ Generally, casualty losses incurred in a business or a for-profit activity are subject only to a basis limitation²⁰ while personal casualty losses are subject to two additional limitations.²¹ Unfortunately, unless the loss occurs in a Federally declared disaster area, the TCJA suspends the deduction of any *net* personal casualty losses if the casualty event occurs in tax years 2018 through 2025.²²

A. Definition of a Casualty Loss

A loss deduction is allowed for “any loss sustained during the taxable year and not compensated by insurance or otherwise.”²³ However, if an individual experiences a loss of personal-use property, a loss deduction is allowed only if the loss arises from “fire, storm, shipwreck or other casualty or from theft.”²⁴ The term “other casualty” is limited to casualty events analogous to fire, storm, or shipwreck.²⁵ Thus, the casualty event must result in a complete or partial destruction of property from an identifiable event of a *sudden, unexpected, and unusual* character.²⁶ The meaning of the terms “sudden, unexpected, and unusual” is as follows:²⁷ (1) *sudden* requires the event to be swift and precipitous and not gradual or

¹⁶*Id.* §§ 61(a)(3), 1001.

¹⁷I.R.C. § 165.

¹⁸*See* Treas. Reg. § 1.1657(b) (as amended in 2018).

¹⁹Treas. Reg. § 1.165-1(d) (as amended in 2018).

²⁰I.R.C. § 165(b).

²¹*Id.* § 165(h).

²²*Id.* § 165(h)(5)(A), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017).

²³*Id.* § 165(a).

²⁴*Id.* § 165(c)(3); Treas. Reg. § 1.165-1(e)(3) (2018). Generally, no deductions are allowed for personal expenses. I.R.C. § 262(a). Congress intended to limit the casualty loss deduction to “extraordinary, nonrecurring losses.” S. REP. NO. 88-830, at 57 (1964).

²⁵Rev. Rul. 72-592, 1972-2 C.B. 101.

²⁶*Id.* Damage or loss caused by the gradual deterioration of property through ordinary wear and tear or passage of time, or the progressive deterioration of property through a steady operating cause, does not qualify. *See* Rev. Rul. 63-232, 1963-2 C.B. 97.

²⁷Rev. Rul. 72-592, 1972-2 C.B. 101.

progressive;²⁸ (2) *unexpected* requires the event to be one that is ordinarily unanticipated and occurs without the intent of the one who suffers the loss;²⁹ and (3) *unusual* requires the event to be extraordinary and nonrecurring and not commonly occurring during the activity in which the individual was engaged nor in the ordinary course of the day-to-day living.³⁰ Further, even though the event is extraordinary and nonrecurring, the event must result in physical damage to the property or loss of physical property as opposed to a temporary decline in market value caused by the casualty event.³¹ Finally, although a loss deduction is not allowed for the mere mysterious disappearance of property, a casualty loss deduction is allowed for property accidentally and irretrievably lost as the result of a casualty event.³² *Importantly*, the deductibility of a casualty loss incurred in a business or a transaction entered into for profit is *not* limited by the type of casualty event.³³

B. Tax Year of a Casualty Loss Deduction

A loss is deductible only for the tax year in which the loss is sustained.³⁴ A loss is *sustained* in the tax year in which the loss occurs, “as evidenced

²⁸The suddenness requirement refers to the lapse of time between the precipitating event and the loss proximately caused by the event. *Maier v. Comm’r*, 76 T.C. 593, 600 (1981), *aff’d*, 680 F.2d 91 (11th Cir. 1982). *See* Rev. Rul. 63-232, 1963-2 C.B. 97 (denying a casualty loss deduction when scientific evidence proved that termite damage was the result of gradual deterioration through a steadily operating cause and not an identifiable event of a sudden, unusual, or unexpected character).

²⁹Foreseeability and negligence, in the absence of gross negligence, were not decisive factors in determining whether a casualty was unexpected. *Heyn v. Comm’r*, 46 T.C. 302, 308 (1966).

³⁰Rev. Rul. 72-592, 1972-2 C.B. 101. Individuals were allowed a casualty loss deduction for flood damage to a residence that was undamaged by rain for more than four years and then suffered flood damage from an unusually heavy hurricane-induced rainstorm. *Butschky v. United States*, No. HM80-1585, 1981 U.S. Dist. LEXIS 16944, at *2–3, *14 (1981).

³¹*Pulvers v. Comm’r*, 407 F.2d 838 (9th Cir. 1969). The service denied a casualty loss deduction for the immediate decline in value of individual’s residence following landslides that destroyed neighboring residences but did not physically damage the individual’s property. *Id.* at 838. *But see* *Finkbohner v. United States*, 788 F.2d 723, 727 (11th Cir. 1986) (allowing a casualty loss deduction after a flood and the demolition of the majority of the homes in the area irreversibly changed the character of the neighborhood, resulting in a permanent devaluation of the individual’s residence).

³²*White v. Comm’r*, 48 T.C. 430, 438 (1967); Rev. Rul. 72-592, 1972-2 C.B. 101.

³³*See* I.R.C. § 165(c)(1), (2).

³⁴*Id.* § 165(a). A loss arising from theft is treated as sustained in the tax year in which the theft is discovered. *Id.* § 165(e); *see also* Treas. Reg. §§ 1.165-1(d)(3), -8(a)(2) (2018).

by closed and completed transactions and as fixed by identifiable events occurring in such taxable year.”³⁵ A casualty loss is ordinarily sustained in the tax year in which the casualty event occurs; however, if the individual cannot immediately determine the extent of the damage, the loss is not sustained until the effects of the casualty event can be observed and evaluated.³⁶

If a claim for reimbursement exists in the tax year of the casualty event, a loss deduction cannot be taken until a determination is made with reasonable certainty as to whether a reimbursement will be received.³⁷ If a claim for reimbursement covers a portion of the loss, only the uninsured portion of the loss is deductible during the tax year in which the casualty event occurred.³⁸ If the individual properly deducts a casualty loss and receives a reimbursement in a later year, the individual cannot amend the earlier tax return for the tax year in which the deduction was taken but must include the reimbursement in income for the tax year received under the *tax benefit rule*.³⁹

C. Amount of a Casualty Loss Deduction

Generally, the amount of the loss deduction cannot exceed the unrecovered basis of the property,⁴⁰ which is reduced for any salvage value and for any insurance or other compensation received.⁴¹ Whether the

³⁵Treas. Reg. § 1.165-1(d)(1) (2018).

³⁶BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 24.05[1] (3d ed. 2002).

³⁷Treas. Reg. § 1.165-1(d)(2)(i). The settlement, adjudication, or abandonment of a claim provides reasonable certainty as to whether or not reimbursement will be received. *Id.* Reimbursement for a casualty loss may include: insurance proceeds; court-awarded damages; forgiveness of a Federal Disaster Loan under the Disaster Relief and Emergency Assistance Act; repairs, restoration, or cleanup services by relief agencies; and other payments if specifically designated to repair or replace property. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CASUALTY LOSS PRACTICE GUIDE 6 (2007).

³⁸Treas. Reg. § 1.165-1(d)(2)(ii) (2018).

³⁹*Id.* § 1.165-1(d)(2)(iii). See generally BITTKER ET AL., *supra* note 36, ¶ 3.07 (discussing the tax benefit rule that requires the inclusion in income of previously deducted items).

⁴⁰I.R.C. § 165(b). Any unrealized appreciation on the destruction of property is not deductible. BITTKER ET AL., *supra* note 36, ¶ 24.04[1]. A loss represents the unrecovered investment in property. I.R.C. §§ 165(b), 1001(a).

⁴¹Treas. Reg. § 1.165-1(c)(4) (2018). The basis of property damaged in a casualty event is reduced by any insurance or other compensation received and any loss deduction taken and is

casualty loss is suffered in a business or a for-profit activity, or with regard to personal-use property, the amount of a casualty loss is the *lesser* of: (1) the difference in the fair market value of the property immediately before and after the casualty event; or (2) the individual's basis in the property.⁴² However, if property used in a business or a transaction entered into for profit is totally destroyed, and the basis is greater than the fair market value of the property immediately before the casualty event, the amount of the casualty loss is the basis of the property.⁴³

A reliable appraisal is usually the best evidence of the reduction in the fair market value of the property immediately before and after the casualty.⁴⁴ As the loss deduction is limited to the actual loss resulting from the casualty, the appraisal must consider the effects of general market decline that may occur simultaneously with the casualty event.⁴⁵ The cost of repairs to damaged property is acceptable as evidence of the loss of fair market value if: (1) the repairs are necessary to restore the property to its condition immediately before the casualty; (2) the amount spent on repairs is not excessive; (3) the repairs do not involve more than the damage suffered; and (4) as a result of the repairs, the value of the property after the repairs does not exceed the value of the property immediately before the casualty.⁴⁶

If an individual incurs a casualty loss in a business activity⁴⁷ or a transaction entered into for profit,⁴⁸ the amount of the loss deduction is only

increased by capital expenditures made to repair or restore the property. I.R.C. § 1016(a)(1) (LexisNexis 2018 & Supp. 2018); Treas. Reg. § 1.165-1(c)(1); Rev. Rul. 71-161, 1971-1 C.B. 76.

⁴²Treas. Reg. § 1.165-7(b)(1) (2018). The fair market value of property immediately after a theft is zero. *Id.* § 1.165-8(c).

⁴³*Id.* § 1.165-7(b)(1).

⁴⁴*Id.* § 1.165-7(a)(2)(i). For the purposes of valuation for the estate tax and charitable contribution deductions, the Treasury Regulations define the term "fair market value" by reference to a hypothetical sale in the marketplace, i.e., "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." *Id.* §§ 20.2031-6(a) (2017), 1.170A-1(c)(2).

⁴⁵*Id.* § 1.165-7(a)(2)(i).

⁴⁶*Id.* § 1.165-7(a)(2)(ii).

⁴⁷I.R.C. § 165(c)(1). *See* *Higgins v. Comm'r*, 312 U.S. 212, 215–218 (1941) (finding that an activity must have sufficient regularity and extent to constitute a trade or business).

⁴⁸I.R.C. § 165(c)(2). *See* Treas. Reg. § 1.183-2(b) (2018) (listing factors relevant to the determination of whether an activity is engaged in for profit).

subject to the basis limitation.⁴⁹ However, if an individual incurs a casualty loss with respect to personal-use property, two additional limitations provided in I.R.C. section 165(h) are applicable.⁵⁰ Generally, a personal casualty loss is allowed only to the extent the amount of the loss from *each* casualty exceeds \$100,⁵¹ and *net* personal casualty losses are deductible only to the extent they *exceed* ten percent of the individual's adjusted gross income.⁵² Thus, the limitations imposed on the deductibility of casualty and theft losses of personal-use property, and not of property used in a business activity or a transaction entered into for profit, are: (1) the event must be analogous to "a fire, storm, shipwreck or other casualty or from theft;"⁵³ and (2) the amount is subject to the \$100 floor and the ten percent of adjusted gross income threshold.⁵⁴

In computing taxable income, the type of activity in which the property is used also is determinative. Allowable casualty loss deductions incurred in a business activity reduce an individual's gross income in computing adjusted gross income.⁵⁵ An individual who incurred casualty losses in a transaction entered into for profit or with regard to personal-use property, the allowable casualty loss deductions are itemized deductions⁵⁶ and reduce the individual's adjusted gross income in computing taxable income.⁵⁷ From adjusted gross income, an individual can either elect to itemize

⁴⁹I.R.C. § 165(b), (c)(1), (c)(2).

⁵⁰*Id.* § 165(b), (c)(3), (h).

⁵¹*Id.* § 165(h)(1); Treas. Reg. § 1.165-7(b)(4)(i) (2018). Whether damage or destruction of property resulted from a single casualty or two or more separate casualties is determined based on the facts and circumstances; nevertheless, events that are closely related in origin generally give rise to a single casualty. Treas. Reg. § 1.165-7(b)(4)(ii) (2018). For example, if a hurricane causes high waves, all wind and flood damage caused by the hurricane gives rise to a single casualty. *Id.*

⁵²I.R.C. § 165(h)(2)(B). The term "adjusted gross income" means gross income minus the deductions listed in I.R.C. Section 62(a). *Id.* § 62(a).

⁵³I.R.C. § 165(c)(3).

⁵⁴I.R.C. § 165(c)(3), (h)(1), (h)(2).

⁵⁵*Id.* § 62(a)(1). However, if the casualty loss is incurred in the individual's business of the performance of services as an employee, the casualty loss deduction is an itemized deduction. *See id.* §§ 62(a)(1), 63(d).

⁵⁶*Id.* § 63(d) (LexisNexis 2018 & Supp. 2018).

⁵⁷*Id.* § 63(a). For tax years 2018 through 2025, miscellaneous itemized deductions, defined in I.R.C. Section 67(b) and subject to the two percent of adjusted gross income floor pursuant to I.R.C. Section 67(a), are suspended. *Id.* § 67(g) (LexisNexis Supp. 2018), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11045, 131 Stat. 2054, 2088 (2017).

deductions or claim the standard deduction.⁵⁸ Itemized deductions, including allowable casualty loss deductions, are not reflected for tax purposes if the standard deduction is claimed.⁵⁹ With the dramatic increase of the standard deduction for tax years 2018 through 2025 by the TCJA, a greater number of individuals will choose the standard deduction instead of itemizing deductions.⁶⁰

1. Casualty Losses Sustained in a Business or For-Profit Activity

If an individual incurs a casualty or theft loss in a business or transaction entered into for profit, the amount of any loss deduction is only subject to the basis limitation.⁶¹ As opposed to personal-use property, the types of allowable casualty events are not restricted to casualty events analogous to a “fire, storm, shipwreck or other casualty or from theft.”⁶² Further, if property used in a business or other for-profit activity is totally destroyed, and the basis of the property is greater than the fair market value immediately before the casualty event, the amount of the casualty loss is the basis of the property even though the basis is greater than the reduction in the fair market value of the property.⁶³ Finally, the casualty loss must be apportioned to each use if the property damaged or destroyed is held partially for business or other income-producing purposes and partly for personal purposes.⁶⁴

With regard to casualty losses sustained in a business activity or transaction entered into for profit, if the individual does not *materially*

⁵⁸*Id.* § 63(b), (e). Personal exemptions provided in I.R.C. Sections 151 and 152 are also deducted from an individual’s adjusted gross income in computing taxable income. *Id.* § 63(b). For tax years 2018 through 2025, the deduction for personal exemptions is effectively suspended by reducing the exemption amount to zero. *Id.* § 151(d)(5) (LexisNexis Supp. 2018), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(f)(2), 131 Stat. 2054, 2082 (2017).

⁵⁹DANIEL L. SIMMONS ET AL., *FEDERAL INCOME TAXATION* 772 (7th ed. 2017).

⁶⁰For tax years 2018 through 2025, the standard deduction is increased to \$24,000 for married individuals filing jointly, \$18,000 for head-of-household filers, and \$12,000 for other filers. I.R.C. § 63(c)(7)(A) (LexisNexis Supp. 2018), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11045, 131 Stat. 2054, 2088 (2017). For tax years beginning after 2017, the standard deduction is indexed using chained CPI-U (C-CPI-U). *Id.* § 63(c)(7)(B), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11002(a), 131 Stat. 2054, 2059 (2017).

⁶¹*Id.* § 165(b), (c)(1), (c)(2).

⁶²*Id.* § 165(c)(3); Treas. Reg. § 1.165-1(e)(3) (2018).

⁶³Treas. Reg. § 1.165-7(b)(1) (2018).

⁶⁴*Id.* § 1.165-7(b)(4)(iv).

participate in an activity, I.R.C. Section 469 limits any loss deductions generated by passive activities to the amount of income generated by passive activities during the tax year.⁶⁵ If the passive activities generate a net passive activity loss, the excess is carried forward and treated as losses from passive activities in the succeeding tax year.⁶⁶ A passive activity loss is the amount by which the aggregate losses from all passive activities for the tax year exceed the aggregate income from all passive activities for the tax year.⁶⁷ An individual materially participates in an activity if the individual's involvement in the operations of the activity is *regular, continuous, and substantial*.⁶⁸ Upon the disposition of the entire interest in a passive activity to an unrelated party,⁶⁹ generally, any current and previously suspended losses from the passive activity are fully deductible against nonpassive income.⁷⁰

Any loss that arises from "fire, storm, shipwreck or other casualty, or from theft," as the phrase is defined under I.R.C. section 165(c)(3), are *excluded* from the passive activity loss limitations even if the losses occur in a passive activity.⁷¹ The loss of property used in a passive activity due to a casualty event does not constitute a complete disposition unless the

⁶⁵I.R.C. § 469(a)(1)(A), (b), (c)(1), (c)(6) (2012). I.R.C. Section 469 applies to individuals, estates, trusts, closely held C corporations, and personal service corporations. *Id.* § 469(a)(2), (j)(1)–(2). A closely held C corporation, which is not a personal service corporation, is allowed to offset passive activity losses against active income other than portfolio income. *Id.* § 469(e)(2).

⁶⁶*Id.* § 469(a)(1)(A), (b), (c)(1), (c)(6).

⁶⁷*Id.* § 469(d)(1). In determining the amount of income or loss from passive activities, portfolio income, such as interest, dividends, annuities, and royalties and expenses allocable to such income, is excluded. *Id.* § 469(e)(1).

⁶⁸*Id.* § 469(h)(1). *See* Treas. Reg. § 1.469-5T(a) (2017) (providing seven rules to determine whether the material participation test is satisfied by an individual).

⁶⁹I.R.C. § 469(g)(1). *See id.* §§ 267(b), 707(b)(1) (defining "related party" for the purpose of I.R.C. § 469 (g)(1)).

⁷⁰*Id.* § 469(g)(1). A disposition of substantially all of an activity can be treated as a disposition of a separate activity if the individual can establish, with reasonable certainty, the amount of deductions and credits allocable to that part of the activity from prior years and the gross income, deductions, and credits allocable to that part of the activity for the current year. Treas. Reg. § 1.469-4(g) (2018).

⁷¹Treas. Reg. § 1.469-2(d)(2)(xi) (2017); I.R.S. Notice 90-21, 1990-1 C.B. 332, § III.A; *see supra* text accompanying notes 24–34 (examining the types of casualty events included in the phrase "fire, storm, shipwreck or other casualty, or from theft" for the purposes of I.R.C. Section 165(c)(3)). Losses from such casualties fall within the exclusion only if losses similar in cause and severity do not occur regularly in the conduct of the activity. Treas. Reg. § 1.469-2(d)(2)(xi); I.R.S. Notice 90-21, 1990-1 C.B. 332, § III.A.

casualty event results in the loss of all of the property in the passive activity.⁷² Accordingly, a casualty loss involving property used in a passive activity does not constitute a complete disposition of the individual's interest in the activity unless the casualty event results in the loss of all property used or created in the activity.⁷³

2. Casualty Losses Sustained in a Personal Activity

With regard to personal-use property, the amount of deductible casualty and theft loss is subject to the basis limitation and two additional limitations as provided in I.R.C. section 165(h).⁷⁴ First, casualty losses are allowed only to the extent the amount of the loss from each casualty *exceeds* \$100.⁷⁵ Second, the amount of casualty losses is limited to the sum of: (1) personal casualty gains; plus (2) the amount of the *excess* personal casualty losses that *exceed* ten percent of the individual's adjusted gross income.⁷⁶ Thus, *net* personal casualty losses are deductible only to the extent they exceed ten percent of the individual's adjusted gross income.⁷⁷

Example: In 2017, a landslide damaged Taxpayer's residence. The purchase price of the residence was \$500,000, and the fair market value was \$600,000 immediately before the landslide and \$400,000 immediately after the landslide. Taxpayer received

⁷²I.R.S. Notice 90-21, 1990-1 C.B. 332, § III.B; *see id.* § V (illustrating the application of I.R.C. Sections 469 and 280B to casualty losses, which disallows a deduction for any amount expended or loss sustained in the demolition of any structure).

⁷³*Id.* § III.B.

⁷⁴I.R.C. § 165(b), (c)(3), (h) (2018). If the individual is insured, a casualty loss deduction is allowed only if the individual files a timely insurance claim. *Id.* § 165(h)(4)(E).

⁷⁵*Id.* § 165(h)(1); Whether damage or destruction of property resulted from a single casualty or two or more separate casualties is determined based on the facts and circumstances; nevertheless, events that are closely related in origin generally give rise to a single casualty. Treas. Reg. § 1.165-7(b)(4)(ii) (2018). For example, if a hurricane causes high waves, all wind and flood damage caused by the hurricane gives rise to a single casualty. *Id.*

⁷⁶I.R.C. § 165(h)(2)(B). The terms "personal casualty losses" and "personal casualty gains" are defined as losses and gains arising from the casualty or theft of personal-use property. *Id.* § 165(h)(3). If personal casualty losses exceed personal casualty gains, personal casualty losses to the extent of personal casualty gains are deductible from gross income in computing adjusted gross income. *Id.* §§ 62(a), 165(h)(4)(A). The amount of *net* personal casualty losses that exceed ten percent of the individual's adjusted gross income are itemized deductions. *Id.* §§ 62(a), 63(d), 67(b)(3).

⁷⁷*Id.* § 165(h)(2)(B).

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\$150,000 in insurance proceeds for the damage to the residence. Taxpayer's adjusted gross income was \$100,000. The amount of Taxpayer's casualty loss was \$50,000 (lesser of the \$200,000 reduction in value (\$600,000 value before minus \$400,000 value after) or \$500,000 basis, minus \$150,000 insurance proceeds). The amount of Taxpayer's deductible personal casualty loss was \$39,900 (\$50,000 minus \$100 floor and \$10,000 (10% of \$100,000 adjusted gross income)). If during 2017, Taxpayer also experienced a personal casualty gain of 75,000, Taxpayer's personal casualty loss of \$49,900 (\$50,000 minus \$100) would be fully deductible.

For tax years 2018 through 2025, the TCJA suspends the deduction of *net* personal casualty losses if the individual's personal casualty losses are not sustained in a Federally declared disaster.⁷⁸ As a result, personal casualty losses, subject to the \$100 floor, are deductible to the extent of personal casualty gains, and any personal casualty losses in excess of personal casualty gains are nondeductible.⁷⁹

Example: In 2018, a fire totally destroyed Taxpayer's uninsured guesthouse in a non-Federally declared disaster. The purchase price of the guesthouse was \$25,000, and the fair market value was \$60,000 immediately before the fire and zero immediately after the fire. Taxpayer's adjusted gross income was \$100,000. The amount of Taxpayer's casualty loss was \$25,000 (lesser of the \$60,000 reduction in value (\$60,000 value before minus zero value after) or \$25,000 basis). As Taxpayer incurred no personally casualty gains, the amount of Taxpayer's *net* personal casualty loss of \$24,900 (\$25,000 minus \$100 floor) was not deductible. If Taxpayer also experienced a personal casualty gain of \$40,000 during 2018, Taxpayer's personal casualty loss of \$24,900 (\$25,000 minus \$100) would be fully deductible.

⁷⁸*Id.* § 165(h)(5)(A), added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017).

⁷⁹*Id.* § 165(h)(5)(B), added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017).

However, if the personal casualty losses are attributed to a Federally declared disaster, the deductibility of personal casualty losses is not limited to the amount of personal casualty gains.⁸⁰ Nevertheless, personal casualty losses due to a Federally declared disaster are still subject to the basis limitation, and the \$100 floor and ten percent of adjusted gross income threshold.⁸¹

Example: In 2018, a flood totally destroyed Taxpayer's vacation home in a Federally declared disaster. The purchase price of the vacation home was \$400,000, and the fair market value was \$500,000 immediately before the flood and zero immediately after the flood. Taxpayer receives \$250,000 in insurance proceeds for the destruction of the vacation home. Taxpayer's adjusted gross income was \$100,000. The amount of Taxpayer's casualty loss was \$150,000 (lesser of the \$500,000 reduction in value (\$500,000 value before minus zero value after) or \$400,000 basis, minus \$250,000 insurance proceeds). The amount of Taxpayer's personal casualty loss deduction was \$139,900 (\$150,000 minus \$100 floor and \$10,000 (10% of \$100,000 adjusted gross income)). Thus, because Taxpayer's vacation home was located in a Federally declared disaster area, the amount of Taxpayer's personal casualty loss deduction was \$139,900 even though Taxpayer did not experience any personal casualty gains.

The Joint Committee on Taxation releases annual projections of tax expenditures. Tax expenditures are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."⁸² By comparing the estimated tax expenditures for casualty and theft losses before and after implementation of the TCJA, the projected tax savings to the federal government of suspending the deduction of *net* personal casualty

⁸⁰*Id.* § 165(h)(5)(A). For tax years 2018 through 2025, any personal casualty gains incurred within the tax year will first be applied against personal casualty losses attributable to non-Federally declared disasters. *Id.* § 165(h)(5)(B).

⁸¹*Id.* § 165(b), (c)(3), (h)(1), (h)(2)(A) (West Supp. 2018).

⁸²Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (2012).

losses suffered in non-Federally declared disasters can be approximated.⁸³ In January 2017, before the TCJA was proposed, the Joint Committee projected a tax expenditure for casualty and theft losses of \$.4 billion per year in tax years 2016 through 2019 and \$.5 billion in tax year 2020.⁸⁴ In May 2018, after the TCJA effective date, the Joint Committee projected a tax expenditure for casualty and theft losses of \$.4 billion for year in tax year 2017 and only \$.2 billion per year in tax years 2018 through 2021.⁸⁵ Thus, after the TCJA effective date of January 1, 2017, the annual tax savings from the suspension of *net* personal casualty loss deduction attributed to non-Federally declared disasters is approximately \$.2 billion per year in tax years 2018 through 2021.⁸⁶

Indeed, concessions are necessary to achieve the projected net reduction in tax of almost \$1.5 trillion over fiscal years 2018 through 2027.⁸⁷ Yet, the Internal Revenue Service estimates that merely implementing the TCJA will cost the agency \$397 million, effectively absorbing two years of projected tax savings generated from the elimination of *net* personal casualty loss deductions attributed to non-Federally declared disasters.⁸⁸ With the federal government collecting approximately \$3.4 trillion in net tax revenues in 2017,⁸⁹ the additional hardship imposed upon individuals experiencing casualty events is fiscally unjustifiable. On a human level, the personal and economic losses to the victims of casualty events are equal whether the casualty event is declared a federal disaster. The Treasury Department contends that one of the goals of the TCJA is to “to provide relief to American families,” but it is difficult to justify that goal with the

⁸³These estimates included all casualty and theft loss deductions whether or not attributed to a Federally declared disaster, reducing the amount of casualty and theft losses deductions attributable to non-Federally declared disasters to a fraction of the estimate. STAFF OF JOINT COMM. ON TAXATION, 115th Cong., No. JCX-3-17, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, at 39 (2017); STAFF OF JOINT COMM. ON TAXATION, 115th Cong., No. JCX-34-18, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2017-2021, at 43 (2018).

⁸⁴STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., No. JCX-3-17 at 39 (2017).

⁸⁵STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., No. JCX-34-18 at 43 (2018).

⁸⁶See I.R.C. § 165(h)(5)(A), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017).

⁸⁷See TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, Ref. No. 2018-44-027, TAX CUTS AND JOBS ACT: ASSESSMENT OF IMPLEMENTATION PLANNING EFFORTS, at 1 (April 11, 2018).

⁸⁸*Id.* at 3.

⁸⁹*Internal Revenue Service Data Book, 2017*, at 1.

knowledge that individuals who suffer casualty or losses outside of Federally declared disaster areas will be without tax relief.⁹⁰

3. Revenue Procedure 2018-8: Safe Harbor Methods to Determine the Amount of Casualty Losses for Personal-Use Residential Real Property and Personal Belongings

Generally, the amount of a casualty loss is the lesser of: (1) the difference in the fair market value of the property immediately before and after the casualty event, or (2) the individual's basis in the property.⁹¹ Aware that determining the amount of a casualty loss is often difficult and may result in time-consuming and expensive litigation, and to provide certainty to both the individual and the Internal Revenue Service, Revenue Procedure 2018-8 provides several safe harbor methods for determining the amount of casualty losses due to natural disasters for personal-use residential real property and personal belongings.⁹² The Internal Revenue Service will not challenge an individual's determination of the decrease in fair market value of personal-use residential real property or personal belongings if the individual uses one of the safe harbor methods described in Revenue Procedure 2018-8.⁹³ The use of a safe harbor method is not mandatory, allowing the individual to determine the amount of a casualty loss by determining, and substantiating, the actual reduction in the fair market value of the property.⁹⁴

With regard to personal-use residential real property, the individual may use one of three safe harbors whether or not the casualty occurs in a Federally declared disaster.⁹⁵ "Personal-use residential real property" is

⁹⁰TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 87.

⁹¹Treas. Reg. § 1.165-7(b)(1) (as amended in 2018).

⁹²Rev. Proc. 2018-8, 2018-2 I.R.B. 286, § 2.15. Revenue Procedure 2018-8 also provides safe harbors for determining the amount of theft losses due to casualty events. *Id.* § 1.01. *See* I.R.S. PUBL'N NO. 547, CASUALTIES, DISASTERS, AND THEFTS (2017) (describing the safe harbor methods for determining the amount of casualty and theft losses provided in Revenue Procedure 2018-8).

⁹³Rev. Proc. 2018-8, 2018-2 I.R.B. 286, § 1.02.

⁹⁴*Id.* § 1.04.

⁹⁵*Id.* § 3.01. If the casualty loss occurs in a Federally declared disaster area, two additional safe harbor methods are available to determine the amount of the casualty losses with respect to personal-use residential real property. *Id.* *See infra* text accompanying notes 333–353 (discussing the additional safe harbor methods available for determining the amount of casualty losses with respect to personal-use residential real property occurring in a Federally declared disaster area).

defined as real property, including improvements such as buildings and ornamental trees and shrubbery, which is owned by the individual who suffered the casualty loss and contains at least one personal residence.⁹⁶ A personal residence is a single family residence or a single unit within a contiguous group of attached residential units such as a townhouse or duplex.⁹⁷ Personal-use residential real property does not include a personal residence if any part of the personal residence is used as rental property or contains a home office used in a business or for-profit activity.⁹⁸ The safe harbors available to individuals who suffer a casualty loss to personal-use residential real property, whether or not located a Federally declared disaster area, are: (1) Estimated Repair Cost Safe Harbor Method; (2) De Minimis Safe Harbor Method; and (3) Insurance Safe Harbor Method.⁹⁹

To determine the decrease in the fair market value of personal-use residential real property under the Estimated Repair Cost Safe Harbor Method, the individual may use the lesser of two repair estimates prepared by two separate and independent contractors, licensed or registered in accordance with State or local regulations.¹⁰⁰ The two repair estimates must itemize the costs to restore the personal-use residential real property to its condition immediately prior to the casualty.¹⁰¹ However, the costs of any improvements or additions that increase the fair market value of the personal-use residential real property above its pre-casualty value, such as the cost to meet new construction requirements, must be excluded.¹⁰² The Estimated Repair Cost Safe Harbor Method is available only for the casualty losses of \$20,000 or less, prior to the application of the limitations under I.R.C. § 165(h).¹⁰³

Under the De Minimis Safe Harbor Method, an individual may estimate the cost of repairs required to restore the personal-use residential real property to the condition existing prior to the casualty event to determine

⁹⁶*Id.* § 3.02.

⁹⁷*Id.* A personal residence does not include a condominium or cooperative unit if the individual who suffered the loss does not own the structural components of the building or owns only a fractional interest in all of the structural components of the building. *Id.*

⁹⁸*Id.*

⁹⁹*Id.* §§ 3.01, 4.02–4.04.

¹⁰⁰*Id.* § 4.02.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.* See *supra* text accompanying notes 100–102 (examining the two limitations for determining the amount of a personal casualty loss deduction provided in I.R.C. § 165(h)).

the decrease in fair market value of the personal-use residential real property.¹⁰⁴ The individual's estimate must be a good faith estimate, and the individual must maintain records detailing the methodology used for estimating the casualty loss.¹⁰⁵ Again, the costs of any improvements or additions that increase the fair market value of the personal-use residential real property above its pre-casualty value, such as the cost to meet new construction requirements, must be excluded.¹⁰⁶ The De Minimis Safe Harbor Method is available only for the casualty losses of \$5,000 or less, prior to the application of the limitations under I.R.C. § 165(h).¹⁰⁷ Finally, the Insurance Safe Harbor Method allows the individual to determine the decrease in fair market value of personal-use residential real property using the estimated casualty losses determined in reports prepared by the individual's homeowners' or flood insurance company.¹⁰⁸

Revenue Procedure 2018-8 also provides a safe harbor method for determining the amount of a casualty loss to personal belongings as a result of a casualty event whether or not incurred in a Federally declared disaster.¹⁰⁹ "Personal belongings" are defined as items of tangible personal property owned by the individual who suffered a casualty and are not used in a business or transaction entered into for profit.¹¹⁰ Personal belongings do not include a boat, aircraft, mobile home, trailer, or vehicle, or an antique or other asset that maintains or increases in fair market value over time.¹¹¹ The safe harbor method available for determining the amount of the casualty loss to personal belongings whether or not the casualty occurs in a Federally declared disaster is the De Minimis Safe Harbor Method.¹¹² Under the De Minimis Safe Harbor Method, an individual may make a good faith estimate of the decrease in the fair market value of the

¹⁰⁴Rev. Proc. 2018-8, 2018-2 I.R.B. 286, § 4.03.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* § 4.04.

¹⁰⁹*Id.* § 3.01. If the casualty loss occurs in a Federally declared disaster area, an additional safe harbor method is available in determining the amount of the casualty losses with respect to personal belongings. *Id.* See *infra* text accompanying notes 333–353 (discussing the additional safe harbor method available for determining the amount of casualty losses with respect to personal belongings occurring in a Federally declared disaster area).

¹¹⁰Rev. Proc. 2018-8, 2018-2 I.R.B. 286, § 3.03.

¹¹¹*Id.*

¹¹²*Id.* § 3.01.

individual's personal belongings.¹¹³ The individual must maintain records describing the personal belongings and detailing the methodology used for estimating the casualty loss.¹¹⁴ The De Minimis Safe Harbor Method is available only for the casualty losses of \$5,000 or less, prior to the application of the limitations under I.R.C. § 165(h).¹¹⁵

D. Net Operating Loss Deduction

I.R.C. § 172 was enacted to minimize the effect of the annual accounting period that requires an individual's taxable income to be computed on the basis of the individual's tax year.¹¹⁶ By allowing a NOL to be carried forward and deducted in a succeeding tax year, the provision affords equivalence between businesses with fluctuating income and businesses with a steady flow of income.¹¹⁷ The result is a type of income averaging for the individual experiencing business losses in some tax years and business profits in other tax years.¹¹⁸

Generally, the TCJA eliminates the carrying back of an NOL, allowing only an indefinite carry forward until fully deducted.¹¹⁹ For losses arising after tax year 2017, the amount of NOL is the *lesser* of: (1) the aggregate of NOL carryovers to the current tax year;¹²⁰ or (2) 80 percent of taxable

¹¹³*Id.* § 5.01.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶I.R.C. § 441(a) (2012); BITTKER ET AL., *supra* note 367, ¶ 19.02[1]. Generally, an individual's taxable year, calendar or fiscal, is the annual accounting period in which the individual regularly computes income. I.R.C. § 441(b)–(c). The term “calendar year” means a period of twelve months ending on December 31. *Id.* § 441(d). The term “fiscal year” means a period of twelve months ending on the last day of a month other than December. *Id.* § 441(e).

¹¹⁷BITTKER ET AL., *supra* note 36, ¶ 19.02[1].

¹¹⁸*See id.*

¹¹⁹I.R.C. § 172(b)(1)(A), *amended by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (2017). With regard to certain losses incurred in the trade or business of farming, an NOL can be carried back and deducted in each of the two tax years preceding the tax year of the loss, beginning with the earlier of the two tax years, and then carried forward indefinitely. *Id.* § 172(b)(1)(B), *amended by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (2017). The NOLs of property and casualty insurance companies can be carried back to each of the two tax years preceding the loss year, beginning with the earlier of the two tax years, and carried forward to each of the succeeding twenty tax years. *Id.* § 172(b)(1)(C), *amended by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2086 (2017).

¹²⁰Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (2017). In determining the amount of NOL, the aggregate of NOL carryovers and carrybacks are considered.

income for the current tax year.¹²¹ Generally, a “net operating loss” for an individual is the excess of business deductions over gross income, subject to the following modifications: (1) personal and dependency exemptions are disallowed; (2) nonbusiness deductions are allowed only to the extent of nonbusiness income; (3) capital losses in excess of capital gains are not deductible; and (4) no exclusion of gain from the sale or exchange of qualified small business stock under I.R.C. § 1202.¹²² Casualty and thefts losses suffered by an individual in a transaction entered into for profit or a personal activity are treated as *attributable* to a business.¹²³ With regard to personal-use property, only losses deductible under I.R.C. § 165(c)(3) are treated as business losses in computing the NOL.¹²⁴ Further, the two loss limitations rules under I.R.C. § 165(h) are applied in determining the amount of any personal casualty loss.¹²⁵

III. CHARACTERIZATION OF CASUALTY GAINS AND LOSSES

The preferential treatment for capital gains comes in the form of a reduced maximum rate of tax.¹²⁶ From 2018 through 2025, the ordinary income of an individual is subject to seven tax rates, which progress from 10 percent to 37 percent,¹²⁷ with the number of tax rates reverting to six tax

Id., § 172(a), amended by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2086 (2017).

¹²¹Tax Cuts and Jobs Act § 13302. Taxable Income is determined without regard to the NOL. *Id.*

¹²²I.R.C. § 172(c)–(d); Treas. Reg. § 1.172-3(a) (2018). The deduction for personal exemptions has been suspended for tax years 2018 through 2025. I.R.C. § 151(d)(5), added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(f)(2), 131 Stat. 2054, 2085 (2017). Generally, I.R.C. Section 1202 allows an exclusion of 100 percent of the gain from the sale of qualified small business stock held for more than five years. *Id.* § 1202(a).

¹²³I.R.C. § 172(d)(4)(C).

¹²⁴*Id.* §§ 172(d)(4)(C), 165(c)(3); Treas. Reg. § 1.172-3(a)(3)(iii). See *supra* note 81 (interpreting the meaning of the phrase “arise from fire storm, shipwreck, or other casualty, or from theft” under I.R.C. § 165(c)(3)).

¹²⁵I.R.C. § 172(d)(4)(C); Treas. Reg. § 1.172-3(a)(3)(iii). See *supra* text accompanying notes 74–77 (examining the \$100 floor and the ten percent of adjusted gross income threshold provided in I.R.C. § 165(h)(1), (2)).

¹²⁶See I.R.C. § 1(a)–(d), (i). Currently, preferential tax treatment for capital gains is not available to corporate individuals. *Id.* §§ 11, 1201(a).

¹²⁷*Id.* § 1(j) (West Supp. 2018), added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001, 131 Stat. 2054 (2017).

rates after 2025, which progress from 10 percent to 39.6 percent.¹²⁸ At the same time, the *net capital gains* of an individual are subject to three maximum tax rates:¹²⁹ 15 percent for adjusted net capital gain;¹³⁰ 25 percent for unrecaptured section 1250 gain,¹³¹ and 28 percent for collectible gain¹³² and section 1202 gain.¹³³ For the high-income individuals, the tax rate on adjusted net capital gain increases to 20 percent.¹³⁴ To counterbalance the preference for capital gains, the ability to deduct capital losses in the tax year sustained is limited.¹³⁵ For individuals, I.R.C. § 1211(b) limits the deduction of capital losses to the amount of capital gains, plus, if capital losses *exceed* capital gains, the lesser of the *excess* or \$3,000.¹³⁶ Any capital losses not deductible in the current tax year are carried forward for an unlimited number of years.¹³⁷

The characterization of casualty gains and losses as ordinary gains and losses or capital gains and losses is critical for a number of reasons. First,

¹²⁸*Id.* § 1(a)–(d), (i).

¹²⁹*Id.* § 1(h). The term “net capital gain” means the excess of net long-term capital gain over net short-term capital loss. *Id.* §§ 1(h)(1), 1222(11). An asset is held long-term if held for more than one year. *Id.* § 1222(3), (4). Short-term capital gains are subject to the tax rates on ordinary income. *Id.* See § 1(h)(1)(A). Capital gains may also be subject to the 3.8 percent tax on net investment income under I.R.C. § 1411. *Id.* § 1411(a)(1), (c)(1).

¹³⁰*Id.* § 1(h)(1)(C), (3). The term “adjusted net capital gain” means long-term capital gain other than collectible gain, Section 1202 gain, and unrecaptured Section 1250 gain, plus qualified dividend income. *Id.* § 1(h)(3). To the extent adjusted net capital gain would have been taxed at ten or fifteen percent, the preferential tax rate is zero. *Id.* § 1(h)(1)(B).

¹³¹*Id.* § 1(h)(1)(E), (h)(6). The term “unrecaptured section 1250 gain” means the gain on the sale of depreciable real property attributable to depreciation deductions taken during the holding period of the property. *Id.* § 1(h)(6)(A)(i).

¹³²*Id.* §§ 1(h)(1)(F), (4), (5), 408(m)(2). The term “collectible” is defined to include any work of art, rug, antique, metal, gem, stamp, coin, alcoholic beverage, or other property specified by the Secretary of the Treasury. *Id.* § 408(m)(2).

¹³³*Id.* § 1(h)(1)(F), (4), (7). The term “section 1202 gain” means the gain on the sale of qualified small business stock in excess of the amount of gain excluded from gross income under I.R.C. Section 1202. *Id.* § 1(h)(7). See *Id.* § 1202 (allowing an exclusion from gross income of 100 percent of the gain on the sale of qualified small business stock held for more than five years).

¹³⁴*Id.* § 1(h)(1).

¹³⁵H.R. REP. NO. 67-1388 (1923). Congressional rationale for the restrictive treatment was also to lessen control over the timing of capital gains and losses. *Id.*

¹³⁶I.R.C. § 1211(b). For corporation taxpayers, the deduction of capital losses is limited to the amount of capital gains, with any unused capital losses carried back for three years and then carried forward for five years. *Id.* §§ 1211(a), 1212(a).

¹³⁷*Id.* § 1211(b). Unused capital loss carryovers expire upon the death of the individual who sustained the losses. BORIS I. BITTKER ET AL., *supra* note 36, ¶ 31.02[4].

generally, long-term capital gains are taxed at preferential tax rates.¹³⁸ Second, capital gains sustained during the tax year allows for the deduction of capital losses.¹³⁹ Third, capital losses are deductible from gross income in computing an individual's adjusted gross income.¹⁴⁰ Therefore, if the individual claims the standard deduction instead of itemizing deductions, the individual can claim the capital loss deduction and the standard deduction.¹⁴¹ In summary, the characterization of casualty gains and losses as capital gains and losses is important as long-term capital gains are taxed at preferential rates, capital gains allow for the deduction of capital losses, and capital losses are deductible even if the individual elects the standard deduction.

Long-term capital gain or loss is generated by the sale or exchange of a capital asset held for more than one year.¹⁴² Unless the character is statutorily provided,¹⁴³ capital gains and losses only result from dispositions that qualify as a *sale or exchange* and property that qualifies as a *capital asset*.¹⁴⁴ For the purposes of characterization, the receipt of insurance proceeds or other compensation for the destruction of property does *not* constitute a sale or exchange.¹⁴⁵ A "capital asset" is defined as property held by the individual whether or not connected with the individual's business.¹⁴⁶ However, the definition of a capital asset contains eight broadly interpreted exceptions,¹⁴⁷ including: (1) inventory and property held primarily for sale to customers in the ordinary course of business; and (2) depreciable property and real property used in business.¹⁴⁸ If property is held as

¹³⁸ See I.R.C. § 1(h).

¹³⁹ *Id.* §§ 1211(b), 1212(b).

¹⁴⁰ *Id.* § 62(a)(3).

¹⁴¹ *Id.* §§ 62(a)(3), 63(b), (d), (e).

¹⁴² *Id.* § 1222(3). To determine the holding period of property, the day of acquisition is excluded and the day of disposition is included. Rev. Rul. 66-7, 1966-1 C.B. 188.

¹⁴³ See, e.g., I.R.C. § 166(d) (deeming the character of nonbusiness bad debts as short-term capital losses).

¹⁴⁴ *Id.* § 1222(1)–(4).

¹⁴⁵ *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 249–50 (1941).

¹⁴⁶ I.R.C. § 1221(a).

¹⁴⁷ *Id.* § 1221(a); *Comm'r v. Gillette Motor Transp. Inc.*, 364 U.S. 130, 133 (1960).

¹⁴⁸ I.R.C. § 1221(a)(1)–(3). The exceptions also include: copyright, literary, musical, or artistic composition, a letter, memorandum or similar property created by the individual; accounts or notes received for the sale of inventory and performance of services; publications of the U.S. government acquired other than by purchase; commodities derivative financial instruments held

inventory¹⁴⁹ or primarily for sale to customers in the ordinary course of business,¹⁵⁰ the disposition of the property always produces ordinary income and losses.¹⁵¹ Most personal use assets, such as a personal residence, and investment assets, such as stock, are capital assets.¹⁵²

Depreciable business property and real property used in business are also excluded from the definition of a capital asset.¹⁵³ Nevertheless, if held for more than one year,¹⁵⁴ I.R.C. § 1231 determines the character of gains and losses from the sale or exchange of such property.¹⁵⁵ Additionally, I.R.C. § 1231 determines the character of gains and losses from the compulsory or involuntary conversion of property used in business and nonpersonal-use capital assets held for more than one year.¹⁵⁶ Generally, if aggregate gains *exceed* aggregate losses, *all* of the gains and losses are characterized as long-term capital gains and losses.¹⁵⁷ However, if the

by a dealer; clearly identified hedging transactions; and supplies regularly consumed in the ordinary course of business. *Id.* § 1221(a)(3)–(8).

¹⁴⁹*Id.* § 1221(a)(1), (b)(1)(A). Inventory accounting must be used whenever “production, purchase, or sale of merchandise is an income-producing factor.” Treas. Reg. § 1.471-1 (2018).

¹⁵⁰I.R.C. §§ 1221(a)(1), 1231(b)(1)(B). In determining whether the individual holds the property primarily for sale to customers in the ordinary course of business, the factors weighed by the court include the frequency and substantiality of the sales, the extent of development activities and improvements, and solicitation and advertising efforts. *Suburban Realty Co. v. United States*, 615 F.2d. 171, 176 (5th Cir. 1980). With regard to property held for multiple purposes, the Supreme Court defined “primarily” to mean “principally” or “of first importance.” *Malat v. Riddell*, 383 U.S. 569, 572 (1966).

¹⁵¹I.R.C. §§ 1221(a)(1), 1231(b)(1)(A), (b)(1)(B).

¹⁵²*Id.* § 1221.

¹⁵³*Id.* § 1221(a)(2).

¹⁵⁴The phrase “property used in the trade or business” means depreciable property or real property used in business and held for more than one year. *Id.* § 1231(b)(1). Property used in the trade or business does not include: (1) inventory; (2) property held primarily for sale to customers in the ordinary course of business; (3) copyright, literary, musical, or artistic composition, a letter, memorandum or similar property created by the individual; and (4) publications of the U.S. government acquired other than by purchase. *Id.* § 1231(b)(1)(A)–(D).

¹⁵⁵I.R.C. § 1231(a)(3).

¹⁵⁶*Id.* § 1231(a)(3), (4)(C). Compulsory and involuntary conversion consists of “destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof.” *Id.* § 1231(a)(3)(A)(ii).

¹⁵⁷*Id.* § 1231(a)(1). *See id.* § 1231(c) (providing recapture rules to prevent the manipulation of the netting rules in order to maximize capital gains and ordinary losses).

aggregate gains *do not exceed* the aggregate losses, *all* of the gains and losses are ordinary.¹⁵⁸

I.R.C. § 1231 also affords special treatment to gains and losses arising from a fire, storm, shipwreck, or other casualty, or from the theft of property used in business and nonpersonal-use capital assets held for more than one year.¹⁵⁹ If the aggregate losses *exceed* the aggregate gains from such casualty events, *all* of the losses and gains are ordinary.¹⁶⁰ However, if the aggregate losses *do not exceed* the aggregate gains, the character of the casualty gains and losses is determined along with the other gains and losses characterized under I.R.C. § 1231.¹⁶¹

Example: During the current tax year, Taxpayer recognized an uninsured \$10,000 loss from a fire that destroyed depreciable property used in Taxpayer's business for more than one year. Taxpayer also recognized a \$5,000 gain from an insurance recovery due to a hurricane destroying a garage used in Taxpayer's business for more than one year. Since the aggregate losses exceeded the aggregate gains from the casualty events, the losses and gains were ordinary. However, if Taxpayer's recognized gain from the destruction of the garage was \$15,000, the aggregate losses were not in excess of the aggregate gains; therefore, the character of the casualty gains and losses must be determined along with the other gains and losses characterized under I.R.C. § 1231.¹⁶² If no additional gains or losses were characterized under I.R.C. § 1231, the taxpayer's aggregate gains exceeded aggregate losses; thus, the \$15,000 gain and \$10,000 loss were long-term capital gains and losses.

¹⁵⁸ *Id.* § 1231(a)(2).

¹⁵⁹ *Id.* § 1231(a)(4)(C). *See supra* text accompanying notes 24–26 (interpreting the phrase “arise from fire, storm, shipwreck, or other casualty, or from theft” under I.R.C. § 165(c)(3)).

¹⁶⁰ *Id.* § 1231(a)(4)(C). The losses and gains are ordinary because depreciable property used in a trade or business is not a capital asset and a casualty event is not a sale or exchange of property. *Id.* § 1221(a)(2); *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 248–49, 251 (1941).

¹⁶¹ I.R.C. § 1231(a)(3), (4)(C) (2012).

¹⁶² *Id.*

I.R.C. § 165(c)(3) allows an individual a loss deduction with regard to personal-use property only if the loss arises from fire, storm, shipwreck, or other casualty, or from theft.¹⁶³ In addition to the basis limitation,¹⁶⁴ I.R.C. § 165 establishes two additional limitations to the amount of personal casualty losses: (1) a personal casualty loss is allowed only to the extent the amount of the loss from each casualty exceeds \$100;¹⁶⁵ and (2) personal casualty losses are deductible only to the extent of personal casualty gains plus the amount of the excess that exceeds ten percent of the individual's adjusted gross income.¹⁶⁶ In addition to deductible limits, I.R.C. § 165(h) determines the character of personal casualty gains and losses.¹⁶⁷ If the aggregate personal casualty gains *exceed* the aggregate personal casualty losses, *all* of the personal casualty losses are deductible and the gains and losses are deemed to be gains and losses from the sale or exchange of capital assets.¹⁶⁸ However, if aggregate personal casualty losses *exceed* personal casualty gains, *all* of the personal casualty gains and losses are ordinary.¹⁶⁹ For tax years 2018 through 2025, the deduction for *net* personal casualty losses is suspended if the personal casualty losses are not the result of a Federally declared disaster.¹⁷⁰

IV. PERMANENT TAX RELIEF AFFORDED ALL CASUALTY EVENTS

The Internal Revenue Code contains permanent tax relief provisions applicable to all individuals affected by casualty events. These provisions were enacted to ease the financial and administrative burdens of individuals in the aftermath of natural disasters. The following permanent provisions

¹⁶³ *Id.* § 165(c)(3).

¹⁶⁴ *Id.* § 165(b).

¹⁶⁵ *Id.* § 165(h)(1); Treas. Reg. § 1.165-7(b)(4)(i) (2018).

¹⁶⁶ I.R.C. § 165(h)(2)(A) (2012). *See supra* text accompanying notes 74–77 (examining the \$100 floor and the ten percent of adjusted gross income threshold provided in I.R.C. § 165(h)(1), (2)).

¹⁶⁷ I.R.C. § 165(h)(2)(A), (B) (2012).

¹⁶⁸ *Id.* § 165(h)(2)(B).

¹⁶⁹ *Id.* § 165(h)(2)(A). A casualty event is not a sale or exchange of property. *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 249–51 (1941).

¹⁷⁰ I.R.C. § 165(h)(5)(A) (West Supp. 2018). *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017). *See supra* text accompanying note 22 (discussing the disallowance of the deduction for *net* personal casualty losses incurred in non-Federally declared disaster areas).

of the Internal Revenue Code apply whether or not the casualty event is declared a federally declared disaster.

If an individual's principal residence is damaged or destroyed in a casualty event, I.R.C. § 123 allows the individual to exclude from income insurance payments received for excess living expenses.¹⁷¹ The payments must compensate or reimburse for living expenses incurred by the individual and members of the individual's household resulting from the loss of occupancy of a principal residence.¹⁷² The exclusion is limited to the amount by which actual living expenses incurred during the period of non-occupancy exceed the normal living expenses that would have been incurred during the same period.¹⁷³ Living expenses include temporary housing, meals, transportation, and other miscellaneous expenditures.¹⁷⁴

Pursuant to I.R.C. § 139, an individual may also exclude from income qualified disaster relief payments received as the result of a qualified disaster.¹⁷⁵ A "qualified disaster relief payment" includes any payment to an individual: (1) to reimburse for reasonable and necessary personal, living, family, or funeral expenses; (2) to reimburse for reasonable and necessary expenses incurred to repair a personal residence or replace of its contents; or (3) paid by a federal, state, or local government in connection with a qualified disaster to promote the general welfare.¹⁷⁶ A "qualified disaster" includes: (1) a Federally declared disaster; (2) a disaster which results from an accident involving a common carrier or any other event determined by the Secretary of the Treasury to be catastrophic; or (3) a disaster which is determined by an applicable federal, state, or local authority to warrant government assistance.¹⁷⁷ I.R.C. § 139 also excludes from income "qualified disaster mitigation payments," which are defined as any amount paid

¹⁷¹I.R.C. § 123(a). The provision also applies if the individual is denied access to the residence by governmental authorities because of the occurrence or threat of occurrence of a casualty event. *Id.*

¹⁷²*Id.*

¹⁷³*Id.* § 123(b). If, at the end of the period of non-occupancy, the total insurance proceeds received exceed the increased living expenses during the period of dislocation, the excess insurance proceeds are includible in income in the tax year in which the period of non-occupancy ends. Rev. Rul. 93-43, 1993-2 C.B. 69.

¹⁷⁴Treas. Reg. § 1.123-1(b)(2) (2017).

¹⁷⁵I.R.C. § 139(a).

¹⁷⁶*Id.* § 139(b)(1), (2), (4).

¹⁷⁷*Id.* § 139(c)(2)-(4). The term "qualified disaster" also includes any terrorist or military action. *Id.* § 139(c)(1).

pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act or the National Flood Insurance Act to be used for hazard mitigation of an individual's property.¹⁷⁸

I.R.C. §§ 402 and 408 require that distributions from tax-deferred retirement plans be transferred into eligible retirement plans within sixty days from receipt by the employee, participant, or beneficiary to avoid income tax and penalties.¹⁷⁹ Nevertheless, the Secretary of the Treasury may waive the sixty-day requirement circumstances where the imposition of the sixty-day requirement would be against equity or good conscience, such as in the case of a "casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement."¹⁸⁰ Accordingly, individuals seeking to roll over tax-deferred distributions into eligible retirement plans may be given an extension without the imposition of income tax and penalties if efforts to meet the requirement are frustrated by a natural disaster.¹⁸¹

I.R.C. § 1033 allows an individual to elect *not* to recognize gain realized on the involuntary conversion of property to the extent the money received is reinvested in property similar or related in service or use to the converted property.¹⁸² The involuntary conversion of property is "its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof."¹⁸³ To determine whether property is *similar or related in service or use*, two tests have been established: (1) the owner-user test; and (2) the owner-lessor test.¹⁸⁴ The *owner-user test* looks at the functional similarities between the properties, requiring the physical characteristics and end uses of the converted and replacement properties to be closely

¹⁷⁸ *Id.* § 139(g). Individuals may *not* increase the basis of their property as a result of the improvements or take a deduction or credit for expenditures made with respect to the qualified disaster mitigation payments. *Id.* § 139(g)(3), (h).

¹⁷⁹ *Id.* §§ 402(c), 408(d).

¹⁸⁰ *Id.* §§ 402(c)(3)(B), 408(d)(3)(I) (West Supp. 2018).

¹⁸¹ *Id.* §§ 402(c)(3)(B), 408(d)(3)(I) (West Supp. 2018).

¹⁸² *Id.* § 1033(a)(2). Realized gain is recognized to the extent money received on the involuntary conversion *exceeds* the cost of the replacement property. *Id.* § 1033(a)(2)(A). Generally, the replacement period begins on the date of the conversion and ends two years after the close of the first tax year in which gain is realized. *Id.* § 1033(a)(2)(B). The basis of the replacement property is the amount paid for the property reduced by any unrecognized gain. *Id.* § 1033(b)(1).

¹⁸³ *Id.* § 1033(a).

¹⁸⁴ Rev. Rul. 79-261, 1979-2 C.B. 295.

similar.¹⁸⁵ The *owner-lessor test* focuses on the extent and type of the lessor's management activity, the amount and kind of services rendered by the lessor to the tenants, and the nature of the business risks associated with the properties.¹⁸⁶

If an individual *owns* and *uses* a residence as a principal residence for a period aggregating two years during the five-year period ending on the date of the sale, the individual can permanently *exclude* up to \$250,000 gain every two years on the sale of the residence under I.R.C. § 121.¹⁸⁷ However, if the disposition of the principal residence within the two-year period is by reason of an unforeseen circumstance, including involuntary conversions and natural disasters, the individual may exclude a corresponding fraction of the exclusion amount.¹⁸⁸ Further, unforeseen circumstances are also not considered periods of nonqualified use, reducing the amount of excludable gain.¹⁸⁹ A formula determines the portion of the gain on the sale of a principal residence attributable to periods of nonqualified use, which are, generally, periods the residence is not used as a principal residence.¹⁹⁰

If an individual's principal residence is involuntarily converted, I.R.C. § 1033 and I.R.C. § 121 can be combined to allow for both the deferral of realized gain and the exclusion of recognized gain.¹⁹¹ I.R.C. § 121 treats an involuntary conversion as a sale.¹⁹² In applying I.R.C. § 1033, the difference between the proceeds received from the involuntary conversion, reduced by the gain excluded under I.R.C. § 121, is treated as the amount realized.¹⁹³ Finally, the period of ownership and use by the individual of the

¹⁸⁵ Rev. Rul. 76-319, 1976-2 C.B. 242.

¹⁸⁶ Rev. Rul. 64-237, 1964-2 C.B. 319.

¹⁸⁷ I.R.C. § 121(a), (b). If a joint return is filed, a couple can exclude up to \$500,000 of gain on the sale of a residence if the requirements of I.R.C. § 121 are otherwise met. *Id.* § 121(a), (b).

¹⁸⁸ *Id.* § 121(c); *see also* Treas. Reg. § 1.121-3(e) (2017) (defining unforeseen circumstances and providing safe harbors and examples of unforeseen circumstances). The formula is the maximum exclusion amount multiplied by the ratio of: (1) the shorter of (a) the aggregate period within the five-year period prior to sale that the taxpayer owned and used the residence as a principal residence or (b) the period from the most recent sale for which the taxpayer excluded gain under I.R.C. § 121, over (2) two years. I.R.C. § 121(c)(1).

¹⁸⁹ I.R.C. § 121(b)(5)(A).

¹⁹⁰ *Id.* § 121(b)(5)(B), (C). The formula is gain on the sale of the residence multiplied by the ratio of the aggregate period of nonqualified use during individual's ownership of residence over the aggregate period of the individual's ownership of the residence. *Id.* § 121(b)(5)(B).

¹⁹¹ *Id.* § 121(d)(5)(B).

¹⁹² *Id.* § 121(d)(5)(A).

¹⁹³ *Id.* § 121(d)(5)(B).

converted principal residence is tacked onto the ownership and use of the replacement principal residence for purposes of I.R.C. § 121.¹⁹⁴

Example: In January of the current tax year, Taxpayer's residence, which cost \$100,000, was destroyed in a hurricane. Taxpayer, a single individual, owned and used the residence as a principal residence for five years prior to the hurricane. Taxpayer received \$700,000 of insurance proceeds for the destruction of the residence. By the end of the tax year, Taxpayer used the \$700,000 of insurance proceeds to construct a new principal residence on the same location. As a result of the hurricane, Taxpayer realized \$600,000 gain (\$700,000 amount realized minus \$100,000 basis). Under I.R.C. § 121, Taxpayer excluded \$250,000 of the \$600,000 realized gain from income. For the purposes of I.R.C. § 1033, Taxpayer's amount realized is \$450,000 (\$700,000 amount realized minus \$250,000 exclusion amount), resulting in realized gain of \$350,000 (\$450,000 amount realized minus \$100,000 basis). Since Taxpayer reinvested an amount equal to or greater than the amount realized of \$450,000 in the construction of the new principal residence, Taxpayer may defer the recognition of the \$350,000 realized gain under I.R.C. § 1033. Taxpayer's basis in the replacement principal residence is \$350,000 (\$700,000 cost of the replacement principal residence minus \$350,000 unrecognized gain).

V. PERMANENT TAX RELIEF AFFORDED ONLY FEDERALLY DECLARED DISASTERS

A. *Federally Declared Disaster Process*

During the past fifty years, Congress has created a legal edifice of byzantine complexity to cope with natural disasters consisting of laws, agencies, programs, policies, and strategies, many of them intended to operate in "partnership" with state and local governments. . . . The

¹⁹⁴*Id.* § 121(d)(5)(C).

number and variety of federal agencies involved in disaster-related activities is breathtaking.¹⁹⁵

Since greater tax relief and economic incentives are afforded Federally declared disasters, the designation of a casualty event as a Federally declared disaster is pivotal. For tax purposes, the term “Federally declared disaster” means any disaster determined by the President of the United States to warrant assistance by the federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),¹⁹⁶ and the term “disaster area” means the area so determined to warrant assistance.¹⁹⁷ The passage of the Stafford Act¹⁹⁸ reflects the congressional finding that, because “disasters cause loss of life, human suffering, loss of income, and property damage, and often disrupt the normal functioning of governments and communities,” special measures are necessary to aid the efforts of affected States in order to expedite the rendering of aid, assistance, and emergency services.¹⁹⁹ The Stafford Act furnishes the Federal government authority to provide States and local governments orderly and continuing assistance in carrying out their responsibility to alleviate the suffering and damage resulting from disaster events.²⁰⁰

The Stafford Act establishes the process for requesting a disaster declaration, the conditions necessary for obtaining assistance, and the types of assistance available for relief expenditures.²⁰¹ The Governors of affected

¹⁹⁵RUTHERFORD H. PLATT, DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS 277 (1999).

¹⁹⁶I.R.C. § 165(i)(5)(A).

¹⁹⁷*Id.* § 165(i)(5)(B).

¹⁹⁸Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5207 (2018). See *The Disaster Declaration Process*, DEP’T OF HOMELAND SEC., <https://www.fema.gov/disaster-declaration-process> (last updated Jan. 8, 2018) (explaining the declaration process and assistance provided under the Stafford Act); See also *A Guide to the Disaster Declaration Process and Federal Disaster Assistance*, DEP’T OF HOMELAND SEC., https://www.fema.gov/media-library-data/20130726-1536-20490-8240/dec_proc.pdf (last updated July 21, 2014); *Overview of Federal Disaster Assistance*, DEP’T OF HOMELAND SEC., http://training.fema.gov/emiweb/downloads/is7unit_3.pdf. (last visited July 16, 2018).

¹⁹⁹42 U.S.C. § 5121(a) (2012).

²⁰⁰Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 § 101(b). Section 101(b) of the Stafford Act lists the types of assistance provided by the federal government to affected States. *Id.*

²⁰¹Thomas A. Garrett & Russel S. Sobel, *The Political Economy of FEMA Disaster Payments*, 41 ECONOMIC INQUIRY 496, 497 (2003). Generally, assistance programs are categorized as one of three types: (1) individual assistance, which includes housing, grants, low-

States submit a request to the President for a federal disaster declaration.²⁰² The request is based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and local governments.²⁰³ As a prerequisite to federal disaster assistance, the Governor must take appropriate response action under the State law, direct execution of the State's emergency plan, and furnish information on the nature and amount of State and local resources committed to alleviating the results of the disaster.²⁰⁴ Based on the request, the President may declare that a major disaster or provide emergency assistance.²⁰⁵ Only after a disaster is declared can disaster relief be provided with the Federal Emergency Management Agency (FEMA) in charge of the level of relief funding for the area and Congress in charge of further appropriations if the necessary funding is beyond FEMA's allocated budget.²⁰⁶

interest disaster loans, and other aid programs; (2) public assistance, which provides monetary assistance to State and local governments; and (3) hazard mitigation, which includes programs that attempt to decrease the potential damage of future disasters. *Overview of Federal Disaster Assistance*, DEP'T OF HOMELAND SEC., http://training.fema.gov/emiweb/downloads/is7unit_3.pdf (last visited July 16, 2018).

²⁰²42 U.S.C. §§ 5170(a), 5191(a). The terms "United States" and "State" mean any state in the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of Northern Marina Islands. *Id.* § 5122(3). Federally recognized Indian tribal governments have the option of pursuing a declaration directly from the President. *Id.* §§ 5170(b), 5191(c).

²⁰³*Id.* §§ 5170(a), 5191(a).

²⁰⁴*Id.* § 5170(a). The Governor must also certify that the State and local government obligations and expenditures will comply with all applicable cost-sharing requirements of the Stafford Act. *Id.*

²⁰⁵*Id.* §§ 5170(a), 5191(a). There were forty-eight major disaster declarations and sixty-eight emergency declarations in 2005; fifty-two major disaster declarations and 5 emergency declarations in 2006; sixty-three major disaster declarations and thirteen emergency declarations in 2007; seventy-five major disaster declarations and seventeen emergency declarations in 2008; fifty-nine major disaster declarations and seven emergency declarations in 2009; eighty-one major disaster declarations and nine emergency declarations in 2010; ninety-nine major disaster declarations and twenty-nine emergency declarations in 2011; forty-seven major disaster declarations and sixteen emergency declarations in 2012; sixty-two major disaster declarations and five emergency declarations in 2013; forty-five major disaster declarations and six emergency declarations in 2014; twenty-six major disaster declarations and no emergency declarations in 2015; thirty-five major disaster declarations and four emergency declarations in 2016; and sixty-three major disaster declarations and sixteen emergency declarations in 2017. *Disaster Declarations by Year*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disasters/grid/year> (last visited July 16, 2018).

²⁰⁶Garrett, *supra* note 201.

The Stafford Act provides for two types of disaster declarations: major disaster declaration and emergency declaration. The President may declare a major disaster for any natural event that the President determines has caused damage of such severity that it is beyond the combined response capabilities of State and local governments.²⁰⁷ A major disaster declaration allows for a wide range of federal assistance programs for individuals and public infrastructure both emergency and permanent.²⁰⁸ Alternatively, the President may declare a state of emergency to supplement State and local emergency assistance efforts.²⁰⁹ The emergency services may include the protection of lives, property, public health, and safety, or to lessen or avert the threat of a catastrophe.²¹⁰ In addition to FEMA's assistance programs, a variety of special tax relief provisions are available for individuals affected by a Federally declared disaster, including both major disasters and emergency declarations.²¹¹

In the granting or denying of FEMA disaster relief, political influence may enter the process from two potential sources.²¹² As authorized by the Stafford Act, the President has the sole discretion to approve or deny a request submitted by a Governor for a declaration of a major disaster or emergency assistance.²¹³ Such unilateral authority, coupled with the lack of a concrete set of criteria upon which to base the declaration, allows politics to be a factor in the President's decision to declare a federal disaster.²¹⁴ As a

²⁰⁷42 U.S.C. § 5170. Natural events include any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or, regardless of cause, fire, flood, or explosion. *The Disaster Declaration Process*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disaster-declaration-process> (last updated Jan. 8, 2018). The Stafford Act also provides for disaster preparedness and mitigation assistance. 42 U.S.C. § 5131.

²⁰⁸*See* 42 U.S.C. § 5170a (describing the type of federal assistance available for declared major disasters).

²⁰⁹*Id.* § 5192(a).

²¹⁰*See id.* (describing the type of federal assistance available for declared emergencies).

²¹¹I.R.S. PUB. NO. 547, CASUALTIES, DISASTERS, AND THEFTS (2017) (explaining the tax treatment of casualties, thefts, and losses on deposits).

²¹²Garrett, *supra* note 201.

²¹³*See* 42 U.S.C. §§ 5170a (Supp. 2018), 5191(a); *The Disaster Declaration Process*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disaster-declaration-process> (last updated Jan. 8, 2018).

²¹⁴Garrett, *supra* note 201. *See* Naim Kapucu, Montgomery Van Wart, Richard Sylves & Farhod Yuldashev, *U.S. Presidents and Their Roles in Emergency Management and Disaster Policy 1950-2009*, 2 RISK, HAZARDS & CRISIS IN PUB. POL'Y 1 (2011) (analyzing the disaster management performance of U.S. Presidents); Richard S. Salkowe & Jayajit Chakraborty, *Federal*

result, the declaration process tolerates a degree of subjectivity, and sometimes political bias, in the presidential decision whether or not to approve or turn down any single gubernatorial request.²¹⁵ Evidence suggests that States politically important to a President have higher rates of disaster declarations and the mean level of disaster declarations increases in election years as compared to nonelection years.²¹⁶ The potential for political influence exists not only as to whether a Federal disaster is declared but also the amount of funding allocated to the disaster.²¹⁷ Once a Federal disaster is declared, researchers have found that the amount of disaster relief per natural event increases with the number of representatives of an affected State on FEMA oversight committees in the House of Representatives.²¹⁸

Disaster Relief in the U.S.: The Role of Political Partisanship and Preference in Presidential Disaster Declarations and Turndowns, 6 DEP'T OF HOMELAND SEC. AND EMERGENCY MGMT. 28 (2009) (describing and analyzing studies that investigate the role of political influence in the presidential disaster declaration process and noting a positive relationship between presidential reelection years and success in acquiring a disaster declaration as well as spatial disparities in the distribution of disaster declarations); Richard Salkowe, *Federal Disaster Declarations and Denials: Analyzing Spatial Equity in the Implementation of the Stafford Act* (Jan. 2014) (unpublished Ph.D. dissertation, University of South Florida) (describing and analyzing, including the research of other scholars, the political, economic, geographic, and health-related aspects of the disaster declaration process). *But see* BRUCE R. LINDSAY & FRANCIS X. MCCARTHY, FED'N OF AM. SCIENTISTS, STAFFORD ACT DECLARATIONS 1953-2014: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS 13-21 (2015), (providing possible explanations for the increase in disaster declarations, including an increase in weather-related incidents, an increase in population and development, policy changes and political considerations, the evolution of federal disaster policy, changes in FEMA policy, and possible presidential election-year influence on major disaster and emergency declarations).

²¹⁵RICHARD SYLVES, *DISASTER POLICY & POLITICS: EMERGENCY MANAGEMENT AND HOMELAND SECURITY* 124 (2d ed. 2015).

²¹⁶Garrett, *supra* note 201, at 504-505, 508 (July 2003). *See* Dan Hopkins, *The Political Fallout of Natural Disasters*, WASH. POST (May 26, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/26/the-political-fallout-of-natural-disasters/?utm_term=.ad7e662372ca (noting social scientists found that voters reward Governors who seek presidential declarations with an increase in voter support of approximately four percent and punish Presidents who deny disaster requests with a decline in voter support of approximately one percent); Thomas Husted & David Nickerson, *Political Economy of Presidential Disaster Declarations and Federal Disaster Assistance*, 42 PUB. FIN. REV. 35 (2014) (finding that disaster declarations are more likely if an incumbent Governor facing reelection is from the same political party as the President).

²¹⁷*See* Garrett, *supra* note 201.

²¹⁸*Id.* at 505-508.

Media coverage is critical in the realm of disaster declarations and helps drive political considerations in the declaration process.²¹⁹ Advances in technology and the rise of the 24-hour news networks are contributing factors in the decision of a President to issue a declaration.²²⁰ During the last thirty years, Presidents have taken a greater interest in disaster events from both a political and public policy perspective.²²¹ Mass media exposure allows a President to demonstrate responsiveness, compassion, leadership, engagement, and presidential priority, and the approval of a Governor's disaster relief request provides an opportunity to generate managerial and political credit with the public.²²² For example, Presidents now customarily visit a major disaster site to demonstrate responsiveness and empathy and concern toward the victims.²²³ Particularly, in the cases of marginal disasters, the intensity of national news coverage of the event often compels the President to exercise the authority to provide federal aid.²²⁴ The perceived mishandling of Hurricane Andrew by President George H. W. Bush damaged his public image sufficiently to have contributed to his defeat in the 1992 presidential election.²²⁵ And the seeming unresponsiveness of the federal government during Hurricane Katrina in 2005 ultimately contributed to the growing public opposition to the policies of the President George W. Bush administration and the election of Barack Obama in 2008.²²⁶

²¹⁹RICHARD SYLVES, *DISASTER POLICY & POLITICS: EMERGENCY MANAGEMENT AND HOMELAND SECURITY* 124 (2d ed. 2015).

²²⁰BRUCE R. LINDSAY & FRANCIS X. MCCARTHY, *FED'N OF AM. SCIENTISTS, STAFFORD ACT DECLARATIONS 1953-2014: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS* 23 (2015).

²²¹*Id.*

²²²Naim Kapucu, Montgomery Van Wart, Richard Sylves & Farhod Yuldashev, *U.S. Presidents and Their Roles in Emergency Management and Disaster Policy 1950-2009*, 2 *RISK, HAZARDS & CRISIS IN PUB. POL'Y* 1, 8 (2011) (analyzing the disaster management performance of U.S. Presidents).

²²³Lindsay & McCarthy, *supra* note 220.

²²⁴Lindsay & McCarthy, *supra* note 220 at 24.

²²⁵RICHARD SYLVES, *DISASTER POLICY & POLITICS: EMERGENCY MANAGEMENT AND HOMELAND SECURITY* 124 (2d ed. 2015).

²²⁶GAVIN SMITH, *PLANNING FOR POST-DISASTER RECOVERY: A REVIEW OF THE UNITED STATES DISASTER ASSISTANCE FRAMEWORK* 39 (2011). Highly critical of the mass media's coverage of Hurricane Katrina, one scholar stated, "[n]ational media had become a megaphone for hysteria and blame. Among the casualties were truth, speed in offering help, and progress in both international affairs and domestic race relations." MARVIN OLASKY, *THE POLITICS OF DISASTER: KATRINA, BIG GOVERNMENT, AND NEW STRATEGY FOR FUTURE CRISES* 21 (2006).

B. Permanent Tax Relief Afforded Federally Declared Disasters

Some permanent provisions of the Internal Revenue Code afford tax relief to victims of disaster events whether or not declared a Federally declared disaster.²²⁷ Nevertheless, numerous permanent provisions of the Internal Revenue Code afford tax relief exclusively to victims of Federally declared disasters, which include disaster events designated as both major disasters and emergency declarations.²²⁸

1. I.R.C. § 165(h): Deduction of Net Personal Casualty Losses

Individuals are allowed a loss deduction with regard to personal-use property only if the loss arises “from fire, storm, shipwreck, or other casualty, or from theft.”²²⁹ In addition to the basis limitation,²³⁰ I.R.C. § 165(h) provides two additional limitations to the amount of personal casualty losses: (1) a personal casualty loss is allowed only to the extent the amount of the loss from each casualty exceeds \$100; and (2) personal casualty losses are deductible only to the extent of personal casualty gains plus the amount of the *excess* that exceeds ten percent of the individual’s adjusted gross income.²³¹ If the personal casualty losses are attributed to a Federally declared disaster, the *excess* personal casualty losses are allowed as a deduction.²³² However, for tax years 2018 through 2025, the deduction of *excess* personal casualty losses is suspended if the personal casualty losses are incurred in a non-Federally declared disaster.²³³

²²⁷ See *supra* Part IV (listing permanent tax relief provisions afforded disaster events whether or not declared a Federally declared disaster).

²²⁸ I.R.S. PUB. NO. 547, CASUALTIES, DISASTERS, AND THEFTS (2017) (explaining the tax treatment of casualties, thefts, and losses on deposits). See *supra* text accompanying notes 207–208 (discussing the distinction between major disasters and emergency declarations).

²²⁹ I.R.C. § 165(c)(3) (West Supp. 2018).

²³⁰ *Id.* § 165(b).

²³¹ *Id.* § 165(h)(1), (2)(A). See *supra* text accompanying notes 74–77 (examining the \$100 floor and the ten percent of adjusted gross income threshold provided in I.R.C. § 165(h)(1), (2)(A)).

²³² I.R.C. § 165(h)(5)(A) (West Supp. 2018), *added by* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11044(a), 131 Stat. 2054, 2087 (2017).

²³³ *Id.* § 165(h)(5). See *supra* text accompanying note 22 (detailing the suspension of the deductibility of *net* personal casualty losses if incurred in a non-Federally declared disaster).

2. I.R.C. § 165(i): Disaster Loss Deductions Claimed in Preceding Tax Year

If elected, a loss from a Federally declared disaster²³⁴ will be treated as sustained, and the disaster to have occurred, in the tax year immediately *preceding* the disaster year under I.R.C. § 165(i).²³⁵ Thus, an individual has the flexibility to deduct the disaster loss in either the tax year in which the disaster event occurred or the previous tax year by filing an amended return.²³⁶ If an election is made, the amount of the uncompensated disaster loss is determined based on the facts existing at the time the individual claims the loss deduction.²³⁷ Any insurance proceeds or other funds received after the close of the tax year in which the deduction is claimed are includible in the individual's income under the tax benefit rule.²³⁸ Because the disaster event is treated as sustained in the preceding tax year, an individual's adjusted gross income for the preceding tax year is used to determine the amount of deductible personal casualty losses.²³⁹

²³⁴The term "Federally declared disaster" means any disaster determined by the President of the United States to warrant assistance by the federal government under the Stafford Act, and the term "disaster area" means the area so determined to warrant assistance. I.R.C. § 165(i)(5) (West Supp. 2018).

²³⁵I.R.C. § 165(i)(1), (2) (West Supp. 2018); Treas. Reg. § 1.165-11T(c) (2018). The election to deduct a disaster loss in the tax year preceding the disaster must be made on or before six months after the due date, without extension, for filing the return for the disaster year. Treas. Reg. § 1.165-11T(f) (2018). An election made pursuant to I.R.C. § 165(i) applies to the entire loss sustained from the disaster during the disaster year. *Id.* § 1.165-11T(d). *See* Rev. Proc. 2016-53, 2016-44 I.R.B. (requiring an election statement with the original or amended tax return and listing the information that must be included in the election statement). An appraisal for the purpose of obtaining a loan of federal funds or a loan guaranteed from the federal government may be used to establish the amount of the disaster loss. I.R.C. § 165(i)(4) (West Supp. 2018).

²³⁶I.R.C. § 165(a), (i)(2) (West Supp. 2018); Treas. Reg. § 1.165-11T(d) (2018).

²³⁷I.R.C. § 165(i)(3) (West Supp. 2018). The amount of the loss deducted in the preceding year cannot exceed the amount of reimbursement from insurance or other compensation that the individual is entitled to receive, or is expected to receive, determined on the basis of facts existing at the time the individual files the return or refund claim. *Id.*

²³⁸*See generally* BORIS I. BITTKER ET AL., *supra* note 36, ¶ 3.07 (discussing the tax benefit rule that requires the inclusion in income of previously deducted items).

²³⁹I.R.C. § 165(i)(2); Treas. Reg. § 1.165-11T(c) (2018); I.R.S. Notice 90-21, 1990-1 C.B. 332, § IV.B. *See supra* text accompanying notes 74-77 (examining the \$100 floor and the ten percent of adjusted gross income threshold provided in I.R.C. § 165(h)(1), (2)(A)).

3. I.R.C. § 165(k): Deduction of Costs to Demolish or Relocate a Residence

Pursuant to I.R.C. § 280B, the owner or lessee of a building cannot claim an otherwise allowable deduction for demolition costs or losses sustained in connection with the demolition of a building and its structural components.²⁴⁰ Instead, the basis of the building and the demolition costs are capitalized and added to the basis of the land on which the structure was located.²⁴¹ If a casualty event damages or destroys a structure and, as a result, the structure is demolished, the basis of the structure is *reduced* by the amount of the casualty loss deduction allowable under I.R.C. § 165 and *increased* by the costs incurred on the demolition of the structure damaged or destroyed by the casualty event and any losses sustained on account of the demolition.²⁴²

Nevertheless, if an individual is ordered by State or local government to demolish or relocate a residence located in a Federally declared disaster area within 120 days after the date of the disaster declaration, the individual may deduct any loss attributable to the demolition or relocation of the residence as a disaster loss under I.R.C. § 165(k).²⁴³ The legislative history of the provision requires that the residence be materially more dangerous after the disaster event and the danger be from a materially increased risk of future failure or destruction as a result of the disaster event.²⁴⁴ As a consequence of a storm, flood, fire, earthquake, mudslide, hurricane, lightning, or tornado, the residence is rendered unsafe for use as a residence.²⁴⁵ For example, if a residence is ordered to be demolished or

²⁴⁰I.R.C. § 280B(1) (2012); Treas. Reg. § 1.280B-1(a)–(b) (2018) (a building’s structural components include its various parts, such as the walls, floors, and ceilings, and its systems, such as heating, plumbing, and lighting); Treas. Reg. § 1.48-1(e)(2), 1.280B-1(b). *See* Rev. Proc. 95-27, 1995-1 C.B. 704 (providing a safe harbor that a structural modification of an existing building will not be treated as a demolition if: (1) seventy-five percent or more of the existing external walls are retained in place as external or internal walls; and (2) seventy-five percent or more of the existing internal structural framework is retained in place).

²⁴¹I.R.C. § 280B(2) (West Supp. 2018); Treas. Reg. § 1.280B-1(a) (2018).

²⁴²I.R.S. Notice 90-21, 1990-1 C.B. 332, § IV.C. *See* I.R.C. § 1016(a)(1) (2018) (requiring the basis of property damaged or destroyed by a casualty event *decreased* for insurance or other compensation received and loss deduction taken losses and *increased* for capital expenditures).

²⁴³I.R.C. § 165(k) (West Supp. 2018).

²⁴⁴JOINT COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 1166 (1984).

²⁴⁵*Id.*

relocated as a result of a storm because the residence was rendered unsafe by nearby mudslides, a loss deduction for the unrecovered basis of the residence is allowed.²⁴⁶

4. I.R.C. § 1033(h): Gain Deferral Applicable to a Principal Residence and Business and Investment Property

Pursuant to I.R.C. § 1033, an individual may elect not to recognize gain realized on the involuntary conversion of property if the money received as a result of the involuntary conversion is reinvested in property similar or related in service or use to the converted property.²⁴⁷ I.R.C. § 1033(h) provides special treatment for the compulsorily or involuntarily conversion of an individual's principal residence due to a Federally declared disaster.²⁴⁸ First, the replacement period is extended from two years to four years after the close of the first tax year in which any part of the gain is realized.²⁴⁹ Additionally, for the destruction of *unscheduled* personal property that was part of the contents of the residence, no gain is recognized on the receipt of insurance proceeds even if the proceeds are not used to acquire replacement property.²⁵⁰ Any insurance proceeds received for the destruction of the principal residence and *scheduled* contents may be treated as a common pool of funds.²⁵¹ As a common pool, at the election of the individual, gain is recognized only to the extent the common pool exceeds the cost of the replacement property.²⁵² This treatment allows the individual to use the common pool of funds to replace or rebuild the residence and/or replace the scheduled contents.²⁵³

Example: A mudslide that was declared a Federal disaster totally destroyed Taxpayer's principal residence and its contents. The destroyed contents included jewelry, art, and sterling flatware that were separately scheduled for insurance purposes, and furniture, appliances, clothing, and

²⁴⁶ *Id.*

²⁴⁷ I.R.C. § 1033(a). *See supra* text accompanying notes 192–194 (discussing the requirements and application of I.R.C. section 1033).

²⁴⁸ I.R.C. § 1033(h)(1) (West Supp. 2018).

²⁴⁹ *Id.* § 1033(a)(2)(B), (h)(1)(B).

²⁵⁰ *Id.* § 1033(h)(1)(A)(i); Rev. Rul. 95-22, 1995-1 C.B. 145.

²⁵¹ I.R.C. § 1033(h)(1)(A)(i).

²⁵² *See id.* § 1033(h)(1)(A)(ii); Rev. Rul. 95-22, 1995-1 C.B. 145.

²⁵³ AM. INST OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 37.

various other items of functional or decorative use that were not separately scheduled for insurance purposes. Taxpayer received insurance proceeds as follows: \$500,000 for loss of the residence, \$25,000 for loss of the jewelry, \$15,000 for loss of the art, \$10,000 for loss of the sterling flatware, and \$100,000 for loss of the unscheduled household contents. Within three years of the casualty event, Taxpayer spent \$700,000 to construct a new residence and did not replace the scheduled or unscheduled contents. Taxpayer will not recognize gain with respect to the \$100,000 received for the loss of the unscheduled contents regardless of Taxpayer's use of the funds. Taxpayer will not recognize gain with respect to the residence and scheduled contents as the cost of rebuilding the residence exceeded the common pool of funds (\$700,000 rebuilding costs exceeded the \$550,000 common pool (\$500,000 for dwelling unit plus \$25,000 for jewelry, \$15,000 for art, and \$10,000 for sterling flatware)).

The compulsorily or involuntarily conversion as a result of a Federally declared disaster of business or investment properties is also given special treatment under I.R.C. § 1033(h).²⁵⁴ If *business* or *investment* property is converted in a casualty event, any tangible property of the type held for use in a *business* will be treated as qualifying replacement property.²⁵⁵ For example, real property can be replaced with personal property, investment property can be replaced with business property, and property used in one type of business can be replaced with property used in another type of business.²⁵⁶ Thus, if an individual engaged in a retail-clothing business on leased premises loses inventory and fixtures in an earthquake that was declared a federal disaster, the use of insurance proceeds to purchase a motel business will be treated as property similar or related in service or use to the destroyed property.²⁵⁷

²⁵⁴I.R.C. § 1033(h)(2) (West Supp. 2018).

²⁵⁵*Id.*

²⁵⁶DANIEL L. SIMMONS ET AL., *supra* note 59.

²⁵⁷*Id.*

5. I.R.C. § 7508A: Authority to Postpone Certain Tax-Related Deadlines

I.R.C. § 7508A grants authority to the Secretary of the Treasury to postpone for up to one year any deadline in determining the tax liability of an individual affected by a Federally declared disaster.²⁵⁸ The actions that may be postponed include: (1) filing of an income, estate, gift, excise, or employment tax return; (2) paying any income, estate, gift, excise, or employment tax; (3) making of contributions to a qualified retirement plan; (4) filing a petition with the Tax Court or for review of a Tax Court decision; (5) filing a claim for credit or refund; and (6) any other time-sensitive act required or permitted under the Internal Revenue Code.²⁵⁹ In addition, the individual may be relieved from interest, penalties, additional amounts, or additions to tax during the postponement period.²⁶⁰ With regard to the failure to pay estimated tax as the result of a casualty, disaster, or other unusual circumstance, I.R.C. § 6654 allows the waiver of the underpayment penalty to the extent the Secretary of the Treasury determines that the imposition of the penalty would be inequitable and against good conscience.²⁶¹

VI. TAX RELIEF AFFORDED FEDERALLY DECLARED DISASTERS THROUGH SPECIAL LEGISLATION

There is, after all, evidence that voters punish incumbents for everything from shark attacks to losses by local sports teams. But on disasters specifically, the most recent evidence suggests more than just knee-jerk blame for whoever happens to be in office. Multiple studies indicate that when incumbents act in voters' interests in the wake of

²⁵⁸I.R.C. § 7508A(a) (West Supp. 2018) (individuals affected by a terrorist or military action are also included); *id.*

²⁵⁹*Id.* § 7508A(a)(1), (a)(3); Treas. Reg. § 301.7508A-1(c)(1). *See id.* § 301.7508A-1(c)(2) (listing acts performed by the Internal Revenue Service that may be postponed); Rev. Proc. 2007-56, 2007-2 C.B. 388 (providing an updated list of time-sensitive acts, the performance of which may be postponed under I.R.C. § 7508A).

²⁶⁰I.R.C. § 7508A(a)(2); Treas. Reg. § 301.7508A-1(b)(2).

²⁶¹I.R.C. § 6654(e)(3) (West Supp. 2018).

a disaster, they are rewarded with increased support. After disasters, people rise to the occasion, and so do voters.²⁶²

The following is a general description of legislation enacted by Congress to assist individuals and businesses impacted by casualty events declared by the President as Federal disaster areas.²⁶³ Surveyed are the most recent legislation and, in addition, the legislation enacted in response to Hurricane Katrina. These tax provisions extend tax relief and economic incentives to victims of a particular casualty event or casualty events occurring during a particular tax year.²⁶⁴ Although the tax relief and economic incentives provided are often similar, the total packages are different with some disaster events and disaster years receiving more favorable tax treatment.²⁶⁵ Further, while the victims of selected casualty events benefit from special legislation, the victims of other Federally declared disasters, unless administrative relief is provided, are limited to the permanent tax relief provisions of the Internal Revenue Code applicable to casualty events whether or not Federally declared disasters.²⁶⁶

A. *Bipartisan Budget Act of 2018*

In addition to providing a continuing resolution to fund the federal government through March 23, 2018, the Bipartisan Budget Act provided tax relief and economic incentives to individuals and businesses ravished by

²⁶²Dan Hopkins, *The Political Fallout of Natural Disasters*, WASH. POST (May 26, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/05/26/the-political-fallout-of-natural-disasters/?noredirect=on](https://www.washingtonpost.com/news/wonk/wp/2013/05/26/the-political-fallout-of-natural-disasters/?hpid=hp_hp-top-table-main-political-fallout%3Ahomepage%2Ft-1&hpid=hp_hp-top-table-main-political-fallout%3Ahomepage%2Ft-1).

²⁶³The descriptions focus on tax relief provided individuals and not the various business tax incentives and energy tax incentives.

²⁶⁴*See generally* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 110 (2018); Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054, 2078 (2017); Disaster Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, 131 Stat. 1168 (2017).

²⁶⁵*Id.*

²⁶⁶Omitted is the Heartland Disaster Tax Relief Act, which provided tax benefits to the victims of severe storms, flooding, and tornadoes that occurred across the Midwest between May 20, 2008, and January 1, 2010, in the “Midwestern Disaster Areas.” Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702(a), 122 Stat. 3765, 3912 (2008). Also omitted is the National Disaster Relief Act, enacted with the Heartland Disaster Tax Relief Act, which provided a broad package of tax benefits and economic incentives available to all individuals affected by Federally declared disasters that occurred after December 31, 2007, and before January 1, 2010. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, 3921 (2008).

the California wildfires.²⁶⁷ The California wildfires disaster area included the area declared a major disaster by the President due to the wildfires in California occurring between January 1, 2017, and January 18, 2018.²⁶⁸ In 2017, California experienced some of the most destructive and costly fires in its history, starting in October with a series of fires in the Northern California wine country, eventually burning more than 200,000 acres and destroying 9,000 structures due to hot, windy conditions.²⁶⁹ Two months later, the Thomas Fire in Southern California burned 280,000 acres and destroyed over 1,000 structures as a result of high winds, rugged terrain, and continuing drought.²⁷⁰ The wildfires followed by torrential rains created the conditions for mudslides, which damaged or destroyed public infrastructure and hundreds of homes in January of 2018.²⁷¹

With regard to early withdrawals from retirement plans, the Bipartisan Budget Act provided an exception to the ten percent additional tax on the early withdrawal of qualified wildfire distributions of up to \$100,000 from an eligible retirement plan.²⁷² Qualified wildfire distributions were defined as any distribution from a qualified retirement plan to an individual whose principal residence was located in the wildfire disaster area and who sustained an economic loss by reason of the California wildfire disaster.²⁷³ In addition, any inclusion in income as a result of a qualified disaster

²⁶⁷ Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20101, 132 Stat. 64,110 (2018) (the Bipartisan Budget Act also extended the tax relief previously enacted for the benefit of victims of Hurricanes Harvey, Irma, and Maria to include disaster areas, resulting from the hurricanes, declared between the periods September 21, 2017, through October 17, 2017). *Id.* at 118 (the Bipartisan Budget Act also contains Hurricane Maria relief for Medicaid programs in Puerto Rico and the Virgin Islands). See I.R.S. PUBL'N NO. 976, DISASTER RELIEF (2018) (explaining tax-relief provisions applicable to individuals and businesses recovering from the impact of 2016 qualified disasters and 2017 qualified disasters attributable to Hurricanes Harvey, Irma, and Maria, and the California wildfires); I.R.S. PUBL'N NO. 584, CASUALTY, DISASTER, & THEFT LOSS WORKBOOK (2017) (aiding the computation of personal casualty losses in the event of a casualty, disaster, or theft).

²⁶⁸ Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20101, 132 Stat. 64, 110 (2018).

²⁶⁹ *The 2018-19 Budget: Fire Recovery Proposals*, LEGIS. ANALYST'S OFFICE (Mar. 1, 2018), available at <http://www.lao.ca.gov/Publications/Report/3767>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20102(a), 132 Stat. 64, 110 (2018). See I.R.S. Notice 2005-92, 2005-51 I.R.B. 283, 1165-72 (providing guidance on the tax-favored treatment of plan distributions and plan loans for victims of Hurricane Katrina and also generally applicable to recent disaster relief legislation).

²⁷³ Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20102(a), 132 Stat. 64, 110 (2018).

distribution could be spread ratably over a three-year period.²⁷⁴ If the qualified distribution was repaid into an eligible retirement plan within three years of the distribution, the repayment would be treated as an eligible rollover distribution, thus, not included in the income of the individual.²⁷⁵ Eligible retirement plan included individual retirement accounts and individual retirement annuities.²⁷⁶

The Bipartisan Budget Act also allowed individuals to deduct *net* disaster-related personal casualty losses.²⁷⁷ In computing the net personal casualty loss, the \$100 floor was increased to \$500, and the ten percent of adjusted gross income threshold was temporarily suspended.²⁷⁸ If the individual took the standard deduction instead of itemizing deductions, the standard deduction was increased by the amount of the net disaster loss.²⁷⁹ The alternative minimum tax (AMT) would not be adjusted for the increase in the standard deduction amount attributable to the net disaster loss.²⁸⁰ As

²⁷⁴*Id.* § 20102 (this section waived the 10% additional tax on early distributions from retirement plans for up to \$100,000 in qualified wildfire distributions. A “qualified wildfire distribution” must have been made on or after October 8, 2017, and before January 1, 2019, to an individual: (1) whose principal place of abode during any portion of the period from October 8, 2017, to December 31, 2017, was located in the California wildfire disaster area, and (2) who had sustained an economic loss by reason of the wildfires to which the declaration of the area relates. A taxpayer who received such a distribution could: (1) repay the distribution by making additional contributions to a retirement account within three years, and (2) include the distribution in gross income by dividing the amount over a three-year period).

²⁷⁵*Id.* (the provisions also permitted individuals to recontribute certain retirement plan withdrawals that were originally made to purchase or construct a home located within the California wildfire disaster area but which could no longer used for that purpose. With respect to certain retirement plan loans, the maximum loan amount the participant could borrow from a qualified employer plan was increased and the repayment period was lengthened).

²⁷⁶Eligible retirement plan had the same meaning given I.R.C. § 402(c)(8)(B). I.R.C. § 402(c)(8)(B) (West Supp. 2018) (an eligible retirement plan included an individual retirement account described in I.R.C. § 408(a); an individual retirement annuity described in I.R.C. § 408(b); a qualified trust; and an annuity plan described in I.R.C. § 403(a)).

²⁷⁷Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104(b), 132 Stat. 64, 115 (2018).

²⁷⁸*Id.* See *supra* text accompanying notes 74–77 (examining the \$100 floor and the ten percent of adjusted gross income threshold provided in I.R.C. § 165(h)(1), (2)).

²⁷⁹Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104(b), 132 Stat. 64, 112 (2018); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504, 131 Stat. 1168, 1184 (2017).

²⁸⁰BORIS I. BITTKER ET AL., *supra* note 36, ¶ 45.1 (3d ed. 2002) (generally, the AMT is a redetermination of taxable income that adds back into the tax base many items that are normally eliminated. This recalculated tax base is reduced by an exemption amount and then subjected to a special two-tiered tax rate).

to charitable giving, the Bipartisan Budget Act suspended the fifty percent of adjusted gross income limitation for individuals and the ten percent of taxable income limitation for corporations.²⁸¹ If the individual's earned income was less in the year preceding the wildfires, the individual could elect to use the earned income amount for the immediately preceding tax year for purposes of determining the earned income credit and the child tax credit.²⁸² Employers whose active trade or business became inoperable due to the California wildfires were allowed an employee retention tax credit.²⁸³ The credit was equal to forty percent of employee wages, up to a maximum of \$6,000 per employee, paid to an employee whose principal place of employment was located in a California wildfire disaster area.²⁸⁴

B. Tax Cuts and Jobs Act of 2017

The TCJA provided additional tax relief for *2016 qualified disasters*, which were Federally declared disasters that occurred in 2016.²⁸⁵ During 2016, the President declared thirty-five major disasters, involving twenty-five States and the District of Columbia.²⁸⁶ The types of natural disasters included severe storms, flooding, tornadoes, landslides, mudslides, windstorms, snowstorms, wildfires, and Hurricanes Mathew and Hermine.²⁸⁷ The TCJA provided tax relief and economic incentives only to Federally declared disasters and only Federally declared disasters that occurred in 2016.

²⁸¹ See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104(a), 132 Stat. 64, 115 (2018).

²⁸² *Id.* at 113 (to qualify, the individual's principal residence must have been located in the California wildfire disaster area and the individual must have been displaced from their principal residence because of the wildfires).

²⁸³ *Id.* at 114.

²⁸⁴ *Id.*

²⁸⁵ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11028(a), 131 Stat. 2054, 2078 (2017). See I.R.S. PUBL'N NO. 976, DISASTER RELIEF (2018) (explaining tax-relief provisions applicable to individuals and businesses recovering from the impact of 2016 qualified disasters and 2017 qualified disasters attributable to Hurricanes Harvey, Irma, and Maria, and the California wildfires); I.R.S. PUBL'N NO. 584, CASUALTY, DISASTER, & THEFT LOSS WORKBOOK (2017) (aiding the computation of personal casualty losses in the event of a casualty, disaster, or theft).

²⁸⁶ FEMA, *Disaster Declarations by Year*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disasters/grid/year> (last visited July 16, 2018).

²⁸⁷ *Id.*

The TCJA provided an exception to the ten percent additional tax for early withdrawals from retirement plans for up to \$100,000 of qualified 2016 disaster distributions.²⁸⁸ A qualified 2016 disaster distribution was a distribution from an eligible retirement plan made during 2016 and 2017 to an individual whose principal residence was located in a 2016 disaster area and who sustained an economic loss by reason of the events that gave rise to the declaration of the area as a Federally declared disaster.²⁸⁹ An individual could include income attributed to qualified disaster distribution ratably over a three-year period beginning with the tax year the distribution was received.²⁹⁰ Treated as a tax-free rollover, qualified 2016 disaster distributions were not included in the individual's income if the distributed amount was recontributed within three years after the date of the distribution.²⁹¹ Eligible retirement plan included an individual retirement account and an individual retirement annuity.²⁹²

If an individual had a *net* disaster loss for tax years 2016 and 2017, which was the result of a qualified 2016 disaster, the disaster-related personal casualty losses in excess of personal casualty gains were deductible.²⁹³ In computing the amount of *net* disaster loss, the \$100 floor was increased to \$500, and the ten percent of adjusted gross income threshold was suspended.²⁹⁴ If the individual did not itemize deductions, the standard deduction was increased by the amount of the net disaster loss.²⁹⁵ In addition, the AMT adjustment for the standard deduction did not apply to the increase in the standard deduction amount that is attributable to the net disaster loss.²⁹⁶

²⁸⁸ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11028(b), 131 Stat. 2054, 2078 (2017).

²⁸⁹ *Id.* § 11028(b)(1)(D)(i).

²⁹⁰ *Id.* § 11028(b)(1)(E).

²⁹¹ *Id.* § 11028(b)(1)(F).

²⁹² *Id.* § 11028(b)(1)(D)(ii); I.R.C. § 402(c)(8)(B) (West Supp. 2018) (an eligible retirement plan had the same meaning given the term under I.R.C. § 402(c)(8)(B), which included an individual retirement account described in I.R.C. § 408(a); an individual retirement annuity described in I.R.C. § 408(b); a qualified trust; and an annuity plan described in I.R.C. § 403(a)).

²⁹³ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 1028(c)(2), 131 Stat. 2054, 2081 (2017).

²⁹⁴ *Id.* § 11028(c)(1).

²⁹⁵ *Id.* § 11028(c)(1)(C).

²⁹⁶ *Id.* § 11028(c)(1)(D).

C. Disaster Tax Relief and Airport and Airway Extension Act of 2017

The Disaster Tax Relief and Airport and Airway Extension Act afforded tax relief and economic incentives to the individuals and businesses devastated by Hurricanes Harvey, Irma, and Maria.²⁹⁷ The storms brought widespread death and destruction to Texas, Florida, Puerto Rico, and the U.S. Virgin Islands.²⁹⁸ The National Oceanic and Atmospheric Administration (NOAA) announced that, in the aggregate, the 2017 Hurricanes Harvey, Irma, and Maria, were the costliest hurricanes in U.S. history, topping the disastrous 2005 hurricane season, which included Hurricanes Karina, Rita, and Wilma.²⁹⁹ Hurricane Katrina remains the costliest at \$160 billion, with Hurricane Harvey ranking second at \$125 billion, Hurricane Maria ranking third at \$90 billion, and Hurricane Irma ranking fifth at \$50 billion.³⁰⁰ The 2012 Superstorm Sandy is ranked fourth at \$70 billion.³⁰¹

The Disaster Tax Relief and Airport and Airway Extension Act extended certain tax preferences to the victims of Hurricanes Harvey, Irma, and Maria.³⁰² The additional ten percent tax on early distributions from eligible retirement plans would not apply to a qualified hurricane distributions up to a maximum of \$100,000.³⁰³ A qualified hurricane distribution was a distribution to an individual whose principal residence was located within the disaster area and who sustained economic loss as a

²⁹⁷ See Disaster Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, 131 Stat. 1168 (2017). See also I.R.S. PUBL'N NO. 976, DISASTER RELIEF (2018) (explaining tax-relief provisions applicable to individuals and businesses recovering from the impact of 2016 qualified disasters and 2017 qualified disasters attributable to Hurricanes Harvey, Irma, and Maria, and the California wildfires); I.R.S. PUBL'N NO. 584, CASUALTY, DISASTER, & THEFT LOSS WORKBOOK (2017) (aiding the computation of personal casualty losses in the event of a casualty, disaster, or theft).

²⁹⁸ Doyle Rice, *2017's Three Monster Hurricanes—Harvey, Irma and Maria—Among Five Costliest Ever*, USA TODAY (Feb. 1, 2018, 11:17 AM), <https://www.usatoday.com/story/weather/2018/01/30/2017-s-three-monster-hurricanes-harvey-irma-and-maria-among-five-costliest-ever/1078930001/>.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, 131 Stat. 1168 (2017).

³⁰³ *Id.* § 502(a)(1), (2). See I.R.S. Notice 2005-92, 2005-51 I.R.B. 165 (providing guidance on the tax-favored treatment of plan distributions and plan loans for victims of Hurricane Katrina and also generally applicable to recent disaster relief legislation).

result of the three hurricanes.³⁰⁴ Unless the individual elected to include the distribution in income for the tax year received, the individual could include the qualified hurricane distribution in income ratably over a three-year period.³⁰⁵ A repayment of the qualified hurricane distribution within three years after the distribution would be treated as a tax-free rollover into an eligible retirement plan.³⁰⁶ An eligible retirement plan was defined in I.R.C. § 408(c)(8)(B) and included individual retirement accounts and individual retirement annuities.³⁰⁷

The amount of an individual's *net* disaster loss deduction was computed with an increase in the \$100 floor to \$500 but without the ten percent of adjusted gross income threshold.³⁰⁸ If the individual did not itemize deductions, the individual's standard deduction was increased by the net disaster loss.³⁰⁹ To encourage charitable giving, the legislation suspended the fifty percent of adjusted gross income limitation for individuals and the ten percent of taxable income limitation for corporations.³¹⁰ To determine the amount of the earned income credit and child tax credit, individuals could use the earned income amount for the immediately preceding tax year.³¹¹ Finally, employers, whose active trades or businesses became inoperable due to the hurricanes, were allowed an employee retention tax credit.³¹² The credit was equal to forty percent of employee wages, up to a

³⁰⁴ Disaster Tax Relief and Airport and Airway Extension Act of 2017 § 502(a)(4)(A).

³⁰⁵ *Id.* § 502(a)(5).

³⁰⁶ *Id.* § 502(a)(3), (b) (the provisions also permitted individuals to recontribute funds to retirement plans if the funds were distributed for a home purchase in a hurricane disaster area that was cancelled because of the hurricanes, and it increases the limit and extends the payment deadline for loans from retirement accounts).

³⁰⁷ *Id.* § 502(a)(4)(B) (an eligible retirement plan had the same meaning given the term under I.R.C. § 402(c)(8)(B), which includes an individual retirement account described in I.R.C. § 408(a); an individual retirement annuity described in I.R.C. § 408(b); a qualified trust; and an annuity plan described in I.R.C. § 403(a)). Tax Cuts and Jobs Act, § 11028(b)(1)(D)(ii), 131 Stat. 2054, 2079 (2017); I.R.C. § 402(c)(8)(B) (West Supp. 2018).

³⁰⁸ Disaster Tax Relief and Airport and Airway Extension Act of 2017 § 504.

³⁰⁹ *Id.* § 504(b).

³¹⁰ *Id.* § 504(a).

³¹¹ *Id.* § 504(c) (to qualify, the individual's principal residence must have been located in the hurricane disaster areas and the individual must have been displaced from their principal residence by the hurricanes).

³¹² *Id.* § 503.

maximum of \$6,000 per employee, paid to an employee whose principal place of employment was in a hurricane disaster area.³¹³

D. Hurricanes Katrina, Rita, and Wilma Tax Acts of 2005 and Gulf Opportunity Zone Act of 2005

Congress enacted the Katrina Emergency Tax Relief Act to aid the residents of the hurricane-ravaged areas of Louisiana, Mississippi, and Alabama.³¹⁴ Tax relief was necessary to assist individuals in rebuilding their homes and lives devastated by Hurricane Katrina.³¹⁵ The legislation allowed the withdrawal of up to \$100,000 from qualified retirement accounts without the ten percent penalty for early distributions if made by individuals whose principal residence was located in the disaster area and who had sustained economic loss as a result of Hurricane Katrina.³¹⁶ Further, if the individual used the distributions to purchase a principal residence the legislation treated the recontribution of the amounts distributed as a tax-free rollover.³¹⁷ The legislation also included the following tax relief provisions: the deduction of personal casualty losses without the \$100 floor per casualty event and the ten percent of adjusted gross income threshold,³¹⁸ the use of the earned income amount for the previous tax year for the purposes of determining the earned income tax credit and the child tax credit;³¹⁹ a five-year replacement period for nonrecognition of gain under I.R.C. § 1033;³²⁰ the exclusion of cancellation of indebtedness income for qualified individuals;³²¹ the allowance of additional personal exemptions for housing individuals displaced by the hurricane;³²² and the extension of

³¹³ *Id.*

³¹⁴ Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73.

³¹⁵ *Id.* See I.R.S. PUB'N NO. 4492, INFORMATION FOR TAXPAYERS AFFECTED BY HURRICANES KATRINA, RITA, AND WILMA (2006) (explaining the major provisions of the Katrina Emergency Tax Relief Act of 2005 and the Gulf Opportunity Zone Act of 2005).

³¹⁶ Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 101.

³¹⁷ *Id.* § 102.

³¹⁸ *Id.* § 402 (Revenue Procedure 2006-28 provided individuals with safe harbor methods in determining the amount of the casualty and theft loss deductions for personal-use residential property and certain personal property damaged, destroyed, or stolen as a result of Hurricanes Katrina, Rita, or Wilma). See Rev. Proc. 2006-32, 2006-28 C.B. 61.

³¹⁹ Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 406.

³²⁰ *Id.* § 405.

³²¹ *Id.* § 401.

³²² *Id.* § 302.

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certain tax-related deadlines.³²³ The Katrina Emergency Tax Relief Act provided inducements for charitable giving, including the suspension of the fifty percent of adjusted gross income limitation for individuals and the ten percent of taxable income limitation for corporations.³²⁴ Employers were given tax credits for hiring individuals from one or more targeted groups³²⁵ and for retaining employees of businesses located in the disaster area.³²⁶

The Gulf Zone Opportunity Act extended and enhanced the provisions enacted in the Katrina Emergency Tax Relief Act and added further tax relief and economic incentives to individuals and businesses affected by Hurricanes Katrina, Rita, and Wilma.³²⁷ Central to the legislation was establishing Gulf Opportunity (GO) Zones, which included the areas hardest hit by Hurricanes Katrina, Rita, and Wilma, providing tax incentives to individuals and businesses to revitalize and rebuild these areas. The legislation contained significant tax relief provisions aimed at businesses, including the five-year carryback of NOLs;³²⁸ accelerated cost recovery deductions; fifty percent deduction for the cost of debris removal and structure demolition; and an increase of the new markets tax credit for investments in low-income communities.³²⁹ The Gulf Opportunity Zone Act also enacted I.R.C. § 1400N and other sections of the Internal Revenue Code, which created tax benefits for State and local governments and for businesses operating in the affected areas.³³⁰

³²³ *Id.* § 403.

³²⁴ *Id.* § 301.

³²⁵ *Id.* § 201.

³²⁶ *Id.* § 202.

³²⁷ *Tax Incentives for Economic Development: What Tax Incentives Were Created in Response to Hurricanes Katrina, Rita, and Wilma?*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/briefing-book/key-elements/economic-development/hurricane-response.cfm>.

³²⁸ Gulf Opportunity Zone Act of 2005 § 101(a) (2005). See I.R.S., PUB'N NO. 4492, INFORMATION FOR TAXPAYERS AFFECTED BY HURRICANES KATRINA, RITA, AND WILMA (2006) (explaining the major provisions of the Katrina Emergency Tax Relief Act of 2005 and the Gulf Opportunity Zone Act of 2005).

³²⁹ Gulf Opportunity Zone Act of 2005 § 101(a).

³³⁰ *Id.*

VII. TAX RELIEF AFFORDED FEDERALLY DECLARED DISASTERS THROUGH ADMINISTRATIVE ACTION

Whether benefiting from special legislation, the victims of Federally declared disasters could receive administrative tax relief afforded by the Treasury Department.³³¹ The Treasury Department issues the tax relief in many forms, including revenue procedures, revenue rulings, notices, announcements, and news releases.³³²

A. *Revenue Procedure 2018-8: Safe Harbor Methods to Determine the Amount of Casualty Losses for Personal-Use Real Property and Personal Belongings Due to a Federally Declared Disaster.*

In 2018, the Treasury Department established safe harbor methods to ease the difficulties individuals encounter in determining the amount of their personal casualty losses due to casualty events.³³³ Revenue Procedure 2018-8 provides safe harbor methods that individuals may use to determine the amount of their casualty losses sustained by their personal-use residential real property and personal belongings.³³⁴ With regard to personal-use residential real property, the individual may use one of three safe harbors whether or not the casualty occurs in a Federally declared disaster area.³³⁵ The safe harbor methods available to *all* individuals who suffer casualty losses to personal-use residential real property are: (1) Estimated Repair Cost Safe Harbor Method; (2) De Minimis Safe Harbor Method; and (3) Insurance Safe Harbor Method.³³⁶ In addition to the three safe harbor methods allowed to all victims of casualty events, an individual who suffers a casualty loss to personal-use real property due to a

³³¹ IRS, DISASTER ASSISTANCE AND EMERGENCY RELIEF FOR INDIVIDUALS AND BUSINESSES <https://www.irs.gov/businesses/small-businesses-self-employed/disaster-assistance-and-emergency-relief-for-individuals-and-businesses> (last modified Mar. 15, 2018).

³³² *Id.*

³³³ Rev. Proc. 2018-8, 2018-2 I.R.B. 286 (the safe harbor methods may also be used to determine the amount of personal casualty theft losses).

³³⁴ *Id.* § 3.01.

³³⁵ *Id.*

³³⁶ *Id.* §§ 3.01, 4.02–.04. *See supra* text accompanying notes 96–115 (defining “personal-use residential real property” and discussing, in detail, the Estimated Repair Cost Safe Harbor Method; the De Minimis Safe Harbor Method; and the Insurance Safe Harbor Method).

Federally declared disaster may also use the Contractor Safe Harbor Method and the Disaster Loan Appraisal Safe Harbor Method.³³⁷

Under the Contractor Safe Harbor Method, the decrease in fair market value of personal-use residential real property may be determined using the contract price for the repairs specified in a contract prepared by an independent contractor, licensed or registered in accordance with State or local regulations.³³⁸ The contract must set forth the itemized costs to restore the individual's personal-use residential real property to the condition existing immediately prior to the Federally declared disaster.³³⁹ For the purposes of the safe harbor, the costs of any improvements or additions that increase the fair market value of the personal residence above its pre-disaster value, such as the cost to elevate the personal residence to meet new construction requirements, must be excluded from the contract price.³⁴⁰ To use the Contractor Safe Harbor Method, the contract must be a binding contract signed by the individual and the contractor.³⁴¹

The second safe harbor method available exclusively to victims of Federally declared disasters is the Disaster Loan Appraisal Safe Harbor Method.³⁴² Under the Disaster Loan Safe Harbor Method, an individual may use an appraisal prepared for the purpose of obtaining a loan of Federal funds or a loan guarantee from the Federal Government to determine the decrease in fair market value of personal-use residential real property.³⁴³ The appraisal must set forth the estimated loss the individual sustained as a result of the damage to, or destruction of, the individual's personal-use residential real property from a Federally declared disaster.³⁴⁴

Revenue Procedure 2018-8 also provides safe harbor methods for individuals who suffer casualty losses to personal belongings as a result of casualty events.³⁴⁵ The safe harbor method available to *all* victims of casualty events for determining the amount of casualty losses to personal

³³⁷ Rev. Proc. 2018-8, 2018-2 I.R.B. 286 §§ 3.01, 4.05.

³³⁸ *Id.* § 4.05(1).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* § 4.05(2).

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* § 3.01.

belongings is the De Minimis Safe Harbor Method.³⁴⁶ An additional safe harbor method to determine the amount of casualty losses to personal belongings, the Replacement Cost Safe Harbor Method, is available to victims of Federally declared disasters.³⁴⁷ Under the Replacement Cost Safe Harbor Method, an individual determines the fair market value of personal belongings immediately before the casualty event by determining the replacement cost and reducing the replacement cost by ten percent for each year the individual owned the personal belongings.³⁴⁸ The individual then subtracts the fair market value of the personal belonging before the casualty event from the fair market value of the property immediately after the casualty event.³⁴⁹ The amount of the personal casualty loss is the lesser of the reduction in fair market value or the original cost of the personal belongings.³⁵⁰ If the individual chooses the Replacement Cost Safe Harbor Method, this method must be used for all claims of loss to personal belongings.³⁵¹ An individual may not use the Replacement Cost Safe Harbor Method for a boat, aircraft, mobile home, trailer, vehicle, or an antique or other asset that maintains or increases in value over time.³⁵² An example provided in Revenue Procedure 2018-8 of the Replacement Cost Safe Harbor Method is as follows:³⁵³

An individual's personal belongings included a couch destroyed by a hurricane in a Federally declared disaster area. The individual purchased the couch for \$700 four years prior to the hurricane. The cost to replace the couch with a new couch is \$1,000. The couch is not insured.

Using the Replacement Cost Safe Harbor Method for Federally declared disaster areas, the individual computes the fair market value of the couch immediately before the hurricane by multiplying the current replacement cost of

³⁴⁶ *Id.* §§ 3.01, 5.01. *See supra* text accompanying notes 110–115 (defining “personal belongings” and discussing the De Minimis Safe Harbor Method).

³⁴⁷ *Id.* § 5.02.

³⁴⁸ *Id.* § 5.02(1).

³⁴⁹ *Id.* § 5.02(1)(a).

³⁵⁰ *Id.* § 5.02(1)(c).

³⁵¹ *Id.* § 5.02(1).

³⁵² *Id.* § 5.02(2) (a vehicle is an automobile, motorcycle, motor home, recreational vehicle, sport utility vehicle, off-road vehicle, van, or truck).

³⁵³ *Id.* § 5.02(3).

the couch, \$1,000, by the applicable percentage of the replacement cost from the Personal Belongings Valuation table, 60%. (The replacement cost is reduced by ten percent for each year the individual owned the property (100% minus 40% (10% times 4 years))).

$$\$1,000 \times 60\% = \$600$$

The individual determines the decrease in the fair market value of the couch by subtracting \$0, the fair market value of the couch immediately after the hurricane, from \$600, the fair market value immediately before the hurricane.

$$\$600 - 0 = \$600$$

The individual compares the basis of \$700 with the decrease in fair market value of \$600. Since the decrease in fair market value is less than the basis, the amount of the individual's casualty loss is \$600.

B. Tax Relief Afforded Certain Federally Declared Disasters through Administrative Action

The Treasury Department offers tax assistance to the victims of Federally declared disasters; however, the tax assistance offered is far from uniform. The following provides a comparison of the additional tax relief extended by the Treasury Department to the victims of Hurricane Sandy and the victims of Federally declared disasters in 2017. A comparison is also made of the additional tax relief extended to the victims of Hurricanes Harvey, Irma, and Maria, and the California wildfires and the additional tax relief extended to the other 2017 Federally declared disasters.³⁵⁴

1. 2012 Hurricane Sandy

The following exchange occurred in the U.S. House of Representatives during the debate of the proposed disaster relief package benefiting the victims of Hurricanes Harvey, Irma, and Maria:

Rep. Carlos Curbelo, a Florida Republican whose district includes the Keys, urged his colleagues during debate Monday afternoon to approve the bill quickly because

³⁵⁴ See *infra* text accompanying notes 370–387.

people hit by the storms need help. “They don’t have time to wait,” Curbelo said. “They certainly don’t have time to play political games.”

But Rep. Bill Pascrell, D-N.J., said Congress took three months to consider an aid package after Sandy and the never debated a package of tax breaks he proposed that was similar to one enacted after Hurricane Katrina devastated the Gulf Coast in 2005.

“Congress until then routinely provided tax relief to communities in the wake of the worst storms,” Pascrell said. “Victims of Hurricane Sandy did not receive the same treatment. . . . This whole debate smacks of a certain hypocrisy.”

House Minority Leader Nancy Pelosi, D-Calif., said in a statement early Monday that the tax provisions “don’t treat all families recovering from natural disasters the same.”³⁵⁵

In October 2012, Hurricane Sandy impacted a wide swath of the East Coast, causing extensive human suffering and damage to public and private property.³⁵⁶ The President declared major disasters for twelve states and the District of Columbia under the authority of the Stafford Act.³⁵⁷ In response to the devastation caused by Hurricane Sandy, Congress proposed the Hurricane Sandy Tax Relief Act of 2012.³⁵⁸ Unfortunately, the Hurricane Sandy Tax Relief Act, which would have provided tax relief and economic incentives similar to those provided to the individuals and businesses affected by Hurricanes Katrina, Rita, and Wilma, was not enacted into law; nevertheless, Congress passed into law the Sandy Recovery Improvement Act³⁵⁹ and the Disaster Relief Appropriations Act.³⁶⁰ The Sandy Recovery

³⁵⁵HERB JACKSON, HOUSE STALLS ON TAX RELIEF FOR HURRICANES HARVEY, IRMA, MARIA VICTIMS THAT SANDY VICTIMS DID NOT GET (2017), <https://www.usatoday.com/story/news/politics/2017/09/25/house-weighs-tax-relief-hurricanes-harvey-irma-maria-victims/700261001/>.

³⁵⁶JARED T. BROWN, FRANCIS X. MCCARTHY & EDWARD C. LIU, CONG. RESEARCH SERV., R42991, ANALYSIS OF THE SANDY RECOVERY IMPROVEMENT ACT OF 2013 (2013).

³⁵⁷*Id.*

³⁵⁸Hurricane Sandy Tax Relief Act of 2012, H.R. 6683, 112th Cong. (2012).

³⁵⁹Sandy Recovery Improvement Act of 2013.

³⁶⁰Disaster Relief Appropriations Act of 2013.

Improvement Act amended the Stafford Act by improving the efficiency and quality of the disaster assistance provided by FEMA.³⁶¹ The Disaster Relief Appropriations Act approved a \$50.7 billion package of disaster assistance and increased the authority of the National Flood Insurance Program to borrow by \$9.7 billion.³⁶²

In addition, the Internal Revenue Service issued a series of notices and news releases that extended additional tax assistance to the victims of Hurricane Sandy.³⁶³ Because of the widespread damage to housing, certain requirements for utilizing the tax credit for low-income housing projects to provide temporary emergency housing for displaced persons were suspended.³⁶⁴ The deadline for making an election to deduct disaster losses in the tax year preceding the year of the disaster event under I.R.C. § 165(i) was postponed.³⁶⁵ Pursuant to the authority granted by I.R.C. § 7508A, return filing and payment deadlines were also postponed for individuals and tax preparers affected by Hurricane Sandy, with the abatement of interest and late filing or payment penalties.³⁶⁶ Given the dire need for charitable relief, employers could adopt leave-based donation programs whereby employees donated their vacation, sick, or personal leave in exchange for employer cash payments to charitable organizations, allowing the employers to deduct and the employees to exclude from income the amounts paid.³⁶⁷ The Service excluded from the income of the recipient the qualified disaster relief payments, including amounts necessary for personal, family, living, or funeral expenses, not covered by insurance,

³⁶¹ BROWN, *supra* at note 356.

³⁶² *Id.*

³⁶³ I.R.S. News Release IR-2012-70 (Sept. 5, 2012) (by way of contrast, the additional tax relief afforded to the individuals and businesses affected by Hurricane Isaac in 2012 consisted merely of the ability to postpone various tax filing and payment deadlines and the abatement of any interest and late filing or payment penalties that would otherwise apply).

³⁶⁴ I.R.S. Notice 2012-68, 2012-2 C.B. 574.

³⁶⁵ I.R.S. Notice 2013-21, 2013-1 C.B. 903. *See* I.R.S. Notice 2012-71, 2012-2 C.B. 672 (providing tax relief for certain small organizations that lost their tax-exempt status because they failed to file a required return or notice due to the effects of Hurricane Sandy).

³⁶⁶ I.R.S. News Release IR-2013-16 (Feb. 1, 2013); I.R.S. News Release IR-2012-82 (Oct. 31, 2012). *See also* I.R.S. Notice 2012-71, 2012-2 C.B. 672 (providing relief for certain small organizations that lost their tax-exempt status because they failed to file a required return or notice due to the effects of Hurricane Sandy).

³⁶⁷ I.R.S. Notice 2012-69, 2012-2 C.B. 712. *See* I.R.S. News Release IR-2012-87 (Nov. 6, 2012) (offering expedited review and approval for organizations seeking tax-exempt status in order to provide relief for victims of Hurricane Sandy).

made by employers and others to the affected individuals.³⁶⁸ Concerning retirement plans, victims of Hurricane Sandy could take advantage of streamlined loan procedures and liberalized hardship distribution rules.³⁶⁹

2. 2017 Federally Declared Disasters: Hurricanes Harvey, Irma, and Maria and Californian Wildfires

Applicable only to the victims of Hurricanes Harvey, Irma, and Maria, the Treasury Department issued Revenue Procedure 2018-9 that provides an optional safe harbor method, the Cost Indexes Safe Harbor Method, for use by individuals to determine the amount of their casualty losses to their personal-use residential real property damaged or destroyed as a result of the three Hurricanes.³⁷⁰ The Internal Revenue Service will not challenge an individual's determination of the decrease in fair market of personal-use residential real property if the individual uses the Cost Indexes Safe Harbor Method.³⁷¹ The Cost Indexes Safe Harbor Method is not mandatory; thus, an individual may use a safe harbor method described in Revenue Procedure 2018-8 or prove the actual reduction in fair market value of personal-use residential real property with proper substantiation.³⁷² The Treasury Department provided this additional safe harbor method due to the widespread devastation from Hurricanes Harvey, Irma, and Maria.³⁷³

Under the Cost Indexes Safe Harbor Method, individuals may use one or more cost indexes to compute the amount of casualty losses to personal-use residential real property.³⁷⁴ An individual may use the Cost Indexes Safe Harbor Method if the individual's personal-use residential real property suffered any of the following: a total loss or near total loss; interior flooding of over one foot; structural and/or roof damage due to wind, rain, or debris; and damage to a detached structure or decking.³⁷⁵ Revenue

³⁶⁸I.R.S. News Release IR-2012-84 (Nov. 2, 2012).

³⁶⁹I.R.S. News Release IR-2012-93 (Nov. 16, 2012).

³⁷⁰Rev. Proc. 2018-9, 2018-2 I.R.B. 290, § 1.01. *See id.* § 3.01 (the individual's personal-use residential real property must be located in the 2017 Disaster Area as a result of the 2017 Hurricanes, which includes the entire state of Texas, Louisiana, Florida, Georgia, South Carolina, Puerto Rico, and the U.S. Virgin Islands). *See also supra* text accompanying notes 96–98 (defining “personal-use residential real property”).

³⁷¹Rev. Proc. 2018-9, 2018-2 I.R.B. 290, § 1.02.

³⁷²*Id.* § 1.04.

³⁷³*Id.* § 2.14.

³⁷⁴*Id.* § 3.03.

³⁷⁵*Id.*

Procedure 2018-9 provides tables and calculation methods for determining the decrease in fair market value for each category of loss or damage based on the cost per square foot, the percentage of damage, the size of the property, and the geographic location of the personal-use residential real property.³⁷⁶

In 2018, the Treasury Department issued Publication 976, Disaster Relief, which explains the special rules that provide tax relief for the victims of Hurricanes Harvey, Irma, and Maria and the victims of the California wildfires, flooding, mudslides, and debris flows.³⁷⁷ Publication 976 explains the special disaster tax relief provisions enacted by Congress in the Disaster Tax Relief and Airport and Airway Extension Act, providing tax relief specifically to the victims of Hurricanes Harvey, Irma, and Maria, and the Bipartisan Budget Act, providing tax relief specifically to the victims of the California wildfires.³⁷⁸ Publication 976 explains Revenue Procedure 2018-8, which provides safe harbor methods that individuals may use to calculate the amount of casualty losses for personal-use residential real property and personal belongings damaged or destroyed in Federally declared disasters.³⁷⁹ Also explained is Revenue Procedure 2018-9, which provides an additional safe harbor method individuals may use to calculate the amount of casualty losses for personal-use residential real property damaged or destroyed in Hurricanes Harvey, Irma, and Maria.³⁸⁰ Finally, Publication 976 summarizes the administrative tax relief provided only to the victims of Hurricanes Harvey, Irma, and Maria and the California wildfires in various notices and news releases issued by the Treasury Department during, and shortly after the natural disasters,³⁸¹ including the extension of deadlines that apply to filing returns, paying taxes, and performing other time-sensitive acts; the election to deduct casualty losses in the tax year preceding the year of the casualty event; and the waiver of the \$50 fee for requesting a copy of earlier tax returns.³⁸²

³⁷⁶ *Id.* § 4.

³⁷⁷ I.R.S. PUB. NO. 976, DISASTER RELIEF (2018).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

3. Other 2017 Federally Declared Disasters

During 2017, severe storms, flooding, straight-line winds, mudslides, and tornadoes resulted in areas of Arkansas, Georgia, Michigan, Missouri, and West Virginia being declared federal disasters.³⁸³ Special legislation was not enacted by Congress, but the additional permanent tax relief provisions of the Internal Revenue Code applicable to the victims of the Federally declared disasters went into effect.³⁸⁴ The Secretary of the Treasury exercised its authority granted by I.R.C. § 7508A to postpone return filing and payment deadlines for affected individuals, with the abatement of interest and late filing or payment penalties that would have otherwise applied.³⁸⁵ Additionally, the news releases stated that individuals were given the election to claim casualty losses either in the year of the disaster event or the previous tax year under I.R.C. § 165(i).³⁸⁶ Further, the Internal Revenue Service would waive the usual fees and expedite requests for copies of previously filed tax returns.³⁸⁷ Thus, although the Treasury Department provided additional administrative relief, the extent of the additional tax relief was minimal.

³⁸³I.R.S. News Release ATL-2017-03 (Jan. 26, 2017); I.R.S. News Release ATL-2017-05 (Jan. 30, 2017); I.R.S. News Release MO-2017-01 (June 6, 2017); I.R.S. News Release AR-2017-01 (June 16, 2017); I.R.S. News Release MI-2017-01 (Aug. 3, 2017); I.R.S. News Release WV-2017-02 (Aug. 22, 2017). See FEMA, *Disaster Declarations by Year*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disasters/year/2017> (last visited July 16, 2018).

³⁸⁴See *supra* Part (V)(B) (examining the permanent provisions of the Internal Revenue Code that afford tax relief to victims of Federally declared disasters).

³⁸⁵I.R.S. News Release ATL-2017-03 (Jan. 26, 2017); I.R.S. News Release ATL-2017-05 (Jan. 30, 2017); I.R.S. News Release MO-2017-01 (June 6, 2017); I.R.S. News Release AR-2017-01 (June 16, 2017); I.R.S. News Release MI-2017-01 (Aug. 3, 2017); I.R.S. News Release WV-2017-02 (Aug. 22, 2017). See *supra* text accompanying notes 258–260 (examining the postponement of certain deadlines under I.R.C. section 7508A).

³⁸⁶I.R.S. News Release ATL-2017-03 (Jan. 26, 2017); I.R.S. News Release ATL-2017-05 (Jan. 30, 2017); I.R.S. News Release MO-2017-01 (June 6, 2017); I.R.S. News Release AR-2017-01 (June 16, 2017); I.R.S. News Release MI-2017-01 (Aug. 3, 2017); I.R.S. News Release WV-2017-02 (Aug. 22, 2017). See *supra* text accompanying notes 235 and 236 (discussing the election to deduct casualty losses in the year the loss was sustained or in the previous tax year).

³⁸⁷I.R.S. News Release ATL-2017-03 (Jan. 26, 2017); I.R.S. News Release ATL-2017-05 (Jan. 30, 2017); I.R.S. News Release MO-2017-01 (June 6, 2017); I.R.S. News Release AR-2017-01 (June 16, 2017); I.R.S. News Release MI-2017-01 (Aug. 3, 2017); I.R.S. News Release WV-2017-02 (Aug. 22, 2017).

VIII. CONCLUSION

The permanent provisions of the Internal Revenue Code provide surprisingly little tax relief to the victims of casualty events. The victims of non-Federally declared disasters now receive even less tax relief with the TCJA effectively eliminating personal casualty loss deductions. Although the victims of Federally declared disasters benefit from additional permanent provisions of the Internal Revenue Code, the tax relief provided is slight compared to the tax relief and economic incentives allowed the victims of more severe, higher-profile Federally declared disasters, who are often the beneficiaries of special legislation and administrative relief.

Even if a Federally declared disaster is of sufficient severity to warrant congressional attention, the tax treatment of the victims is inconsistent. For example, the TCJA extended additional tax relief and economic incentives to the victims of all Federally declared disasters that occurred in 2016. The Disaster Tax Relief and Airport and Airway Extension Act and Bipartisan Budget Act extended a more generous package the victims of 2017 Hurricanes Harvey, Irma, and Maria, and the California wildfires. During 2017, Oregon experienced two declared major disasters due to severe winter storms, flooding, and mudslides; Oklahoma experienced three declared major disasters due to severe winter storms, tornadoes, and flooding; and New Hampshire experienced two declared major disasters due to severe winter storms and flooding,³⁸⁸ with the victims of these Federally declared disasters receiving tax relief only from the permanent provisions of the Internal Revenue Code and negligible administrative tax relief. By comparison, the victims of Hurricane Sandy, who did not receive legislative tax relief, benefited from extensive tax relief and economic incentives provided administratively by the Treasury Department.

Natural disasters are unpreventable and unpredictable occurrences that result in the partial or complete destruction of homes, communities, and businesses. The reaction of the American public to all disaster events includes not only sympathy but also the desire to aid the victims and relieve the inevitable financial hardship. The American public would be shocked to discover that victims of casualty events receive such unequal and piecemeal tax treatment from the President, Congress, and the Treasury Department. Regardless of the number of total victims and size of the area involved,

³⁸⁸FEMA, *Disaster Declarations by Year*, DEP'T OF HOMELAND SEC., <https://www.fema.gov/disasters/year/2017> (last visited July 16, 2018) (listing the disaster declarations for 2017).

Congress should provide meaningful, timely, and fair tax relief and economic incentives for all individuals, communities, and businesses affected by natural disasters. Such a response would provide certainty, consistency, and fairness to a system that currently causes delay, anxiety, and frustration, and differentiates among individuals who are suffering the same emotional and economic trauma. In the interest of sound tax policy and effective tax administration, the relief given to the victims of natural disasters should be available equally and as permanent provisions of the Internal Revenue Code.