from income such contributions by a customer or potential customer, or by a governmental entity or civic group. See I.R.C. § 118(b).

18. Page 280: add to note 3:

The IRS withdrew the proposed regulations described in this note in 2017. See REG-139633-08, 2017-31 I.R.B. 175.

19. Pages 345-46: add to note 4:

The IRS issued final regulations under sections 334(b)(1)(B) and 362(e)(1) implementing the limitations on the importation of net built-in losses in 2016. See T.D. 9759, 2016-15 I.R.B. 545.

20. Page 346, add to note 5:

The IRS withdrew the proposed regulations described in this note in 2017. See REG-139633-08, 2017-31 I.R.B. 175.

21. Page 353, add to section 3:

New section 168(k) allows expensing of the full cost of most new or used tangible property (other than buildings) and some intangible property, if placed in service before 2023. This provision will change the consequences of taxable asset acquisitions, taxable mergers treated as asset acquisitions for tax purposes, and stock acquisitions treated as asset acquisitions under section 338. If the buyer and seller are in the same tax bracket and the buyer can immediately use any deductions arising from the transaction, the tax benefit to the buyer from expensing any section 168(k) property acquired should ordinarily offset the tax cost to the seller even if the seller has a zero basis in the property transferred, effectively producing the combined effect of a tax-exempt transaction. (Of course, the specific impact on each individual party will depend upon how the seller's tax cost and the buyer's tax benefit are shared in the pricing of the property acquired.) If the seller has a positive basis in the property transferred (for example, the property was placed in service before the effect of the new law and has not yet been fully depreciated), then the transaction should ordinarily produce a net tax benefit to the two parties. Unrelated taxpayers holding pre-effective date assets with a positive basis may have an incentive to engage in taxable swaps with one another to realize the tax benefit. The new statute does not include any anti-churning rules designed to prevent such behavior (other than disqualifying an acquisition if it is from a related party or consists of used property previously used by the acquiring party). It is difficult to understand the economic benefit of such transactions other than providing fees to the professionals who arrange them.

One uncertainty concerns whether a shareholder who is distributed eligible property in a taxable liquidation of a corporation can take advantage of section 168(k). Although the liquidating corporation is treated as having sold the property to the shareholder for its fair market value (I.R.C. § 336(a)), the shareholder is simply provided with a fair market value basis in the property distributed (I.R.C. § 334(a)). Should the shareholder be treated as placing the property in service for purposes of section 168(k)? Or might the property be considered ineligible used property because it was previously used by the shareholder (through the corporation)? See I.R.C. § 168(k)(2)(A)(ii) and (iii) and (E)(ii)(I).[16] If the shareholder cannot expense the fair market value basis of the property distributed, the shareholder should be able to obtain a roughly equivalent benefit by transferring the property for its fair market value to an unrelated buyer (depending upon how much of the tax benefit the buyer retains). Alternatively, if the shareholder wants to retain the property (and it is not viewed as "previously used" property), the shareholder could first borrow funds to purchase the property from the corporation and then receive back the borrowed money in the liquidation (and repay the loan).

In general, to the extent a corporation holds property qualifying for the section 168(k) benefit, it would seem that the three acquisition patterns described in this chapter—(1) a taxable corporate liquidation followed by a shareholder sale of the assets distributed (the pattern approved by the Supreme Court in *Cumberland*), (2) a taxable corporate sale of assets followed by a liquidation of the selling corporation (the pattern approved by the Supreme Court in *Court Holding Company*), and (3) a taxable stock sale (with or without a section 338 election)—would all seem to produce the same net tax consequence of a single tax imposed at the shareholder level. In other words, until 2023, the new law would seem to have partially reversed the repeal of *General Utilities*. Of course, the new law in fact may be viewed as accomplishing much more—shifting the tax law further away from income taxation toward consumption taxation—with the repercussions on *General Utilities* repeal being simply a manifestation of this broader shift in the context of a corporate acquisition. In any given case, the specific result will depend upon how much of the target corporation's property may be expensed under section 168(k), the parties' tax profile, and other factors.

Issues such as the proper characterization of a transaction as a stock or asset acquisition and the proper allocation of purchase price to any property acquired may continue, although with modified stakes. For example, if the seller is entitled to a capital gain preference, the seller may still prefer to characterize a transaction as a sale of stock

[16] Except for the "previously used" question, the shareholder's receipt of the property would not seem to violate any of the conditions in sections 168(k)(2)(E)(ii) and 179(d)(2) and (3). Although a shareholder is under some circumstances treated as related to a corporation under section 267 (see I.R.C. § 267(b)(2)), that relationship would not bar recognition of a loss in the liquidation by either the corporation or the shareholder. See I.R.C. § 267(a)(1), second sentence. Hence, related-party status should not prevent the distributee from obtaining the section 168(k) benefit. See I.R.C. §§ 168(k)(2)(E)(ii)(II), 179(d)(2)(A).

rather than assets even though the buyer may prefer the opposite characterization. If assets are acquired, the seller may prefer an allocation of consideration to assets qualifying for capital gain treatment whereas the buyer would ordinarily prefer an allocation that maximizes the section 168(k) allowance.

22. <u>Page 364, add to section 4a</u>:

New section 168(k) may affect the sections 338(g) and 338(h)(10) elections differently. If the section 338(g) election is made, the "old" target is deemed to have sold all of its assets for fair market value to an unrelated "new" target in a single transaction, and the new target is responsible for the tax consequences of the deemed asset sale and repurchase. See I.R.C. § 338(a); Reg. § 1.338-1(b)(1) (new target is not related to old target for purposes of section 168), -1(b)(3)(i) (new target responsible for old target's tax liability). Thus, if old target has a zero basis in assets eligible for section 168(k), new target's expense deduction should exactly offset old target's gain, producing a "wash" if section 338 is elected. If old target has a positive basis in its assets, then the net tax benefit from expensing exceeds the net tax detriment from gain recognition. In short, if most of old target's property qualifies under section 168(k), the tax stakes of making or not making a section 338(g) election may often be quite small.

The consequences of making a section 338(h)(10) election under the new law are different. The effect of the deemed sale and repurchase by the target may again be largely a wash to the extent the target holds assets eligible for section 168(k). The election also allows the seller of the target stock, however, to avoid recognizing gain or loss in the transaction. See I.R.C. § 338(h)(10)(A). Thus, this election would seem in many cases to be quite advantageous to taxpayers (and may produce the equivalent tax benefit of a "reorganization" (see chapters 11 and 12) without satisfying any of its conditions). For the same reason, the section 336(e) election (described in section (b) on p. 367 of the text) should almost always be made.

23. <u>Page 366: add to note 3</u>:

The 2017 tax legislation allows corporations to carry forward their net operating losses indefinitely. Thus, a section 338(g) election should generally not be made for target corporations with losses since the election terminates any losses not used in the transaction. As previously discussed (see supplement addition to text page 364), a section 338(g) election may generally produce a wash to the extent the target holds assets eligible for section 168(k).

24. <u>Page 368: add to section c</u>:

In the future, new section 168(k) may enhance the advantage of using an intermediary. Sellers entitled to a capital gain preference may still prefer to sell stock of their corporations. If an intermediary buys the stock, sells the corporation's assets to a buyer, and avoids paying tax on the gain from the asset sale, the buyer may receive an even greater tax benefit (from expensing the cost of acquisition) than was available under pre-2018 law.

25. Page 372: add to section C:

For reasons previously described (see supplement addition to text pages 353 and 364), section 168(k) has changed the consequences of selling and liquidating S corporations to the extent they hold assets eligible for expensing. In this situation, either a corporate liquidation or sale of assets should generally produce no net tax cost after taking into account the tax benefit to the distributee or acquiring party. But gain of the S corporation in the transaction would still pass through and increase shareholder basis in the S corporation stock. Hence, the transaction should also result in no net tax cost at the shareholder level. In other words, the "single tax" generally imposed under subchapter S may be eliminated to the extent buyers are entitled to expense the full cost of the acquisition. In a sale of an S corporation's stock, the section 338(h)(10) election should generally be made to achieve the same result.

If the S corporation has a built-in gain subject to section 1374 at the time of the acquisition, the corporate-level tax cannot be avoided even if the built-in gain assets qualify under section 168(k). In this situation, the law effectively imposes two immediate taxes on the corporation's gain, but only one of these taxes would be offset by the tax benefit from the buyer's expensing deduction. Thus, there should remain one tax on built-gain that would be passed through to the shareholders, eliminating any further tax consequences at the shareholder level.

26. Page 376, add to note 7:

The IRS finalized the temporary regulations under section 337(d) in 2018 with only minor, nonsubstantive changes. See T.D. 9833, 2018-__ I.R.B. __.

27. Page 398, add to note 4:

The IRS withdrew the proposed regulations described in this note in 2017. See REG-139633-08, 2017-31 I.R.B. 175.