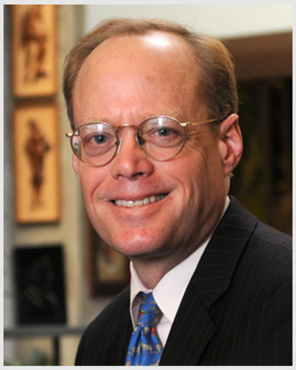
Capital Gain for Inventors in Patent Infringement Disputes

by Robert W. Wood and Donald P. Board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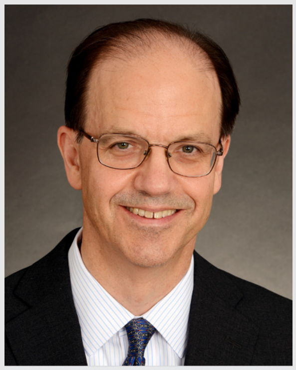
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In this article, Wood and Board examine how individual inventors can use section 1235 to structure their patent infringement recoveries as long-term capital gain after the enactment of the Tax Cuts and Jobs Act.

This discussion is not legal advice.

Twenty years into the 21st century, nobody can doubt the critical importance of patents and other forms of intellectual property to American and global business. As the digital and high-tech economies have expanded, the protection and management of IP have become a major focus of law firms and their clients. The registration, licensing, and enforcement of IP rights is now a significant business in its own right.[1]

IP includes patents, trademarks, copyrights, service marks, and trade secrets. Here we will concentrate on patents, the traditional source of most IP litigation. Patent litigation is also the main source of tax authorities addressing the nature and character of payments received in the resolution of IP disputes.

Our main focus will be section 1235, which allows individual inventors to report income from the transfer of "all substantial rights" to a patent (or an undivided interest therein) as long-term capital gain. In the wake of the Tax Cuts and Jobs Act, section 1235 has emerged as the exclusive means for inventors to treat patent litigation and settlement proceeds as capital gain. Before delving into the statute, however, it is useful to review the broader context.

There are many disputes involving the infringement of copyrights and other forms of IP outside the scope of section 1235. Although it is often easier to report patent recoveries as capital gain, other IP recoveries may also qualify in appropriate cases. And regardless of the type of IP, the stakes are material on recoveries big and small.

Tax rates may be headed up, but for now ordinary income is taxed at 37 percent. Capital gain (depending on income level and the size of the gain) can be taxed as low as 0 percent and as high as 23.8 percent. Plainly, 23.8 percent is better than 37 percent, but it isn't entirely about tax rates, because capital gain reporting can involve recouping basis. If you spent $1 million in sunk development costs that have not been deducted,

[1] This article updates Robert W. Wood's, "Patent Infringement Claims and Capital Gain," *Tax Notes*, Feb. 27, 2012, p. 1179.

that basis can be repaid without tax before you start reporting gain.

Types of IP Litigation

The tremendous value represented by IP often inspires extraordinary measures to protect it. This protection can be both legal and practical. KFC, for example, takes no chances when it comes to its secret blend of 11 herbs and spices. The Colonel's handwritten recipe is kept under 24-hour surveillance, locked in a safe weighing nearly 800 pounds, located in a vault encased in two feet of concrete.[2]

In spite of a business's best efforts to preserve and protect its IP, litigation regularly erupts over the scope of that protection and precisely who can do what. Competitors may infringe on patents, trademarks, and copyrights. Employees may leak information or property or depart with valuable trade secrets.

Ironically, lawsuits to enforce the owner's rights can raise risks of their own. A business seeking damages for patent infringement may quickly find itself defending the patent. Alleged infringers regularly assert that they cannot be liable because the patent in question is invalid. Also, the tax treatment of the recovery and litigation costs can become much more complicated.

Tax Rules for Litigation Recoveries

Before discussing the special rules applicable to IP, some tax ground rules are in order. It is a well-worn axiom that the origin of the claim controls the tax treatment of a recovery in or from a lawsuit, whether it is received as a result of a settlement or a judgment.[3] To determine the origin of the claim, courts and the IRS ask what a recovery was paid in lieu of.[4]

A recovery should be taxed in the same manner as the item for which it is intended to substitute.[5] The origin of the claim is determined by reference to claims raised in the complaint, litigated, and resolved in a verdict or settlement.[6] If the claim was for lost business profits, then the damage award, or settlement payment in lieu of the damage award, would be taxable as ordinary income in the same manner as ordinary business profits. The IRS generally views the complaint as the most persuasive evidence of the origin of the claim.[7]

Inventors and the TCJA

Since the 1950s, the definition of capital asset in section 1221(a)(3) has excluded most forms of IP (other than patents) that are "held by a taxpayer whose personal efforts created such property."[8] Notably, section 1221(a)(3) applies to copyrights, so authors who spend a couple of years writing a book cannot sell their rights and report long-term capital gain.[9] The exclusion ensures that authors will be taxed on the fruits of their "personal efforts" at ordinary rates, like compensation for personal services.[10]

The TCJA expanded section 1221(a)(3) so that its exclusion applies to patents and inventions that are the product of a taxpayer's personal efforts. Congress made parallel changes to section 1231(b)(1)(C) so that "property used in the trade or business" does not include patents or inventions, either. This means that an inventor's gain from the sale or exchange of a patent or invention used in a trade or business cannot qualify as long-term capital gain under section 1231(a)(1).

Although Congress prevented patents and inventions from qualifying as capital or quasi-capital assets in the hands of their inventors, it did not close the door on capital gain. The TCJA did

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[2]*See* Kentucky Fried Bloggin' (Feb. 14, 2009).

[3]*See, e.g.*, *United States v. Gilmore*, 372 U.S. 39, 49 (1963); and *Hort v. Commissioner*, 313 U.S. 28 (1941).

[4]*See Raytheon Production Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir. 1944), *cert. denied*, 323 U.S. 779 (1944); and LTR 200108029.

[5]*Id.*; and *Knowland v. Commissioner*, 29 B.T.A. 618 (1933).

[6]*Id.*; and *State Fish Corp. v. Commissioner*, 48 T.C. 465, 474 (1967), *acq.*, 1968-2 C.B. 3, *mod.*, 49 T.C. 13 (1967).

[7]Rev. Rul. 85-98, 1985-2 C.B. 51.

[8]*See* section 1221(a)(3)(A).

[9]Unlike General Dwight D. Eisenhower, who saved about $400,000 in federal taxes when he sold *Crusade in Europe* to Doubleday in 1948 and reported capital gain. The Eisenhower episode was a major factor in Congress's decision to exclude self-created copyrights from the definition of "capital asset."

[10]Thanks to the efforts of the Nashville Songwriters Association International, Congress has provided an exception for the individual creators of musical works. Under section 1221(b)(3), adopted in 2006, these favored taxpayers may elect to treat gain from the sale or exchange of their copyrights as gain from the sale or exchange of a capital asset.

not touch section 1235, which allows a "holder" to report profits from the transfer of all substantial rights to a patent as long-term capital gain.[11] Because section 1235(b)(1) defines the term "holder" to include "any individual whose efforts created such property,"[12] inventors can still report capital gain in connection with qualifying transfers.

This result has struck some observers as anomalous.[13] Congress went out of its way to exclude inventors from sections 1221(a)(3) and 1231(b)(1)(C), so why didn't it do something to prevent them from reporting long-term capital gain in connection with a transfer described in section 1235(a)? Nobody seems to know for sure.

It is worth recalling, however, that the TCJA was drafted and enacted under intense time pressure. Its failure to repeal or at least amend section 1235 to exclude inventors may mean nothing more than that this one fell between the cracks. If so, one would have expected Congress to correct its omission by addressing patents and section 1235 in subsequent legislation.

However, nothing appears to have been done, or even publicly proposed. For now, at least, inventors can still aim for capital gain treatment by structuring their infringement recoveries as payments for a transfer of all substantial rights to a patent or an undivided interest therein.

Section 1235 Treatment

The IRS has traditionally viewed infringement recoveries as ordinary income.[14] After all, such recoveries can often be understood as substitutes for the patent licensing fees that the infringer should have been paying the aggrieved owner in the first place. Under section 1235, however, the inventor's recovery is treated as capital gain if it is paid in connection with a transfer of all substantial rights to the patent or an undivided interest therein.

Section 1235 doesn't pull any punches: If a settlement agreement provides for the requisite transfer of all substantial rights to a patent or an undivided interest therein, the inventor can report long-term capital gain regardless of the fact that (1) the patent does not qualify as either a capital asset or quasi-capital asset; (2) the transfer does not constitute a sale or exchange; (3) the inventor's holding period does not exceed one year; (4) the inventor is in the business of making inventions or the business of buying and selling patents;[15] (5) the transferee's payments are made over a period that corresponds to its use of the patent; or (6) the payments are contingent on the productivity, use, or disposition of the property.

Thus, section 1235 can help an inventor surmount many obstacles in claiming a long-term capital gain. The transfer cannot be by gift, inheritance, or devise, but those transfers are not taxable in any event. However, there are more demanding requirements that must be met.

Holder

Section 1235's bounty is limited to "holders," which is defined to include "the individual whose efforts created the property"[16] — that is, the individual inventor. It is worth noting that the definition of holder also includes some early-stage investors who purchase an interest in the property from the inventor. The main constraint is that they must purchase their interests before the invention covered by the patent is actually reduced to practice.[17]

The regulations define the term "actual reduction to practice" by reference to the patent law definition in 35 U.S.C. section 102(g).[18] Generally, an invention is reduced to actual practice when it has been tested and operated successfully under operating conditions. This may occur either before or after application for a patent, but it cannot occur later than the earliest

[11] *See* section 1235(a).

[12] Section 1235(b)(1). Reg. section 1.1235(d)(1)(i) adds some technical color, stating that the creator must also be someone "who would qualify as the 'original and first' inventor, or joint inventor, within the meaning of title 35 of the United States Code." We assume that anyone we describe as an "inventor" meets this patent law requirement.

[13] *See, e.g.*, Anthony P. Polito, "Did Congress Goof? Legislating Taxation of Self-Created Patents," *Tax Notes*, Oct. 1, 2018, p. 51.

[14] *See Mathey v. Commissioner*, 177 F.2d 259 (1st Cir. 1949), *aff'g* 10 T.C. 1099 (1948), *cert. denied*, 339 U.S. 943 (1950).

[15] *See* reg. section 1.1235-2(d)(3).

[16] Section 1235(b).

[17] *See* section 1235(b)(2).

[18] *See* reg. section 1.1235-2(e).

time that commercial exploitation of the invention occurs.

Investors will not qualify as holders if they are the inventor's employer,[19] or if they are related to the inventor.[20] Under section 1235(c), two persons are "related" if they stand in any of the relationships specified in sections 267(b) and 707(b), but with the normal 50 percent thresholds for attribution reduced to 25 percent. Although early-stage investors often include the proverbial "friends and family," close family members are not generally considered holders.[21]

Non-individuals generally do not qualify as holders either. Hence, corporations, partnerships, trusts, estates, and other entities must look outside of section 1235 to determine if a transfer of patent rights results in capital gain. However, there is a partial exception for partnerships.

A partnership cannot be a holder per se. However, an individual partner can still qualify as a holder for his *share* of a patent owned by the partnership.[22] The IRS has also ruled that limited liability companies[23] and even state-law trusts[24] can be treated as "partnerships" for purposes of section 1235, as long as that is their general tax classification.

Transfer of All Substantial Rights

One of the key issues under section 1235 is whether the inventor has transferred "all substantial rights" to the patent or an undivided interest therein. The regulations state that "all substantial rights to a patent" means "all rights (whether or not then held by the grantor) which are of value at the time the rights to the patent (or an individual interest therein) are transferred."[25]

Thus, a transfer of "all substantial rights" does not occur if the grant of rights (1) is limited geographically within a jurisdiction, (2) is limited in duration by the terms of the transfer to a period less than the remaining life of the patent, (3) is limited to a specific field of use within a trade or industry, or (4) covers less than all the claims or inventions covered by the patent. As usual, all pertinent facts and circumstances must be considered.[26]

The inventor's retention of legal title simply to secure performance or payment by the transferee in the grant of an exclusive license is not viewed as a failure to transfer all substantial rights. The same goes for the reservation of rights in property that are not inconsistent with the passage of ownership (such as a security interest or a forfeiture condition for nonperformance).[27]

The right conferred by a patent grant is, according to the statute, "the right to exclude others from making, using or selling" the invention.[28] Accordingly, if the patent holder intends to transfer all substantial rights, he must transfer his entire right to exclude others (including himself) from making, using, or selling the invention. At one time, the failure to specify each of these rights in the grant clause of a license agreement could have resulted in the denial of capital gain treatment.[29] Fortunately, the courts now take a more pragmatic approach to determining what rights were actually transferred or retained.[30]

All substantial rights are measured by what the inventor retains, not by what is given up.[31] Whether all substantial rights have been transferred depends on both quantitative and qualitative factors. Each retained right must be examined separately, and collectively with other retained rights, to determine if the inventor has retained too much.[32]

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[19] *See* section 1235(b)(2)(A).

[20] *See* section 1235(b)(2)(B).

[21] Under section 1235(c)(2), an inventor's family consists of his ancestors, spouse, and lineal descendants. This allows siblings to qualify as holders, even though they would normally be considered family members under section 267(c)(4).

[22] Reg. section 1.1235-2(d)(2).

[23] *See* LTR 200506008, LTR 200506009, and LTR 200506019.

[24] *See* LTR 200219017; LTR 200219019; LTR 200219020; LTR 200219021; and LTR 200219026.

[25] *See* reg. section 1.1235-2(b).

[26] *See generally* reg. section 1.1235-2(b).

[27] *See* reg. section 1.1235-2(b)(2).

[28] 35 U.S.C. section 154.

[29] *See, e.g., Marco v. Commissioner*, 25 T.C. 544 (1955), *acq.*

[30] *See, e.g., Lockhart v. Commissioner*, 258 F.2d 343 (3d Cir. 1958).

[31] *Fawick v. Commissioner*, 436 F.2d 655 (6th Cir. 1971).

[32] *Schmitt v. Commissioner*, 30 T.C. 322 (1958).

Payments for Infringement

The breadth of section 1235 is demonstrated by the fact that the capital gain treatment it affords can also apply to payments for infringement (and to payments in the nature of a settlement for infringement). The regulations indicate that if there is a "transfer" of a patent to which section 1235 applies, amounts received in settlement of (or as the award of damages in) a suit for infringement of that patent are taxable as long-term capital gain to the extent that they relate to the interest transferred.[33]

To determine whether a particular recovery qualifies, it is necessary to consider the nature of the interest transferred, and whether the proceeds of the lawsuit (whether by settlement or judgment) are attributable to the transfer of rights. The regulations imply that not only payments from the transferee of rights, but also damages from a third-party infringer, can qualify for long-term capital gain treatment.[34]

Effect of Settlement Agreement

The wording of a settlement agreement is not binding on the IRS when it considers the tax effects of the payments. Nevertheless, the wording is considered, and it can often spell the difference between a short audit and a long one, or a positive or negative result. For a recent example, consider the $23 million taxpayer home run in *NCA Argyle*.[35] Ideally, the settlement agreement in a patent case will explicitly "transfer" all rights to the subject patent, whether by sale or license.

However, many will not, particularly when tax counsel is not involved in the settlement. Nevertheless, a reasonable argument can often be made that the settlement *effectively* conveyed substantially all the plaintiff's rights to the patent that existed at the time of the settlement. In some cases, this argument may be strengthened if the patent has expired during the litigation.

Thus, it is possible that the plaintiff will have no remaining rights in the patent at the time of the settlement. In any event, the retention of rights that do not have any value at the time of the transfer should not prevent qualification under section 1235.[36] However, some settlements could be considered grants of nonexclusive licenses.

In *First National Trust and Savings Bank of San Diego*, the IRS argued that a transfer subject to prior nonexclusive licenses did not qualify as a transfer of all substantial rights under the predecessor of section 1235.[37] The court agreed, stating that the fact that "the end result of such latter conveyance may accomplish a divestiture of all substantial rights which the transferor had in the patent at the time, is not the proper criterion."[38] Other courts, however, have held that the prior transfer of a nonexclusive license does not preclude a later sale to a third party.[39]

Inclusion of Attorney Fees

If an individual inventor is recovering money in an IP suit, there is a good chance that he is doing so with the assistance of a contingent fee lawyer. This raises a question about how the attorney fees should be treated. This is often the inventor's primary tax concern, because the code's unfriendly treatment of many kinds of attorney fees can lead to harsh results.

The Supreme Court has held that plaintiffs must generally include in gross income amounts that are paid to their attorneys in contingent fee litigation.[40] Although individual plaintiffs can generally deduct those fees under section 212, this is a miscellaneous itemized deduction. As such,

[33] Reg. section 1.1235-1(c).

[34] *See* Ronald L. Blanc and James R. Ferrand, "Go to 1235 for Technology Capital Gains!" *Proceedings of the 52nd Annual Institute on Federal Taxation* (Jan. 11, 2000).

[35] *NCA Argyle LP v. Commissioner*, T.C. Memo. 2020-56. *See* discussion in Robert W. Wood, "Legal Settlements as Capital Gain: A Playbook to Avoid Ordinary Income," *Tax Notes Federal*, Sept. 28, 2020, p. 2407.

[36] *See* reg. section 1.1235-2(b)(1) (defining the term "all substantial rights" as all rights "which are of value at the time the rights to the patent (or an undivided interest therein) are transferred").

[37] *First National Trust and Savings Bank of San Diego v. United States*, 200 F. Supp. 274 (S.D. Cal. 1961).

[38] *Id.* at 282.

[39] *See General Aniline and Film Corp. v. Commissioner*, 139 F.2d 759 (2d Cir. 1944) (noting in a footnote: "Nor does it seem to us important, in such a context, that the assignor, before making the assignment, had granted to others some rights under the patent"); *MacDonald v. Commissioner*, 55 T.C. 840, 859 (1971) (declining to follow *First National Trust* on the basis that "the issue of whether all substantial rights have been transferred (that is, whether there has been a sale) should arise only when the transferor has *retained* rights of some sort" [emphasis added]); *Bell Intercontinental Corp. v. United States*, 381 F.2d 1004, 1013-1014 (Ct. Cl. 1967) (criticizing the reasoning of *First National Trust*).

[40] *See Commissioner v. Banks*, 543 U.S. 426 (2005).

the deduction has historically been subject to a variety of limitations and restrictions. The TCJA made a bad situation worse, simply eliminating miscellaneous itemized deductions until 2026.[41]

For business taxpayers filing a corporate, partnership, or S corporation return, this usually causes no harm, because a full business expense deduction should be available under section 162. Individuals (for example, professional inventors) who are able to deduct attorney fees on Schedule C as expenses of carrying on their trade or business can also invoke section 162. But inventors whose activities do not rise to the level of a trade or business may be left with a deduction under section 212, which section 67(g) disallows.

Capitalization of Legal Fees

Fortunately, an inventor whose patent recovery is entitled to capital gain treatment also solves his attorney fee problem. After all, if section 1235 treats the recovery as proceeds from the sale or exchange of a capital asset, the related legal fees will normally also be treated as capital. That should allow them to be offset against the recovery on the inventor's Schedule D.

The effect of including attorney fees in a plaintiff's gross income depends on whether the settlement payment is ordinary income or capital gain. The origin of the claim test is used to determine the tax treatment of the payment of legal fees.[42] Whether legal fees can be deducted or must be capitalized is controlled by the nature of the matter for which the expenses were incurred.[43]

Section 263(a) expressly denies a deduction for any amounts expended for permanent improvements or betterments "made to increase the value of any property or estate." Although legal fees are not highlighted in this language, the regulations make clear that the cost of capital expenditures includes the cost of defending or perfecting title to property.[44] The regulations further provide that expenses paid or incurred in recovering property constitute part of the cost of the property and are therefore not deductible.[45]

In the past, the IRS contended that attorney fees in IP infringement litigation should be capitalized rather than deducted. The Tax Court agreed with the IRS on this point, although the Third Circuit later reversed.[46] The IRS appears to have accepted the Third Circuit's decision, allowing deductions in cases in which the validity of the IP is not in question.[47]

According to the IRS, whether an amount is paid to defend or perfect title on the one hand, or to protect against infringement on the other, is a factual matter.[48] That general proposition seems true enough. However, because patent infringement cases almost invariably involve a challenge to the patent's validity, it is hard to see how the legal fees in pursuing a patent infringement claim that is eligible for capital gain should be anything other than capital expenses.

The IRS has made this point in Field Service Advice:

> A patent is intended to grant the inventor "the exclusive right" to their invention for a limited time so as to "promote the progress of science and useful arts." U.S. Constitution, Art. I, section 8, cl. 8. It is a valuable property right — albeit intangible. In litigating a patent infringement action, it must be recognized that the first defense of the alleged infringer is almost invariably that no valid patent exists. Acknowledging this legal and practical backdrop to patent litigation makes clear that patent infringement actions are actions that essentially defend or perfect the right to the patent monopoly. Given that recognition, the

[41] *See* section 67(g). *See* Wood, "12 Ways to Deduct Legal Fees Under New Tax Laws," *Tax Notes Federal*, Oct. 7, 2019, p. 111.

[42] *See Woodward v. Commissioner*, 397 U.S. 572, 574-579 (1970).

[43] *United States v. Gilmore*, 372 U.S. 39, 49 (1963); and FSA 200228005 ("the deductibility of the payments and legal fees at issue depends on the origin of the claim from which the settlement arose").

[44] Reg. section 1.263(a)-2(c).

[45] Reg. section 1.212-1(k).

[46] *Urquhart v. Commissioner*, 215 F.2d 17 (3d Cir. 1954), *rev'g* 20 T.C. 944 (1953).

[47] *See* reg. section 1.263(a)-4(e)(5), Example 6 (copyright infringement).

[48] *See* Preamble to Proposed Regulations, REG-125638-01.

subject taxpayer's legal costs should be presumed capital in the first instance.[49]

Moreover, claiming that a patent has been sold would surely suggest capitalization of the related legal fees. For example, in *Leigh*,[50] the taxpayer entered into an agreement to sell stock of a manufacturing company. The deal soured, culminating in litigation between buyer and seller.

The court found that the buyer's suit originated in the taxpayer's disposition of stock, and that the stock was a capital asset. It therefore required the taxpayer to capitalize the legal fees under section 263. Courts and the IRS also have ruled that legal fees must be capitalized when they bear a direct relationship to an asset acquired or preserved by a lawsuit.

For example, in *Lange*,[51] a taxpayer sought to deduct legal fees in litigation over his ownership interest in a closely held company. The Tax Court rejected the deduction, ruling that the fees must be capitalized. The origin of the claim lay in the taxpayer's efforts to protect, defend, and acquire ownership interests in the corporation.

Similarly, in *Winter*,[52] the Tax Court held that taxpayers must capitalize legal fees incurred in a lawsuit seeking damages arising from an increased purchase price of a capital asset.[53] Although the case arose outside the field of IP litigation, the IRS seems to recognize the fundamental symbiosis between the nature of legal matters concerning capital assets and the capitalization of the legal fees. In FSA 200228005, the taxpayer paid legal fees to prosecute an action arising from its purchase of contaminated land. The IRS ruled:

> Taxpayer incurred legal fees in its efforts to obtain recovery for the environmental damage to the Purchased Property that was allegedly caused by [the defendant]. Therefore, those legal fees should be treated as capital expenditures.

When capital gain for a patent recovery is being claimed under section 1235, related legal fees should generally be capitalized. They are treated as capital expenditures made regarding the sale or exchange of the asset and applied to increase the plaintiff's basis in the patent. Where capital gain treatment is being claimed, it is simply consistent to do so.

Treatment by Payer

Throughout the litigation settlement arena, the manner in which the payer treats an amount paid can be relevant to the characterization of the payment to the payee for tax purposes. That is one of the reasons why securing an agreement among the parties to litigation on those issues is important. If a payer treats the amount as payment for the purchase of patent rights, this is one indication that section 1235 (or capital gain treatment) may apply to the plaintiff.

Conversely, if the payer treats (and reports) the payment as a payment of royalties, without any mention of the transfer of patent rights, this seems inconsistent with reporting capital gain. Nevertheless, there are arguments that the intent of the payer in this specific context may be less relevant than in many other types of litigation. Indeed, the question whether all substantial rights to a patent have been transferred is a factual determination based on the substance, rather than any specific form, of the transaction.[54]

In addition to the regulations under section 1235, a number of cases indicate that section 1235 should be liberally interpreted. The case law suggests that the capital gain treatment it affords should be accorded far-reaching application.[55]

Conclusion

Nearly three years after the enactment of the TCJA, commentators are still trying to make sense of its inconsistent treatment of individual inventors in sections 1221 and 1231 on the one

[49] 1997 FSA LEXIS 435, *6-8. *See also* FSA 199925012 (noting that in spite of the lack of later IRS challenge to *Urquhart*, "whether the necessary litigation of the patent's validity is in essence tantamount to defending or perfecting its 'title' to the grant of patent monopoly is open to debate").

[50] *Leigh v. United States*, 611 F. Supp. 33 (N.D. Ill. 1985).

[51] *Lange v. Commissioner*, T.C. Memo. 1998-161.

[52] *Winter v. Commissioner*, T.C. Memo. 2002-173.

[53] *See also Spector v. Commissioner*, 71 T.C. 1017 (1979), *rev'd and remanded on another issue*, 641 F.2d 376 (5th Cir. 1981).

[54] *See E.I. du Pont de Nemours and Co. v. United States*, 432 F.2d 1052, 1055 (3d Cir. 1970).

[55] *See, e.g.*, *Gilson v. Commissioner*, T.C. Memo. 1984-447.

hand, and section 1235 on the other. Congress, however, does not appear to have been losing any sleep over the statutory anomaly. The way remains open for inventors to structure their infringement recoveries to generate long-term capital gain. Given the large dollars that can change hands in patent settlements and verdicts, inventors should sweat the details of any settlement with that in mind. ■