

## COMMENT

Some annual inflation adjustments that use the August 31 CPI amount are required under regulation or IRS administrative guidance (see, for example, annual inflation adjustments made to certain rules under the arbitrage bond rules under Code Sec. 148). Presumably, these items will have to be amended and reissued in order to make the switch over to C-CPI-U.

**Effective date.** The provision applies to tax years beginning after December 31, 2017 (Act Sec. 11002(e) of the Tax Cuts and Jobs Act (P.L. 115-97)).

## ¶130 Self-Created Property as Capital Asset

### NEW LAW EXPLAINED

**Patents, inventions, designs, and secret formulas are not capital assets.**—In dispositions after December 31, 2017, a patent, invention, model or design (patented or not), or secret formula or process is not a capital asset in the hands of (1) the taxpayer who personal efforts created the property, or (2) a taxpayer with a substituted or transferred basis from the taxpayer whose personal efforts created the property (Code Sec. 1221(a)(3), as amended by the Tax Cuts and Jobs Act. Thus, gains or losses from the sale or exchange of a patent, invention, model or design, or a secret formula or process that is held either by the taxpayer who created the property or a taxpayer with a substituted or transferred basis from the taxpayer who created the property will not be capital gains or losses.

These types of self-created property also do not qualify for the capital gain/ordinary loss rule for dispositions after December 31, 2017 (Code Sec. 1231(b)(1)(C), as amended by the 2017 Tax Cuts Act).

## CAUTION

According to the Conference Committee Report, the exclusion of these self-created works from capital assets also applies when the taxpayer's basis is determined by reference to the basis of a person for whom the property was created (Conference Report on H.R. 1, Tax Cuts and Jobs Act (H. Rept. 115-466)). However, the amended statutory language apparently still limits this "for whom created" rule to letters, memoranda and similar property.

## COMMENT

Although patents will be excluded from the definition of capital asset after 2017, a qualified holder's gain on the disposition of a patent to an unrelated person may still be taxed at the lowest capital gain tax rate. Qualified holders include the creator of the patent and persons who provided financial backing to the creator (Code Sec. 1235).

**Effective date.** The amendments apply to dispositions after December 31, 2017 (Act Sec. 13314(c) of the Tax Cuts and Jobs Act.