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# A Tale of Two EMBA's

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In this report, Cowan and Hurley review, and draw planning lessons from, two recent Tax Court opinions on the deductibility of Executive Master of Business Administration program tuition and related costs.

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### I. Introduction

Alex Kopaigora was called from his native Ukraine in 1994 for a U.S. mission for the Church of Jesus Christ of Latter-Day Saints. He stayed and later became a U.S. citizen.<sup>1</sup> In 2011, while working in accounting and finance at a hotel in Los

Angeles, he began commuting to Brigham Young University's Executive Master of Business Administration (EMBA) program in Utah. Through no fault of his own, he lost his job at the hotel. Shortly after completing his EMBA, he found work in accounting and finance at a small company.

Megan Zhao Creigh worked for many years as a software engineer and IT manager before leaving to raise her child. She then tried to start a consulting business but was unable to find employment or consulting work. She enrolled in the EMBA program at the University of California, Los Angeles, to network, establish contacts, and gain work for her fledgling consulting business.

Both Kopaigora and Creigh were managers before, during, and after earning their EMBA's. Both deducted their EMBA tuition and related costs on their tax returns as business expenses.<sup>2</sup> The Tax Court, in summary opinions,<sup>3</sup> held that Kopaigora could deduct his EMBA expenses and Creigh could not.<sup>4</sup> Further, Creigh and her spouse were assessed an accuracy-related penalty. This report examines those differing results and draws lessons for taxpayers seeking to deduct EMBA costs as business expenses.<sup>5</sup>

<sup>2</sup>Kopaigora, as an employee, deducted his EMBA costs on Schedule A of Form 1040 as a miscellaneous itemized deduction. Creigh, as an independent consultant, deducted her EMBA costs on Schedule C of Form 1040.

<sup>3</sup>Most disputes over deductions for EMBA expenses will not exceed the \$50,000 threshold for the Tax Court's small-case procedures under section 7463. Although summary opinions are not precedential, they shed light on the Tax Court's approach.

<sup>4</sup>*Kopaigora v. Commissioner*, T.C. Summ. Op. 2016-35; and *Creigh v. Commissioner*, T.C. Summ. Op. 2017-26.

<sup>5</sup>Possible tax benefits for EMBA expenses classified as personal expenses (e.g., the lifetime learning credit) are beyond the scope of this report. See generally IRS Publication 970, "Tax Benefits for Education."

<sup>1</sup>Laura Saunders, "Good News for M.B.A. Students: Tuition Is Now More Deductible," *The Wall Street Journal*, Aug. 12, 2016.

## II. Education Expenses as Business Expenses

### A. Overview

Section 162(a) allows a deduction for the ordinary and necessary expenses of a trade or business. Section 262 generally disallows deductions for personal expenses. Are education expenses deductible ordinary and necessary business expenses or nondeductible personal expenses? Reg. section 1.162-5, discussed in Section II.B, provides guidance, using a mixture of bright-line tests and a facts and circumstances approach.

If a taxpayer's education expenses qualify as business expenses, they are deductible under section 162. Sole proprietors deduct their education expenses like any other business expense on Schedule C of Form 1040. Employees who are not reimbursed for their educational expenses by their employer treat the expenses as miscellaneous itemized deductions.<sup>6</sup> Those deductions are subject to two limits. First, as the name implies, the taxpayer must itemize to claim the deduction. Historically, given the high tuition at most EMBA programs, the education expenses would have pushed many EMBA students above the standard deduction. Second, miscellaneous itemized deductions are deductible only to the extent that they, in the aggregate, exceed 2 percent of the taxpayer's adjusted gross income.<sup>7</sup>

The Tax Cuts and Jobs Act (P.L. 115-97) suspended all miscellaneous itemized deductions for 2018 through 2025.<sup>8</sup> Thus, even if an employee's unreimbursed education expenses qualify as business expenses, they will not be deductible in 2018 through 2025. Nonetheless, the issue of whether education expenses qualify as business expenses still matters after the TCJA. First, the deduction remains in place for sole proprietors. Second, tax years before 2018 may still be subject to audit. Third, miscellaneous itemized deductions may return in 2026 if Congress fails to act. And finally, whether education expenses qualify as business expenses is still important for employees if they're

reimbursed for them by their employers. Many employers will cover the cost of EMBA programs for their promising executives. The taxation of reimbursed education expenses turns on whether the expenses qualify as business expenses. If they do, the reimbursement is generally not taxable to the employee — normally as a working condition fringe benefit. If they do not qualify as business expenses, the reimbursement is treated as taxable compensation.

Of course, the issue is more complicated than that. The first \$5,250 of reimbursement each year may be excluded from the employee's income if the employer's reimbursement plan meets the requirements of section 127 for educational assistance programs. (The \$5,250 amount is not indexed for inflation, and EMBA tuition normally far exceeds \$5,250.) Section 127 does not require that the education qualify as a business expense, but section 127 plans cannot discriminate in favor of highly compensated employees.<sup>9</sup> So if the employer generally does not reimburse educational expenses for its employees but does reimburse them for selected employees (typically, highly compensated employees<sup>10</sup>), the section 127 exclusion will be unavailable, and the analysis will move to section 132(d).

Reimbursements that do not qualify for exclusion under section 127 are excludable as a working condition fringe benefit as defined in section 132(d) "to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167."<sup>11</sup> Before the TCJA, the implications of section 132(d) were clear. If the expenses were business related under section 162 and paid by the employee, they could be deductible as a miscellaneous itemized deduction under section 67. Thus, the employer's reimbursement of the expenses would be nontaxable. The 2 percent floor in section 67(a) wasn't considered when

<sup>9</sup> Section 127(b)(2).

<sup>10</sup> See Duff McDonald, *The Golden Passport: Harvard Business School, the Limits of Capitalism, and the Moral Failure of the MBA Elite* 151 (2017) (discussing Harvard Business School's former practice of admitting to their executive education programs only those students who had their tuition paid for by their employers).

<sup>11</sup> Technically, if section 127 is applicable, it must be applied first because section 132(d) is applicable only to the extent another fringe benefit code section doesn't apply. See section 132(l).

<sup>6</sup> See section 67.

<sup>7</sup> Section 67(a).

<sup>8</sup> Section 67(g).

determining the extent to which the expenses would have been deductible if paid by the employee.<sup>12</sup> So the reimbursement was nontaxable if the education expense was business related, even if the employee wouldn't have been able to deduct the full amount because of the 2 percent floor.<sup>13</sup>

Because the TCJA eliminated the deduction for miscellaneous itemized deductions from 2018 through 2025, some are concerned that because an employee will never be able to deduct business expenses in that period, employer-provided working condition fringe benefits will become taxable.<sup>14</sup> A legislative counsel for the Joint Committee on Taxation said that Congress didn't intend for the TCJA to eliminate tax-free working condition fringe benefits.<sup>15</sup> But some official guidance would be helpful here.

To ensure exclusion of the reimbursement, the employer should reimburse the expenses under an accountable plan.<sup>16</sup> If payments are made under a non-accountable plan, they must be included in the employee's Form W-2 as taxable compensation.<sup>17</sup> Reimbursement of education expenses that are not excluded by section 127 and do not qualify as business expenses would be taxable. The employer has the option of grossing up the reimbursement by paying the employee's tax on the taxable reimbursement to make the employee whole on an after-tax basis. If the employer does this, of course, the tax payment will be taxable, requiring another tax payment by the employer, triggering another taxable payment, etc.

## B. Reg. Section 1.162-5

### 1. Affirmative requirement.

To be deductible as an ordinary and necessary business expense, the education must either (1)

maintain or improve the taxpayer's skills in his employment or other trade or business, or (2) be necessary, by law or employer policy, for the taxpayer to maintain his current job, status, or level of compensation.<sup>18</sup> Those rules apply even if the education leads to a degree.<sup>19</sup>

### 2. Prohibited categories.

Even if a taxpayer meets the affirmative requirements of reg. section 1.162-5, the education will be considered a nondeductible personal expense if either (1) it's needed to meet the minimum educational requirements for qualification in the taxpayer's employment or another trade or business,<sup>20</sup> or (2) it will qualify the taxpayer for a new trade or business.<sup>21</sup> This second prohibition was at issue in *Kopaigora* and *Creigh*.

### 3. Combining the rules.

The regulations essentially look at whether the taxpayer is "in the club" before incurring the educational expenses. If the taxpayer is already in the club — already a CPA or lawyer, for example — the cost of education that maintains or improves the taxpayer's skills or is required by law (continuing professional education or continuing legal education) will be considered a business expense. The expense helps the taxpayer stay in the club. If the taxpayer isn't yet in the club — if she seeks to become a CPA or lawyer — the cost of education to get her into the club is considered personal and thus nondeductible. To be deductible as a business expense, the education must add some value (to meet the affirmative requirement) but not too much value (to avoid qualifying the taxpayer for a new trade or business). The key is to find the ideal value level.

## C. Qualifying for a New Trade or Business

"One of the most challenging things about gauging the influence of . . . any business school . . . on its graduates' careers is that unlike, say, doctors, none of them *needed* to go to graduate school in order to succeed."<sup>22</sup>

<sup>12</sup> Reg. section 1.132-5(a)(1)(vi).

<sup>13</sup> Although not expressly addressed, this rule would presumably also allow a non-itemizer to receive a tax-free working condition fringe benefit. From a practical standpoint, that must be the result. The employer, in determining whether the reimbursement is taxable to the employee, can't be expected to know whether the employee itemizes.

<sup>14</sup> Stephanie Cumings, "Company Picnics and Holiday Parties Still Deductible," *Tax Notes*, Feb. 5, 2018, p. 730.

<sup>15</sup> *Id.*

<sup>16</sup> See generally reg. section 1.62-2.

<sup>17</sup> Reg. section 1.62-2(c)(5).

<sup>18</sup> Reg. section 1.162-5(a).

<sup>19</sup> *Id.*

<sup>20</sup> Reg. section 1.162-5(b)(2).

<sup>21</sup> Reg. section 1.162-5(b)(3).

<sup>22</sup> McDonald, *supra* note 10, at 170.

The regulations state that “a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as is involved in the individual’s present employment.”<sup>23</sup> Various changes in an employee’s duties in the field of education — such as changing from teaching elementary to secondary courses, from teaching math to science, or from teaching in the classroom to being a guidance counselor or principal — won’t be considered new trades or businesses.<sup>24</sup> The regulations provide a few examples beyond teaching: a non-lawyer employee or a self-employed individual attaining a law degree (qualifies the taxpayer for a new trade or business; not deductible),<sup>25</sup> a general practitioner medical doctor learning a new area of medicine (not a new trade or business; deductible),<sup>26</sup> and a psychiatrist studying to learn psychoanalysis (not a new trade or business; deductible).<sup>27</sup> The crux of the matter is that even if the skills attained improve the taxpayer’s ability to do her job, the deduction is disallowed if those skills allow her to qualify for a new profession.<sup>28</sup>

When interpreting reg. section 1.162-5(b)(3), the Tax Court compares “the types of tasks and activities which the taxpayer was qualified to perform before the acquisition of a particular title or degree, and those which he is qualified to perform afterwards.”<sup>29</sup> If there’s a significant difference, the taxpayer qualifies for a new trade or business, and the educational costs therefore

will not be deductible as business expenses.<sup>30</sup> Identifying the differences between the taxpayer’s pre- and post-education abilities and assessing the significance of those differences involves factual findings.<sup>31</sup> And, as *Kopaigora* and *Creigh* show, even slight differences in the facts can change the outcome.<sup>32</sup>

### III. The Nature of EMBA Programs

“If you bring in motivated people, it doesn’t really matter what you do in the classroom. It’s a selection effect. They will still be captains of industry even if all you do is feed them cotton candy for two years. And they’ll still have nice teeth.”<sup>33</sup>

Whether the costs of an MBA qualify as business expenses turns on the facts and circumstances of each student. Some are already in the club; others are not. In contrast, programs like Juris Doctorates help qualify students for a new trade or business (the practice of law). Similarly, a student earning a Master of Accountancy to attain the requisite 150 academic credit hours to become a CPA is qualifying for a new trade or business. Students in this position are not in the club but want to be.

EMBA programs, by design, are for those with experience. This distinguishes them from many traditional MBA programs. If EMBA students are already established in a trade or business as managers (as most are), it should be fairly easy to show that the EMBA program enhances their skills in their current trade or business (management) and does not qualify them for a new trade or business.

<sup>23</sup> Reg. section 1.162-5(b)(3)(i).

<sup>24</sup> Reg. section 1.162-5(b)(3)(i)(a)-(d).

<sup>25</sup> Reg. section 1.162-5(b)(3)(i), Example 1 (self-employed), and Example 2 (employee).

<sup>26</sup> Reg. section 1.162-5(b)(3)(i), Example 3.

<sup>27</sup> Reg. section 1.162-5(b)(3)(i), Example 4.

<sup>28</sup> See *Warren v. Commissioner*, T.C. Memo. 2003-175 (pastor denied a deduction for the expenses of earning a bachelor’s degree in human services); and *Galligan v. Commissioner*, T.C. Memo. 2002-150 (law librarian denied a deduction for the expenses of earning a law degree).

<sup>29</sup> *Glenn v. Commissioner*, 62 T.C. 270 (1974) (finding that a “public accountant” couldn’t deduct the costs of preparing for the CPA exam because those costs qualified him for a new trade or business). See also *Weiszmann v. Commissioner*, 52 T.C. 1106 (1969) (finding that a chemical engineer working as a “patent trainee” couldn’t deduct the costs of a law degree because those costs qualified him for a new trade or business as a patent attorney or even a generalist attorney).

<sup>30</sup> *Glenn*, 62 T.C. 270; and *Weiszmann*, 52 T.C. 1106. Note that the regulations say that a mere change in “duties” (in the same general type of work) post-education won’t constitute a new trade or business, whereas the Tax Court says that a significant change in the taxpayer’s ability to perform “tasks” post-education will qualify the taxpayer for a new trade or business. According to Merriam-Webster, one of the definitions of the term “duties” is “tasks.” Overlapping definitions such as this help explain why there is so much uncertainty in this area of the tax law.

<sup>31</sup> *Glenn*, 62 T.C. 270.

<sup>32</sup> See also *id.* (dismissing the taxpayer’s attempt to equate his facts — involving education needed to go from being a public accountant to a CPA — with the facts in reg. section 1.162-5(b)(3)(i), Example 4 — involving education needed for a psychiatrist to be qualified to practice psychoanalysis).

<sup>33</sup> McDonald, *supra* note 10, at 170 (quoting University of Michigan management professor Jerry Davis).

Our own university, Boise State, offers several MBA programs designed for different types of students. It's helpful to place these programs on a continuum, which mirrors what's happening in MBA programs more broadly. At one end is Boise State's Career Track MBA, which is designed for students with no work experience and no prior business education.<sup>34</sup> The typical student in the Career Track MBA program therefore would be qualifying for a new trade or business (indeed, perhaps their first ever trade or business). A Career Track MBA student is trying to get into the club and likely wouldn't qualify for a business deduction for his educational expenses.

In the middle would be Boise State's part-time Professional MBA. The program's typical candidate is an early- to mid-career professional with at least two years of management experience in which the applicant has already been making "significant business decisions."<sup>35</sup> Students in this program generally continue to work full time while earning their degree. Some students may already be established in a trade or business, and the MBA will enhance that trade or business, while others arguably are getting qualified for a new trade or business (to move into management, for example). Because programs like the Professional MBA require some experience but not a lot, the dispute over whether the educational expenses are business expenses would most likely occur in this space — with some students already in the club (business expenses) and others wanting to get into the club (not business expenses).

At the far end is Boise State's EMBA program. Applicants who are likely to be admitted will have at least 12 years of post-undergraduate experience and six years of managerial experience "with steady career progression" and current employment in middle to upper management. Although these are not bright-line criteria, the program does seek to assemble a cohort of students who can "contribute as well as gain from the educational experience."<sup>36</sup> And in most cases

that implies managerial experience. Most, if not all, students in the program are already in the club and enhancing their skills.

Boise State's admission requirements for its EMBA program are typical. For example, BYU's EMBA program, which Kopaigora attended, requires a minimum of five years of full-time professional experience, although the historical average has been 12 years. The admissions committee seeks applicants with a "demonstrated ability to lead, manage, and make an impact in their organizations."<sup>37</sup>

UCLA's EMBA program, which Creigh attended, states: "Our curriculum is tailored for executives, managers and senior professionals; therefore, we're interested in candidates who have a minimum of 8 years' work experience, including 5 years managing people and/or large projects." The average experience of students in the program is 14 years, with nine years in management roles.<sup>38</sup>

This brief sampling of EMBA admission criteria shows that it's hard to get into an EMBA program unless you're already in the club. The question then becomes whether the EMBA, while enhancing skills in a student's current trade or business, also qualifies her for a new trade or business. The EMBA might help keep the student in her current club while also qualifying her for a new club. That's possible, but given the nature of EMBA course work, unlikely.

The EMBA curriculum generally involves exposing managers to aspects of business (accounting, marketing, data analytics, etc.) that will enhance their ability to manage. For example, a marketing manager may learn more about how to read financial statements in an EMBA accounting course. The course will help the manager better manage the marketing function and communicate more effectively with the company's accounting department. But learning about how financial statements work won't turn

<sup>34</sup> Boise State University, "FAQs: One Minute Videos — Career Track MBA."

<sup>35</sup> Boise State University, "Candidate Profile — Professional MBA."

<sup>36</sup> Boise State University, "Admission Requirements — Executive MBA."

<sup>37</sup> BYU Marriott School of Business, "Admission Criteria — EMBA Program." These are the admission requirements as of this writing; presumably similar criteria applied when Kopaigora joined the program.

<sup>38</sup> UCLA Anderson School of Management, "Admissions." These are the admission requirements as of this writing; presumably similar criteria applied when Creigh joined the program.

the marketing manager into an accountant.<sup>39</sup> Just because an EMBA course has “accounting” in its title does not mean the course is designed to turn the students into accountants.<sup>40</sup>

EMBA programs generally are not designed to enable marketing managers to become accountants or to enable managers of software engineers to become international business strategy experts. The EMBA is not for individuals who want to make such a move. They would be better served earning a more focused (and perhaps less expensive) master’s degree. For example, one of us (Mark J. Cowan) teaches a class session on tax issues in Boise State’s EMBA program. The students (hopefully) come away with a better awareness of tax issues and how their departments interact with their employers’ tax function. The students do not, after such a brief exposure, become qualified to be tax advisers.<sup>41</sup> If they wanted to become tax advisers, they should have enrolled in Boise State’s Master of Science in Accountancy, Taxation program.

EMBA programs help managers become better managers by exposing them to a wide variety of business functions, fields, and perspectives. If all goes well, the students become well rounded and think more critically and strategically. They become better managers; they don’t become qualified to hold themselves out as functional experts. This is true regardless of how EMBA courses are labeled in the university’s catalog.

In sum, most EMBA programs help their students do a better job at their current trade or business; they don’t qualify them to enter a new trade or business. Thus, the EMBA expenses should often qualify as business expenses.

#### IV. Kopaigora’s Tale

##### A. Facts

From 2002 to June 2006, Kopaigora worked for Marriott International Corp. as an accounting manager. In June 2006 he was promoted to senior

assistant controller for the company’s hotel at the Los Angeles International Airport. In that role, Kopaigora had both managerial and financial duties. On the managerial side, he oversaw a team of employees, conducted employee performance reviews, trained employees, and participated in the hiring process. On the financial side, he prepared generally accepted accounting principles financial reports, budgets, forecasts, and an accounting of taxes. He also analyzed financial data, monitored different departments’ performance, conducted audits, reconciled balance sheets, and ensured compliance with internal controls and reporting requirements.

In July 2010 Kopaigora enrolled in the EMBA program at BYU to improve his leadership skills in corporate finance and management. He travelled to the EMBA program in Salt Lake City, Utah, to attend classes every other weekend while continuing to work for Marriott in Los Angeles. Marriott terminated Kopaigora’s employment in April 2011, for reasons that were later determined to be unjustified. After his termination, Kopaigora continued his studies in the EMBA program and looked for full-time employment in corporate accounting in a role similar to, or more advanced than, his prior employment at Marriott.

Kopaigora was successful at both endeavors. He graduated from the EMBA program in August 2012 and less than a month later was hired as vice president of finance for a small financing company. As vice president of finance, Kopaigora had many of the same responsibilities that he had at Marriott. He oversaw department managers and supervised a team of employees handling day-to-day cash, accounting, risk, and business operation issues. He also audited, accounted for taxes, enforced internal controls, and set up a monthly GAAP reporting system.

Kopaigora and his wife deducted \$18,879 for EMBA expenses as miscellaneous itemized deductions on Schedule A of Form 1040.<sup>42</sup> He completed the courses listed in the Appendix of this report. Kopaigora asserted that his EMBA expenses were deductible because (1) he was established in the corporate finance and

<sup>39</sup> Although that might be an improvement.

<sup>40</sup> See *infra* Section VI.A for more on the subject of course titles.

<sup>41</sup> Although they probably would do a better job than some who call themselves that.

<sup>42</sup> These were deducted on the couple’s 2011 Form 1040. There was some dispute over whether some of the expenses were paid in 2010, but that is irrelevant here.

management business before starting the EMBA program, (2) he was still in that business (even while unemployed) during the program, and (3) the EMBA did not qualify him for a new trade or business.

In contrast, the IRS maintained that Kopaigora did not remain in the corporate finance and management business during the period of his unemployment, that the EMBA qualified him for a new trade or business, and that the EMBA, as a general degree, did not maintain or improve the skills Kopaigora needed for his employment.

## B. Tax Court Opinion

The Tax Court agreed with Kopaigora, saying that he was a “well-established” finance and business manager before the EMBA, was effectively continuing that trade or business when he was unemployed and actively seeking work, and that the EMBA did not qualify him for a new trade or business. The court noted that Kopaigora chose to take mostly courses that were related to management and finance — areas that he was already well versed in.<sup>43</sup> Those courses may have improved his skills in his current trade or business but did not qualify him “to perform new tasks or activities,” according to the court. Although Kopaigora took courses outside the finance-management area, the court believed that those courses — standing on their own — did not qualify him for a new trade or business. And even though Kopaigora started his new job after graduating, the EMBA wasn’t a prerequisite of the new position. And the new position had duties similar to those he had at Marriott.

## V. Creigh’s Tale

### A. Facts

Creigh’s story, more detailed than Kopaigora’s, is one of an executive who put her career on hold for the sake of her family and then faced some challenges in reentering the workforce. She earned two degrees in computer science: an undergraduate degree from the University of Washington and a master’s degree from California State University, Fullerton. Before

1993, Creigh worked as a systems software engineer. She then changed employers and spent several years as the head of IT, where she was responsible for managing her employer’s computer systems and IT operations and for developing an IT strategy. Creigh then went to work for a consulting firm, spending 10 years managing project teams that designed integrated computer systems at client locations. In 2007 she left her job at the consulting firm to raise her child.

In 2010 Creigh decided to reenter the workforce. Because of the travel requirements, she didn’t want to return to work for the consulting firm. Instead, she decided to set up her own consulting business, as a sole proprietorship, to allow her more flexibility while she continued to raise her child. At the same time, she began seeking contract work and permanent employment in integrated computer system design and implementation. Creigh believed that even if she did not secure a permanent position, the interview process would allow her to market her consulting business. Creigh began to network, attending local professional events and connecting with former colleagues. Despite those efforts, she was unable to secure any consulting work or a permanent job through 2012, the year at issue.

In September 2011 Creigh began the EMBA program at UCLA. She was interested in the EMBA program because of the networking opportunities. She hoped that her fellow students would be a good source of contacts to help her advance her computer software design and implementation consulting business. She commuted approximately 70 miles from her home to attend the EMBA classes.

Creigh and her husband deducted \$59,282 for tuition, fees, and other expenses of the EMBA program, and \$4,973 in transportation costs related to the EMBA. This was reported on Schedule C for Creigh’s consulting business.<sup>44</sup> Creigh completed the EMBA courses listed in the Appendix before graduating in 2013.

<sup>43</sup> See the Appendix for the electives that Kopaigora took.

<sup>44</sup> Along with a deduction of \$449 for supplies related to her consulting business, this added up to a Schedule C loss of \$64,704 on the couple’s 2012 Form 1040.



## B. Tax Court Opinion

The Tax Court found that Creigh could not deduct her EMBA expenses, and it upheld an understatement penalty. The court said that the EMBA expenses were not deductible because the EMBA qualified Creigh for a new trade or business. In light of that conclusion, the court did not consider the IRS's argument that Creigh wasn't engaged in a trade or business when she started the EMBA.<sup>45</sup> The issue was whether the EMBA refined her existing skills or gave her the ability to perform new activities. The court found that Creigh could, post-EMBA, qualify for work she could not have qualified for pre-EMBA.

Creigh testified that her management skills in her pre-EMBA roles were limited to managing people on projects. She noted that she was not involved in business strategy development or marketing before entering the EMBA program and that the courses she took in the program did not help her in her area of project management. Based on that testimony and an analysis of the courses that Creigh took, the court found that the EMBA gave her new skills in economics, management, finance, accounting, mergers and acquisitions, business policy, negotiations, valuation, and international business. Although Creigh worked as a technology manager before entering the EMBA program, she testified that she did not perform other tasks because she lacked the skills necessary to do so. Creigh further testified that she had the goal of using the new skills she learned in the EMBA to expand the areas in which she could operate her consulting business.

The court also took note of the group project that Creigh completed as part of the EMBA program. She was on a team that was advising a company on whether it should establish an internal consulting division. The court noted that this was unrelated to her prior work in computer systems consulting.

The court went on to uphold an accuracy-related penalty under section 6662, finding that Creigh and her husband did not act with

<sup>45</sup> The IRS had a strong case that Creigh wasn't engaged in a trade or business before starting the EMBA, given the length of time she was not working. But the Tax Court focused on whether the EMBA qualified Creigh for a new trade or business.

reasonable cause and in good faith. Although the couple used an accountant to prepare their tax return, they "failed to offer testimony or other evidence regarding the qualifications of their accountant or the specific advice on which they relied" and "did not establish that they provided their accountant with accurate information or that the incorrect tax return was the result of the accountant's error."

## VI. Advice and Lessons

*Kopaigora* confirmed what many assumed: that a typical EMBA student is enhancing skills in his current trade or business and that the EMBA does not qualify the student for a new trade or business. Students cannot get admitted to an EMBA program until they're already well established as managers, and the general nature of the EMBA course work makes them better managers; it doesn't qualify them to engage in new trades or businesses.<sup>46</sup> If there was ever a flavor of MBA with costs that would virtually per se qualify as business expenses, it would be the EMBA. The determination of whether education qualifies a taxpayer for a new trade or business is based on the taxpayer's unique facts and circumstances. But it seemed a safe bet the EMBA would almost never qualify the taxpayer for a new trade or business — until *Creigh*.

After *Creigh*, taxpayers and their advisers cannot be cavalier about deducting EMBA expenses as business expenses or excluding reimbursements of EMBA expenses from an employee's income.<sup>47</sup> More work is required to determine whether the EMBA expenses are deductible.

### A. Getting the Facts Right

Facts matter. Whether an EMBA qualifies a taxpayer for a new trade or business varies with the facts and circumstances of each student. As *Creigh* made obvious, there is no blanket rule that an EMBA never qualifies a student for a new trade or business. But in many cases, it should be fairly

<sup>46</sup> See *supra* Section III.

<sup>47</sup> As noted earlier, for 2018 through 2025, only sole proprietors can deduct education expenses that qualify as business expenses; employees cannot.

easy to show that a particular taxpayer seeking a deduction or exclusion will not, post-EMBA, be qualified for a new trade or business. It's best to document these facts before taking the deduction or exclusion.

### 1. Admissions essays.

The taxpayer's rationale for earning the EMBA should be well thought out and documented in advance. EMBA programs often require application essays in which this might be documented. For example, the admission application for Boise State's EMBA program asks "What do you expect to accomplish through this executive program? . . . What specific benefits do you anticipate?" The answers to those questions, when compared with the taxpayer's prior experience, could help show whether the EMBA was intended to qualify the taxpayer for a new trade or business.

We aren't suggesting that applicants tailor their answers to admission application questions with a view to getting a tax benefit. Rather, we're suggesting that the answers can be used to show the taxpayer's intent when entering the program. If the intent was to enhance their current management skills, this could provide evidence that the EMBA will not qualify the taxpayer for a new trade or business. If, as in *Creigh*, the intent was to expand a consulting business into new areas, perhaps the EMBA will qualify the taxpayer for a new trade or business. In such a case, the EMBA costs should not be treated as business expenses.

### 2. Curriculum.

The admission essays, even if favorable to the taxpayer's case for a deduction or exclusion, are not conclusive. The essays might reveal the taxpayer's subjective intent in entering the EMBA program. But the taxpayer also must show that the EMBA did not objectively qualify her to engage in a new trade or business.<sup>48</sup> Thus, the EMBA program's curriculum must be examined. In both *Kopaigora* and *Creigh*, the Tax Court reviewed the courses that each taxpayer completed (see the Appendix). In *Kopaigora*, the

court found that the courses lined up, for the most part, with Kopaigora's current trade or business as an accounting-finance manager. In *Creigh*, the court took a more granular approach and found that the courses provided a lot of knowledge that would qualify Creigh for a new trade or business.

Taxpayers should look not just at the course titles but also at their actual content revealed through course descriptions, syllabi, and actual experience. As noted in Section III, many EMBA programs offer courses that, based on their titles, would appear to qualify a student for a new trade or business. But often the actual content of those courses comes nowhere close to doing so. Instead, the course provides knowledge that a manager would need to do their job better. A typical EMBA course in accounting, for example, helps managers better understand the reports they work with on the job, manage their budget, and have a better working relationship with their accounting departments. The course won't qualify them to be an accountant.<sup>49</sup> But this will not be clear unless the taxpayer can document the actual content of each course.

A note on electives: In some EMBA programs, such as Boise State's, there is no (or little) choice of courses. All students are in a cohort and take the same courses together throughout the program. The only diversity in content involves topics in group projects. Recall that the Tax Court noted that Creigh's project was far removed from her prior work as a technology consultant. Other EMBA programs, like the ones attended by Kopaigora and Creigh, allow students to take electives. (See the Appendix.) Although we encourage EMBA students to investigate whether the actual content of the courses they take would qualify for them for a new trade or business, we aren't suggesting that students actually pick their EMBA electives or group project topics with a view to not qualifying for a new trade or business. The tax tail should not be wagging the educational dog. All we are suggesting is that EMBA students document the actual content of

<sup>48</sup> *E.g., Creigh*, T.C. Summ. Op. 2017-26 ("The relevant inquiry is whether petitioner wife was objectively qualified to engage in a new trade or business.").

<sup>49</sup> There may in fact be EMBA programs that provide specialized expertise in functional areas of business. A complete study of the EMBA program universe is beyond the scope of this report, but we suspect that most EMBA programs focus on general management and strategy at the C-suite level.

their courses to determine whether a deduction or exclusion would be appropriate.

It's hard to divide the business world, as the IRS and the Tax Court did in *Creigh*, into neat categories (accounting, marketing, supply chain, etc.) at the executive level — where integration of knowledge and functions is necessary. A taxpayer might be able to preempt this division if she can show how each EMBA course contributes to making her a better manager rather than to becoming an expert in a functional area like accounting.

EMBA programs should be willing to help students understand and document (preferably in advance) what each course actually involves so they can determine whether, in combination with their existing skills, the EMBA will enhance their current trade or business or qualify them for a new one.<sup>50</sup>

## B. Getting Help

### 1. Tax help up front.

EMBA students should consult their tax advisers about the tax treatment of their education expenses. Just giving tuition receipts to a return preparer is insufficient. The students should use expert advisers (for example, CPAs that practice in taxation), discuss the treatment of their EMBA expenses, and give their advisers all the information they have — like their admissions essays, a list of the courses they have taken, and a description of the content of those courses. The adviser can then help the student figure out whether the EMBA expenses are deductible.

Although this is not certain, perhaps if *Creigh* had explained her EMBA situation to her tax adviser, he might have advised her not to deduct her EMBA costs as business expenses — either because she hadn't established a trade or business before the EMBA (not addressed by the court) or because, as the court said, the EMBA qualified her for a new trade or business. If *Creigh* had explained her EMBA situation to her tax adviser and he had advised her to deduct the costs, she and her husband would at least have been more

<sup>50</sup> The way an EMBA program advertises may come into play here. Do its promotional materials promise to make the students better managers or become experts in different functional areas of business?

likely to avoid the accuracy-related penalty through the reasonable cause and good faith exception.

If the student is being reimbursed by his employer, the employer will need some way to determine if the reimbursement should be included in the employee's compensation on Form W-2. As noted earlier, that analysis generally involves figuring out if the EMBA expenses are excluded as working condition fringe benefits. Post-*Creigh*, many employers, fearful of an audit, will be sensitive to the importance of the specific facts of the employee and of the EMBA program at issue and will want to err on the side of reporting reimbursements as compensation. Pre-TCJA, including the reimbursement in the employee's compensation, while not ideal, at least gave the employee the possibility of deducting the EMBA expenses as a miscellaneous itemized deduction (assuming the expenses would qualify as business expenses). No more.<sup>51</sup> Thus, if the student-employee believes that the EMBA expenses qualify as business expenses, it would behoove her to make a case for exclusion to her employer. This might involve providing the documentation noted earlier (essays, course content, etc.) or getting an opinion from her tax adviser. Of course, the employer should also consult its own in-house or external tax advisers — who will likely ask for the same documentation.

### 2. Legal help if audited.

If the taxpayer is audited and ends up in court over the tax treatment of EMBA expenses, she should engage counsel, despite the expense. In about 90 percent of small tax cases, the taxpayers represent themselves.<sup>52</sup> *Kopaigora* was lucky enough to be represented by the University of Idaho College of Law's low-income taxpayer clinic. *Creigh* represented herself. It's no surprise that *Kopaigora's* case was presented more clearly. The court in *Creigh's* case looked at things with a

<sup>51</sup> At least perhaps until 2026. See section 67(g).

<sup>52</sup> Harold Dubroff and Brant J. Hellwig, *The United States Tax Court: An Historical Analysis*, section XIII.A.7 (2d ed. 2014). This is to some extent by design. By using the small-case procedures of section 7463, taxpayers are subject to a less formal process and thus might feel more comfortable representing themselves and avoiding the expense of a lawyer. See *id.*

finer granularity than it did in *Kopaigora*'s case. But what really hurt *Creigh*'s case was her testimony, which arguably showed that she was seeking to expand her abilities beyond her current skill set.<sup>53</sup> A tax lawyer could have helped her present a clearer picture of her motives and dig deeper into the actual content of her EMBA courses. And that could have given *Creigh* a better chance.

Unfortunately, few taxpayers in EMBA programs will qualify for LITC assistance. The clinics can help only taxpayers with income no greater than 250 percent of the federal poverty guidelines.<sup>54</sup> *Kopaigora* likely qualified because he was unemployed for a time as he completed his degree. Nonetheless, *Kopaigora* and *Creigh* show the difference that representation can make. Thus, when disputing the tax treatment of EMBA expenses, paying for a tax lawyer may well be worth the investment.

In summary, what we learn from the sagas of *Kopaigora* and *Creigh* is that the tax treatment of EMBA expenses is very fact-specific. Taxpayers are well-advised to accept this reality, document up front that their EMBA studies qualify as business expenses, seek the advice of a tax adviser, and then, if challenged, attain representation and leverage the evidence they have gathered to make their best possible case.

### Appendix: EMBA Courses Completed by the Taxpayers<sup>a</sup>

Kopaigora (at BYU <sup>b</sup> ) Pre-EMBA Trade or Business: Finance and Accounting Manager	Creigh (at UCLA <sup>c</sup> ) Pre-EMBA Trade or Business: Computer Systems Consultant/Project Manager
<p><b>REQUIRED:</b></p> <ul style="list-style-type: none"> <li>Foreign Business Excursion</li> <li>Global Business Negotiations</li> <li>Introduction to Management (1 and 2)</li> <li>Introduction to Global Management Strategy</li> </ul> <p><b>ELECTIVES:</b></p> <ul style="list-style-type: none"> <li>Business Ethics</li> <li>Business Finance</li> <li>Corporate Financial Reporting</li> <li>Entrepreneurial Management</li> <li>Human Resources Management</li> <li>Leadership</li> <li>Managerial Accounting 1</li> <li>Management and Information Technology</li> <li>Marketing Management</li> <li>Operations Management</li> <li>Selected Topics in Management</li> <li>Spreadsheets for Business Analysis</li> <li>Strategy Implementation and the Manager's Role</li> </ul>	<p><b>REQUIRED:</b></p> <ul style="list-style-type: none"> <li>Business in Japan (International Business Residential)</li> <li>Competitive Strategy and Business Policy</li> <li>Data and Decisions</li> <li>Economic Analysis for Managers</li> <li>Financial Policy for Managers</li> <li>Introduction to Management Research</li> <li>Leadership Foundations Levels 1, 2, and 3</li> <li>Managerial Accounting</li> <li>Marketing Strategy and Policy</li> <li>Operations and Technology Management</li> </ul> <p><b>ELECTIVES:</b></p> <ul style="list-style-type: none"> <li>Customer Information Strategy</li> <li>Economic Forecasting</li> <li>Financial Modeling and Corporate</li> <li>Valuation for Entrepreneurs, Managers, and Dealmakers</li> <li>International Business Management</li> <li>International Business Strategy</li> <li>Negotiations Analysis</li> <li>Managing Human Resources</li> <li>Management Research</li> <li>Policy Analysis Seminar</li> <li>Strategic Business Presentation</li> <li>Web Business</li> </ul>
<p><sup>a</sup>The courses taken by <i>Kopaigora</i> and <i>Creigh</i> were listed in the Tax Court opinions for each case, but the opinions didn't break out the required versus the elective courses. We have tried to do so by referring to each EMBA program's current curriculum. Although the current curriculum and course titles differ somewhat from those listed in the opinions (for the years when the taxpayers were in their respective programs), we have done our best to sort the courses the taxpayers took between required and elective courses.</p> <p><sup>b</sup>BYU, "Curriculum."</p> <p><sup>c</sup>UCLA Anderson School of Management, "EMBA Course Schedule."</p>	

<sup>53</sup> See *supra* Section V.

<sup>54</sup> IRS, "Information for Taxpayers Seeking LITC Services."