which the spousal property basis increase was allocated. But what if basis increases were not timely filed?

Repealed Section 1022. It was later repealed, but an executor could file an amended Form 8939 (if timely filed originally) under the provisions of Treas. Reg. § 301.9100-2(b) for any purpose except to make or revoke an election. That limitation was limiting to say the least.

Narrow opportunity for relief. An executor could apply for relief to supplement a timely-filed Form 8939 under a different regulation[10] to deal with a basis increase that had not been previously allocated if (1) additional property was discovered or (2) the fair market value of the property was adjusted by the Internal Revenue Service.

Finally. . . Relief just might be possible under the general relief provision,[11] although that was generally rated as unlikely.

Significant relief – A Long Time Coming

In *Revenue Procedure 2017-34*, an easing of the administrative framework of portability became reality. A simplified method of obtaining an extension of time to file a portability election for small estates that are not normally subject to filing a Form 706 was authorized.

Many of our readers recall that, in the months after portability became available, attention by those who failed to meet the requirements was focused primarily on the regulation[13] that was available for a fairly broad range of situations. In general, relief could be granted if the taxpayer established to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that the grant of relief would not prejudice the interests of the Government.[14] In early 2014 (since February 10, 2014 to be exact), IRS published a simplified method for an extension of time to elect portability.[15] That simplified method was available only not later than December 31, 2014.

As many of our readers know, IRS responded to a flood of letter rulings after that date, some weeks with a dozen or more rulings listing as approved, some in situations where the decedent's estate was not required to file an estate tax return. In some instances, the executor did not know about the need to file a return to elect portability or did not discover the failure to elect portability. In some instances, awareness occurred after the death of the surviving spouse.[16]

The Department of the Treasury and the Internal Revenue Service grew weary of allocating manpower, especially in instances where estates of decedents have no filing requirement to obtain an extension of time under Treas. Reg. § 301.9100-3.

The contrast of the attitude of IRS and Treasury in the early years of portability compared to the current attitude is substantial. With twenty-twenty hind sight, IRS and Treasury both could have avoided expending scarce resources and saved money for those who could have made use of a simplified system.

END NOTES

[1] Formally cited as the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 302(a)(1), 302(a)(12), 124 Stat. 3296 (2010), *amending* I.R.C. §§ 2010, 2010(c)(4).

[2] See Harl, "Portability – Great Idea But Full of Planning Problems," 22 *Agric. L. Dig*. 137 (2011).

[3] See Notice 2012-21, 2012-1 C.B. 450.

[4] See IR 2012-24, Feb. 18, 2012.

[5] Pub. L. No. 112-240, § 101(a)(2), 126 Stat 2313 (2012).

[6] Treas Reg. § 20.2010-2(a).

[7] Temp Treas. Reg. § 20,2010-2T(a)(1).

[8] CCA 201406010, June 7, 2013.

[9] Temp. Treas. Reg. § 20.2010-2(a)(3).

[10] Treas Reg. § 301.9100-3.

[11] Treas. Reg. § 301.9100-3.

[12] Rev. Proc. 2017-34, 2017-1 C.B. ___.

[13] Treas. Reg. § 301.9100-3.

[14] *Id*.

[15] Rev. Proc. 2014-18, 2014-1 C.B. 513.

[16] Rev. Proc. 2017-34, 2017-1 C.B. ___.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

FEDERAL ESTATE AND GIFT TAXATION

PORTABILITY. The decedent died, survived by a spouse, on a date after the effective date of the amendment of I.R.C. § 2010(c), which provides for portability of a "deceased spousal unused exclusion" (DSUE) amount to a surviving spouse. The decedent's estate did not file a timely Form 706 to make the portability election. The estate discovered its failure to elect portability after the due date for making the election. The estate represented that the value of the decedent's gross estate was less than the basic exclusion amount in the year of the decedent's death including any taxable gifts made by the decedent. The IRS granted the estate an extension of time to file Form 706 with the election. **Ltr. Rul. 201722005, Feb. 14, 2017; Ltr. Rul. 201722020, Feb. 22, 2017; Ltr. Rul. 201722021, Feb. 22, 2017.**

STATUTE OF LIMITATIONS. The decedent died in 1997 and a estate tax return was timely filed. The IRS, however, determined that additional taxes were owed. In 2004, the Tax Court entered a stipulated decision for a lower amount of estate taxes but the taxpayers, heirs of the estate, did not pay the tax judgment. The IRS entered a new assessment based on the judgment on July 16, 2004. In 2013 and 2014, the IRS placed liens on the real property in the estate and sent the taxpayers a Notice of Intent to Levy. On October 5, 2013, the estate mailed request for a Collection Due Process hearing. The IRS did not acknowledge receipt of the request until May 2014, after the estate sent proof of the mailing. The IRS eventually ruled that it was received on October 6, 2013 after the tax. The IRS commenced the current case on March 10, 2015 to foreclose on the tax liens and obtain a money judgment, 10 years and 237 days after the post-judgment assessment was made. The estate claimed that the 10 year statute of limitations thus prohibited the current case. The IRS claimed that the request for the CDP hearing sent on October 5, 2013 suspended the statute of limitations until the hearing was started on June 2, 2014. The court held that the estate was barred by the duty of consistency from denying the mailing of the request for the CDP hearing on October 5, 2013; therefore, the statute of limitations was tolled from October 5, 2013 until the hearing date on June 2, 2014 and the 10-year statute of limitations had not expired at the time the current case was filed. **United States v. Holmes, 2017-1 U.S. Tax Cas. (CCH) ¶ 60,702 (5th Cir. 2017), *aff'g*, 2016-2 U.S. Tax Cas. (CCH) ¶ 60,693 (S.D. Tex. 2016)**.

TRUSTS. The taxpayers had created a grantor retained annuity trust (GRAT) in which the retained term had expired and the trust property reverted to the continuing trust. The trust was split into two trusts, each with two sons as beneficiaries. The trustees petitioned a state court to further split the trusts so that each trust had one son as a beneficiary. The new trusts otherwise had the same terms as the old trusts. The IRS ruled that the reorganization of the trusts (1) did not create or result in a transfer of property subject to federal gift tax under I.R.C. § 2501; (2) the divisions of the trust into the two successor trusts will not cause any portion of the assets of the original trusts or the successor trusts to be includible in the gross estate of any beneficiary under I.R.C. §§ 2035, 2036, 2037 or 2038; (3) the division of the trust will not result in any income, gain or loss to the trusts or beneficiaries; (4) the division of the trust will not result in income, gain or loss to the trusts under I.R.C. §§ 661, 662, or Treas. Reg. § 1.661(a)-2(f); and (5) the basis of assets in the original trust will have the same basis in the successor trusts. **Ltr. Rul. 201722007, Feb. 16, 2017**.

FEDERAL FARM PROGRAMS

GRAIN STANDARDS. The GIPSA has announced that it is suspending the fees that it charges for the supervision of official inspection and weighing services performed by delegated states and/or designated agencies under the United States Grain Standards Act. **82 Fed. Reg. 26843 (June 12, 2017)**.

FEDERAL INCOME TAXATION

CHARITABLE DEDUCTION. The taxpayer was a limited partnership which owned a historic warehouse in New York City. The taxpayer executed an easement deed, entitled "Conservation Deed of Easement," granting a facade easement on the property to the National Architectural Trust, Inc. (NAT). The deed was signed on December 30, 2004 but was not recorded until December 14, 2006. The taxpayer claimed a noncash charitable deduction for the value of the easement on its 2004 income tax return. A taxpayer is generally not allowed a charitable contribution deduction for a gift of property consisting of less than an entire interest in that property; however, I.R.C. § 170(f)(3)(A), (B)(iii) allows a deduction for a donation of a "qualified conservation contribution." I.R.C. § 170(h)(1) provides that a qualified conservation contribution is a contribution (1) of a "qualified real property interest" (2) to a "qualified organization" (3) "exclusively for conservation purposes." I.R.C. § 170(h)(1) defines "qualified real property interest" to include a restriction (granted in perpetuity) on the use which may be made of the real property. In addition, I.R.C. § 170(h)(5)(A) provides a separate and distinct perpetuity requirement that "[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." Treas. Reg. § 1.170A-14(g)(1) provides: "In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation. . .." The IRS argued that, because the easement was not recorded in 2004, the grant of the easement was not effective. The taxpayer argued that, under New York law, the taxpayer conveyed only a restrictive covenant which became effective upon the transfer of the deed of easement. The court cited three cases with very similar facts and arguments, all of which held that such an easement deed was not effective until recorded. Therefore, the court held that in 2004, the easement was not protected in perpetuity because it was not recorded until 2006. **Ten Twenty Six Investors v. Comm'r, T.C. Memo. 2017-115**.

COURT AWARDS AND SETTLEMENTS. The taxpayer had filed a series of military, administrative and court cases alleging that the taxpayer had suffered "sexual harassment and reprisal actions while . . . [the taxpayer] was working as a civilian technician . . . as well as ongoing reprisals and sexual harassment in her current [military] position with the National Guard." In none of the complaint or allegations of sexual harassment, did the taxpayer allege any physical injury. The parties eventually reached a monetary settlement plus attorney fees. The taxpayer excluded the payments from gross income and the IRS assessed taxes on the excluded amounts. I.R.C. § 104(a)(2) provides that gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement .

. .) on account of personal physical injuries or physical sickness.” The court noted that at no point in any of the taxpayer complaints, from the initial complaints to the taxpayer’s superiors to the final court case, did the taxpayer allege any physical injuries from the sexual harassment or employment reprisals. Therefore, the court held that the settlement payments were not made to compensate the taxpayer for physical injuries or sickness and the payments were taxable income. **Devine v. Comm’r, T.C. Memo. 2017-111**.

HOBBY LOSSES. In 2003, the taxpayer formed several partnerships which paid $6.4 million for investigations into the death of the taxpayer’s father in 1946. Although the investigations did not solve the questions about the death, the taxpayer did make an attempt to create a book about the case and sought publicity in order to attract commercial interests. Although a draft of the book was completed, no final book was published and marketed. No other commercial use of the story was made and the taxpayer’s activities never produced any revenue. The court held that the taxpayer did not operate the investigative operation with the intent to make a profit because (1) the operation never earned any revenue or profit; (2) the operation did not have a business plan or budget; (3) the operation was not adjusted to minimize losses and generate revenue; (4) the operation did not create assets which might appreciate in value; and (5) the taxpayer received personal satisfaction from the operation. The appellate court affirmed in a decision designated as not for publication. **Vest v. Comm’r, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,240 (5th Cir. 2017), *aff’g*, T.C. Memo. 2016-187**.

The taxpayer owned and operated an automobile racing company. The taxpayer reported losses from the activity for 2011 and 2012 but small profits for 2013, 2014 and 2015. However, the court found that the taxpayer had not reported some of the activity expenses and that the activity had net losses for 2013 and 2014. The court held that the activity was not engaged in with the intent to make a profit because (1) the activity was not carried on in a business-like manner because the taxpayer did not keep separate records or bank accounts, did not have a written business plan, and did not make any changes tot he activity to improve profitability; (2) the taxpayer had no expectation that the activity’s assets would appreciate; (3) the taxpayer had no history of profit from racing activities; (4) the activity had four years of losses and one year of profit, although the court expressed scepticism that the taxpayer had reported all costs in the year with profits; and (5) the taxpayer received personal pleasure and enjoyment from the racing activity. **Stettner v. Comm’r, T.C. Memo. 2017-113**.

INSTALLMENT SALES. The taxpayer and spouse owned an 85 percent interest in a partnership which operated an internet dating website and developed internet software. The partnership owned two other limited liability companies, taxed as partnerships. The partnership sold equipment and intangible property to the LLCs in exchange for 10-year promissory notes at 10 percent interest. The sales produced substantial taxable gain and the partnership elected to report the gain using the installment method of reporting. The LLCs claimed a stepped-up basis in the assets to equal their purchase price. I.R.C. § 453(a) provides that income from an installment sale shall be taken into account for purposes of taxation under the installment method. I.R.C. § 453(c) provides that “the income recognized for any taxable year from a disposition . . . [shall be] that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price.” Installment sale treatment allows a taxpayer to defer the reporting of gain during the period of the installment note, in this case ten years, thus minimizing current tax. However, I.R.C. § 453(g)(1) provides that this treatment generally is not available “[i]n the case of an installment sale of depreciable property between related persons.” In the case of a related-party sale of depreciable property, installment sale treatment is available only “if it is established to the satisfaction of the Secretary that the disposition did not have as one of its principal purposes the avoidance of Federal income tax.” I.R.C. § 453(g)(2). The court found that the partnership and the two LLCs were related persons in that the taxpayer and spouse owned 85 percent of the partnership and the partnership owned 100 percent of the LLCs. The taxpayer argued that the sale had the valid business purpose of spreading the assets among the entities. The court held that even though the taxpayer may have a business reason for the sales, the actual effect was that no change in control occurred from the sale and the taxpayer received significant tax benefits through both the installment method of reporting the gain and the increase in basis of the assets which allowed depreciation deductions. Thus, the court held that the taxpayer was not entitled to use the installment method of reporting the gain because one principal purpose of the transaction was the avoidance of tax. The appellate court affirmed in a decision designated as not for publication. **Vest v. Comm’r, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,240 (5th Cir. 2017), *aff’g*, T.C. Memo. 2016-187**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. The IRS has issued proposed regulations replacing the TEFRA unified partnership audit and litigation rules. The new rules reflect the provisions of the Bipartisan Budget Act of 2015, as amended by Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113, div. Q, § 411, 129 Stat. 3121 (2015). The proposed regulations contain provisions and procedures for partnerships with 100 or fewer eligible partners to elect out of the new centralized partnership audit regime. Eligible partners are individuals, C corporation, eligible foreign entity, S corporation, or the estate of a deceased partner. Married taxpayers are to be considered as separate partners for the election purposes. The electing partnership is to provide the names, TINs, and federal tax classifications of all partners and must notify all partners about the election. The proposed regulations require consistent reporting of partnership items by the partners. A partner who reports an item inconsistent with the partnership return must identify the inconsistency on the partner’s tax return. As under the TEFRA rules, the proposed regulations require partnerships to designate a representative. Any adjustment of partnership items by the IRS are issued in a notice of proposed partnership adjustment (NOPPA) provided to the partnership and partnership representative. The proposed regulations allow a partnership to pass on the assessment of taxes in a NOPPA to the partners. The proposed regulations affect partnerships for taxable years beginning after December 31, 2017 and any partnerships that elect application of the centralized partnership audit regime pursuant to Treas. Reg. § 301.9100-22T for taxable years beginning after November 2, 2015 and before January 1, 2018. See also *Harl, "Protecting Americans from Tax Hikes Act of 2015 (PATH)" 27 Agric. L. Dig. 1 (2016)*. **82 Fed. Reg. 27333 (June 14, 2017)**.

ELECTION TO ADJUST BASIS. The taxpayer was a limited liability company which elected to be taxed as a partnership. During the tax year several members sold their interests in the LLC. Although the taxpayer intended to file an election under I.R.C. § 754 as a result of the sales, the taxpayer inadvertently failed to include the election with its return. The IRS granted an extension of time to file the election. **Ltr. Rul. 201722013, March 2, 2017**.

SMALL PARTNERSHIP EXCEPTION. Two individuals, father and son each formed a limited liability company (individual LLCs) which owned an interest in the taxpayer LLC which was taxed as a partnership. The individual LLCs were disregarded entities for federal tax purposes. The taxpayer LLC did not designate a tax matters partner. In 2001, the taxpayer LLC claimed a loss from a trust fund in which the taxpayer LLC invested. In 2004 the IRS audited the son's individual tax return and disallowed deductions relating to expenses passed through from the taxpayer LLC but did not disallow the pass-through of the loss reported through the taxpayer LLC. The statute of limitations on the individual return expired in 2005. In 2004 the IRS audited the taxpayer LLC and in 2010 issued a final partnership administrative adjustment (FPAA) notice disallowing the loss from the taxpayer LLC's trust investment and imposing penalties. The son filed a petition in tax court on behalf of the taxpayer LLC, challenging the IRS's notice in regard to the taxpayer LLC's 2001 taxes. The son argued that the IRS's notice was invalid because the taxpayer LLC was exempt from the otherwise-applicable partnership TEFRA audit procedures because of the small-partnership exception set forth at I.R.C. § 6231(a)(1)(B)(i). The IRS obtained a summary judgment in the Tax Court on the basis that the small partnership exception did not apply and that the son lacked standing to bring the suit because the son was not the taxpayer LLC's tax matters partner. In a TEFRA partnership-level proceeding, I.R.C. § 6226(f) provides that a Tax Court has jurisdiction to determine "all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item." Under I.R.C. § 6231(a)(1)(B)(i), an entity will not be considered a "partnership" for the purposes of TEFRA's audit procedures if the entity has "10 or fewer partners each of whom is an individual …, a C corporation, or an estate of a deceased partner." Treas. Reg. § 301.6231(a)(1)-1(A)(2) provides that Section 6231(a) "does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner as defined in section 6231(a)(9)." *Rev. Rul. 2004-88, 2004-2 C.B. 165* holds that a disregarded LLC which is a partner in a partnership is a pass-through entity as to the owner of the disregarded entity. Thus, the appellate court affirmed the Tax Court's holding that the taxpayer LLC was not eligible for the small partnership exception. Because the taxpayer LLC did not designate a tax matters partner, the son's LLC became the default tax matters partner because the LLC owned the largest interest in the taxpayer LLC's profits. The appellate court affirmed the Tax Court's holding the son's LLC was the proper tax matters partner and that the son did not have standing to bring the suit under TEFRA. See Harl, "The 'Small Partnership' Exception: The Best Tax Simplification in Half Century Is In Jeopardy," 28 *Agric. L. Dig*. 25 (2017); Harl: "Repeal of the "Small Partnership' Exception: A Devious and Highly Suspicious Congressional Move," 27 *Agric. L. Dig*. 41 (2016). **Seaview Trading, LLC v. Comm'r, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,243 (9th Cir. 2017), *aff'g unpub. T.C. Order*.**

PENSION PLANS. For plans beginning in June 2017 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the 30-year Treasury securities annual interest rate for this period is 2.96 percent. The 30-year Treasury weighted average is 2.91 percent, and the 90 percent to 105 percent permissible range is 2.62 percent to 3.05 percent. The 24-month average corporate bond segment rates for June 2017, *without adjustment* by the 25-year average segment rates are: 1.71 percent for the first segment; 3.83 percent for the second segment; and 4.75 percent for the third segment. The 24-month average corporate bond segment rates for June 2017, taking into account the 25-year average segment rates, are: 4.16 percent for the first segment; 5.72 percent for the second segment; and 6.48 percent for the third segment. **Notice 2017-34, I.R.B. 2017-26**.

The IRS has published an updated list of I.R.C. § 403(b) pre-approved retirement plans that have received an IRS favorable opinion or advisory letter. A favorable opinion or advisory letter for a Section 403(b) pre-approved plan means that the IRS has determined that the plan satisfies the requirements of Section 403(b) (these requirements are specifically outlined in an opinion or advisory letter). **https://www.irs.gov/pub/irs-tege/preapproved_403b_plans_list.pdf**

QUARTERLY INTEREST RATES. The IRS has announced that, for the period July 1, 2017 through September 30, 2017, the interest rate paid on tax overpayments remains at 4 percent (3 percent in the case of a corporation) and for underpayments remains at 4 percent. The interest rate for underpayments by large corporations remains at 6 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 remains at 1.5 percent. **Rev. Rul. 2017-13, I.R.B. 2017-26.**

S CORPORATIONS

PASSIVE INVESTMENT INCOME. The taxpayer was an S corporation engaged in the business of farming. The taxpayer had accumulated earnings and profits. The taxpayer leased land under a sharecropping lease arrangement to a third party. Under the lease, the taxpayer and lessee shared all taxes in the same proportion as each's share of the crop and shared equally the cost of fertilizer and soil conditioner. The taxpayer paid the cost of the power and fuel necessary to operate the drainage pumping plants as well as the cost of maintaining the irrigation and drainage canals and irrigation pipe line. The taxpayer was also responsible for paying box rent and the grower's share of the state inspection fee. Any processing expenses incurred with the preparation of crops for sale, which were related to the taxpayer's share of the crops, are paid by the taxpayer. The taxpayer determined the percentage of the property to be farmed and the types of crops to be planted. The taxpayer was at risk for crop yields and marketing. The taxpayer was responsible for providing and maintaining insurance on all improvements and fixtures owned by the taxpayer. The taxpayer paid the costs and expenses associated with the repair, maintenance and replacement of the irrigation drainage pumps as well as the insurance, water reclamation tax, water rights fees, water coalition dues and property taxes. I.R.C. § 1362(d)(3)(A)(i) provides that an S corporation election terminates whenever the corporation has accumulated earnings and profits at the close of each of 3 consecutive taxable years and has gross receipts for each of such taxable years more than 25 percent of which are passive investment income. I.R.C. § 1362(d)(3)(C) provides that, except as otherwise provided in I.R.C. § 1362(d)(3)(C)(i), the term "passive investment income" means gross receipts derived from rents, royalties, dividends, interest, and annuities. Treas. Reg. § 1.1362-2(c)(5)(ii)(B)(2) provides that "rents" does not include rents derived in the active trade or business of renting property. Rents received by a corporation are derived in the active trade or business of renting property only if, based on all the facts and circumstances, the corporation provides significant services or incurs substantial costs in the rental business. The IRS stated that, generally, significant services are not rendered and substantial costs are not incurred in connection with net leases. Whether significant services are performed or substantial costs are incurred in the rental business is determined based upon all the facts and circumstances, including but not limited to, the number of persons employed to provide the services and the types and amounts of costs and expenses incurred (other than depreciation). The IRS ruled that the revenue received by the taxpayer under the sharecropping lease arrangement was not passive investment income. **Ltr. Rul. 201722019, March 2, 2017**.

SAFE HARBOR INTEREST RATES
July 2017

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	1.22	1.22	1.22	1.22
110 percent AFR	1.34	1.34	1.34	1.34
120 percent AFR	1.47	1.46	1.46	1.46
		Mid-term		
AFR	1.89	1.88	1.88	1.87
110 percent AFR	2.08	2.07	2.06	2.06
120 percent AFR	2.27	2.26	2.25	2.25
		Long-term		
AFR	2.60	2.58	2.57	2.57
110 percent AFR	2.86	2.84	2.83	2.82
120 percent AFR	3.12	3.10	3.09	3.08

Rev. Rul. 2017-14, I.R.B. 2017-27.

TAX RETURN PREPARERS. The plaintiffs were tax return preparers required by the IRS to obtain preparer tax identification numbers (PTINs) and pay a fee. See Treas. Reg. § 1.6109-2(d): "Beginning after December 31, 2010, all tax return preparers must have a preparer tax identification number or other prescribed identifying number that was applied for and received at the time and in the manner, including the payment of a user fee, as may be prescribed by the Internal Revenue Service." I.R.C. § 6109(a)(4) provides that "[a]ny return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed." 31 U.S.C. § 9701(b) provides that agencies "may prescribe regulations establishing the charge for a service or thing of value provided by the agency." The plaintiffs argued that, because the court in *Loving v. I.R.S., 742 F.3d 1013 (D.C. Cir. 2014)* held that the IRS could not regulate tax return preparers, the assignment of a PTIN did not confer any benefit to return preparers and was not authorized by 31 U.S.C. § 9701(b). The court held that the IRS had the authority to issue PTINs but did not have authority to charge a fee for a PTIN. **Steele v. United States, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,238 (D. D.C. 2017)**.

INSURANCE

EMPLOYEE. The plaintiff provided an insurance policy on a truck driver's vehicles. The driver was injured while driving a grain truck owned by a company insured by the defendant insurance company. The issue was the priority of the two insurance policies in covering the injuries of the driver. The plaintiff had the priority if the driver was an independent contractor and the defendant had the priority if the driver was an employee of the truck owner. Mich. Cod. Laws § 500.3114(3) provides: "An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle." The parties agreed that the issue of whether a person is an employee is determined by "economic reality test." Four factors are considered under the test: "(a) control of the worker's duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." The trial court held that the driver was an employee because (1) the driver had no control over the driver's work, (2) the driver could be fired by the company, (3) the wages were set by the company, and (4) the hauling of the grain was an integral part of the company's business. The appellate court reversed, holding that the driver was an independent contractor because (1) the company exerted little control over the duties of the driver other than to assign the driver to haul grain to a particular location; (2) the driver was free to haul grain for other companies or refuse to haul any particular load at any particular time; (3) the driver submitted time reports as needed and often received some compensation in-kind; (4) the company did not withhold employment taxes or provide health benefits; (5) the company scheduled deliveries, the driver agreed to these on a casual basis and the driver was not required to make all deliveries; and (6) although the hauling of grain was integral to the company's business, the company had other means of accomplishing the deliveries and the driver's services were not essential to the business. **Farm Bureau General Ins. Co. of America v. Westfield Ins. Co., 2017 Mich. App. LEXIS 887 (Mich. Ct. App. 2017)**.

LANDLORD AND TENANT

DAMAGES. The plaintiff leased 35 acres of pasture land from the defendant for $1000 per year under an oral lease. The plaintiff filed a case alleging that the defendant had allowed four horses to graze on the pasture and had prevented the plaintiff from entering the land. The plaintiff sought damages for one-half the fertilizer used on the pasture and one half of the rent. The defendant counterclaimed for one year of unpaid rent. The trial court denied the plaintiff's claims and awarded the defendant the amount of unpaid rent. Because the plaintiff failed to submit a trial court transcript, the appellate court made no judgment as to the factual support for the trial court's ruling. However, the plaintiff included in its defense of the defendant's counterclaim that the defendant failed to mitigate the cost of the unpaid rent. On this issue of law, the appellate court affirmed the trial court in that the defendant could not mitigate the damages of unpaid rent so long as the plaintiff remained in possession of the leased property. The court held that the implied covenant of quiet enjoyment, which exists in every Kansas lease prevented the defendant landlord from interfering with the tenant's exclusive use and possession of the rented property. Thus, the defendant could not obtain substitute rent by leasing the pasture for other grazing while the plaintiff had possession of the pasture. **Miller v. Burnett, 2017 Kan. App. LEXIS 43 (Kan. Ct. App. 2017)**.

NUISANCE

RIGHT-TO-FARM. The North Carolina legislature has passed and the governor has signed a bill which amended the state right-to-farm act, N.C. Stat. §§ 106-700 and 106-701, to add N.C. Stat. § 106-702 which limits the damages in a private nuisance action against an agricultural or forestry operation based on the plaintiff's contractual or business relationship with the operation. If the nuisance is determined to be permanent, the damages are to be based on the reduction of the fair market value of the plaintiff's property but not more than the total fair market value of the property. If the nuisance is a temporary nuisance, the damages are limited to the reduction in the fair rental value of the plaintiff's property. In both cases, if the plaintiff brings any subsequent action against the agricultural or forestry operation, the combined recovery for all such actions shall exceed the fair market value of the plaintiff's property. **N.C. Stat. § 106-702**.

SECURED TRANSACTIONS

PRIORITY. The farm debtor had granted a security interest to a bank to secure a loan. The collateral included all farm products, livestock and their young. The security interest was perfected by filing a financing statement, including a continuation and an amendment. The debtor operated under a business name but there was no proof that the business was structured as a separate entity. The business established credit accounts with several suppliers under the business name and purchased farm supplies. One supplier filed an agricultural supplier's lien covering unpaid supplies used for the cattle. The debtor sold some livestock under the business name and the supplier claimed that the agricultural supplier's lien attached to the proceeds of the sales. However, the bank claimed that none of the cattle was owned in the name of the business. Under North Dakota law, individuals or businesses who furnish agricultural supplies may obtain an agricultural supplier's lien by complying with the procedures listed in N.D.C.C. § 35-31-02. If the agricultural supplier complies with these requirements, its lien achieves priority as to the crops or agricultural products covered by the liens over all other liens or encumbrances except any agricultural processor's lien. See N.D.C.C. § 35-31-03. As used in N.D.C.C. Chapter 35-31, agricultural products include livestock and their products. The bank argued that the supplier's lien was invalid as to the cattle sold because the lien incorrectly listed the business as the owner of the livestock which were actually owned individually by the debtor. The court acknowledge a conflict of evidence as to the ownership of the cattle on the dates of the sales and held that the agricultural supplier's lien was properly perfected as to the cattle sold under the business name. ***In re* McDougall, 2017 Bankr. LEXIS 1465 (Bankr. D. N.D. 2017)**.

FARM ESTATE AND BUSINESS PLANNING

by Neil E. Harl

19th Edition (2016)

The Agricultural Law Press is honored to publish the revised 19th Edition of Dr. Neil E. Harl's excellent guide for farmers and ranchers who want to make the most of the state and federal income and estate tax laws to assure the least expensive and most efficient transfer of their estates to their children and heirs. The 19th Edition includes all new income and estate tax developments.

We also offer a PDF version for computer and tablet use for $25.00.

Print and digital copies can be ordered directly from the Press by sending a check for $35 (print version) or $25 (PDF version) to Agricultural Law Press, 127 Young Rd., Kelso, WA 98626. Please include your e-mail address if ordering the PDF version and the digital file will be e-mailed to you.

Credit card purchases can be made online at www.agrilawpress.com or by calling Robert at 360-200-5666 in Kelso, WA.

For more information, including discounts for purchases of more than 10 books, contact robert@agrilawpress.com.

Agricultural Law Press
127 Young Rd., Kelso, WA 98626

AGRICULTURAL TAX SEMINARS

by Neil E. Harl

August 24-25, 2017 & October 30-31, 2017 - Quality Inn, Ames, IA

Join us for expert and practical seminars on the essential aspects of agricultural tax law. Gain insight and understanding from one of the country's foremost authorities on agricultural tax law. The seminars will be held on two days from 8:00 am to 5:00 pm. Registrants may attend one or both days. On the first day, Dr. Harl will speak about farm and ranch estate and business planning. On the second day, Dr. Harl will cover farm and ranch income tax. Your registration fee includes written comprehensive annotated seminar materials for the days attended and lunch. A discount ($25/day) is offered for attendees who elect to receive the manuals in PDF format only **(see registration form online for use restrictions on PDF files)**.

The topics include:

First day

FARM ESTATE AND BUSINESS PLANNING

New Legislation

Succession planning and the importance of fairness

The Liquidity Problem

Property Held in Co-ownership
- Federal estate tax treatment of joint tenancy
- Severing joint tenancies and resulting basis
- Joint tenancy and probate avoidance
- Joint tenancy ownership of personal property
- Other problems of property ownership

Federal Estate Tax
- The gross estate
- Special use valuation
- Property included in the gross estate
- Traps in use of successive life estates
- Basis calculations under uniform basis rules
- Valuing growing crops
- Claiming deductions from the gross estate
- Marital and charitable deductions
- Taxable estate
- The applicable exclusion amount
- Unified estate and gift tax rates
- Portability and the regulations
- Federal estate tax liens
- Gifts to charity with a retained life estate

Gifts
- Reunification of gift tax and estate tax
- Gifts of property when debt exceeds basis

Use of the Trust

The General Partnership
- Small partnership exception
- Eligibility for Section 754 elections

Limited Partnerships

Limited Liability Companies
- Developments with passive losses
- Corporate-to-LLC conversions
- New regulations for LLC and LLP losses

Closely Held Corporations
- State anti-corporate farming restrictions
- Developing the capitalization structure
- Tax-free exchanges
- Would incorporation trigger a gift because of severance of land held in joint tenancy?
- "Section 1244" stock
- Status of the corporation as a farmer
- The regular method of income taxation
- The Subchapter S method of taxation, including the "two-year" rule for trust ownership of stock
- Underpayment of wages and salaries
- Financing, Estate Planning Aspects and Dissolution of Corporations
- Corporate stock as a major estate asset
- Valuation discounts
- Dissolution and liquidation
- Reorganization
- Entity Sale
- Stock redemption

Social Security
- In-kind wages paid to agricultural labor

Second day

FARM INCOME TAX

New Legislation

Reporting Farm Income
- Constructive receipt of income
- Deferred payment and installment payment arrangements for grain and livestock sales
- Using escrow accounts
- Payments from contract production
- Items purchased for resale
- Items raised for sale
- Leasing land to family entity
- Crop insurance proceeds
- Weather-related livestock sales
- Sales of diseased livestock
- Reporting federal disaster assistance benefits
- Gains and losses from commodity futures, including consequences of exceeding the $5 million limit

Claiming Farm Deductions
- Soil and water conservation expenditures
- Fertilizer deduction election
- Depreciating farm tile lines
- Farm lease deductions
- Prepaid expenses
- Preproductive period expense provisions
- Regular depreciation, expense method depreciation, bonus depreciation
- Repairs and Form 3115; changing from accrual to cash accounting
- Paying rental to a spouse
- Paying wages in kind
- PPACA issues including scope of 3.8 percent tax

Sale of Property
- Income in respect of decedent
- Sale of farm residence
- Installment sale including related party rules
- Private annuity
- Self-canceling installment notes
- Sale and gift combined.

Like-Kind Exchanges
- Requirements for like-kind exchanges
- "Reverse Starker" exchanges
- What is "like-kind" for realty
- Like-kind guidelines for personal property
- Partitioning property
- Problems in Exchanges of partnership assets

Taxation of Debt
- Turnover of property to creditors
- Discharge of indebtedness
- Taxation in bankruptcy.

Self-employment tax
- Meaning of "business"

The seminar registration fees for each of multiple registrations from the same firm and for *current subscribers* to the *Agricultural Law Digest*, the *Agricultural Law Manual*, or *Farm Estate and Business Planning* are $225 (one day) and $400 (two days). The registration fees for *nonsubscribers* are $250 (one day) and $450 (two days). Nonsubscribers may obtain the discounted fees by purchasing any one or more of our publications. See www.agrilawpress.com for online book and newsletter purchasing.

Contact Robert Achenbach at 360-200-5666, or e-mail Robert@agrilawpress.com for a brochure.

IRS APPROVED CONTINUING EDUCATION PROVIDER