By the time of Gallenstein's death, the property had become valuable development property and was sold by Mrs. Gallenstein, the surviving joint tenant and the surviving spouse, after her husband's death. It was discovered that one-half had been included in her husband's estate and that half received a new income tax basis. The other one-half was traceable back to the date of acquisition in 1955.

Upon consultation with her tax advisors, the estate filed an amended federal estate tax return, reporting the full value of the farmland in the gross estate and then filed a claim for refund for the tax on the reduced gain for federal income tax purposes. Both the District Court and the Sixth Circuit Court of Appeals agreed with the estate.[7] Did not that maneuver increase the federal estate tax for the estate? No, because of the then-available federal estate tax marital deduction of 100 percent of the value of property passing to the spouse as the surviving joint tenant.

After the successful District Court decision, the Sixth Circuit, as noted, the Fourth Circuit Court of Appeals, and the Tax Court have held that the consideration furnished rule may be applied to joint interests created after 1954 and before 1977 where the decedent died after 1981.[8]

The Tax Court *Hahn* decision,[9] is especially notable because of the acquiescence by the IRS of the case which gives nation-wide authority to the case.

So why is the opportunity to use *Gallenstein "slipping away"?*

To take advantage of the concept requires that a couple have acquired property after 1954 and before 1977. Unless the Congress loosens the requirements, the lapse of time will eventually bar eligibility for the unusual concept that occurred without specific Congressional action.

ENDNOTES

[1] See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(c), (d)(3), 90 Stat. 1855 (1976).

[2] Gallenstein v. United States, 91-2 U.S. Tax Cas. (CCH) ¶ 60,088 (E.D. Ky. 1991), *aff'd,* 975 F.2d 286 (6th Cir. 1992).

[3] I.R.C. § 2040(a). See Rev. Rul. 56-215, 1956-1 C.B. 324. See also Estate of Fratini v. Comm'r, T.C. Memo. 1998-308 (estate met burden of proving consideration furnished by survivor who was not spouse).

[4] Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(d)(1), 90 Stat. 1856 (1976).

[5] See 5 Harl, *Agricultural Law* § 43.02[2][c][iii] (2017).

[6] *Id*.

[7] Gallenstein v. United States, 91-2 U.S. Tax Cas. (CCH) ¶ 60,088 (E.D. Ky. 1991), *aff'd,* 975 F.2d 286 (6th Cir. 1992).

[8] Patten v. United States, 96-1 U.S. Tax Cas. (CCH) ¶ 60,231 (W.D. Va. 1996), *aff'd* 116 F.3d 1029 (4th Cir. 1997); Anderson v. United States, 96-1 U.S. Tax Cas. (CCH) ¶ 60,235 (D. Md. 1996); Wilburn v. United States, 97-2 U.S. Tax Cas. (CCH) ¶ 50,881 (D. Md. 1997); Baszto v. United States, 98-1 U.S. Tax Cas. (CCH) ¶ 60,305 (M.D. Fla. 1997); Hahn v. Comm'r, 110 T.C. 140 (1998), *acq*., I.R.B. 2001-42, 319 (joint interest created in 1972; consideration furnished rule applied).

[9] Hahn v. Comm'r, 110 T.C. 140 (1998), *acq.,* I.R.B. 2001-42, 319.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

CHAPTER 12

PLAN. The debtor filed for Chapter 12 and filed a plan for confirmation. The plan provided for full payment of all creditors and assumption of leases after paying, upon confirmation, all back rent. The plan proposed to pay several loans at an interest rate 1 percent above the prime rate but extended the term of the loans by several years. The creditors objected to the plan as not feasible. The court found that the debtor's projections of increased revenues and decreasing expenses were unrealistic as compared to the debtor's history of income and expenses revealed in the debtor's tax returns. The court found that the debtor failed to provide sufficient information to explain how revenues would increase and expenses decrease over the life of the plan; therefore, the court held that the plan was not confirmable for lack of feasibility. The creditors also objected to the interest rates and increased terms of the claims paid over the life of the plan. The court held that the plan was not confirmable because the interest rate provided did not include enough interest for the heighten risk factor inherent in farming and did not compensate the creditors for the extension of the loan terms. The court also held that the debtor could not form a confirmable plan and dismissed the case. ***In re* Johnson, 2018 Bankr. LEXIS 74 (Bankr. W.D. Wis. 2018)**.

FEDERAL TAX

DISCHARGE. The debtor filed for Chapter 7 in May 2014 and the IRS filed claims for 1999-2002 unpaid taxes. The debtor had not filed returns for 1999-2002 and was assessed taxes for those years in 2005. The debtor filed returns for those years in 2011 and the IRS abated the assessed taxes based on the returns. The debtor claimed that the 1999-2002 tax returns were not filed because the debtor's spouse died in 1999 and the debtor's grief prevented the debtor from filing returns. The court found that, during the time from 2009-2001, (1) the debtor continued to be employed; (2) the debtor was financially responsible for a child and two grandchildren; (3) the debtor provided no evidence that the debtor received medical or psychiatric care for depression or some other condition that prevented filing the returns; and (4) in

2005, the debtor negotiated with the IRS for installment payments. Section 523(a) provides "For purposes of [Section 523(a)(1)], the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)… ." Citing case law, the court adopted the definition of a "return" to include an "honest and reasonable attempt to satisfy the requirements of the tax law." The court held that the 1999-2002 taxes were nondischargeable because the debtor failed to file a return for those tax years. ***In re* Petersen, 2018-1 U.S. Tax Cas. (CCH) ¶ 50,120 (Bankr. E.D. Calif. 2017)**.

SETOFF. The IRS had filed a proof of claim in the debtor's Chapter 13 case for taxes, penalties and interest resulting from the debtor's failure to file a non-frivolous tax return for 2001, 2003-2008, and 2010-2014. The debtor's income included monthly social security payments and the IRS had instituted proceedings to levy against the social security payments prior to the Chapter 13 filing. Once the case was filed, the IRS attempted, but failed, to freeze the social security payments to avoid levying against the payments in violation of the automatic stay and a portion of one payment was collected by the IRS. The IRS filed a motion to allow the levy as a set off. The IRS argued that, because the social security payments were not part of the Chapter 13 estate, and the tax claim was a nondischargeable debt, the setoff did not violate the automatic stay. The court noted that Section 553 did not apply here because the tax debtor arose pre-petition and the social security payment levy occurred post-petition. Section 362(a)(6), stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." The court found that a setoff of mutual debts was not an "act to collect, assess, or recover a claim against the debtor" and was not prohibited by Section 362(a)(6). The court also held Section 362(a)(7) inapplicable to the setoff because the IRS claim arose after the filing of the petition. Thus, the court held that the setoff levy against non-estate property was not prohibited by the automatic stay. ***In re* Taalib-Din, 2017 U.S. Dist. LEXIS 86362 (E.D. Mich. 2017)**.

FEDERAL ESTATE AND GIFT TAXATION

POWER OF APPOINTMENT. The taxpayer was the beneficiary of a lifetime income interest in a pre-October 22, 1942 trust. The trust provided the taxpayer with a general power of appointment over the income interest. The taxpayer executed a partial release of the general power of appointment intended to restrict the power of appointment in two respects. First, the power to appoint the taxpayer's beneficial interest in the trust was to be exercisable in a manner such that the interest in the trust could be appointed only to the taxpayer's estate. Second, the power to appoint the taxpayer's beneficial interest could not be exercised in a manner that would take effect during the taxpayer's life time. The remainder beneficiaries also had general powers of appointment over their income interests in the trust which arose on the death of the taxpayer. The remainder holders disclaimed any interest in the power of appointment over their interests in the trust. Under I.R.C. § 2041(a)(1), the value of the gross estate shall include the value of all property to the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (A) by will, or (B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under I.R.C. §§ 2035 through 2038; but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. I.R.C. § 2514(a) provides that an exercise of a general power of appointment created on or before October 21, 1942, shall be deemed a transfer of property by the individual possessing such power, but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. The IRS ruled that the general powers of appointment held by the remainder holders were deemed pre-October 22, 1942 created powers of appointment and the disclaimers of the powers did not cause the trust to be included in their gross estates. Similarly, the IRS ruled that the taxpayer's release of portions of the pre-October 22, 1942 created general power of appointment did not cause the trust to be included in the taxpayer's gross estate. **Ltr. Rul. 201803003, Oct. 6, 2017**.

FEDERAL FARM PROGRAMS

ORGANIC FOOD. The AMS has issued a proposed rule which would amend the National List of Allowed and Prohibited Substances provisions of the organic regulations to implement recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board. This rule proposes to change the use restrictions for 17 substances allowed for organic production or handling on the National List: Micronutrients; chlorhexidine; parasiticides; fenbendazole; moxidectin; xylazine; lidocaine; procaine; methionine; excipients; alginic acid; flavors; carnauba wax; chlorine; cellulose; colors; and, glycerin. This rule also proposes to add 16 new substances on the National List to be allowed in organic production or handling: Hypochlorous acid; magnesium oxide; squid byproducts; activated charcoal; calcium borogluconate; calcium propionate; injectable vitamins, minerals, and electrolytes; kaolin pectin; mineral oil; propylene glycol; acidified sodium chlorite; zinc sulfate; potassium lactate; and, sodium lactate. The proposed rule would list the botanical pesticide, rotenone, as a prohibited substance in organic crop production. The proposed rule would remove ivermectin as an allowed parasiticide for use in organic livestock production. **83 Fed. Reg. 2498 (Jan. 17, 2018)**.

SWINE FEVER. The APHIS has announced that it has determined that Mexico is free of classical swine fever (CSF). Based on an evaluation of the animal health status of Mexico, which was made available to the public for review and comment through a previous notice, the APHIS Administrator has determined that CSF is not present in Mexico and that live swine, pork, and pork products may safely be imported into the United States from Mexico subject to conditions in the regulations. **83 Fed. Reg. 2131 (Jan. 16, 2018)**.

FEDERAL INCOME TAXATION

DISASTER LOSSES. On January 2, 2018, the President determined that certain areas in California were eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of wildfires, flooding and mudslides which began on December 4, 2017. **FEMA-4353-DR.** On January 2, 2018, the President determined that certain areas in Vermont were eligible for assistance from the government under the Act as a result of a severe storm and flooding which began on October 29, 2017. **FEMA-4356-DR.** Accordingly, taxpayers in these areas may deduct the losses on their 2017 or 2016 federal income tax returns. See I.R.C. § 165(i).

EARNED INCOME TAX CREDITS. The IRS has published information about eligibility for the earned income tax credit for grandparents who work and are also raising grandchildren. This is important because grandparents who care for children are often not aware that they could claim these children for the EITC. The EITC is a refundable tax credit. This means that those who qualify and claim the credit could pay less federal tax, pay no tax, or even get a tax refund. Grandparents who are the primary caretakers of their grandchildren should remember the following facts about the credit: (1) A grandparent who is working and has a grandchild living with them may qualify for the EITC, even if the grandparent is 65 years of age or older. (2) Generally, to be a qualified child for EITC purposes, the grandchild must meet the dependency and qualifying child requirements for EITC. (3) The rules for grandparents claiming the EITC are the same for parents claiming the EITC. (4) Special rules and restrictions apply if the child's parents or other family members also qualify for the EITC. (5) There are also special rules for individuals receiving disability benefits and members of the military. (6)To qualify for the EITC, the grandparent must have earned income either from a job or self-employment and meet basic rules. (7) The IRS recommends using the EITC Assistant, available in English or Spanish, on IRS.gov, to determine eligibility and estimate the amount of credit. (8) Eligible grandparents must file a tax return, even if they do not owe any tax or are not required to file, in order to receive any refund due to the EITC. **IRS Tax Tip 2018-10**.

EMPLOYMENT TAXES. The taxpayer was the owner and president of an LLC which failed to pay its employment tax liability of $1,183,644 for the first quarter of 2008. After a meeting with the IRS, the company agreed to pay the IRS $300,000 and made the payment using the IRS's electronic funds transfer payment system ("EFTPS"). The taxpayer claimed that the IRS agreed that the $300,000 payment would be all applied to the trust fund liabilities first. Trust fund liabilities include the employment taxes withheld from employees' wages; non-trust fund liabilities include Medicare and social security taxes. However, the IRS applied the payment to non-trust fund employment tax liabilities. The IRS then assessed the taxpayer individually, under I.R.C. § 6672, interest and penalties on the unpaid trust fund employment taxes as a responsible person. The taxpayer argued that the payment should have been allocated first to non-trust fund liabilities, thus reducing the amount of interest and penalties assessed. Non-trust fund employment taxes cannot be assessed individually against a responsible person; whereas, the taxpayer, as a responsible person in the company, was liable for unpaid trust fund payments which the company fails to make. The IRS argued that the $300,000 payment was a voluntary payment and could not be allocated by the taxpayer between trust fund and non-trust fund taxes. The IRS also argued that, even if the payment was allocatable by the taxpayer, such allocation must be made in writing as set forth in *Rev. Proc. 20002-26, 2002-1 C.B. 746*. The court agreed with the IRS and held that the taxpayer failed to properly request in writing the allocation of the payment to trust fund taxes. **Weder v. United States, 2018-1 U.S. Tax Cas. (CCH) ¶ 50,111 (W.D. Okla. 2017)**.

HEALTH INSURANCE. Based on the taxpayer's estimated household income for 2015, the taxpayer received an advance premium assistance tax credit for health insurance purchased under the Affordable Care Act. In 2015 the taxpayer received wages of $39,210 and had discharge of indebtedness income of $16,163. The total of $55,373 exceeded $46,680, 400 percent of the federal poverty line for one taxpayer living in Alabama. The taxpayer did not attach Form 8962, *Premium Tax Credit*, to the 2015 return. The IRS issued a notice of deficiency for the failure of the taxpayer to include the return of the advance premium assistance credit as tax. The taxpayer appealed the deficiency, arguing that the discharge of indebtedness income should not be included in income for purposes of the premium tax credit. Under I.R.C. § 36B(d)(2)(A)(i), (ii), household income is defined as the modified adjust gross income of the taxpayer, and under I.R.C. § 61(a)(12), gross income includes discharge of indebtedness income. Thus, the court held that the IRS was correct in assessing the taxpayer for the advance premium tax credit because the taxpayer's wages and discharge of indebtedness income together exceeded 400 percent of the federal poverty line for one taxpayer living in Alabama. **Keel v. Comm'r, T.C. Memo. 2018-5**.

The IRS extended the 2018 due date for certain employers and health coverage providers to furnish 2017 health coverage information forms to individuals. The following organizations now have until March 2, 2018, to provide Forms 1095-B or 1095-C to individuals: insurers, self-insuring employers, other coverage providers, and applicable large employers. The March 2 date is a 30-day extension from the original due date of Jan. 31. These organizations must furnish statements to employees or covered individuals. The statements have information about the health care coverage offered or provided to the employees or covered individuals. The recipients may use this information to determine if they can claim the premium tax credit on their individual income tax returns. The 30-day extension is automatic. Employers and providers do not have to request it. The due dates for filing 2017 information returns with the IRS are not extended. For 2018, the due dates to file information returns with the IRS are: Feb. 28 for paper filers and April 2 for electronic filers. Because of these extensions, individuals may not receive their Forms 1095-B or 1095-C by the time they are ready to file their 2017 individual income tax return. While information on these forms may assist in preparing a return, taxpayers are not required to have these forms to file. **IRS Tax Tip 2018-06**.

HOBBY LOSSES. The taxpayer owned and operated a successful limited liability company which provided mechanical inspection services for major oil refineries and gas plants. The taxpayer purchased 260 acres of ranch land with poor fences and dilapidated buildings. The taxpayer made many improvements to the property for raising cattle and built up the herd over ten years to a total of 128 cattle, primarily crossbred cattle bred by the taxpayer. The taxpayer had 18 years of losses, resulting from few sales of cattle and expenses for improving the property. The taxpayer kept no written records and was self-taught about raising cattle, although the taxpayer did seek some expert help from others in the cattle industry. The court held that the taxpayer operated the cattle business with the intent to make a profit because (1) the taxpayer expended a significant amount of time over 18 years on developing and operating the ranch; (2) the taxpayer had a reasonable expectation and did experience significant appreciation in the value of the ranch from the taxpayer's personal efforts and general market conditions; and (3) there was no evidence that the taxpayer engaged in the cattle business for personal pleasure. The other six factors of Treas. Reg. 1.183-2(b) were found to be either neutral or slightly against a profit motive. **Wicks v. United States, 2018 U.S. Dist. LEXIS 9352 (N.D. Okla. 2018)**.

The taxpayer owned small music club which was designed to provide a venue for new musicians to play for the public and for music industry agents and scouts. The taxpayer charged a small admission fee for the public and the revenue did not come close to covering the expenses of the club. The taxpayer did not maintain full and accurate records of revenues and expenses and the accounts did not match the income and expenses claimed on the taxpayer's 2012, 2013 and 2014 returns. Although the taxpayer had some opportunities to modify the club to make it more profitable, the taxpayer did not make any changes. The taxpayer had substantial income from trusts established by the taxpayer's former spouse which was offset by the club losses. The court held that the club was not operated with the intent to make a profit because (1) the taxpayer did not maintain adequate records for the club operations, (2) the taxpayer had no expertise in operating a club and rejected the advice of consultants, (3) the club had only losses for the three years, (4) the losses offset substantial income from other sources, and (5) the taxpayer operated the club for personal pleasure. **Ford v. Comm'r, T.C. Memo. 2018-8**.

INCOME. The taxpayer was the president of a software company and had full authority over the business accounts. Unknown to the owner of the business, the taxpayer issued company checks to the taxpayer and used the company's credit cards to make purchases for the taxpayer's spouse's business. The embezzlement was discovered during a random audit of the taxpayer's returns and the taxpayer was eventually indicted, arrested, and charged with embezzlement, fraud, and forgery. The taxpayer did not include the embezzled amounts in income and the IRS assessed taxes on the amounts as additional income. The taxpayer argued that the checks and purchases were loans but the company owner denied all knowledge of the transactions. The court held that the checks and purchases were taxable income to the taxpayer. **Byrum v. Comm'r, T.C. Memo. 2018-9**.

IRA. The IRS has published information about the new provisions in the 2017 Tax Cut and Jobs Act on recharacterization of a contribution to a traditional or Roth IRA. A recharacterization allows a taxpayer to treat a regular contribution made to a Roth IRA or to a traditional IRA as having been made to the other type of IRA. A regular contribution is the annual contribution to a traditional or Roth IRA: up to $5,500 for 2018, $6,500 if the taxpayer is 50 or older (see IRA Contribution Limits for details). It does not include a conversion or any other rollover. To recharacterize a regular IRA contribution, a taxpayer informs the trustee of the financial institution holding the IRA to transfer the amount of the contribution plus earnings to a different type of IRA (either a Roth or traditional) in a trustee-to-trustee transfer or to a different type of IRA with the same trustee. If this is done by the due date for filing a tax return (including extensions), a taxpayer can treat the contribution as made to the second IRA for that year (effectively ignoring the contribution to the first IRA). Effective January 1, 2018, pursuant to the Tax Cuts and Jobs Act (Pub. L. No. 115-97), a conversion from a traditional IRA, SEP or SIMPLE to a Roth IRA cui8oannot be recharacterized. The new law also prohibits recharacterizing amounts rolled over to a Roth IRA from other retirement plans, such as 401(k) or 403(b) plans. A Roth IRA conversion made in 2017 may be recharacterized as a contribution to a traditional IRA if the recharacterization is made by October 15, 2018. A Roth IRA conversion made on or after January 1, 2018, cannot be recharacterized. For details, see "Recharacterizations" in Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*. **IRA FAQs - Recharacterization of IRA Contributions, https://www.irs.gov/retirement-plans/ira-faqs-recharacterization-of-ira-contributions**

A petition for review by the U.S. Supreme Court has been filed in the following case. In 2007, the taxpayers, husband and wife, sold a residence and each contributed $200,000 of the proceeds to their IRAs. In 2007, the maximum contribution limit for IRAs was $4,000 per year. The taxpayers discovered their error in March 2010 and withdrew the excess contributions at that time. The taxpayers paid the taxes and penalties for 2007, 2008 and 2009 but sought a refund of the taxes and penalties for 2009. The taxpayers cited I.R.C. § 4973(b) which provides that IRA contributions made but then distributed under I.R.C. § 408(d)(4) "shall be treated as an amount not contributed." However, I.R.C. § 408(d)(4) says that a "distribution of any contribution paid during a taxable year" will not count as gross income (under I.R.C. § 408(d)(1)) if that distribution "is received on or before the day prescribed by law (including extensions of time) for filing such individual's return for such taxable year." The issue was whether the distribution of the excess in 2010 prior to the due date for the 2009 return could be applied to the excess contribution made in 2007. The court held that, in order for the taxpayers to avoid the taxes and penalties for 2009, the taxpayer had to make the excess distribution in 2009. Essentially, the court restricted the application of I.R.C. § 408(d)(4) only to excess distributions made in the prior tax year; therefore, the court held that the March 2010 distribution had no effect on the taxes and interest on the 2009 excess in the IRAs. The appellate court affirmed. **Wu v. United States, 835 F.3d 711 (7th Cir. 2016), *aff'g*, 2015-1 U.S. Tax Cas. (CCH) ¶ 50,336 (N.D. Ill. 2015)**.

LETTER RULINGS. The IRS has issued its annual list of procedures for issuing letter rulings. The prior procedures were modified (1) to reflect a new address to send the duplicate copy of the Form 3115 for an automatic change in method of accounting, (2) to provide new addresses for exempt organizations to send the Form 3115 and (3) to provide that exempt organizations filing a Form 3115 for a nonautomatic change in method of accounting are subject to the user fees in Appendix A of the revenue procedure. Appendix A contains a schedule of user fees for requests. **Rev. Proc. 2018-1, 2018-1 C.B. 1**.

The IRS has issued its annual revision of the general procedures relating to the issuance of technical advice to a director or an appeals area director by the various offices of the Associate Chief Counsel. The new procedures reflect that in transactions involving multiple taxpayers, the field office may request a single TAM only if each taxpayer agrees to participate in the process by furnishing a Form 8821, *Tax Information Authorization*, or by other written consent. The procedures also explain the rights a taxpayer has when a field office requests technical advice. **Rev. Proc. 2018-2, 2018-1 C.B. 106**.

The IRS has issued its annual list of tax issues for which the IRS will not give advance rulings or determination letters. **Rev. Proc. 2018-3, 2018-1 C.B. 130**.

The IRS has issued its annual list of procedures for issuing letter rulings issued by the Commissioner, Tax Exempt and Government Entities Division, Employee Plans and Agreements Office. **Rev. Proc. 2018-4, 2018-1 C.B. 146**.

The IRS has released an updated revenue procedure which explains when and how the IRS issues technical advice memoranda in the employee plans areas (including actuarial matters) and exempt organizations areas. **Rev. Proc. 2018-5, 2018-1 C.B. 233.**

PARSONAGE INCOME. The U.S. Supreme Court has denied certiorari in the following case. The taxpayers, husband and wife, took a vow of poverty and established a corporation sole to operate a church ministry. The taxpayers transferred all their assets to the corporation, including their home. The church did not have any members and the taxpayers' only activity was to travel across the country helping other establish similar corporations. The taxpayers accepted "donations" based on a schedule of services. The taxpayer did not report any income and did not file returns for three tax years involved in the case. The IRS made assessments of taxes based on bank deposits. The Tax Court held that the amounts received by the taxpayers for their services were taxable income to the taxpayers and subject to self-employment taxes. Although the "donations" were made to the corporation, the Tax Court held that the amounts were taxable to the taxpayers because they performed all the services and had complete control over the corporation. The appellate court affirmed. **Gardner v. Comm'r, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,128 (9th Cir. 2017), *aff'g*, T.C. Memo. 2013-67**.

PENSION PLANS. The taxpayer sought credit for taxes paid on after-tax contributions to the taxpayer's former employer's 401(k) plan because the taxpayer "inadvertently" placed the after-tax contributions in a traditional individual retirement account (IRA), rather than a Roth IRA. In a Chief Counsel Information Letter, the IRS explained that before a participant receives a distribution from an employer-sponsored retirement plan, such as a 401(k) plan, the participant gets an explanation of the various distribution options available. A distribution from a 401(k) plan could be paid to the participant, in which case any after-tax monies distributed would be excluded from gross income. Or the funds in the plan could be paid, in a direct rollover, to another employer-sponsored retirement plan or to a traditional IRA; in this case, any after-tax monies would be excluded from income as they came out of the receiving plan or IRA. If a taxpayer's traditional IRA contains both pre-tax and after-tax monies, the rules treat any distribution as consisting of a proportionate share of each. An individual must report such a distribution on Form 8606, *Nondeductible IRAs*. The instructions for line 2 of the form explain that any nontaxable portion of a rollover from a qualified retirement plan is reported on line 2. By reporting them on line 2 of the form, a taxpayer gets credit for after-tax monies rolled into the IRA (even if the rollover was made in an earlier tax year). **INFO 2017-0028, Jan, 8, 2018**.

SAFE HARBOR INTEREST RATES

February 2018

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	1.81	1.80	1.80	1.79
110 percent AFR	1.99	1.98	1.98	1.97
120 percent AFR	2.17	2.16	2.15	2.15
		Mid-term		
AFR	2.31	2.30	2.29	2.29
110 percent AFR	2.55	2.53	2.52	2.52
120 percent AFR	2.78	2.76	2.75	2.74
		Long-term		
AFR	2.66	2.64	2.63	2.63
110 percent AFR	2.92	2.90	2.89	2.88
120 percent AFR	3.20	3.17	3.16	3.15

Rev. Rul. 2018-05, I.R.B. 2018-6.

NUISANCE

RIGHT-TO-FARM. The plaintiff owned a farm located in the defendant town. In 2011, the plaintiff and defendant entered into a consent judgment enjoining the plaintiff from holding weddings and other commercial events at the farm. The judgment was to be in effect permanently until "superseded by statute." In 2014, the Rhode Island legislature amended R.I. G.L. § 2-23-4(a) to include the following statement: "The mixed-use of farms and farmlands for other forms of enterprise including, but not limited to, the display of antique vehicles and equipment, retail sales, tours, classes, petting, feeding and viewing of animals, hay rides, crop mazes, festivals and other special events are hereby recognized as a valuable and viable means of contributing to the preservation of agriculture." The first sentence of the statute provided a definition of "agricultural operation" covered by the R.I. Right-to-Farm Act, R.I. G. L. § 2-23-1 *et seq*. The plaintiff argued that the added sentence expanded the definition of "agricultural operation" to include commercial events such as weddings and festivals, thus superseding the 2011 injunction. The court noted that the amended statute was followed by R.I. G.L. § 2-23-4(b) which states that "non-agricultural operations" are not covered by the act. Thus, the court held that the added sentence in R.I. G.L. § 2-23-4(a) did not expand the definition of agricultural operations to include weddings and other commercial events but only provided "aspirational" language. **Gerald P. Zarrella Trust v. Town of Exeter, 2018 R.I. LEXIS 8 (R.I. 2018)**.

IN THE NEWS

EARNED INCOME TAX CREDIT. The IRS has published information for people who lived in areas hit by hurricanes and whose incomes dropped in 2017 may be eligible to choose a special option for figuring the EITC. A special computation method, available only to people who lived in one of the hurricane disaster areas during 2017, may enable them to claim the EITC or claim a larger than usual credit. Under this method, taxpayers whose incomes dropped in 2017 can choose to figure the credit using their 2016 earned income rather than their 2017 earned income. Eligible taxpayers should figure the credit both ways -- the regular way using 2017 earned income and this special way using 2016 earned income -- to see which yields the larger EITC. For more information and special instructions on how to report, see the instructions for Form 1040, Line 66, and Publication 976, available on IRS.gov. **IR-2018-10**.

The IRS has published information for taxpayers with a disability and taxpayers with children with a disability about the earned income tax credit (ETC). People with disabilities are often concerned that a tax refund will impact their eligibility for one or more public benefits, including Social Security disability, Medicaid, and SNAP -- the Supplemental Nutrition Assistance Program. The law is clear that tax refunds, including refunds from tax credits such as the EITC, are not counted as income for purposes of determining eligibility for such benefits. This applies to any federal program and any state or local program financed with federal funds. **IR-2018-11**.

PROPERTY TAX DEDUCTION. The IRS has published information advising tax professionals and taxpayers that pre-paying 2018 state and local real property taxes in 2017 may be tax deductible under certain circumstances. The IRS has received a number of questions from the tax community concerning the deductibility of prepaid real property taxes. In general, whether a taxpayer is allowed a deduction for the prepayment of state or local real property taxes in 2017 depends on whether (1) the taxpayer makes the payment in 2017 and (2) the real property taxes are assessed prior to 2018. A prepayment of anticipated real property taxes that have not been assessed prior to 2018 are not deductible in 2017. State or local law determines whether and when a property tax is assessed, which is generally when the taxpayer becomes liable for the property tax imposed. The following examples illustrate these points. *Example 1*: Assume County A assesses property tax on July 1, 2017 for the period July 1, 2017 - June 30, 2018. On July 31, 2017, County A sends notices to residents notifying them of the assessment and billing the property tax in two installments with the first installment due Sept. 30, 2017 and the second installment due Jan. 31, 2018. Assuming taxpayer has paid the first installment in 2017, the taxpayer may choose to pay the second installment on Dec. 31, 2017, and may claim a deduction for this prepayment on the taxpayer's 2017 return. *Example 2*: County B also assesses and bills its residents for property taxes on July 1, 2017, for the period July 1, 2017 - June 30, 2018. County B intends to make the usual assessment in July 2018 for the period July 1, 2018 - June 30, 2019. However, because county residents wish to prepay their 2018-2019 property taxes in 2017, County B has revised its computer systems to accept prepayment of property taxes for the 2018-2019 property tax year. Taxpayers who prepay their 2018-2019 property taxes in 2017 will not be allowed to deduct the prepayment on their federal tax returns because the county will not assess the property tax for the 2018-2019 tax year until July 1, 2018. **IR-2017-210**.

TAX DEFICIENCIES. The IRS has announced that the IRS has begun implementation of new procedures affecting individuals with "seriously delinquent tax debts." These new procedures implement provisions of the Fixing America's Surface Transportation (FAST) Act of 2015. The FAST Act requires the IRS to notify the State Department of taxpayers the IRS has certified as owing a seriously delinquent tax debt. The FAST Act also requires the State Department to deny their passport application or deny renewal of their passport. In some cases, the State Department may revoke their passport. Taxpayers affected by this law are those with a seriously delinquent tax debt, generally someone who owes the IRS more than $51,000 in back taxes, penalties and interest for which the IRS has filed a Notice of Federal Tax Lien and the period to challenge it has expired or the IRS has issued a levy. There are several ways taxpayers can avoid having the IRS notify the State Department of their seriously delinquent tax debt:

- paying the tax debt in full;
- paying the tax debt timely under an approved installment agreement;
- paying the tax debt timely under an accepted offer in compromise;
- paying the tax debt timely under the terms of a settlement agreement with the Department of Justice;
- having requested or have a pending collection due process appeal with a levy; or
- having collection suspended because a taxpayer has made an innocent spouse election or requested innocent spouse relief.

A passport will not be at risk under this program for any taxpayer:

- who is in bankruptcy;
- who is identified by the IRS as a victim of tax-related identity theft;
- whose account the IRS has determined is currently not collectible due to hardship;
- who is located within a federally declared disaster area;
- who has a request pending with the IRS for an installment agreement;
- who has a pending offer in compromise with the IRS; or
- who has an IRS accepted adjustment that will satisfy the debt in full.

For taxpayers serving in a combat zone who owe a seriously delinquent tax debt, the IRS will postpone notifying the State Department, and the individual's passport is not subject to denial during this time. **Notice 2018-1, 2018-1 C.B. 299**.

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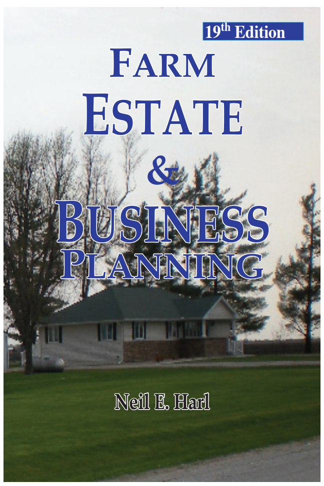

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