The widespread interest in boosting the level of economic activity in the 1960s led to investments by investors to buy and sell livestock (especially cattle) with the encouragement of highly attractive depreciation and investment tax credit rules. For the first few years, the United States Government seemed to accept the development, viewing the phenomenon as part of increased levels of economic growth. However, as time ran on, the political pressure to curb the investment activity became more intense.[6] A feature of the decade of the 1970s was intensified activity by the U.S. Government to discourage tax sheltering. Much of the resulting pressure was on the tax writing committees, culminating with the enactment of the Tax Equity and Fiscal Responsibility Act of 1982.[7]

Several factors served to elevate the standing of the tax writing committees. The complications resulting from the activity elevated the standing of those committees.

Off the tracks

The tip off came in the enactment of I.R.C. § 7701(a)(2) which broadened the term "partnership and partner" to include ". . . a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, and which is not . . . a trust or estate or a corporation . . .; and the term 'partner' includes a member in such a syndicate group, joint venture, or organization."[8] That language effectively disregarded the meaning of those terms under state law, as evidenced by the holding in *Methvin v. Commissioner*.[9] It was not widely understood, but the term "partnership" essentially lost its identity by that time.

In *Methvin,* a taxpayer had a two to three percent investment in various oil and gas ventures. In Article 14 of the agreement between the taxpayer and the operating entities, the parties to that document elected to exclude their agreement from the application of sub-chapter K of the Internal Revenue Code. That was disregarded by the Internal Revenue Service notwithstanding Article 14 and the taxpayer was required to pay the assessment.

It is clear that state law does not matter inasmuch as any state provisions are now disregarded. It is also clear that attempts to apply historic state-level precedents in transactions are disregarded and, apparently, common law fares no better.

Source of guidance

With members of Congress openly admitting that they are not capable of mastering federal tax law, and the senior committee, the Joint Committee on Taxation, is in a position to do about as they please,[10] the opportunity to reflect citizen views in tax policy are severely limited. It is not surprising that only a few individuals are in a position where their voices can be heard.

Tax policy is too important to leave it to a committee that seemingly pursues its own agenda.

ENDNOTES

[1] See, e.g., Hillman, "Limited Liability in Historical Perspective," 54 *Wash. & Lee L. Rev*. 615 (1997); Wheeler v. Comm'r, T.C. Memo. 1978-208; Underwriters Ins. Agency of America v. Comm'r, T.C. Memo. 1980-92. See also 70 Acre Recognition Equipment Partnership v. Comm'r, T.C. Memo. 1996-547.

[2] See 6 Harl, *Farm Income Tax Manual* § 6.01[1][b] (Matthew Bender 2017 ed.).

[3] See Hillman, note 1 *supra*.

[4] *Id*.

[5] Wheeler v. Comm'r, T.C. Memo. 1978-208.

[6] In 1967, the author was asked to serve on a task force in Washington to review the situation and make recommendations.

[7] Pub. L. No. 97-324, 96 Stat. 324 (1982), *adding* I.R.C. § 6231(a)(1)(B).

[8] I.R.C. § 7701(a)(2).

[9] 2016-1 U.S.Tax Cas. (CCH) ¶50,328 (10th Cir. 2016).

[10] See Harl, "Gross Misunderstanding of the Small Partnership Concept," *Tax Notes*, Page 1015, Vol. 152, No. 7, August 15, 2016.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

AUTOMATIC STAY. The IRS had withheld tax refunds for 2013 and 2014 after the debtor filed for Chapter 12. The debtor filed suit for recovery of the refunds, damages and attorney fees. The IRS agreed that the withholding of the refunds violated the automatic stay and issued the refunds to the debtor. The debtor then sought to exhaust administrative remedies by filing a claim to two different IRS employees and an attorney at the U.S. Department of Justice. The debtor did not file any claim with the Chief of the Insolvency Unit of the IRS for the Eastern District of California. The claim has also never been properly served on the IRS. Under I.R.C. §§ 7430(b)(1) and 7433(e)(2)(B)(i), a suit for recovery of attorney's fees and costs cannot be filed until all administrative appeals have been exhausted. Treas. Reg. § 301.7430-1(e) establishes the administrative remedies that a debtor must exhaust before pursuing attorney's fees and costs for a violation of the automatic stay under Section 362(k). This regulation requires a party to "file[] an administrative claim for relief from a violation of section 362 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay violation was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d)." Treas. Reg. § 301.7433-2(e) and (d) contain more conditions that must be satisfied. Treas. Reg. § 301.7433-2(d) requires a debtor to file an administrative claim and wait for the earlier of the decision on the claim or six months after the claim was filed to commence an adversary proceeding for attorney's fees and costs. The court found that the debtor failed to comply with the regulations in that the debtor improperly commenced this adversary proceeding in the Bankruptcy Court before attempting to exhaust the administrative remedies by bringing the Section 362(k) action after the earlier of (1) the IRS's decision on his administrative claim or (2) six months after a compliant filing of the administrative claim. In addition, the debtor failed to file the Section 362(k) claim with the IRS's Chief, Local Insolvency Unit, for the Eastern District of California. Thus, the court held that the court lacked jurisdiction over the debtor's Section 362(k) claim for attorney's fees and costs because the debtor had not exhausted all administrative appeals before filing the suit in the Bankruptcy Court. ***In re* Barcelos, 2017-2 U.S. Tax Cas. (CCH) ¶ 50,387 (Bankr. E.D. Calif. 2017)**.

FEDERAL FARM PROGRAMS

ORGANIC FOOD. The AMS has announced the availability of an interim instruction document intended for use by USDA-accredited organic certifying agents. The interim instruction is entitled *Maintaining the Integrity of Organic Imports (NOP 4013)*. The interim instruction explains the USDA organic regulations' current requirements for certifiers engaged in the oversight of organic products imported into the United States. It also recommends best practices that certifiers may use in order to comply with the existing regulations. **82 Fed. Reg. 49311 (Oct. 25, 2017)**.

The AMS has announced a delay, until May 2018, of the following final regulations announced in January 2017, *82 Fed. Reg. 7042 (Jan. 19, 2017)*. The AMS has adopted as final regulations which amend the organic livestock and poultry production regulations by adding new provisions for livestock handling and transport for slaughter and avian living conditions, and expanding and clarifying existing requirements covering livestock health care practices and mammalian living conditions. Specifically, the regulations: (1) clarify how producers and handlers must treat livestock and poultry to ensure their health and wellbeing; (2) clarify when and how certain physical alterations may be performed on organic livestock and poultry in order to minimize stress; (3) set maximum indoor and outdoor stocking density for avian species, which would vary depending on the type of production and stage of life; (4) define outdoor access to exclude the use of structures with solid roofing for outdoor access and require livestock and poultry to have contact with soil; (5) add new requirements for transporting livestock and poultry to sale or slaughter; and (6) clarify the application of FSIS requirements regarding the handling of livestock and poultry in connection with slaughter to certified organic livestock and poultry establishments and provide for the enforcement of USDA organic regulations based on FSIS inspection findings. **82 Fed. Reg. 52643 (Nov. 14, 2017)**.

FEDERAL ESTATE AND GIFT TAXATION

SPECIAL USE VALUATION. The decedent died with a will which left farm property to the decedent's spouse and provided that upon the death of the spouse, the property would pass to the decedent's daughter and then to her children. The surviving spouse disclaimed any interest in the property and the property passed, under the will, to the daughter. The estate elected special use valuation of the property for estate tax purposes. The daughter's child decided to sell the child's remainder interest in one-half of the farm to the daughter within 10 years after the death of the decedent. The estate sought a ruling that the sale would not subject the estate to recapture of the special use valuation. I.R.C. § 2032A(c)(1)(A) provides that if, within 10 years after the decedent's death and before the death of the qualified heir, the qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of the qualified heir's family), then an additional estate tax is imposed. I.R.C. § 2032A(e)(1) defines "qualified heir" with respect to any property, a member of the decedent's family who acquired such property (or to whom such property passed) from the decedent. If a qualified heir disposes of any interest in qualified real property to any member of his family, such member shall thereafter be treated as the qualified heir with respect to such interest. I.R.C. § 2032A(e)(2) defines "member of the family" with respect to any individual as only—(A) an ancestor of such individual; (B) the spouse of such individual; (C) a lineal descendant of such individual, of such individual's spouse, or of a parent of such individual; or (D) the spouse of any lineal descendant described in subparagraph (C). The IRS ruled that, in this situation, under I.R.C. §§ 2032A(e)(1) and 2032A(e)(2) both the grandson and the daughter were qualified heirs of the decedent because they were lineal descendants of the decedent. Under I.R.C. § 2032A(e)(2), the daughter was a member of the grandson's family because the daughter was an ancestor of the grandson. Therefore, the grandson's sale of his interest in the property to the daughter, within 10 years after the decedent's death, would not be a disposition to a member of his family for purposes of I.R.C. § 2032A(c)(1)(A). Consequently, the sale would not be a disposition upon which an additional tax would be imposed under I.R.C. § 2032A(c)(1)(A). The IRS also ruled that the daughter must sign and execute an amended written agreement consenting to personal liability for additional estate tax under I.R.C. § 2032A(c) reflecting the changed ownership of the property. See *Rev. Rul. 85-66, 1985-1 C.B. 324*. **Ltr. Rul. 201743013, July 26, 2017**.

TRUSTS. The taxpayers, husband and wife, created an irrevocable trust for their benefit and the benefit of their two children and both grantors' fathers. The trust had an independent corporate trustee and a "power of appointment committee" composed of the fathers and guardians of the grantors' minor children. Any action by the committee required either (1) the unanimous written consent of the then serving members of the committee, or (2) the written consent of either or both of the grantors (or the survivor of them) and a majority of the then serving members of the committee. If the committee terminated, the trustee had full discretion to distribute trust income and principal to the beneficiaries. The taxpayers lived in a community property state and the trust provided that all trust property remained community property until the death of one of the taxpayers. The IRS ruled that the contribution of property to the irrevocable trust was not a completed gift subject to federal gift tax due to the powers over the trust's property that were retained by the grantors. Any distribution by the power of appointment committee from the trust to the grantors was merely a return of the grantors' property and not a gift for federal gift tax purposes by any member of the committee. Any distribution of property by the committee from the trust to any beneficiary of the trust other than the grantors was not a completed gift by any member of the committee because the committee members did not possess general powers of appointment over the trust property. However, distributions of property from the trust to a beneficiary other than the grantors would be completed gifts. The powers held by the committee members were not general powers of appointment; therefore, trust property would not be includible in the committee members' gross estates because such member would not be deemed to have held a general power of appointment over trust property within the meaning of I.R.C. § 2041. In addition, on the death of the first grantor die, the fair market value of the predeceased grantor's interest in the trust's property would be includible in the grantor's gross estate for federal estate tax purposes. Upon the death of the surviving spouse, the fair market value of the balance in trust would be includible in the surviving grantor's gross estate for federal estate tax purposes. No portion of the trust would be includible in the estate of any committee member. **Ltr. Rul. 201744006, July 26, 2017; Ltr. Rul. 201744007, July 26, 2017; Ltr. Rul. 201744008, July 26, 2017**.

The decedent formed an *inter vivos* irrevocable discretionary trust for the benefit of the decedent's first spouse and issue. The trust terminated on the later of the death of the decedent or the first spouse, at which time the principal and any accumulated income were distributed outright to the decedent's issue per stirpes. The decedent's first spouse predeceased the decedent and the decedent later married again. The decedent also formed a second irrevocable trust for the benefit of the decedent and his issue. Under the terms of the second trust, an annuity was payable to the decedent for the term of the trust, and the remainder was payable under the terms of the first trust. The decedent formed a third irrevocable trust with the same terms and beneficiaries of the second trust. On the day before the expiration of the respective terms of the second and third trusts, the decedent purchased the remainder interests in those trusts from the trustees of the first trust. The decedent paid the purchase price with two unsecured promissory notes and died the following day. The estate's executor filed Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, and reported the purchases of the remainder interests as non-gift transfers, asserting that the decedent received adequate and full consideration in money or money's worth in the form of the remainder interests in the second and third trusts. The surviving spouse elected to split gifts with the decedent. The estate's executor filed Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, and included the corpus of the second and third trusts in the gross estate. The estate's executor deducted the value of the outstanding promissory notes payable to the trustees of the first trust as claims against the estate. In a Chief Counsel Advice letter, the IRS ruled that the receipt of the remainder interests in the trusts was not adequate and full consideration for the promissory notes because the value of the entire property transferred to the trusts, including the remainder interests, was includible in the donor's gross estate under I.R.C. § 2036. Thus, the value of the promissory notes was a gift to the beneficiaries of the first trust. The IRS also ruled that, because the remainder interests were not adequate and full consideration, no deduction was allowed to the estate for the value of the notes. **CCA 201745012, Aug. 4, 2017**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. *Rev. Proc. 2015-13, 2015-1 C.B. 419* revised the general procedures under I.R.C. § 446(e) and Treas. Reg. §1.446-1(e) to obtain advance and automatic consent to change a method of accounting for federal income tax purposes. Generally, this procedure is effective for Forms 3115 filed on or after January 16, 2015, for a year of change ending on or after May 31, 2014. The IRS has issued a revenue procedure modifying *Rev. Proc. 2015-13*, which provides that, pursuant to I.R.C. § 404A(g)(5), the I.R.C. § 481(a) adjustment period with respect to an election under I.R.C. § 404A is 15 taxable years (year of change and next fourteen taxable years) for a positive I.R.C. § 481(a) adjustment and 15 taxable years (year of change and next fourteen taxable years) for a negative I.R.C. § 481(a) adjustment. **Rev. Proc. 2017-59, I.R.B. 2017-48**.

BUSINESS EXPENSES. The taxpayers, husband and wife, were each employed in 2013. The husband was hired in April 2013 and had to move to a new city to take the employment. The wife remained at the original residence. The employers for both taxpayers had reimbursement policies for business expenses incurred by the taxpayers; however, neither taxpayer presented any objective evidence that either taxpayer requested reimbursement for expenses incurred in their employments. The taxpayers filed a joint return for 2013 and the husband claimed moving expenses and unreimbursed employee expenses. The wife also claimed a deduction for unreimbursed employee business expenses. The court found that the husband failed to provide any credible evidence to support the moving expenses or to even allow the court to make an estimate of such expenses; therefore, the court held that the moving expense deduction was properly disallowed by the IRS. Similarly, the court found that the taxpayers failed to provide credible evidence that either taxpayer requested reimbursement of their employee business expenses; therefore, the court held that the IRS properly disallowed a deduction for those expenses. **Beckey v. Comm'r, T.C. Summary Op. 2017-80**.

The taxpayer owned and operated a construction business and borrowed $20,000 from a lender for business operating funds in 2008. The loan provided for $100 in interest. No repayment schedule was set by the loan but the taxpayer repaid the entire $20,000 in 2013 and claimed the $20,000 as a business deduction for "business loan repayment." The taxpayer did not include the loan proceeds in income for 2008. The court held that the repayment of the loan principal was not a deductible business expense because the loan proceeds were not included in taxable income. **Zollinger v. Comm'r, T.C. Summary Op. 2017-81**.

DISCHARGE OF INDEBTEDNESS. The taxpayer was the parent of an adult child who owned and operated a business hauling cars across the country. When the child's truck broke down, the taxpayer agreed to help purchase a new truck for the business. Although the taxpayer intended only to provide a guarantee of the loan, the loan documents stated that the taxpayer was the primary obligor on the loan. However, the credit union making the loan testified that it looked only to the child for repayment of the loan, and the child made all of the payments. The truck was stolen and the child applied the insurance proceeds to the loan; however, the proceeds did not pay off the loan and the credit union eventually discharged the deficiency. Although the credit union never attempted to collect from the taxpayer, the credit union issued a Form 1099-C, *Cancellation of Debt*, to the taxpayer and the IRS. When the taxpayer did not include the discharge of indebtedness amount as taxable income, the IRS assessed a deficiency. The court stated that, in order for discharge of indebtedness income to exist, there must exist a *bona fide* debt, defined as a genuine intention to create a debt with a reasonable expectation of repayment. The court also noted at a guaranty of a debt creates only a contingent liability dependent upon default of the primary obligor on a debt. A guaranty of a debt does not create discharge of indebtedness solely from the guarantee because the guarantor receives no benefit from the discharge of the indebtedness. The court found that the evidence demonstrated that none of the parties to the loan intended for the taxpayer to be the obligor on the loan and that all parties intended for the taxpayer to be only a guarantor of the loan in the case of the child's default. The court noted evidence that the taxpayer made no payments on the loan; that the child made all the payments, including the insurance proceeds; and that the credit union made no attempt to seek loan payments from the taxpayer. Thus, the court held that no *bona fide* loan was created as between the credit union and the taxpayer and the taxpayer did not realize any discharge of indebtedness income from the discharge of the loan. **Bullock v. Comm'r, T.C. Memo. 2017-219**.

HEALTH FLEXIBLE SPENDING ARRANGEMENTS. The IRS has published information for eligible employees to begin planning to take full advantage of their employer's health flexible spending arrangement (FSA) during 2018. FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans. Because eligible employees need to decide how much to contribute through payroll deductions before the plan year begins, many employers this fall are offering their employees the option to participate during the 2018 plan year. Interested employees wishing to contribute during the new year must make this choice again for 2018, even if they contributed in 2017. Self-employed individuals are not eligible. An employee who chooses to participate can contribute up to $2,650 during the 2018 plan year. That is a $50 increase over 2017. Amounts contributed are not subject to federal income tax, Social Security tax or Medicare tax. If the plan allows, the employer may also contribute to an employee's FSA. Throughout the year, employees can then use funds to pay qualified medical expenses not covered by their health plan, including co-pays, deductibles and a variety of medical products and services ranging from dental and vision care to eyeglasses and hearing aids. Interested employees should check with their employer for details on eligible expenses and claim procedures. Under the use-or-lose provision, participating employees often must incur eligible expenses by the end of the plan year, or forfeit any unspent amounts. But under a special rule, employers may, if they choose, offer participating employees more time through either the carryover option or the grace period option. Under the carryover option, an employee can carry over up to $500 of unused funds to the following plan year — for example, an employee with $500 of unspent funds at the end of 2018 would still have those funds available to use in 2019. Under the grace period option, an employee has until two and a half months after the end of the plan year to incur eligible expenses — for example, March 15, 2019, for a plan year ending on Dec. 31, 2018. Employers can offer either option, but not both, or none at all. Employers are not required to offer FSAs. Accordingly, interested employees should check with their employer to see if they offer an FSA. More information about FSAs can be found in Publication 969, *Health Savings Accounts and Other Tax-Favored Health Plans*. **IR-2017-187**.

INFORMATION RETURNS. The IRS has published information for employers and other businesses as to the Jan. 31, 2018 filing deadline that now applies to filing wage statements and independent contractor forms with the government. The Protecting Americans from Tax Hikes (PATH) Act includes a requirement for employers to file their copies of Form W-2 and Form W-3 with the Social Security Administration by Jan. 31 each year. The Jan. 31 deadline also applies to certain Forms 1099-MISC filed with the IRS to report non-employee compensation to independent contractors. Such payments are reported in box 7 of this form. Failure to file these forms correctly and timely may result in penalties. As always, the IRS urges employers and other businesses to take advantage of the accuracy, speed and convenience of filing these forms electronically. Employers should verify employees' information. This includes names, addresses, Social Security or individual taxpayer identification numbers. Employer should also ensure their company's account information is current and active with the Social Security Administration before January. If paper Forms W-2 are needed, they should be ordered early. An extension of time to file Forms W-2 is no longer automatic. The IRS will only grant extensions for very specific reasons. Details can be found on the instructions for Form 8809, *Application for Extension of Time to File Information Returns*. **IR-2017-189**.

PARTNERSHIPS.

ELECTION TO ADJUST BASIS. The taxpayer was formed as a limited partnership and taxed as a partnership. One of the partners died in the tax year. The taxpayer inadvertently failed to timely file a § 754 election for the tax year of the death of the partner. The IRS granted an extension of time to file an amended return with the Section 754 election. **Ltr. Rul. 201744003, July**

28, 2017.

PASSIVE ACTIVITY LOSSES. The IRS has announced a non-acquiescence in the holding of the following case. The taxpayer was the president of a corporation which operated a property management company. The taxpayer presented evidence that the taxpayer owned 10 percent of the total 100 shares issued by the corporation. The taxpayer and spouse owned interests in several business entities which owned or operated rental properties managed by the management company and owned direct interests in several other rental properties. The taxpayers also owned and participated in businesses which provided services to the rental activities of the employer. The taxpayers grouped their non rental business activities and their rental activities as one unit, reporting the income and losses as nonpassive income and losses. The IRS audited the taxpayers' returns for 2008 and 2009 and recharacterized the income and losses as passive income and losses and rejected the taxpayers' grouping of the business activities and rental activities. The IRS claimed that the taxpayer was not an at least 5 percent owner of the management company and did not materially participate in the business and rental activities. I.R.C. § 469(c)(7)(D)(ii) provides that personal services are not treated as a rental trade or business unless the employee is at least a 5 percent owner of the employer. A 5 percent owner of a corporation is defined by I.R.C. § 416(i)(1)(B)(i) as "any person who owns (or is considered as owning within the meaning of section 318) more than 5 percent of the outstanding stock of the corporation or stock possessing more than 5 percent of the total combined voting power of all stock of the corporation . . .." The court held that the taxpayer was a 5 percent owner of the employer corporation because the taxpayer owned 10 percent of the corporation's stock. I.R.C. § 469(c)(7)(B) provides that a taxpayer will be considered a real estate professional if "(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and (ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates." The court found that the taxpayer spent more than half of working time performing services for the corporation and more than 750 hours per year at the activity. Therefore, the court held that the taxpayer materially participated in the rental activities. The court interpreted Treas. Reg. § 469-9(e)(3)(i) to prohibit the grouping of rental activities and non-rental business activities only for the purpose of determining whether a taxpayer materially participated in the rental activities. For other purposes, Treas. Reg. § 1.469-4 allowed the grouping of rental and non-rental activities ". . . if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of [I.R.C §] 469." The court found that the taxpayers' non-rental business activities had a sufficient interdependent connection to the rental activities to be treated as an economic unit for purposes of I.R.C. § 469. For example, the court found that the non-rental services provided to the rental properties help sustain both activities. Treas. Reg. § 1.469-4(d)(1) requires that the non-rental business activity be insubstantial in relationship to the rental activity and the court so found in this case. Treas. Reg. § 1.469-9(e)(3)(ii) allows a taxpayer to generally credit towards material participation all "work the taxpayer performs in the management activity" as long as it is performed in managing the taxpayer's own rental real estate interests. The court found that the taxpayer performed sufficient hours in the grouped activity to qualify as a real estate professional, resulting in the income and loss from the grouped activities to be nonpassive income and loss. The court held that the taxpayers' income and loss from non-rental and rental activities were nonpassive income and loss where the activities were grouped as one activity and the taxpayer husband materially participated in the grouped activity. **Stanley v. Comm'r, 2015-2 U.S. Tax Cas. (CCH) ¶ 50,560 (W.D. Ark. 2015), *nonacq*., AOD 2017-7, I.R.B. 2017-42**.

The taxpayers were husband and wife. The husband was a medical doctor who practiced at a medical center in which the husband had a limited partnership interest. Because of a health issue, the husband did not perform many surgeries in the tax years involved and did not provide credible evidence to support the husband's claims as to the number of hours worked for the partnership. The taxpayers owned two rental properties through a limited liability company taxed as a partnership. The wife provided most of the services for the partnership but also failed to provide credible evidence of the hours spent on the rental activities. The evidence showed that much of the services provided were through hired contractors. The taxpayers also owned a ranch through a family limited partnership and two other rental properties owned by subsidiaries of the partnership. The taxpayers also failed to provide credible evidence to support the number of hours claimed to have been spent working on the partnership activities. The taxpayers claimed passthrough nonpassive losses from each entity but the IRS disallowed the deductions for the losses and recharacterized the losses as passive activity losses. I.R.C. § 469(c)(1)(B) provides that a passive activity is a trade or business in which the taxpayer does not materially participate. Material participation requires regular, continuous, and substantial involvement in the business operations. See I.R.C. § 469(h)(1). Temp. Treas. Reg. § 1.469-5T(a) provides the tests for what constitutes material participation in an activity, including participation in the activity for more than 500 hours in a tax year. The court found that the taxpayers failed to provide any credible evidence to determine how many hours were spent on the medical activities of the medical partnership; therefore, the court held that the husband did not materially participate in the activity and the losses generated by the activity were passive activity losses. I.R.C. § 469(c)(2) treats any "rental activity" as a passive activity regardless of the taxpayer's material participation unless the taxpayer was a real estate professional. I.R.C. § 469(c)(7)(B) provides that a taxpayer will be considered a real estate professional if "(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and (ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates." The court held that, because the wife failed to provide credible evidence of the number of hours worked at the rental activities, the wife was not a real estate professional and the rental losses were passive activity losses. The taxpayer were also found to have not provided credible evidence of their hours and type of work performed on the ranch; therefore, the court held that the ranch activity losses were passive activity losses. **Syed v. Comm'r, T.C.**

Memo. 2017-226.

PENSION PLANS. For plans beginning in November 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 2.88 percent. The 30-year Treasury weighted average is 2.87 percent, and the 90 percent to 105 percent permissible range is 2.58 percent to 3.01 percent. The 24-month average corporate bond segment rates for November 2017, *without adjustment* by the 25-year average segment rates are: 1.77 percent for the first segment; 3.73 percent for the second segment; and 4.60 percent for the third segment. The 24-month average corporate bond segment rates for October 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 2017-69, I.R.B. 2017-48**.

RETURNS. The IRS has not yet announced a date that it will begin accepting individual tax returns for the 2018 tax filing season. The IRS continues to closely monitor potential legislation that could affect the 2018 tax season, including a number of "extender" tax provisions that expired at the end of 2016 that could potentially be renewed for tax year 2017 by Congress. The IRS anticipates it will not be at a point to announce a filing season start date until later in the calendar year. The IRS stated that speculation on the internet that the IRS will begin accepting tax returns on January 22, 2018, or after the Martin Luther King Jr. Day holiday in January is inaccurate and misleading; no such date has been set. In addition, the IRS cautions taxpayers from relying on misleading refund charts on the internet that project tax refund dates. Any speculation about refund dates in 2018 is premature. In addition, these refund charts can overlook that many different factors affect the timing of tax refunds, ranging from the accuracy of information on the return to whether a taxpayer files electronically. In addition, the IRS and state revenue departments have increased their security protocols against identity theft and refund fraud, which also can affect the timing of federal and state refunds. Due to law changes first affecting last year's returns, the IRS cannot issue refunds for tax returns claiming the EITC or ACTC before mid-February. This law requires the IRS to hold the entire refund — even the portion not associated with the EITC or ACTC. However, there is no need to wait to file such returns since the IRS will process them to the point of refund and then begin refund release when permitted by law. **2017 ARD 216-3**.

The taxpayer was married in 2014 and filed a return for 2014 using the wrong filing status of head of household. The spouse did not have income or file a return for 2014. The IRS sent a notice of deficiency to the taxpayer in 2016, changing the filing status to single. I.R.C. § 6013(b) provides in pertinent part: "(1) In general.—Except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has not expired, such individual and his spouse may nevertheless make a joint return for such taxable year. A joint return filed by the husband and wife under this subsection shall constitute the return of the husband and wife for such taxable year . . .." I.R.C. § 6013(b)(2) provides that a joint return may not be filed "after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed by section 6213." The I.R.C. § 6013(b)(1) election applies only if the taxpayer has filed a "separate return;" thus, if the taxpayer's original return is considered a separate return, the statute bars the taxpayer from filing a subsequent joint return. In this case, the court did not discuss I.R.C. § 6013(b)(1) but cited only I.R.C. §§ 6013 and 7703 to note that the taxpayer was not qualified to use either the head of household or single status. The court followed two cases which held that, in order for a return to be a "separate return" the taxpayer must have made a valid election as to the filing status used in the return. If the status was invalid, the courts reasoned that the taxpayer had no ability to choose such invalid filing status; therefore, a return using an invalid filing status could not be a separate return for purposes of barring a refiling using the married filing jointly status. Thus, the court held that the taxpayers were allowed to change the filing status on the 2014 return to married filing jointly. **Godsey v. Comm'r, T.C. Memo. 2017-214**.

SAFE HARBOR INTEREST RATES.
November 2017

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	1.52	1.51	1.51	1.51
110 percent AFR	1.67	1.66	1.66	1.65
120 percent AFR	1.82	1.81	1.81	1.80
		Mid-term		
AFR	2.11	2.10	2.09	2.09
110 percent AFR	2.32	2.31	2.30	2.30
120 percent AFR	2.54	2.52	2.51	2.51
		Long-term		
AFR	2.64	2.62	2.61	2.61
110 percent AFR	2.90	2.88	2.87	2.86
120 percent AFR	3.16	3.14	3.13	3.12

Rev. Rul. 2017-24, I.R.B. 2017-49.

SAVER'S CREDIT. The IRS has published information about the Saver's Credit which could provide up to a 50 percent credit for the first $2,000 a taxpayer contributes to a retirement plan. Also known as the Retirement Savings Contributions Credit, the Saver's Credit helps offset part of the amount workers voluntarily contribute to a traditional or Roth IRA, a 401(k) or 403 (b) plan, and similar workplace retirement programs. Taxpayers with an IRA have until April 17, 2018, (the due date of their 2017 tax return) to contribute to the plan and still have it qualify for 2017. However, contributions (elective deferrals) to an employer-sponsored plan must be made by the end of the year to qualify for the credit. The Saver's Credit can be claimed by: (1) married couples filing jointly with incomes up to $62,000 in 2017 or $63,000 in 2018; (2) heads of household with incomes up to $46,500 in 2017 or $47,250 for 2018; and (3) singles and married individuals filing separately with incomes up to $31,000 in 2017 or $31,500 in 2018. To qualify for the credit, a person must be: age 18 or older, not a full-time student, and not claimed as a dependent on another person's tax return. Thus, the amount of the credit is based on filing status, income, overall tax liability and the amount contributed to a qualifying retirement plan. It may also be impacted by other credits and deductions or reduced by any recent distributions from a retirement plan. To claim the Saver's Credit, taxpayers must complete Form 8880 and attach it to their tax return. Form 8880 cannot be used with Form 1040EZ. **IR-2017-186**.

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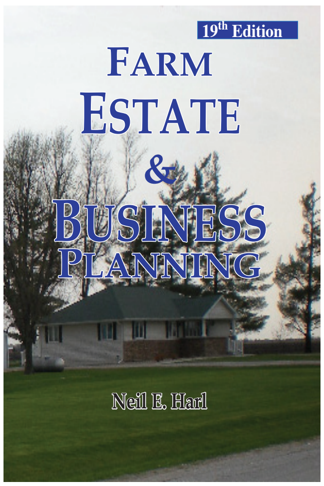

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