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Cases, Regulations and Statutes

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in itself, is unusual, for the Internal Revenue Service to be issuing a statement about what their supervising agency, the Department of the Treasury, "intended" to do.[17]

Revocations.

Insofar as revocations are concerned, the Congress retained the power to establish the rules.[18] In a series of enactments, the Congress amended I.R.C. § 179(c)(2) to allow revocations through 2012[19] and now through 2013.[20] However, the Department of the Treasury has not acted in regulations to extend the right to make a late election after 2007.

To sum up

The authority to elect expense method depreciation on a late return has been non-existent in the years since 2007. The authority to revoke an expense method depreciation election has now been extended, by statute, through 2013.

The questions now are whether the Congress will extend the authority to revoke elections on an amended return after 2013 and to make elections on late returns in a parallel fashion, through at least 2013, by Act of Congress. If the Congress does not address late elections further, the question is whether the Department of the Treasury will properly exercise its authority by regulation to allow late elections to be made without the Commissioner's consent.

ENDNOTES

1 I.R.C. § 179(b)(1(D). See also I.R.C. § 179(b)(2)(D) (phase-out after 2012 of $200,000). See generally 4 Harl, *Agricultural Law* § 29.02[8][h] (2012); Harl, *Agricultural Law Manual* § 4.03[4] (2012), 1 Harl, *Farm Income Tax Manual* § 3.20[2][c][iii] (2012 ed.). For previous articles on this subject, see Harl, "Can Section 179 Elections Be Made on Amended Returns After 2007?" 18 *Agric. L. Dig*. 161 (2007); Harl, "IRS Says Amendments to Regulations Needed for Later Section 179 Elections on Amended returns After 2007," 19 *Agric. L. Dig*. 141 (2008); Harl, "Making Section 179 Elections – One More Time," 21 *Agric. L. Dig*. 161 (2012).

2 Pub. L. No. 112-240, § 315, 126 Stat. 2313 (2012).

3 *Id*. § 315(d).

4 *Id*. § 315(c).

5 Treas. Reg. § 1,179-5(a). Patton v. Comm'r, 116 T.C. 206 (2001)(self-employed welder could not revoke, amend or modify I.R.C. § 179 election after time expired for filing return for taxable year in question). See McGrath v. Comm'r, T.C. Memo. 202-231, *aff'd*, 2003-2 U.S. Tax Cas. ¶ 50,663 (5th Cir. 2003) (failed to make election on return and too late for amended return; involved cost of improvements to leased retail space).

6 Treas. Reg. § 1.179-5(b). See King v. Comm'r, T.C. Memo. 1990-548 (taxpayer may not later substitute other property for expense method depreciation property without revoking election).

7 Starr v. Comm'r, 94 F.3d 1146 (9th Cir. 1996), aff'g, T.C. Memo. 1995-190; Ekman v. Comm'r, T.C. Memo. 1997-318.

8 Treas. Reg. § 1.179-5(c).

9 See I.R.C. § 179(c)(1). See Pub. L. No. 97-34, § 202(e), 95 Stat. 172 (1981).

10 See Treas. Reg. § 1.179-5(c)(2)(i) (can make a late election after 2002 and before 2008).

11 Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 202(e), 117 Stat. 752 (2003).

12 H.R. Conf. Rep. No. 108-126, p. 35 (2003).

13 Temp. Treas. Reg. § 1.179-5T(c)(2)(i).

14 Treas. Reg. § 1.179-5(c).

15 See I.R.C. § 179(c)(2).

16 Rev. Proc. 2008-54, 2008-2 C.B. 722 (the date of 2010 may have been in error inasmuch as the authority to revoke elections without Commissioner consent ran through 2010).

17 For those who would argue that this is a technicality and that IRS had authority to allow late elections, it should be kept in mind that this is a matter of separation of powers. The Congress gave authority for the Department of the Treasury, to establish the rules for late elections, not IRS.

18 See I.R.S. § 179(c)(2).

19 I.R.C. § 179(c)(2), amended by Pub. L. No. 111-312, § 402(e), 124 Stat. 3296 (2010).

20 Pub. L. No. 112-240, § 315(c), 126 Stat. 2313 (2012).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

EXEMPTIONS.

EARNED INCOME CREDIT. The debtor's property included a bank account to which the debtor had deposited an income tax refund, a portion of which was attributable to a federal earned income tax credit. The court held that the federal earned income tax credit was exempt under Ind. Code § 34-55-10-2(c)(11). However, the trustee argued that the credit amount lost its exemption because the funds were commingled in the debtor's bank account with non-exempt funds. The court held that the credit retained its exempt status after commingling in the bank account but the exempt amount would be determined using the first-in, first out method of accounting. Immediately before the deposit of the income tax refund, the balance in the debtors' checking account was $362.23. After the income tax refund was deposited the balance was $5,267.23. However, before the date of filing, withdrawals were made from the account in the total amount of $1,512.13, leaving a balance of $3,755.10 at the time of filing. The court held that, applying the first-in, first-out method, the entire balance at the time of filing consisted of payments received from the earned income credit. Therefore, the debtor was entitled to exempt the entire balance of funds in the checking account on the date of filing. ***In re* Marve, 2013-1 U.S. Tax Cas. (CCH) ¶ 50,148 (Bankr. N.D. Ind. 2013)**.

PRE-PETITION TRANSFERS. The debtor, a cattle dealer, had made an oral arrangement with another cattle dealer to sell the other dealer's cattle to a processing plant which refused to do business with the other cattle dealer. The debtor would sell the other cattle dealer's cattle as the debtor's own cattle and pay the proceeds to the other cattle dealer. Some of these payments were made within 90 days before the debtor filed for Chapter 7 and the trustee sought to recover those payments as preferential transfers. The court held that the debtor acted as only a bailee of the cattle; therefore, neither the cattle nor the payment of the proceeds of the sale of the cattle were estate property. The trustee argued that the bailment was broken when the debtor placed the proceeds in the debtor's bank account. The court held that such commingling of funds was insufficient to destroy the bailment relationship. **Mississippi Valley Livestock, Inc. v. J & R Farms, et al., No. 12 C 50341 (N.D. Ill. 2013)**.

FEDERAL FARM PROGRAMS

No items.

FEDERAL ESTATE AND GIFT TAXATION

ALLOCATION OF BASIS FOR DEATHS IN 2010. The decedent died in 2010 and the executor retained an accountant to advise on estate tax matters including the necessity to file a Form 8939, *Allocation of Increase in Basis for Property Acquired from a Decedent*. The accountant prepared the From 8939 but failed to file the form before January 17, 2012. The estate requested an extension of time pursuant to Treas. Reg. § 301.9100-3 to file the Form 8939 to make the I.R.C. § 1022 election and to allocate basis provided by I.R.C. § 1022 to eligible property transferred as a result of the decedent's death. *Notice 2011-66, 2011-2 C.B. 184 section I.D.1*, provides that the IRS will not grant extensions of time to file a Form 8939 and will not accept a Form 8939 filed after the due date except in four limited circumstances provided in section I.D.2: "Fourth, an executor may apply for relief under § 301.9100-3 in the form of an extension of the time in which to file the Form 8939 (thus, making the Section 1022 election and the allocation of basis increase), which relief may be granted if the requirements of § 301.9100-3 are satisfied. The IRS granted an extension of time to file the election. **Ltr. Rul. 201302008, Sept. 27, 2012.**

The decedent died in 2010 and the executor retained an accountant to advise on estate tax matters including the necessity to file a Form 8939, *Allocation of Increase in Basis for Property Acquired from a Decedent*. The executor requested an extension of time to file the election which was granted by the IRS. **Ltr. Rul. 201303004, Oct. 16, 2012**.

INSTALLMENT PAYMENT OF ESTATE TAX. The estate timely filed its federal estate tax return and paid the estate tax due. The estate did not make a protective election under Treas. Reg. § 20.6166-1(d). The IRS assessed a deficiency that was not attributable to the closely-held business property in the estate. In a Chief Counsel Advice letter, the IRS ruled that the deficiency was not eligible for installment payment under I.R.C. § 6166(h). **CCA 201302037, Nov. 8, 2012**.

MARITAL DEDUCTION. The decedent's will passed estate property in trust to the surviving spouse. The trust was eligible for the marital deduction as a QTIP trust. The spouse, trustee and remainder beneficiaries disagreed on the handling of the trust and the parties reached a settlement under which the trust was split into two trusts, the spouse disclaimed any interest in one of the trusts and the assets in the disclaimed trust passed to the beneficiaries. The IRS ruled that the division of the trust did not disqualify the original trust or the resulting trusts as QTIP trusts. The disclaimer of the one trust resulted in a gift to the beneficiaries from the spouse but was reduced by the amount of gift taxes paid by the beneficiaries. The transfer of the disclaimed trust property to the beneficiaries resulted in a carryover of the basis to the beneficiaries, increased by any gift tax paid, but not over the fair market value of the property transferred. **Ltr. Rul. 201303003, Oct. 22, 2012**.

FEDERAL INCOME TAXATION

CAPITAL GAINS. The taxpayer sold a residence on which the taxpayer realized substantial capital gains. The taxpayer argued that three items reduced the gain on the sale: (1) the amount used to pay off a home equity loan because the original loan proceeds were used in a business; (2) attorney fees incurred to resolve issues involved with the sale; and (3) attorney fees incurred in a Chapter 13 bankruptcy case. The court held that the items did not reduce the capital gains, other than allowed by the IRS, because the taxpayer failed to substantiate that the loan proceeds were used in the business and that the attorney fees were paid for services relating to the sale of the residence. **Albright v. Comm'r, T.C. Memo. 2013-9**.

CHARITABLE CONTRIBUTIONS. The taxpayers, husband and wife, purchased a residential property within a registered historic district, and donated a façade conservation easement to a non-profit organization and claimed a charitable deduction for the value of the easement. The court held that the deduction was properly denied because the appraisal report did not meet the requirements of Treas. Reg. §1.170A-13(b)(2)(ii). The Tax Court rejected the appraisal because the appraisal did not describe the property or the terms of the easement, contain a statement indicating it was prepared for income tax purposes, or provide the method and specific basis for valuing the easement. On appeal, the appellate court reversed, holding that the appraisal was qualified because it provided the basis method of the valuation, explained past IRS treatment of facade conservation easement valuation, and provided sufficient information for the IRS to evaluate the appraisal. On remand to the Tax Court, the court held that the easement had no value because the easement did not adversely affect the marketability of the property and the property was already otherwise subject to development restrictions by the New York Landmark Preservation Commission. **Scheidelman v. Comm'r, T.C. Memo. 2013-18, *on rem. from*, 2012-1 U.S. Tax Cas. (CCH) ¶ 50,402 (2d Cir. 2012), *rev'g and rem'g*, T.C. Memo. 2010-151**.

CHILD TAX CREDIT. The taxpayer cared for the children of a cousin of the taxpayer. Although the IRS conceded that the taxpayer could claim the dependency exemption deduction for the children, the IRS denied the child tax credit. The court agreed because the statute, I.R.C. § 152, used a different definition of qualifying child that did not include children of a cousin of a taxpayer. **Gentry v. Comm'r, T.C. Memo. 2013-16**.

DEPRECIATION. The taxpayer was formed to develop wind power generation properties, including wind turbines and electrical gathering and transmission facilities. Although the wind turbines would be in place and operable in one tax year, the transmission facilities may not allow full capacity electricity generation for another year or so. The IRS ruled that the wind turbines would be considered placed in service in the year in which the turbines were fully operable and capable of producing electricity, even though the other facilities and other circumstances might prevent full generation and transmission of the electricity. **Ltr. Rul. 201302007, Oct. 11, 2012**.

In a Chief Counsel Advice letter, the IRS stated: "The bonus depreciation regulations are very specific. If a taxpayer wants to revoke an election not to deduct bonus depreciation, the taxpayer must obtain the written consent of the Commissioner and, to seek this consent, the taxpayer must submit a letter ruling request. [Treas. Reg.] Section 1.168(k)-1(e)(7)(i)." **CCA 201303015, Dec. 13, 2012**.

The taxpayer was a limited partnership which acquired depreciable real property for which the taxpayer intended to deduct the additional first year depreciation, if the limited partner agreed. After the property rehabilitation was completed, the limited partner determined that the additional first year depreciation election should not have been made. However, the taxpayer's return preparer erroneously made the election to deduct additional first year depreciation on the return. The IRS granted an extension of time to file an amended return without the election. **Ltr. Rul. 201303007, Oct. 11, 2012**.

DISASTER LOSSES. On December 19, 2012, the President determined that certain areas in Massachusetts are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of Hurricane Sandy which began on October 27, 2012. **FEMA-4097-DR**. On January 3, 2013, the President determined that certain areas in Ohio are eligible for assistance from the government under the Act as a result of a Hurricane Sandy which began on October 29, 2012. **FEMA-4098-DR**. On January 10, 2013, the President determined that certain areas in Pennsylvania are eligible for assistance from the government under the Act as a result of a Hurricane Sandy which began on October 26, 2012. **FEMA-4099-DR**. Accordingly, taxpayers in the areas may deduct the losses on their 2011 federal income tax returns. See I.R.C. § 165(i).

DOMESTIC PRODUCTION DEDUCTION. The taxpayer was a billboard company which offered advertising leases for three types of billboards: mobile billboards on the sides of trucks, traditional billboards built on land and modern billboards constructed on steel pillars anchored to cement foundations. In a Chief Counsel Advice letter, the IRS ruled that the traditional and modern billboards were inherently permanent structures under Treas. Reg. § 1.263A-8(c)(3) and real property for purposes of the domestic production activities deduction. The mobile billboards were not inherently permanent structures and were not real property for purposes of the domestic production activities deduction. **CCA 201302017, Nov. 28, 2012**.

FOREIGN ACCOUNTS. The Treasury Department and the Internal Revenue Service have adopted as final regulations for the next major phase of implementing the Foreign Account Tax Compliance Act (FATCA). Enacted by Congress in 2010, the law targets non-compliance by U.S. taxpayers using foreign accounts. The regulations lay out a step-by-step process for U.S. account identification, information reporting, and withholding requirements for foreign financial institutions (FFIs), other foreign entities, and U.S. withholding agents. The regulations implement FATCA's obligations in stages to minimize burdens and costs consistent with achieving the statute's compliance objectives. The rules and implementation schedule are also adjusted to allow time for resolving local law limitations to which some FFIs may be subject. FATCA was enacted in 2010 by Congress as part of the Hiring Incentives to Restore Employment (HIRE) Act. FATCA requires FFIs to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. See Harl, Reporting Foreign Accounts and Funds and Foreign Assets," 23 *Agric. L. Dig.* 121 (2012). **T.D. 9610, 78 Fed. Reg. __ (Jan. __ 2013)**.

The IRS and the Treasury Department have announced that, when final regulations are issued under I.R.C. § 6038D, those final regulations will modify the effective/applicability date of Prop. Reg. §1.6038D-6. Reporting by domestic entities of interests in specified foreign financial assets will not be required before the date specified by final regulations, which will not be earlier than taxable years beginning after December 31, 2012. **Notice 2013-10, I.R.B. 2013-8**.

HOME AFFORDABLE MODIFICATION PROGRAM. The IRS has announced guidance for borrowers, mortgage loan holders and loan servicers who are participating in the Principal

Reduction Alternatives offered through the Department of the Treasury's and Department of Housing and Urban Development's Home Affordable Modification Program (HAMP). To help financially distressed homeowners lower their monthly mortgage payments, Treasury and HUD established HAMP, which is described at www.makinghomeaffordable.gov. Under HAMP, the principal of the borrower's mortgage may be reduced by a predetermined amount called the PRA Forbearance Amount if the borrower satisfies certain conditions during a trial period. The principal reduction occurs over three years. The guidance provides that PRA investor incentive payments made by the HAMP program administrator to mortgage loan holders are treated as payments on the mortgage loans by the United States government on behalf of the borrowers. These payments are generally not taxable to the borrowers under the general welfare doctrine. If the principal amount of a mortgage loan is reduced by an amount that exceeds the total amount of the PRA investor incentive payments made to the mortgage loan holder, the borrower may be required to include the excess amount in gross income as income from the discharge of indebtedness. See Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals)*. Borrowers receiving aid under the HAMP program may report any discharge of indebtedness income — whether included in, or excluded from, gross income — either in the year of the permanent modification of the mortgage loan or ratably over the three years in which the mortgage loan principal is reduced on the loan servicer's books. Borrowers who exclude the discharge of indebtedness income must report both the amount of the income and any resulting reduction in basis or tax attributes on Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)*. **Rev. Proc. 2013-6, 2013-1 C.B. 198**.

HOME OFFICE. The IRS has announced a revenue procedure which provides an optional safe harbor method that individual taxpayers may use to determine the amount of deductible expenses attributable to certain business use of a residence during the taxable year. The safe harbor method is an alternative to the calculation, allocation, and substantiation of actual expenses for purposes of satisfying the requirements of I.R.C. § 280A. The revenue procedure is effective for taxable years beginning on or after January 1, 2013. A taxpayer determines the amount of deductible expenses for a qualified business use of the home for the taxable year under the safe harbor method by multiplying the allowable square footage by the prescribed rate. The allowable square footage is the portion of a home used in a qualified business use of the home, but not to exceed 300 square feet. If the space used exclusively for a home office changes during the tax year, the taxpayer is required to compute a monthly average, not greater than 300 square feet, for use in the safe harbor calculation. The prescribed rate is $5.00 but the IRS may update this rate from time to time as warranted. This safe harbor method is an alternative to the calculation and allocation of actual expenses otherwise required by I.R.C. § 280A; thus, a taxpayer electing the safe harbor method for a taxable year cannot deduct any actual expenses related to the qualified business use of that home for that taxable year. A taxpayer who itemizes deductions and uses the safe harbor method for a taxable year may deduct, to the extent allowed by the Code and regulations, any expense related to the home that is deductible without regard to whether there is a qualified business use of the home for that taxable year (for example, deductions for qualified residence interest, property taxes, and casualty losses). Taxpayers using the safe harbor method deduct these expenses as itemized deductions on Form 1040, Schedule A, and cannot deduct any portion of these expenses from the gross income derived from the qualified business use of the home, either for purposes of determining the net income derived from the business or for purposes of determining the gross income limitation. However, taxpayers with a qualified business use of a home who also have a rental use of the same home under I.R.C. § 280A(c)(3) must allocate a portion of the expenses to the rental use to the extent required under I.R.C. § 280A and any regulations thereunder. A taxpayer using the safe harbor method for a taxable year may deduct, to the extent allowed by the Code and regulations, any trade or business expenses unrelated to the qualified business use of the home for that taxable year (for example, expenses for advertising, wages, and supplies). Taxpayer may make the safe harbor election in any taxable, whether or not taken in a previous year. Disallowed home office deductions from prior tax years may not be carried to tax years in which the safe harbor election is made but may be carried to tax years in which the election is not made. **Rev. Proc. 2013-13, I.R.B. 2013-6**.

INCOME. The IRS has extended, through the tax year 2015, guidance on the federal tax consequences of, and information reporting requirements for, payments made to or on behalf of financially distressed homeowners under programs designed by state housing finance agencies, listed in the guidance, with funds allocated from the Housing Finance Agency Innovative Fund for the Hardest-Hit Housing Markets. The Notice also provides guidance on the federal tax consequences of, and information reporting requirements for, payments made on behalf of financially distressed homeowners under the Department of Housing and Urban Development's Emergency Homeowners' Loan Program (EHLP) and any existing state program receiving funding from the EHLP. **Notice 2013-7, I.R.B. 2013-6, *amplifying*, Notice 2011-14, 2011-1 C.B. 544**.

INNOCENT SPOUSE RELIEF. The taxpayer's former spouse had omitted income from joint returns. Although no assessment had yet been made against the taxpayer personally, the taxpayer sought equitable innocent spouse tax relief for the tax deficiencies resulting from the unreported income. The court held that equitable relief should be granted because (1) the taxpayer was no longer married to the former spouse, (2) the taxpayer received no benefit from the unpaid taxes, (3) the tax liability resulted solely from the former spouse's activities, and the taxpayer would suffer significant hardship from paying the tax deficiency. On appeal, the IRS argued that the Tax Court had inappropriately allowed the taxpayer to present additional evidence not in the administrative record. The appellate court held that the Tax Court was allowed a *de novo* review of all evidence in determining whether innocent spouse relief was appropriate. **Wilson v. Comm'r, 2013-1 U.S. Tax Cas. (CCH) ¶ 50,147 (9th Cir. 2013),** ***aff'g*****, T.C. Memo. 2010-134**.

The taxpayer had filed a joint income tax return with a former spouse while the couple was married. The IRS assessed a deficiency for that tax year because the return did not include any of the former spouse's income. The taxpayer and former spouse testified that the taxpayer did not know about the part time jobs performed by the former spouse because the couple rarely spoke during that year. The court held that the taxpayer did not know or have reason to know that the spouse had not reported income during that year; therefore, the taxpayer was eligible for innocent spouse relief. **Tompkins v. Comm'r, T.C. Memo. 2013-24**.

IRS TESTIMONY. In a Chief counsel Advice letter, the IRS described the procedure for use of pseudonyms by IRS employees in court cases. "This pseudonym, used for privacy and safety reasons, has been registered with the IRS, in accordance with IRS procedures (Internal Revenue Manual 10.5.7, Use of Pseudonyms by IRS Employees), and all IRS procedures governing the use of pseudonyms." **CCA 201303016, Dec. 17, 2012**.

LIKE-KIND EXCHANGES. The taxpayer, a limited liability company (LLC) owns another LLC which is a disregarded entity for tax purposes. The other LLC owns property which was subject to debt owed by the taxpayer in excess of the property's value. The taxpayer entered into an exchange agreement with a qualified intermediary (QI) as defined in Treas. Reg. § 1.1031(k)-1(g)(4)1 to accomplish an exchange intended to qualify as a like-kind exchange under I.R.C. § 1031. The QI acquired and transferred to the taxpayer like-kind replacement property approximately equal in value to the total amount of the outstanding principal debt. The taxpayer assigned to the QI its rights in the transfer agreement with notice being given to the lenders. The taxpayer entered into a contract for the acquisition of the replacement property and the rights were assigned to the QI with notice being given to the seller of the replacement property. The replacement property was acquired from the QI with cash. The IRS ruled that the taxpayer's assignment of its rights in the transfer agreement to QI was a transfer of relinquished property for purposes of determining whether there is an "exchange of property held for productive use in a trade or business or for investment" under I.R.C. § 1031(a), notwithstanding that the fair market value of the exchanged property was less than the principal amount of the outstanding nonrecourse debt on that property. **Ltr. Rul. 201302009, Oct. 10, 2012**.

The taxpayers owned a residence and a business which were sold together as part of the purchase of the business. The taxpayer attempted to obtain like-kind exchange treatment for the purchase of a new residence by including in the purchase agreement a provision requiring the seller to obtain a city permit to use the property as a bed and breakfast. No such permit was acquired and the taxpayers moved into the residence soon after the purchase. The court held that the residence was not like-kind exchange property for the sale of the business because the residence was for personal use and, therefore, was treated as "boot." **Yates v. Comm'r, T.C. Memo. 2013-28**.

PARTNERSHIP

TAX YEAR. Under I.R.C. § 444, a new partnership, an electing S corporation, or a new personal service corporation may elect a taxable year other than a required tax year. I.R.C. § 444(d)(2)(B) provides that if a Section 444 election is terminated, the partnership, S corporation, or PSC may not make another election. In a Chief Counsel Advice letter, the IRS ruled that the taxpayer must change to its required year unless it can demonstrate a business purpose under *Rev. Proc. 2006-46, 2006-2 C.B. 859* or receives a letter ruling from the National Office. The termination may be made by the taxpayer or may be made by the Service by revoking the Section 444 election. Treas. Reg. § 1.444-1T(5)(C) provides that a Section 444 is terminated if a partnership, S corporation, or PSC willfully fails to comply with the requirements of I.R.C. §§ 7519 or 280H. **CCA 201302022, April 4, 2012**.

PASSIVE ACTIVITY LOSSES. The taxpayer was employed full time as a manager in an insurance company. The taxpayer and spouse owned two rental properties, one in a nearby city and one in Florida. The taxpayer reported losses of $84,000, $60,000 and $69,000 in three tax years from the rental properties. The taxpayer used retail tax return preparation software to file the returns and did not make the election to treat both properties as one activity. The taxpayer argued that the taxpayer qualified as a real estate professional under I.R.C. § 469(c)(7)(B) and presented a log of activities and time spent on the rental activities. Although the log showed over 1600 hours spent on the the two properties, the log did not specify the activity and often did not identify the property involved in the activity. The taxpayer claimed that the rental activity included renting and managing the New Jersey property and the Florida property, paying bills, and doing whatever else was required by the states and the towns. The court discounted the value of the log because it showed that the taxpayer worked more hours on the rentals than at the full time job, which also required two hours per day of commuting. In addition, the taxpayer provided no underlying documentary evidence to support the log entries which were very general. The IRS had assessed a 20 percent penalty for substantial understatement of tax. The taxpayer argued that the penalty should not be imposed because the taxpayer reasonably relied on the tax return preparation software to determine the amount of tax. The court acknowledged that the passive loss rules were complex, but the court allowed the penalty to be imposed because the taxpayer's records greatly overstated the number of hours worked on the rental activity. **Hudzik v. Comm'r, T.C. Summary Op. 2013-4**.

REGISTERED TAX RETURN PREPARERS. The plaintiffs were three paid tax return preparers who were required to register with the IRS and comply with new testing and continuing education requirements in order to continue to prepare income tax returns for the public for money. The plaintiffs argued that the new tax return preparer regulations were beyond the authority of the IRS and the plaintiff sought an injunction of enforcement of the regulations. The central issue was whether non-CPA, non-lawyer, tax return preparers "practiced" before the IRS when they filled out tax returns for the public for pay. The court granted the injunction, holding that the authorizing statute, 31 U.S.C. § 330, did not include tax return preparers. **Loving v. I.R.S., 2013-1 U.S. Tax Cas. (CCH) ¶ 50,156 (D. D.C. 2013)**. The IRS has filed a motion to suspend the injunction to allow for an appeal. **2013ARD 018-14 (CCH), Jan. 23, 2013**.

After the decision in *Loving*, above, the IRS has shut down all activity regarding registered tax return preparers while it determines whether to appeal the decision. **http://www.irs.gov/uac/IRS-Statement-on-Court-Ruling-Related-to-Return-Preparers**

RENTAL EXPENSES. The taxpayers, husband and wife, purchased and renovated a second residence with the intent to obtain funds from the sale or rental of the property to provide money for their childrens' educations. The taxpayers were unable to sell or rent the property and allowed a parent to live in the house. The taxpayers claimed that the parent paid rent but provided no evidence to show that any payments were actually made, and they reported no rental income on Schedule E. In addition, the claimed rent was less than the mortgage payments on the property. The court held that the taxpayers could not claim deductions for expenses for the property because it was used for personal purposes. **Langley v. Comm'r, T.C. Memo. 2013-22**.

RETURNS. The IRS has announced that it will issue guidance in the near future to provide relief from the estimated tax penalty for farmers and fishermen unable to file and pay their 2012 taxes by the March 1 deadline due to the delayed start for filing tax returns resulting from the late enactment of the American Taxpayer Relief Act (ATRA). The ATRA affected several tax forms that are often filed by farmers and fishermen, including the Form 4562, Depreciation and Amortization (Including Information on Listed Property). These forms will require extensive programming and testing of IRS systems, which will delay the IRS's ability to accept and process these forms. The IRS is providing this relief because delays in the agency's ability to accept and process these forms may affect the ability of many farmers and fishermen to file and pay their taxes by the March 1 deadline. The relief applies to all farmers and fishermen, not only those who must file late released forms. Normally, farmers and fishermen who choose not to make quarterly estimated tax payments are not subject to a penalty if they file their returns and pay the full amount of tax due by March 1. Under the guidance to be issued, farmers or fishermen who miss the March 1 deadline will not be subject to the penalty if they file and pay by April 15, 2013. A taxpayer qualifies as a farmer or fisherman for tax-year 2012 if at least two-thirds of the taxpayer's total gross income was from farming or fishing in either 2011 or 2012. Farmers and fishermen requesting this penalty waiver must attach Form 2210-F to their tax return. The form can be submitted electronically or on paper. **IR-2013-7**.

In a Chief Counsel Advice letter, the IRS ruled that a scanned signature on a official IRS form (in this case a Form 870-PT) was sufficient as an original signature. **CCA 201302035, Nov. 2, 2012**.

SAFE HARBOR INTEREST RATES
February 2013

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	0.21	0.21	0.21	0.21
110 percent AFR	0.23	0.23	0.23	0.23
120 percent AFR	0.25	0.25	0.25	0.25
		Mid-term		
AFR	1.01	1.01	1.01	1.01
110 percent AFR	1.11	1.11	1.11	1.11
120 percent AFR	1.21	1.21	1.21	1.21
		Long-term		
AFR	2.52	2.50	2.49	2.49
110 percent AFR	2.77	2.75	2.74	2.73
120 percent AFR	3.02	3.00	2.99	2.98

Rev. Rul. 2013-3, I.R.B. 2013-8.

SOCIAL SECURITY BENEFITS. The taxpayer received social security payments during a taxable year and did not include the payments in taxable income, arguing that the payments were disability payments. The court noted that, although disability payments prior to 1984 were excludible, the current I.R.C. § 86 does not make any distinction between disability and non-disability social security payments; both are taxable. Thus, the taxpayer was required to include the social security benefit payments in taxable income. The opinion is designated as not for publication. **Barefield v. Comm'r, 2013-1 U.S. Tax Cas. (CCH) ¶ 50,154 (11th Cir. 2013)**.

TRUSTS

ACCOUNTING. The decedent had created a revocable trust with the decedent as beneficiary. The trust was amended over several years to add 18 beneficiaries. When the decedent's health began to fail, the decedent appointed the successor trustee as co-trustee with the decedent. The co-trustee managed more and more of the trust affairs until the decedent died, at which time the co-trustee became the sole trustee. One of the beneficiaries requested an accounting of the trust affairs including a period before the decedent's death. The trustee resisted these requests, even after the beneficiary filed a motion in the probate court to compel the accounting. The trustee eventually complied with the accounting requests and court order and the probate court assessed all costs against the trustee. The probate court held that the accounting request for the pre-death period was allowed because the trust became irrevocable after death and the request was made when the trust was irrevocable. The appellate court reversed, holding that Iowa Code § 633A.3103 applied and placed no duty on the trustee to account to anyone but the settlor of the trust while the settlor was alive and the trust was revocable. The duty of Iowa Code § 633.4213 for a trustee to account to beneficiaries of an irrevocable trust does not extend to the period before the death of the settlor or before the trust became irrevocable. **In the Matter of Trust #T-1 of Mary Faye Trimble, No. 11-1967, January 25, 2013.**

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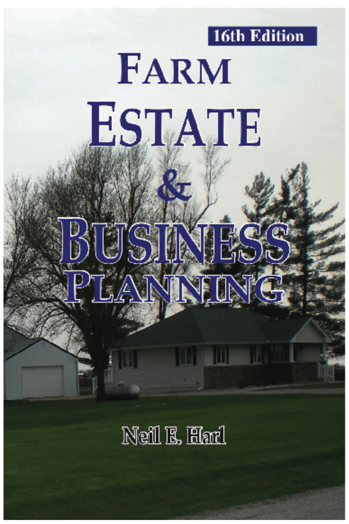

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