nearby; and (3) other employer concerns, such as availability of alcohol products at local restaurants and increased traffic in area, were not sufficient business reasons for shortened meal periods).

[16] See, e.g., Incorporated Trustees of Gospel Worker Soc. v. United States, 85–2 U.S. Tax Cas. (CCH) ¶ 9828 (Fed. Cir. 1985), *aff'g* 6 Cl. Ct. 308 (1984) (value of meals and lodging provided to religious society members living in society printing business premises not excludible from income when employees could adequately perform duties without being provided free meals and lodging).

CASES, REGULATIONS AND STATUTES

BANKRUPTCY

GENERAL

DISCHARGE. The debtors, husband and wife, owned and operated a farm raising cattle and tobacco. The debtors obtained operating loans from the creditor bank and granted security interests in farm equipment and crops. After the debtors defaulted on the loans, the bank obtained judgments against the debtors and the debtors filed for Chapter 13. After the Chapter 13 case was dismissed without a discharge, the debtors liquidated their farm assets and filed for Chapter 7, listing the amount owed to the bank as an unsecured claim. The bank sought summary judgment that its claim was nondischargeable under Section 523(a)(2)(A), (2)(B), (4), and (6) or Section 727(a)(3), (4), (5), and (7). The court held that an issue of fact remained on the Section 523(a)(2)(A) (fraud) claim and denied summary judgment on that claim. The bank argued that its claim was nondischargeable under Section 523(a)(2)(B) because the financial documents submitted by the debtors in applying for the loans were materially false. Section 523(a)(2)(B) denies a discharge—

"for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— . . .

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; . . ."

The court denied summary judgment on this issue because material questions of fact remained as to whether the loan documents were false. Summary judgment was similarly denied because of questions of facts as to the Section 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny) and Section 523(a)(6) (willful and malicious injury) claims. Section 727(a)(3) provides that a court shall grant a discharge unless: "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case . . .." Section 727(a)(5) provides that a court shall grant a discharge unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities . . .." The court found that the debtors failed to provide evidence to account for the loss of value of crops and cattle. Thus, the court held that the debtors failed to account for the disparities between the assets claimed in the financial documents supporting their loan applications and the assets listed on their Chapter 7 schedules; therefore summary judgment denying discharge was granted to the bank. ***In re* Tingle, 2018 Bankr. LEXIS 3654 (Bankr. E.D. Ky. 2018)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION SKIPPING TRANSFERS. The taxpayers, husband and wife, established an irrevocable trust prior to 2000 for their children and descendants. The husband funded the trust with stock. The trust was susceptible to potential generation skipping transfer (GST) tax; however, the taxpayers' attorney told them that the trust was exempt from GST tax. Thus, the taxpayers did not file a Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, to report the transfer to the trust and signify consent to treat all gifts made by both spouses as having been made one-half by each under I.R.C. § 2513. Accordingly, no GST exemption was allocated to the transfer to the trust. A second attorney discovered the error and the taxpayers filed an untimely Form 709 which signified their consent to treat the transfer as made one-half by each spouse under I.R.C. § 2513. In addition, the taxpayers each allocated their GST exemption to the one-half portion of the transfer that was attributable to them based on the consent under Section 2513. The taxpayers then requested an extension of time pursuant to I.R.C. § 2642(g) and Treas. Reg. §§ 301.9100-1 and 301.9100-3 to make a timely allocation of GST exemption to the husband's portion of the transfer to the trust, effective as of the date of the transfer to the trust. I.R.C. § 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. I.R.C. § 2513(a)(2) provides that I.R.C. § 2513(a)(1) shall apply only if both spouses have signified (under the regulations provided for in I.R.C. § 2513(b)) their consent to the application of I.R.C. § 2513(a)(1) in the case of all such gifts

made during the calendar year by either while married to the other. Treas. Reg. § 25.2513-2(b)(1)(i) provides that the consent required by I.R.C. § 2513(a)(2) may not be signified after the 15th day of April following the close of the calendar year of the gift unless before such 15th day, no return has been filed for the year by either spouse, in which case the consent may not be signified after a return for the year is filed by either spouse. *Notice 2001-50, 2001-2 C.B. 189*, provides that under I.R.C. § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in I.R.C. § 2642(b)(1) or (b)(2) or an election described in I.R.C. § 2632(b)(3) or (c)(5) under the provisions of Treas. Reg. § 301.9100-3. The IRS granted the extension time to allocate the husband's GST exemption to the transfer to the trust. **Ltr. Rul. 201847002, Aug. 10, 2018**.

FEDERAL FARM PROGRAMS

WETLANDS. The USDA has issued interim regulations for the Highly Erodible Land and Wetland Conservation Compliance provisions of the Food Security Act of 1985, as amended. This rulemaking clarifies how USDA delineates, determines, and certifies wetlands located on subject land in a manner sufficient for making determinations of ineligibility for certain USDA program benefits. **83 Fed. Reg. 63046 (Dec. 7, 2018)**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. The IRS has issued a revenue procedure providing the procedures by which a taxpayer may obtain the automatic consent of the IRS to change to certain methods of accounting provided in Treas. Reg. §§ 1.263A-1, -2, and -3 (as amended by T.D. 9843, below) for costs allocable to certain property produced or acquired for resale by the taxpayer. **Rev. Proc. 2018-56, I.R.B. 2018-50, 985, *modifying* Rev. Proc. 2018-31, I.R.B. 2018-22, 637**.

The IRS has adopted as final regulations amending Treas. Reg. §§ 1.263A-1, -2, and -3. The final regulations are intended to reduce distortions, compliance costs, burden, and administrative complexity under I.R.C. § 263A by (1) providing rules for the treatment of negative adjustments related to certain costs required to be capitalized to property produced or acquired for resale; (2) providing a new simplified method of accounting, the modified simplified production method, for determining the additional I.R.C. § 263A costs that must be capitalized to ending inventory or other property on hand at the end of the year; and (3) redefining how certain types of costs are categorized for purposes of the simplified methods for determining the additional I.R.C. § 263A costs that must be capitalized to ending inventory or other property on hand at the end of the year. **T.D. 9843, I.R.B. 2018-50, 957**.

Section 13221 of TCJA 2017 made several changes to the timing of income for accrual method taxpayers by redesignating I.R.C. § 451(b) through (i) as (d) through (k), and adding new I.R.C. §§ 451(b) and (c), generally effective for tax years beginning after December 31, 2017. I.R.C. 451(b), as amended by TCJA, generally provides that for an accrual method taxpayer, the all events test with respect to any item of gross income (or portion thereof) shall not be treated as met any later than when such item (or portion thereof) is taken into account as revenue in the taxpayer's applicable financial statement, or such other financial statement as the Secretary may specify. Section 13221(d) of TCJA provides rules relating to the coordination with I.R.C. § 481(a) for a qualified change in method of accounting for the taxpayer's first taxable year beginning after December 31, 2017. Section 13221(d)(2) of TCJA provides that a qualified change in method of accounting is a change that: is required by the amendments made by section 13221 of TCJA, or was prohibited under the Code of 1986 prior to such amendments and that is permitted under the Code after such amendments. The IRS has issued a revenue procedure providing procedures under I.R.C. § 446 and Treas. Reg. § 1.446-1(e) obtain automatic consent of the IRS to change methods of accounting to comply with I.R.C. § 451(b), as amended by TCJA. In addition, for the first taxable year that begins after December 31, 2017, certain taxpayers are permitted to make a method change to comply with I.R.C. § 451(b) without filing a Form 3115, *Application for Change in Accounting Method*. **Rev. Proc. 201860, I.R.B. 2018-51, __, modifying Rev. Proc. 2018-31, I.R.B. 2018-22, 637**.

BUSINESS INTEREST DEDUCTION LIMITATION. The IRS has issued proposed regulations for a provision of the *TCJA 2017, Pub. L. No. 115-97, § 13301, 131 Stat. 2117 (2017)*, which limits the business interest expense deduction for certain taxpayers. For taxpayer subject to the limits, for tax years beginning after Dec. 31, 2017, the deduction for business interest expense is generally limited to the sum of (1) a taxpayer's business interest income (see I.R.C. § 163(j)(6)), (2) 30 percent of adjusted taxable income (see I.R.C. § 163(j)(8)), and (3) floor plan financing interest (see I.R.C. § 163(j)(9)). Taxpayers will use new Form 8990, *Limitation on Business Interest Expense Under Section 163(j)*, to calculate and report their deduction and the amount of disallowed business interest expense to carry forward to the next tax year. This limit does not apply to taxpayers (except tax shelters) whose average annual gross receipts are $25 million or less for the three prior tax years. This amount will be adjusted annually for inflation starting in 2019. Other exclusions from the limit are certain trades or businesses, including performing services as an employee, electing real property trades or businesses, electing farming businesses and certain regulated public utilities. Taxpayers must elect to exempt a real property trade or business or a farming business from this

limit. Taxpayers may rely on the proposed regulations until final regulations are published in the Federal Register. **NPRM REG-106089-18, IR-2018-233**.

The IRS has issued a revenue procedure which provides a safe harbor, under the business interest deduction limitation, that allows taxpayers to treat certain infrastructure trades or businesses as real property trades or businesses solely for purposes of qualifying as an electing real property trade or business under I.R.C. § 163(j)(7)(B). **Rev. Proc. 2018-59, I.R.B. 2018-50, 1018**.

CHARITABLE DEDUCTION. The taxpayer was a limited liability company (LLC) which purchased 1280 acres of undeveloped land for the purpose of developing the land into a planned community with residences, commercial properties, a school and a park. The park was to be built on 125 of the acres. In the taxpayer's application for approval of the planned unit development, the taxpayer included the park in the plans but did not need approval because the park land was outside the city limits. The taxpayer then negotiated the sale of the park land to the county but granted a conservation easement to a charitable organization prior to selling the land to the county. The easement restricted the county's use of the land to the use as a park with structures only relating to the property's use as a park. The taxpayer initially claimed a portion of the appraised value of the park land as a charitable deduction but later filed an amended return which claimed the entire value of the park land as a charitable deduction. The IRS disallowed the entire charitable deduction, arguing that the value of the easement was zero or that the taxpayer received a significant benefit from the easement. I.R.C. § 170(a) allows a deduction for a charitable contribution, defined by I.R.C. § 170(c) as a contribution or gift to or for the use of charitable organizations and governments. However, no deduction for a charitable contribution is allowed if the taxpayer expects a substantial benefit from the contribution. The court found that the taxpayer received a substantial benefit from the easement in that the existence of a park among the residential and commercial properties enhanced the value of the properties. The court noted that the park's existence was included in the taxpayer's application for approval of the planned unit development with the city, although the park was not inside the city limits. In addition, the court also ruled on the value of the easement. Under Treas. Reg. § 1.170A-1(a), (c)(1), the amount of the allowable charitable-contribution deduction is the value of the contributed property. This is also the case when the contributed property is a conservation easement. Treas. Reg. § 1.170A-14(h)(3)(i), provides that, where there is no evidence in the record of sales of easements comparable to the easement, the value of the easement is equal to the value of the land before the easement minus the value of the land after the easement, based on the its highest and best use of the property. Here the court found that the highest and best use of the park property was as a park, both before and after the grant of the easement; therefore, the court held that the value of the easement was zero and no charitable deduction was allowed. **Wendell Falls Development, LLC v. Comm'r, T.C. Memo. 2018-45**.

CHILD TAX CREDIT. The IRS has published information about the child tax credit as amended by the TCJA 2017. *Credit amount*. The new law increases the child tax credit from $1,000 to $2,000. Eligibility for the credit has not changed. As in past years, the credit applies if all of these apply: (1) the child is younger than 17 at the end of the tax year, December 31, 2018, (2) the taxpayer claims the child as a dependent, and (3) the child lives with the taxpayer for at least six months of the year. *Credit refunds*. The credit is refundable, now up to $1,400. If a taxpayer does not owe any tax before claiming the credit, the taxpayer will receive up to $1,400 as part of the refund. *Earned income threshold*. The income threshold to claim the credit has been lowered to $2,500 per family. This means a family must earn a minimum of $2,500 to claim the credit. *Phaseout*. The income threshold at which the child tax credit begins to phase out is increased to $200,000, or $400,000 for married taxpayers filing jointly. Dependents who cannot be claimed for the child tax credit may still qualify the taxpayer for the credit for other dependents. This is a non-refundable credit of up to $500 per qualifying person. These dependents may also be dependent children who are age 17 or older at the end of 2018. It also includes parents or other qualifying relatives supported by the taxpayer. **IRS Tax Reform Tax Tip 2018-182**.

DISASTER LOSSES. On November 5, 2018, the President determined that certain areas in Alabama were eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of Hurricane Michael which began on October 10, 2018. **FEMA-4406-DR**. Accordingly, taxpayers in these areas may deduct the losses on their 2018 or 2017 federal income tax returns. See I.R.C. § 165(i).

IDENTITY THEFT. The IRS has published information about a growing wave of identity theft and W-2 scams aimed at employers. This scheme has become one of the more dangerous email scams. These emails appear to be from an executive or organization leader to a payroll or human resources employee. The message usually starts with a simple greeting, like: "Hey, you in today?" By the end of the email exchange, all of an organization's Forms W-2 for their employees may be in the hands of cybercriminals. Because payroll officials believe they are corresponding with an executive, it may take weeks for someone to realize a data theft has occurred. Generally, the criminals are trying to quickly take advantage of their theft, sometimes filing fraudulent tax returns within a day or two. This scam is such a threat to taxpayers that a special IRS reporting process has been established. A business should report these schemes by (1) email dataloss@irs.gov to notify the IRS of a W-2 data loss and provide contact information. In the subject line, type "W2 Data Loss" so that the email can be routed properly. The business should not attach any employee personally identifiable information data; (2) email the Federation of Tax Administrators at StateAlert@taxadmin.org to get information on how to report victim information to the states; (3) file a complaint with the FBI's Internet Crime Complaint Center; (4) notify employees to protect themselves from identity theft by reviewing the Federal Trade Commission's www.identitytheft.gov site which provides guidance on general steps employees should take; and (5) forward the scam email to phishing@irs.gov. **IRS Tax Tip 2018-188**.

INNOCENT SPOUSE RELIEF. The taxpayer filed a Form

8857, *Request For Innocent Spouse Relief*, in 2011 for taxes owed from 1997 through 2002 on joint returns and was denied relief by the IRS because (1) the taxpayer did not prove that the taxpayer had reason to believe the taxes would be paid at the time the taxpayer signed the returns, and (2) the taxpayer proffered documents that did not show an economic hardship. The taxpayer was informed of the right to contest the denial by filing an appeal with the Tax court within 90 days. The taxpayer did not file an appeal but submitted additional Forms 8857 in 2012 and 2014 which were also denied. The IRS began levying against the taxpayer's assets and discharged some of the tax liabilities due to expiration of the collection statute of limitations. The taxpayer then filed for a refund of the levied property, essentially again asserting the right to innocent spouse relief. The refund request was denied and the taxpayer filed an appeal with the District Court. The IRS sought summary judgment based on lack of jurisdiction of the District Court. Under I.R.C. § 6015(e)(1)(A), if a requesting taxpayer is unsatisfied with the the IRS's decision, or if the IRS fails to give notice of a decision within six months after receiving the request for review, the requesting spouse may petition the Tax Court to review the decision, in addition to any other remedy provided by law. Although the statute does not address whether the Tax Court's jurisdiction is exclusive, courts interpreting the statute have concluded that it is. The court noted that courts have also held that district courts have jurisdiction to decide an innocent spouse issue "only when the taxpayer files a refund suit in the district court while a [Section] 6015 petition is pending with the Tax Court." See *Andrews v. U.S., 69 F. Supp. 2d 972 (N.D. Ohio 1999)*. Thus, because the taxpayer in this case did not file an appeal with the Tax Court which was still pending at the time the taxpayer filed the refund suit, the court held that it did not have jurisdiction over the taxpayer's innocent spouse relief claim and that summary judgment dismissing the case was proper. **Chandler v. U.S., 2018-2 U.S. Tax Cas. (CCH) ¶ 50,498 (N.D. Texas 2018)**.

PAID FAMILY AND MEDICAL LEAVE TAX CREDIT. The IRS has published information about the new tax credit for employers who provide paid family and medical leave, *TCJA 2017, Pub. L. No. 115-97, § 13403, 131 Stat. 2135 (2017), adding I.R.C. § 458*. The credit is available for wages paid in taxable years beginning after December 31, 2017, and before January 1, 2020. Some employers can claim the credit retroactively to the beginning of their first taxable year beginning after December 31, 2017, if they meet the terms of a transition rule on or before December 31, 2018. To be eligible for the credit, an employer must have a written policy in place that includes: (1) at least two weeks of paid family and medical leave annually to full-time employees, prorated for part-time employees; and (2) pay for family and medical leave that's at least 50 percent of the wages normally paid to the employee. Generally, for tax year 2018, the employee's 2017 compensation from the employer must be $72,000 or less. The credit ranges from 12.5 percent to 25 percent of wages paid during an employee's leave. For purposes of this credit, family and medical leave includes leave for one or more of the following reasons: (1) birth of an employee's child and to care for the child; (2) placement of a child with the employee for adoption or foster care; (3) care for the employee's spouse, child or parent who has a serious health condition; (4) a serious health condition that makes the employee unable to do the functions of their position; (5) any qualifying need due to an employee's spouse, child or parent being on covered active duty in the Armed Forces, including notification of an impending call or order to covered active duty; and (6) to care for a service member who is the employee's spouse, child, parent or next of kin. **IRS Tax Reform Tax Tip 2018-183**.

PASSIVE ACTIVITY LOSSES. The decedent owned several commercial and residential rental properties and claimed losses in 2008 and 2009 which were denied as passive activity losses by the IRS. The decedent filed an appeal and died before the case could be heard. The decedent's estate was substituted as petitioner. The decedent's daughter provided testimony to support the estate's claim that the losses were eligible for the I.R.C. § 469(c)(7)(B) exception as a real estate professional. I.R.C. § 469(c)(7)(B) allows a deduction for passive activity losses for real estate professionals, defined as someone who performed more than 750 hours of services during each year in real property trades or businesses in which the taxpayer materially participated. The court found the daughter's testimony not credible as to the amount of time the decedent spent on the rental activities because the estate provided no documentary evidence to substantiate the testimony about the decedent's activities. The court noted that the decedent had been in poor health during 2008 and 2009, had two other jobs, and relied on a management company and independent contractors to perform tenant and other services. Thus, the court held that the deductions were properly characterized as passive activity losses and disallowed. **Estate of Ramirez v. Comm'r, T.C. Memo. 2018-196**.

QUARTERLY INTEREST RATES. The IRS has announced that, for the period January 1, 2019 through March 31, 2019, the interest rate paid on tax overpayments increased to 6 percent (5 percent in the case of a corporation) and for underpayments increased to 6 percent. The interest rate for underpayments by large corporations increased to 8 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 increased to 3.5 percent. **Rev. Rul. 2018-32, I.R.B. 2018-51.**

TAX RETURN PREPARERS. A Chief Counsel Advice letter reviewed the issue of whether an S corporation or its shareholder employees is liable for the I.R.C. § 6695(g) penalty assessed against tax return preparers for lack of due diligence. The letter provided few facts but stated that S corporation provided tax return preparation services for compensation but one of the 25 percent co-owners committed the due diligence error. I.R.C. § 6695(g) generally provides that any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by Treas. Reg. § 1.6695-2(b) that a tax return preparer must comply with to avoid the penalty under I.R.C. § 6695(g). Generally, a tax return preparer must complete and submit with the filed tax return a Form 8867, *Paid Preparer's Due Diligence Checklist*, and retain a copy of the form. In addition, the preparer must not know or have reason to know that any of the information used to compute the relevant credit or credits is incorrect and must make reasonable, documented inquiries concerning the correctness of the information. I.R.C. § 7701(a)(36) defines "tax return preparer" as any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this

title or any claim for refund of tax imposed by this title, subject to certain exceptions not relevant here. Temp. Treas. Reg. § 1.6695-2T(b)(3) provides generally that the tax return preparer must not know, or have reason to know that any information used by the tax return preparer in determining the taxpayer's eligibility for, or the amount of, any credit described in paragraph (a) of this section and claimed on the return or claim for refund is incorrect. Treasury regulation § 1.6695-2(c) provides a special rule that a firm that employs a tax return preparer subject to a penalty under Section 6695(g) is also subject to penalty if, and only if: (1) one or more members of the principal management (or principal officers) of the firm or a branch office participated in or, prior to the time the return was filed, knew of the failure to comply with the due diligence requirements of this section; (2) the firm failed to establish reasonable and appropriate procedures to ensure compliance with the due diligence requirements of this section; or (3) the firm disregarded its reasonable and appropriate compliance procedures through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate) in the preparation of the tax return or claim for refund with respect to which the penalty is imposed." Thus, the IRS stated that an S corporation may be a tax return preparer within the definition of Section 7701(a)(36) if it employs a person who prepares a tax return for compensation, and the S corporation may be the proper person on which to assess the penalty under Section 6695(g). **CCA 201846005, Aug. 27, 2018**.

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