Bulletin, the single fee, commission, or other expense (so-called bundled fee) must be allocated, for purposes of computing the adjusted gross income of the estate or non-grantor trust in compliance with Section 67(e), between the costs that are subject to the 2-percent floor and those that are not.[9]

Effect of TCJA 2017 on Deductibility of Administrative Costs

Because the 2017 Act makes no distinction as to the taxpayers affected by the suspension of miscellaneous deductions, taxpayers and practitioners were justified in being concerned that estates and non-grantor trusts could also be denied a deduction for all miscellaneous itemized deductions, whether or not they are subject to the 2 percent limitation under the pre-2018 Code and regulations.

Notice 2018-61

The IRS has issued *Notice 2018-61*[10] to announce that it intends to issue regulations clarifying that estates and non-grantor trusts may continue to deduct (1) costs which are paid or incurred in connection with the administration of the estate or non-grantor trust and which would not have been incurred if the property were not held in such estate or trust and (2) amounts allowable as deductions under I.R.C. §§ 642(b), 651 or 661, including the appropriate portion of a bundled fee, in determining the estate or non-grantor trust's adjusted gross income during taxable years for which the miscellaneous itemized deductions would otherwise be suspended by the 2017 Act.

However, the deduction for costs paid or incurred in connection with the administration of the estate or non-grantor trust which were subject to the 2 percent floor for miscellaneous deductions prior to 2018 would be suspended by the 2017 Act.

Effect of TCJA 2017 on Deductibility of Excess Deductions

On the termination of an estate or trust which has: (1) a net operating loss carryover under I.R.C. § 172 or a capital loss carryover under I.R.C. § 1212, or (2) for the last taxable year of the estate or trust, deductions (other than the personal exemption or charitable contributions) in excess of gross income for such year, then such carryover or such excess is allowed as a deduction to the beneficiaries succeeding to the property of the estate or trust.[11] An excess estate or trust deduction is not used in computing the beneficiaries' adjusted gross income and is treated as a miscellaneous itemized deduction of the beneficiaries.[12]

Prior to the TCJA 2017 suspension of miscellaneous itemized deductions, such deductions were allowed, subject to the restrictions described above. The IRS states that, for the years in which miscellaneous itemized deductions are not permitted under TCJA 2017, it appears also to exclude the excess deductions on termination of an estate or trust. The Treasury Department and the IRS are studying whether deductions that would not be subject to the limitations imposed by Sections 67(a) and (g) in the hands of the trust or estate should continue to be treated as miscellaneous itemized deductions when they are included as an excess deduction in the hands of beneficiaries. *Notice 2018-61* states that regulations on this issue are forthcoming but does not identify any potential IRS interpretation of the TCJA 2017 provision for this purpose.

ENDNOTES

[1] Pub. L. No 115-97, § 11045, 131 Stat. 2088 (2017), *amending* I.R.C. § 67.

[2] See Harl, *Agricultural Law*, § 44.01[3] (2018) for discussion of estate tax deductions for administrative costs and Harl, *Farm Income Tax Manual*, § 3.25[4] (2018) for discussion of miscellaneous itemized deductions.

[3] I.R.C. § 67(a), prior to suspension by TCJA 2017.

[4] See Temp. Treas. Reg. §1.67-2T(g)(1)(i).

[5] I.R.C. § 67(e).

[6] Treas. Reg. § 1.67-4(a).

[7] Treas. Reg. § 1.67-4(b).

[8] *Id*.

[9] Treas. Reg. § 1.67-4(c).

[10] 2018-31 I.R.B. 278.

[11] I.R.C. § 642(h). See Harl, *Agricultural Law*, § 44.11 (2018) for discussion of excess losses and deductions of estates and trusts.

[12] Note that Treas. Reg. § 1.642(h)-1(b) provides that net operating loss carryovers and capital loss carryovers are taken into account when determining adjusted gross income. Therefore, they are above-the-line deductions and thus are not miscellaneous itemized deductions on the returns of beneficiaries.

CASES, REGULATIONS AND STATUTES

BANKRUPTCY

GENERAL

EXEMPTIONS

HOMESTEAD. The debtors, husband and wife, owned an 88 acre tract of rural land in Texas and had the two acres with the house and buildings designated as the exempt homestead for Texas property tax assessment purposes. The debtors used the property for raising goats, cows, and horses; for hunting and fishing; for running a catering business; and for carrying on general family activities. The debtors claimed the entire 88 acres as exempt homestead property under *Tex. Const. Art. 16, § 51* which states that "[t]he homestead, not in a town or city, s hall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon." See also *Tex. Prop. Code § 41.002(b)(1)*. A creditor challenged the scope of the exemption, arguing that the designation of only two acres as the homestead for

property tax purposes also limited the exemption for homestead for bankruptcy purposes. The Bankruptcy Court stated that the property tax provision for designation of the homestead did not override the constitutional and statutory definition of homestead for execution purposes. Thus, the court noted that a debtor could not create an exempt homestead merely by designating it as a homestead for property tax purposes but must meet the requirements of a homestead for execution purposes. In the same manner, the designation of a homestead for property tax purposes did not limit the exemption for execution purposes where the owners qualified for the full 200 acre homestead exemption. Thus, the court held that the debtors were not limited to an exemption for the two acres but could include the entire 88 acres as exempt homestead property. ***In re* Terrill, 2018 Bankr. LEXIS 1777 (Bankr. N.D. Tex. 2018)**.

FEDERAL ESTATE AND GIFT TAXATION

RETURNS. In a Chief Counsel Advice letter, the IRS discussed whether an executrix can disaffirm the amended returns filed for three tax years by the decedent's spouse under I.R.C. § 6013(a)(3). I.R.C. § 6013(a)(3) provides ". . .. If an executor or administrator of the decedent is appointed after the making of the joint return by the surviving spouse, the executor or administrator may disaffirm such joint return by making, within 1 year after the last day prescribed by law for filing the return of the surviving spouse, a separate return for the taxable year of the decedent with respect to which the joint return was made, in which case the return made by the survivor shall constitute his separate return." The definition of "surviving spouse" in I.R.C. § 2(a) states that a surviving spouse is a taxpayer "whose spouse died during either of his two taxable years immediately preceding the taxable year." In the tax years for which the amended returns were made by the spouse, the decedent was still alive, so the spouse was not considered a surviving spouse as to those years. Because I.R.C. § 6013(a)(3) allows the executrix to disaffirm returns made only by a surviving spouse, and because the spouse in this case was not a surviving spouse as to the tax years involved, the executrix could not disaffirm the amended returns filed by the spouse. **CCA 201830012, March 28, 2018**.

FEDERAL FARM PROGRAMS

DISASTER PAYMENTS. The 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) provides payments to eligible producers who suffered eligible crop, tree, bush, and vine losses resulting from hurricanes and wildfires that occurred in the 2017 calendar year, as authorized by the Bipartisan Budget Act of 2018 (BBA), *Pub. L. No. 115-123*. The FSA has adopted as final a rule which specifies the administrative provisions, eligibility requirements, application procedures, and payment calculations for 2017 WHIP. The BBA provided $2.36 billion, available until December 31, 2019, for disaster assistance for necessary expenses related to crop, tree, bush, and vine losses related to the consequences of Hurricanes Harvey, Irma, Maria, and other hurricanes and wildfires occurring in calendar year 2017. **83 Fed. Reg. 33795 (July 18, 2018)**.

FEDERAL INCOME TAXATION

CHARITABLE DEDUCTION. The IRS has adopted as final regulations providing guidance concerning substantiation and reporting requirements for cash and non-cash charitable contributions under I.R.C. § 170. The regulations reflect the enactment of provisions of the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006. The regulations require taxpayers to obtain a qualified appraisal for donated property if the taxpayer is claiming more than a $5,000 deduction, or attach to the tax return a qualified appraisal for contributions of property for which a deduction of more than $500,000 is claimed. **T.D. 9836, 83 Fed. Reg. 36417 (July 30, 2018)**.

The taxpayer purchased clothing on sale using cash and frequent purchaser discount points. The taxpayer then donated the clothing to a charity. On the taxpayer's return, the taxpayer claimed a charitable deduction for the regular, non-sale, price of the clothing. The return included a Form 8283, *Noncash Charitable Contributions*, but the form was filled out by the taxpayer and not the charity. The IRS assessed a deficiency based upon a disallowance of the charitable deduction for the amount above the actual price paid for the clothing. Although the IRS initially agreed that the value of the frequent purchaser points could be included in the price of the clothing, the IRS attempted to omit that amount but was prevented by court rules on untimely amendment of the pleadings. For all contributions of property other than money, the taxpayer must maintain reliable written records that include the name and address of the donee, the date and location of the contribution, and a description of the property "in detail reasonable under the circumstances." Treas. Reg. § 1.170A-13(b)(2)(ii). For all contributions valued at $250 or more, I.R.C. § 170(f)(8) requires that the taxpayer must obtain a "contemporaneous written acknowledgment" (CWA) from the donee, including a description of any property other than cash contributed. Under I.R.C. § 170(f)(11)(B) more rigorous substantiation requirements are imposed for contributions of property with a claimed value exceeding $5,000. In determining whether donations of property exceed these thresholds, "similar items of property" must be aggregated. Treas. Reg. § 1.170A-13(c)(7)(iii) defines the term "similar items of property" to mean "property of the same generic category or type," such as clothing or toys. If property or similar items of property are valued in excess of $5,000, the taxpayer must substantiate the value of the property with a "qualified appraisal of such property." I.R.C. § 170(f)(11)(C). The taxpayer must also attach to the return a fully completed "appraisal summary" on Form 8283. See Treas. Reg. § 1.170A-13(c)(2)(i)(B). In this case, the taxpayer presented the

purchase receipts, marked-down price tags and receipts from the charity, which included only a general description, the date and the location of the donation. The court found the taxpayer's evidence did not meet the substantiation requirements of I.R.C. § 170 and its regulations. Even if the taxpayer had maintained the proper documentation, the court held that the fair market value of the clothing was far less than the original full retail price, given that the clothing was placed on sale because the clothing could not be sold at the original price; therefore, the taxpayer was entitled to a charitable deduction only for the amount paid for the clothing. **Grainger v. Comm'r, T.C. Memo. 2018-117**.

DEPENDENTS. The taxpayers were the biological parents of two children. The taxpayers' parental rights were terminated by a court order in early 2015 and the children were adopted by their aunt. The children lived with the aunt during almost all of 2015 and the taxpayers were allowed weekend and summer visitations. The taxpayers claimed the children as dependents for purposes of the personal exemption, child tax credit and additional child tax credit. I.R.C. § 152(a) defines a dependent as a qualifying child or a qualifying relative of the taxpayer. In addition to other requirements, a qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the tax year. See I.R.C. § 152(c). Thus, the court held that the children were not qualifying children because they did not live with the taxpayers for more than one-half of the tax year. The court did not discuss the issue of whether the loss of parental rights and adoption of the children affected the determination as to whether the children were qualifying children under I.R.C. § 152. **Jusino v. Comm'r, T.C. Memo. 2018-112**.

DISASTER LOSSES. On June 8, 2018, the President determined that certain areas in Alaska were eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of a severe storm which began on December 4, 2017. **FEMA-4369-DR.** On June 8, 2018, the President determined that certain areas in New Jersey were eligible for assistance from the government under the Act as a result of a severe winter storm which began on March 6, 2018. **FEMA-4368-DR.** On June 8, 2018, the President determined that certain areas in New Hampshire were eligible for assistance from the government under the Act as a result of a severe storm and flooding which began on March 2, 2018. **FEMA-4370-DR.** On June 8, 2018, the President determined that certain areas in New Hampshire were eligible for assistance from the government under the Act as a result of a severe winter storm which began on March 13, 2018. **FEMA-4371-DR.** On June 25, 2018, the President determined that certain areas in Massachusetts were eligible for assistance from the government under the Act as a result of a severe winter storm which began on March 2, 2018. **FEMA-4372-DR.** On June 25, 2018, the President determined that certain areas in Oklahoma were eligible for assistance from the government under the Act as a result of wild fires which began on April 11, 2018. **FEMA-4373-DR.** On June 25, 2018, the President determined that certain areas in Maryland were eligible for assistance from the government under the Act as a result of severe storms and flooding which began on May 15, 2018. **FEMA-4374-DR.** On June 29, 2018, the President determined that certain areas in Nebraska were eligible for assistance from the government under the Act as a result of a severe winter storm which began on April 13, 2018. **FEMA-4375-DR.** On July 6, 2018, the President determined that certain areas in Texas were eligible for assistance from the government under the Act as a result of a severe storm and flooding which began on June 19, 2018. **FEMA-4377-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).

DISCHARGE OF INDEBTEDNESS. In 2015 and 2017, the IRS issued a revenue procedures which provide relief from discharge of indebtedness income for taxpayers whose federal student loans, taken out to attend a school owned by Corinthian College, Inc. (CCI) or the American Career Institutes, Inc., (ACI) are discharged by the Department of Education under the "Closed School" or "Defense to Repayment" discharge process. See *Rev. Proc. 2015-57, 2015-51 I.R.B. 863, and Rev. Proc. 2017-24, 2017-7 I.R.B. 916.* Rev. Proc. 2015-57 provides: "First, the Internal Revenue Service ("IRS") will not assert that these taxpayers must recognize gross income resulting from the discharge of these Federal student loans. Second, the IRS will not assert that these taxpayers must increase their gross income by the amount of certain tax credits or deductions related to the discharged Federal student loans. Third, the IRS will not assert that the creditors of these discharged loans must file information returns and furnish payee statements under section 6050P of the Internal Revenue Code as a result of discharging these Federal student loans." The Higher Education Act of 1965 (HEA), is cited as authority for the Education Department in the Closed School discharge process to exclude from taxable income a discharged federal student loan obtained by a student, or by a parent on behalf of a student, who was attending a school at the time it closed or who withdrew from the school within a certain period prior to the closing date. See generally 20 U.S.C. § 1087(c) (Federal Family Education Loan (FFEL)); 20 U.S.C. § 1087dd(g) (Federal Perkins Loan); and 20 U.S.C. § 1087e(a)(1) (Federal Direct Loan). No authority is cited by the IRS for excluding the discharged indebtedness from taxable income under the Defense of Repayment discharge process other than the exceptions provided in I.R.C. § 108, most likely the insolvency exception. The IRS has issued a new revenue procedure which extends the relief of the prior procedures to provide an exclusion from taxable income of discharge of indebtedness income which resulted from the discharge of private loans resulting from a settlement of a legal cause of action against CCI, ACI, and certain private lenders. Thus, the IRS will not assert that taxpayers within the scope of this revenue procedure must increase their taxes owed in the year of a discharge, or in a prior year, if they received an education credit under I.R.C. § 25A attributable to payments made with proceeds of the discharged loans, or claimed a deduction for the payment of interest under I.R.C. § 221 attributable to interest paid on a discharged loan, or claimed a deduction for the payment of qualified tuition and related expenses under I.R.C. § 222 attributable to payments made with proceeds of the discharged loan. The revenue procedure also provides that the IRS will not assert that the entity discharging these loans

has an information reporting requirement. The new procedure is effective as to private lenders for tax years beginning on or after January 1, 2015. Note: the procedure does not contain any instructions as to alerting the IRS on a tax return that a discharged student loan is being treated as excluded income under this procedure. **Rev. Proc. 2018-39, I.R.B. 2018-34**.

EDUCATION EXPENSES. The IRS has issued a Notice that it intends to issue regulations providing clarification regarding (1) the special rules for contributions of refunded qualified higher education expenses to a qualified tuition program under I.R.C. § 529(c)(3)(D); (2) the new rules under I.R.C. § 529(c)(3)(C)(i)(III) permitting a rollover from a qualified tuition program to an ABLE account under §529A; and (3) the new rules under I.R.C. § 529(c)(7) treating certain elementary or secondary school expenses as qualified higher education expenses. Under I.R.C. § 529, a state or its agency or instrumentality, including eligible educational institutions, may establish or maintain a qualified tuition program (QTP) program that permits a person to prepay or contribute to an account for a designated beneficiary's qualified higher education expenses (QHEEs). I.R.C. § 529(c)(3) provides that distributions (including any attributable earnings) from a QTP are not included in gross income if such distributions do not exceed the designated beneficiary's QHEEs. Prior to its amendment by the TCJA 2017, *Pub. L. 115-97* (the "2017 Act"), I.R.C. § 529(e)(3)(A) defined QHEEs to include tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution, including certain computer equipment and software used primarily by the beneficiary during any years the beneficiary is enrolled at an eligible educational institution. In the case of a special needs beneficiary, QHEEs include expenses for special needs services that are incurred in connection with such enrollment or attendance. QHEEs also include reasonable costs for room and board for eligible students as defined in I.R.C. § 25A(b)(3). I.R.C. § 529(c)(3)(C)(i)(I) and (II) permits a tax-free rollover of a distribution from a QTP, made within 60 days of the distribution, to another QTP for the benefit of either the same designated beneficiary or another designated beneficiary who is a member of the family of the original designated beneficiary. However, *Notice 2001-81, 2001-52 I.R.B. 617*, provides that the distributing QTP must provide a breakdown of the earnings portion of the rollover amount to the recipient QTP and, until the recipient QTP receives appropriate documentation showing the earnings portion, the entire rollover amount is treated as earnings. *Notice 2001-81* applies the same rule to a direct transfer (i.e., a trustee-to-trustee transfer) from a QTP to another QTP. I.R.C. § 529(c)(3)(D), addresses situations in which QTP funds are distributed for a beneficiary's QHEEs with some portion of those expenses refunded to the beneficiary by the eligible educational institution. This could occur, for example, if the beneficiary were to drop a class mid-semester. I.R.C. § 529(c)(3)(D) provides that the portion of such a distribution refunded to an individual who is the beneficiary of a QTP by an eligible educational institution is not subject to income tax to the extent that the refund is recontributed to a QTP of which that individual is the beneficiary not later than 60 days after the date of such refund and does not exceed the refunded amount. I.R.C. § 529(c)(3)(D) applies to refunds received after December 31, 2014. The 2017 Act added I.R.C. § 529(c)(3)(C)(i)(III) which provides that a distribution from a QTP made after December 22, 2017, and before January 1, 2026, is not subject to income tax if, within 60 days of the distribution, it is transferred to an ABLE account of the designated beneficiary or a member of the family of the designated beneficiary. Under I.R.C. § 529(c)(3)(C)(i), the amount of any rollover to an ABLE account is limited to the amount that, when added to all other contributions made to the ABLE account for the taxable year, does not exceed the contribution limit for the ABLE account under I.R.C. § 529A(b)(2)(B)(i), i.e., the annual gift tax exclusion amount under I.R.C. § 2503(b). In addition, the 2017 Act expanded the definition of QHEEs to include tuition in connection with the designated beneficiary's enrollment or attendance at an elementary or secondary public, private, or religious school. The 2017 Act also amended I.R.C. § 529(e)(3)(A) to limit the total amount of these tuition distributions for each designated beneficiary to $10,000 per year from all QTPs of the designated beneficiary. Both amendments apply to distributions made after December 31, 2017. In light of the 2017 amendments, the IRS intends to issue regulations providing that the entire recontributed amount will be treated as principal. This rule of administrative convenience will eliminate the burdens associated with determining the earnings portion. Furthermore, because the recontributed amount previously was taken into account in applying the overall contribution limit under I.R.C. § 529(b)(6), the IRS anticipates that the regulations will provide that the recontributed amount does not count against the limit on contributions on behalf of the designated beneficiary under I.R.C. § 529(b)(6). Consistent with I.R.C. § 529(c)(3)(D), the IRS anticipates that the regulations will confirm that the recontribution must be to a QTP for the benefit of the designated beneficiary who received the refund of QHEEs, although the recontribution need not be to the QTP from which the distributions for the QHEEs were made. The IRS also intends to issue regulations providing that a distribution from a QTP made after December 22, 2017, and before January 1, 2026, to the ABLE account of the designated beneficiary of that QTP, or of a member of the family of that designated beneficiary, is not subject to income tax if two requirements are satisfied: (1) The distributed funds must be contributed to the ABLE account within 60 days after their withdrawal from the QTP. (2) The distribution, when added to all other contributions made to the ABLE account for the taxable year that are subject to the annual gift tax exclusion must not exceed that limitation. To the extent that a direct transfer (or, in the case of a rollover, a contribution of the distributed amount) would exceed the contribution limit, it would be subject to income tax and a 10 percent additional tax, if applicable. A qualified ABLE program is prohibited from accepting certain contributions in excess of the limitations applicable to ABLE accounts, and any violation of those rules could cause the designated beneficiary to incur tax, adversely impacting the ABLE beneficiary's eligibility for certain public benefits. The IRS anticipates that the regulations will provide that, in the case of a direct transfer, any excess contribution that is rejected by the qualified ABLE program and

returned to the QTP will not be deemed to be a new contribution to the QTP for purposes of the contribution limit. Finally, the IRS anticipates that the regulations will provide that QHEEs include tuition in connection with the designated beneficiary's enrollment or attendance at an elementary or secondary public, private, or religious school, but that such QHEEs are limited to a total of $10,000 per year per designated beneficiary, regardless of the number of QTPs making such distributions for that same designated beneficiary. **Notice 2018-58, I.R.B. 2018-33**.

HEALTH INSURANCE. The taxpayers husband and wife were both employed by the same employer in Montana. In 2014, their total income was $81,855 which include social security payments received by the husband who was on Medicare. Because the employer did not offer health insurance, the wife purchased private insurance through the Chippewa Cree Tribe. The wife received a month advance premium tax credit (APTC) for each month in 2014. On the taxpayers' 2014 tax return, not all of the husband's income was reported and the taxpayers did not include Form 8962, *Premium Tax Credit*, to reconcile the APTC with the amount the taxpayers were entitled to. The IRS assessed a deficiency based on the taxpayers ineligibility for the PTC. Under I.R.C. § 36B(f)(2), at the end of each tax year, a taxpayer who received an APTC is required to reconcile the amount of the PTC already received with the entitlement amount. This reconciliation is done on Form 8962 filed with the taxpayer's tax return. If the amount of the APTC is more than the entitlement amount, the taxpayer owes the government the excess credit, and it is reflected as an increase in tax. A taxpayer with income greater than 400 percent of the federal poverty line (FPL) is not eligible for the PTC, and the full amount of the APTC received during the tax year must be included as a tax liability on the taxpayer's tax return. See I.R.C. § 36B(c)(1)(A), (f)(2)(B); Treas. Reg. § 1.36B-4(a)(4), Example (5). For 2014 the FPL was $15,510 for a household of two in Montana and 400% of the FPL was $62,040. Household income, as relevant to petitioners, is defined as modified adjusted gross income which includes Social Security benefits not included in gross income. See I.R.C. § 36B(d)(2)(B)(iii). Because the taxpayers' modified adjusted gross income for 2014 was $81,855 (adjusted gross income plus social security benefits), the taxpayers' MAGI exceeded 400 percent of the Montana FPL and the taxpayers were not entitled to any PTC in 2014; therefore, the court held that the taxpayer owed the amount of APTC received in 2014. **Grant v. Comm'r, T.C. Memo. 2018-119**.

HOBBY LOSSES. The taxpayer was otherwise fully employed during the tax years at issue when the taxpayer also engaged in selling Mary Kay cosmetics directly to consumers. The taxpayer did not maintain separate records for the cosmetics activity and did not provide any supporting evidence of a separate bank account for the cosmetics activity. The taxpayer claimed deductions for substantial losses from the activity which often had a personal benefit, for example taking trips to places where the taxpayer's daughter played volleyball and to vacation destinations. The taxpayer had only limited sales and made no effort to learn new methods of selling in order to increase sales. Treas. Reg. § 1.183-2 provides nine factors to be used to determine whether an activity is engaged in for profit: (1) the manner in which the taxpayer carried on the activity; (2) the expertise of the taxpayer or advisers; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that the assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or loss with respect to the activity; (7) the amount of occasional profits earned, if any; (8) the financial status of the taxpayer; and (9) whether elements of personal pleasure or recreation were involved. The court held that the cosmetics activity was not entered into with the intent to make a profit because (1) the taxpayer did not have a written business plan, balance sheet, ledge or statements of cashflows and took no steps to control losses; (2) although the taxpayer attended some sales seminars, the taxpayer never made use of any of the techniques or sales tips demonstrated in the seminars; (3) the taxpayer had no prior successful businesses; (4) the activity had only losses and no profits during the three years the taxpayer participated in the activity; (5) the only assets were perishable unsold cosmetics which would not appreciate in value; (6) the losses from the activity offset income from the taxpayer's employment; and (7) the taxpayer received personal pleasure from the activity, including a personal discount on cosmetics and the travel which included personal activities. **Nix v. Comm'r, T.C. Memo. 2018-116**.

PENSION PLANS. For plans beginning in July 2018 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 3.05 percent. The 30-year Treasury weighted average is 2.86 percent, and the 90 percent to 105 percent permissible range is 2.57 percent to 3.00 percent. The 24-month average corporate bond segment rates for July 2018, *without adjustment* by the 25-year average segment rates are: 2.14 percent for the first segment; 3.73 percent for the second segment; and 4.44 percent for the third segment. The 24-month average corporate bond segment rates for July 2018, taking into account the 25-year average segment rates, are: 3.92 percent for the first segment; 5.52 percent for the second segment; and 6.29 percent for the third segment. **Notice 2018-60, I.R.B. 2018-31**.

RESTITUTION PAYMENTS. The taxpayer was the owner of a corporation which owned a majority interest in an LLC. The taxpayer served as president of the corporation and secretary of the LLC. The LLC entered into a loan agreement with the Overseas Private Investment Corporation (OPIC), an agency of the U.S. governmental agency established to provide loans for international investment, to help the LLC purchase business assets in Estonia. OPIC discovered that the LLC had misrepresented several financial aspects of the transactions and the taxpayer plead guilty to one count of conspiring to commit mail and wire fraud and to one count of conspiring to commit money laundering. The taxpayer was ordered to pay $750,000 in restitution to OPIC but no fine was imposed. The taxpayer made payments of $400,000 in 2014 as part of the restitution order and claimed on the 2014 return that the $400,000 was estimated tax payments. When the IRS rejected that claim, the taxpayer sought to claim a miscellaneous deduction for the $400,000 payment. Restitution payments are

deductible as a miscellaneous itemized deduction if they constitute expenses attributable to the performance of services as an employee under I.R.C. § 162(a), losses related to the performance of services as an employee under I.R.C. § 165(c)(1), or losses incurred in a transaction entered into for profit under I.R.C. § 165(c)(2). The court found that the restitution payment was not an ordinary and necessary expense incurred as part of the taxpayer's employment by the LLC but was a repayment of the loan that the LLC obtained from OPIC. Loan repayments are not deductible where the loan proceeds were not taxable income. The court acknowledged that a taxpayer's payment of another party's business expense is deductible if: (1) the taxpayer's primary purpose or motive was to protect or promote the taxpayer's own trade or business and (2) the expense is an ordinary and necessary expense of the taxpayer's trade or business. The court found, however, that the taxpayer failed to show that the taxpayer had any trade or business as an employee of the LLC or that the restitution payment was part of any trade or business to be protected by the payment. The court held that the restitution payment was not eligible for a deduction by the taxpayer. **Washburn v. Comm'r, T.C. Memo. 2018-110**.

RETURNS. The IRS has published information about how to amend a tax return. Taxpayer should complete and mail the paper Form 1040X, *Amended U.S. Individual Income Tax Return*. Taxpayers must file an amended return on paper whether they filed the original return on paper or electronically. Filers should mail the Form 1040X to the address listed in the form's instructions. However, taxpayers filing Form 1040X in response to a notice received from the IRS, should mail it to the address shown on the notice. If taxpayers used other IRS forms or schedules to make changes, they should attach those schedules to their Form 1040X. Taxpayers should not amend a tax return to correct math errors; the IRS will make the math corrections for the taxpayers. Taxpayers should also not file an amended return if they forgot to include a required form or schedule. The IRS will mail a request about the missing item. Anyone amending tax returns for more than one year will need a separate 1040X for each tax year. They should mail each tax year's Form 1040X in separate envelopes. Taxpayers should wait for the refund from their original tax return before filing an amended return. They can cash the refund check from the original return before receiving any additional refund. Taxpayers filing an amended return because they owe more tax should file Form 1040X and pay the tax as soon as possible in order to limit any interest and penalty charges. Generally, to claim a refund, taxpayers must file a Form 1040X within three years from the date they timely filed their original tax return or within two years from the date the person paid the tax – usually April 15 – whichever is later. Taxpayers can track the status of an amended return three weeks after mailing using "Where's My Amended Return?" (https://www.irs.gov/filing/wheres-my-amended-return) Processing can take up to 16 weeks. **IRS Tax Tip 2018-118**.

The IRS has adopted as final regulations that would remove the automatic 30-day extension of time to file all information returns subject to the rules formerly under Treas. Reg. § 1.6081-8 and provide a single non-automatic 30-day extension of time to file those information returns. The final regulations adopt the previously proposed regulations only with respect to the removal of the automatic extension of time to file the Form W-2 series (except Form W-2G) and forms reporting nonemployee compensation (currently Form 1099-MISC, "Miscellaneous Income," with information in box 7). The automatic extension of time to file is retained for Form W-2G, Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*, Form 1095-B, *Health Coverage*, Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage*, Form 3921, *Exercise of an Incentive Stock Option Under Section 422(b)*, Form 3922, *Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c)*, and Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips*, the Form 1097 series, Form 1098 series, Form 1099 series (except forms reporting non-employee compensation), and Form 5498 series. Section 201 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), *Pub. L. No. 114-113, Div. Q, 129 Stat. 3040, 3076 (2015)*, amended I.R.C. § 6071 to change the due date for filing Form W-2, *Wage and Tax Statement*, and any returns or statements required by the Secretary to report non-employee compensation. Non-employee compensation is currently reportable in box 7 of Form 1099-MISC. The amendments are effective for information returns for calendar years beginning after 2015. As amended by the PATH Act, I.R.C. § 6071 provides that the due date for filing the Form W-2 and any returns or statements required by the Secretary to report non-employee compensation is January 31 of the calendar year following the calendar year for which the information is being reported, regardless of whether these information returns are filed on paper or electronically. Treas. Reg. § 31.6071(a)-1T(a)(3) provides this due date for the entire Form W-2 series (except Form W-2G). The due date for filing Form 1099-MISC that does not report non-employee compensation was unchanged by the PATH Act amendment to Section 6071, and it remains February 28, or March 31 if filed electronically. **T.D. 9838, 83 Fed. Reg. 38023 (Aug. 3, 2018)**.

SAFE HARBOR INTEREST RATES
August 2018

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	2.42	2.41	2.40	2.40
110 percent AFR	2.67	2.65	2.64	2.64
120 percent AFR	2.91	2.89	2.88	2.87
		Mid-term		
AFR	2.80	2.78	2.77	2.76
110 percent AFR	3.08	3.06	3.05	3.04
120 percent AFR	3.37	3.34	3.33	3.32
		Long-term		
AFR	2.95	2.93	2.92	2.91
110 percent AFR	3.25	3.22	3.21	3.20
120 percent AFR	3.55	3.52	3.50	3.49

Rev. Rul. 2018-21, I.R.B. 2018-32.

Agricultural Law Press
735 N. Maple Hill Rd., Kelso, WA 98626

19th EDITION

FARM ESTATE & BUSINESS PLANNING

The Agricultural Law Press is honored to publish the completely revised and updated 19th Edition of Dr. Neil E. Harl's excellent guide for farmers and ranchers who want to make the most of the state and federal income and estate tax laws to assure the least expensive and most efficient transfer of their estates to their children and heirs. This book contains detailed advice on assuring worry-free retirement years, using wills, trusts, insurance and outside investments as estate planning tools, ways to save on estate settlement costs, and an approach to setting up a plan that will eliminate arguments and friction in the family. Federal estate taxation has undergone great changes in recent years and this book sorts out these changes for you in a concise manner. *Farm Estate and Business Planning* also includes discussion of employment taxes, formation and advantages of use of business entities, federal farm payments, state laws on corporate ownership of farm land, federal gift tax law, annuities, installment obligations, charitable deductions, all with an eye to the least expensive and most efficient transfer of the farm to heirs.

Written with minimum legal jargon and numerous examples, this book is suitable for all levels of people associated with farms and ranches, from farm and ranch families to lenders and farm managers. Some lawyers and accountants circulate the book to clients as an early step in the planning process. We invite you to begin your farm and ranch estate and business planning with this book and help save your hard-earned assets for your children.

The book is also available in digital PDF format for $25; see www.agrilawpress.com for ordering information for both the print and digital versions of the book.

19th Edition
FARM ESTATE & BUSINESS PLANNING
Neil E. Harl

Soft cover, 8.25 x 5.5 inches, 510 pages
Published April 2016

ORDER FORM (or call 360-200-5666)

*Free shipping and handling when check or credit card number submitted with order.

*Return in 10 days for full refund if not satisfied.

*Quantity discounts available for 10 or more books - great for handing out to clients to encourage estate planning.

___ Please send me ____ copies for $35.00 each. Check enclosed for $___________
___ Please charge my credit card: __Visa __ MasterCard __Discover __Am Express #_________________
_____/______Expiration date _____ Cvv code

___ Bill me and add shipping and handling of $5.00 per book.

Name - please print or type

Street address City State Zip

Phone E-mail - if you want to be informed of updates/corrections

Send to: Agricultural Law Press, 735 N. Maple Hill Rd., Kelso, WA 98626